NO. 102981-1

SUPREME COURT OF THE STATE OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE,

Respondent,

v.

STATE OF WASHINGTON, POLLUTION CONTROL HEARINGS BOARD,

Respondent,

and

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondent,

and

BNSF RAILWAY COMPANY, et al.

Petitioner.

RESPONDENT STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules

I. INTRODUCTION

Industrial transportation facilities operated by ports and railroads contribute significant amounts of stormwater pollution to endangered waterbodies like Puget Sound. The Department of Ecology regulates these facilities more stringently than the floor set by the federal Clean Water Act. Ecology's Industrial Stormwater General Permit omits language from a federal regulation that restricts coverage to discrete portions of the facilities. As a result, transportation facilities covered under the Industrial Stormwater General Permit must control stormwater discharges from all areas where industrial activity occurs.

Some facilities have claimed to be surprised by the scope of Ecology's regulation under the permit, but Ecology's position has been consistent for many years. Ecology has regulated all areas of industrial activity at transportation facilities since 2010. Versions of the permit issued in 2010, 2015, and 2020 contained the same scope of coverage.

The Court of Appeals correctly interpreted Ecology's permit. By its plain language, the permit regulates all areas of industrial activity at transportation facilities. Because the permit is unambiguous, the Court of Appeals did not defer to Ecology's interpretation. The Court of Appeals' confirmation of Ecology's longstanding position provides certainty to the regulated community and helps Ecology fulfill its mission to "maintain the highest possible standards to insure the purity of all waters of the state . . . ." RCW 90.48.010.

Petitioners are unable to point to conflicts between the opinion below and decisions from this Court or from other published decisions of the Court of Appeals. Regulating stormwater pollution is complicated, but this case turns on a straightforward construction of a permit that will soon expire. In short, this case does not warrant this Court's review.

II. RESTATEMENT OF ISSUE PRESENTED FOR REVIEW

Did the Court of Appeals correctly hold that Ecology's Industrial Stormwater General Permit regulates stormwater

pollution at industrial transportation facilities more stringently than federal law requires by deliberately omitting language from a federal regulation that restricts coverage to discrete areas of the facility?

III. COUNTERSTATEMENT OF THE CASE

A. Factual Background

1. Ecology's Industrial Stormwater General Permit regulates more stringently than federal law requires

Ecology's Industrial Stormwater General Permit regulates the discharge of stormwater from industrial facilities, such as the ports and railroad terminals operated by the Petitioners. CP 58–130. The permit implements both the federal Clean Water Act and the state Water Pollution Control Act. CP 59; *see* RCW 90.48.260; WAC 173-226-010.

The federal Clean Water Act requires facilities to obtain a National Pollutant Discharge Elimination System (NPDES) permit for discharges "associated with industrial activity." 33 U.S.C. § 1342(p)(2)(B). The federal Environmental

Protection Agency defines "storm water discharge associated with industrial activity" broadly to include runoff from:

> [I]mmediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling sites; . . . shipping and receiving areas; . . . storage areas (including tank farms) for raw materials, and intermediate and final products; . . . storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product, by-product or waste product.

40 C.F.R. § 122.26(b)(14).

EPA has determined that transportation facilities are required to obtain an NPDES permit if they have "vehicle maintenance shops, equipment cleaning operations, or airport deicing operations." 40 C.F.R. § 122.26(b)(14)(viii). According to EPA's regulation, "[o]nly those portions of the facility" involved in vehicle maintenance, equipment cleaning, or airport deicing are subject to the NPDES permit. *Id.* EPA's limiting language means that many activities EPA defines as "storm water discharge associated with industrial activity" are

not subject to NPDES permit requirements when those activities occur at a transportation facility.

The Clean Water Act explicitly authorizes states to regulate water pollution more stringently than federal law requires. 33 U.S.C. § 1370. Ecology has determined that EPA's regulation is too weak to ensure attainment of Washington State's water quality standards. *See* CP 1230, 2265–66. Consistent with the Clean Water Act, which sets a floor and not a ceiling, Ecology has regulated industrial transportation facilities more stringently over time.

In 2008, Ecology issued a version of the Industrial Stormwater General Permit that included the restrictive "only those portions" language found in EPA's regulation. CP 1228–29, 1813, 2259. But, in 2010, Ecology issued a version of the permit that omitted the "only those portions" language. *Id.* As a result of this deliberate omission, the 2010 permit required facilities to manage stormwater discharges from industrial activity occurring anywhere at the facility—not merely from

those portions of the facility where vehicle maintenance, equipment cleaning, or airport deicing occur.

Ecology intentionally continued to omit the "only those portions" language in versions of the Industrial Stormwater General Permit issued in 2015 and 2020. Ecology has therefore regulated stormwater at transportation facilities more stringently than federal law requires for more than a decade.

Like earlier versions of the permit, the 2020 version of the Industrial Stormwater General Permit lists subcategories of transportation facilities in a chart labeled Table 1. CP 66–67. Ecology requires permit coverage for "any facility conducting any activities described in Table 1." CP 120. "Facility" includes "land or appurtenances." *Id*. Reading these provisions together, the permit applies to the land and appurtenances at any transportation facility that conducts vehicle maintenance, equipment cleaning, or airport deicing operations. That is, once permit coverage is triggered by the existence of vehicle maintenance, equipment cleaning, or airport deicing at the

facility, the permit applies to all areas at the facility where industrial activity occurs.

While Ecology was developing the 2020 permit, Petitioner BNSF submitted a comment asking Ecology to restore the "only those portions" language in Table 1. CP 1605. In declining this request, Ecology explained that monitoring data collected at transportation facilities since 2009 "demonstrates that activity on these sites beyond vehicle maintenance shops, equipment cleaning operations, and airport deicing operations is a significant contributor of pollutants leaving the site at concentrations that may reasonably be expected to cause a violation of water quality standards." CP 2276. Ecology confirmed that it would not revert to the weaker federal scheme. Instead, Ecology would "continue to regulate the entire portion of these facilities." *Id*.

Ecology has good reason to regulate more stringently than the floor set by federal law. There is no question that stormwater pollution is a problem at industrial transportation

facilities beyond those areas where vehicle maintenance, equipment cleaning, or airport deicing activities occur.

For example, many permitted transportation facilities include large areas used for container storage. *E.g.*, CP 2761. Industrial activity conducted at these areas includes the use of heavy equipment, such as wharf cranes, forklifts, and other service vehicles to conduct loading, unloading, hauling, and storage of shipping containers. *E.g.*, CP 2723.

Petitioners Port of Seattle and Port of Tacoma acknowledge that they operate "one of the largest container gateways in North America." Petition for Review at 7. At the Port of Tacoma's West Sitcum Terminal, "five enormous ship-to-shore cranes load and unload large shipping containers from docked vessels." CP 1229. Petitioner Port of Tacoma has acknowledged that a "significant amount of debris can accumulate at outside, uncovered loading/unloading areas." CP 2266. Stormwater rapidly discharges through deck drains

directly to water that is adjacent to, or under, the facility's wharf or dock. CP 2267.

As Ecology explained in its Fact Sheet for the draft 2020 permit, "Stormwater may become contaminated by industrial activities as a result of contact with materials stored outside, spills and leaks from equipment or materials used onsite, contact with materials during loading, unloading or transfer from one location to another, and from airborne contaminants." CP 1049. Ecology has documented high levels of copper and zinc in stormwater discharges from water transportation facilities such as ports. These discharges "represent a significant source of pollutants that contribute to a violation of the copper and zinc water quality standards." CP 1230.

In summary, EPA includes stormwater pollution from loading, unloading, hauling, and storage activities in its definition of "storm water discharge associated with industrial activity" under 40 C.F.R. § 122.26(b)(14). At the same time, EPA's "only those portions" language limits the scope of

federal regulation to discrete areas of the facility. This discrepancy is illogical. In order to ensure compliance with state water quality standards, Ecology omitted the "only those portions" language from the 2010, 2015, and 2020 Industrial Stormwater General Permits.

2. Ecology's 2020 permit will soon expire

Ecology's Industrial Stormwater General Permit must be reissued every five years. WAC 173-220-180(1); *see also* 40 C.F.R. § 122.46(a). Ecology's 2020 permit is nearing the end of its cycle. The permit will expire on December 31, 2024. CP 59. Ecology is developing a new permit that will immediately replace the expired permit.

The permit reissuance process includes public notice and public participation requirements. *See, e.g.*, WAC 173-226-130 (requiring public notice), WAC 173-226-110 (requiring preparation of a fact sheet), WAC 173-226-150 (requiring public hearings). Petitioners will have an opportunity to provide feedback on Ecology's 2025 permit, including comments or

suggestions on the scope of coverage at industrial transportation facilities. Ecology will provide a written response to all relevant comments, as required by WAC 173-226-170(1).

B. Procedural History

The Pollution Control Hearings Board ruled that the 2020 Industrial Stormwater General Permit regulates stormwater pollution only at those portions of transportation facilities where vehicle maintenance, equipment cleaning, or airport deicing operations occur. CP 10–28. The Court of Appeals reversed, holding that the permit plainly applies to all areas of the facility where industrial activity occurs. *Puget Soundkeeper All. v. Pollution Control Hearings Bd.*, 545 P.3d 333 (Wash. Ct. App. 2024). Ecology was a respondent in both proceedings.

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals Decision Is Correct

1. The permit plainly applies to all areas of industrial activity at transportation facilities

Ecology deliberately omitted EPA's "only those portions" language in versions of the Industrial Stormwater

General Permit issued in 2010, 2015, and 2020. As a result, the permit has applied to all areas of industrial activity at transportation facilities for more than a decade.

The Court of Appeals correctly concluded that the permit's plain language compels this conclusion. *Puget Soundkeeper All.*, 545 P.3d at 344–46. The permit applies to "any facility conducting any activities described in Table 1." CP 120. "Facility" includes the "land or appurtenances"—i.e., the entire footprint of industrial transportation facilities. *Id.* Although federal law limits permit coverage for "only those portions" of the facility where vehicle maintenance, equipment cleaning, or airport deicing operations occur, Ecology's permit does not contain this limitation.

2. The permit's plain text controls regardless of whether the permit is treated as a contract or as a regulation

The plain language of a water quality permit controls. A court cannot insert language into a permit to manufacture a

result. That is true whether the permit is treated as a contract or as a regulation.

If the court examines the permit using contract interpretation principles, the court will follow the "objective manifestation theory of contracts." *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Under this theory, the "subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used." *Id.* at 504 (citing *City of Everett v. Estate of Sumstad*, 95 Wn.2d 853, 855, 631 P.2d 366 (1981)). The court interprets not "what was intended to be written but what was written." *Id*.

Interpreting a regulation is essentially the same exercise. "When interpreting agency regulations, we apply the same principles used to construe statutes." *Puget Soundkeeper All. v. Dep't of Ecology*, 191 Wn.2d 631, 644, 424 P.3d 1173 (2018). If a statute's meaning is plain on its face, the court gives effect to that meaning as an expression of legislative intent. *State v.*

Valdiglesias LaValle, 2 Wn.3d 310, 317–18, 535 P.3d 856 (2023). A regulation is not ambiguous merely because another interpretation is possible. *Id.* at 318.

The Court of Appeals correctly held that, under the plain language of Ecology's Industrial Stormwater General Permit, the permit applies to all areas of industrial activity at transportation facilities. The court properly refused to insert the "only those portions" language that Ecology deliberately omitted. The Court of Appeals thus gave effect to the "actual words used." *Hearst Commc'ns, Inc.*, 154 Wn.2d at 504. Because the permit is unambiguous, it does not matter whether the permit is treated as a contract or as a regulation. The Court of Appeals' distinction between these two modes of interpretation does not warrant review.

The Court of Appeals explained that Ecology's interpretation would be entitled to deference *if* the permit were ambiguous. *Puget Soundkeeper All.*, 545 P.3d at 346–47. This conclusion did not impact the Court's holding. Because

Ecology's permit is unambiguous, Ecology received no deference. The Court of Appeals instead held, "[W]here the terms of an NPDES permit, whether an individual permit or general permit, are unambiguous, the plain language of the permit controls." *Id.* at 343.

Petitioners fail to identify a conflict between the Court of Appeals' holding—that unambiguous language must be given full effect—and this Court's decisions or other published decisions from the Court of Appeals.

B. The Court of Appeals Decision Presents No Issue of Substantial Public Importance

1. Because the permit is unambiguous, the Court of Appeals' distinction between contract interpretation and interpretation of regulations is inconsequential

The Court of Appeals decision aligns with Ecology's longstanding position that the Industrial Stormwater General Permit regulates industrial activity at transportation facilities more stringently than federal law requires. This conclusion should not have come as a surprise to Petitioners. Ecology's

permit has applied to all areas of industrial activity at transportation facilities since 2010, and there are material, textual differences between the permit and federal law.

Petitioners acknowledge that the distinction between interpretation of contracts and interpretation of regulations "only makes a difference if the language of the permit is ambiguous." Petition at 19. Here, the Court of Appeals held that the 2020 permit is unambiguous. *Puget Soundkeepr All.*, 545 P.3d at 345 (holding "it is plain" that the permit applies beyond the discrete areas identified in EPA's regulation).

Petitioners incorrectly argue that the Court of Appeals deferred to Ecology. Petition at 20. Because the permit is unambiguous, the Court decided that deference was unnecessary. The Court of Appeals said it would defer to Ecology only if it decided that the permit was ambiguous. *Puget Soundkeeper All.*, 545 P.3d at 346.

2. Petitioners overstate the impact of the Court of Appeals decision

The Court of Appeals held that the 2020 Industrial Stormwater General Permit unambiguously applies to all areas of transportation facilities where industrial activity occurs. This holding only applies to the 2020 permit, which will expire at the end of this year. CP 59.

Petitioners argue that this holding requires courts to "give reflexive deference to Ecology's post-hoc interpretation" of permit conditions. Petition at 23. Actually, the Court of Appeals held that unambiguous permit terms must be given effect. The Court did not defer to Ecology's interpretation.

Given the lack of ambiguity, the Court of Appeals' distinction between interpretation of contracts and interpretation of regulations was ultimately inconsequential. That makes this case a poor vehicle to test the distinction's practical implications—if any—for future Ecology permits.

Petitioners also argue that the decision "encourages Ecology to issue vague general permits." *Id.* This argument is

illogical. Ecology has no interest in unnecessary litigation and no incentive to issue vague permits.

Finally, Petitioners argue that the decision creates uncertainty. *Id.* Actually, the decision aligns with Ecology's longstanding position. Ecology's permit has regulated all areas of industrial activity since 2010.

Ecology acknowledges that stormwater management technologies can be costly and can take time to design and build. *See, e.g.,* CP 1597 (Ecology's response to comment regarding compliance costs); CP 2115 (Petitioner Northwest Seaport Alliance's estimate of compliance costs). Ecology has chosen to regulate industrial transportation facilities rigorously to ensure attainment of state water quality standards. Under state law, Ecology must "exercise its powers, as fully and as effectively as possible, to retain and secure high quality for all waters of the state." RCW 90.48.010. Petitioners have had ample time to conform their practices to Ecology's regulatory position, which Ecology has maintained since 2010.

The 2020 Industrial Stormwater General Permit will expire at the end of 2024. Ecology is currently drafting a replacement permit. If Petitioners have concerns about the cost of implementing the draft permit, or if they contend that certain provisions in the draft permit are unclear, they can submit public comments to Ecology. For instance, Petitioners can request clarity regarding the distinction between the Industrial Stormwater General Permit and the Phase I Municipal Stormwater Permit. *See* Petition at 29–30 (arguing that the Court of Appeals decision creates ambiguity for areas of facilities potentially covered by both permits).

Ecology will respond to all relevant comments and will make appropriate changes or clarifying edits before finalizing the permit. After Ecology issues the permit, Petitioners can request technical assistance regarding implementation or enforcement of particular permit provisions.

V. CONCLUSION

Since 2010, Ecology has regulated stormwater pollution at industrial transportation facilities more stringently than federal law in order to protect the State's water quality. The Court of Appeals gave effect to the permit's plain language and correctly declined to insert limiting language that Ecology deliberately omitted. Petitioners do not meet any of the criteria set by RAP 13.4(b). The Supreme Court should deny review.

This document contains 2,908 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 15th day of May 2024.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on May 15, 2024, I caused to be served the foregoing document in the above-captioned matter upon the parties hereto via the Appellate Court Filing Portal, which will send electronic notification of such filing to all parties of record.

DATED this 15th day of May 2024, in Olympia, Washington.

s/ Ronald L. Lavigne
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ATTORNEY GENERAL'S OFFICE - ECOLOGY DIVISION

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