NO. 102445-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 84492-0-I

PUGET SOUNDKEEPER ALLIANCE,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY; SNOHOMISH COUNTY, CITY OF SEATTLE, CITY OF TACOMA, PIERCE COUNTY, CITY OF BELLEVUE, KING COUNTY; and WASHINGTON POLLUTION CONTROL HEARINGS BOARD,

Respondents.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Federal Statutes

State Statutes

State Regulations

IDENTITY OF PETITIONERS

Petitioner is Puget Soundkeeper Alliance ("Soundkeeper"). Soundkeeper was a party in the initial challenge before the Pollution Control Hearings Board ("PCHB") and the appeal in the Court of Appeals, Division I.

COURT OF APPEALS DECISION

Petitioners seek review of the unpublished opinion terminating review by the Court of Appeals, Division I, of September 5, 2023, in *Puget Soundkeeper Alliance v. Washington Department of Ecology et al.*, Case No. 84492-0-I. A copy of the Court of Appeals opinion is attached as Appendix A.

ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred when it found that RCW 90.48.520, WAC 173-201A-510, 173-216-110, and 173-226-070 did not require the specification and application of discharge limits or particular treatment requirements to stormwater pollutant discharges authorized in the Permits for

Western Washington, in conflict with the previous Court of Appeals decision in *Washington State Dairy Federation v. State*, 18 Wn. App. 2d 259, 490 P.3d 290 (Wn. Ct. App. 2021).

2. Whether the Court of Appeals erred when it interpreted the language of RCW 90.48.520, WAC 173-201A-510(1), 173-216-110(1)(d), and 173-226-070(2) and (3) to allow stormwater pollutant discharges authorized in the Municipal Stormwater General National Pollutant Discharge Elimination System Phase I and Phase II Permits (the "Permits") for Western Washington to cause and contribute to violations of Washington's water quality standards.

STATEMENT OF THE CASE

Stormwater runoff that is collected, channeled or piped, and discharged into Puget Sound and its tributary streams, is a primary source of pollution to Puget Sound. AR 566–68[1];

[1] Citations to the Administrative Record prepared by the PCHB are denoted as "AR." Citations to the Clerk's Papers prepared by Thurston County Superior Court are denoted as "CP."

Puget Soundkeeper All. et al. v. Dep't of Ecology et al., 2008 WL 5510412 (PCHB, Apr. 2, 2008) ("2008 Final Order S4") at *12. *See also Puget Soundkeeper All. et al. v. Dep't of Ecology et al.*, 2008 WL 5510413, at *20 (PCHB, Aug. 7, 2008) ("2008 Final Phase I Order"). Stormwater carries many pollutants from the hard surfaces over which it runs. *Id.* Those pollutants include metals such as copper, zinc, and mercury that are toxic to humans, fish, and orcas, as well as bacteria and nutrient pollution, chemicals from car engines, tires, brake pads and linings and gasoline residues such as polycyclic aromatic hydrocarbons ("PAHs") and heat, raising stream temperatures. *Id.*; 2008 Final Order S4 at *12.

Pollutants in stormwater have also long been known as the cause of pre-spawn mortality in salmonids.[2] AR 568. Also, over a decade ago, scientists at Washington State University identified bioinfiltration—treatment of stormwater by running it

[2] Often referred to as Urban Runoff Mortality Syndrome.

through plants and soil before discharging it—an effective treatment to address salmon mortality as well as capturing other pollutants. *Id.* These facts are undisputed by Ecology and fully supported by the record herein.

As a point source of pollutants, the Clean Water Act and Washington law regulate stormwater through National Pollutant Discharge Elimination System ("NPDES") permits. 33 U.S.C. § 1342(p). *See also* 2008 Final Order S4 at *4. State law imposes a number of requirements on discharges authorized by NPDES permits including that pollution discharges authorized by a permit must be subject to specific controls sufficient to ensure the discharges do not cause or contribute to a violation of a water quality standard. RCW 90.48.520; WAC 173-216-110(1)(d), and 173-226-070(2) and (3). Further, for general stormwater permits, best management practices ("BMPs") must be required and applied to ensure discharges do not cause or contribute to violations of standards. WAC 173-201A-510(3)(a) and (b).

The Court of Appeals opinion creates a conflict in the law where the court disregarded its earlier findings and decision finding that each source of pollutants covered by general NDPES permits must meet the statutory and regulatory permitting requirements. *Wash. State Dairy Fed'n*, 18 Wn. App. 2d 259.

Further, the Court of Appeals decision erred in finding that Ecology had the discretion to disregard these requirements, mistakenly concluding that stormwater general permits can allow pollutants from stormwater to contribute to water quality violations and killing salmon before they can spawn.

I. STATUTORY AND REGULATORY FRAMEWORK

The Clean Water Act and state law prohibit the discharge of any pollutant in any amount absent compliance with a NPDES permit. 33 U.S.C. § 1311(a), RCW 90.48.080, and WAC 173-220-020. Stormwater collected and channeled to outfalls that discharge to water is a point source discharge under the Clean Water Act, 33 U.S.C. §§ 1362(14) and 1342(p). *See*

also WAC 173-226-050 and 173-220-030(18); 2008 Final Order S4 at *4. The Washington Department of Ecology ("Ecology") is delegated the authority to issue NPDES permits within the State of Washington. RCW 90.48.260.

State statutes require that stormwater permits include and apply "all known, available, and reasonable technology" or "AKART" to control pollutants in stormwater and that in no event shall the discharge of toxicants be allowed to violate Washington water quality standards. RCW 90.48.010 and RCW 90.48.520.[3] To implement these state statutory directives, Ecology's rules require that (1) all discharge permits be conditioned so they meet water quality standards and (2) no permit can be issued that causes, or contributes to, a violation of water quality standards. WAC 173-201A-510(1) and (3), 173-226-070(2)(b) and (3). Water quality-driven effluent limits are

[3] Washington law also provides that discharge of any pollutant is prohibited where it will degrade the water. RCW 90.54.020(3).

required in permits if the discharge authorized by the permit will cause or has the reasonable potential to cause a violation of a water quality standards, or will contribute to an existing violation of a water quality standard. WAC 173-226-070(2)(b). These are well-known and long-standing Clean Water Act and state requirements for all pollution permits, both general and individual.

To implement the statutory requirements, including for general permits such as the stormwater Permits at issue here, Ecology's own rules spell out that Ecology *shall* apply limits that are necessary to meet Washington water quality standards, and *ensure* compliance with those limits, even if what is required to meet standards is more stringent than standard technological controls. WAC 173-226-070(3)(a). For stormwater pollution, the regulations direct that BMPs *shall* be applied so when all combinations of BMPs are in place, violations of water quality standards *shall* be prevented and that activities which cause pollution in stormwater *shall* be

conducted to comply with water quality standards. WAC 173-201A-510(1) and (3).

II. PERMITS HISTORY AND FACTUAL BACKGROUND

A. The Municipal Stormwater General NPDES Permits

In 2007, Ecology issued Phase I and Phase II Municipal General NPDES Stormwater Permits (the "2007 Permits") which were challenged by a number of interested parties including Soundkeeper. *Puget Soundkeeper All. v. Dep't of Ecology*, PCHB No. 07-021c. As part of that litigation, the PCHB found that the 2007 Permits as written failed to ensure that stormwater pollutant discharges authorized by the Permits would not cause or contribute to violations of water quality standards, meaning the permits did not meet the requirements set forth in RCW 90.48.520; WAC 173-201A-510, 173-216-110, and 173-226-070(2) and (3). 2008 Final Order on S4 at *12–14. To try to address this failure, the PCHB crafted the Section S4 language that is at issue in this case, with the intent

that, consistent with WAC 173-201A-510(3)(b) and 173-226-070(3), the S4 language would result in additional measures as necessary to ensure that authorized stormwater discharges would not cause or contribute to violations of water quality standards. 2008 Final Order S4 at *12–14 and *22–23. Section S4 remained unchanged in the 2013 and 2019 versions of the stormwater Permits. Now, undisputed evidence in the record for this case shows that during the time S4 has been in effect, stormwater discharges caused and contributed to violations of water quality standards throughout Puget Sound. Simply put, Section S4 is not working as intended meaning that the Permits do not specify limits and controls sufficient to ensure that stormwater discharges authorized by the Permits do not cause or contribute to violations of water quality standards contrary to the Clean Water Act and state law.

B. Discharges Authorized by the Permits Cause and Contribute to Violations of Water Quality Standards and Salmon Mortality.

Ecology admits "[i]f there was such a thing as a pollution smorgasbord, urban stormwater would be the ultimate dining experience." AR 378. Ecology has identified stormwater pollutants as including toxic metals, bacteria and nutrient pollution, chemicals from cars, and heat. AR 566–68. *See also* AR 392, 447, and 486. Ecology agrees and reports that monitoring of streams and storm outfalls "ha[s] shown elevated concentrations of metals, nutrients, pesticides and organic compounds in relation to urban development." *Id.*

All these pollutants are threats to area streams, their aquatic life, and ultimately Puget Sound. Ecology admits that stormwater runoff from urbanized areas is "a leading pollution threat to lakes, rivers, streams and marine water bodies in urbanized areas of Washington State." AR 566–68. Ecology has also identified stormwater as a cause of pre-spawn die-offs of coho salmon in Puget Sound urban streams in which

mortality rates for adult females range as high as 60 to 100 percent. AR 568. The phenomenon is "widespread throughout urban streams in Puget Sound." *Id.* Adult coho enter streams containing stormwater runoff and quickly die. *Id.* Pollutants in stormwater—tire chemicals—have been conclusively identified as the cause. *Id.*

Based on stormwater monitoring in Western Washington from 2009 to 2013, Ecology found that "[a]cross all land uses, copper, zinc, and lead were found more often than not to exceed (not meet) water quality criteria" and "[m]ercury and total PCBs exceeded criteria in 17% and 41% of the samples, respectively." Dep't of Ecology, Western Washington NPDES Phase 1 Stormwater Permit: Final S8.D Data Characterization 2009-2013 at 7 (Feb. 2015) (monitoring was conducted pursuant to previous stormwater permit conditions).[4] Ecology has listed many area streams as "impaired" because of these

[4] https://apps.ecology.wa.gov/publications/documents/1503001.pdf.

pollutants.[5] *See* AR 326–504. Unfortunately, Ecology has had to *add* streams to the impaired waters list for pollutants found in stormwater *during* the time that Section S4 and most of the Permit language has been in place (between 2008 and 2019). That is, stormwater pollution discharges authorized by these Permits is creating new problems and making the existing problem *worse* (contributing to violations.) For example, Chambers Creek in Pierce County has been on the list of impaired waters—waters violating water quality standards—since 2004 for mercury, copper, and bacteria, all pollutants carried by stormwater. *See* AR 326–29; *see also* AR 569–70 for pollutants in stormwater. And yet, there are no Permit requirements specified for permittees in Pierce County with stormwater discharges to Chambers Creek to ensure that those discharges are not contributing mercury, copper, and/or bacteria

[5] The impaired waters list is referred to as the 303(d) list, 33 U.S.C. § 1313(d).

to Chambers Creek, making the water quality standards violations worse.[6]

Even more telling, some waterbodies that were already failing to meet water quality standards for particular pollutants have had new pollutant standards violations added to the 303(d) list since 2008 (the date that Section S4's current language was included in the Permits in an effort to avoid just that situation from happening). For example, Coal Creek in Bellevue/King County has been on the impaired waters list since 2008 for violating dissolved oxygen water quality standards. In 2014, Coal Creek was newly-listed as also violating aquatic life water quality standards, clearly having deteriorated over the course of

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[6] Similarly, Juanita Creek in Kirkland/King County and Longfellow Creek in Seattle/King County, are both on the impaired waters list since 2004, for bacteria and temperature violations. AR 330–38. Miller Creek in SeaTac/Burien/Normandy Park/King County has been listed as impaired for bacteria, dissolved oxygen, and high temperatures. AR 342–45. Nowhere in the Permits are there specific provisions ensuring that these permittees are not contributing to, and thereby worsening, the bacteria or temperature violations.

the previous two stormwater permits, despite the language in Section S4. AR 339–41. Walker Creek (Normandy Park/King County) was added to the list as impaired for bacteria and temperature in 2014, again having deteriorated during the two prior stormwater permits that included the Section S4 language. AR 346–48. Swamp Creek in Snohomish County has been listed since 2008 for violating dissolved oxygen standards and in 2014 temperature violations were added (again, having deteriorated over the course of the previous two permits and the presence of the Section S4 language). AR 351–504. Despite these worsening standards violations, the 2019 Permits included no requirements specific to these causes/contributions to violations of water quality standards for the stormwater discharges authorized by these Permits.

Confoundingly, there are known, effective solutions to the problem of polluted stormwater. *See, e.g.*, AR 518–24 and 542 for descriptions of stormwater BMPs. Most importantly, Ecology acknowledges research has conclusively demonstrated

that treating stormwater with bioinfiltration—a best management practice that involves filtering or capturing the stormwater through soil with plants, *e.g.*, a rain garden or bioswale—before it is allowed into a stream, removes the stormwater pollutants that kills salmon pre-spawn and keeps salmon safe. AR 241 and 568. Yet nowhere in the Permits is this simple treatment required to prevent stormwater discharges authorized by this Permit from causing or contributing to salmon mortality in Puget Sound area streams.

III. PROCEDURAL HISTORY

In July 2019, Ecology finalized the version of the Municipal Stormwater Phase I and II General NPDES Permits for Western Washington at issue in this case. AR 507 and 544.

Soundkeeper timely appealed the Permits to the PCHB. PCHB No. 19-043c. On March 18, 2022, the PCHB granted Ecology's and the Permittees' summary judgment motions, affirming the Permits as written. AR 2029–73.

On April 15, 2022, Soundkeeper appealed the PCHB's ruling to Thurston County Superior Court, followed by a request for direct review by the Court of Appeals. CP 1–62 and 63–69. Direct review was had in the Court of Appeals with review transferred from Division II to Division I on September 8, 2022. CP 70–74. On September 5, 2023, the Court of Appeals ruled, affirming the PCHB. See Appendix A. This petition requests review by the Supreme Court on two issues.

ARGUMENT

This Court should accept review of the Court of Appeals decision for two reasons:

(1) The decision is contrary to earlier published Court of Appeals case law in *Washington State Dairy Federation*, 18 Wn. App. 2d 259, creating a conflict in the law; and

(2) There is substantial public interest in courts and regulatory agencies hewing to statutory directives regarding clean water permitting requirements to ensure the health and

protection of Puget Sound and tributary waters and not allowing an agency the discretion to ignore statutory directives.

I. THE COURT OF APPEALS HAS CREATED A CONFLICT IN THE CASE LAW REGARDING GENERAL NPDES PERMITS.

The Court of Appeals' finding that compliance with pollution control requirements in statute and rules can be assessed and complied with vaguely "as a whole" in the Permits as opposed to *ensuring* that *all discharges* covered by the permit are controlled by AKART and/or BMPs necessary to ensure that discharges authorized by the permits do not cause or contribute to violations of water quality standards, is contrary to the holding of *Washington State Dairy Federation*, 18 Wn. App. 2d 259. The decision in this case creates a conflict in the Court of Appeals jurisprudence.

In the *Dairy Federation* case, the Court of Appeals reviewed a PCHB decision concerning the adequacy of Ecology's general NPDES permit for Confined Animal Feeding Operations (CAFOs), applicable to large animal feeding

operations throughout the state. *Wash. State Dairy Fed'n*, 18 Wn. App. 2d at 298–99. Like the stormwater general permits, the CAFO general permit is addressed to multiple sources of discharges from multiple permittees' animal operations. *Id.* All the discharges were to be controlled with the application of various BMPs. *Id.* Similarly, the stormwater Permits at issue here apply to multiple discharges of stormwater pollution by multiple city and county permittees throughout Western Washington. AR 885, 1261, and 1264. The stormwater Permits apply BMP requirements to address stormwater pollution. *See, e.g.*, AR 894–97, 901–05, 927, 951.

In *Dairy Federation*, the Court of Appeals ruled that general NPDES permits for CAFOs must ensure that they do not cause or contribute to violations of water quality standards just as individual permits must. *Wash. State Dairy Fed'n*, 18 Wn. App. 2d at 288. In *Dairy Federation*, the court also addressed separate sections of the CAFO general permit, specifically sections pertaining to lagoons and compost piles,

and applied the requirements of WAC 173-201A-510 and RCW 90.48.010 to *each* separate part of the permit to ensure each part of the permit complied with specific regulatory directives such as ensuring the permit did not authorize discharges that would cause or contribute to violations of standards. *Wash. State Dairy Fed'n*, 18 Wn. App. 2d at 275–76, 279. The Court of Appeals did not allow assessment of treatment requirements "as a whole" in the CAFO general permit. Instead, it required the permit to ensure that treatment requirements are met in each part of the permit for all pollutant sources and discharges covered by the permit. *Id.* at 279.

Here, the Court of Appeals touched on the holding in *Dairy Federation* in only the most oblique way, wholly dismissing it in a footnote. In the footnote, the Court of Appeals discards applicability of *Dairy Federation* as "dissimilar" to the stormwater general Permits at issue here. Opinion, App. A, pp. 26–27, n.17.

The court's attempt to distinguish the permits is completely contrary to, and wholly unsupported by, the facts. Under Washington law, stormwater and CAFOs are both defined as point sources, and both are regulated through the NPDES permitting system. *See* RCW 90.48.520; WAC 173-201A-510, 173-216-110, and 173-226-070. *See also Nat. Res. Def. Council v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977); 33 U.S.C. § 1342 (setting forth requirements for NPDES permits for point sources and including stormwater); 33 U.S.C. § 1362(14) (definition of point source as a "discernible, confined and discrete conveyance" such as the pipes, channels and ditches used to collect, convey, and discharges of municipal stormwater). Like CAFOs, stormwater is primarily controlled through the application of BMPs. WAC 173-201A-510(3) and AR 894–97, 901-05, 927, 951. Like the CAFO general permit, the stormwater general Permits cover many different dischargers where the discharger applies for and receives coverage under them. Permits, Section S1, AR 885, 1261, and

1264 and generally. *See also Wash. State Dairy Fed'n*, 18 Wn. App. 2d at 270. Like the CAFO general permit, the Permits here cover multiple sources of pollution discharges sometimes to multiple receiving waters. *Id.* *See also* Permits at S2, AR 886, 1265–66. For example, the CAFO permit addressed manure management, storage, and composting areas as potential sources of pollutants. *Wash. State Dairy Fed'n*, 18 Wn. App. 2d at 266–67, 271. The Permits here address, for example, stormwater outfalls, BMPs for new and redevelopment, as well as storage of road chemicals, public education, and addressing upset events or illicit dumping. Permits, Section S5, described at AR 606 and 642–44, and 770–71.

There is no difference between the CAFO and stormwater general NPDES permits warranting a different outcome between the *Dairy Federation* case and the case here. The Court of Appeals erred in finding that Section S4 of the Permits need not be separately examined for compliance with

permitting requirements and erred in finding that the Permits are adequate to ensure that discharges authorized by the permits "as a whole" do not cause or contribute to violations of water quality standards. The Court of Appeals' error creates a conflict in the case law, and Soundkeeper urges this Court to accept review and reverse the decision below.

II. THE COURT OF APPEALS DECISION IS CONTRARY TO LAW IN ALLOWING ECOLOGY TO ISSUE A PERMIT THAT AUTHORIZES POLLUTANT DISCHARGES ECOLOGY KNOWS WILL CAUSE AND CONTRIBUTE TO VIOLATIONS OF WATER QUALITY STANDARDS.

The Court of Appeals erred because it interpreted Ecology's discretion contrary to, and beyond the bounds of, requirements in statute. The interpretation means that state law requirements for pollution controls that protect salmon and water quality standards, are reduced to suggested outcomes which Ecology can choose to disregard, making stormwater pollution control and clean urban waters an ever-receding horizon. This is precisely the opposite result to that

contemplated and imposed by the Clean Water Act and state law.

A. The Permits Authorize Discharges That Cause and/or Contribute to Violations of Water Quality Standards Contrary to Statutes and Regulation.

The PCHB previously ruled that stormwater permits must include limitations as necessary to ensure that stormwater discharges do not cause or contribute to violations of water quality standards. 2008 Order on S4 at *12–14. The PCHB concluded that the stormwater permits, including the minimum requirements in Section S5 of the permits, did not contain the protections necessary to ensure that stormwater discharges did not cause or contribute to violations of water quality standards. 2008 Final Order S4 at *11–13. The PCHB therefore created Section S4 of the Permits to provide for more stringent protections wherever a stormwater discharger might be causing or contributing to a violation of water quality standards; it was intended as a mechanism for Ecology and stormwater polluters to comply with the law. AR 2058.

The undisputed facts show that despite best intentions, the Permits, even with the S4 language drafted by the PCHB in 2008, authorize discharges of stormwater pollution that cause and contribute to violations of water quality standards. This is evident in the growing additions to the list of waters not meeting water quality standards for pollutants found in stormwater and in the annual die-offs of coho salmon from pollutants in stormwater. Section S4's language has proved inadequate to avoid those results.

The Court of Appeals concluded Ecology had discretion to allow stormwater to cause or contribute to violations of water quality standards by expanding a small amount of discretion to swallow the specific directives in the law. For example, WAC 173-201A-510(3)(b) provides:

> If a discharger is applying all best management practices appropriate or required by the department and a violation of water quality criteria occurs, the discharger shall modify existing practices or apply further water pollution control measures, selected or approved by the department, to achieve compliance with water quality criteria. Best management

> practices established in permits, orders, rules, or directives of the department shall be reviewed and modified, as appropriate, so as to achieve compliance with water quality criteria.

It is plain from this language that there is no discretion to simply ignore or allow a standards violation. Ecology must determine the appropriate treatment "so as to achieve compliance." The court selectively cited to the first sentence above to find that Ecology need include no specific requirement to ensure water quality standards are met. App. A at p. 35. The court's erroneous interpretation means the discretion to determine how to ensure water quality standards are achieved is expanded to swallow this regulation—and all other statutory and regulatory requirements—whole and to allow Ecology discretion to not require compliance with standards at all.

The Court of Appeals erred when it found that Ecology had full discretion to require nothing more in the Permits under state law.

B. The Court of Appeals Erred by Approving a Self-Regulating Permit, a Concept Previously Rejected by the PCHB And Ninth Circuit.

The Court of Appeals was also incorrect when it opined that by simply reproducing, word for word, the statutory and regulatory text in Section S4 of the permits, Ecology had complied with its regulatory obligations. *See*, App. A at p. 22 and 24. In this regard, the Court of Appeals failed to heed and apply the findings and direction of the PCHB and the Ninth Circuit Court of Appeals on this very point.

The Ninth circuit, in *Environmental Defense Center v. U.S. Environmental Protection Agency*, 344 F.3d 832 (9th Cir. 2003), rejected a similar approach sanctioned by the Environmental Protection Agency ("EPA") where EPA argued that it had the discretion to adopt "flexible" compliance measures to defer specific controls on discharges of stormwater pollution in general permits to some later planning phase that would be largely controlled and driven by permittees themselves. *Id.* at 854. The court rejected the idea discussing,

at length, a regulator's obligations to independently review and *ensure* that pollutant control measures in a permit, or a plan developed under a permit, will actually meet the statutory standards for pollutant control. *Id.* at 855, and n.32. The court also rejected EPA's argument that regulatory permitting requirements would be met because the pollutant controls could be chosen from a menu, ruling again on the grounds that the regulator has an obligation to *ensure* that the controls chosen from the menu will meet the statutory standard of control. *Id.* In rejecting EPA's hands-off permittee-driven approach, the court found the permittee would need do nothing more than decide for itself what reductions were necessary to meet the statutory standard (where the statutory language was, like here, simply dropped into the permit or rule wholesale with no requirements included on how it is to be met.) *Id.* The PCHB has repeatedly cited to, and adopted, the Ninth Circuit's rejection of such "self-regulating" mechanisms in permits. *See, e.g., Puget Soundkeeper All. and Nw. Marine Trade Assoc. v.*

Dep't of Ecology, PCHB No. 05-150c, 2007 WL 314868 at *29–30 (PCHB, Jan. 26, 2007) (concerning the general discharge permit for BMP pollutant controls for boatyards; "The Clean Water Act demands regulation in fact, not only in principle.") *See also* 2008 Final Order on S4 at *17.

The Permit language in S4 found adequate by the Court of Appeals is the same "self-regulating" mechanism rejected by the Ninth Circuit and by the PCHB in the *Northwest Marine* case. The stormwater permittees are left to decide for themselves, *after* a violation or contribution to violation of a standard has occurred, whether to report it and the record shows that has been *never* for salmon mortality or for permitted stormwater discharges to streams where the streams are already impaired for stormwater pollutants. AR 292–99. And, if a report had been submitted, the Permit language leaves it to the Permittee to suggest how to avoid violating water quality standards in the future, but only if Ecology makes them do so, all in an opaque process that occurs outside of public notice and

comment of the original permit.[7] In simply repeating the text of statute and regulation, without imposing specifics in the permit to *ensure* those statutory and regulatory directives are met and achieved, PCHB created and the Court of Appeals has allowed, a "self-regulating" permit; a permit where the permittee decides for itself, after the pollutant fact and outside the public notice and comment and regulatory permitting process, if and how to actually avoid causing or contributing to a violation of water quality standards. This violates statutory and regulatory directives.

The undisputed facts of this case show that Section S4 as well-intentioned as it originally was, is not working. Permittees are not reporting salmon mortality or discharges to already-impaired streams, and no additional permit measures have been required for any discharge anywhere to protect salmon and

[7] The record is also devoid of any evidence that Ecology has ever taken any regulatory action to review, approve, or require any action to address a salmon mortality or standards violation problem under Section S4 of the Permits.

ensure water quality standards are not violated. AR 292–99. Rather, during the period of time that the S4 language has been in the Permits, salmon continue to die at alarming rates upon entering urban streams with no application of the BMP of bioinfiltration, a treatment Ecology acknowledges works (or any other BMP requirement addressed to protecting standards or fish). Waterbodies have been newly-identified and listed as violating more water quality standards for pollutants in stormwater. The self-regulating approach with expansive Ecology discretion to require nothing is not working and does not meet the basic requirements of the law.

Soundkeeper respectfully requests that this Court accept review and reverse the decision below.

CONCLUSION

Soundkeeper requests that the Washington Supreme Court accept review of this case to correct an arbitrary and capricious decision that creates a conflict in the case law. The general stormwater NDPES permits result in stormwater

discharges that cause and/or contribute to violations of water quality standards and salmon mortality contrary to specific statutory and regulatory requirements. Ecology does not have discretion to disregard specific pollution permitting requirements in statute and rule. Soundkeeper asks this Court to reverse the decision below.

Respectfully submitted this 5th day of October, 2023.

This document contains 4,784 words, excluding the parts of the document exempted from the word count by RAP 18.17.

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APPENDIX A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE, Appellant, v. WASHINGTON DEPARTMENT OF ECOLOGY, SNOHOMISH COUNTY, CITY OF SEATTLE, CITY OF TACOMA, PIERCE COUNTY, CITY OF BELLEVUE, KING COUNTY, and WASHINGTON POLLUTION CONTROL HEARINGS BOARD, Respondents.	No. 84492-0-I DIVISION ONE UNPUBLISHED OPINION

SMITH, C.J. — Puget Soundkeeper Alliance (Soundkeeper) is a Washington nonprofit corporation dedicated to protecting and preserving the waters of Puget Sound and the species that live in it. Soundkeeper advocates for the adoption of policies throughout the Puget Sound watershed that will protect water quality and habitat health. For many years, it has been a major voice in the development of municipal stormwater management rules and regulations, and its contributions and criticisms have at times pushed Washington to adopt more aggressive protections. Soundkeeper demonstrates the powerful good that can be accomplished for the environment and our local waterways by both cooperative and adversarial interactions between government and private organizations.

In this case, Soundkeeper challenges the permits issued by the Department of Ecology to municipal stormwater system operators in Washington State. It points to the existence of streams in the Puget Sound region with pollutant levels increasingly exceeding standards set by Ecology itself and raises concerns about high pre-spawn mortality rates in Coho salmon. It asserts that these ever more polluted streams and the resulting harm from the pollutants indicate that the current stormwater permits are ineffective and require restructuring. It argues this is because the permits' compliance mechanism allows discharges of some polluted waters from municipal stormwater systems into protected waters, without counting those discharges as per se violations of the permits themselves. It contests this compliance mechanism's conformity with various state and federal statutes and regulations. The Pollution Control Hearings Board reviewed Ecology's permits and upheld them. Soundkeeper now appeals the Board's conclusions. We affirm.

FACTS

Municipal Stormwater Systems

This appeal concerns the legality of permits granted by the Washington State Department of Ecology to various operators of Municipal Separate Storm Sewer Systems (MS4s) located in Washington State. An MS4 is "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels, or storm drains)" owned and operated by a municipal entity,[1] designed or used for

[1] Throughout this opinion, we will refer to the municipal entities which operate the stormwater systems, and which are party to this case, as MS4s.

collecting or conveying stormwater, and which is not combined with a sewer. 40 C.F.R. § 122.26(b)(8).

Unsurprising, MS4s are extraordinarily complex systems composed of many interrelated parts of our built and natural environment. The MS4s party to this case collect stormwater from across the counties or cities they serve and discharge that stormwater into local bodies of water at hundreds to thousands of locations. This water is often—if not always—polluted to one degree or another.

That MS4 discharges are polluted is the result of activities beyond the control of the entities that own and manage the MS4s. This is unlike other discharges of water pollution, many of which are the results of discrete construction, industrial, or other concerns that actively generate the pollutants they discharge into waters protected by state or federal statute.

This distinction arises from the inherent structure of MS4s. The water that first enters and then exits an MS4 "comes into contact with essentially all surfaces exposed to the sky." In the process it will pick up potential pollutants that have accumulated on those surfaces, "including soil and other particles, nutrients, metals, salts, natural and synthetic organic compounds, oil and grease, etc." These pollutants originate in a broad range of natural and human activity, including lawful, everyday activities such as driving, property upkeep, and business operations.

The history of Seattle's MS4 is emblematic of MS4s complexity and the competing purposes they must balance. Drainage infrastructure in what is now Seattle was originally "built to avert flooding and to protect property and public

health and safety." It was not centrally designed and developed, but instead grew piecemeal as local communities were established and later annexed by the city government. Nor is it, even now, a single comprehensive system; parts of Seattle are managed by mixed sewage and stormwater systems, while some are served only by the MS4 that is party to this case. The quality of the waters into which the Seattle MS4 drains is therefore partially dependent on Seattle's discharges, but also on the activities of others outside of the city's control.

The result is that MS4s balance multiple purposes, operate interdependently with each other and with other polluters, compete with other entities for space and resources, have inherited systems not always well designed for present purposes, and enjoy only limited control over the source of the pollutants they discharge. To the degree that they are asked to reduce that pollution, they alone are given the task of solving the resulting problem caused by all involved.

Structure of the Permits

Because they discharge into protected waters, MS4s are subject to a permitting process regulated under federal and state laws, the goal of which is to ensure that federal and state waters are clean and unpolluted. These permits are issued by the Washington Department of Ecology and are called "Phase I" and "Phase II" permits depending on the scale of the MS4 they seek to regulate. Phase I permits regulate discharges from "large" and "medium" MS4s, and include permittees such as the cities of Seattle and Tacoma, Clark, King, Pierce, and Snohomish Counties, the Port of Seattle, the Port of Tacoma, and various

other similarly sized entities. Phase II permits cover "medium MS4s" throughout the state, including Bellevue, Spokane, Everett, Yakima County, Thurston County, and others.[2]

Under federal law, the permits are re-issued every five years, and as part of that process their requirements are adjusted as necessary. 33 U.S.C. § 1311(d), (m)(3). Ecology issued the most recent versions of the permits on July 1, 2019. They are very detailed and thorough documents. The two permits at issue here—Phase I and one Phase II—total over 400 pages.[3]

In many of their particulars, the permits are identical, including their general structure. Sections S1 through S3 identify permittees, coverage area, the basics of what sort of discharge is authorized, and warn that permittees are responsible for their compliance with the permits' terms. Sections S6 through S9 establish monitoring and reporting requirements, compliance with "Total Maximum Daily Load" (TMDL) requirements, and certain permittee-specific rules. The permits' core regulatory provisions, at least for the purposes of this appeal, are located in sections S4 and S5.

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[2] The size of an MS4 depends on the size of the population it serves. Those over a population of 250,000 people served are large, those between 100,000 and 250,000 are medium, and those below 100,000 are small. 40 C.F.R. § 122.26(b)(4) (defining large MS4s), (7) (defining medium MS4s), (16) (defining small MS4s).

[3] There are two Phase II permits—one for Western Washington and one for Eastern Washington. The Eastern Washington permit was not appealed and is not at issue.

1. Section S5

We first address Section S5, which imposes requirements on permittees that, if breached, are addressed through a compliance pathway located in S4. Jeff Killelea, the Water Quality Program Development Services Section Manager at Ecology, who led the development of the 2019 permits, describes Section S5 as the "heart" of the permits.

The S5 section of the Phase I permit requires that each permittee establish a "Stormwater Management Program." Phase I programs must include a number of aspects, such as mapping water sources, communicating with other MS4s and the public, creation of pollutant source control methods, creation of structural controls, etc. The Phase II programs are similar in most respects, but some of the more specific requirements are less robust.

The S5 sections of the permits' 2019 iterations include more and stricter requirements than previous permits' S5 sections. For instance, a comprehensive stormwater management action planning requirement is a new condition mandating that MS4s "identify retrofits, preferred locations, and land management strategies to better integrate stormwater management into their long range plans." The 2019 Phase I permit now also requires implementation of structural retrofits using a point system to define appropriate compliance levels. On the whole, the impact of these and other changes means that the 2019 permits are stricter than their predecessors, in line with an iterative approach that demands higher standards with every permitting cycle.

2. Section S4

Section S4—which is identical between the two permits—requires permittees' compliance with certain water quality standards and contains the permits' enforcement mechanism. It addresses circumstances in which site-specific water quality violations occur despite compliance with Section S5's programmatic requirements.

The core enforcement mechanism of the permits is located in Subsection S4.F, which dictates what should happen when an MS4's discharge violates any of a number of applicable state and federal water standard requirements. The permittee must notify Ecology "based on credible site-specific information that a discharge from the MS4 owned or operated by the Permittee is causing or contributing to a known or likely violation of water quality standards in the receiving water." If it determines that the permittee is "causing or contributing to" an actual water quality violation, Ecology may institute an "adaptive management response." This response typically involves imposing new, stricter best practices requirements. Ecology may also, however, take no additional action if it determines that the violation is already being addressed through another enforceable water quality clean-up plan or through implementation of other permit requirements. Importantly, if the permittee follows this process, a prohibited discharge does not become a violation of the permit itself.

Thus, S4.F's compliance pathway "uses a cooperative iterative process to correct site-specific violations of water quality standards while relying overall on a broader programmatic process to achieve jurisdiction wide compliance with water

quality standards over time." But S4.F "was not intended to be the primary permit term to achieve eventual compliance with water quality standards on a programmatic or jurisdiction-wide basis." The permits as a whole serve that purpose.

Section S4 has been heavily scrutinized over the years, and was the subject of a 2008 decision from the Pollution Control Hearing Board (Board), which oversees Ecology's permitting process. Puget Soundkeeper All. v. Dep't of Ecology, No. 07-021 at (April 2, 2008) (Order on Dispositive Motions: Condition S4) [https://perma.cc/W66H-DTBL]. In that decision, the Board came to a number of legal conclusions about the applicability of federal and state laws and regulations to MS4 permits and remanded the case to Ecology for modification of S4 in compliance with edits dictated by the Board. Puget Soundkeeper All.v. Dep't of Ecology, No. 07-021, at (Aug. 7, 2008) (Findings of Fact, Conclusions of Law and Order) [https://perma.cc/2ZNG-E2FJ]. Across multiple permitting cycles, S4 has remained substantially unchanged since that decision.

This appeal once again challenges S4's legality.

Origin and History of This Lawsuit

The Washington Association of Sewer and Water Districts initiated this suit against Ecology on July 29, 2019. The Board consolidated the Association's challenge with another filed two days later by the Puget Soundkeeper Alliance. A number of permittees moved to intervene as respondents, which the Board allowed. These intervenor-respondents include King, Pierce, and Snohomish

Counties, and the cities of Bellevue, Seattle, and Tacoma. The Washington Association of Water and Sewer Districts eventually settled with Ecology, leaving only Soundkeeper's challenges.

Soundkeeper's claims before the Board and on appeal revolve around the undisputed fact that many of Washington's waters contain levels of pollutants that exceed applicable water quality standards. A number of streams in the Puget Sound region fail to meet requirements under the federal Clean Water Act[4] (CWA) and are therefore placed on the "303(d)" list of impaired waters.[5] Some of these streams have been categorized as more, not less, impaired over time, a process that has occurred despite previous versions of the currently challenged permits being in place.

Of particular concern to Soundkeeper is the high percentage of deaths—between 60 and 100 percent—of female Coho salmon in urban streams around Puget Sound before they are able to spawn. Ecology acknowledges that stormwater pollution from untreated highway runoff likely contributes to these mortality rates and that 6PPD-quinone, a chemical associated with tires, is a possible culprit. Soundkeeper asserts that there is a known, effective solution to the problem of polluted stormwater: treatment of water with "bio-infiltration"—having water run through soil and vegetation—before in is discharged into

[4] Formally known as the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251 to 1388.

[5] The 303(d) list is discussed below in the Federal Water Quality Standards section.

protected waters.[6]

Soundkeeper expresses alarm that no permittee has notified Ecology of the more recent 303(d) list impairments and their possible effect on salmon per S4.F. It is also concerned that in response to only one out of 243 S4.F reports sent to Ecology required any action other than what was already required under S5 of the permits. It points out that S4 has never been used to require any additional action by a permittee to address pre-spawn salmon mortality.

Soundkeeper moved for partial summary judgment and Ecology and the intervening permittees cross-moved. Before its final decision, the Board granted a joint motion dismissing several of the issues Soundkeeper had raised.[7] The remaining eight issues focused primarily on Section S4.F of the Phase I and Phase II permits.

Through a December 2021 letter, the Board informed the parties of its intent to dismiss six of the remaining issues and to hear the remaining two. By a joint motion, the parties stipulated to the dismissal of the remaining issues and the Board dismissed them. The Board issued its written final order in March 2022, detailing the reason for its dismissal of the six most hotly contested issues.

Soundkeeper petitioned for judicial review in Thurston County Superior Court. There, the parties jointly requested that the trial court certify the case to this court under RCW 34.05.518(2), which allows direct review of an

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[6] Soundkeeper's citations to support this point do not appear to be to sworn evidence but rather to briefing at proceedings below but part of the Ecology factsheet does appear to support the contention.

[7] The joint motion is not in the record.

administrative agency's adjudicative proceeding by the Court of Appeals. It granted their request and Soundkeeper now appeals, assigning error to the Board's conclusion that Section S4 of the permits meets state and federal legal requirements.

BACKGROUND LEGAL PRINCIPLES

Because of the complexity of the federal and state laws regulating MS4s and the way in which the discretion extended to Ecology affects the standard of review, we begin by providing an overview of the applicable legal schemes.

Regulatory Context

This regulatory law governing MS4s is complex, the result of many interrelated state and federal laws and regulations, and has developed a corresponding wealth of jargon. The following overview summarizes this structure.

1. Federal Water Quality Standards

Federal water quality regulation is primarily contained within in one law: the Clean Water Act. The CWA was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The act prohibits "discharge of any pollutant by any person" from any "point source"[8] into the navigable waters of the United States without prior

[8] A point source is usually "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). MS4s are point sources requiring NDPES permits. Snohomish County v. Pollution Control Hr'gs Bd., 187 Wn.2d 346, 351-52, 386 P.3d 1064 (2016). But—thanks to the CWA's 1987 Water Quality Act

approval, and establishes a permitting process to provide that approval. 33 U.S.C. § 1311(a); 33 U.S.C. § 1362(12); 33 U.S.C. § 1342(a). The permitting process is titled the National Pollutant Discharge Elimination System, or NPDES. 33 U.S.C. § 1342. States may request authorization to administer their own NPDES permits, assuming what would otherwise be the duty of the United States Environmental Protection Agency (EPA). 33 U.S.C. § 1342(b); 33 U.S.C. § 1251(d). Washington has done so, designating Ecology as the responsible state agency. RCW 90.48.260(1).

NPDES permit approval is subject to the discharge's conformity to various standards. 33 U.S.C. § 1342(a). Permits must generally require application of the "best practicable control technology [BPT] currently available." 33 U.S.C. § 1311(b)(1)(A). Crucially, however, they must also require the permitholder to meet "any more stringent" water quality standards, treatment standards, and compliance schedules[9] established under any state or federal law or regulation. 33 U.S.C. § 1311(b)(1)(C). Although the BPT requirement is concerned with practical limitations, the application of "more stringent" standards may mean that certain discharges are prohibited regardless of practicality. Defs. of Wildlife v.

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amendments to the CWA, discussed below—unlike other point sources, MS4s are regulated through "general permits" covering an entire geographic area, and they consequently do not have to seek a permit for every conveyance under their control that discharges into a protected water. Envtl. Def. Ctr., Inc. v. U.S. Envtl. Prot. Agency, 344 F.3d 832, 853 (9th Cir. 2003); 33 U.S.C. § 1342(p)(3)(B)(i).

[9] A compliance schedule is "a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard." 33 U.S.C. § 1362(17).

Browner, 191 F.3d 1159, 1163 (9th Cir. 1999); Puget Soundkeeper All. v. Pollution Control Hr'gs Bd., 189 Wn. App. 127, 138, 356 P.3d 753 (2015).

"More stringent" water quality standards exist in a number of forms. Under the CWA, states must designate waters for specific uses, such as propagation of wildlife or recreation. 40 C.F.R. § 131.10. Based on the designated use, states must establish "narrative" or "numeric" criteria to create water quality targets. 40 C.F.R. § 131.11; see also 33 U.S.C. § 1313(c). Numeric criteria set acceptable concentration levels for particular pollutants in waters, "*e.g.*, no more than .05 milligrams of chromium per liter." Am. Paper Inst., Inc. v. U.S. Envtl. Prot. Agency, 996 F.2d 346, 349 (D.C. Cir. 1993).[10]

Narrative criteria are broader and more open to interpretation in any particular instance, "*e.g.*, no toxic pollutants in toxic amounts." Am. Paper Inst., 996 F.2d at 349. They can serve as a means of establishing standards in instances where numeric criteria have not been set. For instance, Washington has not set a numeric criterion for 6PPD-quinone, the chemical the parties agree is likely harming salmon, but application of narrative criteria nonetheless ensures that it cannot be discharged in unrestricted amounts.

Criteria are met through the application of two regulatory methods: best management practices and effluent limitations. Best management practices (BMP), as defined by Washington and federal code, are "schedules of activities,

[10] For instance, Washington's numeric criteria for toxic substances in surface waters are set out in 40 C.F.R. § 131.45 and WAC 173-201A-240 based on designations established in WAC 173-201A-200 (fresh waters) and WAC 173-201A-210 (marine waters).

prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution." WAC 173-226-030(3); 40 C.F.R. § 122.2. They come in many forms, but might include, "treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage." WAC 173-226-030(3). Bio-infiltration, Soundkeeper's suggested solution to the salmon mortality problems caused by stormwater runoff carrying 6PPD-quinone, is a form of BMP.

Effluent limitations, on the other hand, are " 'restrictions on the quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged' " into protected waters. Wash. State Dairy Fed'n v. Ecology, 18 Wn. App. 2d 259, 288, 490 P.3d 290 (2021) (quoting Our Children's Earth Found. v. U.S. Envtl. Prot. Agency, 527 F.3d 842, 848 (9th Cir. 2008)) (alterations in original omitted); 33 U.S.C. § 1362(11). They often "consist[] of a requirement to abide by a specific numeric criterion for a given pollutant," ensuring that no more than a particular quantity of that pollutant is discharged. Dairy Fed'n, 18 Wn. App. 2d at 289-90. Effluent limitations are frequently imposed through calculation of TMDL, defined in Ecology's permits as "the maximum amount of a pollutant that a water body can receive and still meet water quality standards, and an allocation of that amount to the pollutant's sources."

Under the CWA, each state must identify waters within its boundaries that have failed to attain applicable water quality standards—whether numeric or narrative—despite the regulations required by 33 U.S.C. § 1311(b). 33 U.S.C.

§ 1313(d)(1)(A), (3). The list of polluted waters developed under this section is known as the "303(d)" list, after the section of the CWA establishing the list. See Pub. L. No. 92-500 § 303 (enacting the language of 33 U.S.C. § 1313). The state must establish TMDLs for the pollutants causing those 303(d) waters to violate water quality standards. 33 U.S.C. § 1313(d)(1)(C). Through this pathway, no permit may allow a permittee regulated by 33 U.S.C. § 1311 to discharge more of the pollutants that have caused a 303(d) water to become impaired into that water.

Permittees not in compliance with their permits may be subject to governmental enforcement actions. 33 U.S.C. § 1319. Regulators can enforce the CWA through a range of administrative remedies or by bringing civil or even criminal actions. 33 U.S.C. § 1319. But the CWA also provides for regulation through citizen suit, either against the violating permittee or against the agency charged with administering the Act. 33 U.S.C. § 1365(a). Civil penalties can reach $25,000 per violation per day. 33 U.S.C. § 1319(d).

The result of this regulatory scheme is that the usual NPDES permit strictly limits the quantities of pollutants dischargeable into regulated waters. When specific waters are found to be out of compliance with applicable standards, NPDES permits that allow polluted discharges into those waterways ratchet up their requirements, potentially prohibiting discharge of certain pollutants in any quantity. The sticky wicket for MS4s is that, unlike most permittees—e.g., a chemical plant or agricultural facility—they do not generate the pollutants they discharge, and the goal of eliminating the pollutants from

hundreds and thousands of point sources is a task that can only be remedied over time.

2. Applicability of Federal Standards to MS4s

Because of MS4s' complexity, competing purposes, and the separation between them and the source of the pollutants they carry, treatment of stormwater discharges was the subject of significant debate in the CWA's early years. Defs. of Wildlife, 191 F.3d at 1163. EPA initially exempted stormwater discharges from the CWA's requirements. Def. of Wildlife, 191 F.3d at 1163; see 40 C.F.R. § 125.4 (1975). But after the Court of Appeals for the District of Columbia invalidated this exemption, EPA issued regulations governing stormwater discharges and, in 1987, Congress passed the Water Quality Act,[11] amending the CWA. Defs. of Wildlife, 191 F.3d at 1163.

Under the Water Quality Act amendments, municipal stormwater discharge permits are subject to the particular provisions of 33 U.S.C. § 1342(p). Defs. of Wildlife, 191 F.3d at 1163-64. The amendment created a new standard, the "maximum extent practicable" (MEP) standard. 33 U.S.C. § 1342(p)(3)(B)(iii). Under it, NPDES permits for MS4s "require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate." 33 U.S.C. § 1342(p)(3)(B)(iii). Notably, the Water Quality Act amendments to the CWA do

[11] Water Quality Act of 1987, Pub. L. No. 100–4, 101 Stat. 7 (1987) (codified as amended in scattered sections of 33 U.S.C.).

not themselves impose the strict compliance with state and federal water quality standards imposed on NPDES permittees under 33 U.S.C. § 1311(b)(1)(C) and 33 U.S.C. § 1313(d) (TMDLs addressing 303(d) waters).

Following the Water Quality Act amendments, the question became whether municipal stormwater permittees were subject to both § 1311 (the original CWA requirements) *and* § 1342 (the Water Quality Act amendments), or only the latter. If only the latter, then the many "more stringent" water quality standards set through code and statute, and discussed above, would no longer apply to MS4s under the CWA.

In Defs. of Wildlife, the Ninth Circuit held that only the Water Quality Act amendments applied. 191 F.3d at 1164. After Defs. of Wildlife, NPDES permits issued to municipal stormwater permittees require different, lesser standards than typical NPDES permits. 191 F.3d at 1165. Defs. of Wildlife relieves municipal stormwater permittees of the burden of strict compliance with the "more stringent" water quality standards, treatment methods, and compliance schedules otherwise mandated by the CWA. Compare 33 U.S.C. § 1342(p)(3)(B)(i)-(iii) (governing municipal stormwaters) with 33 U.S.C. § 1311(b)(1)(A)-(C) (normal permitting rules).

3. State Water Quality Standards

Washington developed its own water quality standards, separate from and predating those of the CWA, through the Water Pollution Control Act of 1945 (WPCA), Chapter 90.48 RCW. LAWS OF 1945, Ch. 216; RCW 90.48.010. While the CWA sets a floor for the regulation of water quality, it explicitly allows states

to impose more exacting standards. 33 U.S.C. § 1370. State and federal regulations therefore both apply to Washington waters.

The WPCA declares Washington's intent "to maintain the highest possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of wild life, birds, game, fish and other aquatic life, and the industrial development of the state." RCW 90.48.010. In service of these ends, it makes it "unlawful for any person to . . . discharge into any waters of this state . . . any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of the department." RCW 90.48.080. Like the CWA, the WPCA creates a permitting process that Ecology administers, prohibiting unpermitted discharge of "waste" into state waters. RCW 90.48.020 (administration); RCW 90.48.160 (permits).

As part of any permit issuance or reissuance, Ecology must "incorporate permit conditions which require use of all known, available, and reasonable [technologies and] methods to control toxicants." RCW 90.48.520. This requirement is known as the AKART standard.[12] Using rulemaking authority granted to it by the WPCA, Ecology has promulgated regulations expanding on

[12] The statute requires "waste disposal permit[s]" for persons conducting "commercial or industrial operation[s]." RCW 90.48.160. No party challenges that AKART standards apply to MS4s under Washington law or that references to "wastewater" throughout Chapter 90.48 RCW include stormwater, though this has been a point of contention in the past. Puget Soundkeeper All., No. 07-021 (Aug. 7, 2008) (Findings of Fact, Conclusions of Law, and Order: Condition S4) [https://perma.cc/2ZNG-E2FJ] (concluding stormwater is wastewater under the WPCA).

the WPCA's statutory scheme. See RCW 90.48.035 (rulemaking authority). Many of these regulations will be discussed in more detail below.

The WPCA's enforcement mechanisms differ from those of the CWA. Any permittee in compliance with the terms and conditions of the permits is exempted from civil and criminal penalties that would otherwise flow from discharges that violate water quality standards. WAC 173-201A-510(1)(a). Unlike the CWA, the WPCA does not appear to allow for enforcement other than by Ecology. See RCW 90.48.420 ("The department of ecology . . . shall be solely responsible for establishing water quality standards for waters of the state."). Ecology must, however, modify permits "when it is determined that the discharge causes or contributes to a violation of water quality standards." WAC 173-201A-510(1)(a). And where a permittee fails or refuse to comply with permit requirements, Ecology may revoke the permit for that permittee or take direct enforcement action. WAC 173-226-180(5); RCW 90.48.037 (allowing Ecology to enforce through legal suit). In this way, Washington law and regulations confer considerable discretionary authority to Ecology in determining how to structure and implement Washington's clean water policies.

Standard of Review

Our analysis of the issues in this case is heavily informed by the applicable standard of review. Ecology and the intervenor-respondents contend that Ecology's decisions concerning the permits' structure and content should be reviewed through the deferential "arbitrary and capricious standard." The tenor of Soundkeeper's arguments assumes de novo review.

The Washington Administrative Procedure Act (APA), chapter 34.05 RCW, governs state court review of administrative agency actions. RCW 34.05.510. It also guides review of decisions made by the Pollution Control Hearings Board. Port of Seattle v. Pollution Control Hr'gs Bd., 151 Wn.2d 568, 587, 90 P.3d 659 (2004).

Under the APA, we may grant relief where the reviewed agency erroneously interpreted or applied the law. RCW 34.05.570(1)(c); RCW 34.05.570(3)(d); Port of Seattle, 151 Wn.2d at 587. We interpret the meanings of statutes de novo. Port of Seattle, 151 Wn.2d at 587. But where a statute is ambiguous and it falls under the agency's expertise—here, either Ecology's or the Board's—we treat the agency's interpretation of the statute with deference so long as it does not conflict with the statute. Port of Seattle, 151 Wn.2d at 587. We accord Ecology's interpretations of the federal CWA and related regulations "great weight" because it is entrusted with the Act's administration. Port of Seattle, 151 Wn.2d at 594 (addressing statute), 599-600 (addressing regulation). Where Ecology and the Board agree "we are loath to override the judgment of both agencies, whose combined expertise merits substantial deference." Port of Seattle, 151 Wn.2d at 600. We may also grant relief if an agency's determination is "arbitrary or capricious." RCW 34.05.570(1)(c); RCW 34.05.570(3)(i).

The party challenging an administrative decision bears the burden of demonstrating its invalidity. RCW 34.05.570(1)(a). If the reviewing court is concerned with an administrative decision made on summary judgment, as is the case here, "the reviewing court must overlay the [Administrative Procedure Act]

standard of review with the summary judgment standard." Verizon Nw., Inc. v. Emp't Sec. Dep't, 164 Wn.2d 909, 916, 194 P.3d 255 (2008). Summary judgment is appropriate where undisputed facts viewed in the light most favorable to the nonmoving party entitle the moving party to judgment as a matter of law. Verizon Nw., Inc., 164 Wn.2d at 916. Review is limited to the record before the agency; here, the Board. RCW 34.05.558.

These standards mean that the most important step in our review of an agency action is determining whether the agency exercised a degree of discretion in the interpretation or implementation of a relevant law or regulation. Where it did, its decision stands unless the interpretation conflicts with a statute's meaning or the implementation was arbitrary and capricious.

ANALYSIS

Soundkeeper assigns error to the Board's conclusion "that Section S4 of the [permits] met the requirements of state and federal law." It contends that "the Permits have not been stringent enough to meet the basic requirements of either the Clean Water Act or Washington law with stormwater problems worsening and with stormwater continuing to cause and contribute to violations of water quality standards."

Soundkeeper identifies five corresponding legal issues. Two are clearly stated: "Whether 40 C.F.R. § 122.44[13] applies to the Permits" and whether

[13] 40 C.F.R. § 122.44 is the federal regulation governing the what standards are imposed in NPDES permits.

Ecology "violated its obligations to review and assess Section S4 . . . when it reissued the Permits to ensure [S4 meets the applicable legal standards]."

The remaining three issues, however, are less straightforward. They question:

(1) whether Section S4 "fails to ensure that the discharges authorized by the Permits will not cause, have the reasonable potential to cause, or contribute to a violation of a water quality standard,"

(2) whether Section S4 fails to comply with requirements to apply AKART and MEP standards, and

(3) whether Section S4 fails to ensure compliance with limits more stringent than AKART "or water quality based effluent limits as necessary to meet Washington water quality standards or total maximum daily load cleanup plans."

These issue statements focus on the applicability of standards and laws to Section S4 alone, rather than the permits as a whole. Soundkeeper's framing is notable because, at least facially, the permits appear to explicitly incorporate *all* of the standards Soundkeeper contends they fail to ensure. The specifics of their argument are somewhat difficult to follow because the issues fail to cite to particular statutory or regulatory requirements, incorporate a standard of review, or reference the particular alleged facts leading to violations, and they fail to clarify whether the challenge is to the permits' drafting or enforcement.[14]

[14] Issue one, for instance, incorporates language found throughout 40 C.F.R. § 122.44(d)(1): "cause[], have reasonable potential to cause, or contribute[] to," without citing the regulation. See 40 C.F.R. § 122.44(d)(1)(i), (iii), (iv) and (vi). Issue three's mention of limits "more stringent" than AKART draws from similar language in 33 U.S.C. § 1311(b)(1)(A), but it does not clearly place in question that provision's applicability to MS4s. Issues one and three ask whether Section S4 fails to "ensure" discharges are not violative, while issue two asks whether the section fails to "comply" with AKART and MEP standards. Whether this difference in terminology is meaningful is uncertain.

Soundkeeper's briefing does not help to clarify its arguments. It often discusses the practical effects of the permits and Ecology's discretionary enforcement and drafting choices. But despite this, it acknowledges that it is not challenging Ecology's enforcement of the permits' provisions. Instead, it focuses on arguing that the permits' allowance of *any* discharge by MS4s into impaired waters[15] without the permittee being automatically out of compliance means that the permits are necessarily legally inadequate. In this context, it assails what it characterizes as Ecology's "truncated" use of Section S4, criticizing Ecology's decisions to trust to conditions already imposed under Section S5 to eventually cure water quality issues rather than imposing more restrictive conditions through an adaptive management plan. In short, though Soundkeeper's issue statements raise what are framed as pure questions of law, much of its argument focuses on matters that appear to be within Ecology's discretion.

On the whole, Soundkeeper appears to contend that the permits must both prohibit polluted discharges into impaired waters and hold in violation any permittees making such discharges. In light of this, we understand Soundkeeper to raise two issues, which encompass all of Soundkeeper's five issue statements:

> (1) Does state or federal law or regulation require Washington's stormwater permits to hold out of compliance any MS4 that discharges a pollutant into a water impaired by that pollutant?
>
> (2) If not, has Ecology arbitrarily and capriciously drafted the permits by excluding such a provision?

To answer these questions, we first address the statutory and regulatory provisions cited and discussed by Soundkeeper that might impose a bright-line

[15] I.e., those waters on the 303(d) list.

rule that stormwater permits must make any discharge into 303(d) waters a permit violation. We conclude that there is no such rule. We also conclude that Ecology did not act arbitrarily and capriciously by failing to include such a rule of its own volition.

Existence of a Bright-Line Rule

Soundkeeper relies on a number of federal and state statutes and regulations to support the notion that there is a bright-line rule forbidding allowance of any discharge into impaired water. Our review of those statutes and regulations indicates the opposite. Rather, the statutes and regulations each grant Ecology crucial discretion either not to require strict effluent limits, or to enforce limits in the manner it finds most reasonable. Because Ecology enjoys this discretion, its actions must be analyzed not de novo, as Soundkeeper argues, but through an arbitrary and capricious lens.

At the outset, it is worth mentioning that the permits, by their own terms, require compliance with a great number of standards. Subsection S4.A broadly prohibits the discharge of any pollutants into Washington waters that would violate "any" water quality standard. Subsection S4.B more specifically prohibits discharges that would violate portions of Washington code governing surface- and ground-water quality standards and sediment management, and federal code on human health-based criteria.[16] Subsection S4.C requires reduction of

[16] Groundwater quality standards are set by Chapter 173-200 WAC, surface water quality standards by Chapter 173-201A WAC, sediment standards by Chapter 173-204 WAC, and the federal human health-based criteria are found in 40 CFR 131.45.

pollutants per MEP. Subsection S4.D requires use of AKART. And Subsection S4.E requires compliance with all water quality requirements included in the permit itself. Separately, the permit imposes effluent limits in the form of TMDLs. What the permits do not do under Section S4 is make any discharge whose pollutant levels exceed these limits a per se permit violation.

1. 33 U.S.C. § 1311

Since language in Soundkeeper's third issue statement—specifically its mention of "more stringent" standards—echoes language in 33 U.S.C. § 1311, we first, briefly address whether that statute applies to MS4s. We conclude that it does not.

Whether MS4s are subject to 33 U.S.C. § 1311 was directly addressed by Defenders of Wildlife—a federal case that does not directly bind us. 191 F.3d at 1164. Two Washington cases have cited Defenders of Wildlife, but neither directly engaged with its holding because neither concerned a municipal stormwater permit. Puget Soundkeeper All., 189 Wn. App. at 137-38 (concerning BP refinery oil spill); Dairy Fed'n, 18 Wn. App. 2d at 288-89 (concerning state waste discharge general permit for concentrated animal feeding operations). It has not, therefore, yet been adopted by the Washington courts.

Defenders of Wildlife concluded that § 1311(b) does not bind MS4s. 191 F.3d at 1164-65. It looked at language in 33 U.S.C. § 1342 that required industrial actors to comply with § 1311, by incorporation requiring that industrial stormwater discharges apply with "any more stringent limitation[s]." Defs. of Wildlife, 191 F.3d at 1164-65 (citing 33 U.S.C § 1342(p)(3)(A)). It contrasted this

explicit imposition of § 1311's standards on industrial actors with Congress's silence concerning § 1311's application to *municipal* actors. Defs. of Wildlife, 191 F.3d at 1164-65 (citing 33 U.S.C § 1342(p)(3)(B)(iii)). Municipal actors such as MS4s are still regulated, but only by the MEP standard. 33 U.S.C § 1342(p)(3)(B)(iii). Reasoning that Congress would not have explicitly incorporated § 1311 against one actor and failed to do so against another, it therefore concluded that MS4s are not bound by § 1311. Defs. of Wildlife, 191 F.3d at 1164-5. It also reasoned that to hold otherwise would render § 1342 all but superfluous, since the "more stringent limitation[s]" of § 1311 would almost inevitably control over the MEP standard. Defs. of Wildlife, 191 F.3d at 1165-66.

In addition, Defenders of Wildlife addressed arguments by intervening stormwater permittees that EPA lacked the power to impose 33 U.S.C. § 1311's greater requirements on them. 191 F.3d at 1166-67. It concluded that the EPA has the power to impose requirements such as those in 33 U.S.C. § 1311 at its discretion. Defs. of Wildlife, 191 F.3d at 1166-67. This is because the Water Quality Act's amendments to the CWA require MEP standards *in addition* to " 'such other provisions as the Administrator . . . determines appropriate.' " Defs. of Wildlife, 191 F.3d at 1166-67 (alteration in original) (quoting 33 U.S.C. § 1342(p)(3)(B)(iii). But those standards are not required by 33 U.S.C. § 1311 itself.[17]

[17] Soundkeeper asserts that "State case law has further confirmed that NPDES permits such as the Permits here may be issued only when the discharge in question will comply with water quality standards." It cites to Port of Seattle, 151 Wn.2d at 603. That case, however, did not concern MS4 permits, but instead an NPDES permit awarded to the Port of Seattle for its activities

We follow Defenders of Wildlife with respect to both these holdings. Its analysis is thorough and convincing, and the Board has already relied on it, including when drafting the language of Section S4.F, which entitles Defenders of Wildlife's reasoning to deference. Puget Soundkeeper All., No. 07-021 [https://perma.cc/2ZNG-E2FJ]. 33 U.S.C. § 1311(b)(1)(C)'s applicability to MS4s was superseded by the passage of 33 U.S.C. § 1342(p)(3)(B), which directly addresses MS4s and creates the MEP standard.

2. 40 C.F.R. § 122.44(d)

We next consider the applicability of 40 C.F.R. § 122.44, the federal regulation governing the content of NPDES permits. 40 C.F.R. § 122.44(d) directs permitting agencies to include effluent limits in their NPDES permits under certain circumstances. Soundkeeper contends that this regulation applies to MS4s, asserting that "[t]here are no exceptions to the requirements of 40 C.F.R. § 122.44 . . . for stormwater." We disagree.

40 C.F.R. § 122.44 controls the requirements that permitting agencies must include in their NPDES permits. Paragraph (d) mandates that permits include "any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307,

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expanding an airport runway at SeaTac Airport. Port of Seattle, 151 Wn.2d at 579-80. Its references to requirements of federal law that, for instance, "state-issued NPDES permits [must] comply with 33 U.S.C. § 1311 . . . [which] requires effluent limitations" do not, as a result, apply to this review of stormwater permits. Port of Seattle, 151 Wn.2d at 603. Rather, it's holdings must be understood as discussing the requirements that apply to non-stormwater NPDES permits.

Soundkeeper's various citations to Dairy Fed'n, 18 Wn. App. 2d 259 are not persuasive for the same reason.

318, and 405 of the CWA necessary to . . . [a]chieve water quality standards established under section 303 of the CWA." 40 C.F.R. § 122.44(d)-(d)(1). Further subdivisions of sub-paragraph (d)(1) describe more specific triggers for when permits must impose numeric effluent limits, including "[w]hen the permitting authority determines . . . that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a State numeric criteria." 40 C.F.R. § 122.44(d)(1)(iii). Soundkeeper evokes this language throughout its briefing, even when not directly referencing § 122.44.

The plain language of 40 C.F.R. § 122.44(d) indicates that it does not apply to MS4s. This is because the language that prompts the paragraph's application to any given NPDES permit is the relevance of "any requirements in addition to or *more stringent* than" other guidelines. 40 C.F.R. § 122.44(d) (emphasis added). The italicized language is precisely the terminology used in 33 U.S.C. § 1311(b)(1)(C), the portion of the CWA that serves as the pathway to impose effluent limits. As decided by Defenders of Wildlife, though, this section's relevance to MS4s has been negated by the passage of 33 U.S.C. § 1342. We see no reason to treat 40 C.F.R. § 122.44(d)'s use of the same terminology differently. We instead read it as incorporating by reference the "more stringent" standards imposed by 33 U.S.C. § 1311, along with those standards' application only to non-MS4 NPDES permittees.

If there were any ambiguity, the history of EPA's NPDES regulatory scheme further supports this interpretation of 40 C.F.R. § 122.44(d). Much of the

regulation's language originates in rules first promulgated in 1980, before the passage of the 1987 Water Quality Act amendments to the CWA, which addressed the issue of applying strict effluent limits to MS4s. 45 Fed. Reg. 33,449 (May 19, 1980). The regulation's original language, in keeping with existing statute, simply mandated permits' inclusion of any requirements necessary to "achieve water quality standards established under section 303 of CWA." 45 Fed. Reg. 33,449.

After the Water Quality Act became law, EPA promulgated new rules. Most notably, in January 1989, it promulgated 40 C.F.R. § 122.26. 54 Fed. Reg. 255 (Jan. 4, 1989). Entitled "Storm water discharges," this regulation comprehensively lays out the permitting process for MS4s. 40 C.F.R. § 122.26. In June of the same year, EPA modified 40 C.F.R. § 122.44, adding seven new sub-paragraphs to 40 C.F.R. § 122.44, including paragraph (d), upon which Soundkeeper relies. 54 Fed. Reg. 23,872 (June 2, 1989). Unlike § 122.44, § 122.26 does not extensively describe the standards permits must incorporate. 40 C.F.R. § 122.26. Instead, it describes the permit application process, the parts of the application, and what sort of entity must receive stormwater permits. 40 C.F.R. § 122.26.

On this issue the Board concluded in prior proceedings in this case that 40 C.F.R. § 122.44(d) does not apply to municipal stormwater systems. In support, it cited to Defenders of Wildlife and asserted that the regulation "derives its authority from" 33 U.S.C. § 1311, not from the stormwater-specific 33 U.S.C. § 1342. Agreeing with Ecology and the intervenor-respondents, it ruled that 40

C.F.R. § 122.26 is instead the section of the C.F.R. that sets MS4 permit conditions.

Affording the Board and Ecology the deference they are due when interpreting the laws they administer, we mostly agree. But because portions of § 122.44 were promulgated after the passage of the Water Quality Act amendments, it is possible that their authority derives at least in part from 33 U.S.C. § 1342, contrary to the PCHB's conclusion. Relevantly, 40 C.F.R. § 122.44(k)(2) explicitly mentions stormwater discharges, meaning that we cannot read § 122.44 as a whole to exclude regulation of MS4s. More specifically, though, 40 C.F.R. § 122.44(k)(2) mentions stormwater discharges to specify that they may be regulated *through the use of best management practices*. This provision has a clear bearing on our analysis of § 122.44, and further supports reading paragraph (d) as not applying to MS4s. Because of this, to the degree that the Board was categorically denying that § 122.44 may be applied to MS4s and holding that only § 122.26 applies, we cannot agree.[18] But the Board is correct that § 122.44(d) does not demand the imposition of strict effluent limits on MS4s, nor that any discharge violating an effluent limit is a violation of the permits themselves.

We therefore conclude that as to 40 C.F.R. § 122.44's paragraph (d), the Board did not err.[19] Our conclusion is not unique. As recently stated by the

[18] Whether the Board adopted the narrower or broader of these holdings is not clear.

[19] We note that even if we were to conclude that 40 C.F.R. § 122.44(d) applied to MS4s, our analysis would not end. Instead of strict effluent limits,

Superior Court of New Jersey's Appellate Division, addressing § 122.44: "The overarching federal law for MS4s—33 U.S.C. § 1342(p)(3)(B)(iii)—is broad and flexible. It does not require [the permitting agency] to implement numeric effluent limitations; BMPs are appropriate." Delaware Riverkeeper Network v. New Jersey Dep't of Envtl. Prot., 463 N.J. Super. 96, 121, 229 A.3d 875 (App. Div. 2020). We agree.[20]

3. RCW 90.48.520

Soundkeeper cites to one Washington statute that might require MS4 permits to impose strict, numeric effluent limitations. Because, however, this legal theory was not clearly raised in front of the Board and has not been comprehensively briefed on appeal, we decline to consider it.

RAP 2.5(a) allows us to "refuse to review any claim of error which was not raised in the trial court." It includes several exceptions to this principle, none of

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another portion of the regulation, sub-section (k), allows permits to require only best management practices where "numeric effluent limitations are infeasible." 40 C.F.R. § 122.44(k)(3). Paragraph (k) is, as mentioned, the only part of the regulation that mentions stormwater management. This sub-paragraph's existence carves out substantial space for agency discretion to be exercised, a space seemingly tailor-made to function as a pressure relief valve for MS4s.

[20] In passing, Soundkeeper cites to 40 C.F.R. § 131.12(a) when asserting that "Ecology must . . . require additional pollutant controls where necessary to achieve water quality standards because the agency must ensure that pollutants in stormwater do not cause or contribute to a violation of water quality standards and do not degrade waters." It does not quote the provision, which is one of four citations made.

40 C.F.R § 131.12 requires states to develop "antidegradation" policies. Paragraph (a), cited by Soundkeeper, has four sub-parts. 40 C.F.R § 131.12(a)(1)-(4). Soundkeeper does not specify in what manner it relies on this provision, and we therefore do not address it. See Palmer v. Jensen, 81 Wn. App. 148, 153, 913 P.2d 413 (1996) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.").

which is relevant here. RAP 2.5(a). Though our ability to review issues not raised below is permissive, we seldom exercise our discretion to reach an issue that has not first received treatment by the trial court. State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). This practice encourages efficient use of judicial resources, affords the trial court the opportunity to correct any errors, guarantees that counsel and parties are not blindsided by theories raised well into a case, and ensures that we remain a court of review, rather than addressing arguments in the first instance. See State v. Robinson, 171 Wn.2d 292, 304-05, 253 P.3d 84 (2011) (discussing issue preservation rule).

Here, insufficient argument was made below and on appeal to justify our review of RCW 90.48.520's relevance in the present case. A portion of the WPCA, RCW 90.48.520, reads:

> In order to improve water quality by controlling toxicants in wastewater, the department of ecology shall in issuing and renewing state and federal wastewater discharge permits review the applicant's operations and incorporate permit conditions which require [AKART] to control toxicants in the applicant's wastewater. Such conditions *may* include, but are not limited to [effluent limits and TMDLs]. . . . *In no event shall the discharge of toxicants be allowed that would violate any water quality standard*, including toxicant standards, sediment criteria, and dilution zone criteria.

(emphases added). Soundkeeper implicitly relies on this last sentence to assert that the permits must prohibit allowance of *any* discharge that would violate a water quality standard. But it relies on it only obliquely, not quoting or discussing the relevant language, asserting: "Washington law provides that in no event shall the discharge of toxicants be allowed to violate Washington water quality

standards, RCW 90.48.520, a prohibition that is repeated in Section S4.A of the Permits."

Meanwhile, this statute received almost no treatment in front of the Board. The Board did not consider RCW 90.48.520 beyond citing to it as the source of the AKART standard. And the closest Soundkeeper came to relying on it as an authority that binds Ecology's enforcement discretion is in a broad, and broadly supported, introductory sentence:

> Neither Ecology nor Intervenors dispute that applicable permitting law dictates that National Pollutant Discharge Permits ("NPDES") must include controls necessary to ensure that the discharges authorized by those permits, here stormwater discharges by cities and counties, do not cause or contribute to an exceedance of water quality standards and that state law requires that stormwater permits apply "all known and reasonable technology" to control and reduce pollutants in stormwater. RCW 90.48.010; WAC 173-201A-510(1) and 173-226-070; 40 C.F.R. *§* 122.44(d); *see also* RCW 90.48.520, and WAC 173-216-020 and 110(1)(a).

Soundkeeper's scattershot citation does not suffice to preserve an issue. Because RCW 90.48.520's impact on Ecology's discretion was not preserved, we decline to address it.[21]

[21] Though we decline to review this issue, we do not read RCW 90.48.520 as Soundkeeper does. Instead, we would read "allowed" to reflect only the legislature's intent to impose adherence to water quality criteria on MS4s. We would not read it as speaking to Ecology's discretion in matters of enforcement. This better matches the WPCA's grants of significant authority to Ecology. To adopt Soundkeeper's reasoning would result in MS4s, by their very nature, being almost per se out of compliance with Washington law.

4. Washington Administrative Code

Soundkeeper refers to WAC 173-201A-510(1), (3), and (4) and WAC 173-226-070, but none of these administrative code provisions supports its arguments. We address each in turn.

WAC 173-201A-510(1) directs that "[w]aste discharge permits, whether issued pursuant to [NPDES] or otherwise, must be conditioned so the discharges authorized will meet water quality standards."[22] But this requirement is not absolute: "No waste discharge permit can be issued that causes or contributes to a violation of water quality criteria, *except as provided for in this chapter*." WAC 173-201A-510(1) (emphasis added).

WAC 173-201A-510(3) addresses "[n]onpoint source and stormwater pollution." Sub-paragraphs (a) and (c) are directed at non-point sources pollution, and therefore do not apply to MS4s, which are point source polluters. Snohomish County v. Pollution Control Hr'gs Bd., 187 Wn.2d 346, 351-52, 386 P.3d 1064 (2016). Another, relevant part of the paragraph directs that "[b]est management practices shall be applied so that when all appropriate combinations of individual best management practices are utilized, violation of water quality criteria shall be prevented." WAC 173-201A-510(3)(b). Taken alone, this might support Soundkeeper's arguments. But the same sub-part goes on to say that "[i]f a discharger is applying all best management practices

[22] While these regulations do not say exactly what criteria or water quality standards apply, they exist in the same chapter as the designations and numeric criteria developed under the CWA. See, e.g. WAC 173-201A-600 (for fresh waters) and WAC 173-201A-610 (for marine waters).

appropriate or required by the department and a violation of water quality criteria occurs, the discharger shall modify existing practices or apply further water pollution control measures, *selected or approved by the department*." WAC 173-201A-510(3)(b) (emphasis added). In this way, as previously held by the Board, it explicitly grants Ecology the discretion to decide how it will enforce its permits where a violation has occurred; Section S4.F, the compliance pathway, mirrors this enforcement model.

WAC 173-201A-510(4) likewise does not require strict effluent limits. The closest it comes is sub-paragraph (c), which says that "[f]or the period of time during which compliance with water quality standards is deferred, interim effluent limits shall be formally established." WAC 173-201A-510(4)(c). But these limits, the sub-paragraph quickly clarifies, are left to "the best professional judgment of the department" and "may be numeric or nonnumeric." WAC 173-201A-510(4)(c).

The next regulation cited by Soundkeeper, WAC 173-226-070, concerns general permit effluent limitations. Its first sub-paragraph, (a), allows that limitations "may" be imposed to ensure compliance with AKART. WAC 173-226-070(1). And it directs that they "shall" be incorporated into a general permit "if such limitations are necessary" to comply with water quality standards. WAC 173-226-070(2)(a). But it leaves Ecology the discretion to determine *when* such measures are necessary. WAC 173-226-070(2)(a)(i).

The same paragraph's second sub-part, though, says that

> Water quality-based effluent limitations must control all pollutants or pollutant parameters which the department determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion of state ground or surface water quality standards.

WAC 173-226-070(2)(b). The language "will cause, have the reasonable potential to cause, or contribute to" a violation of water quality standards matches the language found in 40 C.F.R. § 122.44(d)(1)(i). But even if this provision, read alone, might create a strict requirement that Ecology must impose strong effluent limits, WAC 173-226-180(1)(c) grants Ecology considerable discretion in determining schedules and methods of enforcement. It allows Ecology to create permit conditions as applicable to achieve water quality standards "[b]y any . . . method deemed appropriate by the department." WAC 173-226-180(1)(c). This catchall provision therefore serves to ensure that Ecology has discretion in the manner of its enforcement.

Whether the Permits Are Arbitrary and Capricious

Lastly, we address Soundkeeper's arguments that Ecology acted arbitrarily and capriciously when it exercised its discretion in drafting the permits. First, we consider Soundkeeper's assertion that Ecology failed to review the permits for compliance with the various applicable standards, and specifically failed when it readapted section S4.F without amendment. Second, having determined that no statutory or regulatory provision creates a bright line rule requiring Ecology's MS4's permits to hold out of compliance any permittee that discharges pollutants in excess of effluent limits, we turn to whether the permits

were arbitrarily and capriciously drafted because they exclude such a requirement.

Arbitrary and capricious actions are " 'willful and unreasoning and taken without regard to the attending facts or circumstances.' " Port of Seattle, 151 Wn.2d at 589 (quoting Wash. Indep. Tel. Ass'n v. Wash. Utils. Transp. Comm'n, 149 Wn.2d 17, 26, 65 P.3d 319 (2003)). But "[w]here there is room for two opinions, and the agency acted honestly and upon due consideration, [the] court should not find that an action was arbitrary and capricious, even though [it] may have reached the opposite conclusion." Port of Seattle, 151 Wn.2d at 589.

A party challenging an agency action under this standard therefore bears a heavy burden of proof and persuasion. Soundkeeper has not met its burden.

1. Re-adoption of S4 Without Amendment

Soundkeeper contends Ecology failed to review or assess the permits' Sections S4 for compliance with AKART, MEP, C.F.R. § 122.44, or various portions of the WAC. It also contends that Ecology has admitted to not conducting this review. We disagree on both counts.

First, we disagree that Ecology has admitted that it failed to conduct a review. Soundkeeper's only supporting citation is an interrogatory answer asserting relitigation of Section S4 was estopped by the Board's 2008 decision. This does not constitute an admission of the sort Soundkeeper represents.

Moreover, Soundkeeper's assertion is contradicted by the record. Ecology "made the AKART and MEP findings as to the Permits as a whole," according to Jeff Killelea, who lead the reissuance. The record includes redlined

versions of the 2019 permits that track every change made from the last iteration; though the permits' general structure survives, few paragraphs remain untouched, and some portions are entirely new. For instance, Section S5 now includes the comprehensive stormwater management action planning requirement, a novel imposition on the permittees. Furthermore, Ecology solicited and responded to public comments during the permits' development. Section S4 survived relatively unscathed—though not totally without alteration—because Soundkeeper relied on the Board's previous approval of section S4, and was not "aware of any change in circumstance since [the Board's decision] that would warrant significantly altering" section S4.

Ecology's decisions while drafting the permits were therefore not willful and unreasoning, nor were they made without regard to the attending facts or circumstances. Instead, after careful consideration, Ecology focused on strengthening the Section S*5* conditions, the heart of the permits, and relied on Section S4 to serve its continuing purpose as a corrective tool.

2. Arbitrary and Capricious Drafting

Finally, we must decide whether the existence of more Washington waters on the 303(b) list and the permits' authorization of some levels of pollutant discharge into those waters without making that discharge a permit violation is arbitrary and capricious. We conclude that it is not.

The permits are the result of a multi-decade iterative process. They are hundreds of pages long, the result of detailed back and forth with the community through the comment process, and have been the subject of years of litigation,

much of it involving Soundkeeper itself. Ecology has devoted a great deal of attention to the question of how to permit MS4s, and is sensitive to the many practical limitations on their operators' abilities to address the pollutants they discharge. To bring Washington's waters in ever greater compliance with water quality standards, they have crafted an iterative permitting system that seeks to impose ever greater requirements on permittees. The permits are therefore an attempt to—albeit more slowly than Soundkeeper and many others may wish—make sustained progress in improving our state's water quality.

But a permit system that aims for incremental improvement is not willful and unreasoning and taken without regard to the attending facts or circumstances, especially when it comes to application of standards concerned with what is "reasonable" (AKART) and "practicable" (MEP). These words, after all, leave ample room for discretionary decision-making. Instead, this system of iterative permits is an attempt to take the many facts and circumstances that attend MS4s into account and craft a structure that accomplishes sustained progress in the face of great complexity.[23]

Nor has Soundkeeper demonstrated that Ecology's use or enforcement of the permits is arbitrary and capricious, or in some way reflects back on the permit conditions to render them impermissible. Soundkeeper relies heavily on the fact that Ecology has seldom used S4 to impose requirements above those already

[23] The parties debate whether, in analyzing the permits' compliance with applicable standards, we should look only at Section S4, or to the permits more broadly. It is a distinction without a difference. Section S4.F incorporates the whole of the permits by allowing Ecology to consider whether a site-specific violation will be remediated through the application of any existing measures.

imposed by S5. Characterizing this as a lackadaisical approach and contrasting it with the increasing presence of certain streams on the 303(d) list, it contends that Ecology's failure to take advantage of S4 to impose stricter requirements is an indication of S4's insufficiency. But Soundkeeper admits that it is not, procedurally, challenging whether specific enforcement actions are arbitrary or capricious. if it were, without thorough review of the reasons for Ecology's reluctance to take advantage of Section S4 to impose stricter requirements, we could not conclude that Section S4's enforcement is somehow infirm.

We affirm.

Smith, C.J.

WE CONCUR:

Hazelrigg, ACJ

Mann, J.

APPENDIX B

RCW 90.48.010 Policy enunciated. It is declared to be the public policy of the state of Washington to maintain the highest possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of wild life, birds, game, fish and other aquatic life, and the industrial development of the state, and to that end require the use of all known available and reasonable methods by industries and others to prevent and control the pollution of the waters of the state of Washington. Consistent with this policy, the state of Washington will exercise its powers, as fully and as effectively as possible, to retain and secure high quality for all waters of the state. The state of Washington in recognition of the federal government's interest in the quality of the navigable waters of the United States, of which certain portions thereof are within the jurisdictional limits of this state, proclaims a public policy of working cooperatively with the federal government in a joint effort to extinguish the sources of water quality degradation, while at the same time preserving and vigorously exercising state powers to insure that present and future standards of water quality within the state shall be determined by the citizenry, through and by the efforts of state government, of the state of Washington. [1973 c 155 § 1; 1945 c 216 § 1; Rem. Supp. 1945 § 10964a.]

RCW 90.48.080 Discharge of polluting matter in waters prohibited. It shall be unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of the department, as provided for in this chapter. [1987 c 109 § 126; 1967 c 13 § 8; 1945 c 216 § 14; Rem. Supp. 1945 § 10964n.]

Purpose—Short title—Construction—Rules—Severability—Captions—1987 c 109: See notes following RCW 43.21B.001.

RCW 90.48.260 Federal clean water act—Department designated as state agency, authority—Delegation of authority—Powers, duties, and functions. (1) The department of ecology is hereby designated as the state water pollution control agency for all purposes of the federal clean water act as it exists on February 4, 1987, and is hereby authorized to participate fully in the programs of the act as well as to take all action necessary to secure to the state the benefits and to meet the requirements of that act. With regard to the national estuary program established by section 320 of that act, the department shall exercise its responsibility jointly with the Puget Sound partnership, created in RCW 90.71.210. The department of ecology may delegate its authority under this chapter, including its national pollutant discharge elimination permit system authority and duties regarding animal feeding operations and concentrated animal feeding operations, to the department of agriculture through a memorandum of understanding. Until any such delegation receives federal approval, the department of agriculture's adoption or issuance of animal feeding operation and concentrated animal feeding operation rules, permits, programs, and directives pertaining to water quality shall be accomplished after reaching agreement with the director of the department of ecology. Adoption or issuance and implementation shall be accomplished so that compliance with such animal feeding operation and concentrated animal feeding operation rules, permits, programs, and directives will achieve compliance with all federal and state water pollution control laws. The powers granted herein include, among others, and notwithstanding any other provisions of this chapter or otherwise, the following:

(a) Complete authority to establish and administer a comprehensive state point source waste discharge or pollution discharge elimination permit program which will enable the department to qualify for full participation in any national waste discharge or pollution discharge elimination permit system and will allow the department to be the sole agency issuing permits required by such national system operating in the state of Washington subject to the provisions of RCW 90.48.262(2). Program elements authorized herein may include, but are not limited to: (i) Effluent treatment and limitation requirements together with timing requirements related thereto; (ii) applicable receiving water quality standards requirements; (iii) requirements of standards of performance for new sources; (iv) pretreatment requirements; (v) termination and modification of permits for cause; (vi) requirements for public notices and opportunities for public hearings; (vii) appropriate relationships with the secretary of the army in the administration of his or her responsibilities which relate to anchorage and navigation, with the administrator of the environmental protection agency in the performance of his or her duties, and with other governmental officials under the federal clean water act; (viii) requirements for inspection, monitoring, entry, and reporting; (ix) enforcement of the program through penalties, emergency powers, and criminal sanctions; (x) a continuing planning process; and (xi) user charges.

(b) The power to establish and administer state programs in a manner which will ensure the procurement of moneys, whether in the form of grants, loans, or otherwise; to assist in the construction, operation, and maintenance of various water pollution control facilities and works; and the administering of various state water pollution control management, regulatory, and enforcement programs.

(c) The power to develop and implement appropriate programs pertaining to continuing planning processes, area-wide waste treatment management plans, and basin planning.

(2) The governor shall have authority to perform those actions required of him or her by the federal clean water act.

(3) By July 31, 2012, the department shall:

(a) Reissue without modification and for a term of one year any national pollutant discharge elimination system municipal stormwater general permit applicable to western Washington municipalities first issued on January 17, 2007; and

(b) Issue an updated national pollutant discharge elimination system municipal stormwater general permit applicable to western Washington municipalities for any permit first issued on January 17, 2007. An updated permit issued under this subsection shall become effective beginning August 1, 2013.

(i) Provisions of the updated permit issued under (b) of this subsection relating to new requirements for low-impact development and review and revision of local development codes, rules, standards, or other enforceable documents to incorporate low-impact development principles must be implemented simultaneously. These requirements may go into effect no earlier than December 31, 2016, or the time of the scheduled update under *RCW 36.70A.130(5), as existing on July 10, 2012, whichever is later.

(ii) Provisions of the updated permit issued under (b) of this subsection related to increased catch basin inspection and illicit discharge detection frequencies and application of new stormwater controls to projects smaller than one acre may go into effect no earlier than December 31, 2016, or the time of the scheduled update under *RCW 36.70A.130(5), as existing on July 10, 2012, whichever is later.

(4) By July 31, 2012, the department shall:

(a) Reissue without modification and for a term of two years any national pollutant discharge elimination system municipal stormwater general permit applicable to eastern Washington municipalities first issued on January 17, 2007; and

(b) Issue an updated national pollutant discharge elimination system municipal stormwater general permit for any permit first issued on January 17, 2007, applicable to eastern Washington municipalities. An updated permit issued under this subsection becomes effective August 1, 2014. [2012 1st sp.s. c 1 § 313; 2011 c 353 § 12; 2007 c 341 § 55; 2003 c 325 § 7; 1988 c 220 § 1; 1983 c 270 § 1; 1979 ex.s. c 267 § 1; 1973 c 155 § 4; 1967 c 13 § 24.]

***Reviser's note:** RCW 36.70A.130 was amended by 2020 c 113 § 1, changing subsection (5) to subsection (4).

Finding—Intent—Limitation—Jurisdiction/authority of Indian tribe under act—2012 1st sp.s. c 1: See notes following RCW 77.55.011.

Authority of department of fish and wildlife under act—2012 1st sp.s. c 1: See note following RCW 76.09.040.

Intent—2011 c 353: See note following RCW 36.70A.130.

Effective date—2007 c 341: See RCW 90.71.907.

Intent—Finding—2003 c 325: See note following RCW 90.64.030.

Severability—1983 c 270: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1983 c 270 § 5.]

RCW 90.48.520 Review of operations before issuance or renewal of wastewater discharge permits—Incorporation of permit conditions. In order to improve water quality by controlling toxicants in wastewater, the department of ecology shall in issuing and renewing state and federal wastewater discharge permits review the applicant's operations and incorporate permit conditions which require all known, available, and reasonable methods to control toxicants in the applicant's wastewater. Such conditions may include, but are not limited to: (1) Limits on the discharge of specific chemicals, and (2) limits on the overall toxicity of the effluent. The toxicity of the effluent shall be determined by techniques such as chronic or acute bioassays. Such conditions shall be required regardless of the quality of receiving water and regardless of the minimum water quality standards. In no event shall the discharge of toxicants be allowed that would violate any water quality standard, including toxicant standards, sediment criteria, and dilution zone criteria. [1987 c 500 § 1.]

RCW 90.54.020 General declaration of fundamentals for utilization and management of waters of the state. Utilization and management of the waters of the state shall be guided by the following general declaration of fundamentals:

(1) Uses of water for domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, and thermal power production purposes, and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state, are declared to be beneficial.

(2) Allocation of waters among potential uses and users shall be based generally on the securing of the maximum net benefits for the people of the state. Maximum net benefits shall constitute total benefits less costs including opportunities lost.

(3) The quality of the natural environment shall be protected and, where possible, enhanced as follows:

(a) Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.

(b) Waters of the state shall be of high quality. Regardless of the quality of the waters of the state, all wastes and other materials and substances proposed for entry into said waters shall be provided with all known, available, and reasonable methods of treatment prior to entry. Notwithstanding that standards of quality established for the waters of the state would not be violated, wastes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except in those situations where it is clear that overriding considerations of the public interest will be served. Technology-based effluent limitations or standards for discharges for municipal water treatment plants located on the Chehalis, Columbia, Cowlitz, Lewis, or Skagit river shall be adjusted to reflect credit for substances removed from the plant intake water if:

(i) The municipality demonstrates that the intake water is drawn from the same body of water into which the discharge is made; and

(ii) The municipality demonstrates that no violation of receiving water quality standards or appreciable environmental degradation will result.

(4) The development of multipurpose water storage facilities shall be a high priority for programs of water allocation, planning, management, and efficiency. The department, other state agencies, local governments, and planning units formed under *section 107 or 108 of this act shall evaluate the potential for the development of new storage projects and the benefits and effects of storage in reducing damage to stream banks and property, increasing the use of land, providing water for municipal, industrial, agricultural, power generation, and other beneficial uses, and improving streamflow regimes for fisheries and other instream uses.

(5) Adequate and safe supplies of water shall be preserved and protected in potable condition to satisfy human domestic needs.

(6) Multiple-purpose impoundment structures are to be preferred over single-purpose structures. Due regard shall be given to means and methods for protection of fishery resources in the planning for and construction of water impoundment structures and other artificial obstructions.

(7) Federal, state, and local governments, individuals, corporations, groups and other entities shall be encouraged to carry out practices of conservation as they relate to the use of the waters of the state. In addition to traditional development approaches, improved water use efficiency, conservation, and use of reclaimed water shall be emphasized in the management of the state's water resources and in some cases will be a potential new source of water with which to meet future needs throughout the state. Use of reclaimed water shall be encouraged through state and local planning and programs with incentives for state financial assistance recognizing programs and plans that encourage the use of conservation and reclaimed water use, and state agencies shall continue to review and reduce regulatory barriers and streamline permitting for the use of reclaimed water where appropriate.

(8) Development of water supply systems, whether publicly or privately owned, which provide water to the public generally in regional areas within the state shall be encouraged. Development of water supply systems for multiple domestic use which will not serve the public generally shall be discouraged where water supplies are available from water systems serving the public.

(9) Full recognition shall be given in the administration of water allocation and use programs to the natural interrelationships of surface and groundwaters.

(10) Expressions of the public interest will be sought at all stages of water planning and allocation discussions.

(11) Water management programs, including but not limited to, water quality, flood control, drainage, erosion control and storm runoff are deemed to be in the public interest. [2007 c 445 § 8; 1997 c 442 § 201; 1989 c 348 § 1; 1987 c 399 § 2; 1971 ex.s. c 225 § 2.]

***Reviser's note:** Sections 107 and 108 of this act were vetoed by the governor.

Findings—Intent—2007 c 445: See note following RCW 90.46.005.

Severability—1989 c 348: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1989 c 348 § 13.]

Rights not impaired—1989 c 348: See RCW 90.54.920.

WAC 173-201A-510 Means of implementation. (1) **Permitting.** The primary means to be used for controlling municipal, commercial, and industrial waste discharges shall be through the issuance of waste discharge permits, as provided for in RCW 90.48.160, 90.48.162, and 90.48.260. Waste discharge permits, whether issued pursuant to the National Pollutant Discharge Elimination System or otherwise, must be conditioned so the discharges authorized will meet the water quality standards. No waste discharge permit can be issued that causes or contributes to a violation of water quality criteria, except as provided for in this chapter.

(a) Persons discharging wastes in compliance with the terms and conditions of permits are not subject to civil and criminal penalties on the basis that the discharge violates water quality standards.

(b) Permits must be modified by the department when it is determined that the discharge causes or contributes to a violation of water quality standards. Major modification of permits is subject to review in the same manner as the originally issued permits.

(2) **Miscellaneous waste discharge or water quality effect sources.** The director shall, through the issuance of regulatory permits, directives, and orders, as are appropriate, control miscellaneous waste discharges and water quality effect sources not covered by subsection (1) of this section.

(3) **Nonpoint source and stormwater pollution.**

(a) Activities which generate nonpoint source pollution shall be conducted so as to comply with the water quality standards. The primary means to be used for requiring compliance with the standards shall be through best management practices required in waste discharge permits, rules, orders, and directives issued by the department for activities which generate nonpoint source pollution.

(b) Best management practices shall be applied so that when all appropriate combinations of individual best management practices are utilized, violation of water quality criteria shall be prevented. If a discharger is applying all best management practices appropriate or required by the department and a violation of water quality criteria occurs, the discharger shall modify existing practices or apply further water pollution control measures, selected or approved by the department, to achieve compliance with water quality criteria. Best management practices established in permits, orders, rules, or directives of the department shall be reviewed and modified, as appropriate, so as to achieve compliance with water quality criteria.

(c) Activities which contribute to nonpoint source pollution shall be conducted utilizing best management practices to prevent violation of water quality criteria. When applicable best management practices are not being implemented, the department may conclude individual activities are causing pollution in violation of RCW 90.48.080. In these situations, the department may pursue orders, directives, permits, or civil or criminal sanctions to gain compliance with the standards.

(d) Activities which cause pollution of stormwater shall be conducted so as to comply with the water quality standards. The primary means to be used for requiring compliance with the standards shall be through best management practices required in waste discharge permits, rules, orders, and directives issued by the department for activities which generate stormwater pollution. The consideration and control procedures in (b) and (c) of this subsection apply to the control of pollutants in stormwater.

(4) **General allowance for compliance schedules.**

(a) Permits and orders issued by the department for existing discharges may include a schedule for achieving compliance with effluent limits and water quality standards that apply to:

(i) Aquatic life uses; and

(ii) Uses other than aquatic life.

(b) Schedules of compliance shall be developed to ensure final compliance with all water quality-based effluent limits and the water quality standards as soon as possible. The department will decide whether to issue schedules of compliance on a case-by-case basis. Schedules of compliance may not be issued for new discharges. Examples of schedules of compliance that may be issued include:

(i) Construction of necessary treatment capability;

(ii) Implementation of necessary best management practices;

(iii) Implementation of additional stormwater best management practices for discharges determined not to meet water quality standards following implementation of an initial set of best management practices; and

(iv) Completion of necessary water quality studies related to implementation of permit requirements to meet effluent limits.

(c) For the period of time during which compliance with water quality standards is deferred, interim effluent limits shall be formally established, based on the best professional judgment of the department. Interim effluent limits may be numeric or nonnumeric (e.g., construction of necessary facilities by a specified date as contained in an order or permit), or both.

(d) Prior to establishing a schedule of compliance, the department shall require the discharger to evaluate the possibility of achieving water quality standards via nonconstruction changes (e.g., facility operation, pollution prevention). Schedules of compliance shall require compliance with the specified requirements as soon as possible. Compliance schedules shall generally not exceed the term of any permit unless the department determines that a longer time period is needed to come into compliance with the applicable water quality standards.

(e) When an approved total maximum daily load has established waste load allocations for permitted dischargers, the department may authorize a compliance schedule longer than ten years if:

(i) The permittee is not able to meet its waste load allocation in the TMDL solely by controlling and treating its own effluent;

(ii) The permittee has made significant progress to reduce pollutant loading during the term of the permit;

(iii) The permittee is meeting all of its requirements under the TMDL as soon as possible; and

(iv) Actions specified in the compliance schedule are sufficient to achieve water quality standards as soon as possible.

(5) **Compliance schedules for dams:**

(a) All dams in the state of Washington must comply with the provisions of this chapter.

(b) For dams that cause or contribute to a violation of the water quality standards, the dam owner must develop a water quality attainment plan that provides a detailed strategy for achieving compliance. The plan must include:

(i) A compliance schedule that does not exceed ten years;

(ii) Identification of all reasonable and feasible improvements that could be used to meet standards, or if meeting the standards is not attainable, then to achieve the highest attainable level of improvement;

(iii) Any department-approved gas abatement plan as described in WAC 173-201A-200 (1)(f)(ii);

(iv) Analytical methods that will be used to evaluate all reasonable and feasible improvements;

(v) Water quality monitoring, which will be used by the department to track the progress in achieving compliance with the state water quality standards; and

(vi) Benchmarks and reporting sufficient for the department to track the applicant's progress toward implementing the plan within the designated time period.

(c) The plan must ensure compliance with all applicable water quality criteria, as well as any other requirements established by the department (such as through a total maximum daily load, or TMDL, analysis).

(d) If the department is acting on an application for a water quality certification, the approved water quality attainment plan may be used by the department in its determination that there is reasonable assurance that the dam will not cause or contribute to a violation of the water quality standards.

(e) When evaluating compliance with the plan, the department will allow the use of models and engineering estimates to approximate design success in meeting the standards.

(f) If reasonable progress toward implementing the plan is not occurring in accordance with the designated time frame, the department may declare the project in violation of the water quality standards and any associated water quality certification.

(g) If an applicable water quality standard is not met by the end of the time provided in the attainment plan, or after completion of all reasonable and feasible improvements, the owner must take the following steps:

(i) Evaluate any new reasonable and feasible technologies that have been developed (such as new operational or structural modifications) to achieve compliance with the standards, and develop a new compliance schedule to evaluate and incorporate the new technology;

(ii) After this evaluation, if no new reasonable and feasible improvements have been identified, then propose an alternative to achieve compliance with the standards, such as site specific criteria (WAC 173-201A-430), a use attainability analysis (WAC 173-201A-440), or a water quality offset (WAC 173-201A-450).

(h) New dams, and any modifications to existing facilities that do not comply with a gas abatement or other pollution control plan established to meet criteria for the water body, must comply with the water quality standards at the time of project completion.

(i) Structural changes made as a part of a department approved gas abatement plan to aid fish passage, described in WAC 173-201A-200 (1)(f)(ii), may result in system performance limitations in meeting water quality criteria for that parameter at other times of the year.

(6) **Combined sewer overflow treatment plant.** The influent to these facilities is highly variable in frequency, volume, duration, and pollutant concentration. The primary means to be used for requiring compliance with the human health criteria shall be through the application of narrative limitations which include, but are not limited to, best management practices required in waste discharge permits, rules, orders and directives issued by the department.

[Statutory Authority: RCW 90.48.035, 90.48.605 and section 303(c) of the Federal Water Pollution Control Act (Clean Water Act), C.F.R. 40,

C.F.R. 131. WSR 16-16-095 (Order 12-03), § 173-201A-510, filed 8/1/16, effective 9/1/16. Statutory Authority: Chapters 90.48 and 90.54 RCW. WSR 03-14-129 (Order 02-14), amended and recodified as § 173-201A-510, filed 7/1/03, effective 8/1/03. Statutory Authority: Chapter 90.48 RCW and 40 C.F.R. 131. WSR 97-23-064 (Order 94-19), § 173-201A-160, filed 11/18/97, effective 12/19/97. Statutory Authority: Chapter 90.48 RCW. WSR 92-24-037 (Order 92-29), § 173-201A-160, filed 11/25/92, effective 12/26/92.]

WAC 173-216-110 Permit terms and conditions. (1) Any permit issued by the department shall specify conditions necessary to prevent and control waste discharges into the waters of the state, including the following, whenever applicable:

(a) All known, available, and reasonable methods of prevention, control, and treatment;

(b) Pretreatment requirements;

(c) Requirements pursuant to other laws, including the state's Hazardous Waste Disposal Act, chapter 70.105 RCW, the Solid waste management—Recovery and recycling, chapter 70.95 RCW, the Resource Conservation and Recovery Act of 1976, Public Law 95.190 or any other applicable local ordinances, state, or federal statute, to the extent that they pertain to the prevention or control of waste discharges into the waters of the state;

(d) Any conditions necessary to meet applicable water quality standards for surface waters or to preserve or protect beneficial uses for groundwaters;

(e) Requirements necessary to avoid conflict with a plan approved pursuant to section 208(b) of FWPCA;

(f) Any conditions necessary to prevent and control pollutant discharges from plant site runoff, spillage or leaks, sludge or waste disposal, or raw material storage;

(g) Any appropriate monitoring, reporting and record keeping requirements as specified by the department, including applicable requirements under sections 307 and 308 of FWPCA;

(h) Schedules of compliance, including those required under sections 301 and 307 of FWPCA, which shall set forth the shortest reasonable time period to achieve the specified requirements; and

(i) Prohibited discharge requirements as contained in WAC 173-216-060.

(2) The permits shall be for a fixed term, not exceeding five years.

(3) Representatives of the department shall have the right to enter at all reasonable times in or upon any property, public or private, for the purpose of inspecting and investigating conditions relating to the pollution or the possible pollution of any waters of the state. Reasonable times shall include normal business hours, hours during which production, treatment, or discharge occurs, or times when the department suspects a violation requiring immediate inspection. Representatives of the department shall be allowed to have access to, and copy at reasonable cost, any records required to be kept under terms and conditions of the permit, to inspect any monitoring equipment or method required in the permit and to sample the discharge, waste treatment processes, or internal waste streams.

(4) The permittee shall at all times be responsible for the proper operation and maintenance of any facilities or systems of control installed by the permittee to achieve compliance with the terms and conditions of the permit. Where design criteria have been established, the permittee shall not permit flows or waste loadings to exceed approved design criteria or approved revisions thereto.

(5) A new application, or supplement to the previous application, shall be submitted, along with required engineering plans and reports, whenever a new or increased discharge or change in the nature of the discharge is anticipated which is not specifically authorized by the current permit. Such application shall be submitted at least sixty days prior to any proposed changes.

(6) In the event the permittee is unable to comply with any of the permit terms and conditions due to any cause, the permittee shall:

(a) Immediately take action to stop, contain, and cleanup unauthorized discharges or otherwise stop the violation, and correct the problem;

(b) Immediately notify the department of the failure to comply; and

(c) Submit a detailed written report to the department within thirty days, unless requested earlier by the department, describing the nature of the violation, corrective action taken and/or planned, steps to be taken to prevent a recurrence, and any other pertinent information.

(7) In the case of discharge into a municipal sewerage system, the department shall consider in the final permit documents the requirements of the municipality operating the system.

(8) Permits for domestic wastewater facilities shall be issued only to a public entity, except in the following circumstances:

(a) Facilities existing or approved for construction with private operation on or before the effective date of this chapter, until such time as the facility is expanded;

(b) Facilities that serve a single nonresidential, industrial, or commercial establishment. Commercial/industrial complexes serving multiple owners or tenants and multiple residential dwelling facilities such as mobile home parks, apartments, and condominiums are not considered single commercial establishments for the purpose of the preceding sentence.

(c) Facilities that are owned by nonpublic entities and under contract to a public entity shall be issued a joint permit to both the owner and the public entity.

[Statutory Authority: Chapter 43.21A RCW. WSR 86-06-040 (Order 86-03), § 173-216-110, filed 3/4/86. Statutory Authority: Chapters 43.21A and 90.48 RCW. WSR 83-23-073 (Order DE 83-29), § 173-216-110, filed 11/18/83.]

WAC 173-220-020 Permit required. No pollutants shall be discharged to any surface water of the state from a point source, except as authorized by an individual permit issued pursuant to this chapter or as authorized by a general permit issued pursuant to chapter 173-226 WAC.

[Statutory Authority: Chapter 90.48 RCW. WSR 93-10-099 (Order 92-55), § 173-220-020, filed 5/5/93, effective 5/19/93. Statutory Authority: RCW 90.54.020 and chapter 90.48 RCW. WSR 88-22-059 (Order 88-9), § 173-220-020, filed 11/1/88. Statutory Authority: RCW 90.48.035 and 90.48.260. WSR 82-24-078 (Order DE 82-39), § 173-220-020, filed 12/1/82; Order DE 74-1, § 173-220-020, filed 2/15/74.]

WAC 173-220-030 Definitions. For purposes of this chapter, the following definitions shall be applicable:

(1) "Administrator" means the administrator of the United States Environmental Protection Agency.

(2) "Combined waste treatment facility" means any publicly owned waste treatment facility in which the maximum monthly average influent from any one industrial category, or categories producing similar wastes, constitutes over eighty-five percent of the design load for biochemical oxygen demand or suspended solids. Each single industrial category must contribute a minimum of ten percent of the applicable load.

(3) "Department" means department of ecology.

(4) "Director" means the director of the department of ecology or his/her authorized representative.

(5) "Discharge of pollutant" and the term "discharge of pollutants" each means (a) any addition of any pollutant or combination of pollutants to surface waters of the state from any point source, (b) any addition of any pollutant or combination of pollutants to the waters of the contiguous zone or the ocean from any point source, other than a vessel or other floating craft which is being used as a means of transportation.

(6) "Discharger" means owner or operator of any facility or activity subject to regulation under the NPDES program.

(7) "Domestic wastewater" means water carrying human wastes, including kitchen, bath, and laundry wastes from residences, buildings, industrial establishments or other places, together with such groundwater infiltration or surface waters as may be present.

(8) "Domestic wastewater facility" means all structures, equipment, or processes required to collect, carry away, treat, reclaim or dispose of domestic wastewater together with such industrial waste as may be present. This term applies only to facilities discharging to surface water.

(9) "Effluent limitation" means any restriction established by the state or administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into surface waters of the state.

(10) "FWPCA" means the Federal Water Pollution Control Act as amended, 33 U.S.C. 1251 et seq.

(11) "General permit" means a permit which covers multiple dischargers of a point source category within a designated geographical area, in lieu of individual permits being issued to each discharger.

(12) "Individual permit" means a permit for a single point source or a single facility.

(13) "Major discharger" means any discharger classified as such by the administrator in conjunction with the director and published in the annual state-EPA agreement.

(14) "Minor discharger" means any discharger not designated as major or covered under a general permit.

(15) "NPDES" means the National Pollutant Discharge Elimination System.

(16) "Permit" means an authorization, license, or equivalent control document issued by the director to implement this chapter.

(17) "Person" includes any political subdivision, local, state, or federal government agency, municipality, industry, public or private corporation, partnership, association, firm, individual, or any other entity whatsoever.

(18) "Point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture.

(19) "Pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water. This term does not include sewage from vessels within the meaning of section 312 of the FWPCA nor does it include dredged or fill material discharged in accordance with a permit issued under section 404 of the FWPCA.

(20) "Regional administrator" means the regional administrator of Region X of the Environmental Protection Agency (EPA) or his/her authorized representative.

(21) "Surface waters of the state" means all waters defined as "waters of the United States" in 40 C.F.R. 122.2 that are within the boundaries of the state of Washington. This includes lakes, rivers, ponds, streams, inland waters, wetlands, ocean, bays, estuaries, sounds, and inlets.

(22) "Water quality standards" means the state of Washington's water quality standards for surface waters of the state, which are codified in chapter 173-201 WAC.

[Statutory Authority: Chapter 90.48 RCW. WSR 93-10-099 (Order 92-55), § 173-220-030, filed 5/5/93, effective 5/19/93. Statutory Authority: RCW 90.54.020 and chapter 90.48 RCW. WSR 88-22-059 (Order 88-9), § 173-220-030, filed 11/1/88. Statutory Authority: Chapter 90.48 RCW. WSR 84-11-024 (Order DE 84-19), § 173-220-030, filed 5/11/84. Statutory Authority: RCW 90.48.035 and 90.48.260. WSR 82-24-078 (Order DE 82-39), § 173-220-030, filed 12/1/82; Order DE 74-1, § 173-220-030, filed 2/15/74.]

WAC 173-226-050 General permit coverage. (1) The director may issue general permits to satisfy any or all of the waste water discharge permit requirements of chapter 90.48 RCW and the FWPCA.

(2) The director may issue general permits to cover categories of dischargers for geographic areas as described under subsection (3) of this section. The area shall correspond to existing geographic or political boundaries, such as:

(a) Designated planning areas under section 208 or 303 of the FWPCA;

(b) Sewer districts or other special purpose districts;

(c) City, county, or state political boundaries;

(d) State or county highway systems;

(e) Standard metropolitan statistical areas as defined by the federal Office of Management and Budget;

(f) Urbanized areas as designated by the Bureau of the Census; or

(g) Any other appropriate division or combination of boundaries.

(3) General permits may be written to cover the following within a described area:

(a) Stormwater sources; or

(b) Categories of dischargers that meet all of the following requirements:

(i) Involve the same or substantially similar types of operations;

(ii) Discharge the same or substantially similar types of wastes;

(iii) Require the same or substantially similar effluent limitations or operating conditions, and require similar monitoring; and

(iv) In the opinion of the director are more appropriately controlled under a general permit than under individual permits.

(4) The following discharges are not subject to permits under this chapter:

(a) Discharges to municipal sewerage systems of domestic wastewater from residential, commercial, or industrial structures.

(b) Any industrial or commercial discharge to a municipal sewerage system for which authority to issue permits has been granted to the municipality under RCW 90.48.165.

(c) Any industrial or commercial discharge to a municipal sewerage system operating under, and in compliance with, the applicable requirements of a local pretreatment program approved under section 307 of FWPCA and WAC 173-216-150. In the event of noncompliance, this exemption no longer applies and the discharger is immediately subject to enforcement action under chapter 90.48 RCW for discharging without a waste discharge permit.

(d) Discharges to municipal sewerage systems of wastes from industrial or commercial sources whose wastewater is similar in character and strength to normal domestic wastewater: Provided, That such discharges do not have the potential to adversely affect performance of the system. Examples of this type of discharge sources may include hotels, restaurants, laundries, and food preparation establishments.

(e) Discharges of domestic wastewater from a septic tank with subsurface sewage treatment and disposal and an ultimate design capacity less than or equal to fourteen thousand five hundred gallons per day. These systems are governed by on-site sewage disposal systems, chapter 246-272 WAC which is administered by the Washington state department of health.

(f) Discharges of domestic wastewater from a mechanical treatment system or lagoon followed by subsurface disposal with an ultimate design capacity less than or equal to three thousand five hundred gal-

lons per day. These systems are governed by on-site sewage disposal systems, chapter 246-272 WAC which is administered by the Washington state department of health.

[Statutory Authority: Chapter 90.48 RCW. WSR 93-10-099 (Order 92-55), § 173-226-050, filed 5/5/93, effective 5/19/93.]

WAC 173-226-070 Permit effluent limitations. Any general permit issued by the department shall apply and insure compliance with all of the following, whenever applicable:

(1) Technology-based treatment requirements and standards reflecting all known, available, and reasonable methods of prevention, treatment, and control required under RCW 90.48.010, 90.48.520, 90.52.040, and 90.54.020 may be imposed through any or all of the following methods:

(a) Effluent limitations and standards promulgated pursuant to sections 301, 302, 306, and 307 of the FWPCA;

(b) Discharge standards contained in chapters 173-221 and 173-221A WAC;

(c) On a case-by-case basis under section 402 of the FWPCA; and/or

(d) Through the use of best management practices.

(2) Water quality-based effluent limitations.

(a) Water quality-based effluent limitations shall be incorporated into a general permit if such limitations are necessary to comply with chapter 173-200 and/or 173-201A WAC for the majority of the dischargers intended to be covered under the general permit and:

(i) The department determines that the use of a general permit rather than individual permits is appropriate; and

(ii) The conditions of coverage contained in WAC 173-226-050 are met.

(b) Water quality-based effluent limitations must control all pollutants or pollutant parameters which the department determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion of state ground or surface water quality standards.

(3) Any more stringent limitations or requirements, including those necessary to:

(a) Meet water quality standards, sediment quality standards, treatment standards, or schedules of compliance established pursuant to any state law or regulation under authority preserved to the state by section 510 of the FWPCA;

(b) Meet any federal law or regulation other than the FWPCA or regulations thereunder;

(c) Implement any legally applicable requirements necessary to implement total maximum daily loads established pursuant to section 303(d) and incorporated in the continuing planning process approved under section 303(e) of the FWPCA and any regulations and guidelines issued pursuant thereto;

(d) Prevent or control pollutant discharges from plant site runoff, spillage or leaks, sludge or waste disposal, or materials handling or storage;

(e) Meet the permit by rule provisions of the state dangerous waste regulation, WAC 173-303-802 (4) or (5);

(f) Comply with a plan approved pursuant to section 208(b) of the FWPCA; and/or

(g) Meet such conditions as the department determines are necessary to carry out the provisions of the FWPCA, prior to promulgation by the administrator of applicable effluent standards and limitations pursuant to sections 301, 302, 306, and 307 of the FWPCA.

(4) In addition to the other applicable requirement of this chapter, general permits authorizing the discharge into a municipal sewerage system shall satisfy the applicable pretreatment requirements of the FWPCA.

(5) Requirements pursuant to other laws, including the state's Hazardous Waste Management Act (chapter 70.105 RCW), the Solid Waste Management——Reduction and Recycling Act (chapter 70.95 RCW), the Resource Conservation and Recovery Act of 1976 (Public Law 95.190), or any other applicable local ordinances, state or federal statute, to the extent that they pertain to the prevention or control of waste discharges into the waters of the state;

(6) In the application of effluent standards and limitations, water and sediment quality standards and other legally applicable requirements pursuant to subsections (1) through (4) of this section, each general permit shall specify:

(a) For industrial wastewater facilities, average monthly and maximum daily quantitative mass and/or concentration limitations, or other such appropriate limitations for the level of pollutants and the authorized discharge;

(b) For domestic wastewater facilities, average weekly and monthly quantitative concentration and mass limitations, or other such appropriate limitations for the level of pollutants and the authorized discharge;

(c) If a dilution zone is authorized, pursuant to chapter 173-201A WAC, within which water quality standards are modified, the dimensions of such dilution zone; and

(d) If a sediment impact zone is authorized within which sediment quality standards are modified pursuant to chapter 173-204 WAC, the dimensions of such sediment impact zone.

[Statutory Authority: Chapter 90.48 RCW. WSR 93-10-099 (Order 92-55), § 173-226-070, filed 5/5/93, effective 5/19/93.]

CERTIFICATE OF SERVICE

I, Adam Hinz, declare that I am employed by Earthjustice, a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On October 4, 2023, I caused the PETITION FOR REVIEW by Petitioner Puget Soundkeeper Alliance to be filed with the Court of Appeals Division I via its e-filing system.

On the same date, I served a true and correct copy in the following manner:

Respondent Pollution Control Hearings Board P.O. Box 40903 Olympia, WA 98504-0903	☒ Email (COVID Protocol) eluho@eluho.wa.gov
Respondent Washington Department of Ecology Laura Watson, Director Department of Ecology P.O. Box 47600 Olympia, WA 98504-7600	☐ U.S. Mail (waived) ☒ Email thomas.young@atg.wa.gov phyllis.barney@atg.wa.gov donna.fredricks@atg.wa.gov ecyolyef@atg.wa.gov serviceATG@atg.wa.gov

Bob Ferguson, Attorney General Washington State Office of the Attorney General 1125 Washington Street SE PO Box 40100 Olympia, WA 98504-0100 Email only: c/o Tom Young and Phyllis Barney Office of the Attorney General Ecology Division P.O. Box 40117 Olympia, WA 98504-0117	
Intervenor-Respondent Snohomish County c/o Alethea Hart and Jessica Kraft-Klehm Deputy Prosecuting Attorneys Snohomish County Prosecutor's Office 3000 Rockefeller Ave., M/S 504 Everett, WA 98201	☒ Email alethea.hart@co.snohomish.wa.us jessica.kraft-klehm@co.snohomish.wa.us nicole.magill@co.snohomish.wa.us ashley.lamp@co.snohomish.wa.us
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DATED this 4th day of October, 2023.

Adam Hinz
Earthjustice
Litigation Paralegal

EARTHJUSTICE

October 04, 2023 - 1:44 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	84492-0
Appellate Court Case Title:	Puget Soundkeeper Alliance, Appellant v. WA State Dept. of Ecology, et al., Respondents
Superior Court Case Number:	22-2-00857-9

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