No. 102981-1

SUPREME COURT
OF THE STATE OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE, Respondent

v.

STATE OF WASHINGTON, POLLUTION CONTROL HEARINGS BOARD, Respondent,

and

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent

and

BNSF RAILWAY COMPANY, THE NORTHWEST SEAPORT ALLIANCE, PORT OF SEATTLE, PORT OF TACOMA, PACIFIC MERCHANT SHIPPING ASSOCIATION, AND SSA TERMINALS, LLC, Petitioners.

AMICUS CURIAE MEMORANDUM OF THE ASSOCIATION OF AMERICAN RAILRAODS IN SUPPORT OF PETITION FOR REVIEW

Erika H. Spanton, WSBA No. 46992
Beveridge & Diamond, P.C.
600 University Street, Suite 1601
Seattle, WA 98101
espanton@bdlaw.com

Attorney for *Amicus Curiae* Association of American Railroads

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Court Cases

State Court Cases

Federal Statutory Authorities

State Statutory Authorities

Federal Rules and Regulations

State Rules and Regulations

I. STATEMENT OF INTEREST

Amicus curiae-applicant Association of American Railroads ("AAR") adopts and incorporates its statement of interest contained in its motion for leave to file an amicus memorandum concurrently filed with this Court.

II. INTRODUCTION AND STATEMENT OF THE CASE

In 2020, the Washington Department of Ecology ("Ecology") issued its Industrial Stormwater General Permit ("ISGP"), a National Pollutant Discharge Elimination System ("NPDES") general permit issued pursuant to the federal Clean Water Act ("CWA") and the Washington Water Pollution Control Act ("WPCA"). The ISGP applies to transportation facilities, including rail facilities operated by AAR's member railroads.

Federal CWA regulations only require select stormwater discharges to be authorized by a NPDES, including stormwater discharges associated with specific categories of "industrial activity" set forth at 40 C.F.R. § 122.26(b)(14)(i)–(xi). With

respect to transportation facilities, the regulations make clear that only stormwater discharges associated with "portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, airport deicing operations, or which are otherwise identified under [40 C.F.R. § 122.26(b)(14) (i)–(vii) or (ix)–(xi)]" need to be authorized by a NPDES permit. 40 C.F.R. § 122.26(b)(14)(viii). Such discharges in turn can be authorized under a general NPDES permit or in an individual NPDES permit. In Washington, nearly all transportation facilities that require a NPDES permit for select stormwater discharges have obtained coverage under the ISGP in lieu of an individual NPDES permit.

The Pollution Control Hearings Board ("PCHB") correctly held that the ISGP's plain and unambiguous language does not expand coverage requirements at transportation facilities beyond stormwater discharges from areas of

"industrial activities" specified in EPA regulations defining the term "associated with industrial activity." Put differently, the ISGP does not impose sampling, monitoring, inspection, and other coverage requirements on stormwater discharges that do not require NPDES permit coverage in the first instance. *Puget Soundkeeper All. v. Cruise Terminals of Am., LLC*, 216 F. Supp. 3d 1198, 1205 (W.D. Wash. 2015) (ISGP's scope limited by EPA's rule at 40 C.F.R. § 122.26(b)(14)(viii)).

The Court of Appeals reversed the decision of the PHCB, holding that ISGP requirements extend to the entire footprint of a transportation facility, regardless of where industrial activity takes place. In reaching this conclusion, the appeals court found that, regardless of ambiguity, general permits should be interpreted as regulations and, as such, deference should be given to Ecology's interpretation of the scope of its permits. This approach creates significant issues of transparency and consistency for permittees potentially subject to arbitrary, subjective interpretations by state agencies.

Petitioners The Northwest Seaport Alliance, Port of Seattle, Port of Tacoma, BNSF Railway Company, SSA Terminals, LLC, and Pacific Merchant Shipping Association (collectively "Permittees") filed a RAP 13.4(b) Petition for Review seeking review of the Court of Appeals, Division I, decision reversing the PCHB's grant of summary judgment to the Permittees. *See* Petition for Review.

AAR files this *amicus* brief to provide the Court with information regarding the broader policy implications for its members and the regulated community that should be determined by the Supreme Court. RAP 13.4(b)(4).

III. ARGUMENT

In Washington, a petition for review will be accepted by the Supreme Court, among other reasons, "[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13(b)(4); *see, e.g.*, *State v. Watson*, 155 Wash. 2d 574, 577 n. 1, 122 P.3d 903, 904 (2005). Such is the case here.

A. The Petition for Review involves an issue of substantial public interest that should be determined by the Washington Supreme Court.

The Court of Appeals decision will impact a wide range of facilities in addition to transportation facilities. *All* entities operating pursuant to Ecology-issued general permits will be impacted. Proper application of contract interpretation principles in determining the scope of a permit is critical so that permittees can rely on the express, unambiguous language in a permit to plan investments and to manage operations while promoting compliance and certainty.

Twenty-nine freight railroads (two Class I and twenty-seven Class III, or shortline, railroads) operate in Washington State on 3,200 route miles of track. *See* AAR Fact Sheet, Washington (https://www.aar.org/wp-content/uploads/2021/02/AAR-Washington-State-Fact-Sheet.pdf, last visited June 17, 2024). Washington is home to 75 ports and nearly 20 percent of Washington's economy is tied to international trade. *Id.* AAR's member railroads, including

BNSF Railway, are critical corridors for this freight, making Washington manufacturers, producers and communities more prosperous. Freight railroads employ more than 3,500 employees in Washington. *Id.* Railroads transport close to 800,000 carloads that originate in Washington and more than 1.2M carloads terminating in Washington. *Id.*

Moreover, the Court of Appeals decision impacts passenger railroads, including Amtrak. Amtrak operates 22 trains per day in Washington accounting for more than 1.1M rides. *See* Amtrak Fact Sheet, Fiscal Year 2023, State of Washington (https://www.amtrak.com/content/dam/projects/dotcom/english/public/documents/corporate/statefactsheets/WASHINGTON23.pdf, last visited June 17, 2024).

Railroads obtain and rely on state and federal permits to ensure their operations meet state and federal regulatory requirements. Uncertainty regarding the scope of the ISGP will negatively impact rail operations by increasing the costs of

compliance with the terms of the ISGP based on potential *post hoc* interpretations by agencies, which reduces overall funding for infrastructure, expansion, and other investments. This, in turn, may encourage a modal shift from rail to less efficient forms of freight transportation, such as trucks.

Ecology's suggestion that the Court of Appeals decision is unimportant because the 2020 ISGP will be replaced in 2025 is fundamentally flawed. *See* Ecology Answer at 2, 19. The 2020 ISGP remains "in effect" and subject to third-party enforcement under the citizen suit provisions of the CWA. 33 U.S.C. § 1365 (f)(7). And both EPA and Ecology have the authority to enforce past and future 2020 ISGP violations even after the 2020 ISGP is no longer in effect. 33 U.S.C. § 1319(a). As a result, hundreds of rail facilities have the potential to be impacted by the Court of Appeals decision incorrectly expanding the scope of the ISGP, further exacerbating uncertainty and increased costs and highlighting the need for this Court to grant the Petition for Review.

B. Rail operators must be able to apply common principles of interpretation and give effect to unambiguous permit terms.

Regulated entities and permittees, including AAR's members, must be able to rely on the plain terms of a permit. Here, the ISGP references and cites EPA's regulations. The lower court's opinion effectively reads out important provisions and definitions in controlling federal regulations found in 40 C.F.R. § 122.26(b)(14)(i-xi), which limits the facilities and portions of a facility covered by the CWA. This is contrary to accepted interpretation principles that dictate that language must be read in harmony with all related provisions—including limitations on the scope.

Here, correctly applying rules of interpretation to the Permit's incorporation of federal regulations—giving effect to EPA's rules governing the scope of the NPDES program—is critical because Ecology is not regulating existing covered activities more *stringently* than provided under federal regulations defining industrial activity, but instead is purporting

to regulate more *broadly*: Ecology seeks to regulate activities and areas that Congress and EPA do not consider industrial. Indeed, the language that Ecology cited in the ISGP to define the Permit's scope—EPA's definition of the term "associated with industrial activity"—is language the courts have found to be "measured" and "exclusive" of the activities subject to permitting. *Ecological Rts. Found. v. Pac. Gas and Elec. Co.*, 713 F.3d 502, 512, 513 (9th Cir. 2013).

The 9th Circuit has explained courts should interpret statutes, like the CWA and NPDES program, to "avoid . . . absurd results." *United States v. Tatoyan*, 474 F.3d 1174, 1181 (9th Cir. 2007). Here, the Court of Appeals read the ISGP as applying to the entire footprint of the area used for transportation. That reading has the absurd result of conflicting with the federal NPDES program that the ISGP (a combined NPDES and state waste discharge permit) purports to implement. EPA defined the phrase "stormwater discharge associated with industrial activity" as stormwater "directly

related to manufacturing, processing or raw materials storage areas at an industrial plant" and excluded areas that are separate from the "plant lands" used for industrial activities. 33 U.S.C. § 1342(p)(4)(A); 40 C.F.R. § 122.26(b)(14). For transportation facilities, the "plant lands" used for industrial activities are "[o]nly those portions" associated with the activities EPA defined as industrial under paragraphs (b)(14)(i)-(xi). 40 C.F.R. § 122.26(b)(14)(viii). The provision of transportation services separated from activities defined as associated with industrial activity does not require NPDES permit coverage. But the decision reads the ISGP as applying to the entire footprint of a transportation facility, a reach that goes far beyond those identified by EPA. *Id.* Excising EPA's rule from the ISGP means the ISGP is not an NPDES permit, a result that is absurd and in conflict with its self-description as an NPDES permit.

In addition, Ecology never formally identified a change to the ISGP's scope in the ISGP or Fact Sheet and never used

rulemaking to redefine the term industrial. Ecology therefore failed to follow Washington's significant legislative rule requirements to inform the public about Ecology's goals and objectives and consideration of alternatives. RCW § 34.05.328

Finally, the lower court's decision would effectively require permittees, including AAR's members, to speculate as to how the Ecology will interpret otherwise unambiguous permit terms instead of allowing permittees to rely on the plain terms of the permit. This would have the perverse result of incentivizing agencies to issue vague permitting terms and to engage in *post hoc* rationalization of changing interpretations.

IV. CONCLUSION

For the foregoing reasons, AAR asks the Court to grant Petitioners' Petition for Review.

This document contains 1,608 words, excluding the parts of the document exempted by RAP 18.17(b) and RAP 18.17(c), and complies with the word limit of RAP 18.17(c)(9).

Respectfully submitted this 17th day of June, 2024.

BEVERIDGE & DIAMOND, P.C.

/s/ Erika H. Spanton

Erika H. Spanton, WSBA No. 46992
600 University Street, Suite 1601
Seattle, WA 9810
espanton@bdlaw.com

Attorney for *Amicus Curiae*
Association of American Railroads

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on this date I caused the foregoing document to be served on the parties hereto via the Appellate Court Filing Portal, which will send electronic notification of such filing to all parties of record.

Dated at Seattle, Washington, this 17th day of June 2024.

/s/Kayla Aslani
Kayla Aslani, Legal Assistant

BEVERIDGE & DIAMOND - SEATTLE

June 17, 2024 - 3:22 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	102,981-1
Appellate Court Case Title:	Puget Soundkeeper Alliance v. State of WA Pollution Control Hearings, et al.
Superior Court Case Number:	22-2-00985-1

The following documents have been uploaded:

- 1029811_Briefs_20240617151747SC956374_4506.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was 2024-06-17 AAR Amicus Memorandum ISO Petition PSK v. PCHB.pdf
- 1029811_Motion_20240617151747SC956374_3075.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  The Original File Name was 2024-06-17 AAR Motion for Amicus Memorandum ISO Petition PSK v. PCHB.pdf

A copy of the uploaded files will be sent to:

- ECYOlyEF@atg.wa.gov
- ESpanton@bdlaw.com
- Kaslani@bdlaw.com
- Lisa.Petersen@atg.wa.gov
- bjones@gth-law.com
- claire@smithandlowney.com
- cohee@dmw.law
- dconway@gth-law.com
- doll@dmw.law
- julian.beattie@atg.wa.gov
- katelyn@pugetsoundkeeper.org
- katelyn@smithandlowney.com
- kharmon@gth-law.com
- klarkin@gth-law.com
- lalseaef@atg.wa.gov
- richard@smithandlowney.com
- ronald.lavigne@atg.wa.gov

Comments:

Sender Name: Kayla Aslani - Email: kaslani@bdlaw.com
Filing on Behalf of: Erika H. Spanton - Email: espanton@bdlaw.com (Alternate Email: kaslani@bdlaw.com)

Address:
600 University
Suite 1601
Seattle, WA, 98101

Phone: (206) 315-4800

Note: The Filing Id is 20240617151747SC956374