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SUPREME COURT OF THE STATE OF WASHINGTON

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PUGET SOUNDKEEPER ALLIANCE, Respondent,

v.

STATE OF WASHINGTON, POLLUTION CONTROL  
HEARINGS BOARD, Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF  
ECOLOGY, Respondent,

v.

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

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***AMICI CURIAE* MEMORANDUM OF THE  
INTERNATIONAL LONGSHORE AND WAREHOUSE  
UNION LOCALS 19 & 23; INLANDBOATMEN'S UNION  
OF THE PACIFIC; and INTERNATIONAL  
ORGANIZATION OF MASTERS, MATES & PILOTS**

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## **I. IDENTITY AND INTEREST OF AMICI**

*Amici Curiae* Applicants International Longshore and Warehouse Union Locals 19 & 23 (ILWU Locals 19 & 23), Inlandboatmen's Union of the Pacific (IBU), and International Organization of Masters, Mates & Pilots (MM&P) (collectively referred to as Applicants) adopt and incorporate the statement of interest contained in their motion for leave to file an *amici curiae* brief. As described in the motion, *Amici Curiae* Applicants are labor organizations whose members have vital interests in the preservation of thriving marine ports in Washington.

The ramifications of the Court of Appeals decision that is the subject of the Petition for Review are potentially catastrophic for *Amici Curiae* Applicants' members and will have significant negative effects on any industry or business dependent on Washington marine terminals. This Court should grant review to assess whether in 2010 the Department of Ecology (Ecology) unilaterally, and without informing current or prospective permittees, expanded the scope of the Ecology-issued Industrial Stormwater General Permit (ISGP) to cover all areas of

transportation facilities, including wharfs at marine terminals. If allowed to stand, the Court of Appeals decision will have catastrophic consequences on the viability of marine commerce in, and international trade to and from, Washington and the jobs that rely on this commerce and trade.

## **II. STATEMENT OF THE CASE**

*Amici Curiae* Applicants adopt the statement of the case in the Petition for Review filed by the Northwest Seaport Alliance, Port of Seattle, Port of Tacoma, BNSF, and SSA Terminals, LLC. They supplement this statement with the following additional information.

Washington's economy depends on exports and imports of goods and services by companies of all sizes, from small "mom and pop" operations and family farms to some of the largest companies in the world. According to the Import-Export Bank, approximately 40% of all jobs in Washington are tied to trade, making Washington the most trade-dependent state in the

nation.<sup>1</sup> Washington's ports handle 7% of U.S. exports and 6% of U.S. imports,<sup>2</sup> and the Ports of Seattle and Tacoma alone support 58,000 well-paying jobs and generate \$12.4 billion in economic activity.<sup>3</sup> The largest of these ports are the Ports of Seattle and Tacoma, which together comprise the second-largest load center in the nation.<sup>4</sup> Altogether, Washington ports are the gateway for countless products grown or manufactured in Washington and are, simply put, absolutely central to the success of the state's economy.

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<sup>1</sup> *The Export-Import Bank: Impact on Washington State Trade*, WASHINGTON INTERNATIONAL TRADE ASS'N, [www.wita.org/atp-research/the-export-import-bank-impact-on-washington-state-trade/#:~:text=Washington's%20economy%20depends%20on%20exports%20and%20imports%20of,the%20most%20trade%20dependent%20state%20in%20the%20nation](http://www.wita.org/atp-research/the-export-import-bank-impact-on-washington-state-trade/#:~:text=Washington's%20economy%20depends%20on%20exports%20and%20imports%20of,the%20most%20trade%20dependent%20state%20in%20the%20nation) (last visited June 14, 2014).

<sup>2</sup> *Freight Mobility, Washington Ports*, Washington Public Ports Ass'n, [https:// www.washingtonports.org/freight-mobility](https://www.washingtonports.org/freight-mobility) (last visited June 14, 2024).

<sup>3</sup> *Cargo Statistics*, THE NORTHWEST SEAPORT ALLIANCE, <https://www.nwseaportalliance.com/about-us/cargo-statistics> (last visited June 14, 2024).

<sup>4</sup> *Freight Mobility, Washington Ports*, Washington Public Ports Ass'n, [https:// www.washingtonports.org/freight-mobility](https://www.washingtonports.org/freight-mobility) (last visited June 14, 2024).

The import and export of goods at Washington ports largely occurs at marine terminals, each of which contains a wharf. Some of these wharfs are massive: the wharf at T18 in Seattle is 14.55 acres, the wharf at T5 in Seattle is 17.3 acres, and the wharf at the Sitcum Waterway in Tacoma is 12.6 acres.<sup>5</sup> These and other marine-terminal wharfs were typically constructed decades ago and have no means to safely or reasonably sample, let alone treat, stormwater.

Unfortunately, Washington marine terminals are experiencing intense pressures from a number of factors, including outside competition and regulations and taxes not imposed in other jurisdictions. As one result, between 2006 and 2023 Canadian West Coast ports saw cargo growth of 67%, while during the same time period the Ports of Tacoma and Seattle saw a decline of 27%.<sup>6</sup> The Ports of Tacoma and Seattle

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<sup>5</sup> *Terminals*, THE NORTHWEST SEAPORT ALLIANCE <https://www.nwseaportalliance.com/cargo-operations/terminals> (last visited June 14, 2024).

<sup>6</sup> *West Coast Trade Report* (April 2024), PMSA, at 15, <https://www.pmsaship.com/wp-content/uploads/2024/04/West-Coast-Trade-Report-April-2024.pdf> (last visited June 14, 2024) (“West Coast Trade Report”).



are also the only West Coast ports that have not seen a return to pre-pandemic (March 2019) levels of inbound container traffic, which is down by 20.7%.<sup>7</sup> Outbound container traffic is down by 31.1%, resulting in an overall reduction in container traffic of 25% over the last five years.<sup>8</sup>

### **III. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

In Washington, a petition for review will be accepted by the Supreme Court if, among other reasons, “the petition involves an issue of substantial public interest that should be determined by the Court.”<sup>9</sup> Here, the Court of Appeals published decision implicates significant issues of substantial public interest—most notably the sustainability of the Washington economy—that should be resolved by this Court.

As set forth in the Petition for Review, the EPA requirements for Clean Water Act NPDES-permit coverage of stormwater discharges associated with industrial activities at

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<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Id.*

<sup>9</sup> RAP 13(b)(4). *See, e.g., State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005).

transportation facilities—of which there are over 4,000 in Washington—is strictly limited to only those portions of a facility engaged in vehicle maintenance, equipment cleaning, or airport deicing.<sup>10</sup> The 45 other states with EPA-delegated NPDES programs and the four states with NPDES programs that EPA administers all observe this limitation on the scope of stormwater NPDES coverage at transportation facilities. And so did the Washington Department of Ecology for decades until its claimed ex post facto decision that the 2010 ISGP expanded coverage to the entire footprint of a transportation facility.<sup>11</sup> The Pollution Control Hearings Board (PCHB) firmly rejected this contention given the clear language of the 2010 and 2020 ISGPs and related facts and law. But the Court of Appeals decision that is the subject of the Petition for Review has now reversed the PCHB’s decision, thus imposing ISGP sampling and treatment requirements on the entirety of transportation facilities such as marine terminals, including their wharfs.

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<sup>10</sup> 40 C.F.R. § 122.26(b)(14)(viii).

<sup>11</sup> The background of this alleged decision is covered by the Petition for Review and underlying briefing.

It is not an exaggeration to say that expanding ISGP coverage requirements at Washington marine terminals will have devastating effects on this vitally important and already struggling sector of Washington's economy. As noted above, existing wharfs at Washington's marine terminals are largely decades-old and are not designed to allow stormwater sampling, let alone treatment, in a reasonable or safe manner. The cost of retrofitting or, more likely, replacing the wharfs at marine terminals so that stormwater sampling and, if necessary, treatment can occur will be in the tens to hundreds of millions of dollars<sup>12</sup> and would mean extensive shutdowns of part or the entirety of the wharfs. The likelihood of Washington ports or the operators of Washington marine terminals being able or even willing to make such investments is questionable, particularly in light of the economic hardships they are already experiencing. And even if they did,

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<sup>12</sup> As noted in the Petition for Review, as of 2020, Northwest Seaport Alliance staff estimated that if the ISGP was interpreted to apply to the entirety of NWSA container facilities it could cost an additional \$100 million, or \$1.1 million per acre, to install catchment and treatment systems for NWSA's piers alone. CP 2115. The related costs would have only increased since then.

these terminals will be closed or at reduced capacity years at a time, all with uncertainty regarding whether the inevitable loss of trade volume to other ports in the interim will ever return. And, of course, the family-wage jobs of *Amici Curiae* Applicants' members will be severely affected and perhaps lost forever.

In sum, by not following the national standard promulgated by EPA in its role as primary enforcer of the Clean Water Act, the Court of Appeals' rejection of the PCHB's well-supported and reasoned decision puts Washington ports at significant competitive risk of losing cargo, jobs, and tax revenue while creating significant confusion and economic distress for the innumerable Washington businesses that rely on Washington marine terminals to export their products and import critical components for their businesses. The Court of Appeals' ill-considered decision should be rejected and the PCHB decision reinstated.

#### **IV. CONCLUSION**

For the reasons set forth above, *Amici Curiae* Applicants respectfully request that this Court grant the Petition for Review

of the Court of Appeals decision.

Pursuant to RAP 18.17, this document contains 1,348 words, excluding exempted portions.

Dated this 17th day of June 2024.

Respectfully submitted,

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## **DECLARATION OF SERVICE**

I, Jennifer Fernando, hereby declare under penalty of perjury that on the date noted below I served the foregoing document on the parties requesting notice via the Appellate Court Filing Portal as noted below:

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## Transmittal Information

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