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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,

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.

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RESPONDENT PUGET SOUNDKEEPER ALLIANCE'S  
RESPONSE TO AMICI CURIAE MEMORANDA

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## I. INTRODUCTION

Amici<sup>1</sup> have not set forth any additional or persuasive arguments as to why this Court should accept review. What is more, all of Amici's concerns are either already addressed in the current permit, are being addressed in other, ongoing agency processes, or are based on incorrect interpretations of the Court of Appeals decision and other misstatements.

The Washington State Department of Ecology ("Ecology") has already built provisions into the Industrial Stormwater General Permit ("ISGP" or "Permit") to address Amici's concerns about the feasibility of monitoring and controlling discharges from industrial facilities. For example: sampling is not required where it is unsafe; nothing in the permit requires particular infrastructure or pollution treatment devices;

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<sup>1</sup> "Amici" refers collectively to the Washington Public Ports Association ("WPPA"), the Association of American Railroads ("AAR"), International Longshore and Warehouse Union Locals 19 & 23 ("ILWU"), Inlandboatmen's Union of the Pacific ("IBU"), and International Organization of Masters, Mates & Pilots ("MM&P"); ILWU, IBU, and MM&P are collectively referred to as ILWU.

and there are numerous off-ramps from Permit requirements that are infeasible or unnecessary—including the option to obtain an individual permit if the ISGP, a general permit, is ill-suited to a particular facility.

Furthermore, if Amici want more, they can engage in the 2025 ISGP public process. The 2020 ISGP which is at issue in this appeal is about to expire, so nothing this Court says about its plain language will govern what Amici need to do at their facilities going forward.

And finally, to the extent the 2020 ISGP might hypothetically be relevant to Amici, the validity of that permit is still to be addressed by the Pollution Control Hearings Board (“PCHB”) in the first instance.

This Court should decline review at this time. Once the two ongoing agency processes conclude, there will be an opportunity to seek review if there is any remaining reason to do so.

## II. ARGUMENT

### A. Amici do not argue this case meets the applicable criteria for review, and it does not.

As argued in Puget Soundkeeper Alliance’s (“Soundkeeper’s”) Response to the Petition, the Court of Appeals decision is interlocutory, and thus, Petitioners must meet the standard found in RAP 13.5(b) for this Court to grant review. Soundkeeper Resp. at 5-9. None of the Amici even address how this case meets the RAP 13.5(b) criteria, much less argue that the standard has been met.

Moreover, the recently issued Ninth Circuit decision, which parallels the reasoning of the Washington Court of Appeals, makes clear that the Court of Appeals has not “committed an obvious error” or “committed probable error” or “so far departed from the accepted and usual course of judicial proceedings.” RAP 13.5(b); Soundkeeper Not. of Suppl. Auth.; *Puget Soundkeeper All. v. Port of Tacoma*, 104 F.4th 95 (9th Cir. 2024). Indeed, the Ninth Circuit explicitly cites the Court of

Appeals decision, and its agreement with the Court of Appeals confirms that the Court of Appeals interpretation of the plain language of the ISGP was correct and is not in need of further review.

**B. Amici misstate the Court of Appeals’ decision.**

Amici misstate the nature and impact of the Court of Appeals’ decision. First, the Court of Appeals’ ruling is based upon its *de novo* review of the plain language of the Permit, not on deference to Ecology. *Puget Soundkeeper All. v. Pollution Control Hr’gs Bd.*, 545 P.3d 333, 344–46 (Wash. Ct. App. 2024) (interpreting the plain language of the permit, and finding it unambiguously covers the entire footprint of transportation facilities, and alternatively holding that *even if* it was ambiguous, the court would defer to Ecology and come to the same conclusion). Accordingly, Amici’s statements that the Court of Appeals unfairly deferred to a post-hoc Ecology interpretation is incorrect. The WPPA claims the ruling removed “any sense of consistency or reliance ports and their constituents may have had,”

and the AAR claims the Court of Appeals ruled that deference is afforded to Ecology “regardless of ambiguity.” WPPA Br. at 5; AAR Br. at 7. Deference to Ecology was not the basis of the Court of Appeals’ decision.

Furthermore, even if it was, Amici’s hyperbolic claims that they will no longer be able to rely upon the permitting process is demonstrably untrue. Ecology has been consistently telling the transportation sector what the Permit requires since long before the 2020 Permit was issued. *Puget Soundkeeper All. v. Pollution Control Hr’gs Bd.*, 545 P.3d at 340 (noting that when appellant BNSF commented on the 2010 draft permit asking about the “only those portions” language, Ecology responded that it chose not to include the limiting language; Ecology’s 2010 FAQ also answered this question; and, when several ports wrote to Ecology in 2010 raising concerns about this issue, Ecology responded that the permit applies to all portions of the facilities); CP 1605; CP 1789; CP 2919-2925 (BNSF’s 2010 deposition of Ecology’s permit writer wherein he makes clear that the 2010



Permit regulates the entire footprint of transportation facilities); CP 1504-1505; CP 2497-2498. BNSF even litigated this issue in 2011 in Federal District Court and lost. CP 3641-3643 (*Puget Soundkeeper All. v. BNSF Railway Co.*, No. 2:19-cv-01087-JCC, at 3 (W.D. Wash.) (April 11, 2011)).

Ecology has been consistent for fourteen years. It is only certain transportation facilities that feign ignorance, even in the face of documentary evidence to the contrary.

Second, the Court of Appeals' decision has no bearing on any other permits. The WPPA refers to fourteen other general permits, and the AAR claims “[a]ll entities operating pursuant to Ecology-issued general permits will be impacted.” WPPA Mot. for Leave at 7; AAR Br. at 9. But the Court of Appeals' decision only interprets the plain language of the 2020 ISGP. It is therefore irrelevant to any other permits.

Cutting away Amici's misstatements about the Court of Appeals' decision reveals that the rule and precedent all Amici advocate for – following the plain, unambiguous permit language

– is the very rule and precedent embodied by the Court of Appeals’ decision.

**C. Amici’s misrepresentations are not a basis for this Court’s review.**

Amici also misrepresent and overstate the reach and requirements of the 2020 ISGP. First, Amici overstate the number of facilities that might be impacted by the 2020 ISGP’s requirements for transportation facilities, suggesting there are 4,000 transportation facilities at issue, ILWU Br. at 6, when there are only about 1,200 facilities *total*, across all industry sectors, regulated by the 2020 ISGP. CP 1666. Moreover, only a small fraction of regulated transportation facilities have overwater wharves that present the compliance challenges Amici complain of. As Amici themselves point out, the scant few facilities that have sizeable wharves are owned and operated by entities with commensurately large budgets. *See* ILWU Br. at 4, WPPA Br. at 7. For example, appellant and Port of Seattle and Tacoma tenant SSA Terminals LLC reported over a billion dollars in revenue in

2019.<sup>2</sup> These entities can afford to clean up their toxic discharges to our waterways.

Second, Amici's claims that the 2020 ISGP imposes inflexible, dangerous, or draconian requirements is false:

- The Permit does not require facilities to risk health and safety to collect discharge samples, as Amici suggest. CP 83 (permit provisions stating, "Permittees need not sample ...during unsafe conditions," and providing a process for moving sampling points to safe locations).
- Nothing in the Permit requires facilities to install stormwater collection or "catchment" infrastructure, which Amici suggest would be costly for large wharves. *See generally* CP 74–108.
- The Permit also does not require facilities to install new stormwater treatment devices unless there is a demonstrated,

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<sup>2</sup> Ernst & Young LLP, CONSOLIDATED FINANCIAL STATEMENTS, SSA Terminals, LLC, Fiscal Years Ended January 25, 2019, January 26, 2018, and January 27, 2017, available at <https://www.sec.gov/Archives/edgar/data/3453/000155837019002865/matx-20181231ex99149c511.htm>.

sustained pollution problem, and even then, there are several accommodations and off-ramps built into the Permit. CP 102–103. For example, the 2020 ISGP provides a specific process for facilities to request that Ecology extend the deadline to install pollution treatment or waive the treatment requirement altogether if installation of treatment is “not feasible or necessary.” CP 103. Facilities can also obtain coverage under an individual permit tailored to their unique circumstances if the ISGP (a general permit) does not suit their site. CP 113–114.

Accordingly, the Court should not be misled by Amici’s hyperbolic claims that the Court of Appeals’ interpretation of the 2020 ISGP will risk lives or livelihoods. Ecology built flexibility into the Permit that addresses all of Amici’s concerns.

**D. Amici’s other points are either time-barred or subject to ongoing administrative processes, not issues for the Court in this appeal.**

Amici raise a few other complaints about issues that are untimely. Amici repeatedly ask this Court to review decisions Ecology made in the 2010 iteration of the ISGP, but the time for challenging those decisions expired long ago and they are not at issue in this appeal. *See* ILWU Br. at 1, 6; WAC 173-226-190 (general permit appeals must be brought within thirty days of permit issuance).

Amici also argue that Ecology did not follow proper procedures when promulgating the 2020 ISGP and renewing the Permit’s requirements for transportation facilities. However, that specific issue is to be decided in the first instance by the PCHB on remand. *Puget Soundkeeper All. v. Pollution Control Hr'gs Bd.*, 545 P.3d at 347–48. The parties fully briefed that issue (Legal Issue 12) to the PCHB, but the PCHB did not reach it. *Id.* at 347. When Soundkeeper raised it in the Court of Appeals, the

parties aligned with Amici argued that the PCHB must address Issue 12 first, and the Court of Appeals agreed, remanding Issue 12 to the PCHB. *Id.* at 347–48.

Finally, Ecology’s ongoing public process for the next iteration of the ISGP provides the most appropriate venue for Amici to voice their policy concerns about permit requirements going forward. The Court of Appeals’ decision interpreting the plain language of the 2020 ISGP has no impact on policy considerations, and the 2020 ISGP will expire at the end of this year. CP 59. Thus, if Amici believe that controlling pollution from the entire footprint of transportation facilities—just like every other regulated industry has long been doing—is too onerous, they can engage in Ecology’s public comment period that is currently open. If Amici do not like how the 2025 ISGP turns out, they will have an opportunity to appeal that permit. And again, any entity that is regulated by the ISGP can also avail itself of the Permit’s many accommodations and off-ramps.

### III. CONCLUSION

For the foregoing reasons and those stated in Soundkeeper's response to the petition for review, the Court should decline review.

This document contains 1,773 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 10th day of July, 2024.

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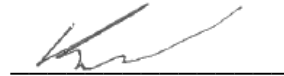
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**CERTIFICATE OF SERVICE**

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 upon the parties in the above-captioned matter via the Appellate Court Filing Portal, which sends electronic notifications to all parties of record.

Dated this 10th day of July 2024, in Seattle, Washington.

A handwritten signature in black ink, appearing to read 'Kai', is written above a solid horizontal line.

Kai McDavid



# SMITH & LOWNEY

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