

No. 102981-1

SUPREME COURT OF THE STATE OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE, Respondent,

v.

STATE OF WASHINGTON, POLLUTION CONTROL
HEARINGS BOARD, Respondent,

and

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
Respondent,

and

BNSF RAILWAY COMPANY, et al., Petitioners.

**WASHINGTON PUBLIC PORTS ASSOCIATION'S
AMICUS CURIAE MEMORANDUM IN SUPPORT OF
PETITIONERS' PETITION FOR REVIEW**

Frank J. Chmelik, WSBA #13969
Holly M. Stafford, WSBA #40674
Sara B. Frase, WSBA #56922

CSD Attorneys at Law P.S.
1500 Railroad Avenue
Bellingham, Washington, 98225
Telephone: (360) 671-1796
*Attorneys for Washington Public
Ports Association*

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I. INTRODUCTION

Petitioners' Petition for Review is one of vital interest to the Washington Public Ports Association ("WPPA") and its members. *See* Exhibit "A" Declaration of Eric ffitch at ¶ 6. If upheld, the Court of Appeals' ("COA") ruling will have a detrimental effect on not only ports, but all industry throughout Washington State.

The COA's ruling provides the Washington Department of Ecology ("Ecology") unfettered authority to apply its *post hoc* opinions and reasoning to its Industrial Stormwater General Permit ("ISGP"); removing any sense of consistency or reliance ports and their constituents may have had in the agency's permitting process. It goes without saying that this is a dangerous precedent to set.

It is economically critical there be reliable, consistent, and transparent standards for the permitting process. Local governments, private industrial facility operators, municipalities, animal feeding operations, construction

facilities, boatyards, shipping terminals, transportation and rail operators, and more rely upon this fact. The COA's ruling ignores this reality, instead creating new and harmful precedent affecting millions of Washington's tax-paying residents.

The WPPA, therefore, asks that the Washington State Supreme Court (the "Court") grant the Petition for Review as this case presents issues of public importance including the interests of the WPPA, and its members, throughout the State.

II. IDENTITY OF AMICUS CURIAE

The WPPA "was authorized by statute in 1961." *ffitch Decl.* at ¶ 3. The WPPA "represents the collective interest of the 75 port districts within the state, located in thirty-three of Washington [sic] thirty-nine counties." *Id.* Of those 75 ports, 69 are WPPA members "who pay annual dues to provide the bulk of the WPPA budget." *Id.* Furthermore, "[t]he WPPA is subject to audit by the State Auditor" and speaks to all branches of Washington government as the collective voice of port

districts in the state. *Id.* “The Port of Tacoma and Port of Seattle [sic] are members of the WPPA.” *Id.*

It is important for the Court to note, however, that the Ports of Tacoma and Seattle are in the minority of port districts in Washington in terms of size and revenue. *Id.* at ¶ 12. In actuality, the majority of Washington’s ports are much smaller, both geographically and in population. *Id.* What this translates to is “a smaller budget, a smaller staff, and an even greater reliance upon the plain language of permits such as the ISGP.” *Id.*

Ports “facilitate local economic development through the management of transportation facilities.” *Id.* at ¶ 7. Crucial services provided by ports include the “operation of commercial airports; marine shipping terminals; creation of industrial development districts; buying, selling, and leasing property; telecommunications facilities; as well as the promotion of tourism.” *Id.* Smaller and more rural port districts are also

deeply involved in the extension of broadband services to their communities. *Id.*

III. STATEMENT OF MATERIAL FACTS

A. Ports and Economic Development.

“It shall be in the public purpose for all port districts to engage in economic development programs.” RCW 53.08.245. Ports achieve their goals of economic development by way of limited financing opportunities. These include “taxes, service fees, bonds, and grants or gifts.” *ffitch Decl.* at ¶ 8.

“Washington port authorities operate five of Washington’s nine (9) commercial airports, and one-third of ports are involved in broadband.” *Id.* at ¶ 7. The promotion and advocacy for broadband in rural Washington State is essential in promoting job growth in those areas. In fact, the Legislature established the State’s Broadband office:

...to encourage, foster, develop, and improve affordable, quality broadband within the state in order to:

- (a) Drive job creation, promote innovation, improve economic vitality, and expand markets for Washington businesses;
- (b) Serve the ongoing and growing needs of Washington's education systems, health care systems, public safety systems, transportation systems, industries and business, governmental operations, and citizens; and
- (c) Improve broadband accessibility and adoption for unserved and underserved communities and populations.

RCW 43.330.532(2)(a)-(c).

Furthermore, “ninety percent (90%) of ports are promoting economic development for their community and region through brick-and-mortar investment in facilities and programmatic engagement in job growth or general economic resiliency and two-thirds of ports are engaged in tourism.”

ffitch Decl. at ¶ 7.

B. Ports Are Bound by a Strict Statutory Budgeting Scheme.

As the economic engines for their communities, ports use the tax revenues of their constituents to invest in infrastructure designed to grow the economy. Currently, the Legislature

limits the rate at which a port district may levy taxes to finance its district to 45 cents per \$1,000 of assessed value on taxable property. RCW 53.36.020.

Each year, every port must submit a preliminary budget for the following fiscal year “showing the estimated expenditures and the anticipated available funds from which all expenditures are to be paid.” RCW 53.35.010; *see also* fitch Decl. at ¶ 9. This preliminary budget must be made available to the district’s taxpayers for their review and a date set for a public hearing “for the purpose of fixing and adopting the final budget.” RCW 53.35.020; *see also* fitch Decl. at ¶ 9. At the hearing, “[a]ny person may present objections to the preliminary budget following which the commission shall, by resolution adopt a final budget.” RCW 53.35.030; *see also* fitch Decl. at ¶ 9.

C. Ports are Environmental Stewards.

Working in tandem with the Legislature’s intention for ports to promote economic development, port districts proudly

remediate contaminated property within their districts and implement environmental protection measures to ensure preparation for future development. ffitch Decl. at ¶ 10-11.

Washington's ports have invested heavily in expanding the scope of stormwater treatment facilities beyond the immediate vicinity of vehicle maintenance shops or equipment cleaning operations. The Port of Tacoma, for example, "invested \$12.8 million in a dual stage stormwater treatment system for its West Siteum terminal, and many other ports are making similar investments." ffitch Decl. ¶ 11.

That being said, not all of Washington's ports have the resources that larger ports, like the Port of Tacoma, have at their disposal. The majority of ports are significantly more limited as far as their available funding for infrastructure projects, including stormwater systems. *Id.* at ¶ 12.

IV. ARGUMENT

A. Ports Must Rely on the Plain Language of Permits.

“If the language of the permit, considered in light of the structure of the permit as a whole, ‘is plain and capable of legal construction, the language alone must determine the permit’s meaning.’” *Natural Res. Def. Council, Inc. v. Cnty. Of Los Angeles*, 725 F.3d 1194, 1204-05 (9th Cir. 2013) (quoting *Piney Run Pres. Ass’n. v. Cty. Comm’rs of Carroll Cty., Md.*, 268 F.3d 255, 270 (4th Cir. 2001)).

Ecology owes its permittees the benefit of transparency by way of clear, understandable, and consistent permit language. As part of a mutual effort to ensure this exists within the ISGP, the Legislature, and Ecology by way of its own regulations, requires that each draft permit go through a mandatory notice and comment period. WAC 173-220-050, 060, 070 (individual permit); WAC 173-226-110, 130, 140, 170 (general permit). WPPA staff are tasked with being up to date with legislative and agency-specific developments throughout the year. ffitch Decl. at ¶ 13. The WPPA, as the voice of its

member ports, is active in reviewing and commenting, when necessary, on the draft stormwater permits. *Id.*

Based upon the plain language of the 2005, 2010, and 2020 ISGPs, the WPPA has consistently understood that the ISGP only applies to facilities conducting industrial activities. For these facilities it is unquestioned that prior to 2010, the ISGP quoted the 40 CFR language regarding transportation facilities but thereafter relied on citing EPA's definition of transportation facilities. The 2015 ISGP stripped out some of the language in the definition of "industrial activities," which were brought back in in 2020. Looking at subpart (1), 40 C.F.R. §122.26(b)(14)(viii) explains that "[o]nly those portions of the [transportation] facility that are either involved in vehicle maintenance..., equipment cleaning operations, airport deicing operations, or which are otherwise identified under paragraphs (b)(14) (i)-(vii) or (ix)-(xi) of this section are associated with industrial activity."

Under subpart (2) of the “industrial activities” definition, the ISGP covers any facility conducting industrial activities listed in Table 1. Table 1 lists the categories of industrial activities found in 40 C.F.R. §122.26(b)(14) in a different format. However, no part of Table 1 deviates from 40 C.F.R. §122.26(b)(14). Based upon the plain language of the last three ISGPs, it is clear to the WPPA that the definition of “industrial activity” must, therefore, include EPA’s definition of industrial activity, including but not limited to the “only those portions” language found in 40 C.F.R. §122.26(b)(14)(viii) applicable to transportation facilities.

Ignoring the ISGP’s numerous citations to EPA’s definition in Condition S1, and its definition of industrial activity, Ecology has now, after the fact and without publishing the issue for public comment, stated that its intention was to expand the ISGP—ostensibly a federal NPDES permit—to activities that EPA and Congress expressly exempted from coverage. However, because the permit should be read like any

other contract, Ecology's intent should not be relevant given that the ISGP defines the industrial activity occurring at transportation facilities using EPA's definition.

B. The Opinions of the PCHB Should be Afforded Great Weight as the Designated Reviewer of Ecology Actions.

The Pollution Control Hearings Board ("PCHB") was created by the Legislature in 1970. RCW 43.21B.010. Its purpose is to "provide for a more expeditious and efficient disposition of designated environmental appeals..." RCW 43.21B.010. The quasijudicial body is charged with independent review of Ecology actions. *Port of Seattle v. Pollution Control Hearings Board*, 90 P.3d 659, 671 (Wash. 2004). For context, under the Administrative Procedures Act, a PCHB factual finding will not be overturned unless it is clearly erroneous, while deference is given to Ecology on technical issues when the PCHB and Ecology disagree. *Id.* at 673; see also RCW 34.05.570.

In the PCHB matter at issue here, the Ports of Seattle and Tacoma and others moved the PCHB for summary judgment on two issues associated with an appeal of the 2020 ISGP. PCHB No. 19-089c, Order on Summary Judgment, 2021 WL 1163243. The issues on summary judgment were (i) whether the 2020 ISGP expanded coverage for transportation facilities beyond that set forth under the Clean Water Act (“CWA”); and (ii) whether the purported expansion of the 2020 ISGP’s coverage beyond the CWA definition was unreasonable or unlawful because Ecology failed to comply with procedural requirements for NPDES permits. *Id.* at *5.

Looking first to the plain language of the 2020 ISGP, the PCHB found that the 2020 ISGP did not mandate coverage of an entire transportation facility as Ecology contended it did. *Id.* at *8. The list of industrial activities remained restricted to “only those portions” of transportation facilities where the activity occurred. *Id.* at *9.

While the PCHB only reviewed the scope of the 2020 ISGP, its analysis is instructive with regard to the facially narrower 2010 and 2015 ISGPs. Moreover, the PCHB found, after viewing all facts in the light most favorable to Ecology and giving Ecology deference on technical issues, that while Ecology may have *intended* to expand coverage to an entire transportation facility, the plain language of the ISGP failed to do so. *Id.* at *9.

C. The COA's Ruling Affects More than the ISGP.

While the COA's ruling refers solely to the scope and interpretation of the ISGP, the WPPA finds deeply concerning the overall effect this ruling will have on the future enforcement of all of the permits Ecology administers. That is to say, if Ecology is given the power to assert unclear and inconsistent opinions at any point *after* the relevant permit is issued, holders of that permit could be required to change their entire infrastructure to meet the new demands of Ecology.

This issue already presents itself in that individual port districts are not only required to comply with Ecology's central office's mandates, but those of their local regional office as well. *ffitch Decl.* at ¶ 14. Washington is divided into four separate regions with "each region being overseen by a different Regional Manager." *Id.* The COA's ruling exacerbates and already onerous permitting process for ports.

The temporal and financial commitments that accompany any after the fact changes to infrastructure will inevitably have a negative impact on the port's relationship with its constituents. If ports cannot predict exactly what Ecology requires as far as procedures on the part of a permit-holder, ports will be forced to re-evaluate their leasing and tenant management procedures. This would likely include shortening lease lengths in order to pass the cost of Ecology-mandated infrastructure changes onto tenants. Shortening lease terms will inevitably result in less infrastructure investment by the private sector due to lack of security in the ground lease. Moreover,

such changes will undoubtedly cause unrest amongst new and long-standing port tenants who rely on consistent and transparent communication and expectations so as to plan for the future success of their business.

It is undisputed that the infrastructure required by many of Ecology's permits is expensive and can take years to fully install. The COA's ruling completely turns the ports' ability to move forward with such installation projects on their head.

Ports are held to a strict statutory schedule for finalizing their budgets each year. Required infrastructure like a stormwater system must be included in that budget along with every other project to be tackled that year. The first place that the port will look to understand what is required of it under a particular permit is the permit itself. This is because, as courts have previously held, the permit ought to be read like a contract whose terms are plainly written on the page.

Unfortunately, what the COA's opinion says is that the plain language of the permit is not enough. Rather, permittees

must consider what Ecology's "intent" was in issuing the permit. Intent is not written out in the plain language of the permit. There is also no logical reason why a permittee would inquire as to the agency's intent in issuing a permit when the plain language on the face of the permit is already unambiguous.

Interestingly, despite agreeing with the PCHB that the language of the ISGP was unambiguous, the COA decided that contrary to established precedent—and the findings of the quasijudicial body the Legislature explicitly tasks with reviewing Ecology's actions—Ecology's *post hoc* statements regarding its "intent" for the scope of the ISGP should be afforded great weight.

V. CONCLUSION

For the foregoing reasons, the WPPA respectfully requests that the Court grant the Petitioners' Petition for Review, to reverse the COA's ruling as to PCHB Legal Issue 11, and affirm the PCHB decision.

This document contains 2,434 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.

CSD ATTORNEYS AT LAW P.S.

s/ Sara B. Frase

Frank J. Chmelik, WSBA No. 13969
Holly M. Stafford, WSBA No. 40674
Sara B. Frase, WSBA No. 56922
Attorneys for Amicus Curiae
Washington Public Ports Association

CSD ATTORNEYS AT LAW

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- richard@smithandlowney.com
- ronald.lavigne@atg.wa.gov
- sfrase@csdlaw.com

Comments:

Sender Name: Sara Frase - Email: sfrase@csdlaw.com

Address:

1500 RAILROAD AVE

BELLINGHAM, WA, 98225-4542

Phone: 360-671-1796

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