No. ______

In the Supreme Court of the United States

PORT OF TACOMA; SSA TERMINALS, LLC; AND SSA TERMINALS (TACOMA), LLC,
Petitioners,

v.

PUGET SOUNDKEEPER ALLIANCE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 505 of the Clean Water Act ("CWA") grants federal courts jurisdiction over citizen suits enforcing "a permit or condition of a permit" if it is "issued under" Section 402 of the CWA. 33 U.S.C. § 1365(a), (f). Section 402 of the CWA establishes the National Pollutant Discharge Elimination System ("NPDES"), a federal permitting regime that governs the discharge of pollutants from point sources into navigable waters. *Id.* § 1342.

The State of Washington, like many States, issues general pollutant-discharge permits that regulate broad sectors of the economy. These permits frequently combine federal requirements for point sources subject to the CWA with additional requirements authorized by state law. Below, the Ninth Circuit held that Section 505 authorizes citizens to enforce in federal court *any* condition of Washington's combined permit for industrial-stormwater discharges, even those adopted under state-law authority that mandate "a greater scope of coverage" than the CWA. App.13a (citation omitted). As the Ninth Circuit acknowledged, that rule "directly conflicts with" Second Circuit precedent on the authority conferred by the CWA's citizen-suit provision. App.13a, 19a (citation omitted).

The question presented is:

Whether Section 505 of the CWA authorizes citizens to invoke the federal courts to enforce conditions of state-issued pollutant-discharge permits adopted under state law that mandate a greater scope of coverage than required by the CWA.

PARTIES TO THE PROCEEDING

Petitioners Port of Tacoma; SSA Terminals, LLC; and SSA Terminals (Tacoma), LLC, were defendants-appellees/cross-appellants below. SSA Marine, Inc., was a defendant-appellant below and is not participating in the proceedings before this Court. APM Terminals Tacoma, LLC, and Don Esterbrook were named as defendants in the United States District Court for the Western District of Washington and are not participating in the proceedings before this Court.

Respondent Puget Soundkeeper Alliance was plaintiff-appellant/cross-appellee below.

RELATED PROCEEDINGS

Puget Soundkeeper Alliance v. Port of Tacoma, Nos. 21-35881, 21-35889, 22-35061, United States Court of Appeals for the Ninth Circuit, judgment entered June 10, 2024.

Puget Soundkeeper Alliance v. SSA Terminals, LLC, No. C17-5016-BHS, United States District Court for the Western District of Washington, judgment entered September 16, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Port of Tacoma; SSA Terminals, LLC; and SSA Terminals (Tacoma), LLC, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App.1a-20a) is reported at 104 F.4th 95. The opinion of the district court granting SSA Terminals, LLC, and SSA Terminals (Tacoma), LLC's motion for summary judgment (App.48a-69a) is reported at 561 F. Supp. 3d 1113. The opinion of the district court granting the Port of Tacoma's motion for partial summary judgment (App.21a-47a) is available at 2020 WL 6445825. The district court's order entering Rule 54(b) judgment (App.70a-75a) is available at 2021 WL 4226162.

JURISDICTION

The court of appeals entered its judgment on June 10, 2024. On September 3, 2024, Justice Kagan extended the time to file a petition for a writ of certiorari to September 25, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced in the petition appendix. App.76a-89a.

INTRODUCTION

This case presents a fundamental question about the reach of the citizen-enforcement provision of the Clean Water Act ("CWA"), 33 U.S.C. § 1365 ("Section 505"). The decision below reaffirmed the Ninth Circuit's position that Section 505 authorizes citizens to bring *federal* lawsuits that seek to enforce *state*-law water-pollution requirements that "mandate 'a greater scope of coverage than that required' by" the CWA. App.12a-13a. According to the Ninth Circuit, private citizens can enforce in federal court *any* condition of a state-issued pollutant-discharge permit—including conditions authorized by state law that go beyond the CWA—as long as *some* portion of that permit implements the federal National Pollutant Discharge Elimination System ("NPDES") program.

The Ninth Circuit's expansive rule on citizen-suit standing demands this Court's review. As the Ninth Circuit itself acknowledged, this rule "directly conflicts" with the Second Circuit's decision in *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993), *cert. denied*, 513 U.S. 811 (1994). App.13a (citation omitted). In *Atlantic States*, the Second Circuit held that "state regulations, including the provisions of [state-issued pollutant-discharge] permits, which mandate 'a greater scope of coverage than that required' by the federal [Act] and its implementing regulations are *not* enforceable through a citizen suit." 12 F.3d at 359 (quoting 40 C.F.R. § 123.1(i)(2)) (emphasis added). The Ninth Circuit below held the exact opposite—while acknowledging the conflict. App.13a.

The Ninth Circuit's rule also is plainly mistaken: It distorts the CWA's statutory language, ignores EPA's stated limits on the reach of the CWA, produces several significant and anomalous consequences, and raises serious constitutional concerns. As Judge O'Scannlain observed below, the Ninth Circuit's position "expand[s] citizen standing in a way Congress never intended." App.18a (specially concurring). As this case shows, that expansion eviscerates Congress' careful drafting of the CWA by illogically allowing private citizens to enforce in federal court permit conditions regulating activities Congress expressly *exempted from* the CWA's scope.

The issue is unquestionably important. There are hundreds of thousands of permits issued under the NPDES program, many of which combine expansive state-imposed water-pollution conditions with federal CWA requirements. As Judge O'Scannlain observed, the Ninth Circuit's ruling below paves the way for costly and unpredictable federal citizen litigation. App.19a-20a. Because of the CWA's strict-liability scheme and attorney's fees and penalty provisions, such litigation can impose massive costs on its targets, including municipalities and other local government entities, based on even minor violations of state-authorized permit conditions that go far beyond the federal requirements.

The Ninth Circuit's rule also impedes the sovereign ability of States to decide how to enforce their own laws, placing authority over such matters in the hands of a virtually limitless—and entirely unaccountable—force of private litigants, who lack the traditional political checks on prosecutorial actions. This case is just one example. Recognizing the challenges of compliance with its increasingly

complex water laws, Washington—like many States—has decided not to allow private actions to enforce violations of its water-pollution requirements. Yet, under the Ninth Circuit's rule, citizen groups like respondent can override Washington's enforcement choices, pursuing even minor violations of its wide-reaching permits. These private enforcement actions not only burden the federal judicial system, but also divert attention and taxpayer resources from local government programs, including those addressing more pressing environmental issues.

This Court's review is warranted to resolve the acknowledged circuit split over this critical question and ensure that the CWA's citizen-suit provision serves its proper, and properly limited, role.

STATEMENT OF THE CASE

A. The Clean Water Act

1. Enacted in 1972, the CWA establishes a regulatory framework that honors our federal structure by dividing the authority to regulate water pollution between the Federal Government and the States. *See Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). By its own terms, the CWA aims to "protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use … of land and water resources," 33 U.S.C. § 1251(b), while also providing for direct federal oversight when necessary.

That federal oversight is found principally in the Act's prohibition of most discharges of "pollutants" from "point sources" to "navigable waters." *Id.* §§ 1311(a), 1362(12). Nonexempt discharges from point sources to navigable waters require a permit, typically from the EPA or a State with delegated

authority. These permits, known as NPDES permits, are issued under Section 402 of the CWA. *See id.* § 1342. NPDES permits translate the CWA's general requirements into specific limitations on the types and amounts of pollutants a point source can discharge, and can include monitoring and reporting requirements to ensure compliance. *Id.* § 1342(a)(2).

As originally enacted, the CWA regulated virtually all discharges from point sources into navigable waters, including stormwater discharges—rainwater that flows over the ground surface instead of being absorbed. But in 1987, Congress amended the Act to exempt "most 'discharges composed entirely of stormwater.'" *Decker v. Northwest Env't Def. Ctr.*, 568 U.S. 597, 603-04 (2013) (quoting 33 U.S.C. § 1342(p)(1)). Congress decided that only certain categories of stormwater discharges require an NPDES permit, including discharges "associated with industrial activity." 33 U.S.C. § 1342(p)(2)(B).

Congress directed EPA to define stormwater discharges "associated with industrial activity." *Decker*, 568 U.S. at 603-04 (citation omitted). In response, EPA defined the term to encompass discharges from "any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant." 40 C.F.R. § 122.26(b)(14). EPA specified eleven categories of facilities meeting those requirements, including transportation facilities with "vehicle maintenance shops, equipment cleaning operations, or airport deicing operations." *Id.* § 122.26(b)(14)(i)-(xi).

EPA was equally clear that the CWA's "associated with industrial activity" term "excludes areas located

on plant lands separate from the plant's industrial activities, … as long as the drainage from the excluded areas is not mixed with storm water drained from" an industrial-activity area. *Id.* § 122.26(b)(14). So, for transportation facilities with "vehicle maintenance shops, equipment cleaning operations, or airport deicing operations," "[o]nly those portions of the 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." *Id.* § 122.26(b)(14)(viii). Stormwater drainage from areas where marine ports do not conduct such activities—such as parking lots, docks, and wharfs—are therefore not subject to the federal requirements for industrial-stormwater discharges.

2. The CWA authorizes enforcement actions by federal and state regulators. 33 U.S.C. § 1342(b); *see id.* § 1319(a)(3) (authorizing EPA to enforce "condition[s] or limitation[s] … in a permit issued under section 1342 of this title"). It also contains a citizen-suit provision authorizing private citizens to sue in federal court to enforce "an effluent standard or limitation under [the CWA]" or "an order issued by [EPA] or a State with respect to such a standard." *Id.* § 1365(a)(1). Congress defined "effluent standard or limitation" to include "a permit or condition of a permit issued under section 1342 of this title that is in effect under this chapter." *Id.* § 1365(f).

Congress intended citizens to play a limited role in enforcing the CWA. As this Court has recognized, "[t]he Senate Report [accompanying the bill including Section 505] noted that '[t]he Committee intends the great volume of enforcement actions [to] be brought

by the State,' and that citizen suits are proper only 'if the Federal, State, and local agencies fail to exercise their enforcement responsibility.'" *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987) (quoting S. Rep. No. 92-414, at 64 (1971), 1971 WL 11307). In other words, the citizen suit was intended to "supplement rather than to supplant governmental action." *Id.*

The CWA's citizen-suit provision is nevertheless a potent weapon. Any citizen may invoke it to allege ongoing violations of the CWA where administrative authorities have declined to bring suit, in order to seek injunctive relief as well as civil penalties payable to the U.S. Treasury. 33 U.S.C. §§ 1319(d), 1365(a). As this Court has recognized, those penalties—assessed on a per-day, per-violation basis, even for completely inadvertent violations—can be "crushing." *Sackett v. EPA*, 598 U.S. 651, 660 (2023). Citizens can also recover attorney's fees, expert witness fees, and other litigation costs. 33 U.S.C. § 1365(d).

B. Washington's Industrial Stormwater General Permit

The CWA charges EPA with issuing NPDES permits in the first instance, but most States—including the State of Washington—are authorized by EPA to issue NPDES permits themselves. 33 U.S.C. § 1342(b); 40 C.F.R. § 123.1(d)(1); Wash. Rev. Code § 90.48.260. Exercising its delegated authority, the State of Washington regulates specific discharge categories through "general water quality permits" issued by the Washington State Department of Ecology ("Ecology") that apply to categories of facilities or industries. 2-PortSER-234. Most of these general permits combine the federal CWA

requirements with Washington's expansive state-law conditions on the release of stormwater or waste materials into ground and surface waters. *See* Wash. Admin. Code § 173-226-070.

At issue here are the 2010 and 2015 versions of the Washington Industrial Stormwater General Permit ("ISGP"), which regulates stormwater discharges from industrial facilities.[1] The ISGP is a combined permit "designed to satisfy" both "the requirements for discharge permits under [the CWA] and the state law governing water pollution control." *Id.* § 173-226-010. Indeed, the ISGP expressly states that it is both an "[NPDES] and State Waste Discharge General Permit" issued "[i]n compliance with the provisions of The State of Washington Water Pollution Control Law … and [t]he [CWA]." App.27a.

The ISGP's scope is staggering. The 2015 version stretches nearly 70 pages, demanding adherence to detailed manuals that span hundreds more. 5-ER-965–1033. Through this far-reaching permit, Washington exerts control over more than 1,200 different facilities. 2-PortSER-265.

Beginning in 2010, Ecology omitted from its ISGP the terms of the federal regulations confining regulation of industrial stormwater to "[o]nly those portions of a [transportation] facility" where vehicle maintenance, equipment cleaning, airport deicing, or other activities specifically defined as industrial take place. App.5a (quoting 40 C.F.R. § 122.26(b)(14)(viii)). At the time, however, Ecology told permittees that the ISGP would apply only to the portions of transportation facilities "where vehicle

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[1] The ISGP is reissued every five years. *See* 40 C.F.R. § 122.46(a).

and equipment maintenance or equipment cleaning occurs." 2-PortSER-358; *see* 2-PortSER-346–358.

After the deadline to challenge Ecology's 2010 ISGP passed, Ecology notified two ports that they needed to expand ISGP compliance to encompass *all* port property. App.31a. The ports responded that the implications of such interpretation would be "extreme," explaining that expanding the ISGP's scope would have "major ramifications on a port's ability to comply" and would "require substantial efforts and expenditures." *Id.*; 4-ER-743.

For example, the ISGP mandates stormwater runoff sampling and corrective actions such as the installation of rainfall collection and treatment systems. 5-ER-988–991, 1005–008. These measures are infeasible for overwater structures such as docks or wharfs that support electrified crane operations, as they are intentionally designed to avoid water collection for safety reasons. Notably, federal regulations contain no similar requirements for stormwater discharges from docks, wharfs, railroad lines, and other areas used solely for transportation.

Ecology nonetheless instructed ports that they needed to take the necessary—and costly—steps to implement the ISGP's requirements "as soon as possible" on "all areas of industrial activity." App.31a-32a. But Ecology stated that it would exercise its "enforcement discretion" to allow time to comply with those requirements. *Id.*

C. West Sitcum Terminal Wharf

The Port of Tacoma—one of the largest container ports in the U.S.—is a deepwater port located on Commencement Bay in south Puget Sound, Washington. It is a publicly owned and operated

facility. 4-ER-738. Through The Northwest Seaport Alliance, a marine cargo operating partnership of the Tacoma and Seattle ports, the Port of Tacoma's customers move goods across the world. 4-ER-771–72.

The West Sitcum Terminal (the "Terminal") is a 137-acre marine cargo terminal at the Port of Tacoma, leased and operated by SSA Terminals (Tacoma), LLC—a privately owned company that provides stevedoring and marine terminal services. App.3a. "The Wharf" is a 12.6-acre overwater portion of the Terminal used only for loading and unloading cargo containers. *Id.* No vehicle maintenance, equipment cleaning, or airport deicing occurs at the Wharf. *Id.* The Wharf is graded to avoid receiving stormwater flows from other portions of the Terminal. 4-ER-772.

The following picture shows the Wharf in yellow, along with the surrounding area (*see* App.50a):

The 2010 and 2015 ISGPs authorized stormwater discharges from the Terminal. Because the Wharf is used only to load and unload containers and does not receive discharges from portions of the Terminal defined by EPA as "associated with industrial activity," discharges from the Wharf are exempted from federal industrial-stormwater requirements. App.4a. But the Ninth Circuit concluded below that such runoff does fall within the state-law-derived provisions of Washington's expanded ISGP. App.8a-11a. Accordingly, under the Ninth Circuit's interpretation of the combined permit, areas like the Wharf must meet the State's requirements for industrial-stormwater discharges—even though stormwater runoff from the Wharf is exempt from such requirements under the CWA.

D. Proceedings Below

1. In January 2017, Puget Soundkeeper Alliance ("Soundkeeper") initiated this CWA citizen suit against APM Terminals Tacoma, LLC ("APMT"), the then-tenant of the West Sitcum Terminal. App.51a. Among other claims, Soundkeeper contended that APMT violated the 2010 and 2015 ISGPs by failing to apply "all known, available, and reasonable methods of prevention, control and treatment" of pollutants. *Puget Soundkeeper All. v. APM Terminals Tacoma, LLC*, No. C17-5016 BHS, 2018 WL 2560995, at *1 (W.D. Wash. June 4, 2018).

After APMT terminated its operations and SSA Terminals (Tacoma), LLC, took over as the Terminal's tenant, Soundkeeper added the Port and SSA[2] as

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[2] "SSA" refers collectively to petitioners SSA Terminals, LLC, and SSA Terminals (Tacoma), LLC.

defendants, alleging (among other claims) that the Port and SSA failed to comply with ISGP requirements on the Wharf—even though no industrial activities as defined by EPA's regulations take place there. App.51a; *supra* at 10.

As relevant here, the Port and SSA moved for summary judgment on Soundkeeper's claims related to stormwater discharges from the Wharf. They first argued that the plain language of the ISGP does not cover discharges from the Wharf. 3-SSA_SER-773; 4-ER-706–11. But they added that, "[e]ven if Ecology exercised state authority to extend the ISGP to all portions of a transportation facility," such broader coverage "is not federally enforceable" by private citizens because "stormwater discharges from the Wharf are exempted from the federal NPDES program by Congress and the EPA." 4-ER-801; *see also* 3-SSA_SER-771–73. As the Port and SSA explained, the CWA's citizen-suit provision does not authorize suits purporting to enforce state-law conditions of state-issued permits that mandate a greater scope of coverage than the CWA. 4-ER-791–802 (citing *Atlantic States*, 12 F.3d at 359).

The district court held that the plain terms of the ISGP do not cover the entire footprint of industrial facilities and thus do not cover discharges from the Wharf. App.43a-45a, 65a-66a. The court accordingly did not reach the alternative argument that, to the extent the ISGP extended such coverage as a matter of state law, that expanded scope of coverage could not be enforced in a CWA citizen suit.

2. The Ninth Circuit reversed. App.1a-20a. The court disagreed with the district court's reading of the 2010 and 2015 ISGPs, concluding that those permits imposed conditions on stormwater discharges from

the entire footprint of the Terminal, including the Wharf. App.8a-11a. The court acknowledged that, "[i]n this respect, the ISGPs differ from the federal regulations"—acknowledging that, "[u]nder the ISGPs, coverage is triggered … when the facility conducts industrial activity, not when a particular discharge is 'associated with industrial activity.'" App.8a (quoting 40 C.F.R. § 122.26(a)(1)(ii)).

The court then rejected the Port and SSA's alternative argument that ISGP conditions regulating discharges from the Wharf are not enforceable in a CWA citizen-suit action "because they exceed the requirements of the federal regulations." App.11a. Citing Ninth Circuit precedent, the court held that "*all* permit conditions" are enforceable in a CWA citizen suit, App.12a (quoting *Northwest Env't Advocs. v. City of Portland*, 56 F.3d 979, 986 (9th Cir. 1995) ("*NWEA II*"))—even if a condition was adopted pursuant to state law and "prescribe[s] 'a greater scope of coverage' than the federal regulations," App.12a-13a. The court acknowledged that this precedent "directly conflicts with the Second Circuit's decision in *Atlantic States*," but stated it was "bound to follow the former." App.13a (citation omitted).

Judge O'Scannlain specially concurred. While acknowledging that the panel opinion "faithfully follows Ninth Circuit precedent," Judge O'Scannlain emphasized that such precedent "created a circuit split" that remains and is a "source of ongoing confusion to parties, such as the Port of Tacoma," that have invoked the Second Circuit precedent. App.18a-19a. Echoing the concerns in an earlier dissent from the Ninth Circuit's refusal to rehear *NWEA II* en banc, he further explained that the Ninth Circuit's

position "continues to expand citizen standing in a way Congress never intended." *Id.* (discussing *Northwest Env't Advocs. v. City of Portland*, 74 F.3d 945, 946 (9th Cir. 1996) ("*NWEA III*") (O'Scannlain, J., joined by Hall, T.G. Nelson, and Kleinfeld, JJ., dissenting from denial of rehearing en banc)).

Judge O'Scannlain explained that the Ninth Circuit's rule not only "upset[s] the delicate balance envisioned by Congress in its promulgation of the current enforcement regime for environmental law," but also invites "excessive, costly, and counterproductive citizen suits, funded by the taxpayers, for the enforcement of standards that are imprecise and astronomically costly to the municipalities affected." App.20a (citation omitted).

REASONS FOR GRANTING THE WRIT

This petition readily satisfies all the traditional criteria for certiorari. First, as the Ninth Circuit acknowledged, its decision has entrenched a direct circuit conflict. Second, the Ninth Circuit's position is wrong. Text, context, and constitutional principles all make clear that the CWA's citizen-suit provision does not authorize private citizens to bring actions in federal court to enforce state-law permit conditions that mandate a greater scope of coverage than required by federal law. And, third, the question presented is undeniably important. The Ninth Circuit's decision upsets the delicate balance of state and federal authority over water-quality matters, hands enforcement decisions over to private interest groups or individuals lacking political checks against prosecutorial abuse, and invites excessive and costly regulatory litigation. Certiorari is thus warranted.

I. The Decision Below Cements An Acknowledged Circuit Conflict Over The Scope Of The CWA's Citizen-Suit Provision

The Ninth Circuit's decision reaffirms an entrenched circuit split over whether citizens can enforce in federal court conditions authorized by state law that go beyond the scope of the CWA.

1. As both the panel opinion and special concurrence acknowledged below, the Ninth Circuit's decision "directly conflicts with" the Second Circuit's ruling in *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993). App.13a; App.19a (O'Scannlain, J., specially concurring). In *Atlantic States*, the Second Circuit held that federal courts lack jurisdiction over citizen-enforcement actions alleging violations of permit conditions authorized by state law that go beyond the requirements of the CWA. *See* 12 F.3d at 358-60. That holding is irreconcilable with the decision below.

The facts of *Atlantic States* closely resemble those here. There, an environmental advocacy group claimed that Kodak violated a state-issued pollutant-discharge permit that—like the ISGP—was "devised to implement both the [CWA] and [state] law." *Id.* at 355. The group alleged that Kodak breached a permit condition adopted "pursuant to" New York law, which allegedly prohibited "the discharge of any pollutant" not specifically listed. *Id.* at 359. The Second Circuit rejected the suit, concluding that, "even if Atlantic States is right about New York law" and the interpretation of Kodak's state-issued permit, the action would still fail "because New York would be implementing a regulatory scheme broader than

the CWA, … and such broader state schemes are unenforceable through … citizen suits." *Id.* at 359-60.

For support, the Second Circuit quoted an EPA regulation specifying that, "[i]f an approved State [NPDES] program has greater scope of coverage than required by Federal law[,] the additional coverage is not part of the Federally approved program." 40 C.F.R. § 123.1(i)(2). It also relied on *United States Department of Energy v. Ohio*, which held that "penalties prescribed by state statutes" for violations of the CWA do not "arise under federal law" for purposes of waiving the United States's sovereign immunity from liability for citizen suits. 503 U.S. 607, 624-26 (1992). While "States may enact stricter standards for wastewater effluents than mandated by the CWA and federal EPA regulations," the Second Circuit explained, "private citizens have no standing" to enforce those standards in federal court under Section 505 of the CWA. *Atlantic States*, 12 F.3d at 357-58.

As Judge O'Scannlain recognized, "[t]his circuit split remains, as the Second Circuit has never reversed itself." App.19a. Accordingly, district courts within the Second Circuit continue to apply *Atlantic States* to dismiss citizen suits that, like Soundkeeper's here, seek to enforce permit conditions broader in scope than the CWA's requirements.[3]

2. The Ninth Circuit's decision below squarely conflicts with *Atlantic States*. The court held that Soundkeeper may enforce "*all* [ISGP] conditions" in

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[3] *See, e.g.*, *Alliance For Env't Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 84-85 (2d Cir. 2006); *Long Island Soundkeeper Fund, Inc. v. New York City Dep't of Env't Prot.*, 27 F. Supp. 2d 380, 386 (E.D.N.Y. 1998).

federal court, including those adopted under state-law authority that "prescribe 'a greater scope of coverage'" than the CWA. App.12a-13a. That is the exact opposite of what *Atlantic States* held—that citizens *lack* standing under the CWA to enforce state-law conditions that go beyond the CWA's requirements. *See* 12 F.3d at 358-60. Moreover, in reaching this holding, the Ninth Circuit reaffirmed its earlier ruling in *NWEA II*, which the panel and concurring opinions below both explicitly recognized had created a "circuit split" with, and "directly conflicts" with, *Atlantic States*. App.13a, 18a-19a.

NWEA II involved a citizen suit brought against the City of Portland to enforce Oregon's generic water-quality standards, which were incorporated into Portland's NPDES permit. 56 F.3d at 982. The CWA does not require permittees to comply with such standards; rather, it instructs States to use their water-quality standards to set "effluent limitations"—specific restrictions on the amount of pollutants that can be discharged—and to incorporate *those* limitations into NPDES permits. 33 U.S.C. § 1311(b). Portland thus argued that the court lacked jurisdiction over the citizen group's claims because they were based on state-law standards that went beyond the scope of the CWA. 56 F.3d at 986-90.

Initially, the Ninth Circuit panel agreed. In an opinion by Judge Ingram (a district judge sitting by designation), the majority highlighted the absence of "a single case in which a court held that citizen suits could be used to enforce [state] water quality standards" in federal court. *Northwest Env't Advocs. v. City of Portland*, 11 F.3d 900, 907-11 (9th Cir. 1993). The majority concluded that such standards

should be enforced "in the state courts," not "by way of a citizen suit" in federal court. *Id.* at 911.

Judge Pregerson dissented from that ruling. But then, the panel granted rehearing and adopted Judge Pregerson's position in another divided ruling. In the revised opinion—authored by Judge Pregerson and joined by Judge Ingram—the majority concluded that the citizen-suit provision "authorizes citizens to enforce *all* permit conditions" in federal court. *NWEA II*, 56 F.3d at 985-90. In so holding, the new majority leaned heavily on the CWA's legislative history, claiming it reflected a concern "about *non*-enforcement" and an intent to "grant *broad* authority for citizen enforcement." *Id.* at 986-87. Thus, according to the majority, the CWA's citizen-suit provision allows citizens to enforce permit conditions based on state standards that "regulate discharges outside the scope of the [CWA]." *Id.* at 988-89.

Judge Kleinfeld dissented. He argued that state water-quality standards, while useful for "government enforcement authorities (who decided not to prosecute this case against the City of Portland)," are "too uncertain and amorphous" to be implemented by private citizens and federal courts. *Id.* at 992. He emphasized that "citizens' suits may produce too much of a good thing with regard to enforcement," particularly because the "burdens" on courts and regulated parties often outweigh the "improvement" in water quality. *Id.* at 992-93. He further warned that "[i]f the private advocacy group" which brought the action prevailed, it would extract "a great deal of money from the citizens of Portland." *Id.* at 992.

The full Ninth Circuit declined to rehear the case en banc, with four judges dissenting. *NWEA III*,

74 F.3d at 946. In an opinion by Judge O'Scannlain, the dissenters argued that the panel opinion "significantly reshaped federal environmental law," contravened "the plain language of the [CWA]," "upset the delicate balance envisioned by Congress in its promulgation of the current enforcement regime for environmental law," sanctioned costly federal suits "at government expense," imposed potentially "astronomical[]" costs to municipalities, and created a circuit split with the Second Circuit. *Id.*

As Judge O'Scannlain recognized below, "[t]his circuit split remains." App.19a. And it is widely recognized. For example, multiple district courts within the Ninth Circuit have acknowledged the conflict between *NWEA II* and *Atlantic States*.[4] And practitioners and practice guides have highlighted it as well. *See, e.g.*, Roger Hanshaw, *State Courts vs. Federal Courts: Jurisdictional Battles over State Water Quality Standards*, 31 Nat. Res. & Env't 12, 14 (2016) ("Until the Supreme Court advises the environmental legal community otherwise, *Atlantic States* will remain a consideration that every citizen suit litigant must address when assessing whether federal jurisdiction exists over an alleged claim under

[4] *See, e.g.*, *Citizens' All. for Prop. Rts. v. City of Duvall*, No. C12-1093RAJ, 2014 WL 1379575, at *2 (W.D. Wash. Apr. 8, 2014) ("Although some courts disagree, the Ninth Circuit has held that citizens may enforce 'permit conditions based on both EPA-promulgated effluent limitations and state-established standards.'" (quoting *NWEA II*, 56 F.3d at 988 and citing *Atlantic States*)), *aff'd*, 636 F. App'x 430 (9th Cir. 2016); *Gill v. LDI*, 19 F. Supp. 2d 1188, 1195 (W.D. Wash. 1998) (explaining that the Ninth Circuit's rule in *NWEA II* conflicts with the Second Circuit's from *Atlantic States*).

the [CWA].").[5] This acknowledged circuit conflict alone warrants this Court's review.

3. But the split runs deeper than simply the Second and Ninth Circuits. The Fourth and Eleventh Circuits, as well as district courts across the country, have sided with the Ninth Circuit and observed that citizens can enforce *any* condition in a state-issued pollutant-discharge permit—without limitation. Oftentimes, these courts have acknowledged that their positions conflict with *Atlantic States*.

In *Parker v. Scrap Metal Processors, Inc.*, for example, the Eleventh Circuit expressly rejected the reasoning of *Atlantic States* in concluding that citizens could enforce any "state law standard[]" embedded in Georgia's General Storm Water Permits. 386 F.3d 993, 1005-06 (11th Cir. 2004). The Eleventh Circuit drew on *Culbertson v. Coats American, Inc.*, 913 F. Supp. 1572 (N.D. Ga. 1995), which explicitly held that the CWA "authorizes citizen suits for the enforcement of *all* conditions of [state-issued pollutant-discharge] permits," including those mandating compliance with all state water laws. *Parker*, 386 F.3d at 1008 (emphasis added) (quoting *Culbertson*, 913 F. Supp. at 1581).

Post-*Parker*, district courts within the Eleventh Circuit have sanctioned citizen suits based on permit conditions adopted under state law that extend

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[5] *See also* 2A Env't Law Practice Guide § 12A.04 (2024) (explaining that *NWEA II* "rejected th[e] view" from *Atlantic States* that permit conditions issued under the authority of state law are not enforceable in federal court); 1 Linda A. Malone, Env't Reg. of Land Use § 8:11 n.36 (2024) (discussing the conflicting holdings in *Atlantic States* and *NWEA II*, and listing these two cases among the four "significant cases" that "have addressed the scope of citizen suits under" the CWA).

beyond the CWA's scope. *See, e.g.*, *New Manchester Resort & Golf, LLC v. Douglasville Dev., LLC*, 734 F. Supp. 2d 1326, 1337-39 (N.D. Ga. 2010) (citing *NWEA II* and *Parker* in sanctioning a citizen suit based on "Georgia's in-stream water quality standards," which govern discharges to artificial and subsurface waters); *Parris v. 3M Co.*, 595 F. Supp. 3d 1288, 1324 (N.D. Ga. 2022) (citizen suit alleging violations of town's sewer-use ordinance and State's water-quality laws incorporated into a permit).

The Fourth Circuit has likewise held that a permit holder "must comply with *all* the terms of its permit" to avoid citizen suits, including state regulations "incorporated in" a permit that govern issues other than the discharge of CWA-regulated pollutants. *Ohio Valley Env't Coal. v. Fola Coal Co.*, 845 F.3d 133, 134-36, 143 (4th Cir. 2017). And district courts within the Fourth Circuit have followed suit, with many expressly rejecting *Atlantic States*'s reasoning along the way. *See, e.g.*, *Ohio Valley Env't Coal., Inc. v. Fola Coal Co.*, No. 12-3750, 2013 WL 6709957, at *18 (S.D.W. Va. Dec. 19, 2013) ("reject[ing] [the] reasoning" of *Atlantic States* and holding that citizens can enforce in federal court all "state law standards" incorporated into a permit); *Ohio Valley Env't Coal., Inc. v. Marfork Coal Co.*, 966 F. Supp. 2d 667, 684-85 (S.D.W. Va. 2013) (holding that citizens can enforce state-law water-quality standards, even those pertaining to pollutants for which a permit "did not establish specific permit effluent limitations").

Finally, district courts in other circuits have also blessed citizen suits enforcing state-authorized permit conditions beyond the scope of CWA's requirements, usually acknowledging that doing so conflicts with *Atlantic States*. *See, e.g.*, *Harpeth River*

Watershed Ass'n v. City of Franklin, No. 14-1743, 2016 WL 827584, at *3 (M.D. Tenn. Mar. 3, 2016) (disagreeing with *Atlantic States* and refusing to consider whether permit conditions adopted under state-law authority were "beyond the scope" of the CWA); *Stephens v. Koch Foods, LLC*, 667 F. Supp. 2d 768, 783 (E.D. Tenn. 2009) (citing courts holding "that plaintiffs have standing by alleging a violation of any NPDES permit condition").

4. Federal jurisdiction to entertain citizen suits under the CWA should not vary based on geographic circumstance. Petitioners strongly believe that the Ninth Circuit's position is wrong. But if the Court disagrees, then there is no basis to deny such jurisdiction to citizens in the Second Circuit. Either way, there should be one national rule on this important and recurring federal question. The Court's intervention is needed to resolve this conflict.

II. The Ninth Circuit's Decision Is Wrong

This conflict and confusion among the lower courts is reason enough to grant review. But certiorari is also warranted because the decision below is wrong. Interpreting the CWA's citizen-suit provision to allow federal lawsuits over permit conditions that exceed the scope of the CWA distorts the statutory text, ignores EPA's own regulations, produces significant and anomalous consequences, and raises serious constitutional concerns. The Ninth Circuit's flawed interpretation of an important federal statute demands this Court's correction.

1. The Ninth Circuit's rule flouts the CWA's plain terms. Section 505 of the CWA authorizes citizen suits—and grants federal jurisdiction—to enforce an "effluent standard or limitation" under the CWA. 33

U.S.C. § 1365(a). "[E]ffluent standard or limitation," in turn, is defined to include "a permit or condition of a permit" if it is "issued under section 1342 of this title." Id. § 1365(f) (emphasis added).

The term "under" means "[w]ith the authorization of" or "by virtue of." *The American Heritage Dictionary* 1395 (1978). As a result, permit conditions are enforceable in citizen suits only if issued "'pursuant to,'" or "'by reason of the authority of,'" 33 U.S.C. § 1342. *Ardestani v. INS*, 502 U.S. 129, 135 & n.2 (1991) (interpreting "expenses awarded under this subsection"); *see Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 52-53 (2008) ("under Chapter 11" means "pursuant to" Chapter 11). The "effluent standards or limitations" enforceable in federal court under Section 505 thus encompass only those conditions issued *under the authority of* the NPDES program. They do not cover any other possible condition a State might add to a permit under state-law authority, simply because part of that permit implements the NPDES program.

The Ninth Circuit effectively rewrote the statute. It held that an "effluent standard or limitation" includes *any* "'permit or condition thereof …'"—omitting the crucial qualifying phrase "'issued under section [1342].'" *NWEA II*, 56 F.3d at 986 (ellipsis in original). Only by excising this language could the court assert that the CWA allows citizens to sue to enforce any "permit or condition thereof." *Id.*

Courts may not read words out of a statute. That is especially true for the CWA, a "carefully drawn" statute in which Congress "carefully addressed" the "balance of public and private interests" implicated by the Act. *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). Through the CWA, Congress did not

grant private citizens a cause of action in federal court to enforce state pollutant-discharge regulations broader in scope than the requirements of the CWA. Instead, Congress carefully defined and limited its grant of jurisdiction to avoid overburdening federal courts, while leaving States free to adopt broader regulations under their own state-law authority. Rewriting the statute to confer jurisdiction on federal courts to enforce state-law permit conditions disrupts the "[careful] balance" Congress struck. *Id.* at 494-95.

2. Other interpretative tools confirm the statute's plain text. For example, the definition of "effluent standard or limitation" includes seven categories of enforceable restrictions, including the "permit or condition thereof" provision. *See* 33 U.S.C. § 1365(f)(1)-(7). None of the other six categories includes state-law matters; they all address federal obligations. *Id.* Those surrounding categories "cabin the contextual meaning" of Section 505, *Yates v. United States*, 574 U.S. 528, 543 (2015) (plurality opinion), confirming that it covers only federal, not state-law, conditions.

EPA's "contemporaneous[]" understanding of the CWA—an "especially useful" tool of statutory construction—cements this commonsense construction. *Loper Bright Enters. V. Raimondo*, 144 S. Ct. 2244, 2262 (2024). The CWA empowers EPA, like private citizens, to enforce violations of "condition[s] or limitation[s] … in a permit issued under section 1342 of this title." 33 U.S.C. § 1319(a)(3). Shortly after these enforcement provisions were enacted, EPA issued a regulation that clearly delineated the CWA's limits, cautioning that, "[i]f an approved State program has greater scope of coverage than required by Federal law[,] the

additional coverage is not part of the Federally approved program." 40 C.F.R. § 123.1(i)(2). For example, EPA noted that, "if a State requires permits for discharges into publicly owned treatment works, these permits are not NPDES permits." *Id.* § 123.1 second note. This regulation remains in effect today. And EPA has clarified the obvious implications of it: "Nor would these State-law requirements be federally enforceable" by citizens or EPA. 73 Fed. Reg. 70418, 70458 (Nov. 20, 2008) (citing 40 C.F.R. § 123.1(i)(2)). This longstanding interpretation of the CWA—not the Ninth Circuit's—is the correct one.

Moreover, EPA and lower courts have interpreted the nearly identical enforcement provisions of the federal Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*, which governs the management of solid and hazardous waste, to exclude state requirements that exceed federal standards. When EPA adopted comparable regulations for RCRA, 40 C.F.R. § 271.1, it explained that it "may not enforce that portion of a state program which is broader in scope of coverage than the Federal regulatory program," Memorandum from William A. Sullivan, Jr., *EPA Enforcement of RCRA-Authorized State Hazardous Waste Laws and Regulation*, Directive No. 9541.01-82x (Mar. 15, 1982), https://rcrapublic.epa.gov/files/12046.pdf. Applying that guidance, even courts on the Ninth Circuit's side of the split have refused to allow federal enforcement of state-law solid-waste requirements that lack a counterpart in the federal RCRA program. *See, e.g.*, *United States v. Recticel Foam Corp.*, 858 F. Supp. 726, 742 (E.D. Tenn. 1993); *Covington v. Jefferson County*, 358 F.3d 626, 642 (9th Cir. 2004). Their

contrary position on the nearly identical CWA citizen-suit provision is entirely inconsistent.

3. Extending Section 505 to cover permit conditions beyond the scope of the CWA also leads to a number of "illogical results"—another red flag. *Jones v. Hendrix*, 599 U.S. 465, 480 (2023).

For example, under the Ninth Circuit's ruling, any violation of a state-issued permit that incorporates NPDES requirements would give rise to a citizen action under the CWA that could result in the imposition of civil penalties payable to the United States Treasury and attorney's fees. *See supra* at 7. That makes no sense. Citizen suits exist to ensure "compliance *with the [CWA]*." *Gwaltney*, 484 U.S. at 60 (emphasis added). Congress did not open the federal courts for the enforcement of all state-law conditions just because they are included in the same permit as federal CWA requirements. Nor does it make sense to impose penalties payable to the U.S. Treasury for violations of state laws.

The Ninth Circuit went even further here. It held that Soundkeeper could enforce state-law conditions on discharges from portions of facilities explicitly *exempted* from the CWA's industrial-stormwater requirements. *See supra* at 12-14. But this just puts the CWA at war with itself, enabling private enforcers to invoke it to enforce conditions that vitiate "carefully drawn" federal limits. *International Paper Co.*, 479 U.S. at 494. Ultimately, the Ninth Circuit's rule dismantles the CWA's precise framework.

Further, under the Ninth Circuit's rule, one of two equally untenable outcomes must be true: either (i) citizens have *more* enforcement authority in federal court than EPA; or (ii) EPA has the ability to

enforce in federal court state laws incorporated into NPDES permits. Both scenarios are unacceptable. As for the first, this Court has repeatedly emphasized that the citizen-suit provision is only a limited "supplement[]" to the enforcement powers vested in EPA. *Gwaltney*, 484 U.S. at 60; *see Middlesex Cnty. Sewerage Auth. V. National Sea Clammers Ass'n*, 453 U.S. 1, 14, 17 n.27 (1981). It would be "paradoxical" to read the citizen-suit provision as giving *citizens* greater enforcement authority than the federal agency charged with enforcing the statute. *Askins v. Ohio Dep't of Agric.*, 809 F.3d 868, 875-76 (6th Cir. 2016) (rejecting interpretation of CWA's citizen-suit provision that would "grant citizens *greater* enforcement authority than the U.S. EPA").

As for the second, EPA itself has disavowed authority to enforce state-law requirements that go beyond the CWA. *Supra* at 25-26. And allowing EPA to enforce matters of state law in federal court would raise serious federalism concerns. It would encroach on one of the most fundamental aspects of state sovereignty—the ability of a State to decide how, when, and by whom its own laws are enforced—while undermining the CWA's express intent to preserve state primacy in water-quality matters. *See* 33 U.S.C. § 1251(b). An interpretation that leads to this result cannot be correct either. Indeed, just last year, this Court rejected an "overly broad interpretation of the CWA's reach [that] would impinge on [the States'] authority" where Congress failed to "'enact exceedingly clear language'" expressing a desire to "'significantly alter the balance between federal and state power.'" *Sackett v. EPA*, 598 U.S. 651, 679-80 (2023).

The only outcome that avoids these untenable results is the one already compelled by the statute's plain text and EPA's implementing regulations: the CWA's citizen-suit provision does not extend to permit requirements adopted under state-law authority that go beyond the scope of the CWA.

4. The Ninth Circuit's rule also raises serious constitutional concerns, making it even more imperative that the CWA's citizen-suit provision not be expanded beyond its terms.

First, the Ninth Circuit's rule creates Article III problems. Article III of the Constitution gives the Judiciary authority to hear cases "arising under" federal law. U.S. Const. art. III, § 2, cl. 1. Under this Court's precedents, Congress cannot simply "grant jurisdiction over a particular class of cases" to meet Article III's "arising under" requirement. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 496 (1983); *see Mesa v. California*, 489 U.S. 121, 136 (1989) ("[P]ure jurisdictional statute[s] … cannot support Article III 'arising under' jurisdiction."). Instead, a case must actually "arise under" federal law for Congress to confer jurisdiction on federal courts under Article III to adjudicate it.

The Ninth Circuit's theory ignores that constitutional line. Soundkeeper claims a federal right to enforce permit conditions that regulate far beyond the federal mandate of the CWA, and that are implemented pursuant to state-law authority that does not include citizen enforcement. The Ninth Circuit's theory turns Section 505 into a jurisdictional grant that shoehorns *state-law* claims into *federal* court—precisely what Article III prohibits.

Moreover, even if this construction didn't raise Article III problems, it still violates this Court's admonition to strictly construe—not vastly enlarge—statutes that confer jurisdiction on the federal courts. *See, e.g.*, *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379 (1959) (explaining the "deeply felt and traditional reluctance of th[e Supreme] Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes").

Second, the Ninth Circuit's rule ignores the need to narrowly construe statutory provisions that empower private citizens to enforce the law, given their potential to "intru[de]" on government enforcement prerogatives. *Gwaltney*, 484 U.S. at 60-61; *see Garcia v. Cecos Int'l, Inc.*, 761 F.2d 76, 81 (1st Cir. 1985) (Wisdom, J.) ("The Supreme Court has demanded strict adherence to statutory provisions for citizens' suits in environmental litigation.").

In the citizen-suit context, a private plaintiff is "basically unchecked to exercise executive, prosecutorial authority as a 'private attorney general.'" Charles S. Abell, *Ignoring the Trees for the Forests: How the Citizen Suit Provision of the Clean Water Act Violates the Constitution's Separation of Powers Principle*, 81 Va. L. Rev. 1957, 1964 (1995). As a result, private citizens can launch CWA suits for reasons entirely unrelated to environmental protection—be it to target industries they dislike, attract donor dollars, or simply out of spite.

This unchecked power has led Justices of this Court to repeatedly question whether the citizen-suit mechanism violates Article II. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring); *id.* at 209 (Scalia, J., joined by Thomas, J., dissenting); *DOT*

v. Association of Am. Railroads, 575 U.S. 43, 62 (2015) (Alito, J., concurring); *see also United States ex rel. Polansky v. Executive Health Res., Inc.*, 599 U.S. 419, 442-450 (2023) (Kavanaugh, J., joined by Barrett, J., concurring) (recognizing the "substantial arguments" that qui tam suits violate Article II for similar reasons). Here, the Ninth Circuit's rule raises significant federalism concerns to boot by intruding on the sovereign ability of States to choose when and how to enforce their own environmental laws and conditions. *See infra* at 35-36.

The Ninth Circuit could, and should, have "avoid[ed] the significant constitutional and federalism questions" raised by its overly broad CWA interpretation. *Solid Waste Agency of N. Cook Cnty. v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001). States that wish to enforce state-law conditions in pollutant-discharge permits have the authority and ability to do so under state law. But Congress did not unleash a force of unchecked private attorneys general to invoke the jurisdiction of the federal courts to do so in their stead.

III. The Question Presented Is Important And Warrants This Court's Review In This Case

The importance of the question presented underscores the need for this Court's intervention.

1. This Court has repeatedly intervened to enforce the careful balance struck by the CWA and protect against overregulation. *See, e.g.*, *Sackett v. EPA*, 142 S. Ct. 896 (2022) (granting certiorari); *County of Maui v. Hawaii Wildlife Fund*, 139 S. Ct. 196 (2019) (same); *Decker v. Northwest Env't Def. Ctr.*, 567 U.S. 933 (2012) (same); *Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, 567

U.S. 933 (2012) (same); *see also City & Cnty. of S.F. v. EPA*, 144 S. Ct. 2578 (2024) (same).

The Court's intervention is likewise needed here. As Judge O'Scannlain observed, the Ninth Circuit's expansive interpretation of the CWA's citizen-suit provision upsets the "delicate balance envisioned by Congress in its promulgation of the current enforcement regime for environmental law." App.20a (citation omitted). Indeed, under the Ninth Circuit's rule, citizens—without any of the institutional checks governing enforcement agencies—can invoke the jurisdiction of the federal courts and assert even "technical" violations of state-law conditions that go beyond the scope of the CWA. Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 Duke Env't L. & Pol'y F. 39, 43, 49-50, 56-57, 62 (2001); *see also* Rick W. Jarvis, *A City Attorney's Citizens' Suit Survival Guide*, League of California Cities (May 1996) (apprising city attorneys on citizens' "creative" theories for bringing federal actions against municipalities, including by threatening to sue over violations of California "Discharge Requirements" that are "far broader than" the CWA's requirements).[6]

In practice, this dynamic has created its own unique breed of professional "citizen suit" plaintiff. Soundkeeper is a good example. According to its website, Soundkeeper has filed more than *170* CWA citizen-suit actions in federal court since 1992—many of which alleged violations of permit conditions that

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[6] https://www.cacities.org/UploadedFiles/LeagueInternet/2a/2a7c5332-7aef-4598-9218-c60b795f8119.pdf.

go beyond the CWA.[7] Indeed, Soundkeeper has already brought another lawsuit against SSA alleging ISGP violations from stormwater runoff at a wharf.[8] Imposing the ISGP's complex—and often infeasible—permit requirements on overwater, non-industrial areas like the Wharf makes them an easy target for citizen suits. The prospect of attorney's fees only heightens the appeal of bringing such suits. And the combination of ever-expanding state-law conditions and the possibility of lucrative fee awards—without the traditional checks on prosecutorial overreach or agency discretion—is a recipe for never-ending litigation never intended by Congress.

Moreover, these professional "citizen suit" plaintiffs target an increasingly expanding community regulated under complex and far-reaching permits. NPDES permits are ubiquitous: The federal government estimates that more than 330,000 project operators nationwide maintained active NPDES permits in fiscal year 2020. U.S. Gov't Accountability Off., *Clean Water Act: EPA Needs to Better Assess and Disclose Quality of Compliance and Enforcement Data* 7 (July 2021).[9] And forty-seven States issue those NPDES permits themselves, often incorporating

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[7] *See* Puget Soundkeeper, *Clean Water Act Lawsuits*, https://pugetsoundkeeper.org/strategy-citizen-lawsuits/ (last visited Sept. 18, 2024) ("CWA Lawsuits").

[8] *See Puget Soundkeeper All. v. SSA Marine, Inc.*, No. 24-cv-00438 (W.D. Wash. filed Apr. 1, 2024); *see also, e.g.*, *Communities for a Healthy Bay v. Husky Terminal & Stevedoring, LLC*, No. 24-cv-05662-BHS (W.D. Wash. filed Aug. 12, 2024) (another citizen group alleging violations of the ISGP at a wharf).

[9] https://www.gao.gov/assets/gao-21-290.pdf.

exclusively state requirements on top of the CWA requirements.

For example, multiple States have incorporated into their NPDES permits conditions on discharging pollutants to groundwater—even though Congress expressly *exempted* such discharges from the CWA.[10] And citizen-suit plaintiffs have taken note—bringing federal suits to enforce those broader conditions.[11]

The consequences of this enforcement regime are particularly severe for municipalities and public entities like the Port of Tacoma. Complex environmental litigation is increasingly expensive, particularly given the CWA's near-mandatory (for plaintiffs) fee-shifting provision. 33 U.S.C. § 1365(d); *see Saint John's Organic Farm v. Gem Cnty. Mosquito Abatement Dist.*, 574 F.3d 1054, 1063-64 (9th Cir. 2009) (a district court's discretion to deny a prevailing citizen fees "is narrow"). As Judge O'Scannlain noted, the Ninth Circuit rule "promises to invite excessive, costly, and counterproductive

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[10] *See, e.g.*, *Maryland Dep't of the Env't v. Assateague Coastal Tr.*, 299 A.3d 619, 633-34 (Md. 2023); *In re Reissuance of an NPDES/SDS Permit to United States Steel Corp.*, 954 N.W.2d 572, 577 (Minn. 2021).

[11] *See, e.g.*, *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 448 (M.D.N.C. 2015) (allowing citizens to enforce permit conditions that applied to groundwater and surface water and that regulated the safety of dams); *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.,* No. 7:13-cv-200, 2014 WL 10991530, at *1 (E.D.N.C. Aug. 1, 2014) (holding that a State has the "ability … to regulate groundwater on its own by imposing NPDES permit conditions" and a citizen can enforce such provisions); *Okanogan Highlands All. v. Crown Res. Corp.*, 544 F. Supp. 3d 1092, 1097 (E.D. Wash. 2021) (allowing citizens to enforce conditions of a combined permit regulating groundwater).

citizen suits, funded by the taxpayers, for the enforcement of standards that are imprecise and astronomically costly to the municipalities affected." *NWEA III*, 74 F.3d at 946. Given the limited resources available to government entities, litigation expenses can divert funds from essential government programs—costs that taxpayers themselves ultimately bear. *See* Susan A. Macmanus, *The Impact of Litigation on Municipalities: Total Cost, Driving Factors, and Cost Containment Mechanisms*, 44 Syracuse L. Rev. 833, 840-41 (1993).

The Ninth Circuit's rule also harms the States by undermining "the CWA's express policy to 'preserve' the States' 'primary' authority over land and water use." *Sackett*, 598 U.S. at 680 (quoting 33 U.S.C § 1251(b)). Many States, including Washington, have chosen not to grant their citizens a cause of action to enforce their water laws. *See* James R. May, *The Availability of State Environmental Citizen Suits*, 18-SPG Nat. Res. & Env't 53, 56 (2004, Westlaw). For good reason: States often need to rely on their own enforcement discretion when experimenting with more stringent regulatory approaches. Allowing private parties to make their own enforcement decisions can "frustrate" the very "objective[s] of environmental protection" by subjecting parties—especially municipalities—to litigation the State has chosen not to invite. Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 Temp. Env't L. & Tech. J. 55, 64 (1989, Westlaw).

Indeed, in light of the significant costs associated with obtaining compliance with its industrial-stormwater requirements on the entirety of an industrial facility, Ecology specifically told ports it would use its "enforcement discretion" to allow time

to comply. 4-ER-746. Yet the decision below allows citizens to override the State's discretion and enlist federal courts to enforce Washington's requirements, supplanting (i) Washington's enforcement prerogatives, (ii) the CWA's cooperative federalism, and (iii) this Court's precedents limiting citizen suits to a "supplementary role." *Gwaltney*, 484 U.S. at 60.

The fact that this case arises from the Ninth Circuit—the nation's largest circuit and a magnet for environmental litigation—amplifies the need for review. Environmental plaintiffs flock to the Ninth Circuit to launch their citizen suits, drawn by the sweeping environmental laws of its States. *See, e.g.*, David Adelman & Robert Glicksman, *Reevaluating Environmental Citizen Suits in Theory and Practice*, 91 Colo. L. Rev. 386, 430-31, 439-40 (2020). Many of these suits seek to enforce state-law permit conditions that are increasingly vague and expansive, extending well beyond federal requirements. *Supra* at 32-34. The Ninth Circuit's unequivocal reaffirmation of its overly broad interpretation of the CWA's citizen-suit provision will only invite more such actions.

2. This case is an ideal vehicle for resolving the question presented. Although citizen groups send hundreds of notices of intent to sue annually, very few citizen-suit cases make it to the courts of appeals, let alone this Court, because the costs and burdens of such litigation often force citizen-suit defendants to settle, rather than fight. *See Friends of the Earth*, 528 U.S. at 209-10 (Scalia, J., dissenting) (observing how citizen plaintiffs' "massive bargaining power ... is often used to achieve settlements requiring the defendant to support environmental projects of the plaintiffs' choosing"); Marc Robertson, *Environmental Ambulance Chasing: DOJ Urges Court To Scrutinize*

Clean Water Citizen-Suit Settlements, Forbes (June 26, 2018) (describing a Department of Justice court filing raising concerns about abusive CWA citizen suits). Indeed, Soundkeeper's own website proudly boasts that most of its citizen suits "resolve[] without going to trial."[12] This Court should not miss this opportunity to settle a well-entrenched circuit split over the breadth of the citizen-suit provision.

This case offers an ideal vehicle to do so. The question presented was dispositive to the judgment below and pressed at every step of this case. *See* App.11a, 6a. The Ninth Circuit's rejection of petitioners' position on the question presented was its sole basis for allowing Soundkeeper's suit against the Port to proceed once the Ninth Circuit determined that the ISGPs cover discharges from the Wharf. *See* App.11a-13a. And both the panel opinion and Judge O'Scannlain's special concurrence fully ventilated this issue and acknowledged the direct circuit conflict.

In short, the question presented clearly warrants review and is cleanly presented here.

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[12] *See* CWA Lawsuits, *supra*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 25, 2024

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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**PUGET SOUNDKEEPER ALLIANCE,
Plaintiff-Appellant,**

v.

**PORT OF TACOMA; SSA Terminals LLC;
SSA Terminals (Tacoma), LLC, Defendants-
Appellees,**

and

**APM Terminals Tacoma LLC; Don Esterbrook,
Defendants.**

**Puget Soundkeeper Alliance, Plaintiff-
Appellee,**

v.

Port of Tacoma, Defendant-Appellant,

and

**SSA Terminals LLC; SSA Terminals (Tacoma),
LLC; APM Terminals Tacoma LLC; Don
Esterbrook, Defendants.**

**Puget Soundkeeper Alliance, Plaintiff-
Appellee,**

v.

**SSA Terminals LLC; SSA Terminals (Tacoma),
LLC, Defendants-Appellants,**

and

**Port of Tacoma; APM Terminals Tacoma LLC;
Don Esterbrook, Defendants.**

No. 21-35881
No. 21-35899
No. 22-35061

Argued and Submitted December 7, 2022
Submission Withdrawn August 18, 2023
Resubmitted June 10, 2024
Seattle, Washington
Filed June 10, 2024

[104 F.4th 95]

Before: Diarmuid F. O'Scannlain, M. Margaret McKeown, and Eric D. Miller, Circuit Judges.

Opinion by Judge Miller;

Special Concurrence by Judge O'Scannlain

OPINION

MILLER, Circuit Judge:

Discharges of stormwater are not generally regulated under the Clean Water Act, but they are regulated when they result from certain industrial activities. This case involves a facility that conducts such activities. The question presented is whether regulation extends to all discharges from the facility or only to discharges from the portions of the facility where the industrial activities occur. We consider that question in the context of several different versions of Washington State's Industrial Stormwater General Permit, which implements the Clean Water Act in Washington. With respect to those permits that have not been challenged in state court, we conclude that the plain text of the permits extends coverage to the entire facility and that the validity of the permits is not subject to collateral attack in federal court. We therefore reverse the district court's contrary determination. With respect to the permit that is subject to an ongoing state-court challenge, we remand to allow the district court to

consider in the first instance the effect of the state proceedings on this case.

I

The Clean Water Act prohibits "the discharge of any pollutant by any person" into the waters of the United States without a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. § 1311(a); *see NRDC v. County of Los Angeles*, 725 F.3d 1194, 1198 (9th Cir. 2013). The Environmental Protection Agency has authority to issue regulations implementing the Act, 33 U.S.C. § 1361(a), and to issue NPDES permits, *id.* § 1342(a).

The West Sitcum Terminal is a 137-acre marine cargo terminal located on Commencement Bay, an arm of Puget Sound, in Tacoma, Washington. It is operated by the Port of Tacoma and by SSA Terminals, LLC and affiliated companies (collectively, the Port). At issue in this case is a 12.6-acre portion of the Terminal, commonly referred to as "the Wharf," where five large cranes load and unload container ships.

When rain falls on the Terminal, stormwater runs into Puget Sound, carrying with it metals and other pollutants. But in recognition that "[p]ractically speaking, rain water will run downhill, and not even a law passed by the Congress of the United States can stop that," the Clean Water Act does not require an NPDES permit for all discharges of stormwater. *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1530 (11th Cir. 1996); *see* 33 U.S.C. § 1342(p) (defining the scope of stormwater regulation). Instead, only certain categories of stormwater discharges require a permit.

One such category is stormwater discharges "associated with industrial activity." 33 U.S.C. § 1342(p)(2)(B). EPA's regulations define that category to include discharges from "[t]ransportation facilities" (further defined as facilities that fall within specified Standard Industrial Classifications) that house "vehicle maintenance shops, equipment cleaning operations, or airport deicing operations." 40 C.F.R. § 122.26(b)(14)(viii). The Terminal is such a facility, but the regulations do not require it to control every discharge of stormwater. Rather, they apply to "*[o]nly those portions* of the facility that are . . . involved in vehicle maintenance . . . , equipment cleaning operations, [or] airport deicing operations." *Id.* (emphasis added). Because such activities do not occur at the Wharf, discharges from there do not require NPDES permits.

Although the EPA has the authority to issue NPDES permits itself, 33 U.S.C. § 1342(a), it can delegate that responsibility to the States, *id.* § 1342(b); *see Southern Cal. All. of Publicly Owned Treatment Works v. EPA*, 8 F.4th 831, 834 (9th Cir. 2021). It has done so in almost every State, including Washington. 39 Fed. Reg. 26,061 (1974). Exercising its delegated authority, Washington regulates industrial stormwater discharges through a "general permit," a single NPDES permit that applies to all facilities conducting industrial activities that discharge stormwater to a surface water body or a storm sewer that drains to one. *See Alaska Cmty. Action on Toxics v. Aurora Energy Servs., LLC*, 765 F.3d 1169, 1171 (9th Cir. 2014). That permit, the Industrial Stormwater General Permit (ISGP), is issued by the Washington State Department of Ecology (Ecology), which is responsible for Clean

Water Act permitting on behalf of the State. At issue here are the three editions of the ISGP issued in 2010, 2015, and 2020, each with a term of five years.

The ISGPs purport to define the requirements of the Clean Water Act: They state that "[a]ny permit noncompliance constitutes a violation of the Clean Water Act." (Many of the words in the ISGPs are italicized; we omit the italics throughout.) But beginning in 2010, Ecology omitted the limiting terms of the federal regulations—that is, the terms confining regulation of industrial stormwater to "[o]nly those portions of a facility" where vehicle maintenance, equipment cleaning, and airport deicing take place—from the ISGPs governing discharges from the Port. 40 C.F.R. § 122.26(b)(14)(viii). Instead, the 2010 permit states that it applies to "[t]ransportation facilities"—not merely portions of such facilities—"which have vehicle maintenance shops, material handling facilities, equipment cleaning operations, or airport deicing operations." The relevant provisions of the 2015 and 2020 permits are the same.

Puget Soundkeeper Alliance (Soundkeeper) is an environmental organization concerned with water quality in Puget Sound. It brought this action under the citizen-suit provision of the Clean Water Act, 33 U.S.C. § 1365, alleging that the Port had violated the Act in various respects. In a memorandum disposition filed concurrently with this opinion, we address Soundkeeper's claims about the discharges from the Terminal that uncontroversially require some degree of regulation. In this opinion, we confine ourselves to considering whether stormwater discharges from the Wharf are subject to regulation.

The district court granted partial summary judgment to the Port on that issue. The court held that the ISGPs do not extend coverage to the entire footprint of facilities that conduct industrial activity. Although the "Permit Coverage" sections of the ISGPs omit the limiting terms from the federal regulations, the court looked to Table 1, which appears just under the "Permit Coverage" section of the ISGPs, and which sets out a list of "activities requiring permit coverage." In the 2010 ISGP, the definition section says that "Table 1 lists the 11 categories of industrial activities identified in 40 CFR 122.26(b)(14)(i-xi) in a different format." Accordingly, the court reasoned, the inclusion of Table 1 in the ISGPs was tantamount to the incorporation of the federal regulations, including section 122.26(b)(14)(viii), which limits the definition of industrial activity—and thus the scope of regulatory coverage—to include only the portions of facilities where that activity takes place. Having determined that the ISGPs do not extend coverage to the Wharf, the court did not consider the Port's alternative argument that, to the extent the ISGPs do extend coverage to the Wharf, they may not be enforced in a citizen suit under the Clean Water Act.

The district court subsequently resolved the remaining claims and entered a final judgment, which both sides appealed under 28 U.S.C. § 1291.

II

The district court analyzed all three ISGPs—the 2010, 2015, and 2020 editions—together, but as the case comes before us, the 2020 ISGP presents distinct issues from the earlier permits. We begin by considering the 2010 and 2015 ISGPs before turning to the 2020 ISGP.

The district court believed that the ISGPs do not extend coverage to the Wharf. The Port defends that interpretation and, alternatively, renews its argument that if the ISGPs do extend coverage to the Wharf, they may not be enforced in a citizen suit under the Clean Water Act. We reject both arguments.

A

At the outset, we must determine the standard of review that applies to the ISGPs. The district court reasoned that "NPDES permits are treated like any other contract." *County of Los Angeles*, 725 F.3d at 1204. But that is true only of an individual permit—that is, a permit authorizing a particular entity to discharge a pollutant in a specific place. *See Alaska Cmty. Action on Toxics*, 765 F.3d at 1172. An ISGP is a general permit—that is, a permit that authorizes discharges by an entire class of potential dischargers across a region. *Id.* Because such a permit is more akin to a regulation, we interpret it as we would a regulation. *Id.* In either case, however, we must "give effect to the natural and plain meaning of [the permit's] words." *Id.* (quoting *Bayview Hunters Point Cmty. Advocates v. Metropolitan Transp. Comm'n*, 366 F.3d 692, 698 (9th Cir. 2004)); *accord County of Los Angeles*, 725 F.3d at 1204–05 ("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.'" (quoting *Piney Run Pres. Ass'n v. County Comm'rs of Carroll Cnty.*, 268 F.3d 255, 270 (4th Cir. 2001))). We review the district court's interpretation de novo. *Alaska Cmty. Action on Toxics*, 765 F.3d at 1172.

The 2010 and 2015 ISGPs plainly require that a transportation facility conducting industrial activities implement stormwater controls across the entire facility. The first section of the ISGPs, entitled "S1. Permit Coverage," begins by stating that "[t]his statewide permit applies to facilities conducting industrial activities that discharge stormwater." A facility "shall apply for coverage" if it "conduct[s] industrial activities listed in Table 1." Table 1 then lists industrial activities and includes an entry for "[t]ransportation facilities which have vehicle maintenance shops, material handling facilities, equipment cleaning operations, or airport deicing operations." In this respect, the ISGPs differ from the federal regulations. Under the ISGPs, coverage is triggered—that is, "[t]his statewide permit applies"—when the facility conducts industrial activity, not when a particular discharge is "associated with industrial activity." 40 C.F.R. § 122.26(a)(1)(ii). The nature of the facility, not the nature of the discharge, determines whether there is coverage. *See Puget Soundkeeper Alliance v. Pollution Control Hearings Bd.*, ––– Wash.App.2d ––––, ––––, 545 P.3d 333, 345 (2024) (holding that "it is plain that [the 2020 ISGP] requires coverage for the land and appurtenances at any transportation facility that conducts vehicle maintenance, equipment cleaning, or airport deicing operations—that is, the entire footprint of the transportation facility"). Because the Terminal is a facility conducting industrial activities, the permits apply to the entire facility, including the Wharf.

The Port argues that regardless of whether the permits writ large apply to the entire facility, the specific provisions of the permits—prescribing the actual substance of the permit-holders' obligations—

are written so as to control only discharges associated with industrial activity. To the contrary, the permits' specific obligations encompass the entire facility.

The ISGPs impose a range of obligations on permit-holders, all of which are derivative, in one way or another, of two core obligations: the preparation of a Stormwater Pollution Prevention Plan and regular sampling of discharges for pollutants. Those two obligations apply across the entire facility. In preparing a Stormwater Pollution Prevention Plan, the permit-holder must identify and implement "all known, available, and reasonable methods of prevention, control and treatment . . . of stormwater pollution." The permit offers no qualification or limitation based on where, on site, the stormwater pollution originates. A permit-holder must update the plan if it determines that the current plan would be "ineffective in eliminating . . . pollutants in stormwater discharges from the *site*." (emphasis added). The plan evidently concerns reduction of pollution from the site as a whole, not pollution associated with specific industrial activities. Likewise, the permit-holder must sample discharges from the entire site. Specifically, Condition S4 requires sampling of pollutant levels at "each distinct point of discharge off-site," not just at discharge points associated with industrial activity.

Because the obligations to prepare a Stormwater Pollution Prevention Plan and to sample encompass discharges from the entire facility, so, too, do the rest of the permit's obligations, such as the obligations to inspect discharges from the facility, to monitor discharges for exceedances of benchmark levels, to take corrective actions when pollutant levels in discharges exceed applicable benchmarks, and

to comply with water quality standards. Consistent with the opening sentence of the permits, the permits "appl[y]" to the entire Terminal.

Where the ISGPs limit the scope of their coverage, they say so clearly by exempting discharges or applying specific rules to them. For instance, "if any part of a facility . . . has a stormwater discharge" containing certain toxic pollutants, the permit-holder must secure an "individual NPDES" permit for that discharge. Similarly, the permits explain that "[f]or sites that discharge to both surface water and ground water, the terms and conditions of this permit shall apply to all ground water discharges," but permittees "are not required to sample on-site discharges to ground." Those carve-outs underscore that, in the ordinary course, the permits require compliance across discharges at an entire facility.

In reaching a contrary conclusion, the district court focused on the permits' definition of industrial activity. In the 2010 ISGP, the definition of "industrial activity" includes the following sentence: "Table 1 lists the 11 categories of industrial activities identified in 40 CFR 122.26(b)(14)(i-xi) in a different format." According to the district court, the ISGP therefore incorporates the federal regulatory definition of what industrial activities are covered at a transportation facility.

The 2015 ISGP does not include that sentence in its definition of "industrial activity," so that line of argument is of limited value in interpreting the 2015 ISGP. Regardless, we read both editions of the permit as requiring stormwater controls across the entirety of facilities conducting industrial activity. The permit "applies to facilities conducting industrial activities," not to discharges associated with industrial

activity. Even if the ISGPs mirrored 40 C.F.R. § 122.26(b)(14)(viii) by directly stipulating that "[o]nly those portions of the facility" involved in vehicle maintenance or equipment cleaning "are associated with industrial activity," the permits' coverage would continue to depend on whether the facility as a whole "conduct[s] industrial activities," not on whether specific discharges are associated with that activity. *See Puget Soundkeeper Alliance*, 545 P.3d at 345 (concluding that a contrary interpretation would require "read[ing] language into the definition and" making parts of the permit "superfluous").

Because the 2010 and 2015 ISGPs apply to the entirety of transportation facilities that conduct listed industrial activity, and because the Terminal is such a facility, the Port needed to implement appropriate stormwater controls across the footprint of the Terminal while the 2010 and 2015 ISGPs were in effect.

B

The Port argues that even if the ISGPs do regulate discharges from the Wharf, they are not enforceable in a citizen suit because they exceed the requirements of the federal regulations, and "Ecology never sought EPA approval to expand the scope of the NPDES program." The district court did not reach that argument, but it was preserved below. Because we may affirm on any ground supported by the record, we proceed to consider it. *Ellis v. Salt River Project Agric. Improvement & Power Dist.*, 24 F.4th 1262, 1268 (9th Cir. 2022).

The Port's argument is foreclosed by the plain language of the Clean Water Act's citizen-suit provision, which states that "any citizen may

commence a civil action . . . against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this chapter." 33 U.S.C. § 1365(a). The term "effluent standard or limitation under this chapter" is defined to include "a permit or condition of a permit issued under section 1342 of this title that is in effect under this chapter." *Id.* § 1365(f)(7); *see also id.* § 1342 (providing the general authorization for NPDES permitting). Here, there is no dispute that the ISGP is "a permit issued under section 1342," nor that it was "in effect." It follows that Soundkeeper may bring a citizen suit to challenge an alleged violation of the ISGP. And that is how we have previously read the statute: "The plain language of [section 1365] authorizes citizens to enforce *all* permit conditions." *Northwest Env't Advocs. v. City of Portland*, 56 F.3d 979, 986 (9th Cir. 1995); *accord County of Los Angeles*, 725 F.3d at 1204; *Community Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 956 (9th Cir. 2002); *see also Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1008 (11th Cir. 2004).

In urging a contrary result, the Port primarily argues that cases about the enforceability of permit conditions are inapposite because they involved "a condition plainly expressed in a permit." That is merely a reprise of the Port's argument that ISGP's plain language does not extend coverage to the Wharf, an argument that we have already rejected. The Port also invokes *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, in which the Second Circuit concluded that "state regulations, including the provisions of [state-issued] permits, which mandate 'a greater scope of coverage than that required' by the federal [Act] and its implementing regulations are not

enforceable through a citizen suit." 12 F.3d 353, 359 (2d Cir. 1993) (quoting 40 C.F.R. § 123.1(i)(2)), *as amended* (Feb. 3, 1994). Whether or not the ISGPs prescribe "a greater scope of coverage" than the federal regulations in the sense contemplated by the Second Circuit, we note that "the holding in [*Northwest Environmental Advocates*] directly conflicts with the Second Circuit's decision in *Atlantic States*," and we are bound to follow the former. *Northwest Env't Advocs. v. City of Portland*, 74 F.3d 945, 948 (9th Cir. 1996) (O'Scannlain, J., dissenting from denial of rehearing en banc).

The Port further argues that a State cannot issue NPDES permits that exceed the stringency of federal stormwater regulations unless the State formally "determines that the [stormwater] discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 40 C.F.R. § 122.26(a)(9)(i)(D). Assuming, without deciding, that Ecology was required to make such a determination but failed to do so, we hold that the Port cannot now collaterally attack the validity of conditions in the 2010 and 2015 ISGPs.

The Clean Water Act "does not contemplate federal court review of state-issued permits." *Southern Cal. All. of Publicly Owned Treatment Works v. EPA*, 853 F.3d 1076, 1086 (9th Cir. 2017) (quoting *American Paper Inst., Inc v. EPA*, 890 F.2d 869, 875 (7th Cir. 1989)). "[S]tate officials—not the federal EPA—have the primary responsibility for reviewing and approving NPDES discharge permits, albeit with continuing EPA oversight." *Akiak Native Cmty. v. EPA*, 625 F.3d 1162, 1164 (9th Cir. 2010)

(quoting *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 650, 127 S.Ct. 2518, 168 L.Ed.2d 467 (2007)).

We have previously observed that the Clean Water Act "make[s] the states, where possible, the primary regulators of the NPDES system." *Southern Cal. All. of Publicly Owned Treatment Works*, 853 F.3d at 1086 (quoting *American Paper Inst.*, 890 F.2d at 873). A party may object to the conditions of a state-issued permit on the basis of federal law, but "state courts can interpret federal law, and thus can review and enjoin state authorities from issuing permits that violate the requirements of the Clean Water Act." *Southern Cal. All. of Publicly Owned Treatment Works*, 8 F.4th at 839 (quoting *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1434 (9th Cir. 1991)). Indeed, parties seeking review of state decisions about permits are guaranteed judicial review in state courts "that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit." 40 C.F.R. § 123.30.

The principle that federal courts do not reconsider the validity of state-issued permits helps explain the settled rule that "[w]here a permittee discharges pollutants in compliance with the terms of its NPDES permit, the permit acts to 'shield' the permittee from liability under the CWA." *County of Los Angeles*, 725 F.3d at 1204; *see also EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205, 96 S.Ct. 2022, 48 L.Ed.2d 578 (1976); *Alaska Cmty. Action on Toxics*, 765 F.3d at 1171. That is, if a permit-holder complies with the terms of its permit, it need not fear liability under the Clean Water Act. Neither the EPA nor a citizen can use an enforcement action or a citizen suit to revisit the validity of permit conditions.

33 U.S.C. § 1342(k). As the Supreme Court has explained, "[t]he purpose of [section 1342(k)] seems to be to . . . relieve [permit holders] of having to litigate in an enforcement action the question whether their permits are sufficiently strict. In short, [section 1342(k)] serves the purpose of giving permits finality." *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n.28, 97 S.Ct. 965, 51 L.Ed.2d 204 (1977).

Accordingly, Soundkeeper could not hold the Port liable in a citizen suit on the theory that certain permit conditions in the ISGP were invalid because they were overly permissive. By the same token, however, the Port cannot avoid liability by arguing that certain terms in its permit are invalid because they are overly restrictive. We will not consider collateral attacks on the validity of permit conditions in the course of an enforcement action or citizen suit, whether those attacks arise offensively or defensively. *See Sierra Club v. Union Oil Co. of Cal.*, 813 F.2d 1480, 1488 (9th Cir. 1987) ("The state's method of adopting a more stringent standard should be subject to scrutiny only at the permit issuance stage."), *vacated*, 485 U.S. 931, 108 S.Ct. 1102, 99 L.Ed.2d 264 (1988), *reinstated as amended*, 853 F.2d 667 (9th Cir. 1988).

Our approach is consistent with that of other courts that have rejected collateral attacks in Clean Water Act enforcement actions. In *General Motors Corp. v. EPA*, a permit-holder sought to defend against an EPA enforcement action by arguing that certain terms in a state-issued permit exceeded the scope of lawful stormwater regulation under the Clean Water Act. 168 F.3d 1377, 1379 (D.C. Cir. 1999). The District of Columbia Circuit held that the

EPA had reasonably interpreted the Act to bar a permit-holder from collaterally attacking "the validity of its state permit in [a] federal enforcement proceeding." *Id.* at 1383. Instead, the court explained, the Act "remit[s] to a state forum any attack upon the validity of a state permit." *Id.*; *accord Public Int. Rsch. Grp. of N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 77–78 (3d Cir. 1990).

Likewise, the Port cannot mount a collateral attack on the validity of stormwater regulations in the 2010 and 2015 ISGPs. Ecology issued ISGPs in 2010 and 2015 providing that "[a]ny permit noncompliance constitutes a violation of the Clean Water Act." The Port now argues that the ISGPs in fact did not comply with the Act. The Port could have challenged the permits before the Washington State Pollution Control Hearings Board. *See* Wash. Rev. Code. § 43.21B.110(1)(c). Had the Board issued an unfavorable decision, the Port could have sought review in state court. *See id.* § 43.21B.180. As we will see, the Port availed itself of just that process when it came to the 2020 ISGP.

But the Port brought no such challenge to the stormwater regulations in the 2010 and 2015 ISGPs. And because it did not, it lost "forever the right to do so." *Public Int. Rsch. Grp. of N.J., Inc.*, 913 F.2d at 78 (quoting *Texas Mun. Power Agency v. Administrator of U.S. EPA*, 836 F.2d 1482, 1484 (5th Cir. 1988)). The conditions in the 2010 and 2015 ISGPs are valid and enforceable, and the Port may be liable for discharges in violation of their terms.

III

Finally, we turn to the 2020 ISGP. Soon after that permit was issued, several parties, including

Soundkeeper and the Port, appealed it to the Washington State Pollution Control Hearings Board. *See Puget Soundkeeper All. v. Department of Ecology*, PCHB No. 19-089c, 2021 WL 1163243 (Mar. 23, 2021). In March 2021, several months after the district court's partial summary judgment order, the Board issued a decision in which it agreed with the Port that "Ecology's deletion of the '[o]nly those portions of the facility' phrase from the federal regulation does not change the fact that only specified actions are listed in the permit coverage section" and that "Ecology's claim that the 2020 ISGP covers the entire transportation facility is without support from the plain language of the permit." *Id.* at *9.

We asked the parties to file supplemental briefs addressing the preclusive effect, if any, of the Board's decision. The Port argued that because the decision "addressed the same legal issue before this Court, it should be given preclusive effect" as a matter of issue preclusion. For its part, Soundkeeper argued that the Port had forfeited any argument for issue preclusion and that, in any event, because the Board's decision was issued after this court assumed jurisdiction over the appeal, any preclusive effect is barred by the priority-of-action rule, under which "the court which first gains jurisdiction of a cause retains the exclusive authority to deal with the action until the controversy is resolved." *Sherwin v. Arveson*, 96 Wash.2d 77, 633 P.2d 1335, 1337 (1981).

The Board's decision was not Washington's last word on the interpretation of the 2020 ISGP. After the parties filed their supplemental briefs in this court, the Washington Court of Appeals reversed the Board's decision. *Puget Soundkeeper Alliance*, 545 P.3d at 333. Paralleling the reasoning we have

employed in construing the 2010 and 2015 permits, it held that "if a transportation facility requires coverage under the 2020 permit because it conducts vehicle maintenance, equipment cleaning, or airport deicing operations, coverage under the permit applies to the entire transportation facility, not just limited areas." *Id.* at 346. The Port has petitioned for review of that decision in the Washington Supreme Court, and the petition remains pending.

The district court has not had an opportunity to consider the effect of the decision of the Washington Court of Appeals, the pending petition before the Washington Supreme Court, or the outcome of any potential remand to the Board. Rather than address those issues in the first instance, we vacate the district court's decision insofar as it resolved the scope of the 2020 ISGP, and we remand for further consideration. On remand, the district court may, in its discretion, evaluate how best to address the risk of piecemeal litigation and conflicting judgments, and it may consider any arguments that it determines to be properly presented to it, including arguments based on issue preclusion or the priority-of-action rule.

VACATED in part, REVERSED in part, and REMANDED.

O'SCANNLAIN, Circuit Judge, specially concurring:

While I concur in the Opinion of the Court because it faithfully follows Ninth Circuit precedent, I write separately to address my concern, ever since 1996, that such precedent is flawed, not only because it created a circuit split at the time, but because it continues to expand citizen standing in a way Congress never intended.

The precedent on which the Opinion correctly relies is *Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979 (9th Cir. 1995) ("*NWEA II*"). If *NWEA II* did not apply, private citizens such as Puget Soundkeeper Alliance would have no standing to sue as to that portion of the case dealing with stormwater discharges from the Wharf.

At the time that *NWEA II* was published, I and several other colleagues objected to its holding, noting that "any citizen will now be permitted to bring a lawsuit at government expense for the enforcement of state water quality standards that have not been translated into effluent limitations in federal permits." *Nw. Envtl. Advocates v. City of Portland*, 74 F.3d 945, 946 (9th Cir. 1996) (O'Scannlain, J., dissenting from the denial of rehearing en banc) ("*NWEA II* En Banc Dissental").

I wrote that "the holding in *NWEA II* directly conflicts with the Second Circuit's decision in *Atlantic States Legal Foundation v. Eastman Kodak*, 12 F.3d 353 (2d Cir. 1993)." *NWEA II* En Banc Dissental, 74 F.3d at 948. This circuit split remains, as the Second Circuit has never reversed itself, and may be a source of ongoing confusion to parties, such as the Port of Tacoma, which reasonably cited *Atlantic States*, in supplemental briefing, for its holding that Congress authorized states to enact standards on wastewater effluent stricter than those mandated by the CWA and federal EPA regulations, but it only authorized enforcement of those stricter standards *by states or EPA, not citizens.*

Indeed, the holding of *NWEA II* substantially altered the regulatory enforcement scheme of the Clean Water Act in a way that was not envisioned by Congress. As I objected at the time:

> "It should go without saying that the environment faces real and growing dangers that warrant protective measures and challenge us to develop innovative solutions. Nevertheless, by allowing citizens to enforce standards that Congress specifically allocated to government agencies to monitor, the court has upset the delicate balance envisioned by Congress in its promulgation of the current enforcement regime for environmental law. The result promises to invite excessive, costly, and counterproductive citizen suits, funded by the taxpayers, for the enforcement of standards that are imprecise and astronomically costly to the municipalities affected."

NWEA II En Banc Dissental, 74 F.3d at 946.

This objection is as strong today as it was in 1996. While Judge Miller's Opinion correctly applies *NWEA II* in dealing with the citizen-suit standing issue, I continue to believe that such precedent unfortunately goes beyond what Congress intended.

[2020 WL 6445825]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PUGET SOUNDKEEPER ALLIANCE, Plaintiff, v. APM TERMINALS TACOMA, LLC, et al., Defendants.	CASE NO. C17-5016 BHS ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTION TO SEAL, DENYING WITHOUT PREJUDICE DEFENDANT'S MOTION IN LIMINE, AND DENYING DEFENDANT'S MOTION FOR LEAVE TO SUPPLEMENT THE RECORD

This matter comes before the Court on Defendant Port of Tacoma's ("Port") motion for partial summary judgment, Dkt. 176, motion to seal, Dkt. 281, motion in limine, Dkt. 283, and motion for leave to supplement the record, Dkt. 299. The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby rules as follows:

I. PROCEDURAL HISTORY

On June 13, 2018, Plaintiff Puget Soundkeeper Alliance ("Soundkeeper") filed a third amended complaint bringing a citizen suit under Section 505 of the Clean Water Act ("CWA") as amended, 33 U.S.C. § 1365, against Defendants APM Terminals Tacoma, LLC ("APMT"), the Port, SSA Marine, Inc., and SSA Terminals, LLC. Dkt. 109.

On November 15, 2018, the Port filed a motion for summary judgment requesting that the Court dismiss Soundkeeper's "claims arising from stormwater discharges to the Wharf." Dkt. 176 at 18.

On November 30, 2018, the Washington Public Ports Association ("WPPA") and the Washington Maritime Federation ("WMF") (collectively "Amici") filed a motion for leave to file an amici curiae brief. Dkt. 182.

On December 3, 2018, Soundkeeper and Defendants SSA Marine, Inc. and SSA Terminals, LLC (collectively "SSA") responded to the Port's motion for summary judgment. Dkt. 185. On December 7, 2018, the Port replied. Dkt. 189.

On May 23, 2019, the Court granted WPPA and WMF's motion, renoted the pending dispositive motions, and requested the parties' positions on whether the Court should invite an amicus curiae brief from the Washington Department of Ecology ("Ecology"). Dkt. 252.

On June 10, 2019, the Court invited Ecology to submit an amicus brief. Dkt. 259. On August 16, 2019, Ecology filed a brief. Dkt. 269. On August 30, 2019, Soundkeeper, the Port, and SSA responded. Dkts. 275, 276, 279.

Also on August 30, 2019, the Port filed a motion to seal, Dkt. 281, and a motion in limine, Dkt. 283.

On September 6, 2019, Ecology, Soundkeeper, the Port, and SSA replied to the responses to Ecology's amicus brief. Dkts. 290, 291, 292, 293.

On September 16, 2019, Soundkeeper responded to the Port's motion in limine. Dkt. 296.

On January 28, 2020, the Port notified the Court of "administrative appeals filed with the State of Washington Pollution Control Hearings Board ("Board") concerning the new Industrial Stormwater General Permit effective January 1, 2020 ("2020 ISGP")." Dkt. 298 at 1.

On August 6, 2020, the Port filed a motion to supplement the record. Dkt. 299. On August 17, 2020, Soundkeeper responded. Dkt. 301. On August 21, 2020, the Port replied. Dkt. 303.

II. FACTUAL BACKGROUND

At issue in this case are industrial stormwater discharges at a large marine cargo terminal ("Terminal") used for ship unloading and cargo distribution. The Court will address the stormwater permitting process in general and then the facts of this case.

A. The Federal Statutes

The CWA is intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To that end, the CWA makes it unlawful to discharge any pollutant from a point source to navigable waters without a permit. *Id.* §§ 1311(a), 1362(12). The National Pollutant Discharge Elimination System ("NPDES") program is "[a] central provision of the Act" requiring that "individuals, corporations, and

governments secure [NPDES] permits before discharging pollution . . . ." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 602 (2013).

To achieve these goals, the CWA "anticipates a partnership between the States and the Federal Government." *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992); *Aminoil U. S. A., Inc. v. Cal. State Water Res. Control Bd.*, 674 F.2d 1227, 1229–30 (9th Cir. 1982) (the CWA created a "scheme of cooperative federalism" and "a 'delicate partnership' between state and federal agencies" (citation omitted)). Under this model of cooperative federalism, the Environmental Protection Agency ("EPA") sets requirements for CWA programs, and then delegates management of those programs to the states. *Aminoil*, 674 F.2d at 1229–30. Delegated states may then issue NPDES permits. 33 U.S.C. § 1342(b). Subject to federal approval, states can impose "requirements [that] are more stringent" than required by EPA. 40 C.F.R. § 123.1(i)(1). However, if a "State program has greater scope . . . than required by Federal law the additional coverage is not part of the Federally approved program." *Id.* § 123.1(i)(2). "For example, if a State requires permits for discharges into publicly owned treatment works, these permits are not NPDES permits." *Id.*

As originally enacted, the CWA regulated virtually all discharges, including all stormwater discharges. *Decker*, 568 U.S. at 602. For stormwater, however, EPA quickly found it impracticable to regulate the "countless owners and operators of point sources throughout the country." *Id.* As one court observed, EPA was facing "potentially millions of NPDES permits," because "[p]ractically speaking, rain water will run downhill, and not even a law

passed by the Congress of the United States can stop that." *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1530 (11th Cir. 1996). Congress, in response to this problem (and EPA's refusal to address millions of stormwater discharges), amended the CWA in 1987 to "exempt from the NPDES permitting scheme most 'discharges composed entirely of stormwater.'" *Decker*, 568 U.S. at 603 (quoting 33 U.S.C. § 1342(p)(1)). Instead, Congress decided that only certain stormwater discharges require a permit, including (as relevant here), discharges "associated with industrial activity." 33 U.S.C. § 1342(p)(2)(B).

Congress did not define "associated with industrial activity" and entrusted EPA to do so. *Decker*, 568 U.S. at 604; 33 U.S.C. § 1342(p)(4) (instructing EPA to issue regulations governing industrial stormwater discharges). EPA issued regulations that identified industrial activities by standard industrial classifications. Relevant here, EPA included transportation facilities that have "vehicle maintenance shops, equipment cleaning operations, or airport deicing operations." 40 C.F.R. § 122.26(b)(14)(viii). EPA's regulations explain that "[o]nly those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, [or] airport deicing operations . . . are associated with industrial activity." *Id.*

Congress also included a second phase of stormwater regulation and gave EPA the discretion to increase the scope of stormwater discharges that are regulated under the CWA. 33 U.S.C. § 1342(p)(5)–(6). EPA was first required to study potential stormwater sources in consultation with the states. *Id.*

§ 1342(p)(5). Congress then authorized EPA (in consultation with the states) to use the results of that study to issue regulations governing any additional stormwater sources that should be regulated under the CWA. *Id.* EPA completed that process in 1999, issuing the "Phase II" rule, "mandating that discharges from small municipal separate storm sewer systems and from construction sites between one and five acres in size be subject to the permitting requirements of the [NPDES]" and "preserv[ing] authority to regulate other harmful stormwater discharges in the future." *Envtl. Def. Ctr., Inc. v. U.S. EPA*, 344 F.3d 832, 840 (9th Cir. 2003).

EPA's Phase II regulations explain that EPA may add, on a case-by-case basis, other stormwater discharges (or categories of discharges) in specific "geographic areas" based on a determination that the discharge "contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 40 C.F.R. § 122.26(a)(9)(i)(D). In its description of the program, EPA explains that state regulation (with EPA approval) of this "reserved category" of discharges would be considered to be within the "scope" of the federally approved program. 64 Fed. Reg. 68,722, 68,781 (Dec. 8, 1999). Under this statutory scheme, Amici assert that, "[a]s of this date, EPA has not extended the CWA to include other stormwater discharges on docks and wharfs." Dkt. 182-4 at 11.

B. Delegation to Washington

In 1974, EPA authorized Ecology to administer the NPDES program in Washington. *See* 39 Fed. Reg. 26,061 (July 16, 1974); RCW 90.48.260. Under state law, Ecology also administers the State Water Pollution Control Act (RCW Chapter 90.48) which

makes it illegal for "any person" to discharge pollutants into waters of the state without a permit. RCW 90.48.080, 90.48.160. For industrial stormwater, Ecology decided to enforce both state and federal requirements using a general permit that covers a broad range of activities. *See* WAC 173-226-010 (regulations establishing "state general permit program" and explaining that "[p]ermits issued under this chapter are designed to satisfy the requirements for discharge permits under [the CWA] . . . and the state law governing water pollution control (chapter 90.48 RCW).").

Ecology's Industrial Stormwater General Permit ("ISGP") reflects this dual state and federal function. As the ISGP states, it is both a "National Pollution Discharge Elimination System (NPDES) and State Waste Discharge General Permit" that was issued "[i]n compliance with the provisions of The State of Washington Water Pollution Control Law, Chapter 90.48 Revised Code of Washington and The Federal Water Pollution Control Act (The Clean Water Act) Title 33 United States Code, Section 1251 et seq." Dkt. 51-1 at 2.

When Ecology issued the ISGP in 2009, it listed facilities that conducted industrial activities in a table. Dkt. 270-1 at 7. The last category of activities requiring permit coverage were "[t]ransportation facilities which have vehicle maintenance shops, material handling facilities, equipment cleaning operations, or airport deicing operations . . . ." *Id.* at 8. Relevant to the instant dispute, this description does not include the limiting language of 40 C.F.R. § 122.26(b)(14)(viii) that "[o]nly those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation,

mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, [or] airport deicing operations . . . are associated with industrial activity." *Id.* Based on this exclusion of language, Ecology contends that "once coverage is triggered at a transportation facility, the ISGP applies to all areas of industrial activity at the facility, rather than only those areas where vehicle maintenance, equipment cleaning, or airport deicing occur." Dkt. 269 at 3. The permit defines "facility" and "industrial activity" as follows:

> *Facility* means any NPDES "point source" (including land or appurtenances thereto) that is subject to regulation under the NPDES program. See 40 CFR 122.2.
>
> *Industrial Activity* means (1) the 11 categories of industrial activities identified in 40 CFR 122.26(b)(14)(i-xi) that must apply for either coverage under this permit or no exposure certification, (2) any *facility* conducting any activities described in Table 1, and (3) identified by *Ecology* as a *significant contributor of pollutants.* Table 1 lists the 11 categories of industrial activities identified in 40 CFR 122.26(b)(14)(i-xi) in a different format.

Dkt. 270-1 at 54.

Ecology issued a companion fact sheet to summarize changes in the proposed 2010 permit. Relevant to the instant matter, Ecology stated that "[s]tormwater may become contaminated by industrial activities as a result of . . . contact with materials during loading, unloading or transfer from one location to another . . . ." Dkt. 270-2 at 10. Under a section specific to water transportation facilities,

Ecology identified potential sources of additional pollutants as "loading/unloading areas" and potential pollutants included "fuels and machinery lubricants, solvents, paints, heavy metals, and paint stripping wastes." *Id.* at 38.

Furthermore, Ecology issued an ISGP frequently asked questions ("FAQ") document. Dkt. 185-1. Ecology stated that the "document is intended as guidance only, and does not modify or otherwise change the permit requirements" and "[i]f there is any discrepancy between this guidance and the [ISGP], the permit requirements supersede this guidance." *Id.* at 2. Relevant to the instant dispute, the document provides a question and answer as follows:

> My transportation facility has vehicle maintenance activity and therefore requires permit coverage. Does the permit apply to the entire footprint of the facility, or just to the area where we conduct vehicle maintenance activity?
>
> The entire footprint of the industrial facility. Once a transportation facility has permit coverage, the permit conditions for sampling, inspection and stormwater management practices are required in all areas of industrial activity, rather than only those areas where vehicle maintenance, equipment cleaning and airport de-icing occur.

Id.

On October 21, 2009, Ecology issued a response to public comments. In the summary section, Ecology stated that "[t]he most significant changes are summarized below. The legal and technical basis for changes related to each public comment is included,

as appropriate." Dkt. 280-13 at 7. Regarding Ecology's decision to exclude language from the table of facilities that conduct industrial activities, Ecology provided as follows:

> Several commentors requested clarification on the permit requirements for facilities in the transportation sector (SIC codes 40XX, 41XX, 42XX, 43XX, 44XX, 45XX, and 5171). Ecology reviewed the applicable federal regulations, EPA Multi-Sector General Permit, discussed the issue with EPA (Region 10 and Headquarters). Changes have been made to Table 1 to improve clarity. One of these changes is to include "material handling facilities" in the criteria for permit coverage at transportation facilities [40 CFR 122.26(b)(14)]. Once a transportation facility obtains permit coverage, the specific areas and stormwater discharges authorized by the permit become site specific. Ecology disagrees with one commentor's suggestion that maintenance activity conducted away from the maintenance shop is not covered under the permit. The intent of the ISWGP is to cover all vehicle maintenance activities at industrial facilities, not just those performed at the physical location of the shop. Since this section of the permit is to specify which type of facilities require permit coverage, Ecology has decided to take the approach in EPA's MSGP and not include the "only those portions of the facility that are involved in vehicle maintenance . . ." statement requested by several commentors. Ecology also added definitions of "vehicle

> maintenance" and "material handling" based on EPA's Final Phase I Stormwater Rule.

Id.[1]

In June of 2010, Ecology permit managers verbally told two port managers that the presence of a vehicle maintenance shop anywhere on port property would trigger ISGP coverage on all port property. Dkt. 182-2 at 5. On July 27, 2010, WPPA sent Ecology a letter stating its concerns regarding the "implementation and enforcement" of the new ISGPs. *Id.* The ports objected to this expansive reading because the "implications are extreme." *Id.* It argued that expansion would require "implementing best management practices, including stormwater treatment, on hundreds or thousands of acres of property (versus a few areas where maintenance typically occurs)" and "has major ramifications on a port's ability to comply." *Id.*

On March 10, 2011, Ecology responded. *Id.* at 9–10. Ecology stated that "[o]nce a facility has [ISGP] permit coverage, the Permit's sampling, inspection, and stormwater management practices are required in all areas of industrial activity - rather than only those areas where vehicle maintenance, equipment cleaning, and airport deicing occur." *Id.* at 9. Ecology instructed the ports that they needed to take the

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[1] The inclusion of "material handling" facilities was challenged and subsequently removed from the ISGP. *Copper Dev. Assoc., Inc. v. State of Washington*, PCHB Nos. 09-135 through 09-141, Order on Summ. J., 2011 WL 62915, *4 (Wash. Pol. Ctrl. Bd. Jan. 5, 2011) ("The [subsequent] change eliminated permit coverage requirements for transportation facilities that have material handling facilities, in order to make the permit term consistent with the applicable definition in federal regulations. 40 C.F.R. § 122.26(b)(14)(viii).").

necessary steps to "implement the Permit requirements on all areas of industrial activity as soon as possible" and that Ecology would use its "enforcement discretion" with respect to the areas outside vehicle maintenance areas to allow the ports time to comply. *Id.* This enforcement discretion would last until June 1, 2011. *Id.* Relevant to the instant dispute, Ecology did not elaborate on the term "industrial activity" for areas other than vehicle maintenance, equipment cleaning, and airport deicing.

On November 6, 2014, Ecology's Water Quality Specialist Jeff Killelea ("Killelea") sent an email to another Ecology employee discussing the relevant amendment. Killelea's explanation was as follows:

- Prior to 2010, the ISGP mirrored the 40 CFR language regarding transportation facilities, which stated:
  - Only those 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 one of the other 11 categories of industrial activities listed in this appendix are associated with industrial activity.
  - This had the practical effect of excluding most material handling, storage, loading/unloading areas from the ISGP's sampling and BMP requirements; even though stormwater from these areas is highly contaminated with zinc, copper, sediment, petroleum, etc.

To address this loophole, the "only hose portions . . ." language was struck from the draft 2010 ISGP. We received public comments from Ports and consultants requesting that the language be reinstated.

• WQ PMT and regional stormwater staff carefully considered the public comments, policy issues, etc., and decided to issue the final 2010 ISGP without the exclusion language (**based on state authority**). This effectively required permit coverage at the entire industrial facility (entire port/rail yard/tank farm, etc.), not just the maintenance areas.

• WQP management met with the Ports to discuss this issue in 2010, and provided a follow up letter that extended "enforcement discretion" until the end of the year - to allow Ports and their tenants to update Stormwater Plans, adjust sampling locations, etc.

Dkt. 280-20 at 3–4 (emphasis added).

On December 3, 2014, Ecology issued a document summarizing and responding to some public comments on the proposed 2015 ISGP. Dkt. 185-2. Relevant to the instant matter, the document provides as follows:

Summary of the Range of Comments:

• EPA's definition of industrial activities associated with "transportation facilities" limits NPDES coverage to specific portions of a transportation facility:

o (viii} Transportation facilities classified as Standard Industrial Classifications 40, 41, 42 except 4221-25}, 43, 44, 45, and 5171 which have vehicle maintenance shops, equipment

cleaning operations, or airport deicing operations. Only those 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 paragraphs (b)(14) (i)-(vii) or (ix)-(xi) of this section are associated with industrial activity.

- The Draft 2015 ISGP and Draft 2015 Fact Sheet continue the omission of the limiting language in the Table 1 summary of the 11 categories of industrial activities identified in 40 CFR 122.26(b)(14)(i-xi).
- While this omission may seem innocuous given the ISGP's directive that Table 1 is merely 40 CFR 122.26(b)(14)(i-xi) in a different format, the years since the promulgation of the 2010 ISGP have shown that the omission has led to profound confusion and significant consequences that were never identified, analyzed, or subjected to notice and other required procedures in the context of the 2010 ISGP.

Response to the Range of Comments:

Ecology has considered the comment and has decided to retain the omission of the following statement from 40 CFR 122.26(b)(14)(viii): "Only those 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 paragraphs (b)(14) (i)-(vii) or (ix)-(xi) of this section are associated with industrial activity." No change was made to the final ISGP in response to this comment.

Id. at 78.

C. The Facility

The Port owns the 137-acre Terminal at issue in this matter. While the majority of the Terminal is not at issue in this matter, the parties dispute a 12.6-acre section commonly referred to as the Wharf. Here, five enormous ship-to-shore cranes load and unload large shipping containers from docked vessels. *See* Dkt. 176 at 2–3.

In March 1983, the Port leased the Terminal to APMT. As part of its operation of the Terminal, APMT applied for and received an ISGP. Dkt. 51-1. On October 2, 2017, Ecology terminated APMT's coverage under the ISGP and granted the Port coverage under the permit. Dkt. 82-3. Ecology informed the Port that it had 30 days to appeal the general permit's applicability as to the Port. *Id.* at 82-3 at 3. Also, on that date, SSA began its lease with the Port for the Terminal.

On October 23, 2017, the Port signed Ecology Agreed Order #15434 (the "Agreed Order"). Dkt. 82-4. The Agreed Order required the Port, subject to Ecology review, to design, construct, and have operational a stormwater treatment system. *Id.* at § IV. The Port has prepared, and Ecology approved, an Engineering Report for a stormwater treatment system for the Terminal. Dkt. 82-6.

The Port's Stormwater Pollution Prevention Plan ("SWPPP") includes a sampling plan and documentation regarding areas where the Port does

not collect stormwater samples. Relevant to the instant matter, the October 2017 SWPPP provides as follows:

> The type of activities that occur along the wharf are substantially identical to the activities that occur in the upland drainage areas associated with [basin] WS1 and [basin] WS2. In addition, collecting samples from the wharf discharge points that are representative of industrial activities in the area would require access underneath the deck or along the edge of the wharf, which is considered unsafe due to tides and/or ship activity and container offloading activity. As such, discharges from the deck drains, scuppers, and power trench and utility vault drains along the wharf are not sampled since they are substantially identical to the discharges from their respective upland drainage areas contributing to WS1 and WS2; and because the ISGP does not require sampling in unsafe conditions.
>
> The industrial activities, site conditions, potential pollutant sources, expected pollutant concentrations, and implemented best management practices (BMPs) associated with the WS1 and WS2 drainage areas are substantially identical. As such, discharges from WS2 will not be sampled since they are substantially identical to WS1 discharges.

Dkt. 87-30 at 4. The Port's June 2018 SWPPP provides in relevant part as follows:

> Discharges from the deck drains are considered to be substantially identical to those monitored from the upland areas of WS2 and are therefore

> exempt from monitoring in accordance with S4.B.2.c requirements. The deck drain discharge points are considered to discharge substantially identical effluent to the WS2 discharge location as activities along the wharf are similar or less intensive than those conducted in the upland. Activities in the upland portion of the basin include hostler truck traffic, container handling, and mobile vehicle and equipment maintenance. Activities in the wharf area of the basin west of the power trench include hostler truck traffic, container handling, and crane maintenance. Material storage and mobile fueling are generally not performed in the area. As discussed previously, the hostler trucks that access the wharf area are exclusively used at the terminal and do not travel outside Basin B, which should reduce [total suspended solids] and turbidity in stormwater discharges relative to the other Terminal basins subject to over the road traffic and potentially track-on from offsite.

Dkt. 186-1 at 7. The Port's October 2018 SWPPP states that "[n]o activities described in 40 CFR § 122.26(b)(14)(viii) are conducted on the wharf and the wharf does not discharge stormwater associated with industrial activity, as defined in 40 CFR § 122.26(b)(14)(i)-(xi)." Dkt. 178-5 at 9.

III. DISCUSSION

A. Nondispositive Motions

The Port filed a motion to seal and a motion in limine. First, "[a]ny motion in limine must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve which matters really are in dispute. A good faith effort to confer requires a face-to-face meeting or a telephone conference." Local Rules W.D. Wash. LCR 7(d)(4).

Regarding the motion in limine, Soundkeeper argues that the Court should deny the Port's motion in limine because it failed to file a certificate that it conferred in good faith to resolve the issue without Court intervention. Dkt. 296. The Court agrees and therefore denies the Port's motion. Soundkeeper also argues that the Court should preclude the Port from filing any additional motions in limine because all motions in limine must be filed in one brief. *Id.* at 7 (citing Local Rules W.D. Wash. LCR 7(d)(4)). The Court declines to order such relief, but it informs the Port that filing another motion without conferring may result in sanctions.

Regarding the motion to seal, the Port moves to seal certain exhibits because they may contain privileged information. Dkt. 281. No party responded to the Port's motion. The Court agrees with the Port to the extent that the documents should be provisionally sealed pending further rulings on whether the documents are privileged or relevant. Therefore, the Court grants the Port's motion and provisionally seals the requested documents.

B. Summary Judgment

The Port moves for partial summary judgment arguing that stormwater discharges from the Wharf "are not 'discharges associated with industrial activities' pursuant to EPA's regulations (40 C.F.R. § 122.26(b)(14)(viii)) and are therefore not subject to the federal NPDES program or citizen suit enforcement of the NPDES program." Dkt. 176 at 1.

1. Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt"). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The Court must consider the substantive evidentiary burden that the nonmoving party must meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory, nonspecific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888–89 (1990).

2. Permit's Scope

"NPDES permits are treated like any other contract." *Nat. Res. Def. Council, Inc. v. Cty. of L.A.*, 725 F.3d 1194, 1204 (9th Cir. 2013). "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.' . . . . If the permit's language is ambiguous, we may turn to extrinsic evidence to interpret its terms." *Id.* (quoting *Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll Cty., Md.*, 268 F.3d 255, 270 (4th Cir. 2001)).

In this case, the first question is the scope of the ISGP regarding industrial activities at the Port's wharf. The Port moved for summary judgment arguing that stormwater discharges from the wharf

"are not 'discharges associated with industrial activities' pursuant to 40 C.F.R. § 122.26(b)(14)(viii) and are therefore not subject to the federal NPDES program or citizen suit enforcement of the NPDES program." Dkt. 176 at 18. The Port recognized that Ecology may issue regulations beyond the scope of the federal NPDES program, but there is no private right of action for violations of such additional regulations. *Id.* at 17. SSA also argues that wharf discharges are beyond the scope of the federal program and that "even if Ecology had included stormwater sampling in wharf areas as part of the scope of the ISGP—which it has not—PSA could not bring a citizen suit enforcing such a regulation." Dkt. 184 at 3.

Soundkeeper responds that it may enforce all conditions of an NPDES permit in an enforcement proceeding and that the Port and SSA's arguments are an untimely and improper collateral attack on the scope of the permit. Dkt. 185. Soundkeeper relies primarily on Ecology's FAQ document and December 2014 summary of comments to support its position that the ISGP applies to all areas of the Port, including the wharf. *Id.* at 8–9.

The Port replies that "it is irrelevant how Ecology might interpret the ISGP or exercise independent state authority" to expand the scope of the ISGP. Dkt. 189 at 8. The Port first relies on an EPA final rule that provides in relevant part that "[i]f a State, Tribe, or local government were to require a permit for discharges exempt from the Clean Water Act NPDES program requirements, those permit requirements would not be considered part of an NPDES program. See 40 CFR 123.1(i)(2)." 71 Fed. Reg. 33628-01, *33635. Regarding the FAQ document, the Port asserts that the document specifically states that it

does not modify the ISGP and that Ecology's answer only states that permit requirements only apply to areas where "industrial activity" occurs without further defining that term. Dkt. 189 at 8.

Based on the parties' dispute regarding the interpretation of the ISGP, the Court invited Ecology to file an amicus brief. Dkt. 252. Ecology asserts that it "exercised its residual Clean Water Act authority under 33 U.S.C. § 1342(p)(2)(E) when it elected to extend the scope of ISGP coverage at transportation facilities that are required to obtain an NPDES permit under the Clean Water Act." Dkt. 269 at 2. Ecology's claimed extension is that the ISGP applies to "all areas of industrial activity" at the Port. *Id.* at 2–4.

The Port responds that Ecology's position is not supported by any evidence. Specifically, the Port argues "Ecology's amicus brief is unsupported by even one document or declarant identifying when Ecology supposedly made a policy decision to exercise such authority, when it notified the public of this 'decision' or any analysis prepared to support such designation." Dkt. 279 at 1. For example, the Port submits Ecology's economic impact analysis ("EIA") for the proposed 2010 ISGP, and Ecology's alleged expansion is not described in the "Changes to the Permit" section. Dkt. 280-5 at 9. Similarly, the Port submitted Killelea's 2014 email wherein he stated that the scope of the permit was expanded "based on state authority." Dkt. 280-20 at 3.

SSA contends that Ecology's position and Killelea's supporting declaration "are, at best, revisionist history." Dkt. 276 at 2. SSA relies on the ISGP's definition of industrial activities that cites and incorporates the language of 40 CFR 122.26(b)(14)(i-

xi) to conclude that the clear language of the ISGP contradicts Ecology's position. *Id.* at 2–4.

Soundkeeper responds, without much analysis, and simply provides the conclusion that "the plain language of the [ISGP] is not ambiguous." Dkt. 275 at 4.

Ecology replied and clarified that it expanded the scope of the permit under its residual state authority. Dkt. 290. Ecology also argued that it properly delegated this authority to Ecology employees and that it need not consider certain factors in expanding the scope of the ISGP with regard to transportation facilities. *Id.* at 4–6. Ecology did not address SSA's argument regarding the incorporation of the federal regulatory language in the specific definition of industrial activity. Soundkeeper likewise ignores this argument in its reply. Dkt. 293 at 3.

Turning to the law of contract interpretation, "[a] written contract must be read as a whole and every part interpreted with reference to the whole, with preference given to reasonable interpretations." *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999), *opinion amended on denial of reh'g*, 203 F.3d 1175 (9th Cir. 2000). "Whenever possible, the plain language of the contract should be considered first." *Id.*

In this case, the plain language of the ISGP supports the Port and SSA's positions. Although the table listing industrial facilities does not include the federal language, the specific definition of industrial activities cites and incorporates this language. That definition "means (1) the 11 categories of industrial activities identified in 40 CFR 122.26(b)(14)(i-xi) that must apply for either coverage under this permit" and

"Table 1 lists the 11 categories of industrial activities identified in 40 CFR 122.26(b)(14)(i-xi) in a different format." Dkt. 270-1 at 54. This is clear, unambiguous language establishing that the ISGP relies on the federal regulations and its "only those portions" exclusionary definition as applied to transportation facilities. Neither Soundkeeper nor Ecology provides a persuasive argument undermining the ISGP's direct reference and incorporation of the federal language. Therefore, the Court concludes that the Port's ISGP defines industrial activity as "[o]nly those 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 paragraphs (b)(14) (i)–(vii) or (ix)–(xi) of this section are associated with industrial activity."

Although Ecology contends that it intended to expand the scope of the ISGP, "courts must interpret contracts, if possible, so as to avoid internal conflict." *Trident Ctr. v. Conn. Gen. Life Ins. Co.*, 847 F.2d 564, 566 (9th Cir. 1988). Interpreting the ISGP as Ecology contends would result in an internal conflict between the table of industrial activities, Table 1, and the statement "Table 1 lists the 11 categories of industrial activities identified in 40 CFR 122.26(b)(14)(i-xi) in a different format." Dkt. 270-1 at 54. Ecology, as drafter of the ISGP and aware of the confusing conflict from public comments, Dkt. 185-2 at 78, fails to harmonize its intent with its permit. Thus, the Court must reject Ecology's position regarding an

expansive permit and grant the Port's motion on the clear language of the ISGP.[2]

3. Alternative Activities

Soundkeeper argues that even if the Court accepts the Port's position on the initial issue, the Port engages in other industrial activities on the wharf that compel compliance with stormwater management. Dkt. 185 at 18–24. Soundkeeper relies on section (b)(14)'s preamble that sets forth a non-exhaustive list of industrial activities such as material handling and rail lines for carrying cargo. *Id.* at 19–20. The problem, however, is that this list of activities may not overcome the exclusionary language in part (viii) that limits industrial activities to "only those portions" of transportation facilities. Ecology recognized this "loophole" and unsuccessfully attempted to expand the scope of the ISGP by listing "material handling activities." The Court likewise recognizes the controlling and specific limiting language is set forth in part (viii) and rejects Soundkeeper's argument that transportation facilities are subject to regulation for the non-exhaustive list of activities set forth in the preamble. Based on this conclusion, the Court also rejects Ecology's argument that loading and unloading of containers at the wharf constitute industrial activities subject to regulation. Dkt. 269 at 4–5.

Soundkeeper cites *Puget Soundkeeper All. v. Rainier Petroleum Corp.*, C14-0829JLR, 2015 WL 13655379 (W.D. Wash. Dec. 16, 2015) for the proposition that this Court held that industrial

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[2] The Court denies the motion to supplement the record because the additional evidence is irrelevant to the plain language of the ISGP.

activities other than vehicle maintenance and/or equipment cleaning at a marine transportation facility required stormwater management. Dkt. 185 at 21–22. This case, however, is neither controlling nor persuasive because the regulated entity was both a marine transportation facility and a petroleum storage facility, which significantly expanded the industrial activities that it had to monitor and manage.

4. Regulated Activities

The Port moves for summary judgment on any of Soundkeeper's claims arising from stormwater discharges at the wharf. Dkt. 176 at 18. Soundkeeper responds in part that vehicle maintenance and/or equipment cleaning occur on the wharf because the large mechanical cranes are maintained and cleaned in place on the wharf. Dkt. 185 at 24–25. To support this argument, Soundkeeper has submitted a report by Dr. Richard Horner citing grease and gear oil spills observed during a site visit. Dkt. 187. The Port counters that Soundkeeper's reference to the cranes as "equipment" is dispositive because the ISGP only regulates "vehicle" maintenance and equipment cleaning. Dkt. 189 at 2–3. The Court agrees with the Port because equipment maintenance is not an industrial activity under 40 C.F.R. 122.26(b)(14)(viii) or the corresponding ISGP. Therefore, the Court grants the Port's motion on Soundkeeper's claims regarding discharges from the Port's wharf.

IV. ORDER

Therefore, it is hereby **ORDERED** that Port's motion for partial summary judgment, Dkt. 176, and motion to seal, Dkt. 281, are **GRANTED**, the Port's motion in limine, Dkt. 283, is **DENIED without**

prejudice, and the Port's motion for leave to supplement the record, Dkt. 299, is **DENIED**.

Dated this 3rd day of November, 2020.

s/Benjamin H. Settle
BENJAMIN H. SETTLE
United States District Judge

[561 F. Supp. 3d 1113]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PUGET SOUNDKEEPER ALLIANCE, Plaintiff, v. SSA TERMINALS, LLC, et al., Defendants.	CASE NO. C17-5016 BHS ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Defendants SSA Terminals (Tacoma), LLC ("SSATT") and SSA Terminals, LLC's ("SSAT") (collectively "SSA") motion for summary judgment. Dkt. 317. The Court has considered the briefings filed in support of and in opposition to the motion and the remainder of the file and hereby grants the motion for the reasons stated herein.

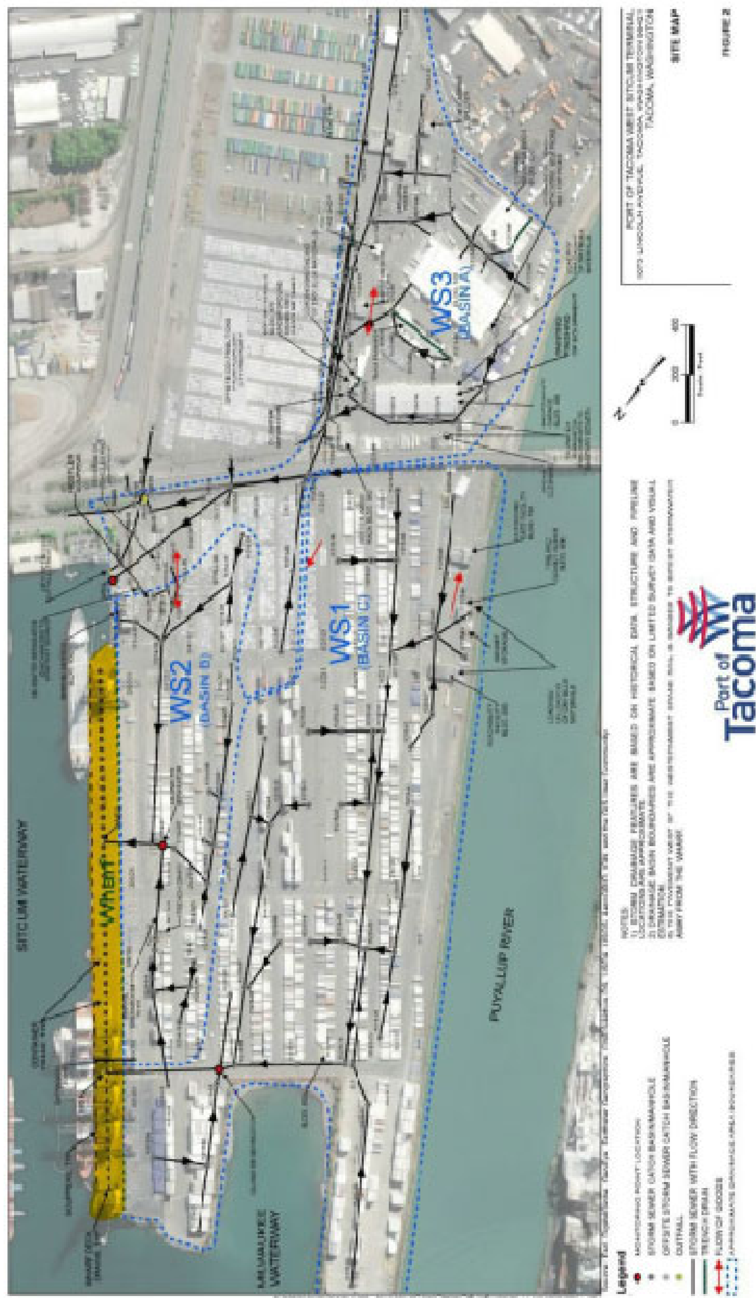
I. FACTUAL & PROCEDURAL BACKGROUND

A. Overview

As the parties are familiar with the extensive history of this case, the Court provides the following overview. This case is a citizen suit brought under Section 505 of the Clean Water Act as amended, 33 U.S.C. § 1365. Plaintiff Puget Soundkeeper Alliance ("Soundkeeper") seeks, *inter alia*, a declaratory judgment and injunctive relief for alleged violations

of the CWA and the National Pollutant Discharge Elimination System ("NPDES") permit authorizing discharges of pollutants from Defendants the Port of Tacoma and SSA's facility to navigable waters. Dkt. 254, Fourth Amended Complaint ("FAC"), ¶ 1.

At issue in this case are industrial stormwater discharges at a large marine cargo terminal ("Terminal") used for ship unloading and cargo distribution. The Port owns the 137-acre Terminal at issue in this matter. While the majority of the Terminal is not at issue, the parties dispute a 12.6-acre section commonly referred to as the "Wharf." Here, five enormous ship-to-shore cranes load and unload large shipping containers from docked vessels. The Wharf is depicted below, as provided in the Port's motion for partial summary judgment:



Dkt. 176 at 2.

Soundkeeper alleges, in part, that SSA is in violation of the NPDES permits that authorize discharges of stormwater associated with industrial activity and thus are in violation of Section 505 of the CWA. FAC, ¶ 65.

B. Procedural History

On January 9, 2017, Soundkeeper filed a complaint against Defendant APM Terminals Tacoma, LLC ("APMT") alleging ongoing violations of APMT's NPDES permit. Dkt. 1, ¶ 1. APMT was the lessee of the Terminal at the time of the initial complaint, and on November 28, 2017, Soundkeeper filed a second amended complaint adding the Port of Tacoma as a defendant, stating that the Port owns the facility and that APMT leases the facility. Dkt. 75.

On June 13, 2018, Soundkeeper filed a third amended complaint adding the Port's new tenants, Defendants SSA Marine, Inc. and SSAT. Dkt. 109. On June 4, 2019, the Court granted Soundkeeper's motion for leave to amend, Dkt. 253, and Soundkeeper filed its Fourth Amended Complaint, dropping APMT and SSA Marine, Inc. as parties and adding SSATT. Dkt. 254. Soundkeeper has settled all of its claims in this case against APMT via a consent decree. Dkt. 224.

The Port moved for partial summary judgment as to Soundkeeper's claims arising from stormwater discharges from the Wharf. Dkt. 176. Soundkeeper then filed a motion for partial summary judgment, arguing that (1) the Port is liable for APMT's violations, (2) the Port is liable for Level 3 corrective action requirements that occurred in 2013 and 2015, (3) the Port is liable for failing to monitor discharges from the Wharf, (4) the Port's stormwater pollution

prevention plans ("SWPPP") are inadequate, (5) Soundkeeper has standing to bring its claims, and (6) the Court has subject matter jurisdiction over the alleged violations. Dkt. 196. The Port responded and filed a cross-motion for summary judgment to dismiss Soundkeeper's claim against it in its entirety. Dkt. 210. SSA joined in the Port's opposition to Soundkeeper's motion. Dkt. 209.

The Court granted the Port's motion for partial summary judgment, Dkt. 304, and granted in part and denied in part the cross-motions for summary judgment, Dkt. 305.

1. Relevant Court Orders

The Port filed a motion for partial summary judgment requesting that the Court dismiss Soundkeeper's "claims arising from stormwater discharges to the Wharf." Dkt. 176 at 18. After extensive briefing from the parties and amici, the Court granted the Port's motion. Dkt. 304. The Port persuasively argued that stormwater discharges from the Wharf are not "discharges associated with industrial activities" pursuant to the Environmental Protection Agency's regulations (40 C.F.R. § 122.26(b)(14)(viii)) and are therefore not subject to the federal NPDES program or citizen suit enforcement of the NPDES program.

EPA has empowered the Washington State Department of Ecology to administer the NPDES program in Washington. *See* 39 Fed. Reg. 26,061 (July 16, 1974); RCW 90.48.260. Under state law, Ecology also administers the State Water Pollution Control Act (RCW Chapter 90.48) which makes it illegal for "any person" to discharge pollutants into waters of the state without a permit. RCW 90.48.080,

90.48.160. For industrial stormwater, Ecology decided to enforce both state and federal requirements using a general permit that covers a broad range of activities. *See* WAC 173-226-010 (regulation establishing "state general permit program" and explaining that "[p]ermits issued under this chapter are designed to satisfy the requirements for discharge permits under [the CWA] . . . and the state law governing water pollution control (chapter 90.48 RCW)").

Ecology's Industrial Stormwater General Permit ("ISGP") reflects this dual state and federal function. As the ISGP states, it is both a "National Pollution Discharge Elimination System (NPDES) and State Waste Discharge General Permit" that was issued "[i]n compliance with the provisions of The State of Washington Water Pollution Control Law Chapter 90.48 Revised Code of Washington and The Federal Water Pollution Control Act (The Clean Water Act) Title 33 United States Code, Section 1251 et seq." Dkt. 51-1 at 2.

The Court thus had to determine the scope of the ISGP issued to the Port regarding industrial activities at the Wharf. The Court concluded that the ISGP clearly and unambiguously relied on the federal regulations, which includes the exclusionary language in part (viii) that limits industrial activities to "only those portions" of transportation facilities. *See* Dkt. 304 at 20–22. The Court rejected Soundkeeper's argument that transportation facilities are subject to regulation based upon the federal regulation's non-exhaustive preamble and rejected Ecology's argument that loading and unloading of containers at the Wharf constitute industrial activities subject to regulation.

In sum, the Court agreed with the Port that "equipment maintenance is not an industrial activity under 40 C.F.R. 122.26(b)(14)(viii) or the corresponding ISGP" and granted the Port's motion for partial summary judgment regarding claims involving discharges from the Wharf. *Id.* at 23.

The Court also agreed with the Port's cross-motion for summary judgment, granting the Port's motion and dismissing Soundkeeper's entire claim against the Port. Dkt 305. While the Court concluded that Soundkeeper had standing to bring claims against the Port, *id.* at 10–12, the Court agreed with the Port that it is not jointly liable for alleged violations that occurred during APMT's tenancy, including generic permit violations and Level 3 corrective action violations that occurred in 2013 and 2015, *id.* at 12–15.

The Court also denied Soundkeeper's cross-motion for summary judgment regarding its claim that the Port is liable for failing to monitor discharges from the Wharf and failing to identify the Wharf in its SWPPP because the Court had previously concluded that the Wharf is not covered by the ISGP. *Id.* at 15; *see also* Dkt. 304. Finally, the Court granted the Port's cross-motion as to whether it was violating its current permit. The Court agreed with the Port that Soundkeeper could not establish any violation because the Port would not be violating its new permit until September 30, 2019 at the earliest. Dkt. 305 at 15–16. Even if the Port was in violation of the agreed order, the Court concluded that Soundkeeper failed to establish that violation of an agreed order is grounds for a citizen suit. Thus, the Court dismissed all claims against the Port, and the Port was terminated as a Defendant.

2. Instant Motion for Summary Judgment

On February 4, 2021, SSA moved for summary judgment, arguing that under the Court's previous Orders described herein, Soundkeeper cannot maintain its claims against them. Dkt. 317. The Port joined SSA in their motion. Dkt. 321. On February 22, 2021, Soundkeeper responded, opposing SSA's motion and requesting a Rule 56(d) continuance in the alternative. Dkt. 322. On February 26, 2021, SSA replied, Dkt. 327, and on March 24, 2021, SSA and the Port filed a notice of supplemental authority, Dkt. 332.[1]

C. Relevant Facts

On August 3, 2017, Soundkeeper sent SSAT and SSA Marine a 60-day "Notice of Intent to Sue" letter regarding alleged violations of the NPDES permit at the Terminal. Dkt. 109, ¶ 7, Ex. 4. SSATT commenced operations at the Terminal on October 2, 2017. FAC, ¶ 2. On June 13, 2018, Soundkeeper filed its third amended complaint. Dkt. 109. SSAT and SSA Marine then moved to dismiss Soundkeeper's claim, arguing, in part, that Soundkeeper failed to give adequate notice. Dkt. 136. The Court granted the motion to dismiss, concluding that Soundkeeper's anticipatory notice letter was inadequate. Dkt. 217 at 3–5.

Following the dismissal of its claims against SSAT and SSA Marine, Soundkeeper sent a new 60-day notice letter to SSA on February 28, 2019. Dkt. 246-1 at 116. On May 2, 2019, Soundkeeper then filed its fourth motion to amend its complaint seeking to bring

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[1] The Port has also filed a motion for entry of Rule 54(b) judgment, Dkt. 320, which the Court will address in a separate order.

SSA back into the case, asserting that its "claims against SSA are the same, or narrower, as they were the first time this Court permitted Soundkeeper to add SSA." Dkt. 246 at 4. The Court granted Soundkeeper's motion. Dkt. 253.

The February 2019 Notice Letter asserts that the 2015 ISGP (1) prohibits SSA from discharging stormwater that causes or contributes to violations of water quality standards; (2) requires SSA to apply all known and reasonable methods of prevention, control, and treatment ("AKART") to all stormwater discharges, including preparation and implementation of an adequate stormwater pollution prevention plan ("SWPPP") and best management practices ("BMP"); (3) requires SSA to sample each distinct point of discharge and record, retain, and report analyses of these samples; and (4) requires SSA to develop and implement a SWPPP consistent with permit requirements. *See* Dkt. 246-1 at 116–122.

The Notice Letter further asserts that SSA is in violation of the 2015 ISGP because they (1) discharge stormwater that contains elevated levels of copper, zinc, turbidity, and total suspended solids; (2) have not applied AKART or BMP by operating the Facility without a stormwater treatment system in place and without a stormwater treatment system which treats discharges from the Wharf; (3) failed to collect discharge samples from each distinct point of discharge, including in the Wharf; and (4) have failed to comply with permit requirements in their SWPPP by, among others, identifying all discharge points from the Wharf. *See id.* Soundkeeper additionally asserted that the 2015 ISGP required SSA to discharge stormwater in compliance with Condition

S10 of the ISGP, install a stormwater treatment system before commencing operations, and undertake a Level 3 Corrective Action. *See id.*; FAC, ¶¶ 39, 40, 42.

II. DISCUSSION

SSA moves for summary judgment, arguing that under the Court's previous Orders, they cannot be liable for any permit violation premised on runoff from the Terminal's Wharf or any violation premised on the argument that APMT's corrective-action deadline transferred to the Port or SSA. Dkt. 317. Soundkeeper, in response, argues that questions of material fact exist as to whether SSA is in violation of water quality standards and AKART requirements. Dkt. 322. It also requests, in the alternative, that the Court grant a Rule 56(d) continuance to allow discovery as to the current conditions of the Terminal and whether SSA is in compliance with all conditions of the ISGP. *Id.*

A. Summary Judgment Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,

475 U.S. 574, 586–87 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt"). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The Court must consider the substantive evidentiary burden that the nonmoving party must meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 256). Conclusory, nonspecific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888–89 (1990).

B. Merits

1. Violations of Water Quality Standards

The Clean Water Act imposes liability on any person who discharges pollutants from a facility in non-compliance with the issued permit. 33 U.S.C. § 1311(a). Soundkeeper alleges that SSA is in violation of the ISGP's prohibition of discharges that contribute to a violation of Surface Water Quality Standards or Sediment Management Standards.

SSA first argues that the 2015 ISGP incorporates a presumption of compliance with water quality standards when the permittee is in full compliance with all permit conditions and is fully implementing Ecology-approved best management practices. Dkt. 317 at 9–11. However, Condition S10.B of the ISGP states that *Ecology* will presume compliance with water quality standards unless discharge monitoring data or other site-specific information demonstrates that a discharge causes or contributes to a violation of water quality standards. Dkt. 82-5 at 49. SSA has not provided any legal authority to support its argument that the Court can apply such a presumption.

But, SSA also argues that the Terminal's stormwater discharges were below the ISGP benchmarks for every parameter in every basin in the last three quarters of 2019 (including the quarter in which Soundkeeper added SSA as Defendants). Dkt. 317 at 11. This evidence shows that the stormwater discharges were not in excess of the ISGP benchmarks for the relevant periods of Soundkeeper's claim. It appears that Soundkeeper now wants to allege that the discharges are in excess of the 2020 ISGP, *see* Dkt 322 at 4, 14–16, but such a claim cannot

move forward at this time because Soundkeeper has not provided SSA with the requisite 60-day notice, 33 U.S.C. § 1365(b)(1)(A).

The Court notes that it previously denied the Port's motion to dismiss the Second Amended Complaint under the Port's theory that Soundkeeper failed to provide the Port with adequate notice. Dkt. 107. The Port argued that Soundkeeper's notice letter was insufficient to place it on notice of violations of the 2015 ISGP, but the Court concluded that Soundkeeper's anticipatory allegations regarding violations of the 2015 ISGP were duplicative of the 2010 ISGP violations Soundkeeper asserted against the Port. *Id.* at 11–15. This motion is the first instance of Soundkeeper asserting violations of the 2020 ISGP, and Soundkeeper may not pursue these new claims without notice. *See Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 31 (1989) ("the notice and 60–day delay requirements are mandatory conditions precedent to commencing suit under the [applicable] citizen suit provision; a district court may not disregard these requirements at its discretion").

Soundkeeper's claims are limited to those of the February 2019 Notice Letter, i.e., that "SSA discharges stormwater that contains elevated levels of copper, zinc, turbidity, and total suspended solids" in violation of Condition S10.A of the 2015 permit. Dkt. 246-1 at 117–18. Soundkeeper has not presented evidence to create a dispute of material fact that SSA was in violation of the 2015 ISGP. Specifically, Soundkeeper's expert, Dr. Richard Horner, fails to create a genuine dispute of material fact. He opines that the discharges from the third quarter of 2017 through the first quarter of 2019 "*have the potential* to cause or contribute to exceedances of the state's

water quality criteria in the receiving water for those discharges." Dkt. 323, ¶ 13 (emphasis added). Dr. Horner does not opine that SSA's discharges are actually in violation of the ISGP's prohibition of discharges that cause or contribute to violations of water quality standards. Rather, he speculates that the discharges could cause or contribute to the violations—this is insufficient to defeat a motion for summary judgment. *See Matsushita*, 475 U.S. at 586 (the nonmovant must "do more than simply show that there is some metaphysical doubt as to the material facts").

Soundkeeper mischaracterizes Dr. Horner's opinion to be that SSA's discharges have caused or contributed to violations of water quality in the receiving water. *See, e.g.*, Dkt. 322 at 15. Such evidence could be sufficient to create a dispute of material fact, but that is not Dr. Horner's opinion here. Soundkeeper has failed to meet its burden to create a genuine issue of material fact, and SSA is entitled to summary judgment as to the claim that they are not in compliance with water quality standards under the 2015 ISGP.

In the alternative, Soundkeeper argues that a Rule 56(d) continuance is necessary. *Id.* at 18–21. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may defer considering the motion, deny the motion, or allow time to obtain affidavits or declarations or to take discovery. Fed. R. Civ. P. 56(d). The nonmovant must show that "(1) it has set forth in affidavit form the specific facts it hopes to elicit from further discovery; (2) the facts sought exist; and (3) the sought-after facts are essential to oppose summary judgment."

Fam. Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp., 525 F.3d 822, 827 (9th Cir. 2008). When confronted with a Rule 56(d) motion, the court may "(1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Fed. R. Civ. P. 56(d).

Soundkeeper has provided the requisite declaration, *see* Dkt. 324, but the Court does not agree that a Rule 56(d) continuance is necessary here. Soundkeeper seeks discovery to see if SSA is in compliance with all conditions of the ISGP in order to refute the presumption of compliance with water quality standards. But the Court has determined that only Ecology is entitled to make the presumption. Additional discovery is not necessary in order to determine whether SSA is in violation of the 2015 ISGP's prohibition of discharges that cause or contribute to violations of water quality standards. The non-speculative evidence is that SSA is not. Soundkeeper's request for a Rule 56(d) continuance is DENIED.

SSA's Motion for Summary Judgment on this claim is therefore GRANTED, and it is DISMISSED with prejudice.

2. Compliance with AKART Requirements

Soundkeeper also alleges that SSA is in violation of the 2015 ISGP condition which requires SSA to apply AKART to stormwater discharges prior to discharging. SSA asserts that because Ecology has approved their treatment system and issued a notice of compliance to SSA, they have implemented the requisite AKART requirements as a matter of law. Dkt. 317 at 11–12.

Soundkeeper, in response, argues that the Court must make its own determination and may not adopt Ecology's position here. Dkt. 322 at 16–18. It further asserts that there are questions of fact as to whether SSA is fully implementing AKART methods and in the alternative requests a Rule 56(d) continuance. *Id.* at 18–21.

Unlike Condition S10.B of the ISGP which states Ecology will presume compliance with water quality standards, the Court may assume compliance with AKART requirements here because Ecology has endorsed the AKART plan. AKART is determined through the submittal of an engineering report by the facility, and its subsequent review and approval by Ecology. Dkt. 211-53 at 18, 20. Ecology confirmed that "[t]he engineering report submittal and review process in essence defines the AKART process by looking at treatment alternatives and associated costs." *Id.* at 18.

SSA and the Port's AKART measures have been reviewed and approved by Ecology as detailed in SSA's reply. Dkt. 327 at 3–4. Ecology has found that SSA and the Port are in full compliance with the October 2017 Agreed Order, which identified the criteria and procedures Ecology would follow in rendering an AKART determination. *See* Dkt. 318, Ex. 2. The uncontroverted evidence is that SSA and the Port have implemented AKART and that they have thus complied with the requirement of the 2015 ISGP to do so. This is fatal to Soundkeeper's claim. *See Van Zanten v. City of Olympia*, No. C10-5216-JCC, 2011 WL 5299492, at *5 (W.D. Wash. Nov. 2, 2011).

Soundkeeper's arguments that there are material disputes of fact precluding summary judgment

do not alter the Court's determination. For example, Soundkeeper "contends" that SSA is in violation of Condition S10.C which requires the implementation of AKART methods, but offers no evidence to support this contention. Dkt. 322 at 16–18. Dr. Horner opines that SSA is out of compliance with water quality standards and therefore SSA cannot comply with the AKART requirements. Dkt. 323, ¶¶ 22, 23. But this is a conclusory assertion. Further, he has not been on site at the Terminal since 2018 and has no up-to-date knowledge of SSA's AKART practices. *Id.* ¶¶ 25–27. Soundkeeper has not offered any evidence beyond speculation that SSA is not implementing AKART. It is not SSA's burden to show that it is in compliance with the ISGP, it is Soundkeeper's burden to show a violation. Upon a review of the evidence, the Court determines that SSA has implemented AKART as required by the 2015 ISGP.

And Soundkeeper's request for a Rule 56(d) continuance fares no better. As the Court has determined, Soundkeeper's claims against SSA are limited to the alleged violations of the 2015 ISGP—not the 2020 ISGP. Soundkeeper's request to conduct a site visit to assess the implementation of SSA's *current* AKART methodologies and best management practices has no bearing on whether SSA has implemented AKART in compliance with the 2015 ISGP. The sought-after discovery is not essential to oppose SSA's summary judgment motion here. *See Fam. Home & Fin. Ctr.*, 525 F.3d at 827. Soundkeeper's request for a Rule 56(d) continuance is DENIED.

Summary judgment is therefore GRANTED, and this claim is DISMISSED with prejudice.

3. Scope of Coverage

SSA persuasively argues that Soundkeeper's scope of coverage claims of the 2015 ISGP[2] should be dismissed in light of the Court's previous Orders determining that the Wharf is not within the scope of the Permit. Dkt. 317 at 12–15. Soundkeeper alleges that SSA violated the ISGP by operating a stormwater treatment system which does not treat discharges from the Wharf, by failing to describe in their SWPPP custom deck drain filter inserts installed on the Wharf, identify drainage on the Wharf, and collect discharge samples from the discharge points in the Wharf. But as the Court previously concluded, the Wharf is not covered by the ISGP. *See* Dkt. 304.

Soundkeeper's arguments in response do not persuade the Court otherwise. It asserts that its claims "which rely on the scope of coverage issue should not be dismissed because Soundkeeper may yet appeal these issues." Dkt. 322 at 21. It asks the Court to not dismiss the claims which are dependent upon the scope of the ISGP so that Soundkeeper may later pursue these claims on appeal. Soundkeeper provides no legal authority to support this argument, and the Court will apply the law of this case to the claims it has asserted against SSA. If Soundkeeper wishes to pursue an appeal of the Court's previous Orders determining the scope of the ISGP's coverage, it may do so. But a hypothetical appeal is not enough to preclude the Court from granting summary

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[2] Soundkeeper's claims based on the scope of coverage of the ISGP are detailed in Sections I(B), I(C), and I(D) of its Notice Letter. Dkt. 246-1 at 119–121.

judgment on SSA's substantially similar scope of coverage claims based on the Court's previous Orders.

Additionally, Soundkeeper argues that the scope of coverage under the 2020 ISGP (which is currently in effect) is still pending before the Pollution Control Hearings Board and so SSA's motion should be denied.[3] But as SSA highlights, *see* Dkt. 327 at 13, and the Court has concluded, the case presently before the Court does not involve allegations arising under the 2020 ISGP. Even so, the Pollution Control Hearings Board has adopted this Court's reasoning that the Wharf is not within the scope of coverage. *See* Dkt. 332.

Therefore, SSA's Motion for Summary Judgment on Soundkeeper's claims connected with the Wharf is GRANTED, and the claims are DISMISSED with prejudice.

4. Remaining Claims

In its Notice Letter, Soundkeeper asserts that SSA failed to sample discharges from Outfall WS2 during the fourth quarter of 2017. Dkt. 246-1 at 120. SSA argues that the Port sampled every monitoring location on October 12, 2017 and submitted that data to Ecology in January 2018. Dkt. 317 at 15. They assert that the Port did not report the data in a Discharge Monitoring Report because Ecology had not yet enabled such reporting under the Port's new permit. *Id.* Soundkeeper does not respond to this argument.

A party's failure to respond to a motion for summary judgment does not permit the court to grant

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[3] Since Soundkeeper has filed its response, the Pollution Control Hearings Board has resolved the appeal on the 2020 ISGP's scope of coverage. *See* Dkt 332.

the motion automatically. *See Heinemann v. Satterberg*, 731 F.3d 914, 916 (9th Cir. 2013) ("[A] motion for summary judgment may not be granted based on a failure to file an opposition to the motion."). Rather, the court may only "grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it." Fed. R. Civ. P. 56(e)(3); *see Heinemann*, 731 F.3d at 916. Where facts asserted by the moving party in an unopposed motion are concerned, the court may "consider the fact undisputed for purposes of the motion." Fed. R. Civ. P. 56(e)(2); *see Heinemann*, 731 F.3d at 917.

The Court concludes that discharges from Outfall WS2 were sampled during the fourth quarter of 2017 as indicated by SSA's supporting evidence. *See* Dkt. 318, Ex. 3. Soundkeeper has not presented any evidence to the contrary to create a genuine issue of material fact. SSA's motion for summary judgment on this claim is therefore GRANTED, and it is DISMISSED with prejudice..

Soundkeeper also alleges in its Fourth Amended Complaint that SSA failed to complete the corrective action responses as required by the ISGP. FAC, ¶ 42. SSA argues that the Court previously decided this issue in its previous Order, Dkt. 305. Dkt. 317 at 15–16. The Court concluded that the earliest a corrective action would be taken would be by September 20th of the year following three quarterly violations, which would be September 30, 2019 under the Port's new 2017 permit. Dkt. 305 at 16 & n.2. Additionally, SSA argues that Soundkeeper failed to identify this allegation in its Notice Letter. Dkt. 317 at 16.

Soundkeeper again does not respond to this argument.

Under either theory, the Court concludes that SSA is entitled to summary judgment. First, Soundkeeper did not give adequate notice of this claim involving the purported corrective action responses it alleges that SSA (and the Port) were required to make. *See Hallstrom*, 493 U.S. at 31. Second, the Court has concluded that the earliest a corrective action could be taken was September 30, 2019. Dkt. 305 at 16 & n.2. SSA asserts, and Soundkeeper does not refute, that its stormwater treatment system was operational by June 13, 2019. *See* Dkt. 318, ¶ 4. SSA's motion for summary judgment on this claim is therefore GRANTED, and it is DISMISSED with prejudice.

In sum, Soundkeeper has failed to create a genuine issue of fact as to whether SSA is in violation of the 2015 ISGP prohibition of discharging stormwater that causes or contributes to violations of water quality standards or the 2015 ISGP's requirement to apply AKART methodology. All of Soundkeeper's remaining claims fall within the scope of this Court's previous Orders determining the scope of the 2015 ISGP and cannot be maintained as a matter of law. Soundkeeper's claims against SSA are DISMISSED with prejudice.

III. ORDER

Therefore, it is hereby **ORDERED** that Defendants SSATT and SSAT's motion for summary judgment, Dkt. 317, is **GRANTED**. The Clerk shall terminate SSATT and SSAT as defendants.

Dated this 15th day of September, 2021.

s/Benjamin H. Settle
BENJAMIN H. SETTLE
United States District Judge

[2021 WL 4226162]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PUGET SOUNDKEEPER ALLIANCE, Plaintiff, v. SSA TERMINALS LLC, et al., Defendants.	CASE NO. C17-5016 BHS ORDER GRANTING DEFENDANT'S MOTION FOR ENTRY OF RULE 54(B) JUDGMENT

This matter comes before the Court on Defendant Port of Tacoma's motion for entry of Rule 54(b) judgment. Dkt. 320. The Court has considered the briefings filed in support of and in opposition to the motion and the remainder of the file and hereby grants the motion for the reasons stated herein.

I. FACTUAL & PROCEDURAL BACKGROUND

This case is a citizen suit brought under Section 505 of the Clean Water Act as amended, 33 U.S.C. § 1365. Plaintiff Puget Soundkeeper Alliance ("Soundkeeper") originally brought suit against APM Terminals Tacoma LLC ("APMT") in January 2017. Dkt. 1. At that time, APMT was the Port's tenant and operator of the Terminal at issue. Dkt. 254, ¶ 2. APMT terminated its lease with the Port on October 2, 2017. *Id.* That same month, Defendants SSA Terminals (Tacoma), LLC and SSA Terminals, LLC

(collectively "SSA") leased the Terminal from the Port. *Id.*

In November 2017, Soundkeeper amended its compliant to add the Port as a Defendant, alleging that the Port was liable for violations of APMT's Industrial Stormwater General Permit ("ISGP") prior to October 2, 2017 and for the Port's ISGP after October 2, 2017. Dkt. 75. Soundkeeper then filed a Third Amended Complaint in June 2018 adding SSA Marine, Inc. and SSA Terminals as Defendants. Dkt. 109. The Port asserted crossclaims against APMT in its answer to the Third Amended Complaint. Dkt. 126.

Soundkeeper settled its claims against APMT in February 2019 via a consent decree. Dkt. 224. The Consent Decree settled Soundkeeper's claims against APMT, and Soundkeeper agreed to dismiss all of its claims for penalties against the Port for violations occurring prior to October 2017 with prejudice. *Id.* at 4.

The Court subsequently granted SSA Marine and SSA Terminals' motion to dismiss, agreeing that Soundkeeper's 60-day notice letter was defective as it was sent prior to SSA's October 2017 tenancy. Dkt. 217. In June 2019, the Court granted Soundkeeper's motion for leave to amend, Dkt. 253, and Soundkeeper filed its Fourth Amended Complaint, dropping APMT and SSA Marine, Inc. as parties and adding SSA Terminals (Tacoma), Dkt. 254. In its answer to the Fourth Amended Complaint, the Port asserted amended crossclaims against APMT for, *inter alia*, breach of contract. Dkt. 260. APMT has also asserted counterclaims against the Port and Don Esterbrook, the Port's Deputy Chief Executive

Officer, for the Port's allegedly wrongful draw on a letter of credit. Dkt. 335.

The Port then moved for partial summary judgment as to Soundkeeper's claims arising from stormwater discharges from the Wharf. Dkt. 176. Soundkeeper then filed a motion for partial summary judgment, Dkt. 196, and in response the Port filed a cross-motion for summary judgment to dismiss Soundkeeper's claim against it in its entirety, Dkt. 210. After extensive briefing from the parties and amici, the Court granted the Port's motions, dismissed all of Soundkeeper's claims against the Port with prejudice, and terminated the Port as a defendant. Dkts. 304, 305.

SSA then moved for summary judgment, arguing that under the Court's Orders granting the Port's motions for summary judgment, Soundkeeper could not maintain its claims against them. Dkt. 317. The Port joined SSA in their motion. Dkt. 321. The Court granted SSA's motion, dismissed all of Soundkeeper's claims against SSA with prejudice, and terminated SSA as defendants. Dkt. 355. The only remaining claims in this case are the crossclaims and counterclaims between APMT and the Port.

In the interest of judicial economy, the Port moved for an entry of Rule 54(b) judgment while SSA's motion for summary judgment was pending before the Court. Dkt. 320. The Port argues that, "given the Court's termination of the claims against the Port, a ruling in favor of SSA would satisfy the standard for a final judgment pursuant to Federal Rule of Civil Procedure 54(b)." *Id.* at 2. Soundkeeper opposes the motion, arguing that entering judgment now will result in premature and piecemeal litigation. Dkt. 325.

II. DISCUSSION

"When an action presents more than one claim for relief . . . or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b). An order of dismissal with prejudice is a final order. *Wakefield v. Thompson*, 177 F.3d 1160, 1162 (9th Cir. 1999). The determination of whether "there is any just reason for delay . . . is left to the sound judicial discretion of the district court." *Curtiss-Wright Corp. v. Gen. Elec. Corp.*, 446 U.S. 1, 8 (1980).

"A district court must first determine that it is dealing with a 'final judgment.'" *Id.* at 7. The Court agrees with the Port that its Orders granting the Port's motions for summary judgment, Dkts. 304, 305, and granting SSA's motion for summary judgment, Dkt. 355, are final judgments on Soundkeeper's claims. The Orders decided that Soundkeeper does not have cognizable claims for relief against the Port and SSA, and the Orders are final in that they are the ultimate disposition of all claims against the Port and SSA. *See Curtiss-Wright*, 446 U.S. at 7. These Orders may be certified under Rule 54(b).

After finding finality, a court must then determine whether there is any just reason for delay. *Id.* at 8. Soundkeeper first argues that the Port's motion should be denied because the Port is the prevailing party and would not be seeking an appeal. Dkt. 325 at 3–5. It argues that it will suffer prejudice if it is forced to appeal "prematurely." *Id.* at 5. Rule 54(b) does not distinguish between plaintiffs and defendants or prevailing and losing parties. While one purpose of Rule 54(b) may be to benefit the losing

party, the Rule does not explicitly limit a motion for judgment to losing parties. *See Patriot Mfg. LLC v. Hartwig, Inc.*, 2014 WL 4538059 (D. Kan. Sept. 11, 2014). Rather, the Rule allows for an entry of final judgment if there is no just reason for delay. The Court concludes that there is no just reason.

All of Soundkeeper's claims against the Port and SSA have been dismissed. Soundkeeper's arguments that it still has active claims against SSA and that it needs to conduct further discovery are moot. The only remaining claims in this case are between the Port and APMT, and the resolution of those claims has no bearing on Soundkeeper's Clean Water Act claims against the Port and SSA. The Court does not agree with Soundkeeper that the Port's and APMT's crossclaims arising out of the breach of contract are sufficiently related to its claims. While there are some partially overlapping facts between the Port's and APMT's crossclaims and Soundkeeper's claims against the Port and SSA, the Court is not foreclosed from entering a Rule 54(b) judgment. *See Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 575 (9th Cir. 2018). As the Port highlights, a final resolution of the claims between the Port and APMT will primarily center on the Court's interpretation of the lease and the letter of credit. Dkt. 326 at 5. This is factually distinct from the Clean Water Act claims Soundkeeper asserted against the Port and SSA. Entering judgment now before a resolution of the Port's and APMT's claims would not result in piecemeal litigation.

Soundkeeper's remaining arguments, such as that an appeal could preclude a global resolution, are immaterial. In essence, Soundkeeper argues it would be prejudiced because it does not want to appeal the

Court's Orders now and wants to continue to litigate this case. But the Court has dismissed all of Soundkeeper's claims, and Soundkeeper has not made a legitimate showing of prejudice. There is no just reason for delay of an entry of final judgment.

III. ORDER

Therefore, it is hereby **ORDERED** that the Port's motion for entry of judgment, Dkt. 320, is **GRANTED**.

The Clerk shall enter a JUDGMENT in favor of the Port and SSA.

Dated this 16th day of September, 2021.

s/Benjamin H. Settle
BENJAMIN H. SETTLE
United States District Judge

33 U.S.C. § 1342

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter

shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

* * *

(p) Municipal and industrial stormwater discharges

(1) General rule

Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

(B) Municipal discharge

Permits for discharges from municipal storm sewers—

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall 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 for the control of such pollutants.

(4) Permit application requirements

(A) Industrial and large municipal discharges

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges

shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies

The Administrator, in consultation with the States, shall conduct a study for the purposes of—

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations

Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

* * *

33 U.S.C. § 1365

§ 1365. Citizen suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the

alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; United States interests protected

(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(3) PROTECTION OF INTERESTS OF UNITED STATES.— Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not

a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

(d) Litigation costs

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Statutory or common law rights not restricted

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) a standard of performance or requirement under section 1322(p) of this title; (6) a certification under section 1341 of this title; (7) a permit or condition of a permit issued under

section 1342 of this title that is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (8) a regulation under section 1345(d) of this title.

(g) "Citizen" defined

For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) Civil action by State Governors

A Governor of a State may commence a civil action under subsection (a), without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

40 C.F.R. § 123.1

§ 123.1. Purpose and scope

(a) This part specifies the procedures EPA will follow in approving, revising, and withdrawing State programs and the requirements State programs must meet to be approved by the Administrator under sections 318, 402, and 405(a) (National Pollutant Discharge Elimination System—NPDES) of the CWA. This part also specifies the procedures EPA will follow in approving, revising, and withdrawing State programs under section 405(f) (sludge management programs) of the CWA. The requirements that a State sewage sludge management program must meet for approval by the Administrator under section 405(f) are set out at 40 CFR part 501.

(b) These regulations are promulgated under the authority of sections 304(i), 101(e), 405, and 518(e) of the CWA, and implement the requirements of those sections.

(c) The Administrator will approve State programs which conform to the applicable requirements of this part. A State NPDES program will not be approved by the Administrator under section 402 of CWA unless it has authority to control the discharges specified in sections 318 and 405(a) of CWA. Permit programs under sections 318 and 405(a) will not be approved independent of a section 402 program.

(d)(1) Upon approval of a State program, the Administrator shall suspend the issuance of Federal permits for those activities subject to the approved State program. After program approval EPA shall

retain jurisdiction over any permits (including general permits) which it has issued unless arrangements have been made with the State in the Memorandum of Agreement for the State to assume responsibility for these permits. Retention of jurisdiction shall include the processing of any permit appeals, modification requests, or variance requests; the conduct of inspections, and the receipt and review of self-monitoring reports. If any permit appeal, modification request or variance request is not finally resolved when the federally issued permit expires, EPA may, with the consent of the State, retain jurisdiction until the matter is resolved.

(2) The procedures outlined in the preceding paragraph (d)(1) of this section for suspension of permitting authority and transfer of existing permits will also apply when EPA approves an Indian Tribe's application to operate a State program and a State was the authorized permitting authority under § 123.23(b) for activities within the scope of the newly approved program. The authorized State will retain jurisdiction over its existing permits as described in paragraph (d)(1) of this section absent a different arrangement stated in the Memorandum of Agreement executed between EPA and the Tribe.

(e) Upon submission of a complete program, EPA will conduct a public hearing, if interest is shown, and determine whether to approve or disapprove the program taking into consideration the requirements of this part, the CWA and any comments received.

(f) Any State program approved by the Administrator shall at all times be conducted in accordance with the requirements of this part.

(g)(1) Except as may be authorized pursuant to paragraph (g)(2) of this section or excluded by § 122.3, the State program must prohibit all point source discharges of pollutants, all discharges into aquaculture projects, and all disposal of sewage sludge which results in any pollutant from such sludge entering into any waters of the United States within the State's jurisdiction except as authorized by a permit in effect under the State program or under section 402 of CWA. NPDES authority may be shared by two or more State agencies but each agency must have Statewide jurisdiction over a class of activities or discharges. When more than one agency is responsible for issuing permits, each agency must make a submission meeting the requirements of § 123.21 before EPA will begin formal review.

(2) A State may seek approval of a partial or phased program in accordance with section 402(n) of the CWA.

(h) In many cases, States (other than Indian Tribes) will lack authority to regulate activities on Indian lands. This lack of authority does not impair that State's ability to obtain full program approval in accordance with this part, i.e., inability of a State to regulate activities on Indian lands does not constitute a partial program. EPA will administer the program on Indian lands if a State (or Indian Tribe) does not seek or have authority to regulate activities on Indian lands.

NOTE: States are advised to contact the United States Department of the Interior, Bureau of Indian Affairs, concerning authority over Indian lands.

(i) Nothing in this part precludes a State from:

(1) Adopting or enforcing requirements which are more stringent or more extensive than those required under this part;

(2) Operating a program with a greater scope of coverage than that required under this part. If an approved State program has greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program.

NOTE: For example, if a State requires permits for discharges into publicly owned treatment works, these permits are not NPDES permits.