

LATHAM & WATKINS LLP

December 11, 2024

Via Hand-delivery

Mr. Scott S. Harris
Clerk of the Court
Supreme Court of the United States
One First Street, NE
Washington, DC 20543-0001

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Re: *Port of Tacoma, et al. v. Puget Soundkeeper Alliance*, No. 24-350,
Response to Notice of Supplemental Authority

Dear Mr. Harris:

Petitioners submit this response to the notice of supplemental authority filed by Puget Soundkeeper Alliance (“Soundkeeper”) on December 5, 2024, concerning the 2025 Industrial Stormwater General Permit (“2025 ISGP”) issued by the State of Washington Department of Ecology (“Ecology”) on December 2, 2024.¹ Soundkeeper’s letter is yet another attempt to distract this Court from the important question presented on which—as Soundkeeper itself has acknowledged—the circuits are split.

In its notice, Soundkeeper doubles down on the baseless vehicle objection it floated in its opposition brief as to the 2015 ISGP. BIO 13-15. Only this time, it relies on documents related to the 2025 ISGP—a permit issued a few days ago that has never been a part of this case. Whether the State purported to exercise federal “residual designation” authority under the Clean Water Act (“CWA”), rather than state law, in the 2025 ISGP has no bearing on this petition. The case before this Court concerns only Petitioners’ alleged violations of the *2015 ISGP*. See BIO 15-16 (referring to the 2015 ISGP as “the only [permit] at issue in this petition”).

Regardless, even as to the 2025 ISGP, Soundkeeper’s assertion that the State used federal “residual designation” authority to regulate discharges from docks and wharfs—areas EPA expressly *exempted from* the federal industrial-stormwater program—is unfounded. Like every prior version of the permit, the face of the 2025 ISGP—the relevant document establishing the terms and conditions under which permittees must operate—nowhere identifies, much less claims to exercise, any federal “residual” authority. Indeed, the words “residual designation,” the CWA provision purportedly granting this authority, and the EPA regulation expounding on it, are all conspicuously absent from the 100-page permit. That omission is fatal.

¹ See Ecology, 2025 Industrial Stormwater General Permit (effective Jan. 1, 2025), https://fortress.wa.gov/ecy/ezshare/wq/permits/ISGP_2025_FinalPermit.pdf.

Moreover, the “Fact Sheet” issued with the draft and final 2025 ISGP, which sets out the State’s “regulatory . . . bases” for its permitting decisions, explicitly states that the State “us[ed] its *State Authority* . . . to require ISGP coverage” for docks, wharfs, and other areas of transportation facilities.² Like the face of the permit, the Fact Sheet contains no record of a federal “residual” designation. Soundkeeper’s suggestion that the State somehow expanded the scope of the 2025 ISGP based on a federal “residual designation”—despite that the 2025 ISGP itself is silent on such a claim, and the Fact Sheet explicitly states the opposite—has no merit.

In the face of that, Soundkeeper cites responses to comments on the draft 2025 ISGP. Those responses are neither part of the ISGP nor even the separate “Fact Sheet.” And even these responses are at best inconclusive because they separately assert that the State also used “state authority” to regulate docks and wharfs.³ In all events, an agency’s responses to comments are insufficient to change the federal NPDES program, much less to override the express exemption in the regulations for stormwater runoff from the facilities at issue here. Pet. 5-6.

In short, Soundkeeper’s attempt to turn the 2025 ISGP into a vehicle problem is just as baseless (if not *more* so) than its failed attempt to manufacture a vehicle problem out of the 2015 ISGP. As Petitioners have explained, the conventional certiorari criteria are readily met here—there is a conceded conflict on an important and recurring question. Denying the petition will only perpetuate that conflict, harming the numerous interests—represented by amici ranging from States to business and labor groups—that are impacted by unauthorized citizen suits, and creating an incentive for States to adopt expansive permit conditions going beyond the scope of the CWA without transparently identifying the authority on which they are purporting to act.

In other words, Soundkeeper’s latest ploy to evade this Court’s review provides all the more reason to *grant* certiorari in this case, not deny it.

Respectfully,



Gregory G. Garre
of LATHAM & WATKINS LLP

Counsel for Petitioners
Port of Tacoma, SSA Terminals, LLC,
and SSA Terminals (Tacoma), LLC

cc: Claire E. Tonry
Counsel for Respondent

² Ecology, Fact Sheet for Draft ISGP 4, 35, 80 (May 15, 2024), https://fortress.wa.gov/ecy/ezshare/wq/permits/ISGP_2025_FinalFactSheet.pdf.

³ Ecology, Response to Comments, ISGP Addendum to Fact Sheet: Appendix C at 12-13 (Dec. 2, 2024), https://fortress.wa.gov/ecy/ezshare/wq/permits/ISGP_2025_ResponseToComments.pdf.