No. 24-350

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

SUPPLEMENTAL BRIEF FOR RESPONDENT

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SUPPLEMENTAL BRIEF FOR RESPONDENT

The Solicitor General's recommendation to grant certiorari here is shot through with deficiencies. The Government brushes aside a glaring vehicle problem that the Ninth Circuit flagged; ignores another one that the certiorari briefing makes evident; and buries in a footnote a new disclosure indicating for yet another reason that the question presented makes no difference to the outcome of this case. The Solicitor General also says the circuits are split—but not because of any actual statutory analysis in *Atlantic States Legal Foundation v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993). Instead, the Solicitor General predicts that the Second Circuit would agree with the Government's newly minted conception of the CWA's text—a conception no court has ever adopted (and that differs even from the textual argument petitioners advance). And when push comes to shove on the merits, the Solicitor General relies most heavily not on that textual argument, but on a single regulation that does not even purport to construe the CWA's citizen suit provision. That would be an odd move in the post-*Chevron* era even if the regulation spoke directly to the question presented. That the regulation does *not* do so makes the Solicitor General's brief all the more bizarre.

On top of all this, the Solicitor General's new conception of the CWA conflicts with the position the United States and EPA have repeatedly taken before this Court and others. If there is any governmental view this Court should consult here, it is the previously longstanding understanding of the CWA expressed in those filings. The Court accordingly should deny certiorari.

I. This is a terrible vehicle for addressing the question presented.

For three independent reasons—including one that has just recently come to light—the question presented makes no difference to the outcome of this case.

1. The Solicitor General recognizes that permits regulating discharges under the "state residual authority" set forth in 33 U.S.C. § 1342(p)(2)(E) are enforceable in citizen suits. *See* CVSG Br. 22; BIO 14. And the State has made clear here that it indeed "exercised its residual Clean Water Act authority under 33 U.S.C. § 1342(p)(2)(E)" to extend permit coverage to the entire facility at issue here. CA E.R. 479. What's more, EPA itself has recognized that the State "is using its 'residual designation' authority" to regulate the Wharf. Letter from Chris Hladick, Regional Administrator, EPA Region 10, Dkt. No. 17-05016, ECF No. 429-3.

The Solicitor General turns a blind eye to these unequivocal statements, suggesting that this Court should simply leave for remand the question "whether Washington exercised its residual designation authority" here. CVSG Br. 22. But this suggestion misapprehends how petitioners' position on this issue interacts with what the Ninth Circuit already decided below. Petitioners say that, if they prevail in this Court, they would argue on remand that a state cannot claim "*after the fact*" that it based permit conditions on its residual authority. Cert. Reply 9-10. But the Ninth Circuit has already held that—even "[a]ssuming" that the State is required to make a formal determination contemporaneous to issuing a permit that it is exercising its residual authority—"the

Port cannot now collaterally attack" the 2010 or 2015 permits to defend against this lawsuit. Pet. App. 13a.

That collateral-attack holding, which petitioners have not asked this Court to review, locks in the outcome of this case: The 2010 and 2015 permits are valid exercises of the State's residual authority and thus are indisputably enforceable in a citizen suit. Put another way, the Ninth Circuit did not reserve the question whether the permits "prescribe[] 'a greater scope of coverage'" than federal law requires (CVSG Br. 22 (quoting Pet. App. 13a)) because it might matter in further litigation. The Ninth Circuit declined to address the issue because its collateral-attack holding renders that question irrelevant—much like a waiver or harmless-error holding would. Petitioners seek nothing more than an advisory opinion on the question presented.

2. The question presented is immaterial to this case for another reason the Solicitor General's brief places in stark relief. Petitioners have conceded (and the Solicitor General does not dispute) that stormwater discharges from the entire Terminal—including the Wharf—are subject to the CWA's rules governing "municipal" discharges. BIO 3. That means discharges from the Wharf are indisputably subject to the NPDES program. The permit's coverage of the Wharf simply subjects stormwater discharges that all agree are subject to the program's limits for *municipal* discharges to the more stringent limits for *industrial* discharges. BIO 28.

All this being so, petitioners lose even under their own proposed construction of the CWA. Petitioners draw a distinction between permit conditions that are "greater in scope" of coverage and those that are

merely "more stringent" than federal law requires. Cert. Reply 4 n.2. According to petitioners, the former cannot support citizen suits, but the latter can. *Id.*; *see also* BIO 17-18. And the Solicitor General confirms that citizen suits are permissible "[w]hen a state regulates the same discharges that the CWA regulates, but the State's substantive permit conditions are 'more stringent' than federal law requires." CVSG Br. 17 (quoting 33 U.S.C. § 1311(b)(1)(C)).

That description fits this case precisely. The CWA regulates the very stormwater discharges at issue in this suit under its "municipal" discharge permitting rules. BIO 3. Consequently, this is nothing more than a textbook case of "more stringent" state regulation.

The Solicitor General never denies this. The Government nevertheless suggests that this case is a suitable vehicle for addressing the question presented because "*the Ninth Circuit* assumed that the CWA does not regulate" the discharges at issue at all. CVSG Br. 17 (emphasis added). But the Solicitor General provides no citation for this supposed judicial assumption, and in fact the Ninth Circuit assumed no such thing. The truth is that the court of appeals had no need to address the issue. Regardless, it would make no sense for this Court to grant certiorari based on an assumption that all agree is demonstrably untrue. The CWA indisputably regulates stormwater discharges from the Wharf as municipal discharges, and that simple fact renders the question presented irrelevant.

3. As if all of this were not already enough, the Solicitor General cites a recent filing by petitioner SSA Terminals that makes triply clear that petitioners are

asking for nothing more than an advisory opinion. Recall that petitioners argue that the permit here is "greater in scope" than the CWA requires because the Act's industrial-stormwater program regulates only those portions of transportation facilities where "vehicle maintenance . . ., *equipment cleaning* operations, airport deicing," or other specified activities occur. Pet. 6 (quoting 40 C.F.R. § 122.26(b)(14)(viii) (emphasis added)). And according to the Petition for Certiorari, "[n]o . . . equipment cleaning . . . occurs at the Wharf." *Id.* 10.

Yet petitioner SSA Terminals recently swore the opposite is true. In a filing with the State of Washington, signed under penalty of perjury, SSA stated that it conducts "*cleaning* . . . of electric ship-to-shore cranes and crane parts" on the Wharf. CVSG Br. 7 n.2 (quoting Letter from Emily Jones to Wash. Dep't of Ecology 2 (Jan. 10, 2025) (emphasis added)). Respondent sees no way this new revelation can be squared with the purported factual predicate for the Petition (or with petitioners' factual representations below).[1] In fact, while the Solicitor General advises the Court of SSA's new filing, the Government does not even try to harmonize the filing with petitioners' prior representations. Instead, the Solicitor General simply notes that the district court held (without the benefit of the information SSA recently revealed) that no

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[1] SSA's new filing can be viewed online at https://perma.cc/4KHK-57PB, by searching the Permit Number WAR000467. The relevant filing is titled "WAR000467-2025-01-13-MOD-SampePointWaiverRequest.pdf." For filings in the district court when this issue was initially litigated stating the opposite—that "no . . . equipment cleaning" occurred on the Wharf—see, e.g., Dkt. 176 at 5; Dkt. 179 at ¶ 6.

"industrial activity" occurs on the Wharf. *Id.* And the Solicitor General urges the Court to decide the case based on the basis of "that finding." *Id.*

That will not do. This Court sits to decide actual cases and controversies, not hypothetical legal questions based on apparently false factual predicates. And the essential predicate that no industrial activity occurs on the Wharf now appears false. "[E]quipment cleaning" constitutes industrial activity as a matter of law, 40 C.F.R. § 122.26(b)(14)(viii), and petitioner SSA now admits it cleans equipment on the Wharf.

At the very least, this Court should wait to consider whether to grant certiorari until the district court has an opportunity to sort out the discrepancy between petitioners' prior factual representations and SSA's new revelation. Respondent today is moving the district court to take account of SSA's new concession that equipment cleaning occurs on the Wharf. (For the Court's convenience, that motion is attached as an Appendix to this brief.) If the Court were to grant review before the district court rules on the motion, it would needlessly risk having to dismiss the case later as improvidently granted.

II. The Solicitor General's proposed construction of the CWA contradicts numerous past governmental filings and is incorrect.

1. This is not the first time the Government has opined on the propriety of citizen suits under the circumstances here. Perhaps most notably, the United States filed an amicus brief years ago explaining that the CWA's citizen-suit provision allows suits to enforce state water-quality provisions incorporated into a state-issued NPDES permit. Citing the Ninth Circuit's decision that established the precedent the panel

reaffirmed here, the United States wrote: "Such provisions are effluent limits subject to enforcement in a citizen suit both because they are 'a permit or condition thereof,' 33 U.S.C. § 1365(f)[(7)], and because they constitute 'any restriction' upon a permitted discharge. *Id.* § 1362(11)." Br. of United States, *Ohio Valley Env't Coal. (OVEC) v. Fola Coal Co.*, 845 F.3d 133 (4th Cir. 2017), 2016 WL 6524150, at *6 (citing *Nw. Env't Advocs. v. City of Portland*, 56 F.3d 979 (9th Cir. 1995), *cert. denied*, 518 U.S. 1018 (1996)).[2]

Briefs the Office of the Solicitor General has previously filed in this Court are in accord. About a decade ago, for instance, the Solicitor General explained that citizen suits may be brought to enforce "*any* term or condition of an approved NPDES permit," including conditions in state-issued permits implementing state water-quality standards. Br. of the United States as Amicus Curiae Supporting Neither Party [at the Merits Stage] at 9, *L.A. Cnty. Flood Control Dist. v. Nat. Res. Def. Council, Inc.*, 568 U.S. 78 (2013) (emphasis added); *see also* Br. for the United States as Amicus Curiae [at Cert. Stage] at 5, *L.A. Cnty. Flood Control Dist. v. Nat. Res. Def. Council, Inc.*, 567 U.S. 933 (2012) (same). That is true, the Solicitor General made clear in another filing, regardless of whether the NPDES permit is "issued under federal or state law." Pet. for Cert. at 6, *U.S.*

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[2] The Solicitor General references the Fourth Circuit's holding in *OVEC* that "a 'permit holder must comply with *all* the terms of its permit to be shielded from liability' under [the CWA]." CVSG Br. 20 (quoting *OVEC*, 845 F.3d at 143). But the Solicitor General does not mention that the United States propounded that position in the case.

Dep't of Energy v. Ohio, 503 U.S. 607 (1992). The citizen suit provision applies without qualification.

2. In his filing here, the Solicitor General disregards all of the Government's previous briefs relating to the question presented. *See* CVSG Br. 13-15. But none of the reasons the Solicitor General advances for doing so withstands scrutiny.

Having apparently concluded that petitioners' novel textual argument based on the word "under" does not work (*see* BIO 23-24), the Government floats a new textual argument of its own that no court has ever accepted either. According to the Solicitor General, Section 1365(f)(7)'s language dictating that a citizen suit can be brought to enforce a "*condition* of a permit issued under section 1342" refers only "to NPDES permit terms that are intended to ensure compliance with enumerated CWA provisions." CVSG Br. 12 (emphasis added). But the Solicitor General's focus on the word "condition" does not accomplish anything. Section 1342 requires NPDES permits to carry out "requirements under section[] 1311." 33 U.S.C. 1342(a)-(b). Section 1311, in turn, requires States to include conditions necessary to meet "any more stringent limitation . . . established pursuant to any State law or regulations." *Id.* § 1311(b)(1)(C). Ergo, a permit condition included to satisfy state law is by definition one that ensures compliance with an enumerated CWA provision—namely, Section 1311.

Faced with this straightforward syllogism, the Solicitor General responds not with anything from the Clean Water Act's text, but instead with "regulatory language." CVSG Br. 17. Citing the distinction 40 C.F.R. § 123.1 draws between state laws that are "more stringent" than the CWA and those that are

"greater in scope," the Solicitor General extrapolates that any State-issued permit condition that falls in the latter category should not be enforceable in a citizen suit. CVSG Br. 13; *see id.* at 16-17.

The regulation the Solicitor General quotes cannot carry the weight he assigns to it. To start, the "plain language" of the CWA unambiguously allows citizen suits like this one, Pet. App. 11a-12a, and when the words of a statute are unambiguous, the Court's interpretive inquiry not only "begins with the statutory text" but "ends there as well." *Nat'l Ass'n of Mfrs. v. U.S. Dep't of Def.*, 583 U.S. 109, 127 (2018) (citation omitted). At any rate, there is no distinction in Section 1311 or anywhere else in the CWA between state laws that are "more stringent" than the CWA and those that are "greater in scope." Nor is there any reason why the Act would distinguish between the two (if it is even possible to do so). The Act intertwines federal and state law throughout, and Section 1311 makes clear that there is nothing wrong with permit conditions derived from state water-quality laws that are more demanding than EPA's minimum standards. *See* BIO 24-25.

Even if it were permissible to look to 40 C.F.R. § 123.1 here, that still would not support the Solicitor General's position. The regulation does not speak directly to the permissibility of citizen suits. Nor does it speak to that subject even implicitly. The regulation's "greater in scope" language deals with state-law permits that do not purport to be part of the NPDES program at all. BIO 26. The regulation does not require courts to parse each condition of validly issued NPDES permits. *Id.* That is presumably why

the government has never before suggested the regulation is relevant to the question presented here.

That leaves the Solicitor General's last move. The language in CWA Section 1365 that allows citizen suits is materially identical to the language in Section 1319 describing EPA's enforcement authority. Recognizing, therefore, that EPA's power to enforce conditions in permits like the ones here stands or falls with the public's ability to do the same in citizen suits, the Solicitor General declares that Section 1319 "does not authorize EPA to enforce any NPDES permit conditions that are broader in scope than federal law requires." CVSG Br. 13.

The Solicitor General is incorrect. EPA enforcement actions to enforce "state-issued NPDES permits that are derived from state law" are permissible, the Government itself has previously made clear, because limitations derived from state law are still conditions contained in "a permit issued under [Section 1342] of this title." Br. in Opp. at 11 & n.2, *Smithfield Foods, Inc. v. United States*, 531 U.S. 813 (2000) (citing 33 U.S.C. § 1319(a)(3)). In addition, Section 1319 gives EPA authority to bring an action to redress a "violation of any permit condition or limitation implementing," among other provisions, Section 1311. 33 U.S.C. § 1319(a)(3). And as explained above, Section 1311 requires States to include conditions in NPDES permits that are necessary to meet "any more stringent limitation . . . established pursuant to any State law or regulations" *Id.* § 1311(b)(1)(C).

That is the end of the matter. The new Administration is free to exercise its enforcement discretion as it wishes. But it cannot wish away

federal statutory law, which plainly gives EPA the power to enforce NPDES permit conditions that are grounded in state law.

III. There is no genuine split.

Finally, the Solicitor General maintains that the Ninth Circuit's interpretation of the CWA here conflicts with the Second Circuit's decision in *Atlantic States*. CVSG Br. 18-20. But the only reasoning in *Atlantic States* that the Solicitor General defends as valid is its reliance "on 40 C.F.R. 123.1(i)(2)." CVSG Br. 18. In the post-*Chevron* era, a decades-old decision resting on nothing more than recitation of an administrative regulation cannot give rise to a genuine split of authority.

The Solicitor General's only response is that "for the reasons stated [elsewhere in the Government's brief]," "ordinary principles of interpretation" also "compel[] th[e] result" the Second Circuit reached. CVSG Br. 19. But the Second Circuit in *Atlantic States* did not rely on any such reason or principle. Nor has any other court ever adopted any of the statutory arguments the Solicitor General advances. Accordingly, there is no real conflict here—and certainly none that warrants this Court's intervention without further percolation. *See* BIO 10-13.

* * *

All told, the Court is faced here with a terrible vehicle for considering new legal arguments no court has ever considered—and that, upon inspection, fly in the face of the plain language of the CWA. The Court should deny certiorari. All the more so because the Solicitor General does not deny that the question presented hardly ever arises anyway. *See* BIO 19.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 10, 2025

APPENDIX

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APPENDIX A

THE HONORABLE BENJAMIN H. SETTLE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PUGET SOUNDKEEPER ALLIANCE, Plaintiff, v. PORT OF TACOMA; SSA TERMINALS, LLC; and SSA TERMINALS (TACOMA), LLC, Defendants.	Case No. 3:17-cv-05016-BHS PUGET SOUNDKEEPER ALLIANCE'S MOTION FOR AN ORDER TO SHOW CAUSE REGARDING DEFENDANTS' NEW ADMISSION OF INDUSTRIAL ACTIVITY ON THE WHARF

I. MOTION

Plaintiff Puget Soundkeeper Alliance ("Soundkeeper") respectfully moves for an order directing defendants Port of Tacoma ("Port"), SSA Terminals LLC, and SSA Terminals (Tacoma) LLC (collectively "SSA") to show cause for maintaining the stay in this case and any other finding or order in this case that is premised on the Port's and SSA's claim that no industrial activity, including equipment cleaning, occurs on their Wharf. Soundkeeper brings this motion in light of SSA's recent sworn statement that it cleans the enormous electric ship-to-shore cranes and crane parts on its Wharf.

II. PERTINENT FACTS

A. Case background and the ongoing pollution from Defendants' facility.

This is a long-running Clean Water Act enforcement suit against the owner and operators of the West Sitcum Terminal for its polluted stormwater discharges to Commencement Bay. Dkt. 1 (2017 complaint against former terminal operator); Dkts. 47-1, 75 (claims against Port); Dkt. 109 (claims against SSA). The 137-acre Terminal includes a 12.6-acre over-water portion called the Wharf, where five large cranes load and unload container ships. Soundkeeper alleges violations stemming from the Wharf as well as the much larger non-Wharf areas of the Terminal. SSA has been operating the Terminal since October 2017 and became the named permit-holder in January 2020. Dkt. 324-1.

Defendants have failed to collect and test stormwater discharges from the Wharf and do not treat Wharf runoff prior to discharging it into Puget Sound.[1]

In November 2018, the Port moved for summary judgment, arguing *inter alia*, that discharges from the Wharf are not subject to regulation or enforcement because no vehicle maintenance, equipment cleaning, or airport deicing occur there. Dkt. 176 at 5, 12. Ultimately, the Court granted the Port's motion and SSA's similar motion and

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[1] The Port did eventually install a treatment system for the non-Wharf discharges, but it does not consistently reduce pollutant levels below benchmarks. Dkt. 429-1; Koepfgen Decl., Ex. 1.

dismissed all of Soundkeeper's claims. Dkts. 304, 305, 355. Soundkeeper appealed, and the Ninth Circuit reversed in part, remanding for adjudication of Soundkeeper's claims concerning the Wharf and its claims against SSA related to water quality and pollution controls for the non-Wharf areas. Dkts. 403, 404. SSA and the Port appealed the Ninth Circuit's decision to the United States Supreme Court, and their petition for a writ of certiorari is pending.

Despite the Ninth Circuit's remand and denial of Defendants' motion to stay the mandate, Dkt. 406, Soundkeeper has been unable to advance the case and remedy the ongoing pollution either through settlement or litigation. *See* Dkt. 413 (Soundkeeper's motion to appoint settlement judge); Dkt. 427 (order denying same); Dkt. 431 (order granting Defendants' motion to stay).

B. Defendants' contradictory statements about industrial activities on the Wharf.

For seven years, SSA and the Port both swore many times under penalty of perjury and in filings before this Court, the Ninth Circuit, and the United States Supreme Court that no vehicle maintenance, equipment cleaning, or airport deicing occurred on the Wharf. However, the Port has repeatedly acknowledged and even emphasized that the cranes on the Wharf are "equipment." Dkt. 189 at 2 (arguing that fact "that Ship-to-Shore Cranes are *equipment* is critical" because of how EPA regulations use that term) (emphasis original); Dkt. 258 at 3 ("Moreover, . . . PSA and its expert conceded the Wharf's cranes are equipment."). And SSA recently submitted a report signed under penalty of law admitting that it

cleans these cranes and crane parts on the Wharf. Koepfgen Decl. Ex. 2.

1. Defendants repeatedly averred that no equipment cleaning occurs on the Wharf.

On November 6, 2018, in response to Soundkeeper's discovery requests, the Port repeatedly stated, "The West Sitcum Terminal's wharf does not discharge stormwater associated with vehicle maintenance, equipment cleaning, or airport deicing." Koepfgen Decl., Ex. 3 at 8, 11, 14, 18, 21, 24, 28, 31, 33, 35, 39, 51, 57.

On November 15, 2018, in its motion for summary judgment, the Port stated:

> Specifically, PSA contends the Port must monitor and treat stormwater discharges from all areas of the Terminal. Dkt. 109, ¶30. This includes the Wharf, Dkt. 144 at 4:5-14, despite the fact that no activities defined by NPDES regulations (i.e., vehicle maintenance shops, **equipment cleaning**, or airport deicing) take place on the Wharf. . . . **There are no portions of the Terminal engaged in equipment cleaning** or airport deicing that discharge to surface water. . . . No vehicle maintenance or **equipment cleaning** occurs on the Wharf.

Dkt. 176 at 5, 12 (emphasis added).

In support of this summary judgment motion, the Port filed the sworn declarations of Deanna Seaman and Wes Anderson. Dkt. 178, 179. Deanna Seaman was the Senior Manager for Water Quality for the

Northwest Seaport Alliance, which comprises the Port of Tacoma and Port of Seattle. Dkt. 178 at ¶ 1. Ms. Seaman stated:

> The Port has not monitored stormwater discharges from the Wharf portion of the terminal, in part because no activities defined by EPA as industrial occur on the wharf. The Port corrected its SWPPP to remove language that incorrectly suggested that vehicle maintenance ever occurs on the Wharf or that the Wharf could discharge industrial stormwater. Since 2017, I have been on the West Sitcum Terminal roughly 24 times. I have never observed vehicle maintenance, **equipment cleaning**, or airport deicing occurring on the wharf. Based on my experience and knowledge, equipment washing never occurs on the Wharf: **neither cranes nor vehicles are washed anywhere on the Terminal** that could result in a discharge to surface water. In addition, no vehicles are maintained on the Wharf at any time.

Id. at ¶ 9 (emphasis added). Attached to Ms. Seaman's declaration was Port of Tacoma's stormwater pollution prevention plan ("SWPPP") for the facility, which is also signed under penalty of perjury by Ms. Seaman. Dkt. 178-5 at 2. It stated, "No 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)." *Id.* at 9.

Wes Anderson was the facility manager for SSA. Dkt. 179 at ¶ 1. He stated, "In summary, no vehicle maintenance, equipment cleaning, or airport deicing occurs on the Wharf." *Id.* at ¶ 6.

SSA filed a response to the Port's motion for summary judgment in which it stated, "No vehicle maintenance, equipment cleaning, or airport de-icing occur on the wharf portion of the Terminal." Dkt. 185 at 2.

In the Port's December 7, 2018 reply in support of its motion for summary judgment, it stated, "[T]here are no vehicle maintenance or equipment cleaning operations on or discharging to the Wharf." Dkt. 189 at 1.

Then, in June 2019, in a supplemental brief regarding the Court's request to seek input from the Department of Ecology, SSA stated:

> Here, it is undisputed that there is no vehicle maintenance shop on the Wharf and no equipment cleaning or airport de-icing occur on the Wharf. . . . Accordingly, [Soundkeeper] may enforce the ISGP at the West Sitcum Terminal only where the federal program is implemented: namely, areas where vehicle maintenance, equipment cleaning, and airport de-icing occur. It is uncontroverted that none of these activities occurs on the Wharf."

Dkt. 257 at 2, 3.

Similarly, in the Port's supplemental brief, it stated:

> It is undisputed that when vehicle maintenance and equipment cleaning operations are conducted, this is done in areas that cannot, and do not, discharge to Wharf. Dkt. 176 at 6:11-26; Dkt. 179 at ¶¶4-6; Dkt. 178 at ¶9. Moreover, [Soundkeeper] has identified no vehicle maintenance or equipment cleaning operations on the Wharf, and [Soundkeeper] and its expert conceded the Wharf's cranes are equipment. Dkt. 185 at 24:25-26 (describing cranes as "mechanical equipment"); Dkt. 187 at 2:10 (describing cranes as "equipment"). The Port's SWPPP, certified under penalty of federal law, states that no activity defined by EPA as industrial occurs in areas draining to the Wharf. Dkt. 178-5 at 9 (section S1.A).

Dkt. 258 at 3.

Then, in February 2021, in SSA's motion for summary judgment, it stated, "SSAT has never conducted vehicle maintenance, equipment cleaning, or any other activity identified by the EPA as industrial activity on the Terminal wharf." Dkt. 317 at 13. In support of its motion, SSA submitted the declaration of Kelly Garber, its environmental director. Mr. Garber stated, "SSATT has never conducted vehicle maintenance, equipment cleaning, or any other activity identified as industrial activity under 40 C.F.R. 122.26(b)(14)(viii) on the terminal's wharf." Dkt. 319 at ¶ 3.

2. The Court granted Defendants summary judgment based on their assertions.

In response to Defendants' summary judgment motions, Soundkeeper argued that industrial activity occurs on the Wharf, relying on evidence that Defendants maintain the Wharf cranes. Dkt. 185 at 24-25. The Court was not presented with any evidence of crane cleaning (beyond Defendants' representations that no equipment cleaning occurs on the Wharf) and did not make any factual findings in that regard. *Id.*; Dkt. 304 at 23. Instead, the Court determined that (1) the cranes are equipment, not vehicles; (2) maintaining the cranes is equipment maintenance, not vehicle maintenance; and (3) equipment maintenance is not an enumerated industrial activity. *Id.* ("The Court agrees with the Port because equipment maintenance is not an industrial activity under 40 C.F.R. 122.26(b)(14)(viii)."); *accord* Dkt. 355 at 5-6, 16 (order granting SSA's motion and reiterating basis for summary judgment as to the Wharf).

3. Defendants repeat their assertions on appeal.

The Port and SSA continue to repeat these assertions in their appellate briefing. Defendants told the Ninth Circuit, "No vehicle maintenance, equipment cleaning, or airport deicing occurs on the wharf." *Puget Soundkeeper Alliance v. Port of Tacoma et al.*, Nos. 21-35881, 21-35899, 22-35061, Dkt. 25 at 14 (9th Cir. March 24, 2022).

Defendants' petition to the United States Supreme Court likewise asserts that "'The Wharf' is a

12.6-acre overwater portion of the Terminal used only for loading and unloading cargo containers. . . . No vehicle maintenance, equipment cleaning, or airport deicing occurs at the Wharf." *Port of Tacoma et al. v. Puget Soundkeeper Alliance*, No. 24-350, Petition at 10, https://perma.cc/63DY-DEQG.

4. SSA now admits that equipment cleaning necessarily occurs on all of its terminals' wharves, including the West Sitcum Wharf.

The current iteration of the Industrial Stormwater General Permit ("ISGP") allows permittees to request a waiver if sampling from certain discharge points is infeasible. ISGP at 29, Condition S4.B.2.f., https://perma.cc/PPH7-V74C. On January 10, 2025, SSA applied for such waiver as to stormwater discharge points on its wharf, certifying under penalty of perjury that the request and all of its attachments were true, accurate, and complete. Koepfgen Decl., Ex. 2. SSA's application states, "SSATT prohibits vehicle and equipment fueling, vehicle cleaning, and vehicle maintenance on the wharfs. **The only cleaning and maintenance activities performed on the wharfs are for cleaning and maintenance of electric ship-to-shore cranes and crane parts** that cannot be removed from the wharf for cleaning or repair." *Id.* at 2 (emphasis added).

SSA made identical admissions in sampling waiver requests it submitted for its three other terminals regulated by the ISGP, indicating that crane cleaning is SSA's standard and presumably long-standing practice. *Id.*, Ex. 4.

On April 17, 2025, Ecology issued an administrative order in response to SSA's waiver request at West Sitcum. *Id.*, Ex. 5. The administrative order includes Ecology's factual finding that the "only cleaning and maintenance activities performed on the wharfs are for cleaning and maintenance of electric ship-to-shore cranes and crane parts that cannot be removed from the wharf for cleaning or repair." *Id.* at 2. The thirty-day window to appeal Ecology's administrative order passed without SSA filing an appeal. *Id.* at 5; Koepfgen Decl. ¶ 7. Indeed, rather than correcting or disputing anything in its sampling waiver application or Ecology's administrative order, on May 15, 2025, SSA finally identified one discharge sample point on the Wharf. *Id.*, Ex. 6; *id.*, ¶ 8.

C. Defendants' present efforts to capitalize on their apparent misrepresentations.

Despite SSA's admission that it cleans the cranes on the Wharf, Defendants continue to press forward their Supreme Court petition, which is premised entirely on the misrepresentation that no such industrial activity occurs on the Wharf. As discussed below, Defendants obtained a stay of this litigation on that same premise.

Defendants also continue to press their appeal of the 2020 ISGP in state fora, despite that the only remaining issue is irrelevant given the admission that the Wharf falls within the federal definition of industrial stormwater.

III. ARGUMENT

A. The Court has broad inherent authority to revise its findings and orders premised on Defendants' misrepresentations.

Under both Rule 54(b) and its inherent common law authority, the Court has "wide latitude" to revise prior non-final orders "at any time before the entry of a judgment." *MidMountain Contractors, Inc. v. Am. Safety Indem. Co.*, No. 10-cv-1239-JLR, 2013 U.S. Dist. LEXIS 143438, at *10 (W.D. Wash. Oct. 1, 2013) (citing Fed. R. Civ. P. 54(b)); *City of L.A. v. Santa Monica BayKeeper*, 254 F.3d 882, 886 (9th Cir. 2001) (holding that the "court's power to rescind, reconsider or modify an interlocutory order over which it has jurisdiction is derived from common law").

The Court likewise has authority under the federal rules and its inherent power to revise final orders. *See, e.g.,* Fed. R. Civ. P. 59(e), 60(b) & (d); *United States v. Asarco Inc.*, 430 F.3d 972, 979 (9th Cir. 2005) (noting that the Rules codify and preserve court's traditional, inherent authority to modify the prospective effect of their decrees). For example, Rule 60(d)(3) specifically preserves the Court's inherent authority to set aside a final judgment for fraud on the court at any time. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) (citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944)). Like here, "[m]ost fraud on the court cases involve a scheme by one party to hide a key fact from the court and the opposing party." *United States v. Est. of Stonehill*, 660 F.3d 415, 444 (9th Cir. 2011).

The orders premised on Defendants' misrepresentations are all interlocutory and under

the Court's jurisdiction. Plainly, the recent order temporarily staying the litigation is interlocutory. The Court's substantive orders concerning the Wharf are also interlocutory because Soundkeeper's claim that Defendants are violating the Clean Water Act with respect to Wharf discharges was reopened by the Ninth Circuit's remand. Dkt. 403. While Defendants are petitioning the Supreme Court for review of the Ninth Circuit's decision, the Ninth Circuit's mandate issued, placing the claim back in this Court's jurisdiction. Dkt. 407; *see also* Dkt. 406 (denying motion to stay mandate).

B. The stay order is premised on Defendants' misrepresentations and should be lifted.

Defendants sought and obtained the current stay of litigation based on their petition to the Supreme Court which asks whether Soundkeeper may enforce permit conditions concerning the Wharf. Dkt. 426 at 1; Dkt. 432. The key factual premise of their petition is that the Wharf falls outside the federal definition of stormwater associated with industrial activity because no vehicle maintenance, equipment cleaning, or airport deicing occur on the Wharf. *Port of Tacoma et al. v. Puget Soundkeeper Alliance*, No. 24-350, Petition at 10. SSA's recent sworn statement to the Department of Ecology shows that premise is false. Koepfgen Decl., Ex. 2.

Defendants also persuaded the Court that "Entering a Stay Will Further the Orderly Course of Justice," by asserting that "the Supreme Court could entirely resolve issues regarding discharges from the Wharf. It would waste judicial resources to move ahead with discovery and potential motion practice

relating to the Wharf that might ultimately prove completely unnecessary." Dkt. 430 at 5. But given SSA's admission that industrial activity—namely, equipment cleaning—occurs on the Wharf, Defendants are wrong. Defendants are asking the Supreme Court an academic question that will not resolve any issue in this case. Maintaining the stay only serves to allow Defendants' polluted discharges to continue unabated. *See* Dkt. 429-1; Koepfgen Decl., Ex. 1.

C. The summary judgment findings premised on Defendants' misrepresentations should be amended.

The Court's summary judgment findings premised on Defendants' misrepresentations that no equipment cleaning occurs on the Wharf are being misused and misconstrued. Accordingly, Soundkeeper requests the Court amend and clarify the record.

The Solicitor General's recent amicus brief filed in the Supreme Court illustrates how the Court's prior orders are being misconstrued. The Solicitor General notes SSA's admission that it cleans equipment (cranes) on the Wharf, but states that the case nonetheless "comes to the [Supreme] Court on the understanding that no industrial activity occurs at the Wharf," because this Court supposedly "rejected [Soundkeeper's] argument that 'vehicle maintenance and/or equipment cleaning occur on the [W]harf because the large mechanical cranes are maintained and cleaned' there," and Soundkeeper "did not appeal that finding." *Port of Tacoma, et al. v. Puget Soundkeeper Alliance*, No. 24-350, Brief for the

United States as Amicus Curiae at 7, n. 2, https://perma.cc/5PJF-6VQV.[2] In other words, this Court's prior order is being used and interpreted to perpetuate a fundamental misunderstanding and to ignore evidence that has been hidden and misrepresented.

Here, Defendants not only failed to disclose the fact that they clean the Wharf cranes in response to Soundkeeper's discovery requests, Defendants repeatedly told the Court that no equipment cleaning occurs on the Wharf. *See supra* Section II.B.1. Defendants have not only let this false impression stand uncorrected, they have continued to press the misrepresentation forward in multiple appeals, including the Supreme Court petition, even after SSA admitted that it cleans the Wharf cranes.

IV. CONCLUSION

For the foregoing reasons, the Court should order Defendants to show cause for their contradictory representations and the orders they obtained through what appear to be serious misrepresentations to the Court.

RESPECTFULLY SUBMITTED this 10th day of June, 2025.

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[2] Soundkeeper disagrees with the Solicitor General's suggestion that the Court made a "finding" that Defendants do not clean the cranes. The Court did not make any factual findings in that regard. Instead, the Court determined that the cranes are not vehicles and therefore maintaining the cranes is not vehicle maintenance. *See supra* Section II.B.2.

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I certify that this memorandum contains 2,916 words, in compliance with the Local Civil Rules.