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

## CORRECTED SUPPLEMENTAL BRIEF FOR PETITIONERS


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## SUPPLEMENTAL BRIEF

Faced with a brief from the Solicitor General urging the Court to grant certiorari, Soundkeeper doubles down on its effort to evade review of the important question presented by manufacturing a vehicle problem. The Solicitor General correctly saw through those arguments in recommending a grant. Soundkeeper's overheated rhetoric and wild predictions about how alternative arguments might fare on remand change nothing. No one disputes that the Ninth Circuit "squarely" decided the question presented. U.S. Br. 21; *see* Pet. 37. As the Solicitor General explained, that "important" and circuit-splitting question "warrants this Court's review" to ensure "a clear and consistent standard on the reach of the citizen-suit provision." U.S. Br. 3, 19, 21. Indeed, in the Ninth Circuit, Soundkeeper itself urged the court to address, and resolve, that issue on the broadest possible terms. Pet. Reply 8-9; *see* U.S. Br. 22. The Ninth Circuit did just that. Pet.App.11a-13a. There is zero impediment to this Court reviewing, and rejecting, that broad rule now.

## ARGUMENT

Soundkeeper has never seriously tried to dispute that the traditional criteria for certiorari are met—and still does not do so.[1] Instead, it has resorted to trying to evade review of the certworthy question presented by manufacturing a "vehicle" problem. In its latest brief, Soundkeeper amps up the rhetoric, but its renewed vehicle arguments are just as baseless as

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[1] Its passing attempt (at 11) to deny the existence of the direct circuit conflict that the Ninth Circuit (Pet.App.13a) and Solicitor General (at 18-20) have acknowledged is feeble at best.

before. More important for present purposes, they are beside the point. The fact that there may be alternative arguments outside the question presented for the lower courts to address on remand is neither unusual nor a basis to deny certiorari. And that is particularly true here, where Soundkeeper urged the Ninth Circuit to pass over such arguments in order to adopt the broad rule that it now seeks to insulate from this Court's review.

1. Soundkeeper starts by rehashing—for the *third* time—an argument that both petitioners and the Solicitor General have thoroughly debunked. Echoing its brief in opposition and a supplemental letter, Soundkeeper again insists (at 2) that the permit conditions it seeks to enforce are justified because Washington exercised so-called "residual designation" authority under the CWA to regulate docks and wharfs in its 2015 Industrial Stormwater General Permit (ISGP). Notably, the premise of this argument (the one that Soundkeeper always leads with) is that the permit conditions at issue *do* mandate a greater scope of coverage than federal law. Soundkeeper tries to justify that by arguing that the State engaged in a *sub silentio* exercise of its federal "residual designation" authority—a rarely used power that is suspect to begin with. Pet. Reply 10-11.

As the Solicitor General explains, this argument should not "dissuade this Court from correcting the Ninth Circuit's erroneous interpretation of the citizen-suit provision." U.S. Br. 21. Soundkeeper itself repeatedly "urged" the lower courts to bypass this "residual designation" issue, advocating for a sweeping ruling that all permit conditions are privately enforceable in federal courts. *Id.* at 22; Pet. Reply 8-9. And that is exactly the ruling Soundkeeper

secured. Pet. Reply 9. Now it says that this argument is a reason for *denying* review—a bait and switch. The "residual designation" issue is, at most, an issue for "remand," as (as Soundkeeper urged below) "[n]either the court of appeals nor the district court has addressed that question." U.S. Br. 22. It presents no obstacle to deciding the question presented.

Moreover, on remand, Soundkeeper is almost certain to lose on this "residual designation" argument for all the reasons petitioners have given—e.g., the 2015 permit at issue plainly never invoked the authority, EPA never approved any such exercise of authority, and the authority has expired anyway—reasons Soundkeeper conspicuously still ignores. Pet. Reply 8-11; Petrs. Suppl. Br. 1-3.[2]

Soundkeeper's assertion (at 3) that the Ninth Circuit's "collateral-attack holding" would block petitioners from succeeding on that argument on remand is flat-out wrong. The Ninth Circuit ruled only that the "*validity* of [the 2010 and 2015] permits is not subject to collateral attack in federal court." Pet.App.2a (emphasis added); *see* Pet.App.15a ("[T]he Port cannot avoid liability by arguing that certain terms in its permit are *invalid* ...." (emphasis added)). But petitioners' potential remand argument—that

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[2] Soundkeeper misleadingly suggests (at 2) that "EPA itself" recognized that the State used "'residual designation'" authority to regulate the Wharf, citing a letter from a regional administrator. *See* D. Ct. No. 17-5016, Dkt. No. 429-3. But that letter does not purport to confer a formal agency approval of anything and, anyway, pertains only to the *2020 ISGP*—not the 2015 ISGP at issue in this petition. *See id.* As the Solicitor General observes (at 23), "only the 2015 version of the ISGP remains at issue here," so questions about the 2020 ISGP could "not affect this Court's ability to resolve the question presented."

the permit conditions are authorized by state, but not federal, law—does not question the "validity" of those conditions; it pertains to whether federal courts have jurisdiction over lawsuits seeking to *enforce* them. *See* Pet. Reply 10 n.5. As the government explains, *that* argument does not "collaterally attack the permit's validity, since Washington could continue to enforce the provision as a matter of state law even if petitioners ultimately prevail." U.S. Br. 23.

In other words, Soundkeeper's "collateral attack" argument is just another strawman.

2. Soundkeeper next claims (at 2-4) that "[t]he [ISGP's] coverage of the Wharf" does not go beyond the scope of the federal program simply because the Port also holds a NPDES *Municipal* Separate Storm Sewer System (MS4) permit. For starters, this argument is odd, because Soundkeeper has been pounding the "residual designation" argument in its briefs as a (manufactured) basis to get around the fact that the permits conditions at issue *do* go beyond federal law. But, in any event, this late-arriving argument is also irrelevant and wrong.

First, this is just another argument Soundkeeper *might* advance on remand if this Court overturns the Ninth Circuit's categorical rule—which, again, is not a vehicle issue at all. Soundkeeper even admits (at 4) that "[t]he truth is that the court of appeals had no need to address the issue" due to the categorical legal rule the Ninth Circuit applied. That categorical rule is what warrants this Court's review, and Soundkeeper's remand-focused alternative argument does not stand in this Court's way.

This argument is also doomed in the lower courts in any event. The Port's MS4 permit does not affect

the relevant remand question—whether Washington's ISGP goes beyond the scope of the federal NPDES *Industrial Stormwater Program*. Pet. 12, 27. As petitioners and the government explain, it does. Federal law *exempts* stormwater runoff from docks, wharfs, and other areas used solely for transportation from all federal industrial-stormwater requirements. *Id.* at 5-6, 12, 27; Pet. Reply 4 n.2, 11; U.S. Br. 6. Soundkeeper has never disputed this. The permit conditions at issue eliminate that exemption—and so clearly go beyond the scope of the federal program. Pet. 6-9.

Nor is there any overlap between the claims Soundkeeper has brought in this case and the Port's MS4 permit. "Unlike traditional NPDES permits," a MS4 permit does not "establish[] benchmarks or other numeric or narrative effluent limits for stormwater discharges"; it requires that the Port implement a "stormwater management program[]" and educate its tenants about best practices. *Puget Soundkeeper Alliance v. State of Washington*, PCHB Nos. 07-021, 07-026, et al., 2008 WL 5510413, at *4-5 (Aug. 7, 2008); *see also Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1164-66 (9th Cir. 1999) (explaining the differences between a municipal and an industrial-stormwater permit). Washington's ISGP and the Port's MS4 permit are apples and oranges—as Soundkeeper itself argued in the district court. *See* D. Ct. Dkt. 39-2 at 2 n.1 (explaining that the Port's MS4 permit was irrelevant to its claims).

Soundkeeper's claims in this litigation are not about violations of that *municipal* permit or the Port's management plan or tenant education; they are about discharges from the Wharf allegedly violating specific effluent limits and water-quality standards for

*industrial* sources. And those limits and standards could apply to the Wharf only because the State chose to expand the scope of its ISGP *beyond* the federal program. Pet. 5-9. That understanding was taken as given by the parties and the Court during the Ninth Circuit appeal. The Port's MS4 permit does not change the fact that the ISGP conditions at issue go beyond the scope of the CWA.

3. Soundkeeper's final "vehicle" argument especially reeks of desperation. Citing a "show cause" motion it filed in the district court mere *hours* before its supplemental brief, Soundkeeper tries (at 4-6) to create a vehicle problem by collaterally attacking an issue that was resolved against it by the district court and that Soundkeeper did not appeal below.

According to Soundkeeper (at 5), "petitioner SSA Terminals recently swore" that "equipment cleaning" occurs on the Wharf, which supposedly contradicts the "factual predicate" on which this case was decided—that industrial activity, as defined by the federal regulations, did not occur on the Wharf during the relevant time period. The Solicitor General addressed this issue in its brief and explained why it poses no barrier to review. U.S. Br. 7 n.2. The Solicitor General is right. Soundkeeper's last-ditch attempt to make something out of this is wrong.

To begin, Soundkeeper's recounting (at 6) of this "concession" is not accurate. The statement—which came from an outside consultant to SSA, and which has been publicly available for nearly five months—pertains to SSA's *current* activities under the *2025 ISGP*. *See* D. Ct. Dkt. 435-2 at PDF 6. Those activities have nothing to do with the case before the Court, which is undisputedly focused exclusively on alleged violations of the *2015 ISGP* occurring no later

than 2019—six years ago. Pet. Reply 11; U.S. Br. 23. Soundkeeper does not claim to have any evidence that "equipment cleaning operations" occurred on the Wharf during that relevant time period.[3] That is a complete answer to this vehicle argument.

Moreover, the question whether "equipment cleaning operations" occurred before 2019 has already been conclusively adjudicated by the lower courts. Soundkeeper pushed a similar version of this argument in the district court, asserting that discharges from the Wharf were covered by the federal industrial-stormwater regulations because the large ship-to-shore cranes were "lubricated and maintained in place" there. D. Ct. Dkt. 185 at 24-25. The district court rejected Soundkeeper's argument that "vehicle maintenance and/or equipment cleaning [as defined by the federal regulations]" occurred "because the large mechanical cranes are maintained *and cleaned* in place on the [W]harf." Pet.App.46a (emphasis added). Soundkeeper could have—but did not—appeal that conclusion. "[T]he case accordingly comes to the Court on the understanding that no industrial activity occurs at the Wharf"—notwithstanding the fact that the large ship-to-shore

[3] But there is ample evidence to the contrary, including the sworn testimony of the Port's senior manager for water quality who testified that, in more than 24 visits to the Wharf, she "never observed vehicle maintenance," "equipment cleaning," or "equipment washing" during the period that *is* at issue in this case. D. Ct. Dkt. 178 at ¶ 9 (Declaration of Deanna Seaman). While Soundkeeper tries to make something out of a consultant's passing statement made *years* later, it has identified no basis to question the veracity of the Seaman declaration or the other evidence in the record as it pertains to the 2015 permit at issue.

cranes are obviously maintained in place there. U.S. Br. 7 n.2.[4]

Soundkeeper's late-breaking attempt to manufacture a factual dispute thus has zero bearing on this Court's review of the question presented. But there's more. Contrary to Soundkeeper's insinuation, the vague reference to "cleaning" in the consultant's 2025 correspondence simply did not address whether the Wharf hosts activities qualifying as "industrial" "*equipment cleaning operations*" under the federal regulations, the relevant question. 40 C.F.R. § 122.26(b)(14)(viii) (emphasis added). So there is no inherent contradiction between the vague statement on which Soundkeeper now relies and petitioners' consistent legal position that no "industrial activity, as defined in 40 C.F.R. § 122.26(b)(14)[(viii)]" occurred on the Wharf. Resp. Suppl. Br. 5a.

"Equipment cleaning operations" is a term of art under the federal regulations that requires a systematic "business process or practice" for washing industrial equipment; "one-off" or "incidental" wipings do not qualify. *In re San Pedro Forklift, Inc.*, CWA Appeal No. 12-02, 2013 WL 1784788, at *23

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[4] Given its irrelevance to the question before the Court, Soundkeeper's suggestion (at 6) that this Court hold the petition pending the district court's resolution of its show-cause motion—even though the district court has stayed all proceedings in this case pending *this Court's* decision on the petition and that stay remains in place, *see* D. Ct. Dkt. 432—is baseless. Worse, it is a transparent attempt to interfere with this Court's consideration of the petition, timed—to the day—with the filing of its supplemental brief, even though the glancing consultant statement on which it relies has been publicly available for five months. If the Court accepts this invitation, it will create a playbook for staving off review of certworthy questions by making baseless, last-minute district court pleas.

(E.A.B. Apr. 22, 2013). Here, despite significant discovery in the district court, there is no evidence—much less evidence pertaining to the 2015 permit at issue—of any such "business process or practice" for stripping or washing the massive ship-to-shore container-handling cranes at the Wharf. To the extent the consultant's statement was referencing incidental wiping of windows (interior or exterior), that would not result in any discharge to surface water—and would not constitute an "equipment cleaning operation[]" under the federal regulations.

This is, in short, yet another attempt to manufacture a vehicle problem that does not exist.

* * *

A true vehicle argument identifies a reason the Court *cannot* reach the question presented. Soundkeeper has not even claimed to have identified such a problem, and there is none. The truth is this case provides an excellent vehicle to address the question presented. As the Solicitor General has confirmed, the question presented was "squarely raised and decided below." U.S. Br. 21. The Ninth Circuit's decision even includes a concurring opinion highlighting the issue that has split the circuits. Pet.App.18a-20a. The Ninth Circuit's resolution of that issue is as clean as it comes. And with Soundkeeper's late-arriving Supreme Court counsel, the Court can be assured that this issue will be vigorously briefed and argued on the merits.

Soundkeeper positioned this case to get what it wanted in the Ninth Circuit—a broad rule allowing citizens and professional citizen-suit plaintiffs like Soundkeeper to invoke the federal courts to enforce state-law conditions embedded in NPDES permits

that go beyond federal law, an extraordinary enforcement power even the federal government lacks. U.S. Br. 13-15.[5] It is obvious what is going on now; Soundkeeper wants to keep that rule at all costs—no doubt figuring that if it can snatch a deny from the jaws of the Solicitor General's grant recommendation, the Ninth Circuit's rule will remain in place for decades to come, especially since most defendants are forced to settle when confronted with meritless suits like this. Pet. 36-37; Chamber Amicus Br. 17-20; WPPA Amicus Br. 16-18.

But this Court's review is needed now. The Ninth Circuit's rule is the subject of an acknowledged conflict, is egregiously wrong, and is harming a multitude of interests, as underscored by the diverse array of amici urging this Court's review. And try as it might, Soundkeeper has failed to identify any impediment to this Court's review of the question presented. The Court should follow the Solicitor General's recommendation and grant certiorari.

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[5] Soundkeeper's attempt (at 6-11) to second-guess the Solicitor General on the scope of the government's enforcement authority and argue that "what's good for the geese is good for the gander" fails. The United States is obviously in the best position to determine its enforcement authority under the CWA. And it has correctly determined that it lacks the authority to enforce state-law permit conditions that go beyond the scope of the federal program. U.S. Br. 13. Any other determination would not only defy the CWA, but turn federalism upside down.

## CONCLUSION

The petition should be granted.

Respectfully submitted,

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