

**POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

PUGET SOUNDKEEPER ALLIANCE,
BNSF RAILWAY COMPANY, THE
NORTHWEST SEAPORT ALLIANCE,
PORT OF SEATTLE, PORT OF TACOMA,
PACIFIC MERCHANT SHIPPING
ASSOCIATION, and SSA TERMINALS,
LLC,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 19-089c

ORDER ON SUMMARY JUDGMENT

1. INTRODUCTION

This appeal concerns the 2020 Industrial Stormwater General Permit (2020 ISGP), issued by the Department of Ecology (Ecology). Relevant to this order, the Permittees¹ contended in Legal Issue 11 that Ecology did not expand coverage for transportation facilities beyond stormwater associated with activities identified in a federal regulation. The Pollution Control Hearings Board (Board) agreed and, in a prior order, granted summary judgment to the Permittees on Legal Issue 11. The parties also sought summary judgment on Legal Issue 12, which asks whether Ecology followed the proper procedure in expanding coverage for transportation facilities.

¹ The Permittees are appellants BNSF Railway Company, Northwest Seaport Alliance, Port of Seattle, Port of Tacoma, Pacific Merchant Shipping Association, and SSA Terminals, LLC.

1 In its prior order, the Board dismissed Legal Issue 12 as moot because of its ruling on Legal
2 Issue 11.

3 The Court of Appeals reversed the Board's decision, concluding under Legal Issue 11 that
4 the 2020 ISGP applies to all areas of industrial activity at covered transportation facilities, not only
5 the limited areas specified in the federal regulation. *Puget Soundkeeper All. v. Pollution Control*
6 *Hr'gs Bd.*, 30 Wn. App. 2d 360, 386, 545 P.3d 333 (2024). The Court of Appeals remanded this
7 appeal to the Board, instructing the Board to grant summary judgment on Legal Issue 11 in favor
8 of Ecology and appellant Puget Soundkeeper Alliance (PSA) and to reach the merits of Legal
9 Issue 12.

10 Reaching the merits of Legal Issue 12, the Board now concludes that the expansion of the
11 2020 ISGP's scope of coverage for transportation facilities was not unreasonable or unlawful on
12 the basis that it does not comply with procedural requirements under federal and state law. There
13 is no genuine issue of fact regarding whether Ecology complied with applicable procedural
14 requirements, and Ecology is entitled to summary judgment on Legal Issue 12.

15 The parties to this appeal are as follows. PSA filed an appeal with the Board on December
16 19, 2019, challenging the 2020 ISGP (PCHB No. 19-089). BNSF Railway Company, The
17 Northwest Seaport Alliance (NWSA), Port of Seattle, Port of Tacoma, Pacific Merchant Shipping
18 Association, and SSA Terminals, LLC, filed three separate appeals with the Board on December
19 20, 2019, challenging the same permit (PCHB Nos. 19-090, 19-091, 19-092). The Board
20 consolidated the above appeals under the caption PCHB No. 19-089c. *Am. Prehearing Order* (Feb.
21 10, 2020).

1 The Board deciding this matter was comprised of Board Member Gabriel E. Verdugo,
2 presiding, Board Chair Michelle Gonzalez, and Board Member Christopher G. Swanson.
3 Attorneys Richard A. Smith, Claire E. Tonry, Alyssa Koepfgen, and Kelsey Furman represented
4 PSA. Attorneys Bradford Doll, Lynne M. Cohee, and Devra Cohen represented the Port of Seattle,
5 the Port of Tacoma, and BNSF. Attorneys Bradley B. Jones and Dianne K. Conway represented
6 SSA Terminals and Pacific Merchant Shipping Association. Assistant Attorneys General Julian
7 Beattie and Samuel C. Yang represented Ecology.

8 In ruling on the Motion, the Board considered the following materials:

- 9 1. State of Washington, Department of Ecology's Response in Opposition to Appellants'
10 Joint Motion for Summary Judgment on Issues 11 and 12 (*Ecology's Motion*);
- 11 2. Declaration of Travis Porter in Support of Department of Ecology's Response in
12 Opposition to Appellants' Joint Motion for Summary Judgment on Issues 11 and 12,
13 with Exs. A-B (*Porter Decl.*);
- 14 3. Declaration of Vincent McGowan in Support of Department of Ecology's Response in
15 Opposition to Appellants' Joint Motion for Summary Judgment on Issues 11 and 12
16 (*McGowan Decl.*);
- 17 4. Declaration of Ronald L. Lavigne in Support of Department of Ecology's Response in
18 Opposition to Appellants' Joint Motion for Summary Judgment on Issues 11 and 12,
19 with Exs. A-R (*Lavigne Decl.*);
- 20 5. Permittee-Appellants' Response to Ecology's Motion for Summary Judgment on Issue
21 12 (*Permittees' Resp.*);

6. Declaration of Bradley B. Jones in Support of Appellants' Response to Ecology's Motion for Summary Judgment on Issue 12, with Exs. 1-4 (*Jones Decl.*);
7. Declaration of Bradford T. Doll in Support of Permittee-Appellants' Response to Ecology's Motion for Summary Judgment on Issue 12, with Exs. 1-26 (*Doll Decl.*);
8. Corrected Declaration of Bradley B. Jones in Support of Appellants' Response to Ecology's Motion for Summary Judgment on Issue 12, with Exs. 1-4 (*Corr. Jones Decl.*);
9. State of Washington, Department of Ecology's Reply to Appellants' Response to Ecology's Motion for Summary Judgment on Issue 12 (*Ecology's Reply*);
10. Puget Soundkeeper Alliance's Reply in Support of Department of Ecology's Motion for Summary Judgment on Issue 12 (*PSA's Reply*);
11. Declaration of Alyssa Koepfgen in Support of Puget Soundkeeper Alliance's Reply in Support of Department of Ecology's Motion for Summary Judgment on Issue 12, with Exs. 1-36 (*Koepfgen Decl.*); and
12. The Board's file in this matter.

Based on the written arguments and evidence before the Board on the motion, the Board enters the following decisions.²

² The Permittees requested oral argument in their response brief. The Presiding Officer finds oral argument on the motion is unnecessary and denies the request. *See* WAC 371-08-450 ("Unless oral argument is held, the board normally decides motions exclusively on the parties' written submissions.").

2. BACKGROUND

The federal Clean Water Act (CWA) prohibits the discharge of pollutants from point sources unless the discharge is authorized by a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. § 1342(a). Congress directed the U.S. Environmental Protection Agency (EPA) to authorize states to administer the NPDES permit program. 33 U.S.C. § 1342(b). EPA allowed the state of Washington to administer the NPDES program in 1974, and the Washington Legislature designated Ecology as the state water pollution control agency for purposes of the CWA. 39 Fed. Reg. 26,061; RCW 90.48.260. Ecology also administers Washington's Water Pollution Control Act. *See* ch. 90.48 RCW.

There are two types of NPDES permits: individual and general. *Puget Soundkeeper All.*, 30 Wn. App. 2d at 367 (citing *Nat. Res. Def. Council v. U.S. Env't Prot. Agency*, 279 F.3d 1180, 1183 (9th Cir. 2002)). An individual permit, which is issued after an informal agency adjudication process, authorizes a specific entity to discharge pollutants in a specific place. *Id.* A general permit, on the other hand, is issued pursuant to an administrative rulemaking process—including public notice, public hearing, and an administrative appeal process. *Id.* A general permit may regulate an entire class of potential dischargers that apply for and obtain coverage under the permit. *Id.* General permits, such as the 2020 ISGP, are designed to satisfy the requirements of both the federal CWA and the state Water Pollution Control Act. WAC 173-226-010.

The 2020 ISGP “applies to facilities conducting industrial activities that discharge stormwater to a surface waterbody or to a storm sewer system that drains to a surface waterbody.”

1 2020 ISGP, p. 1 (emphasis omitted).³ Although stormwater discharge generally was exempted
2 from the CWA’s earlier requirements, Congress amended the CWA in 1987 so that “stormwater
3 discharges . . . associated with industrial activity” no longer are exempt from permit requirements.
4 *Puget Soundkeeper All.*, 30 Wn. App. 2d at 368-69 (citing 33 U.S.C. § 1342(p)(2); Water Quality
5 Act of 1987, Pub. L. No. 100-4, 101 Stat. 7). EPA regulations define the term “[s]torm water
6 discharge associated with industrial activity” in paragraph (b)(14) of Section 122.26, and list
7 “categories of facilities [that] are considered to be engaging in ‘industrial activity’ for purposes of
8 paragraph (b)(14)[.]” 40 C.F.R. § 122.26(b)(14). Relevant to this appeal is category 8:
9 “Transportation facilities . . . which have vehicle maintenance shops, equipment cleaning
10 operations, or airport deicing operations.” 40 C.F.R. § 122.26(b)(14)(viii). The federal regulation
11 includes a limitation on which portions of a “transportation facility” may be subject to NPDES
12 permit requirements: “Only those portions of the facility that are either involved in vehicle
13 maintenance . . . , equipment cleaning operations, airport deicing operations, or which are
14 otherwise identified under paragraphs (b)(14) (i)-(vii) or (ix)-(xi) of this section are associated
15 with industrial activity” *Id.*

16 Ecology has addressed stormwater discharge from transportation facilities in multiple
17 iterations of the ISGP, including in 2010, 2015, and 2020. When Ecology issued the 2010 ISGP,
18 it elected not to include the “only those portions” limitation found in EPA’s regulation. *Doll Decl.*
19 *Ex. 23, pp. 11-12*. In a deposition regarding the 2010 ISGP, Ecology’s witness testified that the
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³ A copy of the 2020 ISGP is included in the Notice of Appeal.

1 Water Quality Program Management team decided to expand the permit's scope of coverage
2 beyond the terms found in federal regulations. *Koepfgen Decl. Ex. 23, p. 12:11-21; see also id.*
3 *Ex. 13, pp. 338:24-339:6* (Ecology witness recalling "the decision to have transportation facilities
4 covered wherever industrial activity occurred rather than just the vehicle maintenance shop").
5 Additionally, a "Frequently Asked Questions" document about the 2010 ISGP addresses the scope
6 of coverage for transportation facilities:

7 Q9: My transportation facility has a vehicle maintenance shop and therefore
8 requires permit coverage. Does the permit apply to the entire footprint of the
9 facility, or just to the area where we conduct vehicle maintenance activity?

9 A9: The entire footprint of the industrial facility. Once a transportation facility has
10 permit coverage, the permit conditions for sampling, inspection and stormwater
11 management practices are required in all areas of industrial activity – rather than
12 only those areas where vehicle maintenance, equipment cleaning and airport de-
13 icing occur.

12 *Lavigne Decl. Ex. B, Dep. Ex. 44, p. 5.*

13 The 2015 ISGP similarly excluded the "only those portions" limitation found in the federal
14 regulation. Before Ecology released the 2015 ISGP, a discharger commented "that the ISGP
15 should only be applied to those portions of a marine terminal where vehicle maintenance and other
16 'industrial activities' are preformed [sic], not to the whole terminal." *See Lavigne Decl. Ex. H, pp.*
17 *76:25–77:17-25; id. Dep. Ex. 26, p. 3.* In response, Ecology explained that it "disagree[d] with the
18 suggestion to limit the applicability of the ISGP to only those areas where vehicle maintenance is
19 performed." *Lavigne Decl. Ex. H, Dep. Ex. 26, p. 3.* The 2015 ISGP was not appealed.

1 Like the 2010 and 2015 ISGPs, the 2020 ISGP does not include the “only those portions”
2 language from the EPA regulation. *See 2020 ISGP, pp. 2-3, Table 1* (listing activities requiring
3 permit coverage).

4 Ecology provided notice to the public and EPA regarding the draft 2020 ISGP. The public
5 notice process included a 60-day period for review and comment on the draft permit and fact sheet,
6 from May 1 to June 29, 2019. *Koepfgen Decl. Ex. 37, p. 1*. Ecology also organized public
7 workshops and hearings on the draft 2020 ISGP in Mount Vernon, Moses Lake, Seattle, Olympia,
8 and Vancouver, and held an online webinar. *Id.* And Ecology submitted the draft permit to EPA
9 for review, in compliance with the 90-day review period allowed under a memorandum of
10 agreement between Ecology and EPA. *Id., p. 2*.

11 After the public comment period, appellant NWSA wrote to EPA about the 2020 ISGP,
12 including an inquiry about the permit’s coverage of transportation facilities. NWSA explained that
13 the draft permit purported to expand the activities subject to the program to include two additional
14 sectors that EPA had not defined as industrial activities. *Lavigne Decl. Ex. N, p. 1*. And, relevant
15 to the “only those portions” language at issue in this appeal, NWSA noted that citizen-plaintiffs
16 had:

17 [C]ited earlier changes to the ISGP as evidence that the State of Washington made
18 State requirements federally enforceable in all areas of transportation facilities (not
19 just areas with discharges from vehicle maintenance shops, equipment cleaning
operations, or airport deicing) and contend[ed] that this greater scope of coverage
[was] subject to CWA citizen enforcement.

20 *Id., Ex. N, p. 3*. NWSA asked EPA to “confirm that to the extent the ISGP regulates discharges not
21 defined by EPA as associated with industrial activity, the ISGP’s effluent limits are not issued

1 under section 1342, are not part of the Federally approved program, and are not federally
2 enforceable in a CWA citizen suit.” *Id.* EPA responded to NWSA’s letter, explaining that it had
3 reviewed the draft 2020 ISGP and “did not have any objections to the draft permit as established
4 by the procedures” in the memorandum of understanding between EPA and Washington state. *Id.*,
5 *Ex. O.*

6 Ecology issued the 2020 ISGP on November 20, 2019. Seven appellants filed a total of
7 four appeals of the 2020 ISGP. *See* PCHB Nos. 19-089, 19-090, 19-091, 19-092. The Board
8 consolidated the appeals under the caption PCHB No. 19-089c. The Ports of Seattle and Tacoma,
9 NWSA, and BNSF filed Appellants’ Joint Motion for Summary Judgment on Issues 11 and 12.
10 Ecology responded and sought summary judgment in its favor on the same issues. PSA also
11 responded and supported Ecology’s request for summary judgment.

12 Legal Issues 11 and 12 ask:

13 11. Does the ISGP extend or expand the coverage for transportation facilities
14 beyond stormwater associated with “vehicle maintenance (including vehicle
15 rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment
cleaning operations, airport deicing operations, or which are otherwise identified
under” 40 C.F.R. § 122.26(b)(14)(i)-(viii), or (ix)-(xi)?

16 12. Is the purported expansion of the ISGP’s scope of coverage for transportation
17 facilities beyond the definition of discharge associated with industrial activity
18 unreasonable or unlawful by failing to comply with the procedural requirements for
NPDES permitting under federal and state law?

19 *Am. Prehearing Order, pp. 4-5.*

20 The Board entered an order granting summary judgment to the Permittees on Legal Issue
21 11. *Order on Summ. J.* (Mar. 23, 2021). The Board concluded that the 2020 ISGP, by its plain

1 terms, did not expand permit coverage beyond the “only those portions” limitation found in the
2 EPA regulation. *See id.*, pp. 17-18 (“Ecology’s deletion of ‘only those portions’ language in Table
3 1 in Condition S1 does not change the fact that ‘industrial activity’ is still defined in the ISGP to
4 mean Category Eight of the federal regulation, which does contain the ‘only those portion’ limiting
5 language.”). Because the Board found that the 2020 ISGP did not expand coverage under the
6 permit beyond the limitation in EPA’s regulation, the Board found that Legal Issue 12, which asks
7 whether Ecology complied with procedural requirements in expanding coverage for transportation
8 facilities, was moot. *Id.*, p. 18.

9 PSA appealed the Board’s order, which the Court of Appeals reversed in a decision issued
10 on March 18, 2024. *Puget Soundkeeper All.*, 30 Wn. App. 2d at 387. The Court of Appeals decided
11 that under the unambiguous terms of the 2020 ISGP, “if a transportation facility requires coverage
12 under the 2020 permit because it conducts vehicle maintenance, equipment cleaning, or airport
13 deicing operations, coverage under the permit applies to the entire transportation facility, not just
14 limited areas.” *Id.* at 383-84. And, because the court also concluded that it interprets a general
15 NPDES permit as it would a regulation, if the 2020 ISGP were ambiguous, the court would give
16 great weight to Ecology’s interpretation of the permit and still conclude that it applies to entire
17 transportation facilities. *Id.* at 384. The court remanded this appeal to the Board to grant summary
18 judgment on Legal Issue 11 in favor of Ecology and PSA and to reach the merits of Legal Issue
19 12. *Id.* at 387. The Permittees sought review at the Washington Supreme Court, which denied their
20 petition for review. On May 14, 2025, the Thurston County Superior Court issued an order
21 remanding this appeal to the Board.

1 The parties filed a joint status report with the Board on January 22, 2025, proposing next
2 steps in this appeal. The Permittees requested a case schedule for consideration of Issue 12 and
3 contended that additional briefing would assist the Board in considering the issue on summary
4 judgment. *Joint Status Report*, p. 4. The Permittees also argued that additional discovery was
5 warranted. *Id.* Ecology and PSA contended that Issue 12 had already been fully briefed and was
6 ripe for summary judgment. *Id.* They proposed that a prehearing conference would be necessary
7 only if the motions for summary judgment were denied. *Id.* After this appeal was remanded from
8 the superior court to the Board, the Presiding Officer sent a letter explaining that the Board found
9 “Legal Issue 12 ha[d] been sufficiently briefed” and that the Board would enter a ruling on
10 summary judgment. *Letter to Parties*, p. 2 (June 11, 2025).

11 Several of the Permittees then filed a Motion to Reopen Summary Judgment Briefing on
12 Issue 12 Remand, requesting the Board to allow additional briefing so “the Board [could] consider
13 case law and formal statements and evidence” from EPA and Ecology that were not available when
14 the parties filed summary judgment briefing. *Mot. to Reopen*, p. 1. The Presiding Officer then sent
15 another letter, informing the parties that the Board would deny the Motion to Reopen in a
16 subsequent order. *Letter to Parties*, p. 2 (July 2, 2025).

17 On July 10, 2025, the Permittees that filed the motion for summary judgment on Legal
18 Issues 11 and 12 on October 2, 2020, filed a notice withdrawing that motion as to Legal Issue 12
19 “so that the parties [could] proceed to a hearing regarding Issue 12.” *Appellants’ Not. of Part.*
20 *Withdrawal of Summ. J. Mot. on Issue 12*, p. 1. PSA and Ecology both responded to the notice.
21 Among other arguments, PSA and Ecology noted that the Board has authority to enter summary

1 judgment in favor of a non-moving party where the facts are not in dispute and the non-moving
2 party is entitled to judgment as a matter of law. *Ecology's Resp. to Appellants' Not. of Part.*
3 *Withdrawal of Joint Mot. for Summ. J. on Issue 12, p. 4; Puget Soundkeeper Alliance's Resp. to*
4 *Appellants' Not. Re: Issue 12, pp. 1-2.*

5 The Presiding Officer held a status conference on July 25, 2025, regarding the parties'
6 recent filings. As stated in a later order, the Presiding Officer explained that the Board intended to
7 enter an order on Ecology's request for summary judgment on Legal Issue 12, which Ecology
8 addressed in its response to the Permittees' motion for summary judgment. *See Order on Briefing*
9 *Schedule, p. 2* (citing *Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992)).
10 The Presiding Officer ruled that Ecology's original response brief would be considered the moving
11 papers on Legal Issue 12 and allowed limited additional briefing, particularly because the
12 Permittees had withdrawn their motion for summary judgment as to Legal Issue 12. *Id.* The
13 Permittees filed a joint response to Ecology's motion. Ecology and PSA each filed a reply brief in
14 support of the motion.

15 3. ANALYSIS

16 3.1. Summary Judgment Standard

17 Summary judgment is a procedure available to avoid unnecessary trials where there is no
18 genuine issue of material fact. *Am. Express Centurion Bank v. Stratman*, 172 Wn. App. 667, 675-
19 76, 292 P.3d 128 (2012). The summary judgment procedure is designed to eliminate trial if only
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1 questions of law remain for resolution, and neither party contests the facts relevant to a legal
2 determination. *Rainier Nat'l Bank v. Sec. State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443 (1990).

3 Summary judgment is appropriate “if the pleadings, depositions, answers to
4 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
5 genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter
6 of law.” Civil Rule 56(c). A material fact in a summary judgment proceeding is one affecting the
7 outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992).

8 Summary judgment is subject to a burden-shifting scheme. If the moving party satisfies its
9 burden, then the nonmoving party must present evidence demonstrating that material facts are in
10 dispute. *Atherton Condo. Apartment-Owners Ass'n Bd. v. Blume Dev. Co.*, 115 Wn.2d 506, 516,
11 799 P.2d 250 (1990). When determining whether an issue of material fact exists, all facts and
12 inferences are construed in favor of the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d
13 291, 300, 45 P.3d 1068 (2002). However, bare assertions concerning alleged genuine material
14 issues do not constitute facts sufficient to defeat a summary judgment motion. *SentinelC3, Inc. v.*
15 *Hunt*, 181 Wn.2d 127, 140, 331 P.3d 40 (2014). A nonmoving party cannot rely on speculative
16 statements or conclusory allegations to defeat summary judgment. *Seiber v. Poulsbo Marine Ctr.,*
17 *Inc.*, 136 Wn. App. 731, 736, 150 P.3d 633 (2007).

18 If there are no genuine issues of material fact, the Board then determines whether the
19 undisputed material facts entitle the moving party to judgment as a matter of law. *Skagit Hill*
20 *Recycling v. Skagit County*, 162 Wn. App. 308, 318, 253 P.3d 1135 (2011).

1 **3.2. Ecology Followed All Applicable Procedural Requirements in Making a Residual**
2 **Designation Determination.**

3 The Permittees contend that Ecology’s residual designation determination—expanding the
4 ISGP’s scope for transportation facilities—is unlawful and unreasonable because Ecology failed
5 to comply with state and federal procedural requirements. *Permittees’ Resp.*, p. 1. Ecology and
6 PSA contend that Ecology followed the substantive and procedural requirements for making a
7 residual designation. *Ecology’s Reply*, p. 2; *PSA’s Reply*, p. 1. The Board agrees with Ecology and
8 PSA.

9 Under its residual designation authority, Ecology may require an NPDES permit for
10 stormwater discharges where the agency director “determines that the discharge, or category of
11 discharges within a geographic area, contributes to a violation of a water quality standard or is a
12 significant contributor of pollutants to waters of the United States.” 40 C.F.R. § 122.26(a)(9)(i)(D).

13 The record shows that Ecology determined that discharges from the facilities beyond the
14 scope defined in the federal regulation contribute to a violation of water quality standards or are
15 significant contributors of pollutants. The fact sheet for the 2020 ISGP states that “Ecology has
16 determined that stormwater discharges may cause a violation of water quality standards for a
17 variety of pollutant parameters.” *Lavigne Decl. Ex. P*, p. 16. And in response to comments to the
18 draft permit, Ecology explained that it expressly considered and found that activities beyond the
19 areas described in the federal regulation were a significant contributor of pollutants and may cause
20 a violation of water quality standards. Specifically, in response to comments on the draft 2020
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1 ISGP asking Ecology to clarify that the permit was consistent with the “only those portions”
2 limitation found in 40 C.F.R. § 122.26, Ecology explained that:

3 DMR data from all transportation categories collected since 2009 demonstrates that
4 activity on these sites beyond vehicle maintenance shops, equipment cleaning
5 operations, and airport deicing operations is a significant contributor of pollutants
6 leaving the site at concentrations that may reasonably be expected to cause a
violation of water quality standards. Ecology will continue to regulate the entire
portion of these facilities. Ecology has considered the comments and chosen not to
make the suggested change to draft permit.

7 *Id.*, *Ex. Q*, *p. 8*. Consistent with Ecology’s response, the draft fact sheet for the 2020 ISGP relies
8 on DMR results from 2015 through 2018, well after Ecology first expanded the scope of the ISGP
9 for 2010. *See Doll Decl. Ex. 8, pp. 85, 87*.

10 This is also consistent with the Court of Appeals’ decision on Legal Issue 11, in which the
11 court found that “the determination that activity at such facilities is a significant contributor of
12 pollutants supports Ecology’s interpretation” of the permit. *Puget Soundkeeper All.*, 30 Wn. App.
13 2d at 385.

14 While the Board concludes that the above facts are sufficient to establish that Ecology
15 complied with applicable requirements in making its residual designation determination, the
16 declaration of Vince McGowan further supports this conclusion. McGowan was the manager of
17 the Program Development Services section within Ecology’s Water Quality Program at the time
18 the 2020 ISGP was prepared and issued. *McGowan Decl.* ¶ 3. The Program Development Services
19 section is responsible for drafting and issuing general NPDES permits. *Id.* Ecology’s director
20 delegated authority to issue general NPDES permits to both the manager of the Program
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1 Development Services section and to the Water Quality Program Manager. *Id.* ¶ 4. Heather Bartlett
2 was the Water Quality Program Manager at the time. *Id.* ¶ 3.

3 McGowan explains that during the development of the 2020 ISGP, he met with
4 representatives of several of the Permittees and informed them that the permit would apply to the
5 wharf areas of port facilities. *Id.* ¶ 5. The representatives asked Ecology to state that the extension
6 of ISGP coverage to wharfs was done as a matter of state law rather than under the CWA. *Id.*
7 McGowan states that “Ecology denied this request based on our determination that stormwater
8 discharges from transportation facilities are significant contributors of pollutants at concentrations
9 that may reasonably be expected to cause a violation of water quality standards.” *Id.* This
10 explanation is similar to the standard for a residual designation determination described in 40
11 C.F.R. § 122.26(a)(9)(i)(D). McGowan discussed Ecology’s determination with Bartlett, who later
12 signed the 2020 ISGP. *Id.* McGowan’s declaration reinforces that Ecology made a residual
13 designation determination, in compliance with 40 C.F.R. § 122.26(a)(9)(i)(D).⁴

14 The Board concludes that Ecology made the relevant findings in making a residual
15 designation under 40 C.F.R. § 122.26(a)(9)(i)(D).

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19 ⁴ The Permittees contend that “Ecology fails to show that Mr. McGowan was delegated authority to make a
20 determination that *must be made by the Ecology Director*.” *Permittees’ Resp.*, p. 22 (citing 40 C.F.R. § 122.26(a)(9))
21 (emphasis added). The Permittees are incorrect as a matter of law in asserting that only Ecology’s director could make
a residual designation determination. “Consistent with their assigned duties and responsibilities, [Ecology] employees
are delegated authority to act on behalf of the director and department in the administration of programs and all other
duties assigned to the department.” WAC 173-06-120(1).

1 **3.3. The Permittees Have Not Shown that Additional Procedural Requirements Apply to**
2 **Ecology’s Residual Designation Determination.**

3 Relying on case law and EPA’s practices and statements in other instances, the Permittees
4 contend that Ecology failed to meet procedural requirements in expanding the scope of the ISGP’s
5 coverage beyond the federal definition. Specifically, the Permittees argue that Ecology erred by
6 failing to make a formal determination to support a residual designation, collect data to support a
7 residual designation determination, and provide notice to the public and EPA. *Permittees’ Resp.*,
8 *pp. 12-22*. The Board concludes that the Permittees have not shown that Ecology failed to satisfy
9 any procedural requirements that apply to its residual designation determination.

10 **3.3.1. Ecology’s Residual Designation Determination Was Sufficiently Expressed in**
11 **the 2020 ISGP.**

12 The Permittees argue that Ecology erred in failing to make a separate, express residual
13 designation determination in a formal document. *Id.*, *pp. 12-15*. They rely on federal case law and
14 EPA statements. *Id.*

15 None of the cases cited by the Permittees show that formal requirements apply to Ecology’s
16 residual designation determination or that the agency’s determination is deficient because it was
17 not expressed in some particular way. The Permittees cite, for example, a federal case for the
18 conclusion that a residual designation under section 122.26 “requires ‘a separate, express
19 determination by the agency.’” *Id.*, *p. 12* (quoting *Conservation Law Found., Inc. v. Pruitt*, 881
20 F.3d 24, 32 (1st Cir. 2018)) (internal quotation marks omitted). *Conservation Law Foundation*,
21 however, did not concern a state agency’s exercise of its residual designation authority, but rather

1 whether EPA issued a residual designation in response to a citizen petition, which is governed by
2 a different provision of section 122.26. *See* 881 F.3d at 31-32 (describing EPA’s “practice of
3 issuing residual designations in response to citizen petitions”); *see also* 40 C.F.R. § 122.26(f)
4 (“Any person may petition the Director to require a NPDES permit for a discharge which is
5 composed entirely of storm water which contributes to a violation of a water quality standard or is
6 a significant contributor of pollutants to waters of the United States.”).

7 The context of *Conservation Law Foundation* also shows that it does not apply here. In
8 that case, the court was asked to decide whether, in helping to develop and approve certain total
9 maximum daily loads (TMDLs), EPA “implicitly [had] done what it normally does through an
10 entirely different process” and made a residual designation determination that triggered its
11 obligation to inform “every landowner and business in the area covered by each TMDL” that it
12 required a permit. 881 F.3d at 28-30, 32. EPA opposed this interpretation, explaining its position,
13 stated above, that such a residual designation required a “‘separate, express determination’ by the
14 agency.” *Id.* at 32. In other words, *Conservation Law Foundation* involved the contention that
15 EPA tacitly had made a residual designation determination—contrary to the agency’s practice and
16 own position in the litigation—with wide-reaching consequences. Here, however, Ecology
17 repeatedly has asserted that it *did* make the relevant findings under the applicable provision of
18 section 122.26. *See Lavigne Decl. Ex. P, p. 16; id. Ex. Q, p. 8; McGowan Decl. ¶ 5.* To the extent
19 *Conservation Law Foundation* is relevant to EPA’s interpretation of Ecology’s duties in making a
20 residual designation determination under section 122.26, the Board concludes Ecology met those
21 requirements by determining that activities beyond vehicle maintenance shops are a significant

1 contributor of pollutants and may reasonably be expected to cause a violation of water quality
2 standards. *See Lavigne Decl. Ex. Q, p. 8* (“DMR data from all transportation categories collected
3 since 2009 demonstrates that activity on these sites beyond vehicle maintenance shops, equipment
4 cleaning operations, and airport deicing operations is a significant contributor of pollutants . . .”).

5 The Permittees’ reliance on *San Francisco Baykeeper v. Levin Enterprises*, 12 F. Supp. 3d
6 1208 (N.D. Cal. 2013), is misplaced as well. In that case, the permitting authority *included* in the
7 permit “only those portions” language similar to the version discussed by the parties in this appeal,
8 but the appellant, an environmental advocacy group, argued that permit coverage was required for
9 all the permittee’s activities based on informal letters from agency staff. *Id.* at 1210, 1216, 1219.
10 A representative of the permitting authority submitted a declaration stating that the agency had
11 taken no “formal” action adopting the position that the permittee must have coverage for activities
12 that otherwise were not subject to the general permit. *Id.* at 1217.

13 Here, the Permittees cite *San Francisco Baykeeper* for “California’s position that a formal
14 designation process is required.” *Permittees’ Resp., p. 12*. However, that case concerned whether
15 informal statements from agency staff had expanded coverage beyond the scope of the permit’s
16 terms. No such tension exists here. Rather, as concluded by the Court of Appeals, the unambiguous
17 language of the 2020 ISGP expanded the scope of coverage beyond the terms in the federal
18 regulation. *See Puget Soundkeeper All.*, 30 Wn. App. 2d at 383-84. And, as discussed above, the
19 record supports the conclusion that Ecology made the determinations described in 40 C.F.R.
20 § 122.26(a)(9)(i)(D) to support a residual designation determination. *See, e.g., Lavigne Decl.*
21 *Ex. Q, p. 8*. To the extent *San Francisco Baykeeper* stands for the proposition that a permitting

1 authority must take a “formal” action to describe a permit’s scope, Ecology complied with that
2 requirement in drafting the plain language of the 2020 ISGP and issuing the permit. *See Puget*
3 *Soundkeeper All.*, 30 Wn. App. at 380 (describing the unambiguous terms of the 2020 ISGP and
4 agreeing that “because the permit does not include the limiting language in 40 C.F.R.
5 § 122.26(b)(14)(viii), the permit applies to the entire transportation facility”).

6 Nor do EPA’s statements cited by Permittees show that Ecology failed to properly support
7 its residual designation determination. The Permittees rely on EPA’s briefing from *Conservation*
8 *Law Foundation*, in which EPA writes that, in the agency’s view, a residual designation
9 determination:

10 [R]equires a separate agency action in which EPA or the State specifically analyzes
11 the stormwater discharge and makes an express determination that a permit is
12 required because the discharge ‘contributes to a violation of a water quality
13 standard or is a significant contributor of pollutants to waters of the United States.’

14 *Doll Decl. Ex. 12, p. 20* (quoting 33 U.S.C. § 1342(p)(2)(E)). However, as discussed above,
15 *Conservation Law Foundation* concerned the argument that EPA silently had made a residual
16 designation determination when it approved TMDLs, which would have required many
17 landowners and businesses to obtain permits. *See id.* (“EPA’s approval of a TMDL does not
18 constitute a determination about the specific sources of pollutants into the waters addressed by the
19 TMDL, let alone whether each or any of those sources requires a permit.”). Here, on the other
20 hand, Ecology’s decision regarding the 2020 ISGP’s scope is reflected in the terms of the permit
21 itself as well as in other statements by Ecology. *See* 30 Wn. App. 2d at 383-84; *Lavigne Decl.*
Ex. P, p. 16; id., Ex. Q, p. 8; McGowan Decl. ¶ 5. In other words, this appeal does not concern

1 whether Ecology's residual designation determination is improperly being implied from the
2 agency's action—rather, the record shows that Ecology made the proper findings to support a
3 residual designation determination, which is consistent with the plain language of the 2020 ISGP.
4 EPA's statements in other litigation do not conflict with this conclusion.

5 The Permittees have not raised a genuine issue of fact as to whether Ecology's residual
6 designation determination is deficient because it does not meet any formal requirements.

7 **3.3.2. Ecology Adequately Supported its Residual Designation Determination.**

8 The Permittees also argue that Ecology's determination is erroneous because the agency
9 failed to collect data to support a residual designation. *Permittees' Resp.*, pp. 15-18. According to
10 the Permittees, instead of performing any analysis of areas of the facilities that are beyond the
11 scope of the federal regulation, Ecology referenced only more general data that was not specific
12 to the areas of the facilities that would be added under the expanded scope of the 2020 ISGP.
13 *See id.*, pp. 15-18. The Permittees contend that Ecology's reliance on general data conflicts with
14 EPA's practice in its own residual designation determinations and violates Ecology's duty to
15 consider and describe its significant factual, legal, methodological, and policy decisions under
16 regulations that govern fact sheets. *Id.*, pp. 15-17, 23-24 (citing WAC 173-226-110(1)(j); 40
17 C.F.R. § 124.8).

18 Like the Permittees' contention that Ecology was obligated to make a separate, express
19 residual designation determination, however, the Permittees' arguments here are not supported by
20 any binding legal authority. The regulation that authorizes Ecology to make a residual designation
21 determination allows the agency to require a permit if it decides that a discharge or category of

1 discharges “contributes to a violation of a water quality standard or is a significant contributor of
2 pollutants to waters of the United States[,]” but it does not further direct *how* a permitting authority
3 makes such a determination or dictate what data an agency must consider. *See* 40 C.F.R.
4 § 122.26(a)(9)(i)(D). And, while EPA may have chosen to engage in a more detailed analysis in
5 support of some of its residual designation determinations, that does not mean that EPA or any
6 permitting authority is legally *required* to do so. Indeed, EPA explained in one of the documents
7 provided by the Permittees that “Section 402(p)(2)(E) of the CWA prescribes no procedural
8 mechanism by which EPA is to determine residual designations.” *Doll Decl. Ex. 15, p. 16; see also*
9 *id.* (“Without ‘express congressional direction . . . agencies are free to choose their procedural
10 mode of administration.’”) (quoting *Davis v. EPA*, 348 F.3d 772, 785 (2003)). Nor do the general
11 requirements for fact sheets found in state and federal regulations stand for the proposition that
12 Ecology was required specifically to describe in more detail the basis for its residual designation
13 determination. *See* WAC 173-226-110(1)(j); 40 C.F.R. § 124.8.

14 The Permittees appear to argue that the Board already concluded that Ecology failed to
15 consider data in support of its residual designation determination. *See Permittees’ Resp., pp. 18,*
16 *25.* In its prior ruling on summary judgment, the Board stated that “no evidence has been produced
17 that Ecology has determined that facilities belonging to or operated by the parties are subject to
18 Condition S1.B. (significant contributor of pollutants or reasonably expected to cause a violation
19 of any water quality standard).” *Order on Summ. J., p. 18.* However, as the next sentence in the
20 order explains, the Board was interpreting the plain language of the 2020 ISGP—not whether
21 Ecology lawfully had complied with procedural requirements in exercising its residual designation

1 authority. *See id.* Furthermore, the Court of Appeals has since reversed the Board’s interpretation
2 of the permit’s plain language.

3 In any event, the Permittees overlook the evidence in the record indicating that Ecology
4 collected and considered data in making its residual designation determination. *See Lavigne Decl.*
5 *Ex. P, p. 16; id., Ex. Q, p. 8; McGowan Decl. ¶ 5.* The fact sheet refers repeatedly to the federal
6 CWA and expressly reflects that Ecology “determined that stormwater discharges may cause a
7 violation of water quality standards for a variety of pollutant parameters.” *Lavigne Decl. Ex. P,*
8 *p. 16.* And although the Permittees highlight deposition testimony from the 2020 Permit writer,
9 Travis Porter, that he could not identify DMR data *specific* to the portions of transportation
10 facilities that are not regulated by EPA, *Permittees’ Resp., p. 17,* the 2020 ISGP is supported by
11 data collected long after Ecology had expanded the scope of permit coverage beyond the terms of
12 the federal regulation, *see Doll Decl. Ex. 8, pp. 85, 87.* This data would include discharge from the
13 expanded scope of the permitted facilities and inform Ecology’s decision making for the
14 2020 ISGP. *See Lavigne Decl. Ex. Q, p. 8* (“DMR data from all transportation categories collected
15 since 2009 demonstrates that activity on these sites beyond vehicle maintenance shops, equipment
16 cleaning operations, and airport deicing operations is a significant contributor of pollutants . . .”).

17 Additionally, the Permittees were not necessarily bound to be regulated by the 2020 ISGP
18 and its expanded scope of coverage. If the Permittees believe that discharges from the portions of
19 their facilities where Ecology expanded coverage do not contribute to a violation of water quality
20 standards, Ecology recognizes that they may “apply for an individual permit to allow for a site-

1 specific analysis of their stormwater impacts.” *Ecology’s Mot.*, pp. 24-25 (citing WAC 173-226-
2 240(4)).

3 The Permittees have not raised a genuine issue as to whether Ecology’s residual
4 designation determination is adequately supported.

5 **3.3.3. Ecology Provided Adequate Notice to the Public.**

6 The Permittees also contend that Ecology failed to provide necessary notice of a
7 designation to the public. *Permittees’ Resp.*, pp. 18-20. The Permittees argue that 40 C.F.R.
8 § 122.26(a)(9)(iii) requires Ecology to provide dischargers at least 180 days’ notice of a residual
9 designation determination. *Id.*, pp. 18-19. This provision states that:

10 Operators of storm water discharges designated pursuant to paragraphs (a)(9)(i)(C)
11 and (a)(9)(i)(D) [pertaining to residual designations] of this section shall apply to
the Director for a permit within 180 days of receipt of notice, unless permission for
a later date is granted by the Director (see § 124.52(c) of this chapter).

12 40 C.F.R. § 122.26(a)(9)(iii). According to the Permittees, Ecology gave no notice that hundreds
13 of ISGP permittees would be subject to a residual designation. *Permittees’ Resp.*, pp. 19-20.

14 Contrary to the Permittees’ argument, the text of 40 C.F.R. § 122.26(a)(9)(iii) indicates
15 that it concerns individual permits—not general permits like the ISGP. The provision states that a
16 discharger must “apply to the Director for a permit[,]” but dischargers do not “apply” for general
17 permits—instead, they submit “a notice of intent to be covered by the general permit.” 40 C.F.R.
18 § 122.28(b)(2)(i) (emphasis added). Additionally, the provision that the Permittees cite expressly
19 references 40 C.F.R. § 124.52(c), which concerns the requirement to obtain an “individual permit”
20 and states that the discharger must apply for a permit within 180 days of notice, unless permission
21

1 for a later date is granted. *See* 40 C.F.R. § 124.52(c) (“Prior to a case-by-case determination that
2 *an individual permit* is required for a storm water discharge under this section”) (emphasis
3 added). The plain language of 40 C.F.R. § 122.26(a)(9)(iii) indicates that it does not obligate
4 Ecology to provide at least 180 days’ notice of a residual designation determination in the context
5 of a general permit.

6 Not only is the conclusion that 40 C.F.R. § 122.26(a)(9)(iii) applies only to individual
7 permits consistent with the regulatory text, but it also makes practical sense. Dischargers that must
8 apply for an individual permit need time to prepare permit applications in light of new
9 designations. In the case of general permits, however, dischargers have the opportunity to
10 participate in meetings and the rulemaking process before the general permit is finalized and they
11 seek coverage. *See* WAC 173-226-130; WAC 173-226-150.

12 Despite the plain language of 40 C.F.R. § 122.26(a)(9)(iii), the Permittees argue that EPA
13 indicated in responses to a public notice for an unrelated final designation in Los Angeles County
14 that 180 days’ notice must be provided even for general permits. *Permittees’ Resp.*, p. 19. EPA
15 was responding to a commenter’s concern that a state permitting authority might adopt a general
16 NPDES permit before EPA had taken final action on the designation. *Doll Decl. Ex. 15*, p. 69.
17 EPA responded that EPA’s final action would take place before a final permit was adopted by the
18 state permitting authority, which would “facilitate compliance for the sites covered by the
19 designation, as NPDES regulations require they apply for *a permit* within 180 days of designation
20” *Id.*, pp. 69-70 (citing 40 C.F.R. § 124.52(c)) (emphasis added). EPA also explained that
21 ongoing coordination between the agencies would “ensure *some type of permitted coverage* is

1 available for facilities” *Id.*, p. 70 (emphasis added). Contrary to the Permittees’ argument,
2 EPA’s response does not indicate that EPA requires 180-day notice for residual designations in
3 the context of general permits. Indeed, the regulation EPA relies on specifically concerns the
4 “determination that an *individual permit* is required” 40 C.F.R. § 124.52(c) (emphasis added).
5 Instead, EPA’s response explains that the federal agency was coordinating with the state authority
6 to ensure that sites could apply for “some type of permitted coverage”—i.e., potentially an
7 individual permit, in which case the 180-day notice period would apply. *See Doll Decl. Ex. 15*,
8 p. 70.

9 Not only have the Permittees failed to show that Ecology was required by regulation to
10 provide notice of the specific source of authority supporting the residual designation, but the record
11 does not support the Permittees’ claim that they applied for the 2020 ISGP without being notified
12 of the scope of coverage as a matter of fact. *See Permittees’ Resp.*, pp. 19-20. To the contrary, the
13 scope of the ISGP’s coverage over transportation facilities had been raised by numerous
14 dischargers, and Ecology addressed the issue in its “Frequently Asked Questions” document
15 pertaining to the 2010 ISGP. *Lavigne Decl. Ex. B, Dep. Ex. 44*, p. 5. And, per the Court of Appeals’
16 decision in this matter, the unambiguous language of the 2020 ISGP itself establishes that once
17 coverage is triggered for a transportation facility, it applies to the entire facility. *See Puget*
18 *Soundkeeper All.*, 30 Wn. App. 2d at 383-84.

19 Ecology provided proper notice of its residual designation determination and of the scope
20 of coverage under the 2020 ISGP.

1 **3.3.4. Ecology Provided Adequate Notice to EPA.**

2 The Permittees also argue that Ecology failed to notify EPA of either the exercise of its
3 residual designation authority or the expansion of coverage. *Permittees' Resp.*, pp. 20-22. Ecology
4 is entitled to summary judgment on both counts. First, as with their argument that Ecology failed
5 to give the public adequate notice of its use of its residual designation authority, the Permittees
6 have not shown that Ecology was required expressly to disclose to EPA when it made its residual
7 designation. Second, as to the Permittees' contention that EPA did not receive adequate notice of
8 the expansion to the scope of permit coverage itself, the Court of Appeals has resolved that
9 question. According to the court's decision, the plain language of the 2020 ISGP established the
10 expanded scope of coverage for transportation facilities. *Puget Soundkeeper All.*, 30 Wn. App. 2d
11 at 383-84. Because EPA reviewed the draft 2020 ISGP and "did not have any objections" to it,
12 *Lavigne Decl., Ex. O*, the record demonstrates that EPA received notice of the expansion.

13 The Board concludes that the Permittees have not shown any issue of fact as to whether
14 EPA received adequate notice.

15 **4. CONCLUSION**

16 Ecology's expansion of the ISGP's scope of coverage for transportation facilities beyond
17 the federal definition is not unreasonable or unlawful on the basis of failing to comply with
18 procedural requirements under state or federal law. The Permittees have not identified any
19 applicable requirements for making a residual designation determination that Ecology failed to
20 meet. Ecology is entitled to summary judgment on Legal Issue 12. And, in compliance with the
21

1 Court of Appeals' ruling, the Board enters summary judgment in Ecology's and PSA's favor on
2 Legal Issue 11.

3 **5. ORDER**

4 Accordingly, it is hereby ordered that summary judgment is granted in favor of Ecology
5 and PSA on Legal Issues 11 and 12. This appeal is DISMISSED.

6
7 SO ORDERED this 25th day of September, 2025.

8 **POLLUTION CONTROL HEARINGS BOARD**

9
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11 _____
GABRIEL E. VERDUGO, Presiding
Board Member

12 

13 _____
MICHELLE GONZALEZ, Chair

14 

15 _____
CHRISTOPHER G. SWANSON, Member

16
17 This is a FINAL ORDER for purposes of appeal to Superior Court within 30 days.
18 See Administrative Procedures Act (RCW 34.05.542) and RCW 43.21B.180.

19 You are being given the following notice as required by RCW 34.05.461(3): Any party
20 may file a petition for reconsideration with the Board. A petition for reconsideration must be filed
21 with the Board and served on all parties within ten days of mailing of the final decision. WAC
371-08-550.