

# ISGP Litigation and the Washington State Water Pollution Control Act

WPPA Environmental Seminar 2024

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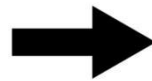
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# Washington State Water Pollution Control Act (“WPCA”)

## The 10,000 Foot View

# State Authority Starts with Federal Authority

- Federal Clean Water Act (33 U.S.C. § 1251 *et seq.*) (1972)
- Washington State Water Pollution Control Act (Chapter 90.48 RCW)



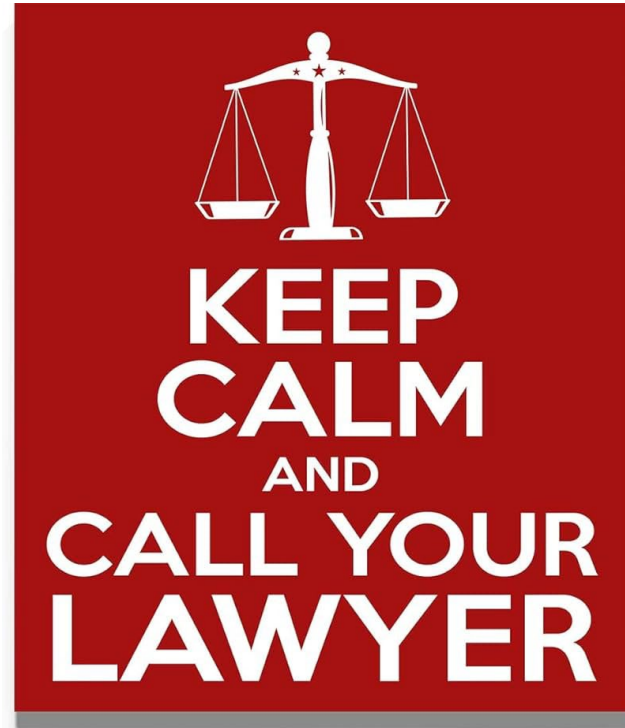
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# The Power of the ISGP

- “General” v. “Individual Permits”
- Requirements?
- Permit renews every five (5) years
  - “hint hint”

# Clean Water Act Lawsuits and the ISGP

- Now things get tricky...



# State Permit With Federal Jurisdiction

- ISGP = State Issued Permit
- But remember...
  - Citizen Suits only authorized under federal law

## What Triggers a Citizen Suit?

- Reporting mishaps
- Illicit discharges
- “Transportation Facilities” (sound familiar?)
- Sixty (60)-Day NOI



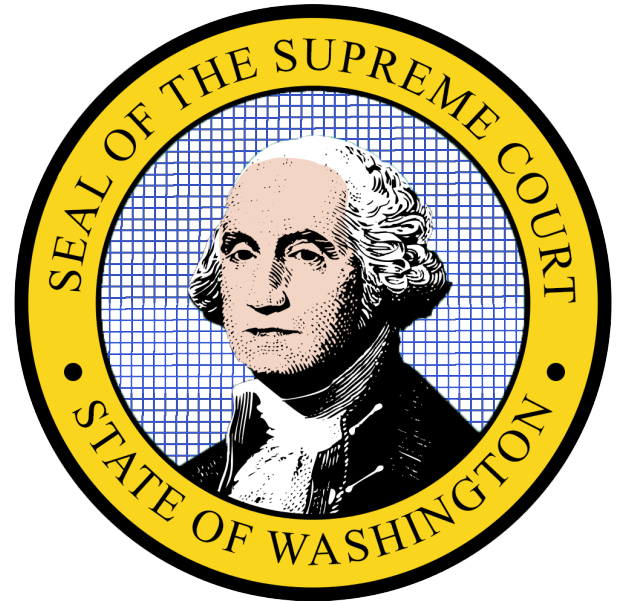
# What's Happening Now?

Tracking Current State & Federal Litigation



# Litigation in Washington State Court

- Pollution Control Hearings Board  
(PCHB No. 19-089c)
- Division I Court of Appeals  
(*PSA v. PCHB*, 545 P.3d 333 (Wash. Ct. App. Div. I) (Mar. 18, 2024))
- Washington State Supreme Court  
Review?



# Litigation in the Federal Court

- Western District of Washington (*PSA v. APM Terminals Tacoma, LLC, et al.*, C17-5016 BHS, 2020 WL 6445825 (W.D. Wash. Nov. 3, 2020))
- Ninth Circuit Court of Appeals (*PSA v. Port of Tacoma et al.* 104 F.4<sup>th</sup> 95 (9th Cir. June 10, 2024))
- U.S. Supreme Court Review?



But there's a twist. Maybe...

# The 2025 ISGP

- Key Changes in the Draft ISGP
- Comment period ended July 15, 2024.



# Why Does This All Matter to Ports?

- Reliance on Permit Language
- Relationships with Port Tenants and Port Liability
- Infrastructure?
- Funding
- Leasing and Operator Agreements

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**Margaret Lee**



**The Endangered Species Act  
and the Demise of Chevron Deference**

**WPPA Environmental Seminar  
September 19, 2024**

# The Endangered Species Act (ESA)



- Section 4 – listing species
- Section 9 – prohibited acts
- Section 10 – exceptions and permits
- Section 7 – interagency cooperation and consultation



# ESA Consultation

- Consultation can be informal or formal
- Informal: All correspondence between action agency and NMFS or FWS (“Services”)
- Formal: If Services determine action is “likely to adversely affect” listed species or critical habitat, the agencies engage in formal consultation
- Formal consultation concludes with the Service’s Biological Opinion (“BiOp”)

# June 16, 2023: *Maine Lobstermen's Association v. NMFS* 70 F.4th 582 (D.C. Cir. 2023)



- Why is this case important?
  - Clarifies fundamental standards for Section 7 consultation
- The Case:
  - Challenge to NMFS's BiOp for effect on right whale from lobster and crab fisheries
  - NMFS found fisheries would decimate right whale population within a decade

# ***Maine Lobstermen's Association v. NMFS***



- Court conclusions:
  - NMFS erred by concluding it must give “the benefit of the doubt” to an endangered species by relying on worst-case scenarios
  - Agency must ensure an action is “not likely” to jeopardize existence of a protected species
  - NMFS’s prediction on effects of an action must be based on “best scientific and commercial data available”

## ***Maine Lobstermen’s Association v. NMFS***

*“Here, the Service misconceived the law, wrongly claiming the legislative history of the ESA had ordained—if legislative history could ever ordain—a precautionary principle in favor of the species. The Service therefore gets no deference, and its action cannot stand.”*

## May 6, 2024: *New ESA Rules*

- Changes to Section 7 consultation process
- Expands purpose of reasonable and prudent measures (RPMs) to include offsetting impacts
- Changes the scope of RPMs to include onsite and offsite offsets or mitigation
- Litigation filed challenging rules

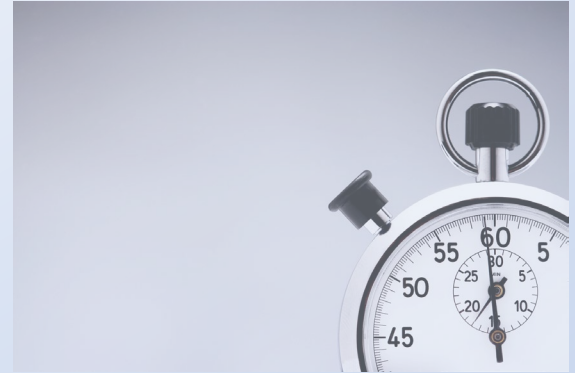


## June 28, 2024: *Loper Bright Enterprises v. Raimondo* 144 S. Ct. (2024)

- U.S. Supreme Court overturned the 1984 “Chevron” decision
- The Case:
  - Challenge to NMFS’s authority to charge \$ for observer to be on board commercial fishing vessels to collect data
  - NMFS argued statute was ambiguous on this issue and NMFS’s interpretation was entitled to deference
- Holding:
  - The APA requires courts to judge whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of law simply because a statute is ambiguous

# July 1: *Corner Post, Inc. v. Federal Reserve System* 144 S. Ct. 2440 (2024)

- Previous APA Statute of Limitations:
  - Six (6) years from final agency action
- New APA Statute of Limitations:
  - APA claim does not accrue until plaintiff is injured by agency action
- What does this mean?
  - A new entity can be formed, claim injury from a final agency rule, and file an APA claim even if the rule has been in effect more than six years.



## Takeaways from *Loper Bright* and *Corner Post*

- More litigation – greater uncertainty
- *Loper Bright* only applies when agency is interpreting an ambiguous term in a statute
- *Loper Bright* does not apply to:
  - Agency factual or scientific determinations
  - Soundness of agency decision
  - Interpretation of ambiguous agency regulations
  - Delegated authority
  - Constitutional questions
  - Procedural deficiencies



QUESTIONS?