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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NORTHWEST ENVIRONMENTAL ADVOCATES

Petitioner,

v.

STATE OF WASHINGTON DEPARTMENT OF ECOLOGY,

Respondent.

Brief of Appellant Northwest Environmental Advocates

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I. INTRODUCTION

Since 1945, Washington law has mandated "the use of all known, available and reasonable methods by industries and others to prevent and control the pollution of the waters of the state of Washington"—a standard known as "AKART"—in order "to maintain the highest possible standards to insure the purity of all waters of the state." RCW 90.48.010. When applying this standard to sewage treatment plants discharging into Puget Sound and its tributaries, the Washington Department of Ecology ("Ecology") for years has relied on an outdated and incomplete regulation to avoid undertaking any analysis of what constitutes AKART for these facilities. The result of this approach has been the avoidable degradation of water quality in Puget Sound, one of Washington's most environmentally significant waterbodies.

In 2018, Northwest Environmental Advocates ("NWEA") petitioned Ecology asking that the agency to update its 31-year-old treatment standards for sewage treatment plants in the Puget Sound area. The Petition, noting that the current rules are based on 100-year-old technology and do not address nutrients and toxics, two of the leading causes of the water quality problems in Puget Sound, described the evolution of available treatment technology that has occurred since Ecology last updated its regulation; established that the available, modern technology is economically reasonable for the majority of sewage treatment facilities in the Puget Sound region; and cataloged the

environmental and economic benefits that implementing this technology would bring.

Yet, Ecology denied the Petition. In doing so, Ecology ignored the clear, unambiguous duty to act, failed to address the specific request made, and failed to provide a viable alternative for how the agency will bring itself and the regulated community into compliance with the law.

On February 7, 2020, the Thurston County superior court summarily affirmed Ecology's denial, stating little more than that the agency was owed deference. But the fact remains: Ecology has failed to comply with Washington's AKART requirement for years. The rationale expressed in Ecology's letter denying the Petition is arbitrary and capricious, and does not comply with the substantive and procedural requirements of the Administrative Procedure Act ("APA"). This Court should reverse Ecology's denial and order the agency to begin the requested rulemaking.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. Ecology's denial of NWEA's Petition violated the agency's duty to ensure that sewage treatment plants use all known available and reasonable treatment methods before discharging pollutants to Puget Sound and its tributaries.

2. Ecology violated the APA by failing to specifically address the issues raised in NWEA's Petition, and by failing to identify the alternative means by which it will address NWEA's concerns.

3. Ecology's denial of NWEA's Petition was arbitrary and capricious because it failed to consider an important aspect of the

problem, failed to consider the available evidence on the need for updated treatment standards, and proffered an explanation that relies on an unlawful interpretation of the law.

4. The Superior Court erred in affirming Ecology's denial of NWEA's Petition.

Issues Pertaining to Assignments of Error

1. Under RCW 90.52.040 and WAC 173-221A-020, is Ecology required to make an AKART determination before it issues a federal Clean Water Act permit allowing the discharge of pollutants to Washington's waters? (Assignment of Error 1).

2. Can Ecology satisfy its mandatory duty to make an AKART determination for permits allowing the discharge of nutrients and toxics into Puget Sound and its tributaries from sewage treatment facilities by relying on WAC 173-221-040, which does not establish effluent limits for nutrients and toxics and does not take into account the current, modern treatment technology and methods known as "tertiary treatment" that can control the discharge of nutrients and toxics? (Assignment of Error 1).

3. When issuing pollutant discharge permits, Ecology affirmatively relies on WAC 173-221-040 to determine whether the facility is meeting AKART. Can Ecology meet its obligation to ensure that all sewage treatment facilities that discharge nutrients and toxics into Puget Sound and its tributaries are using "all known available and reasonable" treatment technology without updating WAC 173-221-040 to include presumptive effluent limits for nutrients and toxics based on current, modern treatment technology and methods? (Assignment of Error 1).

4. In order to lawfully deny a rulemaking petition, the APA requires an agency to state, in writing, "its reasons for the denial, specifically addressing the concerns raised by the petitioner." RCW 34.05.330(1)(i). Did Ecology violate the APA when its denial did not address NWEA's request for effluent limits specifically to address the discharge of toxic pollutants to Puget Sound and its tributaries? (Assignment of Error 2).

5. In its Petition to amend WAC 173-221-040, NWEA specifically requested that Ecology adopt presumptive effluent limits for the discharge of nutrients from sewage treatment facilities based on modern technology. Did Ecology violate the APA when its denial treated NWEA's petition as if it had requested absolute, unchangeable effluent limits, rather than presumptive limits that may be modified on a case-by-case basis? (Assignment of Error 2).

6. Under the APA, when an agency denies a rulemaking petition, it must state "the alternative means by which it will address the concerns raised by the petitioner." RCW 34.05.330(1)(ii). Did Ecology violate this rule when it failed to identify any actions that it will, or could, take to ensure that sewage treatment plants discharging to Puget Sound and its tributaries will come into compliance with the AKART requirement? (Assignment of Error 2).

7. Was Ecology's denial of NWEA's Petition arbitrary and capricious because its sole stated rationale for denying the Petition was that Ecology prefers to tackle nutrient pollution in Puget Sound through a "water quality-based" approach, whereby, presumably, discharge limits for each facility

will be determined based on applicable water quality standards—not on the AKART requirement? (Assignment of Error 3).

8. In support of its Petition, NWEA submitted hundreds of documents that detailed the current water quality crisis in Puget Sound, the evolution of available treatment technology for nutrients and toxics that has occurred since Ecology last updated its regulation, established that the modern technology is economically reasonable for the majority of sewage treatment facilities in the Puget Sound region, and cataloged the environmental and economic benefits that would be realized if this technology were implemented. Does Ecology's admission that it did not review any of this information, save one document, render its denial arbitrary and capricious? (Assignment of Error 3).

9. Does Ecology's failure to address, in any way, the Petition's request to adopt presumptive effluent limits for toxic pollution render its denial arbitrary and capricious? (Assignment of Error 3).

10. Did the Superior Court err in affirming Ecology's denial of NWEA's Petition by deferring to the agency's rationale of its failure to act in compliance with the law? (Assignment of Error 4).

III. STATEMENT OF THE CASE

A. The Water Quality Crisis in Puget Sound

The discharge of nutrients and toxic pollution from sewage treatment facilities into Puget Sound and its tributaries is creating a water quality crisis. There are currently over a hundred such facilities. AR0007; NWEA01992

(map showing facilities discharging directly to Puget Sound); *see also* AR0922 (map depicting the amounts of nitrogen discharged annually to Puget Sound).[1] Ecology estimates that these facilities discharge 34,300 kilograms—over 75,000 pounds—of nitrogen each day to the Sound. NWEA10245. In addition, scientists calculate that these facilities discharge 97,000 pounds per year of pharmaceuticals and other drugs to Puget Sound. NWEA05569.

Of the many threats to the Sound, the dangerously low levels of dissolved oxygen may present the most immediate and pressing problem. As Ecology stated so simply and matter-of-factly a dozen years ago, "[f]ish need oxygen" yet "[t]here are many areas in Puget Sound with very low levels of dissolved oxygen." AR0008 (citing NWEA02985; Ecology, Public Notice South Puget Sound Dissolved Oxygen Study (2006)). According to Ecology, the presence of excess nutrients in the water—*i.e.,* nitrogen and phosphorous—is causing dissolved oxygen levels to drop to critically low levels in some parts of Puget Sound. AR0106; NWEA02060–64 (Ecology, Puget Sound and the Straits Dissolved Oxygen Assessment Impacts of Current and Future Human Nitrogen Sources and Climate Change through 2070, at 98–101 (2014)). These excessive levels of nutrients feed an overabundance of plant and algal growth, which in turn causes oxygen concentrations in the water to drop below levels needed to support fish and

[1] Citations to the Clerk's Papers begin with "CP." Citations to documents beginning with "AR" refer to the Administrative Record filed by Ecology. Citations to documents beginning with "NWEA" refer to the additional evidence submitted by NWEA for inclusion in the record for judicial review, *see* CP132 (Order Granting Motion Petition Admit Evidence).

other marine life. Algal blooms decrease the water's oxygen levels in several ways. For example, when algae die they sink to the bottom where they are consumed by bacteria. These bacteria use up the available oxygen in the lower water column, reducing dissolved oxygen concentrations to unsafe levels. Dense algal growth can also reduce the penetration of sunlight through the water, killing other plants, lessening oxygen production, and further depleting oxygen levels. NWEA013448.

Algal blooms caused by excess nutrients in Puget Sound can harm water quality in several other ways, too. For example, some species of algae produce toxins that are harmful to humans and animals. AR0047, *quoting* NWEA06734 (Washington Sea Grant, Soundtoxins Manual: Puget Sound Harmful Algal Bloom Monitoring Program, at 1 (2016) ("About 50 known species of phytoplankton produce toxins. As toxins move through the food web, they bioaccumulate in the tissues of large fish and marine mammals. Humans can contract illnesses from eating contaminated shellfish and fish.")). Excess algae that form into mats and surface scums, AR0754, may affect recreational activities and industries that contribute significantly to the region's economy. *See* AR0078–80 (the state's water-dependent economy includes a $21.6 billion outdoor recreation industry).

Excess nitrogen in Puget Sound is also exacerbating the local effects of worldwide ocean acidification. As noted above, excessive nitrogen in the water column results in an explosion of algae growth. And when the algae die, they decompose and release carbon dioxide, making the water more acidic and more harmful to other aquatic organisms. In 2017, Ecology

determined that nutrient pollution is a "contributing issue" to ocean acidification in Puget Sound. AR0060; NWEA002118 (Ecology, Salish Sea Model: Ocean Acidification Module and the Response to regional Anthropogenic Nutrient Sources, at 7 (June 2017)).

Population growth will further stress the ecosystem. According to Ecology, treated sewage is the largest human source of nitrogen in Puget Sound, responsible for 81 percent of human loads in the summer and 59 percent annually. AR0045. Ecology projects that by 2070 this nitrogen will almost double from 2006 levels due to population growth. AR0931.

Puget Sound is also suffering from high levels of regulated and unregulated toxic pollutants discharged from sewage treatment facilities, including pharmaceuticals, personal care products, endocrine-disrupting chemicals, nanomaterials, metals, and persistent organic pollutants. These pollutants are directly impacting the Sound and its wildlife. For example, endangered Southern Resident killer whales carry some of the highest concentrations of polychlorinated biphenyl ("PCB") and polybrominated diphenyl ethers ("PBDE") reported in animals worldwide as a result of the poisoning of their food chain. AR0009 (citing NWEA06889 (EPA, https://www.epa.gov/salish-sea/southern-resident-killer-whales)). The U.S. Environmental Protection Agency ("EPA") determined that these levels of pollutants "exceed those known to affect the health of other marine mammals." *Id.* Furthermore, pharmaceuticals and other drugs, at levels found in the Sound, reduce growth rates and cause metabolism disruptions in Chinook salmon—the primary diet of the Southern Resident killer whales—

in a "pattern generally consistent with starvation" that "may result in early mortality or an impaired ability to compete for limited resources." NWEA05459 (James P. Meador et al., Adverse metabolic effects in fish exposed to contaminants of emerging concern in the field and laboratory, 236 Environmental Pollution, at 850 (2018)).

B. Washington Law Requires the Control of Pollutants

In Washington, state law and the federal Clean Water Act work in tandem to establish the regulatory framework for controlling and eventually eliminating pollution discharged into the state's waters. The Washington Water Pollution Control Act declares the "public policy of the state of Washington to maintain the highest possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of wildlife, birds, game, fish and other aquatic life, and the industrial development of the state." RCW 90.48.010. Thus, "[c]onsistent with this policy, the state of Washington will exercise its powers, as fully and as effectively as possible, to retain and secure high quality for all waters of the state [and] work[] cooperatively with the federal government in a joint effort to extinguish the sources of water quality degradation." *Id*. The Clean Water Act, in turn, is designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), with the goal of not just reducing, but eliminating, all water pollution. *Waterkeeper Alliance, Inc. v. U.S. E.P.A*, 399 F.3d 486, 490 (2d Cir. 2005). (citing 33 U.S.C. § 1251(a)(1)).

To achieve these objectives, both state and federal law make it unlawful for any person to discharge pollutants from a point source—any discernible, confined, and discrete conveyance—into the state's surface waters without a permit. RCW 90.48.080, WAC 173-220-020; *see also* 33 U.S.C. §§ 1311(a), 1362(12).[2] Such permits, known as National Pollutant Discharge Elimination System ("NPDES") permits, must include "effluent limitations" for the pollutants being discharged. *Waterkeeper Alliance*, 399 F.3d at 491. The permit's effluent limits must ensure compliance with the laws' two independent requirements: (1) technology-based effluent limitations; and (2) water quality-based effluent limitations. *See Am. Mining Congo. v. U.S. E.P.A,* 965 F.2d 759, 762 n.3 (9th Cir. 1992).[3] These two types of permit effluent limits—and the rules for how they must be established—are at the heart of the laws' framework for curbing and eventually eliminating the discharge of pollution to our waters.

1. Ecology Is Required to Impose Technology-Based Effluent Limits Based on All Known, Available and Reasonable Treatment Technology

The primary tool for controlling, and eventually eliminating, the discharge of pollutants is the requirement that every discharge permit must

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[2] The CWA provides that the U.S. Environmental Protection Agency may authorize states to carry out the NPDES permit program. 33 U.S.C. § 1342(b). EPA has authorized Washington to issue some NPDES permits and Ecology is the state Water Pollution Control Agency in Washington. RCW 90.48.260.

[3] Washington law must meet the federal minimum requirements. 33 U.S.C. § 1370; *City of Pasco v. Ecology*, PCHB No. 84-339, 1985 WL 21907, *4 (Sept. 23, 1985) ("Notwithstanding the existence of a federal statute, the state continues to have power to impose more stringent requirements than federally demanded.").

include effluent limitations based on "a series of increasingly stringent *technology-based standards*." *Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 822 F.2d 104, 123 (D.C. Cir. 1987) (emphasis added). These technology-based standards set the minimum level of pollution treatment technology that must be used for all similar facilities—and the maximum levels of pollution that may be discharged—*regardless of a discharge's potential impact on water quality*.

Under Washington law, state technology-based effluent limits must also include "all known, available, and reasonable methods of preventing, controlling and treating" pollutants—namely, Washington's "AKART" standard. RCW 90.58.010. This fundamental requirement seeks to ensure that public waters are protected to the maximum extent possible by requiring dischargers to keep pace with improvements in treatment technology. That is, AKART "shall represent the most current methodology that can be reasonably required for preventing, controlling, or abating the pollutants associated with a discharge." WAC 173-201A-020. Thus, the AKART requirement is "'clearly meant to foster the use of new emission control technology' in the hopes of someday 'extinguish[ing] sources of water quality degradation.'" *Waste Action Project v. Draper Valley Holdings LLC*, 49 F. Supp. 3d 799, 813 (W.D. Wash. 2014) (quoting *Puget Soundkeeper Alliance v. Wash. Dep't of Ecology,* 102 Wn. App. 783, 789 & 792, 9 P.3d 892 (2000)); *see also* NWEA02322 (Permit Writer's Manual ("The permit writer may determine that for some permits AKART is zero discharge. Although there is no explicit statement in RCW 90.48 equivalent to the 'zero

discharge' goal of the Clean Water Act, both of these laws have a technology-based principle which, when followed to the logical conclusion lead to zero discharge, when achievable and reasonable.")).[4]

Once Ecology establishes what pollution removal treatment qualifies as AKART for a particular discharge, it must translate that technology into permit limitations. WAC 173-220-130(1)(A). As the D.C. Circuit aptly observed, "the rubber hits the road when the state-created standards are used as the basis for specific effluent limitations in NPDES permits." *American Paper Inst., Inc. v. U.S. E.P.A*, 996 F.2d 346, 350 (D.C. Cir. 1993).

2. The Difference Between Technology-Based and Water Quality-Based Effluent Limitations

While technology-based effluent limits are aimed at ensuring that permit limits keep pace with advances in available treatment technology, the second type of permit limit is aimed at achieving minimum standards for water quality pending the cessation of all polluting discharges. *See* 33 U.S.C. §§ 1311(b)(1)(C), 1342(a)(2). These water quality-based effluent limits are derived from state water quality standards, which define the minimum water quality that must be attained—without exception—in the receiving waterbody in order to protect human health and aquatic life. *See* 33 U.S.C. § 1313(a)(3), (c)(2)(a); *PUD No. 1 of Jefferson Cnty. v. Wash.*

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[4] While AKART fits naturally into the NPDES framework requiring technology-based limits, it is a separate and distinct requirement from the mandates of the federal Clean Water Act, which together are intended under Washington law to "extinguish the sources of water quality degradation" while "preserving and exercising state powers." RCW 90.48.010; *see also ITT Rayonier, Inc. v. DOE,* PCHB No. 85-218, 1989 WL 76504, *3 (Jan. 5, 1989) (AKART as a more stringent state law requirement is "not . . . the equivalent of any federal formulation, but rather as an independent criterion.").

Dep't. of Ecology, 511 U.S. 700, 704 (1994) ("state water quality standards provide a supplementary basis . . . so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels") (internal quotations omitted).

Water quality-based effluent limits are necessary when Ecology determines that even after imposing the required technology-based effluent limits, the discharge will still "cause [or have] the reasonable potential to cause" an exceedance of applicable water quality standards. 40 C.F.R. § 122.44(d)(1)(i); NWEA02355 (Ecology, Water Quality Program Permit Writer's Manual (hereinafter "Permit Writer's Manual") ("When reviewing a permit application or renewal, the permit writer must first determine the proper technology-based limits. Then the writer must decide if these limits are stringent enough to ensure that water quality standards are not violated in the receiving water. If they are not, then water quality-based limits must be developed.")). In other words, sometimes keeping pace with available technology is not enough to ensure that minimum water quality standards are attained and a discharger must innovate to do even better than the generally best technology.

C. Ecology's Current Approach to AKART for Pollution from Sewage Treatment Plants Is Outdated and Does Not Address Nutrients or Toxic Pollutants

With respect to Washington's technology-based AKART requirement, Ecology's longstanding practice is to set a rebuttable baseline

presumption of what pollution control technology constitutes AKART. Rather than make an individual AKART determination for each permit issued to a sewage treatment facility, Ecology has long relied on a presumptive definition of AKART, defined by rule, for the sector as a whole. *Port Angeles v. Ecology*, PCHB No. 84-178, 1985 WL 21908, at *10 (Oct. 4, 1985)(noting that Ecology's approach "establishes a generic treatment level as appropriate for the entire class of municipal dischargers and, then, allows for a sort of variance from this level on a showing of 'compelling evidence.'"). Ecology's current AKART standard for sewage treatment facilities sets a rebuttable presumption of numeric effluent limits for four pollutant parameters: biological oxygen demand, total suspended solids, fecal coliform, and pH. *See* WAC 173-221-040. A facility may apply for "alternative" effluent limits where site-specific conditions apply. WAC 173-221-050.

Ecology's current AKART standard for sewage facilities is based on "secondary treatment." WSR 87-23-020 (Order 87-26) (filed Nov. 12, 1987).[5] Secondary treatment of sewage is a pollution removal technology that is over a century old, with the first full-fledged sewage treatment systems having come on-line in 1920. *See* NWEA01292–93 (P.F. Cooper, Historical Aspects of Wastewater Treatment, in Decentralized Sanitation and Reuse: Concepts, Systems and Implementation, at 27–28 (2001) ("Historical Aspects of Wastewater Treatment")). While secondary treatment technology

[5] *See also* NWEA02355-57 (Ecology Permit Writer's Manual (describing the development of the current AKART regulation)).

became the underpinning for modern sewage treatment, it was also noted long ago—in the 1950s and 1960s—that secondary treatment did not reliably or predictably remove nitrogen or ammonia. NWEA01294 (Historical Aspects of Wastewater Treatment, at 29). Thus, although the discharge of nutrient pollution is a major concern for sewage treatment facilities, according to EPA, "[w]astewater treatment plants that employ conventional biological treatment processes designed to meet secondary treatment effluent standards typically do not remove total nitrogen (TN) or total phosphorus (TP) to an extent sufficient to protect certain receiving waters." NWEA03966 (EPA, Municipal Nutrient Removal Technologies Reference Document Volume 1–Technical Report, at ES-1 (Sept. 2008)).

Despite having not updated its regulation since 1987, Ecology relies exclusively on WAC 173-221 to establish permit conditions for sewage treatment facilities that discharge to Puget Sound and its tributaries. *See* AR0024 and 0036–39 (providing examples of permitting decisions that rely on WAC 173-221). In doing so, Ecology actively avoids conducting the required analysis of what technology is known, available, and reasonable in order to prevent, control, and abate the discharge of pollutants from the facility, and notably never addresses what technology can and should be used to remove nutrients and toxics for the discharge because "[n]utrients are not included in the WAC for AKART." AR0037. As a result, for decades, Ecology has issued permits to sewage treatment plants in the Puget Sound region that do not include effluent limits in compliance with AKART. *Id.*

D. The Time has Come to Mandate Tertiary Treatment

AKART is an evolving standard that mirrors the development of new pollution removal technologies because, by definition, the technology that is known, available, and reasonable will change over time. Thus, to implement AKART, Ecology must require dischargers to use increasingly more stringent treatment as technological advancements become known, available, and reasonable to prevent, control, and abate the discharge of pollutants. *See* WAC 173-201A-020 ("AKART shall represent *the most current* methodology that can be reasonably required for preventing, controlling, or abating the pollutants associated with a discharge.") (emphasis added); *Puget Soundkeeper Alliance,* 102 Wn. App. at 789 ("[T]he statutory scheme envisions that effluent limitations will decrease as technology advances."). By requiring that dischargers implement new technologies as they become available, AKART ensures that water quality continues to improve as "reductions in effluent limits are driven by advances in technology." *Id*. The ultimate goal is to eliminate pollution, not merely to manage it on an interim basis to meet certain minimum water quality standards.

The sewage treatment technologies called "tertiary treatment" are the modern treatments used across the world and the United States. Tertiary treatment can include biological, chemical, and physical means to remove nutrient and toxic pollution from sewage. In 2011, seeking to use AKART as the basis for cleaning up Puget Sound, Ecology compiled and studied the types of "established technologies that are available and economically reasonable and have been applied in Washington and elsewhere in the

United States to upgrade municipal wastewater treatment plants to achieve specific nitrogen and phosphorus reduction goals." AR0176 (Ecology, Technical and Economic Evaluation of Nitrogen and Phosphorus Removal at Municipal Wastewater Treatment Facilities (2011)). In its analysis, Ecology concluded that tertiary treatment "can reliably reduce total inorganic nitrogen to 3 mg/L and [total phosphorus] to 0.1 mg/L." *Id*. This conclusion is consistent with the findings of the EPA. *See* AR0012–13 (collecting EPA studies showing sewage treatment can reduce total inorganic nitrogen to 3 mg/L and total phosphorus to 0.1 mg/L). Similarly, the Washington Pollution Control Hearings Board ("PCHB") has already determined that tertiary treatment is AKART for sewage discharges. *Sierra Club v. Washington*, PCHB No. 11-184, 2013 WL 4490310 at *11(July 19, 2013).

E. NWEA Petitioned Ecology to Update Its AKART Regulations to Set a New Presumptive Standard Based on Current Technology and to Address Nutrient and Toxic Pollutants

Notwithstanding the widespread availability of tertiary treatment, at a reasonable cost, Ecology continues to require only the less effective, 100-year old secondary treatment technology as AKART—embodied in Ecology's existing rules at WAC 173-221—when issuing discharge permits. Ecology's failure to require sewage facilities to use the more effective tertiary treatment methods has had, and continues to have, widespread impacts on the health of Puget Sound and the aquatic fish and wildlife that rely on Puget Sound for survival. This was precisely the wrong that NWEA sought to correct with its Petition to Ecology.

NWEA submitted its rulemaking petition to Ecology on November 14, 2018. AR0001. The petition requested that Ecology revise WAC 173-221 (Discharge Standards and Effluent Limitations for Domestic Wastewater Facilities) to replace current standards based on secondary treatment that do not include nutrients and toxics and to define AKART as tertiary treatment for sewage discharges into Puget Sound.

Specifically, NWEA's Petition requested four things. First, NWEA asked Ecology to initiate a formal rulemaking to "define AKART for the approximately 107 municipal sewage treatment plants discharging to Puget Sound and its tributaries as year-round tertiary treatment to remove nutrient pollution." AR0007. Second, NWEA requested that this rulemaking establish effluent limitations for those facilities of 3.0 mg/L for total nitrogen and 0.1 mg/L (or lower) of total phosphorus, consistent with what is achievable through the use of tertiary treatment. *Id*. Third, NWEA requested that the proposed rule "establish a presumption" that tertiary treatment and these effluent limits are "reasonable," unless rebutted on a case-by-case basis by individual sewage treatment plants as their NPDES permits come up for renewal. AR0007–8. Finally, NWEA requested that Ecology initiate a formal rulemaking to define AKART for the municipal sewage treatment plants to remove toxic pollution (not just nutrient pollution). AR0007.

F. Ecology's Denial

On January 11, 2019, Ecology denied NWEA's Petition but did not address the specific components of the rule requested by NWEA.

AR0105. First, Ecology refused to undertake the requested rulemaking to establish a presumptive standard of tertiary treatment, and corresponding numeric effluent limits, because it asserted that it prefers to tackle nutrient pollution in Puget Sound through a "water quality-based" approach, whereby, presumably, effluent limits for each facility will be determined based on applicable water quality standards—not on the AKART requirement. AR0105. Second, Ecology attempted to justify its denial, claiming that tertiary treatment "is neither affordable nor necessary for all wastewater treatment plants" without addressing whether the presumptive standard approach proposed in the Petition would address these concerns. AR0106 (emphasis added). Third, Ecology supported its denial of the Petition with a list of alternative actions it proposed to take, claiming they are "achievable in the near term and appropriate for our current level of understanding of nutrient dynamics in Puget Sound," but not explaining how they would bring the agency into compliance with AKART. AR0106. Finally, Ecology entirely failed to address NWEA's arguments concerning toxic pollutants, choosing instead to focus solely on nutrients.

IV. ARGUMENT

Ecology's denial of the Petition was unlawful for three reasons. First, by failing to undertake the requested rulemaking to update its antiquated regulations regarding the minimum technology standards for sewage treatment facilities, Ecology violated its duty to ensure these facilities comply with AKART. Second, Ecology violated the APA by failing to respond to the issues raised in the Petition and to explain how it

is addressing or intends to address the issues raised. Finally, Ecology's denial of the Petition was arbitrary and capricious because it was willful, unreasoned, and taken without regard to the attending facts and circumstances.

A. Ecology Is in Violation of Its Legal Duty to Require the Use of All Known, Available, and Reasonable Treatment Methods to Prevent and Control the Discharge of Nutrients and Toxics

The Washington Administrative Procedure Act ("APA"), Chapter 34.05 RCW, governs review of agency actions. An agency's decision to deny a rulemaking petition is subject to judicial review under RCW 34.05.570(4)(c), which authorizes relief if the agency action is unconstitutional, outside the agency's authority, arbitrary or capricious, or taken by unauthorized persons. *Rios v. Wash. Dep't of Labor & Indus.*, 145 Wn.2d 483, 493, 39 P.3d 961, 966 (2002).

An agency action is arbitrary and capricious when its action is "'willful and unreasoning and taken without regard to the attending facts or circumstances.'" *Cmty. Ass'n for Restoration of the Env't v. State, Dep't of Ecology*, 149 Wn. App. 830, 841 (2009) (quoting *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997)). Deference to an administrative agency "does not extend to agency actions that are arbitrary, capricious, and contrary to law." *Skokomish Indian Tribe v. Fitzsimmons*, 97 Wn. App. 84, 93, 982 P.2d 1179, 1185 (1999).

Applying the arbitrary and capricious standard to an agency's denial of a rulemaking petition requires the Court to carefully examine the

underlying statutory mandate as well as the agency's rationale for its action. While "[o]rdinarily, an agency is accorded wide discretion in deciding to forgo rulemaking," such discretion "cannot be regarded as an unbeatable trump in the agency's hand." *Id*. at 507. Indeed, the level of judicial scrutiny employed when reviewing a decision whether or not to initiate a requested rulemaking falls along a continuum from "intensive" to "deferential," depending in part on "the nature of the particular problem faced by the agency." *State Farm Mut. Auto. Ins. Co. v. Dep't of Transp.*, 680 F.2d 206, 218–22 (D.C. Cir. 1982), *vacated on other grounds sub nom. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (quoting *Nat. Res. Def. Council, Inc.*, 606 F.2d 1031, 1050 (D.C. Cir. 1979)). As Justice Madsen explained in her dissent in *Rios*,

> Federal courts have appropriately explained that the degree of deference to the agency under the arbitrary and capricious standard, where agency inaction is the refusal to adopt a rule, depends in part upon the reason that the agency declines to adopt the rule. For example, where the reason lies in the agency's construction of statute, *i.e*., a question of law, there is less reason for deference than in the case where the agency's decision not to regulate is based upon factors not inherently susceptible to judicial review, such as internal management considerations relating to budget or personnel, the agency's assessment of its own competence, or the weighing of competing policies in an extensive statutory scheme.

145 Wn.2d at 516 (J. Madsen dissenting).

Indeed, the federal courts have teased out points along this continuum, and those cases are instructive on the distinctions between the

cases that fall at the two poles. *See, e.g., American Horse Protection Ass'n v. Lyng,* 812 F.2d 1, 4 (D.C. Cir. 1987)).[6] On one end of the spectrum are cases where the decision of whether to enter into a rulemaking falls squarely within the agency's expertise. These situations would include instances where the agency is called upon to make decisions based on "specialized areas of fact determination" or "quasi-legislative judgments about matters of social and economic policy." *Nat. Res. Def. Council, Inc.*, 606 F.2d at 1048. In these cases, the courts have "exercise[d] considerable deference in their review of such issues." *Id.*

At the other end of the spectrum, where the petition is targeted at the "agency's compliance with substantive and procedural norms," the court's "standard of review must perforce be 'exacting' to ensure that the agency has 'scrupulously' followed the law." *ITT World Communications, Inc. v. F.C.C.*, 699 F.2d 1219, 1246 (D.C. Cir. 1983), *reversed on other grounds* 466 U.S. 463, 104 S.Ct. 1936, 80 L.Ed.2d 480 (1984)(quoting *Nat. Res. Def. Council, Inc.*, 606 F.2d at 1053). "The judiciary's expertise lies in statutory interpretation of Congress' mandate as expressed in statutes which give administrative agencies their authority to take certain types of action. When a court is acting in this capacity, the

[6] The federal courts' interpretation of the standard of review for the denial of rulemaking petitions is instructive. *See* RCW 34.05.001 ("The legislature also intends that the courts should interpret provisions of this chapter consistently with decisions of other courts interpreting similar provisions of other states, the federal government, and model acts."). The Federal statute addressing the grounds for relief from agency action is 5 U.S.C. § 706. RCW 34.05.570 and 5 U.S.C. 706 are analogous. *Northwest Ecosystem Alliance v. Washington Forest Practices Board*, 149 Wn. 2d 67, 79, 66 P.3d 614 (2003) (citing Federal cases on whether petition for rulemaking is a requirement for seeking judicial review).

reasons for judicial deference are diminished." *Pub. Citizen v. Heckler*, 653 F. Supp. 1229, 1239 (D.D.C. 1986).[7]

Moreover, a higher level of scrutiny is appropriate in these situations because the legislature "delegates rulemaking power in the anticipation that agencies will perform particular tasks. Reviewing courts are required to strike down agency actions that exceed this mandate." *State Farm*, 680 F.2d at 221. "Judicial scrutiny of agency action . . . depends on the extent to which the agency has deviated from congressional expectations." *Id.*, at 229 ("An agency is seldom locked on course, but it must have increasingly clear and convincing reasons the more it departs from the path marked by Congress."). Thus, when the Court finds "plain errors of law, suggesting that the agency has been blind to the source of its delegated power," it is obligated to intervene and set aside an agency's refusal to engage in a necessary rulemaking. *Am. Horse Prot. Ass'n*, 812 F.2d at 5 (quoting *State Farm*, 680 F.2d at 221).

In Washington, the courts have applied this continuum of deference in cases reviewing an agency's denial of a rulemaking petition, even if they have not always precisely identified where along the continuum they have landed. For example, in *Rios*, the Supreme Court held that "in failing to act on the request for rulemaking, the Department

[7] In this way, the standard of review for a court's review of an agency's obligation to initiate a rulemaking is more akin to the standard for determining whether the agency has acted in accordance with law, where the Court's primary task is determining the meaning of a statute rather than the traditional arbitrary and capricious standard for review. As always, it is the "duty of the judicial branch to say what the law is." *Safeco Ins. Companies v. Meyering*, 102 Wn.2d 385, 392, 687 P.2d 195, 200 (1984).

violated RCW 49.17.050(4), the requirement that the Department set a 'standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health' where the available evidence demonstrated that requested monitoring program was necessary under the statute." 145 Wn.2d at 508. In *Rios,* the Court gave relatively little deference to the agency because it was violating a specific statutory mandate.

In contrast, in *Squaxin Island Tribe v. Wash. State Department of Ecology*, this Court deferred to the agency's policy and factual determinations regarding the initiation of a rulemaking process. 177 Wn. App. 734, 312 P.3d 766 (2013). There, the court was asked to review the denial of a petition to initiate rulemaking to revise Ecology's water management rule for Johns Creek. *Id*. at 738. Noting the steps Ecology took to address the concerns raised in the petition and the explanation the agency provided regarding staff reductions and the need to gather additional information before it could act, the court upheld the denial because "[u]nlike the mandatory duty in *Rios*, the statutes at issue in this case clearly confer discretion on Ecology to prioritize instream flow rule making based on competing demands and limited resources." *Id.* at 746.

Here, as discussed in detail below, the requested rulemaking is necessary to ensure Ecology complies with the explicit mandate established by the Washington legislature that all discharges comply with AKART. As a result, because (1) Ecology has a mandatory duty to establish effluent limits for sewage treatment plants based on AKART; (2)

its current regulation is inadequate to ensure that all such dischargers meet the AKART standard; and (3) Ecology relies on this regulation to avoid making a permit-by-permit determination of whether these facilities meet the AKART requirement, the question presented is whether Ecology must engage in the requested rulemaking. By establishing its existing regulations as a barrier to individual AKART determinations, Ecology leaves no other path but for it to assess whether its regulations are consistent with the statutory mandate of ensuring compliance with AKART. Consequently, this Court's review of the agency's refusal to act must be "intensive" and "exacting" to ensure that the agency has "scrupulously" followed the law.[8]

1. Ecology Must Require the Use of All Known, Available, and Reasonable Treatment Methods to Prevent and Control the Discharge of Nutrients and Toxics

Ecology's denial of the Petition was unlawful because Ecology has a clear, unambiguous statutory duty to require sewage treatment plants to use all known, available, and reasonable treatment methods before discharging pollutants to Washington's waters. Here, the Petition asked Ecology to initiate a rulemaking to ensure compliance with this duty—a duty Ecology has ignored for decades. Ecology's refusal to come into compliance with the law, therefore, is unlawful.

[8] When the inquiry demands construction of a statute, review is *de novo*. *Port of Seattle v. Pollution Control Hearings Bd.,* 151 Wn. 2d 568, 587, 90 P.3d 659 (2004).

AKART is both a substantive and procedural requirement. Substantively, the Pollution Disclosure Act of 1971 directs that Ecology "shall, regardless of the quality of the water of the state to which wastes are discharged or proposed for discharge, and regardless of the minimum water quality standards established by the director for said waters, require wastes to be provided with all known, available, and reasonable methods of treatment prior to their discharge or entry into waters of the state." RCW 90.52.040. The Water Pollution Control Act similarly requires that AKART "shall" be applied to wastes "prior to entry." RCW 90.54.020(3)(b). The Pollution Control Act, in addition to mandating AKART to protect Washington's waters, RCW 90.48.010, specifically requires AKART to be applied to control the discharges of toxic pollutants. RCW 90.48.520 ("In order to improve water quality by controlling toxicants in wastewater, the department of ecology shall in issuing and renewing state and federal wastewater discharge permits review the applicant's operations and incorporate permit conditions which require [AKART].").

The procedural requirement applies to Ecology. To comply with its statutory duty, Ecology must make an AKART determination each time it issues a permit to a discharger under section 402 of the Clean Water Act, and RCW 90.48.162, that authorizes the discharge of treated sewage to state waters. RCW 90.52.040 (Ecology "shall . . . require wastes to be provided with all known, available, and reasonable methods of treatment prior to their discharge or entry into waters of the state."). It must then establish effluent limits in the permit that are consistent with the AKART determination.

RCW 90.48.520 ("In order to improve water quality by controlling toxicants in wastewater, the department of ecology shall in issuing and renewing state and federal wastewater discharge permits review the applicant's operations and incorporate permit conditions which require all known, available, and reasonable methods to control toxicants in the applicant's wastewater."). *See also* RCW 90.48.010 ("the state of Washington will exercise its powers, as fully and as effectively as possible, to retain and secure high quality for all waters of the state."); RCW 90.52.040 (the Director of Ecology "shall . . . require wastes to be provided with all known, available, and reasonable methods of treatment prior to their discharge or entry into waters of the state."); RCW 90.54.020(3)(b) ("wastes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except in those situations where it is clear that overriding considerations of the public interest will be served."). Ecology's regulations, in turn, are consistent with the mandatory, near-universal requirement to apply AKART to all discharges. *See, e.g.*, WAC 173-221A-010 (implementing RCW 90.48, 90.52, and 90.54 "by setting minimum discharge standards which represent [AKART] for industrial wastewater facilities that discharge to waters of the state.").

This requirement applies to discharges from municipal sewage treatment facilities. *In the Matter of City of Bellingham v. Wash. Ecology*, PCHB No. 84-211, 1985 WL 21854, * 13 ("RCW 90.52.040 applies to municipalities."); *see also* WAC 173-221-020.

The mandatory language of the statutes and regulations establishing the AKART requirement means Ecology must apply AKART to all discharges, including from sewage treatment plants. *Crown Cascade, Inc. v. O'Neal,* 100 Wn.2d 256, 261, 668 P.2d 585 (1983) (*citing Kanekoa v. Dep't of Social & Health Services*, 95 Wn.2d 445, 448, 626 P.2d 6 (1981)) (use of "shall" creates mandatory duty).

2. Ecology's Reliance on Its Inadequate and Outdated Regulation Demonstrates Its Refusal to Initiate the Requested Rulemaking was Arbitrary and Capricious

To fulfill this mandatory duty, Ecology has long relied on defining AKART for classes of dischargers in its regulations. *See Port Angeles*, 1985 WL 21908, at *5 (upholding Ecology's discretion to "establish[] a generic treatment level as appropriate for the entire class of municipal dischargers and, then, allows for a sort of variance from this level on a showing of 'compelling evidence.'"). WAC Chapter 173-221 establishes discharge standards and effluent limitations for municipal sewage treatment plants. WSR 87-23-020 (Order 87-26) (filed Nov. 12, 1987). This regulation—promulgated in and unchanged since 1987—establishes treatment standards *based on secondary treatment* for just four parameters: biological oxygen demand ("BOD"), total suspended solids ("TSS"), fecal coliform, and pH. WAC 173-221-040. Notably, the regulation does not establish discharge standards for nutrients (such as nitrogen and phosphorus) or toxic contaminants.

Ecology relies exclusively on this rule to determine compliance with AKART when issuing NPDES permits to such facilities. As the Petition demonstrates, Ecology has boiled its AKART analysis down to a blockquote that it uses each time it issues a permit to a sewage treatment plant discharging into Puget Sound:

> Federal and state regulations define technology-based effluent limits for municipal wastewater treatment plants. These effluent limits are given in 40 CFR Part 133 (federal) and in chapter 173-221 WAC (state). These regulations are performance standards that constitute all known, available, and reasonable methods of prevention, control, and treatment (AKART) for municipal wastewater.

See, e.g., AR0021 (quoting NWEA022948 (Ecology, Fact Sheet for NPDES Permit WA0032182 King County Carnation Wastewater Treatment Facility 15 (Dec. 13, 2013); *see also* AR0037–39 (collecting additional examples of Ecology's permitting decisions where the agency relied on WAC 17-223 rather than conducting an individual AKART analysis). Ecology's rote citation to secondary treatment performance standards in the state regulations as AKART means that technology-based requirements for these facilities has remained frozen in place for over 32 years, and will remain so for the foreseeable future, despite the development and use of new treatment technology across this country.

This is true even for pollutants that are not covered in the regulation—namely nutrients and toxics. Indeed, Ecology has affirmatively relied on the existing regulation to avoid establishing AKART-based effluent limits for nutrients, explaining:

> Chapter WAC 173-221 WAC establishes and defines AKART for POTWs (domestic wastewater treatment plants) . . . . The regulation does not include nutrient removal in the definition of AKART for domestic wastewater facilities. Nutrients are not included in the WAC for AKART.

AR0037 (quoting NWEA07308 (Ecology, Fact Sheet for NPDES Permit WA0020907 Bainbridge Island Wastewater Treatment Plant 66 (Aug. 1, 2017)); *see also* AR0037–39 (collecting additional examples).

Ecology goes further and relies on the current regulation to avoid any analysis of what constitutes AKART for a particular facility even when it notes that the facility has voluntarily chosen to implement treatment technology beyond secondary treatment to remove nitrogen. *See* AR0038 (citing NWEA05397 Ecology, Fact Sheet for NPDES Permit No. WA0022578 City of Lynden Wastewater Treatment Plant 57 (Sept. 7, 2017)); *see also* AR0038–39 (citing examples).

Ecology's consistent failure to undertake the mandatory AKART analysis at the time it issues individual permits, by relying solely on an outdated and ineffective regulation, demonstrates why its refusal to undertake the requested rulemaking was arbitrary and capricious.

3. Ecology's Current Regulation Does Not Conform to AKART.

Ecology's reliance on a regulation to establish AKART for these facilities is not inherently problematic, so long as Ecology keeps it updated. Its reliance on an outdated and inadequate regulation to avoid the required

AKART analysis when issuing a permit is unlawful. As explained above, *see* section III.C & D, WAC 173-221 does not represent AKART today.

In order to implement AKART, Ecology must require dischargers to use increasingly more stringent treatment as technological advancements become known, available, and reasonable in order to prevent, control, and abate the discharge of pollutants. *See* WAC 173-201A-020 ("AKART shall represent *the most current* methodology that can be reasonably required for preventing, controlling, or abating the pollutants associated with a discharge.") (emphasis added); *see also* Washington Attorney General Opinion, AGO 1983 No. 23, 1983 WL 162422, *7 n. 19 (citing *Weyerhaeuser v. Southwest Air Pollution Control Authority*, 91 Wn.2d 77, 586 P.2d 1163 (1978) ("The use of the encompassing word "all" [in AKART] indicates to us that the existing "state of the art" or "best available" treatment technologies are required to be used.")); *Puget Soundkeeper v. State*, 102 Wn. App. at 789 ("[T]he statutory scheme envisions that effluent limitations will decrease as technology advances."). By requiring that dischargers implement and incorporate new technologies as they become available, AKART ensures that water quality continues to improve as "reductions in effluent limits are driven by advances in technology." *Id.; see also* Attorney General Opinion 1983 No. 23, at 14 (AKART "include[s] but *[is] not limited to* 'secondary treatment'") (emphasis added). By definition, the technology that is known, available, and reasonable will change over time.

Ecology's current 32-year old regulations no longer represent AKART. First, secondary treatment is no longer AKART. Second, the regulations do not include standards for nutrients and toxics.

As the Petition and the supporting documents demonstrate, treatment technology beyond secondary treatment is known, available, and reasonable. In fact, according to EPA in 2004, "[o]ver 30 percent of the [16,000] wastewater treatment facilities today produce cleaner discharges by providing even greater levels of treatment than secondary." AR0063 (citing NWEA04215; EPA, Primer for Municipal Wastewater Treatment Systems 4 (Sept. 2004)). In Washington, the PCHB has already determined that tertiary treatment is AKART for municipal sewage discharges in a case pertaining to the Spokane County sewage treatment plant. *Sierra Club,* 2013 WL 4490310, *11. The simple fact is that tertiary treatment should be considered AKART for most, if not all, facilities that discharge to Puget Sound and its tributaries.

Tertiary treatment that removes nutrient and toxic pollution has been known and available for decades. AR0066–67 (collecting examples of tertiary treatment used in the 1960s and 1970s). Indeed, for over a decade, EPA has urged the use of tertiary treatment for sewage treatment plants, concluding in 2007 that "[t]here appear[s] to be no technical or economic reason that precludes others from using any of the tertiary treatment technologies that are employed at [23 American municipal waste water treatment plants]." NWEA04245 (EPA Advanced Wastewater Treatment to Achieve Low Concentration of Phosphorus, 3

(April 2007)). In 2015, EPA encouraged the use of nutrient removal through "relatively low-cost modifications" for some facilities that "may not be specifically designed for nutrient removal." NWEA03486 (EPA, Case Studies on Implementing Low-Cost Modifications to Improve Nutrient Reduction at Wastewater Treatment Plants DRAFT Version 1.0, at 2–15 (August 2015)). EPA has issued multiple evaluations of the many tertiary treatment options that are known, available, and found to be reasonable at many facilities across the country. *See* AR0066–68.

Some of this modern technology is already used by dischargers in the Puget Sound region. For example, Pierce County determined on its own volition to implement nitrogen removal at its Chambers Creek facility. AR0068. Similarly, the LOTT facility in Olympia has implemented nutrient controls for many years. *See* AR0068-69. In addition, King County, Tacoma, and Bellingham have all evaluated the numerous existing nutrient removal technology options that go well beyond secondary treatment. *See* AR0069. These examples demonstrate that this technology is known, available, and been found to be reasonable for some facilities.

Indeed, for most, or a majority, of sewage treatment facilities in the Puget Sound region, tertiary treatment would be found to be reasonable. Whether a treatment technology is "reasonable" is a technical and economic determination. *See Puget Soundkeeper Alliance v. Wash. Dep't of Ecology*, 102 Wn. App. at 793; *see also* Permit-Writer's Manual, at 84 (AKART "requires an engineering judgement and an economic

judgment.”). According to Ecology, the reasonableness test imbedded in an AKART determination “requires estimates of the costs of the proposed treatment technologies; estimates of pollutant removal levels; and profit, cost, and revenue data.” NWEA02321 (Permit Writers Manual, at 92). Ecology further cites the PCHB opinion in *Bellingham* (1985) that there are two economic tests for reasonableness: (1) whether the treatment in question “would involve significantly greater costs than for others obliged to obtain the same levels of treatment,” and (2) whether the treatment in question is “within the economic ability of the source to meet the costs of treatment.” *Id.* at 115. Ecology concurs that both tests apply to municipal dischargers, asserting with regard to the first test that “[o]ne measure of cost is cost per pound of pollutants removed. Another measure—which is applicable to STPs—is cost per user.” *Id*. With regard to the second test, Ecology states that “[f]or municipalities, ability to pay is measured by the impact of the treatment technology’s cost on user rates.” *Id.* Finally, Ecology notes that, “[g]reater amounts of pollution reduction make a given level of cost more reasonable.” *Id*.

Based on the EPA and Ecology reports on treatment technology cited by NWEA in its petition (information Ecology has admitted it largely did not review before denying the Petition, *see infra*, section IV.C.2, at 48-49), and the costs to the economy and environment of Washington if no action is taken, it is likely that use of tertiary treatment will be found to be economically reasonable.

In 2011, the year that Ecology published its finding that discharges of treated sewage are the largest anthropogenic source of nitrogen to Puget Sound, AR0045, Ecology also concluded:

> It is generally accepted that established wastewater treatment technologies can reliably reduce total inorganic nitrogen to 3 mg/L and [total phosphorous] to 0.1 mg/L. This report identifies a range of established technologies that *are available and economically reasonable and have been applied in Washington* and elsewhere in the United States to upgrade municipal wastewater treatment plants to achieve specific nitrogen and phosphorus reduction goals.

AR0176 (emphasis added). In that analysis, Ecology further demonstrated that the cost of tertiary treatment is reasonable. There, Ecology showed an average increase in sewer fees of between $7.29 and $28.43 per month in 2010 dollars, the equivalent in 2018 dollars of $8.48 to $33.08. *See* AR0093 (citing AR0163, Nutrient Removal Evaluation, at ES-8, table ES-3). The cost to meet the request set out in the NWEA Petition, termed "Objective F" in the analysis, was associated with projected fee increases ranging from $11.46 to $94.66, or $13.12 to $108.38 in 2018 dollars. AR0158 (Nutrient Removal Evaluation, at ES-3, table ES-1); AR0094.

In upholding Ecology's requirement that the City of Bellingham comply with AKART, the PCHB has previously held that fee increases in this range are "reasonable." *In the Matter of City of Bellingham*, 1985 WL 21854, *7-8. In particular, the PCHB found that a high-cost estimate of $27.38 per month in fee increases—equivalent to $65.44 in 2018 dollars—made the cost reasonable, and thus the additional technology was required under AKART. *Id*.

Therefore, given the significant technological developments that have occurred in the over 32 years since Ecology last updated its AKART regulations, and its use of those regulations as a barrier to permit-by-permit determinations of AKART, Ecology is duty-bound to engage in the requested rulemaking.

In this way, this case is like *Rios*, 145 Wn.2d at 505. In *Rios*, the Supreme Court reviewed the Department of Labor and Industries' denial of a rulemaking petition to mandate a blood-test program for agricultural pesticide handlers. *Id*. at 486. Under the Washington Industrial Safety and Health Act of 1973, RCW 49.17.050(4), the Department was required to "set a standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health." The Department denied the petition, citing its "limited resources." 145 Wn.2d at 506. Because the Department had already made the determination that the proposed rule was "necessary and doable," and because it had a clear statutory duty to protect farmworkers from the negative effect of pesticides, however, the Supreme Court held that its denial of the rulemaking petition was arbitrary and capricious. *See id*. at 508.

Here, as in *Rios*, Ecology had previously studied the very issue raised in NWEA's Petition—namely, whether it should require tertiary treatment to remove nutrients and toxics for sewage treatment plants—and concluded that, first, the technology is widely "available" and that, second, use of that technology was likely economically reasonable. AR0156-68.

Because Ecology has a mandatory duty to ensure that all discharges, including from sewage facilities, comply with AKART, and because it already determined that the standards and technology requested in the Petition presumptively meet AKART, Ecology's denial of NWEA's Petition was arbitrary, capricious, and outside its authority under Washington's AKART requirement. This Court must, therefore, order Ecology to initiate the requested rulemaking. RCW 34.05.574(1)(b).

The illegality of Ecology's denial is also analogous to *Massachusetts v. E.P.A.*, where the U.S. Supreme Court held EPA's denial of a rulemaking petition to regulate greenhouse gases unlawful because "under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do." 549 U.S. 497, 533 (2007). There, when EPA's denial of a petition for rulemaking did not demonstrate that it conformed to the authorizing statute, "EPA ha[d] refused to comply with this clear statutory command." *Id.* "[O]nce EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute." *Id.* The same legal standard must apply here. The Legislature has spoken clearly, AKART is mandatory, and Ecology must implement it in a timely and effective manner. "To the extent that this constrains agency discretion to pursue other priorities . . . , this is the [legislative] design." *Id.*

B. Ecology's Denial Fails to Comply with the APA

The APA allows any person to petition an agency to adopt, amend, or repeal a rule. RCW 34.05.330(1). The agency then has sixty days to:

> (a) deny the petition in writing, *stating (i) its reasons for the denial, specifically addressing the concerns raised by the petitioner, and, where appropriate, (ii) the alternative means by which it will address the concerns raised by the petitioner*, or (b) initiate rule-making proceedings.

Id. (emphasis added).

An agency action is contrary to the law if it is outside the agency's statutory authority or jurisdiction, is an erroneous interpretation or application of the law, or is inconsistent with agency rule. *Port of Seattle*, 151 Wn.2d at 587. Here, Ecology has both failed to address the specific issues raised in the Petition and to explain how, despite denying the Petition, it is working to or will address the concerns raised.

1. Ecology Wholly Ignored the Request to Initiate a Rulemaking to Require the Use of Current Technology to Reduce or Eliminate the Discharge of Toxics

Ecology's denial wholly failed to address the Petition's request to ensure that AKART is applied to control and reduce the discharge of toxic pollutants. The Petition noted that Ecology and others have demonstrated that tertiary treatment removes a range of toxic pollutants from treated sewage, including pharmaceuticals and personal care products, which are both unregulated and known to be harming Puget Sound. AR0010 (citing NWEA02755 (Ecology, Control of Toxic Chemicals in Puget Sound Phase

3: Pharmaceuticals and Personal Care Products in Municipal Wastewater and Their Removal by Nutrient Treatment Technologies, at v (Jan. 2010)). In contrast, Ecology's denial did not address toxics, but focused entirely on nutrients. AR0105-08 (Ecology did not acknowledge the Petition requested a rulemaking to establish AKART for the discharge of toxic pollutants).

Puget Sound suffers from high levels of toxic pollution. NWEA's Petition provided Ecology with documentation of the significant threat this pollution poses to the Sound, and its fish and wildlife. *See* AR0048-51. Ecology chose to ignore this information and failed to address this important aspect of NWEA's request altogether in its response. *See* AR0105-07. Indeed, the administrative record is devoid of any information on how Ecology is addressing the need to implement current technology to reduce and eliminate the discharge of toxic pollution into Puget Sound.

Under the APA, this is unlawful. *See* RCW 34.05.030 (agency denial of a rulemaking petition must "specifically address[] the concerns raised by the petitioner"); *Squaxin Island Tribe*, 177 Wn. App. at 741 ("The purpose of requiring an agency to provide reasons for rejecting a rule making request is to give notice to interested parties and enable a reviewing court to determine whether challenged agency action is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law."). Here, Ecology has failed to clear even the very low bar set by this Court in *Squaxin Island Tribe*, where it held that while the agency's response to a petition need not always "resolve" the concerns raised, it must "specifically address them." 177 Wn. App. at 741.

2. Ecology Failed to Respond to the 'Rebuttable Presumption' Requested in NWEA's Petition

As noted above, Ecology also denied NWEA's petition on the basis that tertiary treatment is not "affordable [or] necessary for all wastewater treatment plants." *See* AR0106. This rationale for Ecology's denial is arbitrary and capricious.

First, Ecology's position that it need not revise its AKART regulations because tertiary treatment is not "necessary" for all sewage treatment plants misstates the law. If tertiary treatment meets the AKART standard—*i.e.*, if it is known, available, and reasonable—then state law mandates that it be implemented. RCW 90.58.010 (Ecology must require "all known, available, and reasonable methods of preventing, controlling and treating" pollutants prior to discharge into the State's waters). Ecology's determination that such measures are not "necessary" is both immaterial and is not a rational basis for denying the Petition. *Porter v. Kirkendoll*, 194 Wn.2d 194, 212, 449 P.3d 627, 637 (2019) ("the court 'must not add words where the legislature has chosen not to include them.'") (quoting *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003)).

Second, Ecology's statement that tertiary treatment does not meet the AKART standard for "all" sewage treatment plants is a straw man. NWEA never requested that tertiary treatment be defined as AKART for all treatment plants, but only that it be set as the presumptive standard that could be rebutted on a case-by-case basis. *See* AR0001 ("Through this rulemaking, Ecology should amend its existing regulations to establish

presumptive limits (and a process for rebutting that presumption)" based on tertiary treatment to meet AKART). In this respect, Ecology's response either misunderstood NWEA's Petition, or it knowingly obfuscates the issue. Either way, NWEA did not request a definition of AKART that would apply regardless of the individual circumstances of individual sewage treatment plants. In manufacturing and then rejecting that approach, Ecology failed to respond to the actual rulemaking request contained in NWEA's Petition.

An agency action is arbitrary and capricious when it is "'willful and unreasoning and taken without regard to the attending facts or circumstances.'" *Cmty. Ass'n for Restoration of the Env't*, 149 Wn. App. at 840-41 (quoting *Hillis*, 131 Wn.2d at 383). Here, the specific proposal contained in NWEA's Petition is one of the "attending facts and circumstances." Mischaracterizing that proposal and attacking only a straw man is arbitrary and capricious.

3. Ecology's Alternative Measures Are Not a Substitute for AKART

In its denial, rather than addressing the specific rulemaking action requested, Ecology enumerated three actions it claimed "will prevent increased nutrient loading" as Ecology continues to consider how to address the Puget Sound's nutrient pollution problems. AR0106. Specifically, Ecology claimed in lieu of the requested rulemaking, it would:

> 1. Set nutrient loading limits at current levels from all permitted dischargers in Puget Sound and its key tributaries to prevent increases in loading that would continue to contribute to Puget Sound's impaired status;

> 2. Require permittees to initiate planning efforts to evaluate different effluent nutrient reduction targets; and
>
> 3. For treatment plants that already use a nutrient removal process, require reissued discharge permits to reflect the treatment efficiency of the existing plant by implementing numeric effluent limits used as design parameters in facility specific engineering reports.

AR0106. Ecology contends these actions are "achievable in the near term and appropriate for our current level of understanding of nutrient dynamics in Puget Sound." *Id.* In addition, Ecology relied on its Puget Sound Nutrient Source Reduction Project ("PSNSRP"), which it defines as a "stakeholder engagement process aimed at finding holistic solutions to dissolved oxygen impairments in Puget Sound." *Id.* Ecology claimed it will use the "PSNSRP outputs and outcomes to develop water quality-based effluent limits for nutrients and appropriate vehicles to implement them." *Id*. Neither excuse relieves Ecology of its statutory mandate.

Notably, these proposed actions do not address the need to bring the AKART regulations into the modern era, the very definition of AKART. Neither do these proposals address Ecology's use of its current regulations to preclude making AKART determinations when issuing permits. Instead, Ecology cites its uncertainty about how it will develop water quality-based "solutions" to avoid taking action to comply with the technology-based requirements of AKART. This is not a reasonable justification. Just as the EPA could not "avoid its statutory obligation by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time," Ecology cannot avoid

answering the question of whether its current regulations remain sufficient to implement AKART. *Massachusetts*, 549 U.S. at 501. Thus, because Ecology "rejected the rulemaking petition based on impermissible considerations" its action was arbitrary and capricious. *Id*.

Moreover, any consideration of AKART—including Ecology's duty to determine what it is—is wholly absent from the PSNSRP process. Instead, as the record demonstrates—and Ecology willingly admits—that process relies on complex modeling of the Sound's nutrient problems and pertains to toxics not at all. As discussed above, the substantive requirements of AKART are entirely different from and independent of the requirement that dischargers not violate water quality standards. Thus, Ecology is not using the PSNSRP to develop technology-based effluent limits based on AKART, but rather *to avoid* taking such action.

C. Ecology's Denial Was Arbitrary and Capricious Because It was Unreasoned and Taken Without Regard to the Attending Facts and Circumstances

Finally, as noted above, an agency's action is arbitrary and capricious if it is willful, unreasoned, and taken without regard to the attending facts and circumstances. *Wash. Dep't. of Ecology v. Theodoratus*, 135 Wn.2d 582, 598, 957 P.2d 1241 (1998). This standard requires the court to "assure itself that the agency considered the relevant factors, that it explained the 'facts and policy concerns' relied on, and that the facts have some basis in the record." *Id*.

This Court, in *Squaxin Island Tribe*, stated that "[t]he purpose of requiring an agency to provide reasons for rejecting a rule making request is to give notice to interested parties and enable a reviewing court to determine whether challenged agency action is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law." 177 Wn. App. at 741; *see accord Am. Horse Prot. Ass'n,* 812 F.2d at 4 ("agencies denying rulemaking petitions must explain their actions."). Applying that rule here, a reviewing court must take the agency at its word when it denies a petition to initiate a rulemaking and it must determine the validity of the agency's action based on the provided rationale. *Oregon Natural Desert Ass'n v. BLM*, 625 F.3d 1092, 1120 (9th Cir. 2010) (rejecting position not advanced "in the [decision document] itself" because it "is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself").

Here, the rationale Ecology offered for denying the Petition demonstrates that its decision was not grounded in the relevant factors under the controlling statutes, it failed to address the key facts presented in the Petition, and it was not supported by the information available to the agency. For these reasons, the Court should find that Ecology's denial was arbitrary and capricious and remand the matter back to Ecology for a new decision.

1. Ecology Denied the Petition Because It Preferred to Take a Different Approach to the Water Quality Problems in Puget Sound

In its Petition denial, Ecology suggested that it need not make "a broad AKART determination for Puget Sound" because a "water quality-

based approach" to reducing nutrient discharges "is more appropriate." AR0106. Thus, according to Ecology, it may, at some point, develop "water quality-based effluent limits for nutrients" that will be included in future discharge permits. *Id.* By relying on its purported efforts to move towards a water-quality based approach to addressing the discharge of pollution to Puget Sound, Ecology has demonstrated, unequivocally, that it is not acting in compliance with the separate statutory mandate to apply AKART.

Ecology does not have the authority to choose between applying the technology-based AKART requirement, on the one hand, and water quality-based restrictions, on the other. As discussed above, under state and federal law, permits regulating the discharge of pollutants must include both technology-based effluent limits *and* water quality-based limits. *See Am. Mining Congo.,* 965 F.2d at 762 n.3 (noting that permit effluent limits must "implement both technology-based and water quality-based requirements of the Act"). These two sets of limits are necessary to ensure that each discharger meets minimum technology-based treatment requirements to achieve pollution prevention, as well as all applicable water quality standards to protect water quality. WAC 173-220-130. Of the two, however, the technology-based effluent limits are required for every discharge; it is only when such limits are not sufficient to ensure compliance with water quality standards that Ecology is required to include water quality-based effluent limits in a permit. *See* WAC 173-220-130(1)(b)(i) ("Any permit issued by the department shall apply and insure compliance with all of the following,

whenever applicable: . . . *[a]ny more stringent limitation, including those necessary to . . . [m]eet water quality standards* . . . .") (emphasis added).[9]

Here, the mandatory duty that Ecology ensures that each discharger complies with AKART *regardless of water quality standards* is clear from the plain meaning of the applicable statutes. The Pollution Disclosure Act of 1971 provides that "[r]egardless of the quality of the water of the state to which wastes are discharged or proposed for discharge, and regardless of the minimum water quality standards established by the director for said waters, require wastes to be provided with all known, available, and reasonable methods of treatment prior to their discharge or entry into waters of the state." RCW 90.52.040. Indeed, the duty to ensure every discharge complies with the state's technology-based requirement, AKART, is mandatory regardless of the quality of the receiving waterbody. *Id.*; *see also* RCW 90.54.020 (similarly requiring AKART "[r]egardless of the quality of the waters of the state) and RCW 90.48.520 (requiring AKART before allowing the discharge of toxic pollutants "regardless of the quality of receiving water and regardless of the minimum water quality standards.").

The "starting point" when construing a statute "must always be the statute's plain language and ordinary meaning." *Spokane Cnty. v. Dep't of Fish & Wildlife,* 192 Wn.2d 453, 457, 430 P.3d 655, 658 (2018) (internal quotations omitted). "Statutes must be interpreted and construed so that all

[9] *See also* NWEA02355 (Permit Writer's Manual ("When reviewing a permit application or renewal, the permit writer must first determine the proper technology-based limits. Then the writer must decide if these limits are stringent enough to ensure that water quality standards are not violated in the receiving water. If they are not, then water quality-based limits must be developed.")).

the language used is given effect, with no portion rendered meaningless or superfluous." *Id*. at 458. "When the plain language is unambiguous, subject to only one reasonable interpretation," the court's inquiry ends. *Id*. Here, Ecology's efforts to some day develop water quality-based effluent limits, however well-intentioned and independently required, is no answer for how it will comply with AKART.[10] As a result, its response to this petition, premised on these efforts, is arbitrary and capricious. *See Massachusetts*, 549 U.S. at 533 ("[O]nce EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute.").

Ecology is not free to ignore the AKART requirement because it has determined that a "water quality-based approach" to reducing nutrient discharges "is more appropriate." AR0106. The Legislature has spoken. Ecology must listen. *Blomstrom v. Tripp*, 189 Wn.2d 379, 390, 402 P.3d 831 (2017) ("If the meaning of the statute is plain on its face, then we must give effect to that meaning as an expression of legislative intent.").

2. Ecology Has Failed to Review the Relevant Information to Determine Whether Requiring Tertiary Treatment Is Reasonable.

Ecology's failure to consider, let alone reference, the information supporting NWEA's proposed rule confirms that Ecology's decision was

[10] Notably, even if Ecology's proposed approach—to address the pollution crisis in Puget Sound through the development of water quality based effluent limits—were a viable alternative to requiring compliance with AKART, the resulting decades of continued harm alone would render Ecology's reliance on this plan arbitrary and capricious. Ecology's proposed approach is to develop a nutrient reduction plan by 2022. AR1256. This plan, however, will take years to implement through the NPDES permit system. These permits are issued every five years, and Ecology expects that required upgrades will be implemented "over multiple permit cycles." AR1515. Therefore, even under the most optimistic scenario, Ecology's plan will not benefit the Sound until 2025-2030, at the earliest.

arbitrary and capricious. *See NW Sportfishing Indus. Ass'n v. Dep't of Ecology*, 172 Wn. App. 72, 100, n.51 (2012). As always, the "agency record" for judicial review "shall consist of any agency documents expressing the agency action, [and] other documents identified by the agency as having been considered by it before its action and used as a basis for its action . . . ." RCW 34.05.566. The administrative record compiled by Ecology here contained only one study submitted by NWEA in support of its Petition. *See* AR0112.

What is missing are the hundreds of documents NWEA submitted with its Petition that described the inadequacy of the existing AKART regulations, Ecology's use of its regulations to preclude AKART determinations, support for the conclusion that tertiary treatment meets the definition of AKART, and the science documenting the need for immediate action to reform how Ecology applies AKART to sewage treatment facilities discharging nutrients and toxic pollution to Puget Sound and its tributaries. This information was accepted by the Superior Court as "additional evidence," pursuant to RCW 34.05.562(1). CP132. Under the APA, the court may admit evidence outside of the administrative record if that evidence relates to or explains the decision-making process. *Aviation West Corp. v. Dep't of Labor & Industries*, 138 Wn.2d 413, 419, 980 P.2d 701(1999). The absence of this information from the administrative record—which, again, must include "documents identified by the agency as having been considered by it before its action"—means Ecology did not consider any of these documents or information. As a result, Ecology's

decision is arbitrary and capricious because it was taken without regard to the attending facts or circumstances.

Nor can Ecology claim to have followed a "reasoned process," when it admits that it ignored the thousands of pages of information supporting NWEA's request for rulemaking. *See NW Sportfishing Indus. Ass'n*, 172 Wn. App. at 91. Simply put, Ecology failed to consider the substantial evidence provided by NWEA to support its petition. This failure renders Ecology's decision arbitrary and capricious. *Rios* 145 Wn.2d at 508.

3. Ecology Failed to Address the Petition's Request Regarding Toxics

As discussed in detail above, *see supra* section IV.B.1, Ecology's denial did not address toxic pollution; instead, it focused entirely on nutrients. AR0105-08. Ecology's failure to specifically address the need to update its regulations to incorporate the modern technology that can be used to control the discharge of toxics, much less offer a valid rationale for refusing to grant the Petition to undertake a rulemaking to make these necessary changes, renders the agency's decision arbitrary and capricious. *See Squaxin Island Tribe*, 177 Wn. App. at 741.

V. CONCLUSION

For the reasons set forth above, NWEA respectfully requests that this Court declare that Ecology violated the APA and Water Pollution Control Act by failing to implement AKART for sewage discharges into the Puget Sound, as requested in NWEA's Petition for Rulemaking, vacate and set aside Ecology's decision denying NWEA's Petition for

Rulemaking as arbitrary and capricious and beyond the agency's authority, and remand the matter for further proceedings consistent with the Water Pollution Control Act and concerns raised in NWEA's Petition for Rulemaking. In addition, NWEA respectfully requests that the Court grant such other relief as this Court deems appropriate. RCW 34.05.574. Finally, NWEA requests that the Court award fees and costs pursuant to RCW 4.84.350 and other applicable law.

RESPECTFULLY SUBMITTED this 28th day of May 2020,

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CERTIFICATE OF SERVICE

I certify that on May 28, 2020, I caused to be served the Brief of Appellant Northwest Environmental Advocates in the above-captioned matter upon the parties herein using the Appellate Court Portal filing system, which will send electronic notification of such filing to the following:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 28th day of May 2020, in Seattle, Washington.

s/ Andrew M. Hawley
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