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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.

**STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY'S
RESPONSE BRIEF**

ROBERT W. FERGUSON
Attorney General

RONALD L. LAVIGNE, WSBA #18550
Senior Counsel
Office of the Attorney General
P.O. Box 40117
Olympia, WA 98504-0117
360-586-6751
ronald.lavigne@atg.wa.gov

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ISSUE PRESENTED	3
	Was it arbitrary, capricious, or beyond Ecology’s authority to deny NWEA’s petition to adopt a regulation that would require a specific type of treatment technology for Puget Sound municipalities?	3
III.	STATEMENT OF THE CASE	3
	A. Puget Sound	3
	B. Municipal Wastewater Treatment Plants	4
	C. NWEA’s Petition and Ecology’s Response	9
IV.	STANDARD OF REVIEW.....	13
V.	ARGUMENT	14
	A. Ecology Properly Implements the AKART Requirement and the Tertiary Treatment NWEA Requested Is Not Economically Reasonable.....	14
	B. The Regulation NWEA Requested Is Unnecessary and Likely Indefensible	21
	C. Ecology Denied NWEA’s Petition Because the Technology It Requested Is Not Economically Reasonable, Not Because Ecology Prefers a Different Approach.....	25
	D. It Was Not Arbitrary or Capricious for Ecology To Decide Not To Adopt NWEA’s Proposed Rebuttable Presumption	27
	E. Ecology’s Conclusion That the Treatment Technology NWEA Requested Is Not Economically Reasonable	

Addressed NWEA’s Request That the Treatment Also Be
Used To Reduce the Discharge of Toxic Pollutants29

F. The Alternative Means Ecology Provided to Address
NWEA’s Concerns Comply With
RCW 34.05.330(1)(a)(ii)31

G. Ecology Properly Considered NWEA’s Petition.....33

VI. CONCLUSION35

TABLE OF AUTHORITIES

Cases

Dioxin/Organochlorine Ctr. v. Dep't of Ecology,
119 Wn.2d 761, 837 P.2d 1007 (1992)..... 8

Massachusetts v. EPA,
549 U.S. 497, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007)..... 16, 31

Nat. Res. Def. Council v. EPA,
808 F.3d 556, (2d Cir. 2015) 26

Port of Seattle v. Pollution Control Hearings Bd.,
151 Wn.2d 568, 90 P.3d 659 (2004)..... 14

Puget Soundkeeper All. v. Dep't of Ecology,
102 Wn. App. 783, 9 P.3d 892 (2000)..... 7, 15

Rios v. Dep't of Labor & Indus.,
145 Wn.2d 483, 39 P.3d 961 (2002)..... 13, 14, 20, 21

Sierra Club v. Dep't of Ecology,
No. 11-184, 2013 WL 4490310 (Wash. Pollution Control
Hearings Bd. July 19, 2013) 8

Squaxin Island Tribe v. Dep't of Ecology,
177 Wn. App. 734, 312 P.3d 766 (2013)..... 14, 30

State ex. Rel. Martin Marietta Aluminum, Inc. v. Woodward,
84 Wn.2d 329, 525 P.2d 247 (1974)..... 8

Waste Action Project v. Draper Valley Holdings LLC,
49 F. Supp. 3d 799 (W.D. Wash. 2014)..... 18, 26, 31

Statutes

33 U.S.C. § 1311(b)(1)(B) 5

33 U.S.C. § 1370..... 6

42 U.S.C. § 7521(a)(1).....	16
RCW 34.05.010(16).....	15, 24
RCW 34.05.320	21
RCW 34.05.325	21
RCW 34.05.328(1)(c)	22
RCW 34.05.328(1)(d).....	22
RCW 34.05.328(1)(e)	22, 23
RCW 34.05.328(5)(c)(iii)	22
RCW 34.05.330(1)(a)(ii)	12, 31, 32
RCW 34.05.330(3).....	13
RCW 34.05.570(1)(a)	14
RCW 34.05.570(4)(c).	13
RCW 34.05.570(4).....	13
RCW 4.84.350	36
RCW 43.21A.020.....	14
RCW 43.21B.010.....	8
RCW 43.21B.020.....	8
RCW 43.21B.110.....	7
RCW 90.54.020(3)(b).....	7, 16

Regulations

40 C.F.R. § 133.101(g)(2).....	29
40 C.F.R. § 133.102.....	5
40 C.F.R. § 133.103(a).....	29
40 C.F.R. § 133.103(d).....	29
40 C.F.R. § 133.105.....	29
40 C.F.R. § 403.3(q).....	5
WAC 173-221-040.....	15, 23
WAC 173-221-040(1).....	6, 22
WAC 173-221-040(2).....	6, 22
WAC 173-221-040(3).....	22
WAC 173-221-050.....	29
WAC 173-500-040.....	12
WAC 371-08-485(1).....	8

I. INTRODUCTION

Northwest Environmental Advocates (NWEA) petitioned the Department of Ecology to use scarce public resources to adopt an unnecessary and indefensible regulation that would require Puget Sound municipalities to spend billions of dollars to install wastewater treatment capable of achieving specific levels for total nitrogen and phosphorous. While NWEA asserted this expensive treatment technology is known, available, and both economically and technically reasonable for Puget Sound municipalities, NWEA also recognized that the technology it requested is not economically reasonable for all Puget Sound municipalities. Nonetheless, NWEA requested that Ecology adopt a regulation that declares it is reasonable to require Puget Sound municipalities to spend billions of dollars on NWEA's requested treatment technology unless Ecology demonstrates, on a case-by-case basis, that installing NWEA's requested technology would cause severe economic hardship for a given municipality. NWEA also requested that Ecology speculate as to which municipalities would face severe economic hardship if required to implement NWEA's requested technology and to establish in the regulation the alternative treatment standards that would be required for those currently unknown municipalities.

Ecology denied NWEA's Petition because the requested technology is not economically reasonable for Puget Sound municipalities. Ecology already has the authority to require NWEA's requested technology in those instances where it is reasonable to do so and NWEA's requested regulation is therefore unnecessary. NWEA's requested regulation would also be indefensible because it employs an improper legal standard, singles out Puget Sound municipalities from other municipalities across the state, and would likely not satisfy rulemaking requirements under the Administrative Procedures Act.

The Court should affirm Ecology's denial of NWEA's Petition because the treatment technology NWEA requested is not economically reasonable and its requested regulation is unnecessary. If NWEA believes Ecology has failed to require Puget Sound municipalities to use all known, available, and reasonable methods of treatment to prevent and control pollution (AKART), NWEA can appeal any municipality's discharge permit to the Pollution Control Hearings Board where NWEA's opinion can be evaluated by the agency the Legislature created to review Ecology's permitting decisions. NWEA has never exercised this available administrative remedy and the Board has never concluded that Ecology has issued a permit to a Puget Sound municipality that fails to comply with AKART requirements. As a matter of law, these unchallenged

permits are presumed to be valid and NWEA's opinion to the contrary does not support NWEA's request that Ecology adopt an unnecessary and indefensible regulation.

II. ISSUE PRESENTED

Was it arbitrary, capricious, or beyond Ecology's authority to deny NWEA's petition to adopt a regulation that would require a specific type of treatment technology for Puget Sound municipalities?

III. STATEMENT OF THE CASE

A. Puget Sound

Like urban estuaries around the country, Puget Sound has pollution problems. *See* AR 1324 (discussing nutrient pollution in Chesapeake Bay), AR 1364 (discussing nitrogen pollution in Long Island Sound), AR 1403 (discussing nutrient pollution in San Francisco Bay).¹ Among the problems facing Puget Sound is the addition of nutrients from numerous sources that contribute to low dissolved oxygen levels in Puget Sound. AR 1086. The sources of nutrients include the Pacific Ocean, rivers in Canada and Washington, industrial facilities, and municipal wastewater treatment plants in Canada and Washington. NWEA 1975–77. The Pacific

¹ Citations to documents beginning with AR refer to the original Administrative Record filed by Ecology. Citations to documents beginning with NWEA refer to the additional evidence the Superior Court authorized pursuant to NWEA's unopposed Motion for Admission of Additional Evidence. Citations to documents beginning with CP refer to the Clerk's Papers.

Ocean is the dominant source of nitrogen to Puget Sound, and the Frasier River in Canada delivers the largest single freshwater nitrogen load to the Salish Sea. NWEA 1975.²

In order to address Puget Sound's pollution problems, Ecology created the Puget Sound Nutrient Source Reduction Project in the spring of 2017 to develop strategies to reduce sources of nutrient loads into Puget Sound. AR 1086. A wide cross-section of stakeholders participate in the Nutrient Source Reduction Project, including state and federal agencies, Tribes, environmental organizations, consultants, and municipalities. AR 0901–04 (attendance list from May 30, 2018 Puget Sound Nutrient Forum). In March 2019, the Nutrient Source Reduction Project heard presentations by officials from Virginia, Connecticut, and San Francisco to learn how they are addressing nutrient problems in Chesapeake Bay, Long Island Sound, and San Francisco Bay that are similar to the nutrient problems facing Puget Sound. AR 1324–1472.

B. Municipal Wastewater Treatment Plants

A wide variety of municipal wastewater treatment plants discharge treated effluent to Puget Sound. NWEA 1992, Fig. 10. The facilities range from large plants that serve Seattle and Tacoma, to very small plants like

² The Salish Sea includes the Strait of Georgia, Strait of Juan de Fuca, and Puget Sound. NWEA 1975.

the ones that serve the Thurston County communities at Boston Harbor, Carlyon Beach, and Tamoshan. *Id.* Ten municipal wastewater treatment plants serve about 80 percent of the Puget Sound population that is connected to a central sewer collection system, and discharge 85 percent of the annual nitrogen discharged to Puget Sound by wastewater treatment plants. AR 1474. The vast majority of Puget Sound residents connected to a central sewer collection system are connected to two King County wastewater treatment plants (West Point and South Plant), and these two facilities are the dominant sources of nutrients to Puget Sound from municipal wastewater treatment plants. AR 1473.

Under the federal Clean Water Act, all publicly owned treatment works are required to treat their effluent to meet secondary treatment requirements.³ 33 U.S.C. § 1311(b)(1)(B). The U.S. Environmental Protection Agency (EPA) has defined secondary treatment at 40 C.F.R. § 133.102. Under EPA's regulations, secondary treatment requires effluent with a biological oxygen demand (BOD) not to exceed a 30-day average of 30 mg/L and a 7-day average of 45 mg/L; total suspended solids not to exceed a 30-day average of 30 mg/L and a 7-day average of 45 mg/L; and pH between 6–9. *Id.* In addition, secondary treatment requires at least 85

³ Publicly owned treatment works (POTWs) are defined as a treatment facility owned by a state or municipality. 40 C.F.R. § 403.3(q). The term is synonymous with municipal wastewater treatment plant.

percent removal of the BOD and total suspended solids that enter a wastewater treatment plant. *Id.* Ecology must issue discharge permits that meet these federal requirements, but may issue permits with more stringent requirements. 33 U.S.C. § 1370.

In order to ensure that municipal wastewater treatment plants in Washington comply with EPA's secondary treatment regulation, Ecology adopted a regulation to require that discharges from municipal wastewater treatment plants "shall not exceed" the secondary treatment requirements established by EPA. WAC 173-221-040(1).⁴ This regulation ensures that, at a minimum, municipal wastewater treatment plants comply with EPA's secondary treatment requirements, and allows Ecology to impose more stringent requirements where appropriate. Ecology routinely relies on its independent state law authority to impose more stringent requirements on municipal wastewater treatment plants. *See* NWEA 1240 (permit for Pierce County's Chambers Creek facility with numeric effluent limits, acute and chronic toxicity requirements, and narrative conditions).

Permits issued by Ecology must also include conditions to meet the state requirement that any discharge of wastes into waters of the state must be provided with all known, available, and reasonable methods of

⁴ Under WAC 173-221-040(2), municipal wastewater treatment plants are also required to meet fecal coliform limits that are not included in EPA's secondary treatment regulation.

treatment. RCW 90.54.020(3)(b). The Legislature’s use of the word “reasonable” means that permit conditions to implement the AKART requirement must be economically and technically feasible. *Puget Soundkeeper All. v. Dep’t of Ecology*, 102 Wn. App. 783, 793, 9 P.3d 892 (2000). Ecology is not required to rely on numeric effluent limits to meet the AKART requirement. *Id.* at 793. Discharge permits issued by Ecology include narrative conditions, in addition to numeric effluent limits, to control the pollution that is released to waters of the state and meet the AKART requirement. *Id.* at 786, 794 (permit under appeal included numeric effluent limitations, whole effluent toxicity limitations, and narrative conditions that together satisfy the AKART requirement). *Compare* NWEA 1240 (permit for Pierce County’s Chambers Creek facility also includes numeric effluent limits, toxicity requirements, and narrative conditions). Determining whether a discharge permit complies with AKART requires an analysis of both the numeric and narrative conditions in a permit. *Puget Soundkeeper All.*, 102 Wn. App. at 794.

If a party believes Ecology has issued a discharge permit that fails to comply with AKART, the party may appeal the permit to the Pollution Control Hearings Board (PCHB or Board). RCW 43.21B.110. The Legislature created the Board “to provide for a more expeditious and efficient disposition” of appeals within the Board’s jurisdiction.

RCW 43.21B.010. An appeal to the Board is the exclusive means for challenging the conditions in a discharge permit issued by Ecology. *Dioxin/Organochlorine Ctr. v. Dep't of Ecology*, 119 Wn.2d 761, 771, 837 P.2d 1007 (1992). Board members are required to be qualified in matters pertaining to the environment, RCW 43.21B.020, and the Board's uniform and independent review of Ecology's decisions "is patently preferable to fragmented and perhaps uneven results among the various superior courts in our 39 counties." *State ex. Rel. Martin Marietta Aluminum, Inc. v. Woodward*, 84 Wn.2d 329, 333, 525 P.2d 247 (1974). Board hearings are formal and "quasi-judicial." WAC 371-08-485(1). The standard of review before the Board is de novo. *Id.*

NWEA contends Ecology has issued permits to Puget Sound municipalities "for decades" that fail to comply with the AKART requirement. Brief of Appellant Northwest Environmental Advocates (NWEA Br.) at 15. However, NWEA has never appealed an Ecology issued permit to the Board to challenge Ecology's implementation of AKART. Nor has the Board ever concluded that a permit issued by Ecology to a municipal wastewater treatment plant fails to comply with the AKART requirement.⁵

⁵ The Board has held that the advanced tertiary treatment used by Spokane County is AKART for that facility. *Sierra Club v. Dep't of Ecology*, No. 11-184, 2013 WL 4490310, at *4 (Wash. Pollution Control Hearings Bd. July 19, 2013). However, that

C. NWEA's Petition and Ecology's Response

In November 2018, NWEA submitted a 98-page Petition to Ecology requesting that Ecology amend WAC 173-221 to create unique discharge requirements for the approximately 107 municipal wastewater treatment plants that discharge to Puget Sound and its tributaries.

AR 0007. In particular, NWEA requested that Ecology adopt a rule that presumes it is “reasonable” under the AKART requirement for Puget Sound municipalities to implement year round tertiary treatment with numeric effluent limits of 3.0 mg/L total nitrogen and 0.1 mg/L (or lower) for total phosphorous. AR 0007–8. NWEA recognized that its requested rule did not meet the “reasonable” prong of the AKART requirement, and requested that the rule:

establish a presumption that tertiary treatment is “reasonable” and the specific numeric limits are achievable unless Ecology affirmatively demonstrates, through compelling evidence to the contrary, that the owner/operator(s) of an individual sewage treatment plant would face severe economic hardship if required to install such treatment technology, even on an attenuated compliance schedule.

holding is dicta because the only issue in the case was whether the County's permit “unlawfully authorize [sic] PCB discharges that will cause or contribute to a violation of water quality standards” *Id.* at *1. There are no Board findings that the treatment technology used by the County would meet the nitrogen and phosphorous limitations NWEA requested in its Petition. In addition, the County's facility was “a new wastewater treatment plant.” *Id.* at *4. NWEA's Petition addressed existing wastewater treatment plants with site-specific factors that “can have a dramatic impact on the ultimate cost of a treatment plant upgrade.” AR 0192.

Id.

NWEA also requested that the rule establish the process and standards for rebutting the presumption that its requested treatment technology is “reasonable” and to establish the treatment standards that would be required if Ecology determined NWEA’s requested treatment technology was not reasonable for a particular municipality. AR 0008. NWEA suggested that Ecology would only make such a finding in “rare instances.” *Id.* However, as discussed below, information NWEA relied on for its requested treatment technology demonstrates that the requested technology is very expensive and would rarely meet the economically reasonable prong of the AKART requirement. NWEA did not explain how pushing a municipality to the brink of “severe economic hardship” would satisfy the reasonable prong of the AKART requirement. Nor did NWEA explain how Ecology could adopt a defensible rule that defined AKART as NWEA’s requested treatment technology for Puget Sound municipalities, but not for other municipalities around the state. For example, why would it be reasonable for Ecology to require a small community on Puget Sound to install and operate expensive treatment technology, but not require the same treatment technology for a large municipality like Vancouver, Washington?

One of the documents NWEA submitted with its Petition was a June 2011 report prepared by Tetra Tech for Ecology entitled: *Technical and Economic Evaluation of Nitrogen and Phosphorous Removal at Municipal Wastewater Treatment Facilities* (2011). AR 0112. In this report, Tetra Tech evaluated six different tertiary treatment technologies, but only one of the technologies, Objective F, satisfied the 3.0 mg/L nitrogen and 0.1 mg/L phosphorous numeric effluent limits NWEA requested. AR 0157. Tetra Tech cautioned that its report presented “preliminary analyses” and was an “early step in a public process to determine levels of nutrient removal that could be required in Washington. Significant additional work is needed before any such nutrient limits can be adopted.” AR 0156. Tetra Tech provided cost estimates “in the range of -50 percent to +100 percent.” AR 0160. In other words, the actual cost of the treatment technology Tetra Tech evaluated could be 50 percent lower or 100 percent higher than Tetra Tech’s cost estimates.

Tetra Tech estimated the capital, as well as the operation and maintenance (O&M) costs for each of the six tertiary treatment technologies it evaluated, including Objective F, the only technology evaluated that would meet NWEA’s requested numeric effluent limits of 3.0 mg/L nitrogen and 0.1 mg/L phosphorous. *Id.* Tetra Tech’s cost estimates included the costs to implement NWEA’s requested treatment

technology in each of Washington’s 62 Water Resource Inventory Areas (WRIAs). AR 0164. Puget Sound and its tributaries are WRIAs 1–19. WAC 173-500-040, -990. The cost to install and operate NWEA’s requested treatment technology (Objective F) for the municipal wastewater treatment plants in WRIAs 1–19 is \$4,482,200,000 in 2010 dollars.⁶ AR 0164. Since the actual cost of the treatment technology could be 50 percent less or 100 percent more than Tetra Tech’s estimates, the actual cost would range from \$2,241,100,000 to \$8,964,4000,000 in 2010 dollars.

By letter dated January 11, 2019, Ecology informed NWEA that it was denying NWEA’s Petition because the treatment technology NWEA requested is not reasonable. AR 0105. In accordance with RCW 34.05.330(1)(a)(ii) Ecology identified steps it would take to address the concerns NWEA raised regarding the level of treatment provided by Puget Sound municipalities. AR 0106. These steps include continuing to work with stakeholders in the Puget Sound Nutrient Source Reduction Project to find holistic solutions to the dissolved oxygen impairments in Puget Sound, setting nutrient limits at current levels to prevent increased nutrient loading, requiring permittees to evaluate different nutrient

⁶ This is the sum of the capital and O&M costs shown in Table ES-4 for Objective F in WRIAs 1–19.

reduction targets, and establishing numeric effluent limits for nutrients at the design parameters used in the engineering reports for those facilities that have nutrient removal processes. *Id.* By letter dated January 30, 2019, NWEA appealed Ecology’s denial to the Governor’s Office pursuant to RCW 34.05.330(3).⁷ On February 8, 2019, NWEA filed its Petition for Review with Thurston County Superior Court, requesting that the court vacate Ecology’s denial of NWEA’s rulemaking petition. CP at 1. By letter dated March 13, 2019, Governor Inslee affirmed Ecology’s denial of NWEA’s Petition. By Order dated February 7, 2020, Thurston County Superior Court also affirmed Ecology’s denial of NWEA’s Petition. CP at 138.

IV. STANDARD OF REVIEW

An agency’s decision to deny a rulemaking petition is subject to judicial review as other agency action under RCW 34.05.570(4). *Rios v. Dep’t of Labor & Indus.*, 145 Wn.2d 483, 491–92, 39 P.3d 961 (2002). Relief is only available if the agency action is unconstitutional, outside the agency’s authority, arbitrary or capricious. RCW 34.05.570(4)(c). An agency has “wide discretion to choose and schedule rule making efforts.” *Squaxin Island Tribe v. Dep’t of Ecology*, 177 Wn. App. 734, 747, 312

⁷ The administrative record does not include NWEA’s appeal to the Governor or the Governor’s decision affirming Ecology’s denial of NWEA’s Petition.

P.3d 766 (2013) (citing *Rios*, 145 Wn.2d at 507). This discretion includes wide discretion to forgo rulemaking and, absent “extraordinary circumstance[s],” an agency’s decision to forgo rulemaking is not arbitrary or capricious. *Rios*, 145 Wn.2d at 507.

The Legislature designated Ecology as the agency responsible for regulating the state’s water resources, RCW 43.21A.020, and Ecology’s interpretation of relevant statutes and regulations is entitled to great weight. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004). As the party challenging Ecology’s action, NWEA bears the burden of demonstrating the invalidity of Ecology’s decision to forego unnecessary rulemaking. RCW 34.05.570(1)(a).

V. ARGUMENT

A. Ecology Properly Implements the AKART Requirement and the Tertiary Treatment NWEA Requested Is Not Economically Reasonable

Ecology and NWEA agree that Ecology has a statutory obligation to require municipal wastewater treatment plants to implement AKART. NWEA Br. at 25. Ecology simply disagrees with NWEA’s contentions that the permits Ecology issues to municipal wastewater treatment plants fail to comply with the AKART requirement, and that the treatment technology NWEA requested is reasonable.

Ecology adopted WAC 173-221-040 because all municipal wastewater treatment plants are required to comply with the secondary treatment requirements codified in this regulation. *See*, RCW 34.05.010(16) (defining “rule” as a “regulation of general applicability”). However, the secondary treatment requirement in WAC 173-221-040 is just one of the many requirements that Ecology includes in discharge permits for municipal wastewater treatment plants on a case-by-case basis. As Division I of this Court recognized in *Puget Soundkeeper All.*, 102 Wn. App. 783, determining whether a permit complies with AKART is not limited to simply reviewing the numeric conditions in a permit, but must also consider the narrative requirements in a permit. When considered in their entirety, the permits Ecology issues to Puget Sound municipalities comply with AKART.

The plaintiff in *Puget Soundkeeper Alliance*, unsuccessfully argued that compliance with AKART is determined solely by evaluating the numeric effluent limits in a permit. *Id.* at 794. By contrast, NWEA’s opinion that Ecology has failed to implement AKART “for decades,” NWEA Br. at 15, is not based on any analysis of any permit conditions. Rather, NWEA relies on a handful of sentences from fact sheets and responses to comments as the sole support for its opinion. NWEA Br. at 29–30. NWEA then relies on its opinion to argue that Ecology’s denial of

NWEA's Petition was "arbitrary, capricious, and outside [Ecology's] authority under Washington's AKART requirement." *Id.* at 37. However, Ecology does not need to adopt a regulation to implement the legislative directive to require all known, available, and reasonable methods of treatment. RCW 90.54.020(3)(b) (directing that wastes "shall be provided with all known, available, and reasonable methods of treatment" prior to entry into waters of the state).

The fact that the Legislature has directed Ecology to implement AKART distinguishes this case from *Massachusetts v. EPA*, 549 U.S. 497, 506, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007). NWEA Br. at 37. That case involved a congressional directive under the Clean Air Act for EPA to engage in rulemaking: "The [EPA] Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant . . . which in his judgment . . . may reasonably be anticipated to endanger public health or welfare." (quoting § 202(a)(1) of the Clean Air Act, 42 U.S.C. § 7521(a)(1)). Under this Clean Air Act requirement, EPA must adopt a regulation before it regulates air pollutants. By contrast, the Legislature did not direct Ecology to adopt regulations in order to implement AKART. The Legislature simply directed Ecology to implement AKART, RCW 90.54.020(3)(b), and it is not necessary for

Ecology to adopt a regulation defining what AKART is for Puget Sound municipalities in order to implement this legislative directive.

If NWEA believes any permit issued by Ecology fails to comply with AKART, NWEA can appeal the permit to the Pollution Control Hearings Board where NWEA's opinion can be evaluated by the administrative tribunal created by the Legislature to review Ecology's permitting decisions. In an appeal to the PCHB, the actual terms of a permit, rather than a handful of sentences from fact sheets and response to comments, would be evaluated to determine whether the permit complies with AKART. The fact that NWEA is unable to point to a single PCHB decision to support its opinion that Ecology has allegedly been ignoring AKART for decades demonstrates there is no merit to NWEA's opinion. Moreover, NWEA's opinion that AKART for Puget Sound municipalities is treatment technology capable of achieving effluent limits of 3.0 mg/L for nitrogen and 0.1 mg/L for phosphorous is not supported by the Tetra Tech Report NWEA relies on to conclude that the limits and technology it requested are reasonable. NWEA Br. at 35 (quoting and citing Tetra Tech's Report, AR 0112).

NWEA focuses on two sentences in the Tetra Tech Report to support NWEA's erroneous conclusion "that Ecology has already determined that the discharge limits and technology requested in NWEA's

Petition are available and economically reasonable.” NWEA Br. at 35.

These two sentences provide:

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 phosphorous reduction goals.

Id. (quoting AR 0176).

Tetra Tech evaluated six different nutrient removal objectives, and only one of those objectives, Objective F, satisfied NWEA’s request for treatment technology that results in total inorganic nitrogen at 3 mg/L and total phosphorous at 0.1 mg/L. AR 0178. The Tetra Tech report demonstrates that there is an available technology that achieves the effluent limits NWEA requested. The Tetra Tech report does not demonstrate that this technology is economically reasonable, a key consideration when evaluating AKART:

The mere availability of certain technology in the marketplace cannot be the only consideration: the technology may not be compatible with existing operations, it may be cost prohibitive, or the benefits of adoption may be so minimal that it would not be reasonable.”

Waste Action Project v. Draper Valley Holdings LLC, 49 F. Supp. 3d 799, 814 (W.D. Wash. 2014).

As discussed above, the one treatment technology Tetra Tech evaluated that achieved the specific effluent limits NWEA requested would cost Puget Sound municipalities billions of dollars to install and operate. Despite NWEA's contention to the contrary, neither the Tetra Tech Report nor Ecology have determined that this is economically reasonable. In fact, the Tetra Tech report includes a number of qualifying statements that NWEA ignores.

Tetra Tech specifically noted that its report "presents preliminary analyses" and is "an early step in a public process to determine levels of nutrient removal that could be required in Washington. Significant additional work is needed before any such nutrient limits can be adopted." AR 0156. Significant additional work is needed to address adverse environmental impacts caused by the nitrogen removal technology NWEA requested. For example, reducing nitrogen to 3 mg/L generally requires the addition of a carbon substrate which would produce up to 5 percent more sludge that a wastewater treatment plant would need to be able to handle. AR 0160. In addition, energy consumption for nitrogen removal is significant. "Reducing the [total inorganic nitrogen] effluent concentration statewide to less than 8 mg/L would require approximately two to three times the amount of electrical energy currently used by municipal wastewater treatment facilities." AR 0161. Facilities that use energy

recovery processes that rely on the production of methane gas from sludge “would produce approximately 5 to 10 percent less energy as a consequence of the removal of nitrogen.” *Id.* Finally, Tetra Tech warned that its cost estimates “are likely to vary significantly from real costs of upgrading a particular treatment plant facility.” AR 0192. Tetra Tech recommended that:

[c]ost budgets for implementing nutrient removal at any specific facility should be based on a site-specific engineering report so that concerns, needs and constraints specific to the site, community and facility can be thoroughly addressed. Site-specific factors such as wastewater characteristics, site constraints, geotechnical conditions, and the condition and layout of the existing facility can have a dramatic impact on the ultimate cost of a treatment plant upgrade.

AR 0192. *See also* NWEA 2067 (nutrient removal at some wastewater treatment plants “may be limited by land availability and other constraints”). The Tetra Tech Report does not represent a determination by either Tetra Tech or Ecology “that the standards and technology requested in [NWEA’s] Petition presumptively meet AKART.” NWEA Br. at 37.

NWEA argues this case is like *Rios*. NWEA Br. at 36. However, this case is readily distinguishable from *Rios*, which presented “an extraordinary circumstance” where the Department of Labor and Industries declined to adopt a regulation for a pesticide monitoring

program the Department had determined was “both necessary and doable.” *Rios*, 145 Wn.2d at 507–08. Here, the Tetra Tech Report specifically noted that “[s]ignificant additional work is needed before” specific nutrient limits can be considered doable. AR 0156. It was not arbitrary, capricious, or outside of Ecology’s authority for Ecology to deny NWEA’s Petition because the treatment technology NWEA requested is not economically reasonable.

B. The Regulation NWEA Requested Is Unnecessary and Likely Indefensible

The rulemaking process is a significant undertaking and state agencies are understandably reluctant to adopt unnecessary regulations. The rule NWEA requested is not only unnecessary, but is also likely indefensible because it would replace economic reasonableness under the AKART requirement with “severe economic hardship,” would be limited to Puget Sound municipalities, and would likely not satisfy rulemaking requirements under the Administrative Procedures Act (APA).

Under the APA, standard rulemaking requires notice of the proposed rule and a public participation process that includes an opportunity for written and oral comments and a concise explanatory statement that includes a summary and response to public comments. RCW 34.05.320, 34.05.325. The rule NWEA requested would be a

significant legislative rule under RCW 34.05.328(5)(c)(iii). In order to adopt a significant legislative rule, Ecology is required to conduct a cost-benefit analysis and make a “least burdensome alternative” determination. RCW 34.05.328(1)(c), (d), (e) (determine that the rule being adopted “is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives” of the statute being implemented).

The regulation NWEA requested is unnecessary because WAC 173-221-040 sets minimum requirements for biological oxygen demand (BOD) and total suspended solids (TSS) (discharges “shall not exceed” specific limits for BOD and TSS and shall remove not less than eight-five percent of these pollutants). WAC 173-221-040(1). The regulation also requires that fecal coliform “not exceed” specified levels and that pH be between 6.0 and 9.0. WAC 173-221-040(2), WAC 173-221-040(3). As discussed above, this regulation incorporates EPA’s secondary treatment requirements, which are the minimum requirements all municipal wastewater treatment plants must meet. However, the regulation only establishes minimum requirements, and Ecology remains free to set more

stringent requirements for the pollutants addressed by the regulation, and to set limits for pollutants not addressed by the regulation.

Nothing in WAC 173-221-040 prevents Ecology from requiring the specific treatment technology NWEA requested if that technology satisfies the AKART requirements at a particular facility. Ecology has not done so because the treatment technology NWEA requested is not economically reasonable. While NWEA disagrees with Ecology's conclusion, NWEA has never challenged the conclusion by appealing a permit to the Pollution Control Hearings Board where the merits of NWEA's contention would be subject to a full evidentiary hearing. Since WAC 173-221-040 already allows Ecology to require the treatment technology NWEA requested, the rule NWEA requested is unnecessary. In addition, NWEA's requested rule would likely fail the least burdensome alternative analysis required by the APA because NWEA's requested rule would only apply to Puget Sound municipalities. If NWEA's requested rule is not necessary to implement the AKART requirement at other municipalities throughout the state, Puget Sound municipalities will likely argue that NWEA's requested rule is not "the least burdensome alternative . . . that will achieve" compliance with the AKART requirement. RCW 34.05.328(1)(e). These municipalities will also understandably wonder what statutory authority Ecology has to use

NWEA's "severe economic hardship" as the AKART test for Puget Sound municipalities, while every other municipality in the state remains subject to the economic reasonableness test the Legislature adopted for AKART.

NWEA has never explained how pushing a municipality to the brink of severe economic hardship satisfies the economically reasonable prong of the AKART requirement. Pushing a municipality to the brink of severe economic hardship is not economically reasonable and Ecology properly denied NWEA's Petition because the rule NWEA requested misstates the AKART requirement. NWEA proposed the "severe economic hardship" test to allow its requested effluent limits to "be modified on a case-by-case basis." NWEA Br. at 4, 40. A rule is defined as a "regulation of general applicability" RCW 34.05.010(16). There is no benefit to establishing effluent limits in a regulation if the limits are ultimately going to be determined on a case-by-case basis because a rule is not required to establish effluent limits on a case-by-case basis. NWEA's requested rule is therefore unnecessary.

NWEA requested a regulation that would define AKART as NWEA's proposed treatment technology for Puget Sound municipalities, but not for any other Washington municipalities. AR 0007. NWEA has never explained how it would be defensible for Ecology to adopt a rule that would deem technology economically reasonable for Puget Sound

municipalities, but not for other Washington municipalities. Ecology properly declined to use its scarce public resources to adopt NWEA's requested regulation because the requested regulation is unnecessary and likely indefensible.

C. Ecology Denied NWEA's Petition Because the Technology It Requested Is Not Economically Reasonable, Not Because Ecology Prefers a Different Approach

Ecology and NWEA agree that Ecology is required to implement both the technologically based AKART requirement and water quality based restrictions. NWEA Br. at 45. Ecology has never claimed that it can ignore either the technology based or water quality based requirements of the federal Clean Water Act and the state Water Pollution Control Act. Ecology did not deny NWEA's Petition because Ecology prefers a water quality based approach. *Id.* at 44–45. Ecology denied NWEA's Petition because the treatment technology NWEA requested, with specific numeric nutrient effluent limits, is not reasonable. AR 0105.

The estimated cost of implementing the type of treatment technology NWEA requested for Puget Sound municipalities is nearly \$4.5 billion in 2010 dollars. AR 0164, Table ES 4. According to Tetra Tech, the cost could be as low as \$2.2 billion or as high as nearly \$9 billion in 2010 dollars. It was neither arbitrary nor capricious for Ecology to conclude that requiring Puget Sound municipalities to spend

billions of dollars on NWEA's requested treatment technology was not economically reasonable. *See Waste Action Project*, 49 F. Supp. 3d at 814 (the mere availability of certain technology in the market place cannot be the only consideration when evaluating AKART because available technology "may be cost prohibitive").

Even where the treatment technology NWEA requested is not economically reasonable, and therefore not AKART, it may still be necessary for Ecology to require Puget Sound municipalities to use NWEA's requested treatment as a water quality based effluent limit to address the nutrient and toxics water quality problems in Puget Sound. *See NWEA Br.* at 13 (acknowledging that water quality based effluent limits are necessary after imposing technology based effluent limits if the discharge will cause or contribute to a violation of water quality standards). Unlike AKART, which is a technology based limitation that requires economically reasonable technology, water quality based effluent limits can require the use of technology that is not economically reasonable. *Nat. Res. Def. Council v. EPA*, 808 F.3d 556, 565 (2d Cir. 2015) (water quality based effluent limits "are set without regard to cost or technology availability"). *See also AR 0106* (explaining why a water quality based approach is more appropriate than a technology based approach for addressing the water quality problems in Puget Sound).

It was not arbitrary or capricious for Ecology to conclude that the treatment technology NWEA requested is not economically reasonable, nor to acknowledge that a water quality based approach is necessary to address the water quality impairments in Puget Sound.

D. It Was Not Arbitrary or Capricious for Ecology To Decide Not To Adopt NWEA's Proposed Rebuttable Presumption

Ecology denied NWEA's Petition because Ecology concluded the tertiary treatment NWEA requested is not reasonable. AR 0105. Ecology correctly noted that treatment technology needs to be both economically and technically feasible in order to be AKART. AR 0106. NWEA incorrectly asserts that Ecology denied its Petition because Ecology concluded the requested treatment technology was not "necessary" for all municipal wastewater treatment plants. NWEA Br. at 40. However, Ecology never stated that treatment technology needed to be "necessary" in order to be AKART. Instead, Ecology informed NWEA that EPA was conducting a nationwide nutrient survey of Publically Owned Treatment Works, in part because EPA has concluded that "enhanced treatment for nutrient removal is neither affordable nor necessary for all wastewater treatment plants." AR 0106. *See also* AR 0109 (EPA's *National Study of Nutrient Removal and Secondary Technologies*, with EPA's statement that "[m]any POTWs have added treatment processes for extensive nutrient

removal, but these upgrades are not affordable or necessary for all facilities”). It was not arbitrary or capricious for Ecology to inform NWEA of an ongoing nationwide study by EPA “to learn about low-cost, effective solutions for reducing nutrient discharges.” AR 0109.

NWEA also argues it was arbitrary and capricious for Ecology to decline to adopt NWEA’s “rebuttable presumption” regarding the reasonableness of NWEA’s requested treatment technology. NWEA Br. at 40. NWEA requested that Ecology establish “the alternative technology-based treatment standards that will be required” when Ecology demonstrates that NWEA’s requested treatment technology would cause “severe economic hardship” for a particular municipality. AR 0008. In order to establish alternative treatment standards, Ecology would need to speculate about the municipalities that would face “severe economic hardship” if required to install NWEA’s requested treatment technology, and then speculate further as to what alternative standards would be applied to this unknown universe of municipalities. It was neither arbitrary nor capricious for Ecology to deny NWEA’s request that Ecology engage in multiple levels of speculation to establish alternative treatment standards for Puget Sound municipalities that would face severe economic hardship if required to implement NWEA’s requested treatment

technology.⁸ In addition, as discussed above, NWEA has never explained how pushing Puget Sound municipalities to the brink of severe economic hardship meets the economically reasonable prong of the AKART requirement. It was not arbitrary or capricious for Ecology to decline to adopt NWEA's rebuttable presumption based on "severe economic hardship" because that is not the proper test for the AKART requirement and NWEA's rebuttable presumption approach would require multiple levels of speculation.

E. Ecology's Conclusion That the Treatment Technology NWEA Requested Is Not Economically Reasonable Addressed NWEA's Request That the Treatment Also Be Used To Reduce the Discharge of Toxic Pollutants

NWEA requested a rule that defined AKART as treatment technology that could achieve effluent limitations of 3.0 mg/L for total nitrogen and 0.1 mg/L (or less) for total phosphorous. AR 0007. NWEA also requested that the rule require Puget Sound municipalities to use this specific type of treatment technology to "remove . . . toxic contaminants"

⁸ WAC 173-221-050 establishes alternative discharge standards and effluent limits for four different types of secondary treatment: trickling filters constructed and/or expanded prior to November 1984, small waste stabilization ponds or ponds approved by Ecology prior to November 1987, facilities with combined sewers, and facilities with "less concentrated influent wastewater." These alternative limits are based on EPA's secondary treatment regulations. 40 C.F.R. §§ 133.101(g)(2), 133.105 (trickling filters and waste stabilization ponds), 133.103(a) (combined sewers), and 133.103(d) (less concentrated influent). As discussed above, it makes sense to codify these requirements in a regulation because these are the minimum requirements for all municipalities under the Clean Water Act. Since these alternatives are based on EPA's regulations, adopting them did not involve the level of speculation required to codify NWEA's requested rebuttable presumption.

to an unspecified level. *Id.* Ecology properly denied NWEA's request because NWEA's requested treatment technology is not reasonable. AR 0105. NWEA now argues Ecology's denial of its Petition was unlawful because Ecology failed to address NWEA's request that treatment technology to achieve specific nitrogen and phosphorous effluent limitations should also be used to remove toxics. NWEA Br. at 38.

As NWEA acknowledges, "[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." NWEA Br. at 39 (quoting *Squaxin Island Tribe*, 177 Wn. App. at 741). Ecology's response to NWEA's Petition provided notice that Ecology was rejecting NWEA's requested rulemaking because Ecology did not agree with NWEA's assertion that the requested treatment technology is reasonable. The Court is able to determine whether it was arbitrary, capricious, an abuse of discretion, or otherwise contrary to law for Ecology to conclude that NWEA's requested treatment technology is not reasonable and therefore beyond AKART for both nutrients and toxics.

F. The Alternative Means Ecology Provided to Address NWEA's Concerns Comply With RCW 34.05.330(1)(a)(ii)

When an agency denies a rulemaking petition, the APA directs the agency to identify, where appropriate, “alternative means by which it will address the concerns raised by the petitioner.” RCW 34.05.330(1)(a)(ii). To address this requirement, Ecology identified alternative means it would use to address NWEA’s concerns regarding the level of treatment provided by Puget Sound municipal wastewater treatment plants. NWEA now argues that by identifying alternatives pursuant to RCW 34.05.330(1)(a)(ii), Ecology was arbitrary and capricious because it “rejected the rulemaking petition based on impermissible considerations.” NWEA Br. at 43 (quoting *Massachusetts v. EPA*, 549 U.S. at 501). However, Ecology denied NWEA’s Petition because the treatment technology requested is not reasonable, and economic reasonableness is clearly a permissible consideration when evaluating the AKART requirement. *Waste Action Project*, 49 F. Supp. 3d at 814 (technology that is “cost prohibitive” is not AKART).

In addition, the alternatives Ecology provided appropriately address the concerns raised in NWEA’s Petition. One of the alternatives to the requested rulemaking was to require permittees “to initiate planning efforts to evaluate different effluent nutrient reduction targets.” AR 0106.

This site-specific analysis is what Tetra Tech recommended in the report NWEA relied on to support its Petition. *See* AR 0192 (recommending site specific analysis “so that concerns, needs and constraints specific to the site, community and facility can be thoroughly addressed.”). Moreover, this required site-specific evaluation will allow Ecology to determine what additional technology-based treatment requirements are reasonable at a given facility, rather than arguing with municipalities on a case-by-case basis about “severe economic hardship” as requested by NWEA.

Another alternative was to include numeric effluent limits in reissued discharge permits based on the design parameters in facility specific engineering reports for those facilities that already have nutrient removal processes. AR 0106. This alternative addresses NWEA’s concern that Ecology has not required facilities with nutrient removal processes to use those processes. NWEA Br. at 33, AR 0038–39.

Ecology properly denied NWEA’s Petition because the expensive treatment technology NWEA requested is not economically reasonable and is therefore not AKART. It was neither arbitrary nor capricious for Ecology to comply with RCW 34.05.330(1)(a)(ii) by identifying the alternative means Ecology will use to reduce the level of nutrients and other pollutants discharged by Puget Sound municipalities.

G. Ecology Properly Considered NWEA's Petition

NWEA argues that Ecology's denial of its Petition was arbitrary and capricious because Ecology allegedly failed to consider "the hundreds of documents NWEA submitted with its Petition" NWEA Br. at 48. NWEA's argument is based on the fact that the record Ecology provided to the Thurston County Superior Court did not include most of the documents NWEA submitted with its Petition. *Id.* However, Ecology's denial of NWEA's Petition was based on the fact that the treatment technology NWEA requested is not economically reasonable, and Ecology and its counsel believed a reviewing court would not need the hundreds of documents NWEA included with its Petition to review that decision. Ecology did not object to NWEA's request to supplement the record, and the record now includes the hundreds of documents that were not included in the record Ecology originally provided to the superior court.

The record Ecology submitted to the superior court included the 2011 Tetra Tech Report NWEA primarily relies on to support its argument that the requested treatment technology is AKART. NWEA Br. at 35. In fact, the Tetra Tech Report demonstrates the treatment technology NWEA requested is not economically reasonable because it would cost Puget Sound municipalities billions of dollars to install and operate. AR 0164. The record Ecology submitted to the court also included documents

demonstrating Ecology's awareness of the pollution problems facing Puget Sound and Ecology's efforts to address these problems, efforts that will require water quality based effluent limits that go beyond AKART requirements.

Many of the documents Ecology did not include in the record submitted to the superior court were written by Ecology and the agency was obviously fully aware of those documents. Documents in this category include the fact sheets and response to comments that NWEA relies on in an attempt to demonstrate that conditions in discharge permits fail to implement AKART. As discussed above, the validity of permit conditions is not determined by isolated sentences in fact sheets and responses to comments, and the PCHB has never determined that a permit for a Puget Sound municipality fails to implement AKART. Other omitted documents detailed the environmental problems in Puget Sound. Ecology is well aware of these problems and its denial letter noted that Ecology shares NWEA's concerns about Puget Sound pollution, but disagrees with NWEA's suggested approach to address those concerns. AR 0105. Finally, NWEA's 92-page Petition independently provides a detailed explanation of NWEA's concerns, and the attached documents simply elaborate on those concerns.

NWEA's Petition alleged that its requested treatment technology is economically reasonable and represents all know, available, and reasonable methods of treatment for Puget Sound municipalities. Ecology concluded NWEA's requested treatment technology is not economically reasonable, and the record Ecology submitted to the superior court allows a reviewing court to review Ecology's conclusion. Ecology had no objection when NWEA wanted to supplement the record which now includes all the documents NWEA submitted with its Petition. Ecology's decision to provide an administrative record that did not include all of the documents NWEA submitted with its lengthy Petition does not render Ecology's decision to deny the Petition arbitrary or capricious.

VI. CONCLUSION

NWEA requested that Ecology adopt a rule to define all known, available, and reasonable methods of treatment for Puget Sound municipalities to include numeric effluent limits that are not economically reasonable to achieve. NWEA's requested rule was also unnecessary because AKART is a statutory requirement that does not require rulemaking to implement. Ecology properly declined NWEA's invitation to require Puget Sound municipalities to spend billions of dollars to implement NWEA's requested treatment technology.

The State of Washington, Department of Ecology respectfully requests that the Court affirm Ecology's denial of NWEA's rulemaking Petition. If the Court vacates Ecology's denial of NWEA's Petition, Ecology respectfully requests that the Court find that Ecology's action was substantially justified or that the circumstances make an award of fees and costs unjust under RCW 4.84.350.

RESPECTFULLY SUBMITTED this 29th day of July, 2020.

ROBERT W. FERGUSON
Attorney General



RONALD L. LAVIGNE, WSBA #18550
Senior Counsel
Attorneys for Respondent
State of Washington,
Department of Ecology
ronald.lavigne@atg.wa.gov
360-586-6751

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on July 29, 2020, I caused to be served the Department of Ecology's Brief in the above-captioned matter upon the parties herein via the Appellate Court filing portal as indicated below:

ANDREW M. HAWLEY
WESTERN ENVIRONMENTAL
LAW CENTER
1402 THIRD AVENUE, SUITE 1022
SEATTLE WA 98101

By Email:
hawley@westernlaw.org

BRYAN TELEGIN
BRICKLIN & NEWMAN, LLP
1424 FOURTH AVENUE, SUITE 500
SEATTLE WA 98101

By Email:
telegin@bnd-law.com

DATED this 29th day of July, 2020, at Olympia, Washington.



RONALD L. LAVIGNE, WSBA #18550

ATTORNEY GENERAL'S OFFICE - ECOLOGY DIVISION

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Filing on Behalf of: Ronald L. LavigneJr. - Email: ronald.lavigne@atg.wa.gov (Alternate Email: ECYOlyEF@atg.wa.gov)

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Olympia, WA, 98504-0117
Phone: (360) 586-6770

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