NO. 102479-7

Court of Appeals No. 39494-8-III

SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF TACOMA, BIRCH BAY WATER AND SEWER DISTRICT, KITSAP COUNTY, SOUTHWEST SUBURBAN SEWER DISTRICT, and ALDERWOOD WATER & WASTEWATER DISTRICT,

Respondents,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Petitioner.

PETITION FOR REVIEW

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I. INTRODUCTION

Over twenty years ago, this Court warned that adopting an overly broad definition of a "rule" under the Administrative Procedure Act would unduly constrain agency action by requiring formal rulemaking for the simplest and most rudimentary interpretation of statutes and regulations. In this case, Division Three ignored this Court's warning, as well as this Court's most recent decision about when agency action constitutes a "rule" under the APA, to conclude that the Department of Ecology adopted a "rule" in a nonbinding letter denying a petition for rulemaking. It also erroneously held that Ecology must go through formal rulemaking to use its existing authority to regulate nutrient pollution in Puget Sound.

All three branches of Government in Washington acknowledge that Puget Sound suffers from excessive nutrient pollution. Ecology has been working to address this issue for decades. In late 2018, Ecology received a rulemaking petition from Northwest Environmental Advocates (NWEA) asking

Ecology to adopt a rule requiring all municipalities that discharge to Puget Sound and its tributaries to install advanced treatment technology to remove nutrients. Ecology denied the petition because the agency did not believe the requested treatment technology was reasonable.

As required by the APA, Ecology's denial letter explained the alternative means it would use to address concerns raised in the petition. Ecology stated that when it reissued individual discharge permits to municipal wastewater facilities, it would use its statutory directive to require that wastes discharged to waters of the state of Washington be provided with all known, available, and reasonable methods of treatment (AKART) to establish nutrient limits set at the current levels of nutrient discharge from those facilities. This would prevent increased nutrient pollution from the facilities while Ecology further evaluated nutrient reductions necessary to meet the existing regulatory standards and restore Puget Sound's environmental health.

Ecology's denial letter has resulted in two inconsistent Court of Appeals decisions. In NWEA's appeal of the rulemaking petition denial, Division Two upheld Ecology's denial of the petition. Division Two specifically concluded that Ecology did *not* need to engage in rulemaking to implement the statutory directive that wastes discharged to waters of the state of Washington be provided with AKART. Division Two recognized that AKART is a technology-based requirement that is constantly changing as science advances. It held that requiring Ecology to engage in rulemaking before it could require facilities to keep up with technological advancement would unnecessarily and artificially constrain Ecology's existing statutory authority and frustrate implementation of the statute.

In this case, however, Division Three reached the opposite conclusion. It held Ecology *is* required to engage in rulemaking to implement the Legislature's directive that Ecology implement AKART when it issues water quality

permits. Division Three's decision would require Ecology to adopt rules for every technological advancement in water pollution treatment simply to issue permits implementing the existing statutory directive to require compliance with AKART in discharge permits. This decision unduly restricts Ecology's ability to comply with the Legislature's directive to issue a discharge permit to reduce nutrients in wastewater discharges to Puget Sound.

Division Three erred in determining that Ecology's statement regarding nutrient limits in Ecology's denial letter bear the hallmarks of a rule. The statement was not binding, nor did it have any independent regulatory effect, on the regulated community. It did not uniformly apply nutrient limits to all members of the regulated class. Instead, it allowed Ecology to exercise discretion in establishing nutrient permit limits, and in practice, Ecology has exercised such discretion in issuing permits since the denial letter. Despite all this, Division Three

still concluded Ecology's letter denying a rulemaking petition was an unlawful rule.

This Court should accept review under RAP 13.4(b)(1) and (2) because Division Three's decision conflicts with decisions of this Court and published decisions of the Court of Appeals. This conflict creates confusion about Ecology's permitting authority and will result in differing determinations on the validity of permit requirements depending on the division that reviews a permit challenge. The Court should also accept review under RAP 13.4(b)(4) because Ecology's ability to use its existing authority to address the longstanding nutrient crisis in Puget Sound involves issues of substantial public interest that should be determined by this Court.

II. IDENTITY OF PETITIONER AND DECISION

The State of Washington, Department of Ecology petitions for review of the Published Opinion of Division Three of the Court of Appeals, *City of Tacoma v. Department of*

Ecology, No. 39494-8-III (Wash. Ct. App. Sept. 14, 2023) (slip op.). A copy of the decision is attached hereto as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in concluding that an Ecology statement is a rule where the statement allows for the exercise of agency discretion, is not binding on the regulated community, has no independent regulatory effect, and does not apply uniformly to a class.

2. Whether the Court of Appeals erred in concluding that the regulation of nutrient pollution under existing statutory authority establishes, alters, or revokes any qualification or requirement for pollution discharge permits.

3. Whether the Court of Appeals erred in concluding that Ecology must engage in rulemaking before it can regulate nutrient pollution when state and federal law require restrictions on the discharge of pollutants whenever Ecology determines that the discharge has a reasonable potential to cause or contribute to an excursion of a water quality standard.

4. Whether the Court of Appeals erred in concluding that Ecology must engage in rulemaking to implement the requirement that all waste discharged to waters of the State shall be provided with all known, available, and reasonable methods of treatment prior to entry.

IV. STATEMENT OF THE CASE

A. Federal and State Water Pollution Control Laws

The federal Water Pollution Control Act, also known as the Clean Water Act, makes it unlawful for any person to discharge any pollutant from a point source into navigable waters of the United States unless the discharge is in compliance with a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. §§ 1311(a), 1342(a), 1362(12). The Clean Water Act requires that states adopt water quality standards to protect public health, enhance the quality of waters, and serve the purposes of the Act. 33 U.S.C. § 1313(c)(2). Water quality standards are subject to review and approval by the Environmental Protection Agency (EPA). 33 U.S.C. § 1313(c)(3). NPDES permits for publicly owned treatment works must include effluent limits based on secondary treatment, as defined by EPA, and must also include any more stringent limitations necessary to meet water quality

standards. 33 U.S.C. § 1311(b)(1)(B), (C).[1] Water-quality based effluent limits must control all pollutants that are or may be discharged at a level that has a reasonable potential to cause or contribute to an excursion above any water quality standard. 40 C.F.R. § 122.44(d)(1)(i). States may enforce more stringent water pollution control requirements than the Clean Water Act, but are prohibited from enforcing water pollution control requirements that are less stringent than the Clean Water Act. 33 U.S.C. § 1370.

Congress authorized the EPA to delegate the NPDES permit program to states. 33 U.S.C. § 1342(b). EPA has delegated the NPDES permit program to Washington State, and Ecology is designated the state's Water Pollution Control Agency for all Clean Water Act purposes. RCW 90.48.260.

[1] Publicly owned treatment works are also referred to as municipal wastewater treatment plants or simply wastewater treatment plants.

Washington's Water Pollution Control Act declares the state's "public policy" "to maintain the highest possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment thereof." RCW 90.48.010. The Act makes it unlawful to discharge any material that "shall cause or tend to cause pollution" into waters of the state. RCW 90.48.080. "Pollution" is broadly defined to include the discharge of any substance that is likely to render waters of the state harmful to fish or other aquatic life. RCW 90.48.020.

The discharge of waste material by any municipality must be authorized by a state waste discharge permit. RCW 90.48.162. Ecology must require the use of "all known available and reasonable" methods of treatment to prevent and control the pollution of waters of the state. RCW 90.48.010, 90.52.040. Washington's water quality standards require the protection of aquatic life as a designated use, including the migration, rearing, and spawning of fish and shellfish. WAC 173-201A-210(1)(a). Of particular relevance to this case,

Washington's water quality standards also include dissolved oxygen criteria to protect aquatic life. WAC 173-201A-210(1)(d).

B. The Nutrient Crisis in Puget Sound

Ecology has been working to address nutrient pollution in Puget Sound for decades because excess nutrient pollution leads to low dissolved oxygen levels that fail to support Puget Sound's aquatic life. Through a process known as eutrophication, excess nutrients in Puget Sound act as a fertilizer and cause algae to grow, resulting in algae blooms. AR 0000058. The algae consumes oxygen as it decomposes, resulting in low dissolved oxygen levels that are harmful to Puget Sound's aquatic life. *Id.* Excess nutrients can lead to profound consequences beyond low dissolved oxygen. These consequences include acidification, which can prevent shellfish from forming shells, seasonal reductions in fish habitat, intensification of fish kills, and the potential disruption of the food web. AR 0000351.

Ecology has conducted numerous studies to evaluate how nutrients impact low dissolved oxygen levels in Puget Sound. A 2002 study documented that nitrogen is the nutrient that primarily controls the rate of algae and aquatic plant growth that leads to eutrophication in Puget Sound. CP 1339–40. In 2003, Ecology research regarding low dissolved oxygen levels in Budd Inlet suggested that nutrient sources outside Budd Inlet affected water quality in the Inlet. CP 998. In a 2006 public notice announcement regarding the South Puget Sound Dissolved Oxygen Study, Ecology noted that many areas in Puget Sound had low levels of dissolved oxygen, and that nitrogen was the main pollutant that caused the low dissolved oxygen. AR 00000238. When nitrogen is released into Puget Sound, it moves around and nitrogen discharged at one spot may cause low dissolved oxygen many miles away. *Id.*

The Legislature has directed agencies to address the deteriorating health of Puget Sound. In 2007, the Legislature

created the Puget Sound Partnership "to oversee the restoration of the environmental health of Puget Sound by 2020." RCW 90.71.210. The Legislature found that "Puget Sound is in serious decline," including "low-dissolved oxygen levels causing death of marine life." RCW 90.71.200(1)(b). The Legislature directed the Partnership to develop an action agenda to "[s]ignificantly reduce nutrients and pathogens entering Puget Sound fresh and marine waters." RCW 90.71.260(1), .300(2)(d). The Legislature directed "that all governmental entities within Puget Sound will exercise their existing authorities to implement the applicable provisions of the action agenda." RCW 90.71.350(1).

Accordingly, starting more than a decade ago, municipalities throughout Puget Sound began to start planning for the potential that Ecology would use its existing permitting authority to require reductions in the nitrogen discharges that were contributing to low dissolved oxygen levels in Puget Sound. For example, in 2009, Bellingham evaluated options

for nitrogen removal in case its future discharge permits required nitrogen removal. AR 00000265–66. In 2010, Pierce County similarly completed an Environmental Impact Statement (EIS) for the Chambers Creek Regional Wastewater Treatment Plant that included an evaluation of nutrient removal technology. AR00000259. The EIS acknowledged that "Nitrogen has been identified as seasonally limiting in marine waters . . . increas[ing] the likelihood and frequency of potentially harmful algal blooms and possible depletion of oxygen in the Sound . . . . Consequently, Ecology has begun to notify wastewater utilities that nitrogen control will be a part of future discharge permit requirements." *Id.* In 2010, King County completed an assessment of nitrogen removal technologies at its South Treatment Plant and evaluated the potential for nitrogen removal at its West Point Plant in 2011. AR 00000261–63. In 2012, Tacoma issued a nitrogen removal report, co-funded by Tacoma and Ecology, regarding the most

effective project to control nitrogen discharges from its treatment plants. CP 992; AR 00000264.

Ecology continued to study the impact of excess nutrients on low dissolved oxygen in Puget Sound, and studies in 2008, 2012, 2014, 2017, and 2018, led Ecology to determine that human sources of nutrients discharged to Puget Sound, including discharges from municipal wastewater treatment plants, cause instances of low dissolved oxygen throughout Puget Sound. CP 33.

In its 2020 Supplemental Operating Budget, the Legislature reinforced its commitment to reducing nutrient pollution in Puget Sound by appropriating $535,000 to Ecology "solely for the department to develop a Puget Sound nutrients general permit for wastewater treatment plants in Puget Sound to reduce nutrients in wastewater discharges to Puget Sound." CP 1410, ¶ 29. Ecology issued the Puget Sound Nutrient General Permit in December 2021. CP 1498. Most of the parties in this case have appealed the Permit to the

Pollution Control Hearings Board, where it has been stayed pending resolution of this appeal. The Legislature created the Board to provide uniform and independent review of Ecology's decisions. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 592, 90 P.3d 659 (2004).

In its 2021–23 Capital Budget, the Legislature appropriated $9,000,000 to Ecology to fund the Puget Sound Nutrient Reduction Grant Program to provide grant funding to eligible municipalities for necessary upgrades to municipal wastewater treatment facilities to reduce nutrient loading to Puget Sound. CP 1416, § 3101.

C. Ecology's Denial of Northwest Environmental Advocates' Rulemaking Petition

Frustrated with what it believed to be inadequate action to implement the nutrient reductions the Legislature determined were necessary in 2007, an environmental group, NWEA, submitted a rulemaking petition to Ecology in November 2018. AR 00000231. NWEA requested that Ecology adopt a rule to define all known, available, and reasonable treatment for the

107 municipal wastewater treatment plants in Washington State that discharge to Puget Sound and its tributaries as year-round tertiary treatment to remove nutrient pollution with effluent limitations of 3.0 mg/L for total nitrogen and 0.1 mg/L (or lower) for total phosphorus. AR 00000237. NWEA noted that Ecology had identified the need to reduce nitrogen discharges from wastewater treatment plants in order to address the "very low levels of dissolved oxygen" in Puget Sound as early as 2006. AR 00000238–39. NWEA argued that Ecology had failed to implement AKART for nutrient discharges from municipal wastewater facilities that discharge to Puget Sound, and had only required secondary treatment to abate nutrient pollution, "an old technology that is woefully outdated and that no longer represents all known, reasonable, and available methods of addressing Puget Sound's nutrient and toxics problem." AR 00000250.

In a January 2019 letter, Ecology timely denied NWEA's petition, and, pursuant to RCW 34.05.330(1)(a), identified the

alternative measures Ecology would take to apply AKART to municipal wastewater treatment plants. AR 00000335–36. One alternative measure Ecology suggested was to use its existing AKART authority when it reissued individual NPDES permits to "[s]et 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." AR 00000336. This sentence is the portion of the denial letter that Petitioners in this case allege constitutes an unlawful rule. CP 2.

NWEA appealed Ecology's denial of its rulemaking petition, and both the superior court and the Court of Appeals affirmed Ecology's denial. *Nw. Envtl. Advocates v. Dep't of Ecology,* No. 54810-1-II, 2021 WL 2556573, at *1, *13 (Wash. June 22, 2021) (unpublished).[2] Division Two acknowledged

[2] This unpublished opinion is non-binding authority which has no precedential value and is cited only for its persuasive value.

that Puget Sound suffers from excessive nutrient pollution. *Id.* at *1. The Court of Appeals held that Ecology's denial letter "appropriately listed alternatives under RCW 34.05.330(1)(a)(ii)" to the proposed rulemaking because the denial letter "listed the alternative measures [Ecology] was taking to apply AKART to its individual treatment plant permitting process." *Id.* at *11. The Court also held that because pollution control requirements under AKART are constantly changing, requiring rulemaking to establish AKART "could lead to an absurd result where Ecology must conduct a rulemaking for every technological advancement. Such an outcome would place an unreasonable burden on the agency." *Id.* at *7 n.4. The Court concluded "Ecology's denial letter complied with the APA because it stated its reasons for denying NWEA's petition and stated the alternative means by which it will address NWEA's concerns." *Id.* at *13.

While NWEA's appeal of Ecology's denial letter was pending, Tacoma, Kitsap County, and three wastewater districts

that discharge to Puget Sound brought a Petition for Judicial Review and Declaratory Judgment against Ecology. The Petitioners alleged that the statement in the denial letter proposing to set nutrient loading limits in individual permits at current levels was unlawful rulemaking.[3] CP 1–2.

Thurston County Superior Court agreed with Petitioners. CP 1482. Before the superior court's decision, Ecology issued the nutrient general permit and two individual permits that set annual nutrient action levels for some but not all facilities that discharge to Puget Sound. Ecology appealed to Division Two and the case was transferred to Division Three. Division Three concluded that the sentence in Ecology's letter denying NWEA's rulemaking petition regarding setting nutrient limits at current levels was an unlawful rule. Slip op. at 38.

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[3] The denial letter suggested two additional alternatives that were not challenged in the declaratory judgment action. AR 00000336.

Division Three also reached an issue that had not even been alleged in the complaint. Despite the fact that the declaratory judgment action only challenged a singular sentence regarding setting nutrient limits at current levels, Division Three went further and concluded the "new requirements" in the nutrient general permit Ecology issued pursuant to the Legislature's 2020 Supplemental Operating Budget are also unlawful. *Id.* Contrary to Division Two's ruling in the *NWEA* case, Division Three also concluded Ecology "is required to adopt rules requiring" AKART. *Id.* at 11.

V. ARGUMENT

A. Review Should be Accepted Because Division Three's Decision Conflicts with this Court's Decisions and Published Decisions of the Court of Appeals

This Court should accept review because the decision below conflicts with this Court's decisions defining a "rule" under the APA. It also conflicts with both general Court of Appeals decisions defining a rule, and a specific decision by Division Two that Ecology did not need to engage in formal

rulemaking to take the same action the Petitioners challenged here.

To start, the decision below conflicts with this Court's cases defining a rule under the APA. The APA definition of a rule contains "two elements." *Nw. Pulp & Paper Assoc. v. Dep't of Ecology,* 200 Wn.2d 666, 672, 520 P.3d 985 (2022). First, a "rule" must be "any agency order, directive, or regulation of general applicability"; second, "the rule must fall into one of five enumerated categories." *Id.* at 672–73. If the first element is not met, then the challenged action is not a rule and courts need not consider the second element. *Id.*

This Court held just last year that agency action is not a "directive of general applicability," and therefore not a rule, unless it "applies uniformly to all members of a class." *Id.* at 673. This Court made clear that, to successfully challenge agency action as invalid rulemaking, "a plaintiff must challenge *a policy that applies to all participants in a program*, and not how policy is being applied under a single contract or

assessment of individual benefits." *Id.* (emphasis added). This Court also provided specific guidance that "distilled the distinguishing characteristics" of a "directive of general applicability." *Id.* at 673. Specifically, it held that agency action is *not* a directive of general applicability when it "provides guidance for agency staff" that "(1) allows staff to exercise discretion, (2) provides for case-by-case analysis of variables rather than uniform application of a standard, and (3) is not binding on the regulated community." *Id.* (quoting *Nw. Pulp & Paper Assoc. v. Dep't of Ecology,* 20 Wn. App. 2d 533, 546, 500 P.3d 231 (2021)). It further held that an agency action is not a rule if it does not have an independent regulatory effect on the regulated community. *Nw. Pulp & Paper,* 200 Wn.2d at 676.

Division Two interprets rulemaking requirements under the APA consistent with this decision. *Nw. Pulp & Paper,* 20 Wn. App. 2d at 545--46 (citing *Sudar v. Fish & Wildlife Comm'n,* 187 Wn. App. 22, 31–33, 347 P.3d 1090 (2015)).

Division Three, however, has now concluded that agency action can constitute a rule even if it is *not* uniformly applied to all members of a class. Slip op. at 22 n.5. Specifically, Division Three reasoned in this case that, while an agency "action is of general applicability if applied uniformly to all members of a class . . . [t]rial courts should not commit the logical fallacy of implying the converse; that is, by implying that an action is *not* of general applicability if *not* applied uniformly to all members of a class." *Id.* But this directly conflicts with this Court's holding in *Pulp and Paper* and conflicts with Division Two precedent on this same issue.

Compounding its error, Division Three held that, because it was difficult to determine whether the challenged statement in the denial letter was a rule, it needed to consider how Ecology had implemented the denial letter. Slip op. at 27. The record demonstrates that in Ecology's practice, however, the statements in the denial letter did not constitute a rule of general applicability because Ecology set nutrient limits for only a

fraction of the 107 facilities addressed by the rulemaking petition, and exercised considerable discretion in setting those nutrient limits. Specifically, NWEA sought a rule to establish numeric limits for nutrient discharges from approximately 107 municipal wastewater facilities that discharge to Puget Sound and its tributaries. AR 00000237. But the nutrient general permit that Ecology subsequently issued applies to only 58 facilities, not to "all" members of the class. Respondents' Brief in Response to Appellant's Opening Brief (Response Br.) App. A at 7. Moreover, instead of uniformly applying nutrient limits on these facilities, Ecology staff exercised discretion and set nutrient action levels for only 27 of the 58 facilities. *Id.* App. A (Tables 5, 8, and 11). The remaining 31 facilities do not have nutrient limits or action levels.

Ecology staff also exercised discretion in placing nutrient levels in the two individual permits issued after the denial letter. For the Big Lake Permit, Ecology set an action level for total nitrogen based on the design criteria in approved engineering

documents for the Big Lake treatment facility. CP 769, 878. By contrast, for the Birch Bay Permit, Ecology set an action level for total inorganic nitrogen based on historic total inorganic nitrogen discharges from the facility. CP 841, 918.

Rather than setting nutrient limits on 107 facilities, Ecology exercised its permitting discretion and set different nutrient action levels, not limits, on only 29 facilities. Like the Manual at issue in *Pulp & Paper,* the denial letter allowed staff to exercise discretion rather than requiring uniform application of a standard, and was not binding on the regulated community. Division Three erred in concluding that the denial letter is an unlawful rule.

Division Three also took issue with Division Two's decision in *Sudar* and this Court's holding in *Pulp & Paper* that an agency action is not a rule if it does not have any "independent regulatory effect." *Nw. Pulp & Paper,* 200 Wn.2d at 676. Division Three concluded that this holding was "nonbinding dicta" because it would have effectively overruled

Simpson Tacoma Kraft Company v. Department of Ecology, 119 Wn.2d 640, 835 P.2d 1030 (1992). Slip op. at 33–34. This is wrong. *Pulp & Paper* properly distinguished *Simpson* by noting that the Manual at issue in *Pulp & Paper*, like the denial letter at issue here, allowed for the exercise of discretion and did not impose an enforceable uniform numeric standard that applied without discretion, as was the case in *Simpson. Nw. Pulp & Paper,* 200 Wn.2d at 674–75. Moreover, "independent regulatory effect" is simply another way of saying "binding on the regulated community." However this element of rulemaking is described, it is an essential element of the APA definition of a rule—an agency order, directive, or regulation of general applicability "the violation of which subjects a person to a penalty or administrative sanction." RCW 34.05.010(16)(a). In order for a person to be subject to a penalty or administrative sanction for violating an agency action, the action must have independent regulatory effect (i.e., it must be binding on the

regulated community). Division Three erred in determining this requirement was nonbinding dicta.

Similar to the policy at issue in *Sudar,* 187 Wn. App. at 32, here, permittees are *not* subject to any sanctions for violating any statements in the denial letter because the statements in the denial letter are unenforceable unless and until Ecology issues permits that can be enforced on violators. And, as discussed above, in issuing permits, Ecology staff exercised discretion and decided not to establish any nutrient limits for most of the municipalities that discharge nutrient pollution to Puget Sound.

Division Three's erroneous conclusion that an unenforceable statement in a denial letter constitutes a rule conflicts with this Court's *Pulp & Paper* decision as well as Division Two's published decisions in *Pulp & Paper* and *Sudar*. The Court should accept review to address this conflict.

B. Ecology's Ability To Require AKART and To Establish Discharge Limits To Achieve Compliance with Water Quality Standards Without Adopting Rules Is a Matter of Substantial Public Interest That Should Be Determined by the Court.

In RCW 90.52.040, the Legislature directed Ecology to "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." As Division Two has properly concluded, while RCW 90.52.040 "requires that Ecology implement AKART, the Legislature left the method by which AKART should be implemented up to Ecology." *Nw. Envtl. Advocates,* 2021 WL 2556573, at *6 (unpublished). AKART is a constantly changing technology-based requirement and requiring rulemaking to implement AKART would lead to an absurd result requiring Ecology to conduct formal rulemaking for every technological advancement. *Id.* at *7 n.4. *Accord, Puget Soundkeeper All. v. Dep't of Ecology,* 102 Wn. App. 783, 788, 9 P.3d 892 (2000) (NPDES permit program designed to

impose progressively more demanding limits as technology advances).

By contrast, Division Three has held that under RCW 90.52.040 "Ecology is required to adopt rules requiring" AKART. Slip op. at 11. But this conflicts with RCW 90.52.040, which simply directs Ecology to require AKART when it issues discharge permits. It does not require Ecology to engage in rulemaking every time it issues a permit requiring AKART.

NPDES permits are not static. They frequently change to include more stringent pollution control requirements based on advancing technology and scientific discovery. *Puget Soundkeeper All.*, 102 Wn. App. at 788. These increasingly stringent pollution control requirements are established in federal and state water pollution control laws. The nutrient levels in the general permit arise from existing state and federal statutory and regulatory requirements that obligate Ecology to impose limitations necessary to ensure compliance with water quality standards, and to implement AKART. 33 U.S.C.

§ 1311(b)(1)(C); 40 C.F.R. § 122.44(d)(1)(i); WAC 173-201A-510; RCW 90.52.040; WAC 173-220-130(1)(a).

Under this Court's decision in *Budget*, rulemaking is not required where an agency does not add new requirements or qualifications, but simply applies existing requirements in response to new information. *Budget Rent A Car Corp. v. Dep't of Licensing*, 144 Wn.2d 889, 896, 31 P.3d 1174 (2001). Division Three erred by misinterpreting state and federal water quality requirements and by failing to follow *Budget*.

This Court has warned that an overly broad interpretation of rulemaking requirements "would all but eliminate the ability of agencies to act in any manner during the course of an adjudication." *Id.* at 898. This Court has further acknowledged that, while the APA is designed to provide "greater public and legislative access to administrative decision making," the APA's requirements are "not designed to serve as the straitjacket of administrative action." *Id.*

Division Three's ruling is effectively a straightjacket on Ecology's ability to implement essential water quality regulations, undermining the Legislature's directive to Ecology to control the nutrient pollution that has plagued Puget Sound for decades. The Legislature has declared that Puget Sound is a "national treasure" that "is in serious decline" and "must be restored and protected in a more coherent and effective manner." RCW 90.71.200(1)(a)-(c). Ecology's ability to use its existing authority to control pollution in Puget Sound, and all of Washington's waterbodies, without having to engage in rulemaking is a matter of substantial public interest that should be determined by this Court.

VI. CONCLUSION

Division Three's decision conflicts with this Court's decisions and with published decisions of the Court of Appeals. It also raises a matter of substantial public interest that should be determined by this Court because it undermines Ecology's

ability to address the urgent issue of nutrient pollution in Puget Sound. This Court should accept review.

This document contains 4,856 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 16th day of October, 2023.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on October 16, 2023, I caused to be served the foregoing document upon the parties herein via the Appellate Court Portal filing system, which will send electronic notifications of such filing to the registered parties.

DATED this 16th day of October 2023, in Olympia, Washington.

s/ Ronald L. Lavigne
Ronald L. Lavigne, WSBA #18550
Senior Counsel

APPENDIX A

Published Opinion

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

CITY OF TACOMA, BIRCH BAY WATER AND SEWER DISTRICT, KITSAP COUNTY, SOUTHWEST SUBURBAN SEWER DISTRICT, and ALDERWOOD WATER & WASTEWATER DISTRICT, Municipal Corporations and Political Subdivisions of the State of Washington	)	No. 39494-8-III
Respondents,	)	PUBLISHED OPINION
v.	)	
STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,	)	
Appellant.	)	

LAWRENCE-BERREY, J. — Respondents are all either local governments or special purpose districts that own and operate public sewer systems and associated wastewater treatment plants (WWTPs) discharging into Puget Sound (Sound). In 2019, the Department of Ecology (Ecology) generated two documents discussing nitrogen pollution in Puget Sound. One document recommended action to regulate nitrogen discharges to the Sound and the other committed to doing so.

The respondents (hereafter Tacoma) sued to block regulation of their nitrogen discharges by arguing that these two documents improperly adopted three new rules in violation of the rulemaking provisions of chapter 34.05 RCW, the Administrative Procedure Act (APA). The superior court agreed with Tacoma. Ecology appeals.

We clarify the APA's definition of "rule" and conclude that "directive," for purposes of one APA component of "rule," includes an agency's directive to its staff to include new terms in permits. We conclude that the first and second purported rules are not "rules" within the APA's definition, but we conclude that the third purported rule is.

We affirm in part and reverse in part.

FACTS

The waters of Puget Sound extend from Olympia and the inside of the Olympic Peninsula north through the San Juan Islands up to Bellingham. Puget Sound is itself part of a greater body of water, known as the Salish Sea. The Salish Sea extends from the northern tip of Vancouver Island in British Columbia, south through the Strait of Georgia and the Strait of Juan de Fuca, continuing through the entirety of Puget Sound along the inside of the Olympic Peninsula. Some maps extend the Salish Sea further south along the Oregon Coast and include the mouth of the Columbia River.

Puget Sound and the Salish Sea are polluted. Some pollution is naturally caused. Other pollution is anthropogenic (i.e., human caused). Some of the human-caused sources of water pollution include shipping, fishing, fisheries, other forms of aquaculture, agricultural runoff, stormwater runoff, industrial waste, medical waste, garbage, oil and gas production, and discharges from WWTPs. This case concerns attempts to control pollution from WWTPs.

Since enactment of the Federal Water Pollution Control Act of 1972 (Clean Water Act or CWA), 33 U.S.C. § 1251 et seq., the United States has attempted to mitigate human-caused water pollution. Some of the mitigation tools adopted by the CWA, its amendments, and implementing regulations were monitoring and limiting discharges of biological oxygen-demanding pollutants, suspended solids, fecal coliform, pH (hydrogen ion concentration) impairing pollutants, and thermal impairing pollutants. *See* 33 U.S.C. § 1314(a). Another tool was requiring point source emitters of pollution to obtain a permit for the continued right to discharge pollutants into the waters of the United States. *See* 33 U.S.C. § 1342. These permits are known as "National Pollutant Discharge Elimination System (NPDES)" permits. Another tool was requiring industrial polluters to adopt "pretreatment" and requiring WWTPs to adopt "secondary treatment." *See* 33 U.S.C. § 1317(b), § 1311(b)(1)(B). Pretreatment seeks to reduce or eliminate

nonstandard pollutants prior to the pollutant entering a WWTP.[1] 40 C.F.R. § 403.3(s). Secondary treatment typically consists of activated sludge, trickling filters, and/or biological contactors intended to remove biodegradable organic pollutants. Primary treatment typically consists of screening, skimming, and settling to remove large solids that sink, and oils and lighter solids that float to the surface. Wastewater treatment also typically includes some form of disinfection, such as application of chlorine, ozone, or ultraviolet light.

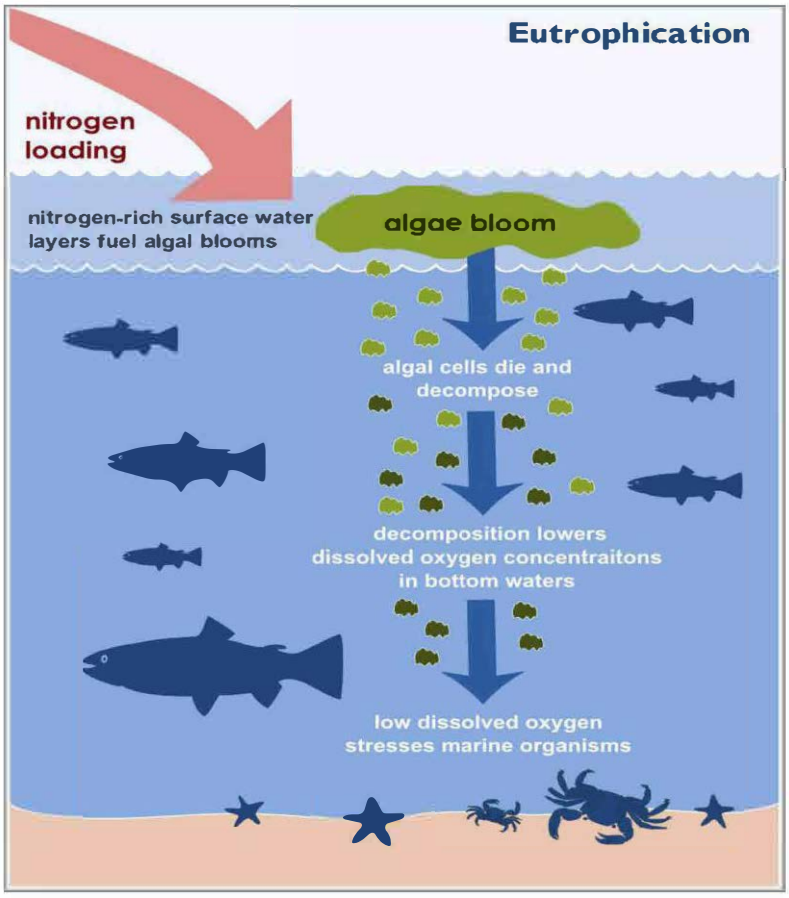
Despite all these forms of treatment, many pollutants still remain in wastewater discharged into the waters of the United States. As technology and scientific knowledge have continued to advance, additional forms of treatment have emerged. Additional treatment is often referred to as tertiary treatment, final treatment, or advanced secondary treatment. This additional treatment may refer to technology and agents that remove pharmaceutical waste, micropollutants such as plastics, phosphorus, nitrogen, or any other remaining unwanted substance. In this case, tertiary treatment is used to refer to nitrogen removal.

[1] Most WWTPs were originally designed to handle typical household and light commercial waste.

Some WWTPs in Washington already incorporate nitrogen removal, such as the Spokane Regional Water Reclamation Facility and the Budd Inlet Treatment Plant. Despite having been technologically feasible for several decades, tertiary treatment is not yet required for all WWTPs.

One of the primary impediments to wider adoption of tertiary treatment is cost. In 2017, the Chambers Creek Regional Wastewater Treatment Plant in Pierce County finished installation of a nitrogen removal system at a cost of $342 million. Individual plants may also be impeded by a lack of available land on which to construct new infrastructure or insufficient access to additional electricity. Other impediments are gaps in our knowledge.

Nitrogen, while commonly thought of as a beneficial nutrient, is also a pollutant. Simplified, excess nitrogen results in excess algal growth. Algae generate organic carbon. When carbon decomposes, it consumes



oxygen. Depleted oxygen, or eutrophication, can render water incapable of supporting many forms of aquatic life.

Puget Sound contains many areas with low levels of dissolved oxygen (DO) as a result of excess nitrogen. More specifically, Puget Sound contains low oxygen in the strata where aquatic life has historically thrived.

What is unknown, at least within Puget Sound, is to what extent excess nitrogen in these strata is due to WWTPs. The Pacific Ocean is the largest source of nitrogen entering Puget Sound. The Pacific is believed to account for about 88 percent of the total nitrogen entering Puget Sound. Just because the Pacific is the largest source of nitrogen does not mean that it is the largest driver of oxygen depletion in the life-sustaining layers of the Sound.

Oceans and seas are complex ecosystems. The tides, water temperature, geography, and other variables impact flow and mixing among bodies of water. Most of the nitrogen that enters Puget Sound via the Pacific also flows back out. But the nitrogen entering Puget Sound from the Pacific is unlikely to have a significant negative impact on oxygen levels because water entering from the Pacific is usually colder, meaning it is denser than the water already in the Sound, causing the water from the Pacific to sink below the water already in the Sound. The negative impacts of excess nitrogen occur

closer to the surface, in the euphotic zone, where the sun's light allows for photosynthesis to occur. The euphotic zone is also where most marine life is found.

WWTPs emit significant amounts of nitrogen. Yet it is unknown to what extent this nitrogen causes DO impairment in Puget Sound. Nitrogen at the point of discharge can be measured, but one cannot determine where this nitrogen goes once the wastewater gets carried away on the currents and mixes with the rest of the Sound. Without this information, it is not possible to reasonably regulate nitrogen discharges from WWTPs. This is because anthropogenic pollutant discharges only violate Washington's clean water standard if it can be shown that human actions "cause the D.O. of that water body to decrease more than 0.2 mg/L." WAC 173-201A-210(1)(d)(1).

Development of the Salish Sea Model

To fill this knowledge gap, Ecology and the Pacific Northwest National Laboratory (PNNL) spent years developing the Salish Sea Model (SSM). The SSM is a predictive computer model that lets Ecology isolate and test water quality variables based on actual water quality data and predict water quality in areas where we do not currently have actual water quality measurements. It takes months to prepare the data to run a single scenario, days to run it through the SSM on one of PNNL's high powered computers, and additional time to interpret and report the data.

Some of the questions the SSM helps to answer are:

- "Are human sources of nutrients in and around the Salish Sea significantly impacting water quality now? How bad might it get in the future?"
- "Where are the areas that are most sensitive to human impacts? When are those effects the most harmful?"
- "How much do we need to reduce human sources of nutrients to protect water quality in the Salish Sea?"

Administrative Record (AR) at 104. The model also allows Ecology to predict where and by how much DO levels would improve based on hypothetical nitrogen reductions. The model also allows Ecology to test and quantify its hypothesis that DO levels are most impaired in Puget Sound's remote inlets and basins due to poor circulation resulting in pollutants accumulating and spending more time in those areas.

Despite its immense power, the SSM does have limits. While the SSM can account for human-caused sources of pollution, the model cannot isolate the effect of individual WWTPs. However, Ecology hopes to further refine the SSM "to define discharger-specific nutrient loading limits based on localized and far-field impacts." Clerk's Papers (CP) at 127.

Professors Gordon Holtgrieve and Mark Scheuerell from the University of Washington, scientists working with the regulated stakeholders, have also expressed concern that Ecology is overconfident in the SSM's predictive power. Every predictive model has levels of uncertainty, often reported as confidence intervals. In lay terms, these

scientists worry that the SSM is not yet ready for prime time because it appears to lack sufficient sensitivity to confidently determine which segments of Puget Sound violate the DO standard in WAC 173-201A-210 as a result of human-caused pollution. The SSM's predictive accuracy is particularly important because many areas of Puget Sound are on the edge of the state's DO water quality standard. These scientists are also concerned that Ecology has not publicly shared sufficient information for others to independently verify Ecology's interpretation of the results.

To be clear, this appeal is not about whether Ecology should be using the SSM to inform regulation or whether it is accurate and reliable. This appeal is about whether Ecology violated the APA by adopting rules without allowing for public comment during its efforts to investigate and respond to human causes of DO depletion in Puget Sound.

In January 2019, Ecology published the results of its first three scenarios using the SSM. The report, referred to as the Bounding Scenarios Report (BSR), modeled "a range of climate and ocean conditions" from 2006, 2008, and 2014. CP at 34. The report looked at current levels of pollution during those years and what would happen if nitrogen and carbon discharges were reduced at all WWTPs, only midsize and large WWTPs, and only large WWTPs. There are 79 WWTPs in the United States' portion of the Salish Sea.

The report's authors found that approximately 20 percent of Puget Sound did not meet Washington's DO water quality standards during each of the reference years. The modeling used in the BSR suggested that reducing nitrogen and carbon discharges from WWTPs using "seasonal biological nitrogen removal (BNR) technology" would improve DO compliance by approximately 50 percent, meaning only about 10 percent of Puget Sound would continue to not meet DO standards. CP at 37. The report's authors also found DO noncompliant areas within all of Puget Sound's basins, except Admiralty Inlet. The authors also found "[a]ll areas not meeting the water quality standard have depleted levels of DO in the water column as a result of human loadings from Washington State." CP at 36. While the SSM cannot yet quantify the effects of individual WWTPs, the model confirmed that discharges have both a near- and a far-field effect, meaning that discharges into one part of Puget Sound contribute to DO depletion in other parts of the Sound as the discharged water mixes and travels along the currents.

Northwest Environmental Advocates (NWEA) Rulemaking Petition

For years, Ecology has kept stakeholders updated on the development of the SSM and other water quality efforts through the Puget Sound Nutrient Forum. The forum also presented stakeholders with preliminary results from the SSM. Shortly before the official publication of the BSR, NWEA—an active participant in the Nutrient Forum—filed a petition with Ecology "to propose and adopt a rule establishing technology-based effluent limits for the discharge of nutrients and toxics from municipal wastewater treatment facilities that discharge to Puget Sound and its tributaries." AR at 231. Specifically, NWEA wanted a rule designating tertiary treatment of wastewater as "AKART." AR at 231.

AKART stands for "All Known, Available, and Reasonable Treatment." WAC 173-201A-020. AKART represents "the most current methodology that can be reasonably required for preventing, controlling, or abating the pollutants associated with a discharge." *Id.* Under RCW 90.52.040, Ecology is required to adopt rules requiring "wastes to be provided with all known, available, and reasonable methods of treatment prior to their discharge or entry into waters of the state." Such treatment is required regardless of whether the water quality is pristine, impaired, or anywhere in between. RCW 90.52.040. In addition to implementing state law, AKART standards also mirror

parallel provisions of the Clean Water Act requiring NPDES permittees to adopt the best available technology economically achievable for eliminating the discharge of pollutants. *See* 33 U.S.C. §§ 1311, 1314. Thus, if tertiary treatment meets the definition of AKART, Ecology is obligated by statute to make tertiary treatment a precondition to issuance/reissuance of NPDES permits.

On January 11, 2019, Ecology sent NWEA a concise letter denying the rulemaking petition. Under the APA, Ecology had 60 days to either initiate rulemaking or issue a denial explaining the reasons for denial and "where appropriate" the alternative means Ecology would use to address NWEA's concerns. RCW 34.05.330(1). Ecology denied rulemaking because AKART technologies must be economically feasible and Ecology believed that tertiary treatment was cost prohibitive. While it may be economically feasible for some WWTPs, NWEA's petition wanted tertiary treatment mandated for all 79 Puget Sound WWTPs, regardless of any one plant's size and impact on Puget Sound. Ecology also denied rulemaking because the SSM needed further refinements before Ecology had sufficient data to craft discharger-specific limits for individual NPDES permittees.

Although Ecology denied rulemaking, Ecology shares NWEA's concerns and ultimate goals. It is the policy of this state

> 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 wild life, birds, game, fish and other aquatic life, and the industrial development of the state, and to that end require 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.

RCW 90.48.010. In the denial letter, Ecology announced the alternative actions it would take:

> Ecology remains committed to [working with stakeholders to solve the DO problem in Puget Sound]. While this work is progressing, Ecology ***will*** through the individual permitting process:
> 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.
> 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.

CP at 127 (emphasis added). Ecology also stated that it would explore development of a general permit to regulate "nutrient loading" (i.e., nitrogen discharges) into Puget Sound. CP at 127. A general permit that covers multiple discharging entities is an alternative to issuing individual NPDES permits. WAC 173-226-020, -050.

Unhappy with the denial of its rulemaking petition, NWEA sought judicial review. Division Two of this court affirmed Ecology's denial of the rulemaking petition. *See generally Nw. Env't Advocs. v. Dep't of Ecology*, No. 54810-1-II (Wash. Ct. App. June 22, 2021) (unpublished), http://www/courts.wa.gov/opinions/pdf/548101_unp.pdf).

NPDES Permits and the Puget Sound Nutrient General Permit

Ecology started adding new terms to individual NPDES permits as those permits came up for renewal, requiring nitrogen discharge limits and nitrogen reduction planning. Ecology also worked to develop a general permit. The final version of the general permit went into effect January 1, 2022. It placed a limit on how many pounds of nitrogen each large and midsize WWTP could discharge per year and required all WWTPs to create nitrogen reduction plans. Any WWTP that exceeds its annual limit must spend the next year studying what caused it to exceed its limit and what corrective action it can take to not exceed its limit. If a WWTP exceeds its limit two years in a row, it must begin taking that corrective action. The validity of the general permit is currently in litigation at the Pollution Control Hearings Board. That litigation is stayed pending the resolution of this appeal.

Concerns Raised by the Regulated Community

The findings of the BSR, the rulemaking denial letter, and the prospect of a general permit all happened within a fairly short time frame. The commitments made in the denial letter especially alarmed the regulated community.

In the denial letter, Ecology promised that as each NPDES came up for renewal, it would "[s]et nutrient loading limits at current levels . . . to prevent increases in loading that would continue to contribute to Puget Sound's impaired status." CP at 127. The short-term effect of freezing nutrient loading limits impairs development because development increases demand on WWTPs. But, it is not possible to significantly reduce nitrogen in the short term. Significant nitrogen reduction requires long-term capital improvements. Immediately, the city of Tacoma (City) started putting caveats in building permits allowing the City to "rescind the permit" in the event Ecology limited the City's treatment capacity by capping nitrogen discharges. CP at 991. This put several major projects in limbo, including multifamily housing developments, a behavioral health hospital, and an expansion at Bates Technical College Medical School.

An internal legal memo authored by counsel for the City concisely lays out its concerns:

> The costs of such full-scale improvements are estimated to range from $250 million to over $750 million and would likely take at least six years or longer to fund, plan for and implement. In the interim, implementation of the TIN [total inorganic nitrogen] load cap would have the unintended consequence of halting development, in effect a de facto moratorium. Projects could not be approved because sewer capacity would not be available. The City will be exposed to substantial risk if it does not qualify all sewer availability notices with the right to rescind the assurance of sewer availability in the event Ecology's permit caps sewer capacity. Adding this condition will impair lending and effectively halt most development, including affordable housing, shelters, and accessory dwelling units. Further, funding of capital improvements needed to meet the new permit requirements has the potential to more than double or triple sewer rates, disproportionately affecting low-income populations.

AR at 620.

There were also concerns that capping nitrogen discharges at current levels, without allowing leeway for development to continue, would unintentionally force growth into rural areas. This would be in areas where septic is allowed due to a lack of sewer service. The unintended consequence of this could make matters worse, causing leaky and untreated septic waste to enter the Puget Sound.

Petition for Judicial Review

To prevent Ecology from limiting WWTP discharges, the City and the other respondents filed a joint petition for judicial review under RCW 34.05.570. The City alleged Ecology violated the APA by adopting three "rules" outside of the APA's rulemaking process. Two of the purported rules were in the BSR and the third purported

rule was in the denial letter. The City refers to the first purported rule as the DO standard rule, the second as the DO impairment rule, and the third as the TIN cap rule.[2]

The City alleged the DO standard rule appeared on page 20 of the BSR, that the DO impairment rule could be found on pages 12, 60, 61, and 62 of the BSR when read together, and that the TIN cap rule could be found in the three commitments Ecology made in the denial letter.

With respect to the DO standard rule, the City alleged the BSR effectively amended WAC 173-201A-210(1)(d)(iii), which covers DO testing and sampling procedures. With respect to the DO impairment rule, the City alleged the BSR effectively amended the state's 303(d) list[3] of impaired water segments when the BSR reported the SSM's findings of areas not meeting Washington's DO water quality standard.

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[2] The phrase "total inorganic nitrogen" does not appear in the denial letter. The reason the City refers to it as the TIN cap rule is because TIN is the parameter that Ecology settled on for implementing the commitments in its letter.

[3] The 303(d) list is a reference to the list states are required to periodically submit to the Environmental Protection Agency under 33 U.S.C. § 1313(d). Entities that discharge into waterways on the 303(d) list are subject to more stringent requirements in their NPDES permits.

With respect to the TIN cap rule, the City alleged that Ecology placed new limits in NPDES permits.

In addition to arguing that the three alleged rules violated RCW 34.05.570 by not going through the rulemaking process, the City also alleged that they were arbitrary and capricious and exceeded Ecology's statutory authority.

The trial court agreed with the City on all grounds and remanded the matter "to Ecology for consideration of the immediate adoption of temporary emergency rules while regular rule-making proceeds." CP at 1483. Ecology appeals.

ANALYSIS

In its briefing to this court, the City abandoned its prior claims that Ecology's purported rules are arbitrary and capricious and exceeded Ecology's statutory authority. Accordingly, the only substantive issue is whether the three purported rules are "rules" as defined by RCW 34.05.010(16) and were therefore required to be adopted through formal rulemaking.

A. STANDARD OF REVIEW

Whether any of the three purported rules adopted by Ecology are "rules" as defined by Washington's APA are questions of statutory interpretation, the court reviews

de novo. *Nw. Pulp & Paper Ass'n v. Dep't of Ecology*, 200 Wn.2d 666, 672, 520 P.3d 985 (2022).

Ecology argues that because it is the agency designated to regulate water pollution, we should defer to its interpretation of the laws it administers. *See City of Redmond v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998) (this court defers to an agency's interpretation of the law it administers). We agree with the legal principle cited by Ecology, but disagree it applies here. We are tasked here with determining the scope of Ecology's *authority* to promulgate purported rules. "'[W]e do not defer to an agency the power to determine the scope of its own authority.'" *Ass'n of Wash. Bus. v. Dep't of Ecology*, 195 Wn.2d 1, 10, 455 P.3d 1126 (2020) (internal quotation marks omitted) (quoting *Lenander v. Dep't of Ret. Sys.*, 186 Wn.2d 393, 409, 377 P.3d 199 (2016)).

B. THE PURPORTED RULES

The APA defines "rule" as

> any agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction; (b) which establishes, alters, or revokes any procedure, practice, or requirement relating to agency hearings; (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law; (d) which establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or

> profession; or (e) which establishes, alters, or revokes any mandatory standards for any product or material which must be met before distribution or sale.

RCW 34.05.010(16).

No agency subject to Washington's APA may adopt a rule outside of the rulemaking process established in chapter 34.05 RCW, §§ .310-.395. RCW 34.05.570(2)(c). The label that an agency assigns to its activities does not determine whether those activities constitute rulemaking under the APA. *McGee Guest Home, Inc. v. Dep't of Soc. & Health Servs.*, 142 Wn.2d 316, 322, 12 P.3d 144 (2000).

The APA definition of "rule" implies a two-step inquiry. First, the court determines whether the purported rule is an "'order, directive, or regulation of general applicability.'" *Nw. Pulp*, 200 Wn.2d at 672 (quoting RCW 34.05.010(16)). Second, the court determines whether the purported rule "fall[s] into one of the five enumerated categories" in RCW 34.05.010(16). *Id.* at 672-73. If the purported rule fails the first part of the inquiry, "we need not address whether [it] falls within one of the enumerated categories in satisfaction of the second element." *Id.* at 676.

For the first inquiry, the City argues that each of Ecology's purported rules are directives of general applicability. For the second inquiry, the City argues that each of the purported rules fit within RCW 34.05.010(16) categories (a) and (c).[4]

1. *The DO standard described on page 20 of the BSR is not a rule*

This court's first step is to determine whether page 20 of the BSR states a directive of general applicability. The APA does not define "directive" or "general applicability." However, the Supreme Court has previously defined the latter term: "[W]here the challenge is to a policy applicable to all participants in a program, not its implementation under a single contract or assessment of individual benefits, the action is of general applicability within the definition of a rule." *Failor's Pharm. v. Dep't of Soc. & Health*

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[4] In its first amended petition for judicial review, the City alleged categories (c) and (d), but not (a). Ecology argues that the City's failure to plead RCW 34.05.010(16)(a) in its petition for judicial review precludes consideration of that category. To support its argument, Ecology cites RCW 34.05.546(7). That subsection requires the petitioner to set forth in its petition for review its "reasons for believing that relief should be granted."

RCW 34.05.546(7) does not describe the required level of specificity. On its face, it might require citation only to RCW 34.05.010(16) or it might require citation to one or more of subsection 16's five categories. Because Ecology does not cite any authority to support its argument or attempt to show what level of specificity the legislature intended, we decline to consider the argument. *Holland v. City of Tacoma*, 90 Wn. App. 533, 537-38, 954 P.2d 290 (1998) (passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration).

Servs., 125 Wn.2d 488, 495, 886 P.2d 147 (1994) (citing *Simpson Tacoma Kraft Co. v. Dep't of Ecology*, 119 Wn.2d 640, 648, 835 P.2d 1030 (1992)).[5]

While the Supreme Court has defined "general applicability," it has not defined the term "directive" as used in the APA. Undefined terms in statutes are given their ordinary dictionary definition. *Am. Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 8, 802 P.2d 784 (1991). Webster's defines "directive" in its noun form as "something that serves to direct, guide, and usu. impel toward an action, attainment, or goal." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 641 (1993).

Applying this definition, page 20 of the BSR does not contain a directive of general applicability. Page 20 of the BSR states, in relevant part:

> Regions of Puget Sound that do not meet the DO standard are expressed in terms of area (e.g., acres or km^2). Since the model is three dimensional, each vertical column of water is represented by ten layered grid cells. Area, in this context, refers to the surface area of the vertical column (which is equivalent to the area represented by the grid cell in Figure 4). If DO levels in one or more layers in the water column does not meet the DO standard, the surface area of that water column is counted towards the total noncompliant area.

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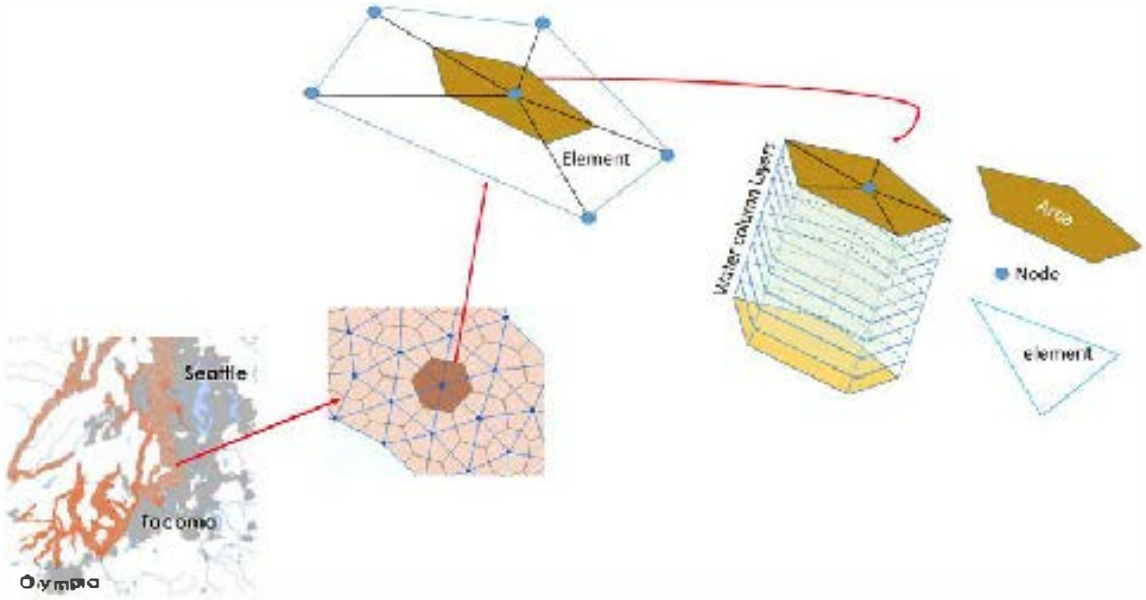
[5] Various cases additionally state, "[a]n action is of general applicability if applied uniformly to all members of a class." *See, e.g.*, *Failor's Pharm.*, 125 Wn.2d at 495. Trial courts should not commit the logical fallacy of implying the converse; that is, by implying that an action is *not* of general applicability if *not* applied uniformly to all members of a class. Implying this logical fallacy would make it easy for an agency to skirt the rulemaking requirements of the APA simply by imposing incremental standards on permittees rather than a single standard.

CP at 44. Following is a graphic from the BSR depicting the SSM's water column layering.



CP at 45 (Fig. 4).

This portion of the BSR simply explains how the BSR's authors reported their results. As defined above, a directive is something that impels toward an action. Because the DO standard does not impel anyone to act, it is not a "directive" and it therefore is not a "rule" under the APA.

Yet the BSR report promises to "supply information [to Ecology to] design management strategies for anthropogenic nutrient inputs affecting DO" and "will be used to inform and develop the nutrient management strategy for Puget Sound." CP at 45-46. The City argues that these and other comments within the report show that the BSR

approach for measuring DO will be used for determining whether they are in violation of applicable DO standards. We are unpersuaded.

The BSR is a tool that Ecology will use to better measure and control DO levels. There is no indication from the report or elsewhere that Ecology plans to use anything other than the existing rule, WAC 173-201A-210(1), for measuring DO levels for deciding whether any WWTP is in violation of its individual permit or a general permit.

Because the first purported rule does not state a "directive," this court does not address whether it meets either categories (a) or (c) of the second element.

2. *The description of DO impairment on pages 12 and 60-62 of the BSR is not a rule*

Page 12 of the BSR states in relevant part:

> We found the following when applying [Washington's DO] standards to the model results:
>
> - The total area of greater Puget Sound waters not meeting the marine DO standard was estimated to be around 151,000 acres (612 km^2) in 2006, 132,000 acres (536 km^2) in 2008, and 126,000 acres (511 km^2) in 2014. These areas correspond roughly to about 23%, 20%, and 19% of greater Puget Sound in each year, respectively, excluding the intertidal zone.
>
> - Noncompliant areas are located within all Puget Sound basins except Admiralty Inlet. All areas not meeting the water quality standard have depleted levels of DO in the water column as a result of human loadings from Washington State. Model computations take into account multiple oceanographic, hydrographic, and climatological

> drivers, so that depletions due to human activity alone can be computed by excluding other influences, such as that of the Pacific Ocean.

CP at 36.

The above comments show that the modeling scenarios run using the SSM projected that every single basin in Puget Sound, except Admiralty, had at least one water column layer that failed to meet DO standards. As argued by Professors Holtgrieve and Scheuerell, many of these noncompliant layers might actually be compliant due to limitations in the SSM's sensitivity. For purposes of the BSR, the report's authors classified these areas as DO-impaired.

BSR pages 60-62 discuss the SSM's results concerning DO depletion due to human causes. Page 60 states, in relevant part:

> The cumulative impact of all human activities causes DO concentrations to decrease by more than 0.2 mg/L at multiple locations in Puget Sound. Figure 25 shows the spatial distribution of minimum water column DO for both existing and reference conditions, along with the difference between the two, for 2006, 2008, and 2014. Spatial patterns in minimum DO under the reference scenario closely resemble the existing condition patterns. The difference plot shows that maximum DO depletions (depletions below the reference condition DO levels) are predicted to occur in inlets where flushing is relatively poor compared to the main channel . . . .

CP at 84.

Page 61 (right) is Figure 25, a graphic representation of Puget Sound's DO levels at reference levels without human influence, at existing levels, and the difference between the two, as predicted by the SSM.

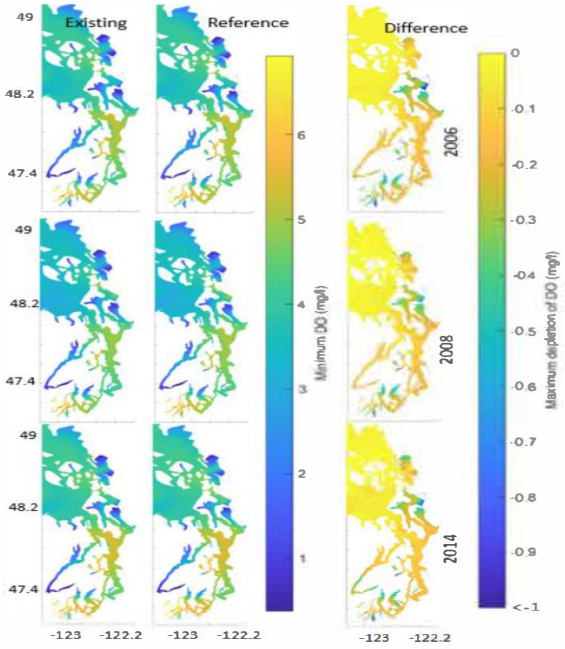


Figure 25. Comparison of the spatial distribution of predicted 2006, 2008, and 2014 minimum dissolved oxygen (DO) concentrations, corresponding reference condition scenarios, and the difference between them.
Areas that are green to blue are most sensitive to DO depletion from all human sources in Washington.

Page 62 reiterates the findings summarized in the abstract from page 12, but with more detail on duration and degree of DO noncompliance.

The City argued that when read together, the pages conclude "that all municipal WWTPs discharging to Puget Sound are causing or contributing to the alleged impairment, effectively expanding the existing list of 'impaired' or CWA 303(d) water bodies in Washington to include all of Puget Sound." CP at 1204.

During oral argument, the City withdrew this assignment of error.[6] We accept this concession. Similar to our conclusion in the previous section, BSR pages 12, 60, 61, and 62 do not state a directive. That is, they do not impel one to act. Rather, these pages state the authors' conclusions.

3. *Ecology's commitments in the denial letter and subsequent actions show it has adopted rules in violation of the APA*

In the abstract, it is difficult to discern whether Ecology's commitments to NWEA in the denial letter constitute a rule under the APA. It therefore is necessary to consider how Ecology has implemented its commitments.

We previously outlined how Ecology began implementing some of its commitments through the issuance of renewed individual permits while in the process of formulating a general permit. We now provide greater detail on this process.

The new general permit

Beginning in April 2018, Ecology convened meetings of the Puget Sound Nutrient Forum for the purpose of developing a nutrient reduction plan for Puget Sound. At the first meeting, Ecology outlined to stakeholders some options to address nutrient sources

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[6] Wash. Court of Appeals oral argument, *City of Tacoma v. Dep't of Ecology*, No. 39494-8-III (June 7, 2023), at 40 min., 40 sec., *video recording by* TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-3-court-of-appeals-2023061095/?eventID=2023061095.

and some nutrient reduction strategies being used in other parts of the country. At the March 2019 meeting, representatives from around the country discussed their use of general permits to regulate nutrient pollution in their respective areas. Following these presentations, stakeholders expressed interest in a general permit that would address Puget Sound nutrient pollution. Pursuant to WAC 173-226-060, in August 2019, Ecology issued a preliminary determination to develop a general permit, and provided a 60-day comment period.

Ecology convened a Puget Sound Nutrient General Permit advisory committee to advise it in drafting permit requirements to reduce nutrient loads discharged into Puget Sound by WWTPs. The advisory committee represented diverse stakeholders, including WWTPs, environmental organizations, and state and federal agencies. The City was a member of the committee.

After several monthly meetings, Ecology developed a preliminary draft general permit and solicited public comment from January 27, 2021 through March 15, 2021. Ecology used the comments it received to develop a formal draft general permit, which it released for another round of public comment on June 16, 2021. Ecology issued the general permit on December 1, 2021.

The general permit categorizes permittees as dominant, moderate, or small—based on the amount of TIN they annually discharge into Puget Sound. Dominant and moderate loaders have TIN action levels that Ecology calculated to reflect the pounds of TIN each facility discharges each year. Dominant and moderate loaders are required to implement a nutrient optimization plan to maximize nitrogen removal by their existing treatment facility and submit a nutrient reduction evaluation to Ecology by December 31, 2025.

If a dominant loader exceeds its action level, it must submit a report with a proposed approach to reduce its annual TIN load by 10 percent but it does not need to implement the proposed approach unless it exceeds its action level two years in a row or three years during the five-year permit term.

If a moderate loader exceeds its action level, it must submit a report with a proposed approach to reduce its annual TIN load below its action level but does not need to implement the proposed approach unless it exceeds its action level two years in a row or three years during the five-year permit term.

Small loaders do not have any caps on nutrient discharges but must implement a nutrient optimization plan to maximize nitrogen removal by their existing treatment facility and submit an AKART analysis to Ecology by December 31, 2025.

The impact of these changes goes further than requiring the WWTPs to comply with existing water quality standards. As noted previously, these changes actually freeze existing nutrient loading limits because the action level is based on each permittee's prior year TIN load rather than existing water quality standards.

Renewal of individual permits

While Ecology was in the process of formulating the general permit, it imposed restrictions similar to those described in the individual permits for Birch Bay and the Big Lake WWTPs. Those individual permits became effective March 1, 2021, and do not expire until 2026.

The practical effect of the denial letter creates rules

Ecology argues that the denial letter cannot be a rule within the meaning of the APA because it does not direct, order, or require anything. We disagree. As explained below, it directs its own staff to impose new restrictions within NPDES permits.

First inquiry: Directive of general applicability

The first inquiry is whether the purported rule is an order, directive, or regulation of general applicability. *Nw. Pulp*, 200 Wn.2d at 672. "[W]here the challenge is to a policy applicable to all participants in a program, not its implementation under a single contract or assessment of individual benefits, the action is of general applicability within

the definition of a rule." *Failor's Pharm.*, 125 Wn.2d at 495 (citing *Simpson*, 119 Wn.2d at 648). Here, Ecology's commitments in the denial letter are of general applicability because they apply to all WWTPs.

The parties, however, dispute whether the action is a "directive." As previously defined, a directive is something that impels action. The precise issue presented in this appeal is whether a directive can be an internal directive, e.g., a commitment by Ecology that its own staff will impose new requirements on permittees.

Ecology argues that including an internal directive within the APA definition of directive is inconsistent with *Sudar v. Department of Fish and Wildlife Commission*, 187 Wn. App. 22, 31-33, 347 P.3d 1090 (2015). We question some of the broad language used by the *Sudar* court.

We begin first by discussing *Simpson*. In *Simpson*, Ecology determined that the state's existing water quality standard required all NPDES permits issued to pulp and paper mills to limit dioxin discharges to no more than 0.13 parts per quadrillion because that was the level at which dioxin "'may . . . adversely affect public health.'" 119 Wn.2d at 643. "Ecology arrived at this numeric standard by using federal guidance and federal data, but without going through rule-making procedures." *Id.* at 643-44. Ecology's staff included the new standard in all pulp and paper mills' NPDES permits. *Id.* at 644.

The pulp and paper mills sued. They argued that this new numeric standard that Ecology's staff required in all renewed permits needed to be adopted through the rulemaking process. The Supreme Court agreed. It noted that the nature of a rule is "'it [must] apply to individuals only as members of a class.'" *Id.* at 648 (quoting William R. Andersen, *The 1988 Washington Administrative Procedure Act—An Introduction*, 64 WASH. L. REV. 781, 790 (1989)). The high court concluded that the numeric standard was a directive of general applicability because it applied "uniformly to the entire class of entities which discharges dioxin into the state's waters . . . ." *Id.* It also concluded that the violation would subject the respondents to punishment if they did not comply with the new standard. *Id.* at 647. Because the two inquiries for what constitute a rule were satisfied, the court concluded that the rule was invalid because Ecology failed to satisfy the APA requirements for rulemaking. *Id.* at 648-49. *Simpson* stands for the proposition that "directive" includes an agency's internal directive to its staff for issuing permits.

In *Sudar*, the Fish and Wildlife Commission adopted Policy C-3620. The policy set "guiding principles and a series of actions it may follow to improve the management of salmon in the Columbia River Basin." 187 Wn. App. at 27. The policy "outline[d] a number of objectives, including phasing out the use of nonselective gill nets in nontribal commercial fisheries . . . and the transition of gill net use to off-channel areas." *Id.* The

Sudar court held that the policy was not a rule under the APA and distinguished *Simpson* on the basis that the policy was "unenforceable until and unless the Department promulgates rules that can be enforced on violators." *Id.* at 32. This is not an apt distinction. In *Simpson*, the directive to the agency employees was not a promulgated rule. Rather, the agency's employees were directed to include a new standard in all renewed permits and, by doing so, the permitees were subject to punishment if they violated the new standard.

Ecology argues that construing directive as including an internal directive is inconsistent with *Northwest Pulp*. We conclude that the language relied on by Ecology is nonbinding dicta.

In *Northwest Pulp*, our Supreme Court reviewed a challenge to Ecology's adoption, in its manual, of two new methods for identifying the source of polychlorinated biphenyls (PCBs) in water, Methods 1668C and 8082A. 200 Wn.2d at 670. There, permit writers were required to use Method 608.3 to determine compliance with PCB limits but had discretion whether to use data collected by Methods 1668C and 8082A when evaluating the source of PCBs. *Id.* at 670-71. There, the court agreed with the lower appellate court's distillation of what characterizes a rule of general applicability: an agency action is not a rule when it "'(1) allows staff to exercise

discretion, (2) provides for case-by-case analysis of variables rather than uniform application of a standard, and (3) is not binding on the regulated community . . . .'" *Id.* at 673 (quoting *Nw. Pulp & Paper Ass'n v. Dep't of Ecology*, 20 Wn. App. 2d 533, 500 P.3d 231 (2021), *aff'd*, 200 Wn.2d 666). Applying those standards, the court concluded that the challenged methods were not rules because permit writers had discretion to choose the best method for measuring PCB sources on a case-by-case basis. *Id.* at 674.

Admittedly, later in the opinion, the court noted that Ecology's internal manual had no independent regulatory effect. *Id.* at 676. This is the comment Ecology relies on for implying that only regulations can be a rule. We disagree for two reasons. First, there is no functional difference between a promulgated rule that adds new terms for renewing a permit and a directive to staff to add new terms for reissuing a permit. Second, the *Northwest Pulp* court's comment was surplusage and, taken literally, would have overruled *Simpson*. It is well established that statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum and need not be followed. *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 531, 79 P.3d 1154 (2003). If the court's passing comment was intended to change precedent, agencies could adopt rules internally without the rulemaking process simply by directing staff to

include the new rules in every renewed permit. This would render the APA's requirement for rulemaking meaningless.

Here, unlike *Northwest Pulp*, Ecology directed its staff to include new requirements in both the individual permits and the general permit. The record indicates these requirements were nondiscretionary and were part and parcel of the commitments Ecology made to NWEA.

> *Second inquiry: The action establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law*

To prove that the denial letter established a "rule" under RCW 34.05.010(16)(c), the City relies heavily on *Failor's Pharmacy* and *Hillis v. Department of Ecology*, 131 Wn.2d 373, 932 P.2d 139 (1997).

In *Failor's Pharmacy*, the Department of Social and Health Services (DSHS) issued policy memoranda changing the way DSHS calculated Medicaid pharmacy reimbursement rates. 125 Wn.2d at 491-92.[7] The policy memoranda established

[7] *Failor's Pharmacy* was decided under a prior version of the APA when it was codified under chapter 34.04 RCW; however, the definition of "rule" and its five categories were the same then as today.

reimbursement tiers based on a pharmacy's business volume. *Id.* After several years operating under these new rate calculations, multiple pharmacies sued. *Id.* at 492.[8]

The pharmacies argued that the policy memoranda instituted invalid rules because they were orders/directives/regulations of general applicability that established, altered, or revoked a qualification or requirement relating to the enjoyment of benefits or privileges conferred by law. *Id.* at 494. DSHS responded that the policy memoranda did not "'relat[e] to the enjoyment of benefits or privileges conferred by law'" under former RCW 34.04.010(2)(c) (1988) because pharmacies have "neither statutory nor contractual rights to payment until performance and can withdraw from the program at any time . . . ." *Id.* at 496. DSHS additionally responded that Medicaid participation was voluntary and the pharmacies were free to accept or reject Medicaid clients. *Id.*

The Supreme Court disagreed with DSHS by focusing on Medicaid patients. While federal case law suggested that Medicaid participation was not a benefit or a privilege conferred by law to Medicaid providers, Medicaid was a benefit conferred to Medicaid patients. *Id.* at 496-97. In holding that the policy memoranda instituted invalid

[8] Similar to this case, the pharmacies were affected by the agency's policy memorandum only indirectly, by the agency requiring its staff to include the new terms in its Medicaid reimbursement contracts. An additional similarity is the presence of a tiered system based on volume rather than a uniform requirement.

rules, the court stated:

> [T]he inclusion of the reimbursement schedules in a unilateral contract does not preclude their status as a rule. . . . The benefit of the Medicaid program runs to the Medicaid patient, RCW 74.09.200, and its enjoyment is altered by the change in reimbursement rates. By insulating reimbursement schedule changes from rulemaking requirements Defendant denied notice and comment to those intended beneficiaries of the program.

Id. at 497 (citations omitted).

Failor's Pharmacy directly supports the City's argument. The challenged portion of the denial letter promised that Ecology's permit writers would alter the qualifications and requirements for NPDES permits. A letter mandating that new performative language be included in all NPDES permits is indistinguishable from the memoranda in *Failor's Pharmacy* mandating new price terms in Medicaid reimbursement contracts. Furthermore, issuance of an NPDES permit is a privilege conferred by law because without an NPDES permit, no person or entity may discharge any substance into Puget Sound. RCW 90.48.160, .162.

Ecology attempts to distinguish *Failor's Pharmacy* by arguing that the new requirements in the permits are mandated by WAC 173-201A-510, which prohibits WWTPs from violating existing water quality standards. We disagree that the new permit requirements merely require the WWTPs to comply with existing water quality standards. Existing water quality standards set numeric levels for DO in Puget Sound but do not

regulate or set numeric levels for nitrogen discharges. While nitrogen is one of several causes of DO impairment, it has never been subject to direct regulation until now.

We conclude that the City has satisfied both parts of the two-part inquiry and that the commitments in the denial letter are "rules," as defined by the APA. We further conclude that the new requirements in the individual permits and the general permit are unlawful. If Ecology desires to keep its commitments to NWEA, it must do so through the rulemaking procedures of the APA.

Affirm in part; reverse in part.[9]

Lawrence-Berrey, J.

WE CONCUR:

Fearing, C.J.

Pennell, J.

[9] Amici raise the question of whether the City had standing to file suit in superior court. Ecology did not raise standing as an issue before this court. We generally decline to address issues raised solely by amici. *State v. J.W.M.*, 1 Wn.3d 58, 74 n.4, 524 P.3d 596 (2023); *State v. Hirschfelder*, 170 Wn.2d 536, 552, 242 P.3d 876 (2010); *Teamsters Local 839 v. Benton County*, 15 Wn. App. 2d 335, 352, 475 P.3d 984 (2020). For this reason, we decline to address the issue of standing.

ATTORNEY GENERAL'S OFFICE - ECOLOGY DIVISION

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