



1 On January 11, 2019, Ecology denied NWEA’s rulemaking petition, though it did not  
2 address the specific rule requested by NWEA. Nor did it address the many concerns raised in  
3 NWEA’s petition, including the urgent need for additional limits on nutrient and toxic pollution in  
4 Puget Sound. Ecology’s denial letter is attached hereto as Exhibit B.

5 Now, pursuant to RCW 34.05.570(4), the Washington Administrative Procedures Act  
6 (“APA”), NWEA petitions this Court for review of Ecology’s denial. In support of this petition for  
7 review, NWEA alleges as follows:

8 **II. ALLEGATIONS REQUIRED BY RCW 34.05.546**

9 **1. Name and Mailing Address of the Petitioner**

10 Northwest Environmental Advocates  
11 PO Box 12187  
12 Portland, OR 97212-0187

13 **2. Name and Mailing Address of the Petitioner’s Attorney**

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15 Western Environmental Law Center  
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17 Seattle, WA 98101  
18 206-487-7207  
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21 Bricklin & Newman, LLP  
22 Attorneys at Law  
23 1424 Fourth Avenue, Suite 500  
24 Seattle WA 98101  
25 (206) 264-8600  
26 telegin@bnd-law.com

**3. Name and Mailing Address of Agency Whose Action Is at Issue**

Washington Department of Ecology  
PO Box 47600  
Olympia, WA 98504-7600

**4. Identification of the Agency Action at Issue**

This petition challenges Ecology’s January 11, 2019 denial of NWEA’s “Petition for Rulemaking to Adopt a Presumptive Definition of ‘All Known, Available, and Reasonable

1 Treatment’ as Tertiary Treatment for Municipal Sewage Discharges to Puget Sound and its  
2 Tributaries” (Exhibit B hereto).

3 **5. Identification of Any Parties to Adjudicative Proceedings Below, if Any**

4 No adjudicative proceedings occurred below.

5 **6. Facts to Demonstrate that the Petitioner is Entitled to Obtain Judicial Review**

6 6.1 NWEA is a 501(c)(3) non-profit organization that works through advocacy and  
7 education to protect and restore water quality, wetlands, and wildlife habitat in the Northwest.

8 6.2 NWEA has standing to pursue judicial review pursuant to RCW 34.05.530. NWEA  
9 has members who recreate in or enjoy the waters of Puget Sound and are concerned that pollution  
10 from municipal waste discharges will adversely affect their use and enjoyment of the area. NWEA  
11 has members who use the Puget Sound area for recreation including hiking, walking, boating,  
12 fishing, shellfish gathering, swimming, photographing, and observing wildlife. NWEA and its  
13 members are concerned that pollution from municipal waste discharges has had, is, and will continue  
14 to have adverse effects on their enjoyment of these activities in the Puget Sound region, and on the  
15 region’s aquatic and aquatic-dependent fish and wildlife.

16 6.3 NWEA submitted its “Petition for Rulemaking to Adopt a Presumptive Definition of  
17 ‘All Known, Available, and Reasonable Treatment’ as Tertiary Treatment for Municipal Sewage  
18 Discharges to Puget Sound and its Tributaries” (hereinafter “Petition for Rulemaking”) to Ecology  
19 on November 14, 2018. *See* Ex. A. The petition requested Ecology revise Chapter 173-221 WAC,  
20 Discharge Standards and Effluent Limitations for Domestic Wastewater Facilities, to define  
21 AKART as tertiary treatment for municipal wastewater discharges into Puget Sound and its  
22 tributaries to replace current standards that are based on secondary treatment. On January 11, 2019,  
23 Ecology denied the petition. *See* Ex. B.

24 6.4 Ecology’s January 11, 2019, decision to deny NWEA’s Petition for Rulemaking has  
25 prejudiced or is likely to prejudice the interests of NWEA and NWEA’s members by continuing to  
26 allow sewage treatment facilities to discharge pollutants at levels that are not allowed under

1 Washington’s AKART requirement, resulting in harmful impacts to Puget Sound and the region’s  
2 aquatic and aquatic-dependent fish and wildlife. RCW 34.05.530(1).

3 6.5 The interests of NWEA and NWEA members are among those Ecology was required  
4 to consider when it denied NWEA’s Petition for Rulemaking. RCW 34.05.530(2). *See also* RCW  
5 34.05.330(1) (requiring Ecology to “specifically address[] the concerns raised by the petitioner”).

6 6.6 Judgment in favor of NWEA will substantially eliminate or redress the prejudice  
7 suffered by NWEA and NWEA’s members caused by Ecology’s denial of NWEA’s Petition for  
8 Rulemaking by forcing Ecology to address Petitioner’s concerns, as required by RCW 34.05.330(1),  
9 and by requiring Ecology to adopt more stringent standards for the discharge of nutrients and other  
10 pollutants to Puget Sound. RCW 34.05.530(3).

11 6.7 Petitioners have exhausted all available administrative remedies available within the  
12 agency, of which there are none. RCW 34.05.534.<sup>1</sup>

13 6.8 This petition for judicial review of final agency action is timely filed within thirty  
14 days after the agency action. RCW 34.05.542(3).

15 6.9 Ecology’s denial of NWEA’s Petition for Rulemaking is subject to judicial review  
16 pursuant to RCW 34.05.510 and .570(4).

17 6.10 This Court has jurisdiction over this matter pursuant to RCW 34.05.510.

18 6.11 Venue is proper pursuant to RCW 34.05.514(1)(a).

19 **7. Reasons Relief Should be Granted**

20 7.1 Washington Water Pollution Control Act (chapter 90.48 RCW) requires Ecology to  
21 apply AKART to municipal wastewater discharge permits. Pursuant to RCW 90.48.010, it is  
22 Washington’s policy to “maintain the highest possible standards to insure the purity of all waters of  
23 the state consistent with public health and public enjoyment thereof, the propagation and protection  
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25 <sup>1</sup> On January 30, 2019, NWEA appealed Ecology’s denial to the Governor’s office pursuant  
26 to RCW 34.05.440(3). However, because the Governor is not an “agency,” that appeal does not fall  
within the APA’s requirement for exhaustion of administrative remedies at RCW 34.05.534.

1 of wild life, birds, game, fish and other aquatic life, and the industrial development of the state.” To  
2 that end, the Act requires “the use of *all known available and reasonable methods* by industries and  
3 others to prevent and control the pollution of the waters of the state of Washington.” *Id.* (emphasis  
4 added). This standard is commonly known as “AKART.” Pursuant to RCW 90.48.162 and .520,  
5 Ecology is charged with applying the AKART standard when issuing discharge permits to municipal  
6 sewage treatment facilities.

7       7.2     AKART is an evolving standard that changes as new technologies are developed and  
8 become available. The AKART standard requires municipal sewage treatment facilities to use  
9 increasingly more stringent treatment methods as technological advancements become known,  
10 available, and reasonable. In other words, these facilities must stay up to date with their treatment  
11 technology as each new federal Clean Water Act discharge permit is granted or renewed. “[T]he  
12 statutory scheme envisions that effluent limitations will decrease as technology advances.” *Puget*  
13 *Soundkeeper v. State*, 102 Wn. App. 783, 789–90, 9 P.3d 892, 895 (2000).

14       7.3     Ecology’s longstanding practice is to set a rebuttable baseline presumption of what  
15 treatment technology constitutes AKART. Rather than make individual AKART determinations for  
16 each discharge permit issued to a municipal sewage treatment facility, Ecology has long relied on a  
17 presumptive definition of AKART, defined by rule, for municipal sewage treatment facilities.  
18 Currently, the AKART standard for municipal sewage facilities is codified at WAC Chapter 173-  
19 221, which establishes discharge standards and effluent limitations based on “secondary treatment,”  
20 a 100-year old technology for removing pollutants from treated sewage. The AKART standards  
21 include limits on four specific parameters or pollutants, none of which is a nutrient or toxic pollutant.  
22 These rules were adopted in 1987. In the subsequent 32 years, Ecology has not updated its  
23 presumptive AKART standard for municipal dischargers.

24       7.4     Tertiary treatment technology is far more effective at removing pollutants than  
25 secondary treatment and satisfies the AKART requirement. NWEA’s Petition for Rulemaking  
26 (Exhibit A) explains that tertiary treatment—a more recent treatment technology—is far more

1 effective at removing pollutants from treated sewage than the secondary treatment standard currently  
2 defined as AKART in Ecology’s rules. In particular, it is far more effective at removing nutrients  
3 and toxic pollutants. Tertiary treatment is also widely available and economically reasonable for  
4 most, if not all, sewage treatment facilities that discharge to Puget Sound. The reasonableness,  
5 effectiveness, and availability of tertiary treatment have been confirmed by multiple state and federal  
6 studies, as documented in NWEA’s Petition for Rulemaking, and by many of the treatment facilities  
7 themselves.

8           7.5     Notwithstanding the wide availability of tertiary treatment for municipal sewage  
9 treatment facilities, at reasonable cost, Ecology continues to treat the less effective, 100-year old  
10 secondary treatment technology as AKART when issuing discharge permits to municipal sewage  
11 treatment facilities. Ecology’s failure to require facilities to use the more effective tertiary treatment  
12 methods has had, and continues to have, widespread impacts on the health of Puget Sound and the  
13 aquatic and aquatic-dependent fish and wildlife that rely on Puget Sound for survival.

14           7.6     For all of the reasons above, NWEA’s Petition for Rulemaking asked Ecology to  
15 update its rules at WAC Chapter 173-221 to define tertiary treatment as the presumptive AKART  
16 standard for municipal sewage treatment facilities, specifically to remove nutrient pollution and  
17 toxic contaminants, and to establish effluent limitations of 3.0 mg/L for total nitrogen and 0.1 mg/L,  
18 or lower, of total phosphorus—limits that are readily achievable with tertiary treatment. These  
19 effluent limits represent a significant benefit to the environment over the limits achievable with  
20 secondary treatment alone. It also requested that Ecology establish the process and standards for a  
21 municipality to rebut the assumption that use of tertiary treatment technology is “reasonable” in  
22 recognition that the reasonableness prong of AKART is site specific.

23           7.7     Under RCW 34.05.330(1), Ecology was required to either grant NWEA’s Petition  
24 for Rulemaking, or deny the petition in writing, stating “its reasons for the denial, specifically  
25 addressing the concerns raised by [NWEA].”  
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1           7.8     On January 11, 2019, Ecology denied NWEA’s Petition for Rulemaking, citing two  
2 reasons in support. The first was that tertiary treatment “is neither affordable nor necessary for all  
3 wastewater treatment plants.” The second was that Ecology prefers to tackle nutrient pollution in  
4 Puget Sound through a “water quality-based” approach, where individualized effluent limits are  
5 determined based on their actual impact on receiving waters in relation to adopted water quality  
6 standards. Notwithstanding these rationales for the denial, Ecology’s action was arbitrary and  
7 capricious, and exceeded the agency’s authority, in the following ways:

8           7.9     First, the existing secondary treatment standards defined as AKART at WAC  
9 Chapter 173-221 no longer represents AKART as defined by statute. Secondary treatment is over  
10 100 years old and is less protective than the readily available, affordable, and effective tertiary  
11 treatment technologies referenced in NWEA’s Petition for Rulemaking. By failing to update its  
12 rules as NWEA requested, Ecology is in violation of RCW 90.48.010 and the Water Pollution  
13 Control Act.

14           7.10    Second, it is immaterial that tertiary treatment may not be feasible for “all” facilities,  
15 as Ecology states in its denial. NWEA’s proposal was to define tertiary treatment as AKART on a  
16 presumptive basis, which could be rebutted by individual facilities. This presumptive approach is  
17 also the approach Ecology has taken for municipal sewage treatment facilities since 1987 when it  
18 adopted its current rules. Ecology’s focus on whether tertiary treatment is always feasible is  
19 arbitrary and capricious.

20           7.11    Third, Ecology acted arbitrarily and capriciously by denying NWEA’s petition on the  
21 alleged basis that a water-quality based approach is “more appropriate” than strictly enforcing the  
22 AKART requirement. Under RCW 90.48.010, AKART must be applied regardless of the quality of  
23 the receiving waterbody. This is clear in from the language of RCW 90.48.520, which requires  
24 Ecology to enforce AKART “regardless of the quality of receiving water and regardless of the  
25 minimum water quality standards.” This is reiterated in the Pollution Disclosure Act of 1971, which  
26 provides that “[r]egardless of the quality of the water of the state to which wastes are discharged or

1 proposed for discharge, and regardless of the minimum water quality standards established by the  
2 director for said waters, require wastes to be provided with all known, available, and reasonable  
3 methods of treatment prior to their discharge or entry into waters of the state.” RCW 90.52.040.  
4 And this is reiterated a third time in the Water Resources Act of 1971, that “[r]egardless of the  
5 quality of the waters of the state, all wastes and other materials and substances proposed for entry  
6 into said waters shall be provided with all known, available, and reasonable methods of treatment  
7 prior to entry.” RCW 90.54.020. By relying on a water-quality based approach in lieu of an up-to-  
8 date AKART standard, Ecology’s denial was arbitrary and capricious.

9         7.12 Similarly, Ecology’s basis of denying NWEA’s Petition for Rulemaking is not  
10 consistent with its own regulations. Under Ecology’s “Discharge Standards and Effluent  
11 Limitations for Domestic Wastewater Facilities,” all wastewater must be provided with AKART  
12 prior to discharge “[r]egardless of the quality of the waters of the state.” WAC 173-221-020.

13         7.13 Fourth, even if Ecology could lawfully pick and choose between AKART and a  
14 water-quality based approach, the water-quality based approach preferred by Ecology will take years  
15 to develop (currently, it does not have the data necessary to implement that approach, and it will  
16 likely be years before it does). By choosing a future, yet-to-be-developed water-quality based  
17 approach over NWEA’s proposed AKART standard, which relies on current technology and clear  
18 standards, Ecology ignored the urgent need to address nutrient pollution in Puget Sound.

19         7.14 Fifth, Ecology did not address NWEA’s concerns stated in the Petition for  
20 Rulemaking, as required by RCW 34.05.330(1). Among other things, NWEA noted that tertiary  
21 treatment is not only effective at removing nutrient pollution from treated sewage, but also toxic  
22 contaminants including pharmaceuticals and personal care products, which also harm Puget Sound.  
23 In contrast, Ecology’s response does not address the toxics issue, but focuses entirely on nutrients.  
24 Similarly, NWEA requested a presumptive AKART standard of tertiary treatment, but Ecology  
25 treated it as a request that all facilities meet a higher standard without exception. In that way, too,  
26 Ecology did not respond to the concerns raised by the petitioner.





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