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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

NORTHWEST ENVIRONMENTAL ADVOCATES

Petitioner,

v.

STATE OF WASHINGTON DEPARTMENT OF ECOLOGY,

Respondent.

Reply of Appellant Northwest Environmental Advocates

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 3

A. The Proposed Rulemaking is Necessary Because Ecology Relies on its Existing Regulation to Avoid Implementing AKART 3

B. Ecology Has Never Determined Whether Implementing Tertiary Treatment is Unaffordable for Sewage Treatment Facilities, Collectively or Individually 9

C. Ecology's Rejection of the 'Rebuttable Presumption' Approach is Arbitrary and Capricious 13

D. Ecology Wholly Ignored the Request to Initiate a Rulemaking to Require the Use of Modern, Currently Available Technology to Reduce the Discharge of Toxics 19

E. Ecology's "Alternatives" Demonstrate its Failure to Comply with AKART and Do Not Address the Issues Raised in the Petition 20

F. The Record Before the Court Demonstrates That Ecology's Decision was Arbitrary and Capricious 22

III. CONCLUSION AND REQUEST FOR RELIEF 25

TABLE OF AUTHORITIES

Cases

Am. Horse Prot. Ass'n, Inc. v. Lyng,
812 F.2d 1 (D.C. Cir. 1987) 4

Aviation West Corp. v. Dep't of Labor & Industries,
138 Wn.2d 413 (1999) 22

Bowers v. Pollution Control Hearings Bd.,
103 Wn. App. 587 (2000) 16

Oregon Natural Desert Ass'n v. BLM,
625 F.3d 1092 (9th Cir. 2010) 10

Puget Soundkeeper All. v. State, Pollution Control Hearings Bd.,
189 Wn. App. 127 (2015) 6

Puget Soundkeeper Alliance v. Wash. Dep't of Ecology,
102 Wn. App. 783 (2000) 10

Rios v. Wash. Dep't of Labor & Indus.,
145 Wn.2d 483 (2002) 9, 17

Somer v. Woodhouse,
28 Wn. App. 262 (1981)... 18

Spokane Cnty. v. Dep't of Fish & Wildlife,
192 Wn.2d 453 (2018) 12

Wash. Dep't. of Ecology v. Theodoratus,
135 Wn.2d 582 (1998) 23

Waste Action Project v. Draper Valley Holdings LLC,
49 F. Supp. 3d 799 (W.D. Wash. 2014).................................. 11

Waterkeeper Alliance, Inc. v. U.S. E.P.A,
399 F.3d 486 (2d Cir. 2005) 9, 10

Weyerhaeuser Co. v. Sw. Air Pollution Control Auth.,
91 Wn.2d 77 (1978) 16

Statutes

RCW 34.05.330 19

RCW 34.05.330(1)(a)(i)...20

RCW 34.05.562(1)... 22

RCW 34.05.566(1)..22, 23

RCW 34.05.574(1)(b)... 9

RCW 90.48.010 1

RCW 90.52.040 .... 3, 12

Regulations

40 C.F.R. § 122.44(d)(1)(i) 6

40 C.F.R. § 123.5 7

40 C.F.R. § 124.8 7

WAC 173-205-030(3) 6

WAC 173-220-060(1)(e) 7

WAC 173-221 ....passim

WAC 173-221-040...5, 13

WAC 173-221-050..5

WAC 173-221-050(4)(a) 13

WAC 173-221A-020 .... 3, 12

Other Authorities

Washington Attorney General Opinion, AGO 1983 No. 23 20

In the Matter of City of Bellingham v. Washington Ecology,
PCHB No. 84-211, 1985 WL 21854 (June 19, 1985) 11, 16

In The Matter of City of Port Angeles v. State of Washington, Department of Ecology, PCHB No. 84-178, 1985 WL 21908 (Oct. 4, 1985)................ 12

Marine Environmental Consortium, et al., v. State of Washington, Department of Ecology, et al., 1997 WL 709347 (Oct. 22, 1997) 20

I. INTRODUCTION

Since 1945, Washington law has mandated "the use of all known, available and reasonable methods by industries and others to prevent and control the pollution of the waters of the state of Washington"—known as "AKART"—in order "to maintain the highest possible standards to insure the purity of all waters of the state." RCW 90.48.010. The AKART standard requires anyone who may release pollutants to Washington's waters to use state-of-the-art treatment technology to avoid or minimize such discharges. The Washington Department of Ecology ("Ecology") is charged with ensuring compliance with AKART. Nevertheless, when it comes to the discharges from sewage treatment facilities, Ecology has failed to comply with this mandate by relying on its 31-year old regulations that are based on 100-year old technology. In 2018, in an attempt to right this wrong, Northwest Environmental Advocates ("NWEA") submitted a rulemaking petition requesting that Ecology adopt a presumptive definition of AKART as "tertiary treatment" for all sewage treatment plants that discharge to Puget Sound and its tributaries.

Ecology now raises four main arguments in defense of its denial of NWEA's Petition, none of which withstand scrutiny. First, Ecology claims that the requested rulemaking is unnecessary because it is complying with its duty to implement AKART. The record tells another story. For decades, Ecology has relied on long outdated and inadequate discharge standards as a way to avoid its duty under Washington law to determine,

on a case-by-case basis, what each sewage treatment facility must do to comply with the AKART mandate.

Second, Ecology *now* claims it denied NWEA's Petition because requiring the use of modern, tertiary treatment is not economically "reasonable." But that defense is belied by the rationale in Ecology's denial letter and the lack of supporting evidence in the Administrative Record. Instead, the record before the Court shows both that Ecology did *not* make an economic reasonableness determination when considering NWEA's Petition *and* it ignored information critical to such a determination, namely, an evaluation of the cost of modern technology and the environmental benefits that would result from its use.

Third, Ecology claims to have denied the Petition because it found the proposed "rebuttable presumption" framework unworkable. This argument is especially peculiar both because Ecology *claims* to perform a case-by-case analysis to ensure compliance with AKART before issuing each permit and because its current rules contain a similar structure that allows for the deviation from the proscribed standards in limited circumstances.

Fourth, Ecology argues that it is free to ignore an important aspect of NWEA's Petition—regarding the application of AKART to *toxic* pollutants—because it claims to have addressed another aspect of the Petition concerning nutrient pollutants. This argument flies in the face of Ecology's duty to respond to the specific issues raised in a rulemaking

petition and is not supported by the record regarding what the agency did—and did not do—when it denied the Petition.

Ecology also claims that it addresses NWEA's concerns about the degradation of Puget Sound water quality through "alternative" actions outlined in its denial letter. However, these alternative actions serve only to demonstrate further that Ecology is refusing to implement AKART. Ecology's admission that it will not conduct a case-by-case analysis to ensure that each facility is using all known, available and reasonable methods to control the discharge of nutrients and toxic pollutants confirms the need to revise the existing regulations.

II. ARGUMENT

A. The Proposed Rulemaking is Necessary Because Ecology Relies on its Existing Regulation to Avoid Implementing AKART

Washington law requires Ecology to make an AKART determination before it issues a permit allowing the discharge of pollutants. *See, e.g.,* RCW 90.52.040 (Ecology "shall . . . require wastes to be provided with all known, available, and reasonable methods of treatment prior to their discharge or entry into waters of the state."); WAC 173-221A-020 ("Regardless of the quality of the waters of the state, all wastes and other materials and substances proposed for entry into said waters shall be provided with all known, available, and reasonable methods of treatment prior to entry."). This mandatory language means Ecology must apply AKART to all discharges. With respect to the sewage treatment plants at issue in this case, AKART is

implemented through limits and conditions in National Pollutant Discharge Elimination System ("NPDES") permits that control the types and amounts of pollutants discharged to Washington's waters.

As NWEA demonstrated in its Opening Brief and Petition, Ecology has consistently failed to undertake a case-by-case AKART analysis for each sewage facility as its permit come up for renewal. NWEA Opening Br. at 28-30. This ongoing failure results from Ecology's continued reliance on its existing regulation, which purports to establish a uniform AKART standard for such facilities. *See* WAC 173-221. Because this regulation is both outdated (relying on 100-year-old technology) and is inadequate (because it does not have standards for nutrients and toxics), this reliance is misplaced. As a result, Ecology is duty-bound to modernize its regulation to conform to AKART requirements. *See Am. Horse Prot. Ass'n, Inc. v. Lyng*, 812 F.2d 1, 6 (D.C. Cir. 1987) (agency may not refuse to replace an existing regulation that allows precisely the practice Congress intended to eliminate).

In its response brief, Ecology argues that it need not update its rules because it retains authority to "impose more stringent requirements where appropriate." Resp. Br. at 6. Ecology's application of WAC 173-221 proves otherwise. Relying on this rule, Ecology has refused to consider what technology is required to address nutrient pollution because "[t]he regulation does not include nutrient removal in the definition of AKART for domestic wastewater facilities." *See, e.g.*, NWEA05453 (City of Lynden Fact Sheet, at 57) ("Nutrients are not included in the WAC for

AKART.").[1] Thus, while Ecology *may* retain the ability to go beyond the rule's requirements, it has expressly refused to do so.

Indeed, Ecology's sole example for how, purportedly, it "routinely relies on its authority to impose more stringent requirements," Resp. Br. at 6, perfectly illustrates its failure to implement AKART. Ecology points to the "numeric effluent limits, acute and chronic toxicity requirements, and narrative conditions" in the Chambers Creek NPDES permit as evidence that it may, and does, "impose more stringent requirements" than are called for in WAC 173-221. *Id*. That is simply not the case, however.

First, the "numeric effluent limits" Ecology touts are taken directly from WAC 173-221-040 and WAC 173-221-050. *See* NWEA01245 (Chambers Creek NPDES Permit); *see also* NWEA01206 (Chambers Creek Fact Sheet). Indeed, the permit's Fact Sheet confirms Ecology relied exclusively on the existing regulation when setting these limits:

> Municipal wastewater treatment plants are a category of discharger for which technology-based effluent limits have been promulgated by federal and state regulations. These effluent limitations are given in the Code of Federal Regulations (CFR) 40 CFR Part 133 (federal) and in Chapter 173-221 WAC (state). *These regulations are performance standards that constitute all known available and reasonable methods of prevention, control, and treatment for municipal wastewater*.

NWEA01206 (emphasis added). Ecology cannot claim this permit's numeric effluent limits reflect anything but the rote use of its outdated AKART regulations.

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[1] *See also* NWEA07672 (Central Kitsap Fact Sheet) (same); NWEA07509 (City of Mount Vernon Fact Sheet) (same); NWEA07436 (Vashon Fact Sheet) (similar).

Second, the permit's "toxicity requirements" in the form of Whole Effluent Toxicity ("WET") testing are *water quality-based limits* and do not support Ecology's position that it is implementing AKART. *See* NWEA01212–13. As discussed in NWEA's Opening Brief at pages 12 to 13, water quality-based limits are necessary when Ecology determines that even after imposing effluent limits based on AKART, the discharge will still "cause [or have] the reasonable potential to cause" an exceedance of water quality standards. 40 C.F.R. § 122.44(d)(1)(i).[2] Such water quality-based limits are distinct from the technology-based limits that Ecology must impose to ensure compliance with AKART. Here, Ecology's Chambers Creek Fact Sheet makes clear that the WET test is a water quality-based limit. *See* NWEA01212 (Chambers Creek Fact Sheet) ("the Water Quality Standards for Surface Waters require that the effluent not cause toxic effects in the receiving waters.").[3] As a result, this limit is not based on AKART and does not support Ecology's argument.[4]

Finally, Ecology's reference to some unidentified "narrative conditions" in the Chambers Creek permit does not support its contention that it included additional AKART limits, beyond the requirements of

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

[3] *See* WAC 173-205-030(3) ("The determination to require or not to require whole effluent toxicity characterization in a permit shall be explained in the fact sheet . . . .").

[4] Ironically, this Court has previously held that this WET test provision, found in a different NPDES permit, was unlawful. *Puget Soundkeeper All. v. State, Pollution Control Hearings Bd.*, 189 Wn. App. 127, 152, 356 P.3d 753 (2015).

WAC 173-221. It is telling that Ecology cannot point to anything in the permit, or Fact Sheet, to support its argument that permit's provisions go beyond what is required by WAC 172-221. Rather, the Fact Sheet confirms the opposite. *See* NWEA01206 (Chambers Creek Fact Sheet, at 6) (relying exclusively on WAC 173-221 for its AKART determination).

Ecology's inability to cite a single example of its having conducted the required, case-by-case AKART analysis for a Puget Sound area sewage facility is not surprising. *Not one* of the NPDES permits for sewage treatment that discharge to Puget Sound or its tributaries contains additional AKART conditions above and beyond the requirements of Ecology's current regulations at WAC 172-221. Further, Ecology's Fact Sheets for all area permits—and its response to comments for a more limited subset—make clear that the agency has never explored whether a more modern form of sewage treatment is necessary to comply with AKART. [5]

Indeed, when pressed on whether a particular facility should be required to use modern, known, and available technology to remove nitrogen, Ecology has repeatedly cited its rules as a barrier to conducting such analysis. Specifically, when NWEA raised the issue of AKART in public comments on draft discharge permits, Ecology rejected the premise that Washington law requires AKART for all pollutants:

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[5] Notwithstanding Ecology's attempt to undermine the importance of these documents, Resp. Br. at 17, such Facts Sheets must explain "[t]he legal and technical grounds for the draft permit determination, including an explanation of how conditions meet both the technology-based and water quality-based requirements" of state and federal law, including AKART. WAC 173-220-060(1)(e); *see also* 40 C.F.R. §§ 123.5, 124.8.

> [NWEA] Comment summary: Comment argues that the use of enhanced secondary and/or tertiary treatment for removal of nitrogen is AKART and cites the cases, *City of Bellingham v. Washington Ecology*, PCHB No. 84-211 and *Sierra Club v. Washington*, PCHB No. 11-184 in support.
>
> [Ecology] Response: Chapter WAC 173-221 WAC establishes and defines AKART for POTWs (domestic wastewater treatment plants) by setting discharge standards which represent "all known, available, and reasonable methods" of prevention, control, and treatment for domestic wastewater facilities which discharge to waters of the state. WAC 173-221-040 defines secondary treatment as AKART for all domestic wastewater treatment facilities and establishes effluent quality requirements. The listed parameters are BOD5, TSS, Fecal coliform, and pH. The regulation does not include nutrient removal in the definition of AKART for domestic wastewater facilities. Nutrients are not included in the WAC for AKART.

NWEA07373 (Bainbridge Island Fact Sheet). *See also* NWEA07672 (Central Kitsap Fact Sheet) (same); NWEA07509 (City of Mount Vernon Fact Sheet) (same); NWEA07436 (Vashon Fact Sheet) (similar).[6]

In sum, a review of Ecology's permits, which NWEA collected and summarized in the Petition, leads to the singular conclusion that Ecology relies exclusively on its existing regulation to avoid any individual analysis of AKART for these facilities. Because that regulation is woefully outdated, does not reflect the modern, available technology, and does not address nutrients or toxics, the proposed rulemaking is necessary to ensure Ecology ensures compliance with the AKART mandate. Therefore, this Court should remand the Petition denial back to

[6] This practice holds even where the permittee installed technology to reduce nutrient discharges. For example, while the Lynden sewage treatment plant employs more modern control technology, when issuing its most recent NPDES permit Ecology never assessed if these measures constituted AKART nor deviated from the limits proscribed by the regulation. *See* NWEA05410, 5452-53 (Lynden Fact Sheet 14 and 56-57); NWEA05362 (Lyden NPDES Permit 5) (effluent limits based on WAC 173-221).

Ecology with instructions to initiate the required rulemaking to amend its existing regulation to ensure compliance with the AKART requirements. RCW 34.05.574(1)(b); *see also Rios v. Wash. Dep't of Labor & Indus.*, 145 Wn.2d 483, 508, 39 P.3d 961 (2002).[7]

B. Ecology Has Never Determined Whether Implementing Tertiary Treatment is Unaffordable for Sewage Treatment Facilities, Collectively or Individually

In its brief, Ecology attempts to distance itself from the rationale stated in its denial letter by recasting it as a finding that tertiary treatment is not economically reasonable under the AKART standard. *See, e.g.*, Resp. Br. at 25. This sleight of hand cannot disguise the fact that Ecology has never made such a reasonableness determination.

Rather, Ecology denied the Petition because of a preference to address pollution in Puget Sound through a water quality-based approach. Ecology's denial letter could not be more explicit on this point:

> Ecology does not agree that revising Chapter 173-221 WAC to define AKART as tertiary treatment for municipal discharges into Puget Sound and its tributaries *is a reasonable approach to address Puget Sound water quality impairments.* As discussed below, *Ecology believes a water quality-based approach is necessary to address dissolved*

[7] Ecology's attempt to shift the burden for its historical failure to comply with AKART to NWEA must fail. Ecology attempts to distract from its failure to comply with AKART by noting that "NWEA has never challenged the conclusion by appealing a permit to the Pollution Control Hearings Board" ("Board") to suggest that NWEA cannot now claim Ecology's practice is unlawful. Resp. Br. at 22. Just as a Washington State Patrol Trooper would not accept a driver's "I have been speeding on this road for decades and you have never stopped me before" defense, Ecology's protest that NWEA has not (yet) taken it to task before the Board should not give the Court pause. Indeed, as discussed above, Ecology has routinely used the existing regulation to deflect potential challenges to its failure to comply with AKART. As a result, NWEA's choice to use the State's procedure to petition Ecology to amend its existing regulation is the appropriate mechanism for addressing Ecology's fundamental failure to upgrade its regulations.

> *oxygen impairments caused by excess nutrient loading* to Puget Sound and its tributaries.

AR0105 (emphasis added); AR0106 (concluding "a water quality-based approach is more appropriate than a broad AKART determination for Puget Sound."). Ecology did not say, as it now claims, that tertiary treatment is too expensive, not feasible, or otherwise does not meet the AKART standard of being known, available, and reasonable. Neither Ecology's denial letter nor its brief cites such a decision, and the Administrative Record is devoid of any such analysis. Instead, Ecology hopes the Court will defer blindly to it, but the Court, however, may not "defer to a void." *Or. Nat. Desert Ass'n v. BLM*, 625 F.3d 1092, 1121 (9th Cir. 2010).

Instead of an actual finding, by the agency, Ecology's argument about the economic reasonableness of tertiary treatment is now presented solely as the argument of legal counsel and hinges entirely on the mere suggestion that implementing tertiary treatment will be expensive. *See, e.g.*, Resp. Br. at 25-26. But the absolute cost of implementing particular treatment technology is not the test of reasonableness. According to Ecology, AKART "requires an engineering judgment and an economic judgment," and determining if a technology is reasonable requires it to review the "(1) planning status, (2) environmental or siting constraints, and (3) economics." NWEA002313 and 002320 (Permit Writer's Manual at 84, 91); *see also Puget Soundkeeper Alliance v. Washington Dep't of Ecology,* 102 Wn. App. 783, 793, 9 P.3d 892 (2000) (Whether a technology is "reasonable" is a technical and economic determination.).

This economic component requires Ecology to determine the "resulting rate structure after meeting [the new treatment standard] and a comparison to rates in other municipalities in the state and nation." NWEA002320 (Permit Writer's Manual at 91). Thus, Ecology's own AKART reasonableness test "requires estimates of the costs of the proposed treatment technologies; estimates of pollutant removal levels; and profit, cost, and revenue data." NWEA002324 (Permit Writer's Manual at 95). Ecology has not undertaken this analysis for sewage treatment plants.

In contrast, available information demonstrates that the cost of implementing tertiary treatment likely *is* reasonable. In 2011, Ecology showed an average increase in sewer fees of between $7.29 and $28.43 per month in 2010 dollars, the equivalent in 2018 dollars of $8.48 to $33.08. *See* AR0093 (citing AR0163, Nutrient Removal Evaluation, at ES-8, table ES-3). With respect to the standards proposed in NWEA's Petition—effluent limits of 3 mg/L for nitrogen and 0.1 mg/L phosphorus—Ecology found the projected fee increases ranged from $11.46 to $94.66 (or $13.12 to $108.38 in 2018 dollars), depending on the technology chosen. AR0158 (Nutrient Removal Evaluation, at ES-3, table ES-1); AR0094. As discussed in NWEA's Opening Brief, at 35-36, such costs are consistent with what the Board considered reasonable when upholding an Ecology AKART determination. *In the Matter of City of Bellingham v. Washington Ecology*, PCHB No. 84-211, 1985 WL 21854, *8 (June 19, 1985).

In sum, Ecology has never determined whether tertiary treatment is or is not economically reasonable under AKART. Instead, Ecology

announced its preference to tackle water quality problems in Puget Sound using a water quality-based approach. *See* AR0105. Regardless of whether Ecology develops water quality-based permit limits at some unspecified future date, Resp. Br. at 26, it cannot ignore the AKART requirement. If a treatment technology is available, known, and technically and financially feasible, it must be used. *See, e.g.,* RCW 90.52.040; WAC 173-221A-020. To allow otherwise would violate the letter and intent of the state law. *Spokane Cty. v. Dep't of Fish & Wildlife*, 192 Wn.2d 453, 458, 430 P.3d 655 (2018) ("When the plain language is unambiguous, subject to only one reasonable interpretation," the court's inquiry ends).

The Court should reject Ecology's attempt to recast the rationale behind its denial letter—based on a false claim that is now the centerpiece of its defense—and order Ecology to begin the rulemaking necessary to bring its rules into compliance with the law. RCW 34.05.574(1).

C. Ecology's Rejection of the 'Rebuttable Presumption' Approach is Arbitrary and Capricious

NWEA's Petition requested that Ecology establish, in rule, a rebuttable presumption that tertiary treatment is AKART while allowing dischargers to demonstrate otherwise. AR0007-8. In this regard, the Petition was consistent with Ecology's long-standing practice of defining AKART for municipal sewage dischargers by rule, using a presumptive standard.[8] Instead of confronting the need to update its outdated and

[8] *See, e.g., In The Matter of City of Port Angeles v. State of Washington, Department of Ecology*, 1985 WL 21908, at *10 (Oct. 4, 1985) (noting that Ecology's approach "establishes a generic treatment level as appropriate for the entire class of

inadequate regulations, however, Ecology defends its inaction by first misstating how the proposed rule would work, and then attacking NWEA's articulation of when the presumptive standard would apply.

First, Ecology claims that a presumptive definition of AKART would require it to "speculate" about which municipalities might not be able to implement tertiary treatment, and further speculate about the "alternative treatment standards that would be required for those currently unknown municipalities." Resp. Br. at 28. But Ecology need not speculate at all. A rebuttable presumption approach allows individual dischargers to seek a variance to the presumptive treatment standard if the use of modern technology is not reasonable for their facility. For those facilities, Ecology can then determine, on a case-by-case basis, what alternative treatment standards should apply. There is no need to speculate; Ecology can simply address these issues as they arise.

In this way, NWEA's proposal mirrors both Ecology's current regulations and its claimed approach to AKART. Ecology's existing rules allow for alternate effluent limits, in limited situations, where a facility can make specific showings. *See, e.g.*, WAC 173-221-050(4)(a) (allowing a facility to request lower percent removal effluent limitation than the WAC 173-221-040 discharge standards in specific situations). Thus, while NWEA's proposal would change the presumptive standard—raising the bar to reflect modern technology, and add a defined mechanism for facility

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municipal dischargers and, then, allows for a sort of variance from this level on a showing of 'compelling evidence.'").

to petition for a relaxed standard based on economic factors—the *process* Ecology would follow for establishing permit limits would not change: the standard limits would apply unless an exception was claimed and granted. Moreover, Ecology claims to undertake a case-by-case analysis of each permittee's situation now. Resp. Br. at 15 ("However, the secondary treatment requirement in WAC 173-221-040 is just one of the many requirements that Ecology includes in discharge permits for municipal wastewater treatment plants *on a case-by-case basis*.") (emphasis added). If that is indeed the case, the proposed change will not impose any more (or less) work on Ecology. The updated rules would, however, ensure that permittees comply with the AKART mandate.

Next, Ecology instead takes exception to NWEA's shorthand description of the "reasonableness" prong of the AKART test, claiming that that could not move forward with the requested rulemaking because "the rule NWEA requested misstates the AKART requirement." Resp. Br. at 24. This strawman argument is without merit for three reasons.

First, this argument is based on a misreading of NWEA's Petition. To be clear, NWEA did not include a proposed test for "reasonableness" in its Petition. Instead, NWEA merely sought to demonstrate that the proposed AKART standards fell comfortably within the realm of what Ecology had previously determined to be reasonable. *See* AR00092-95 (explaining how the estimated costs of tertiary treatment compared to previous AKART determinations). In doing so, NWEA first looked for Ecology's explanation of its test for determining whether a particular

technology is “reasonable.” Finding none, in the introduction to its Petition, NWEA attempted to summarize the “reasonableness” standard, as articulated in Ecology’s guidance and case law. AR0008. Ecology now claims NWEA created a new and different standard—seizing on a few words in the Petition’s introduction—rather than having made a shorthand summary of the existing test set out in the body of the Petition, and claims without support to have denied the Petition as a result. Resp. Br. at 21.

Second, to the extent NWEA’s Petition sought to demonstrate that tertiary treatment could be deemed sufficiently economically reasonable such that the rulemaking is required, the test suggested in the Petition was based on existing guidance and case law. The reasonableness test is a line drawing exercise: On one side of the line, the cost of implementing the treatment technology or method is reasonable; on the other side of the line, it is not. For each discharger, Ecology must determine the economic reasonableness of known and available technology by answering two questions: (1) would the modern treatment “involve significantly greater costs than for others obliged to obtain the same levels of treatment,” and (2) whether the modern treatment is “within the economic ability of the source to meet the costs of treatment.” NWEA02347 (Permit Writer’s Manual at 118).

Faced with no clear direction from Ecology on its definition of “reasonable” with regard to sewage treatment facilities—in large part because Ecology does not appear to have ever undertaken such an analysis since promulgating its regulation in 1987—NWEA turned to the existing

case law and made a reasonable attempt to divine where Ecology may draw the line. To that end, NWEA began with the Washington Supreme Court's interpretation of economic feasibility to mean an agency "may not require a system which would impose an unreasonable financial burden on the applicant because of excessive initial outlay or annual operating costs." *Weyerhaeuser Co. v. Sw. Air Pollution Control Auth.*, 91 Wn.2d 77, 82, 586 P.2d 1163 (1978) (interpreting RCW 70.94.152(1), which imposes a similar AKART requirement for air pollution). The Court of Appeals later drew on this standard, upholding the Board's decision not to require the use of known and available technology, when doing so would result in "severe potential negative . . . economic impacts." *Bowers v. Pollution Control Hearings Bd.*, 103 Wn. App. 587, 615, 13 P.3d 1076 (2000).

Combining the guidance from these cases with the requirement established in earlier Board decisions for "compelling evidence" to avoid a presumptive AKART standard, *see Bellingham*, 1985 WL 21854, at *5, NWEA used the standard mentioned in the Petition—*i.e.,* that facilities be presumed capable of implementing tertiary treatment unless doing so would cause "severe economic hardship." AR0008. This is not a new standard, but a summary of the existing case law described above.

Nevertheless, in its briefing, Ecology faults NWEA for misstating the "reasonableness" standard. Resp. Br. at 24. Notably, however, Ecology does not explain *how* NWEA's language differs from Ecology's preferred approach. Instead, Ecology acts like the proverbial King, commanding to be brought a stone, rejecting each for not being *the* stone he desires. It is just as

arbitrary and capricious for Ecology's counsel to seize on the exact phraseology NWEA used in the introduction to its Petition to now claim that it cannot move forward with any part of the proposed rulemaking simply because it disagrees with how NWEA summarized the reasonableness test.

Third, Ecology's myopic focus on NWEA's precise articulation of the reasonableness standard misses the forest for the trees. Ecology argues that "[p]ushing a municipality to the brink of severe economic hardship is not economically reasonable." Resp. Br. at 24. Ecology's argument, however, exposes the critical AKART questions: What is "economically reasonable" and how will Ecology determine it? The regrettable irony of Ecology's denial is that the rulemaking process, which Ecology refused to begin, is the proper mechanism for crafting the answer to those questions.

As Ecology points out, Resp. Br. at 22, the process of actually adopting rules would require a preliminary cost-benefit analysis. RCW 34.05.328(1)(c). Through this public process, an agency must "[d]etermine that the probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented." *Rios,* 145 Wn. 2d at 500 n. 10 (citing RCW 34.05.328(1)(c)). AKART itself requires balancing the costs and benefits of a particular technology. *See* NWEA02347 (Permit Writer's Manual at 118) ("in setting AKART effluent limits, pollution reduction benefits (as measured by amounts of pollution reduction) are also to be considered."). Thus, by engaging in the

requested rulemaking, Ecology would, at long last, articulate the economic reasonableness standard under AKART for sewage treatment facilities.[9]

In sum, Ecology's current *claimed* approach to implementing AKART is to apply its established standards in WAC 173-221, while making adjustments on a case-by-case basis. *See* Resp. Br. at 15. If this is the case, Ecology's argument against updating the underlying, presumptive standard is meritless. In the alternative, if, as history proves, Ecology simply applies its existing regulation, and undertakes no additional analysis of what is reasonable for a particular facility, the need to revise and update the existing regulation is obvious. Ecology's arguments over NWEA's articulation of the "reasonableness" test is merely a distraction.

D. Ecology Wholly Ignored the Request to Initiate a Rulemaking to Require the Use of Modern, Currently Available Technology to Reduce the Discharge of Toxics

Despite the Petition's duel focus on nutrients and toxics, Ecology's denial did not address toxic pollution at all. AR0105-08. Ecology attempts to cover up that omission in its response brief, arguing that "Ecology did

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[9] Ecology's *post hoc* rationalization based on speculation on what arguments may be made during the rulemaking process cannot support its decision to deny NWEA's Petition. *See Somer v. Woodhouse*, 28 Wn. App. 262, 272, 623 P.2d 1164 (1981) (noting that an agency must explain the basis for its decision because " agency action cannot be sustained on post hoc rationalizations supplied during judicial review."). Although not raised in its denial, Ecology now claims that it cannot move forward with the rulemaking because some permittees may raise concerns about the proposed rule. Resp. Br. at 23-24. This argument is without merit for at least two reasons. First, the ability to conceive of a potential counterargument is not a rational basis for refusing to begin a necessary rulemaking process. Second, the question of whether tertiary treatment is AKART for facilities outside of the Puget Sound region is proper grist of the rulemaking mill, not a reason to avoid updating the patently outdated regulation as it applies to the facilities that Ecology has determined are contributing to a worsening environmental crisis.

not agree with NWEA's assertion that the requested treatment technology is reasonable." Resp. Br. at 30. In this way, Ecology not only doubled-down on its false claim that it made a reasonableness determination but it now argues for applying this non-existent determination to toxic pollution, which Ecology did not discuss anywhere in its denial letter. Ecology's argument on this issue should be rejected.

As discussed above, Ecology's decision to forego the requirement to implement AKART was based only on its stated preference to work towards a "water quality-based approach." AR0106. Any suggestion that it also evaluated the reasonableness or feasibility of tertiary treatment for removing toxics under AKART, using the factors that Ecology itself has established for such an evaluation, is simply not supported by the decision document or the Administrative Record.

Indeed, even if the administrative record contained some hint of such an analysis, which it does not, the APA requires the agency's decision document to "specifically address[] the concerns raised." RCW 34.05.330. Here, Ecology's denial letter does not address NWEA's concerns about toxic pollutants. Thus, the agency has violated the law.

The significant impact of toxic pollutants discharged from sewage treatment plants to the Sound is well documented. *See* AR0048-51 (discussing impacts of toxic pollutants on fish, wildlife, and human health); NWEA05907 (discussing impacts and the paucity of permit limits on toxics). Ecology ignored this issue when denying NWEA's Petition, in violation of the APA's requirement that the denial "specifically address[]

the concerns raised by the petitioner." RCW 34.05.330(1)(a)(i). As a result, the Court should remand the denial to Ecology.

E. Ecology's "Alternatives" Demonstrate its Failure to Comply with AKART and Do Not Address the Issues Raised in the Petition

Ecology's "alternatives" outlined in its denial letter are an admission that Ecology is failing to implement AKART. First, in its brief, Ecology points to a plan to request that permittees "initiate planning efforts to evaluate" some unspecified "effluent nutrient reduction targets" as part of the next permit issuance process. Resp. Br. at 31 (quoting AR 0106). Thus, Ecology admits that it will issue new permits to these facilities *before* they undertake the type of "site-specific evaluation [that] will allow Ecology to determine what additional technology-based treatment requirements are reasonable at a given facility," Resp. Br. at 32. AKART, however, requires a discharger to use modern treatment technology as soon as it is known and available, when it is reasonable. *Cf Marine Environmental Consortium, et al., v. State of Washington, Department of Ecology, et al.*, 1997 WL 709347, at *4 (Oct. 22, 1997) (the word "all" in the AKART standard means "that the existing 'state of the art' or 'best available' treatment technologies are required to be used." (quoting 1983 Wash. Op. Att. Gen. No. 23 at 14, n.19.)). Notwithstanding this mandate, Ecology admits it has no intent to ensure compliance with AKART in a timely fashion, as permits are valid for five or more years.

Second, lest there was any question, Ecology admits it has no intention to conduct the required AKART analysis for these facilities, but

rather intends to establish nutrient limits base on the facilities' current discharges. AR0106 (Ecology will "set nutrient loading limits at current levels from all permitted dischargers in Puget Sound and its key tributaries to prevent increases in loading"). This is the antithesis of an AKART analysis. AKART is "'clearly meant to foster the use of new emission control technology' in the hopes of someday 'extinguish[ing] sources of water quality degradation.'" *Waste Action Project v. Draper Valley Holdings LLC*, 49 F. Supp. 3d 799, 813 (W.D. Wash. 2014) (quoting *Puget Soundkeeper Alliance v. Washington Dep't of Ecology*, 102 Wn.App. 783, 789 (2000)). Simply codifying what a facility is doing, without analyzing whether the facility is, in fact, using *all* known, available, and reasonable methods to prevent and control the pollution, is unlawful.

Third, as discussed in NWEA's Opening Brief, the alternatives identified by Ecology do not address NWEA's concerns because they will not ensure the region's sewage treatment facilities will use the currently available modern treatment technology to reduce or eliminate the discharge of *toxic pollutants*, as required by law. Op.Br. at 41-43.

Finally, Ecology may have a lengthy process for eventually requiring these facilities to comply with water quality standards. But NWEA's concerns arise under AKART, not the need to ensure compliance with water quality standards. *See* RCW 90.52.040 (AKART is required regardless of the quality of the waters to which wastes are discharged). It is the process of determining what is necessary to ensure compliance with AKART that

Ecology never commits to undertake. Thus, Ecology's stated alternatives fail to "address the concerns raised by the petitioner." RCW 34.05.330(1)(a)(ii).

F. The Record Before the Court Demonstrates That Ecology's Decision was Arbitrary and Capricious

Finally, the spare Administrative Record Ecology produced here further underscores that Ecology's denial was made without regard for the attendant facts and circumstances. Under the Washington APA, an administrative record must contain all documents the agency considered in its decision-making process. RCW 34.05.566(1). According to Ecology, it "concluded NWEA's requested treatment technology is not economically reasonable." Resp. Br. at 35. This purported conclusion is central to Ecology's defense of its denial. And Ecology believes "the record [it] submitted to the superior court allows a reviewing court to review Ecology's conclusion." *Id.*

However, as Ecology notes, *id*. at 33, the Administrative Record does not include hundreds of documents submitted with NWEA's Petition. These documents are before the Court because NWEA submitted them as extra-record, additional evidence, pursuant to RCW 34.05.562(1), [10] to amplify what is already apparent from the paucity of information in the agency's record—namely, Ecology has never determined if tertiary treatment is "reasonable" for the facilities in question, collectively or individually. In this way, it is true that "the record Ecology submitted to the

[10] *See Aviation West Corp. v. Dep't of Labor & Industries*, 138 Wn.2d 413, 419, 980 P.2d 701(1999) (additional evidence may be admitted if it relates to or explains the decision-making process).

superior court allows a reviewing court to review Ecology's conclusion," Resp. Br. at 35, just not in the way Ecology proposes. Rather, the agency's Record shows that it did not consider "the attending facts and circumstances," rendering its decision arbitrary and capricious. *Wash. Dept. of Ecology v. Theodoratus*, 135 Wn.2d 582, 598, 957 P.2d 1241 (1998).

Even a cursory review reveals that Ecology's record does not include the information necessary to make its claimed reasonableness determination. Under AKART, the "economic reasonableness test is intended to be a cost-benefit test and benefits are measured in terms of amounts of pollutants removed." NWEA02324 (Permit Writer's Manual, at 95); NWEA02347 (Permit Writer's Manual, at 118) ("In setting AKART effluent limits, pollution reduction benefits (as measured by amounts of pollution reduction) are also to be considered."). The Administrative Record does not contain the information to support this analysis, but the documents NWEA provided do.

For example, NWEA collected the NPDES permits and the corresponding Fact Sheets for facilities that have installed additional pollution controls for nutrients. *See, e.g.*, NWEA01240, NWEA01234, NWEA01198 (Chambers Creek); NWEA00690, NWEA07674 (Brightwater); NWEA00838, NWEA022948 (Brightwater). These documents provide the clearest picture of how modern technology is already in use across the region, the logical first step in the AKART analysis. While Ecology declares it is "fully aware" of these documents, Resp. Br. at 34, it cannot claim to have relied on this information. RCW 34.05.566(1).

Similarly, Ecology did not include in its Administrative Record any of the studies done by individual facilities to evaluate the engineering feasibility and costs of moving past secondary treatment. *See, e.g*., NWEA04821 (West Point), NWEA07016 (Tacoma), NWEA00058 (Bellingham), NWEA06770 (South Plant). These studies tend to confirm that this technology is both known and available, and provide information on the potential costs and benefits of applying these measures. Nevertheless, again, this information is not in the record.

Finally, on the benefits side of the ledger, as NWEA's Petition and its supporting information make clear, moving the region's sewage facilities to tertiary treatment would result in measurable environmental benefits. *See generally*, AR0046-52 (discussing the environmental benefits of curbing nutrient and toxic discharges). These benefits can be measured in increased dissolved oxygen levels, reduced algal blooms, reduced local acidification, and reduced adverse effects to the Puget Sound food web, and will likely create economic benefits across Washington's economy. *See generally*, AR0080-92 (discussing the benefits of improved water quality). Again, this information is found not the Administrative Record, but in the documents Ecology chose to ignore. *See, e.g.,* NWEA02985 (2006 finding that nitrogen is a problem across Puget Sound); NWEA08089 (Ecology predicts a 40 percent increase in nitrogen); NWEA018322 (toxic reductions obtainable from advanced treatment); NWEA03152 (2011 finding that municipal dischargers are the greatest source of nitrogen); NWEA02989 (2012 Ecology scientists summarizing nitrogen effects on Puget Sound); NWEA11075

(2014 Ecology model matches field observations of widespread algal blooms).

III. CONCLUSION AND REQUEST FOR RELIEF

For the reasons above and in its Opening Brief, NWEA respectfully requests this Court declare that Ecology violated the law by failing to implement AKART for sewage discharges into Puget Sound; vacate and set aside Ecology's denial of NWEA's rulemaking Petition as arbitrary and capricious and beyond the agency's authority; remand the matter to Ecology with instructions to begin the required rulemaking, or in the alternative for further proceedings; grant such other relief as this Court deems appropriate; and award NWEA fees and costs.

RESPECTFULLY SUBMITTED this 28th day of August 2020,

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CERTIFICATE OF SERVICE

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

Ronald Lavigne Assistant Attorney General Ecology Division P.O. Box 40117 Olympia, WA 98504-0117	[ ] U.S. Mail [ ] Hand Delivered [x] Email: ronald.lavigne@atg.wa.gov; ECYOlyEF@atg.wa.gov

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

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

s/ Andrew M. Hawley
ANDREW M. HAWLEY, WSBA # 53052

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