

# NORTHWEST ENVIRONMENTAL ADVOCATES



October 21, 2019

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**Re: Request for Section 401 Water Quality Certification for Suquamish  
Wastewater Treatment Plant in Kitsap County**

Dear Ms. Jones:

This letter constitutes the comments of Northwest Environmental Advocates (NWEA) on the requested 401 Certification for the proposed issuance of Kitsap County Public Works NPDES Permit No. WA0023256 for the Suquamish Wastewater Treatment Plant. As discussed in detail in the attached comments to the Environmental Protection Agency (EPA) on the proposed permit, because the draft permit fails to provide any reasonable assurance that the activity as proposed and conditioned will be conducted in a manner that will comply with applicable water quality standards and other appropriate requirements of state law, Ecology may not issue the requested Certification under section 401 of the Clean Water Act, 33 U.S.C. § 1341.

Under section 401(a) of the CWA, “[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable water[s] shall provide the licensing or permitting agency a certification from the State in which the discharge originates[.]” 33 U.S.C. § 401(a)(1). A state’s § 401 power to deny or condition federal environmental permits allows a state to influence—or simply veto—certain federal activities. *See, e.g., PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 712 (1994) (holding that states have authority to restrict federal activity pursuant to § 401(d)); *S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. 370 (2006) (noting that states have the “primary responsibilities and rights . . . to prevent, reduce, and eliminate pollution.”). The purpose of section 401 is to give states a measure of control over federally-permitted projects within their jurisdiction that may harm water quality. *S.D. Warren Co.*, 547 U.S. at 380 (citing S. Rep. No. 92-414, p. 69 (1971) (provision must have “a broad reach” if it is to realize the Senate’s goal: to give states the authority to “deny a permit and thereby prevent a Federal license or permit from issuing to a discharge within such State.”)). Here, the Suquamish Sewage Treatment Plant requires a National Pollutant Discharge Elimination System (NPDES) permit from the

Environmental Protection Agency, and such a permit cannot be issued without the required water quality certification from Ecology.

Under U.S. Supreme Court precedent arising in a case argued by the Washington Department of Ecology, section 401 authority is broad, and it allows a state agency to condition or deny a project based on any adverse impact to water quality—not just the discharge that triggers section 401 oversight. *PUD No. 1*, 511 U.S. at 710-13 (“[O]nce the threshold condition, the existence of a discharge, is satisfied . . . the certifying state or tribe may consider and impose conditions on the project activity in general, and not merely on the discharge, if necessary to assure compliance with the CWA and any other appropriate requirement of state or tribal laws”). The *PUD No. 1* holding also confirms that § 401 authority may be used to prevent or mitigate violations of all the elements of state water quality standards—not just numeric criteria. 511 U.S. 700 at 714-15. Washington has adopted water quality standards to protect “public health and public enjoyment of the waters and the propagation and protection of fish, shellfish, and wildlife.” WAC 173-201A-010(1).

Ecology has repeatedly noted, in exercising its authority under 33 U.S.C. § 1341, the department must review an application for a 401 Certification for:

1. Conformance with the state water quality standards contained in Chapter 173-201A WAC and authorized by 33 U.S.C. §1313 and by Chapter 90.48 RCW, and with other applicable state laws;
2. Conformance with applicable water quality-based, technology-based, and toxic or pretreatment effluent limitations as provided under 33 U.S.C. §§1311, 1312, 1313, 1316, and 1317; and
3. Conformance with the provision of using all known, available, and reasonable methods to prevent and control pollution of state waters as required by RCW 90.48.010.

Only when Ecology has reasonable assurance that a project will not violate these requirements may a certification issue. 40 C.F.R. § 121.2(a)(4). As discussed in detail in the attached comments on the proposed NPDES permit, this standard is not and cannot be met here.

First, discharges of nitrogen to Puget Sound, directly and indirectly via tributaries, are by definition causing or contributing to violations of water quality standards, including the numeric criteria for dissolved oxygen, the narrative criterion that prohibits deleterious material that causes adverse effects, and the state’s antidegradation policy. Specifically, Ecology has determined that nutrient discharges from sewage treatment plants discharging to Puget Sound are causing or contributing to violations of dissolved oxygen water quality standards in Puget Sound. *See Ecology, Focus on: Water Quality Permitting to Control Nutrients in Puget Sound* (Aug. 2019) at 1. In addition, Ecology most recently confirmed that nitrogen discharges to Puget

Sound are responsible for violations of the narrative criteria, leading to profound consequences for the ecosystem, such as: increased acidification, which can prevent shellfish and other marine organisms from forming shells; shifts in the number and types of bottom-dwelling invertebrates; increases in abundance of macroalgae, which can impair the health of eelgrass beds; seasonal reductions in fish habitat and intensification of fish kill events; and potential disruption of the food web. Finally, nitrogen discharges from this and other facilities are harming existing and designated uses, which is a violation of Tier I of the antidegradation policy.

Ecology has been clear that “[t]he dominant human sources are through marine point source discharges of treated municipal wastewater. Watershed inflows, which include both natural and human components, deliver nitrogen to the surface waters of South and Central Puget Sound.” Ecology, *South Puget Sound Dissolved Oxygen Study Water Quality Model Calibration and Scenarios* (March 2014) at 13-14; *see also* Ecology, *Puget Sound and the Straits Dissolved Oxygen Assessment Impacts of Current and Future Human Nitrogen Sources and Climate Change through 2070* (March 2014) at 7 (“Human nitrogen contributions from the U.S. and Canada to the Salish Sea have the greatest impacts on DO in portions of South and Central Puget Sound. Marine point sources cause greater decreases in DO than watershed inflows now and into the future.”). Ecology’s determination has not changed over time. *See* Ecology, *Focus on: Water Quality Permitting to Control Nutrients in Puget Sound* at 1 (“Discharges of excess nutrients to Puget Sound from domestic sewage treatment plants (WWTPs) are significantly contributing to low oxygen levels in Puget Sound. Ecology must require WWTPs to control nutrients consistent with the US Clean Water Act and Washington’s Water Pollution Control Act.”). Thus, all current point source discharges of nitrogen to Puget Sound, including from this permittee, are causing or contributing to violations of water quality standards in Puget Sound.

Second, the proposed permit fails to impose the applicable water quality-based and technology-based effluent limitations required under the law. EPA’s regulations implementing section 301(b)(1)(C) of the CWA requires that permits include limits for all pollutants or parameters which are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State or Tribal water quality standard, including narrative criteria for water quality. 40 C.F.R. § 122.44(d)(1). Given the potential impact this facility is having water quality—as discussed above and in the attached comments—here EPA must certainly conduct a reasonable potential analysis. However, the Fact Sheet demonstrates that EPA did not assess whether this discharge has the reasonable potential to cause or contribute to violations of water quality standards, and did not use procedures to account for existing controls on point and nonpoint sources of nutrients and parameters affecting dissolved oxygen and the narrative criterion as required by federal regulations. EPA Fact Sheet at 18. Instead, EPA merely concludes, in a sentence that is not complete, that “[i]n this case because there are no approved TMDLs that specify wasteload allocations for this discharge.” *Id.* This failure alone is sufficient grounds for Ecology to deny the requested Certification.

Jocelyn W. Jones  
October 21, 2019  
Page 4

Finally, the proposed permit fails to ensure the facility will comply with the state's technology-based permit requirement of "all known, available, and reasonable methods of prevention, control, and treatment" or "AKART. "AKART shall represent the most current methodology that can be reasonably required for preventing, controlling, or abating the pollutants associated with a discharge." WAC 173-201A-020. The AKART standard is required for all dischargers. RCW 90.54.020(3)(b), 90.54.040; WAC 173-220-130(1)(a). AKART applies to discharges from domestic wastewater facilities. *Id.*; WAC 173-221-010. Currently, enhanced secondary and tertiary treatment for the removal, control, and treatment of nutrients is a known method of removing nitrogen. *See, e.g., Ecology, Technical and Economic Evaluation of Nitrogen and Phosphorus Removal at Municipal Wastewater Treatment Facilities* (June 2011). These treatments are available methods for removal, control, and treatment of nitrogen. *See, e.g., id.* Therefore, the use of enhanced secondary and/or tertiary treatment for removal of nitrogen is AKART. While this facility may be using AKART, EPA does not mention anything about AKART in its fact sheet.

As a result, Ecology cannot issue the requested certification for the permit, as proposed. If Ecology intends to issue a certification with the conditions necessary to ensure compliance with the state's water quality standard and other requirements, Ecology will have no choice but to do all of the work EPA has failed to complete. That will require Ecology first to determine what level of treatment is necessary to comply with the AKART standard. Once that is established, Ecology will then need to (1) identify the applicable water quality standards; (2) characterize effluent and receiving water; (3) determine the need for water quality-based effluent limits, and; (4) calculate water quality-based effluent limits for the facility. The resulting technology-based and water quality-based effluent limitations will then need to be embodied in enforceable requirements, along with the necessary monitoring and reporting elements to support those conditions, that must be identified as conditions to be included in the permit. 33 U.S.C. § 1341(d). Absent the development and imposition of such terms and conditions, Ecology must deny the requested Certification.

Sincerely,



Nina Bell  
Executive Director

Attachment: Letter from Nina Bell, NWEA, to Kai Shum, EPA, Re: Draft NPDES Permit No. WA0023256 Kitsap County Public Works Suquamish Wastewater Treatment Plant (Oct. 21, 2019) with attachments forwarded by separate emails.