

NORTHWEST ENVIRONMENTAL ADVOCATES



March 15, 2021

Ellie Ott, PSNGP Permit Writer
Department of Ecology
Water Quality Program
PO Box 47600
Olympia, WA 98504-7600

Re: **Puget Sound Nutrient General Permit Preliminary Draft**

Dear Ms. Ott:

The following are comments from Northwest Environmental Advocates (NWEA) on Ecology's Puget Sound Nutrient General Permit Preliminary Draft (Jan. 2021) (hereinafter "Preliminary Draft").

I. Ecology Errs in Proposing a General Permit for Nitrogen in Puget Sound

- We agree with Ecology that "current individual permits do not address this [nitrogen] pollutant," Preliminary Draft at 7, but we do not agree with Ecology that it can force facilities to apply for this coverage, *id.* at 6 ("must submit"). Under what legal authority does Ecology believe that it can force an application for coverage under this permit, particularly given that all of the facilities in question already have NPDES permits?
- NWEA does not believe that a general permit is allowable under the Clean Water Act (CWA) and implementing regulations. See Letter from Nina Bell, NWEA, to Water Quality Permit Coordinator, Ecology Northwest Office, Re: *Preliminary Determination to Issue a Puget Sound Nutrients General Permit* (Oct. 9, 2019) (hereinafter "NWEA Comments on Preliminary Determination").

II. Ecology's Failure to Include Numeric Effluent Limits and Make AKART Determinations in the Draft Preliminary Permit Renders it Inconsistent with Both Federal and State Law

NWEA has made the point that Ecology's intent to issue an NPDES permit, whether individual or general, that fails to include numeric nitrogen effluent limitations is contrary to federal and state law. We attach for your reference some of our previous comments: NWEA Comments on

www.NorthwestEnvironmentalAdvocates.org

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Preliminary Determination; Letter from Nina Bell, NWEA, to Tricia Miller, Ecology, *Re: Draft NPDES Permit WA0030597 Skagit County Sewer District No. 2 (Big Lake Wastewater Treatment Plant)* (July 14, 2020); Letter from Nina Bell, NWEA, to Tricia Miller, Ecology, *Re: Draft NPDES Permit WA0029556 (Birch Bay Water and Sewer District)* (July 14, 2020); NWEA, Before the United States Environmental Protection Agency, *Petition for Corrective Action or Withdrawal of Authorization from the State of Washington to Issue National Pollutant Discharge Elimination System Permits* (Feb. 13, 2017); and NWEA, Before the Washington Department of Ecology, *Petition for Rulemaking to Adopt a Presumptive Definition of "All Known, Available, and Reasonable Treatment" as Tertiary Treatment for Municipal Sewage Dischargers to Puget Sound and its Tributaries* (Nov. 14, 2018).

III. Problems with the Preliminary Draft

- Ecology is proposing with its Preliminary Draft permit to effectively modify some expired/administratively extended NPDES permits, an action that is prohibited by federal law. See Clean Water Act § 402(b)(1)(B); 40 C.F.R. §§ 122.6, 122.46(a), (b); 49 Fed. Reg. 27998 (Sept. 26, 1984).
- Ecology has not demonstrated that adoption of numeric effluent limits is infeasible. It has merely stated that it would prefer to take this action in the future.
- The purported best management practices (BMPs) that are required when a numeric effluent limit is not feasible are not, actually, BMPs, rendering the permit inconsistent with federal law.
- Action levels as proposed in the Preliminary Draft are not legal alternatives to effluent limits required by federal law. What is the legal basis for such action levels?
- Ecology's proposed future reliance on purported "wasteload allocations" that will be contained in a plan that has no legal standing (i.e., is not a total maximum daily load pursuant to CWA section 303(d)) will likely be challenged as having no link to EPA-approved water quality standards. What plan does Ecology have to avoid this outcome?
- The Action Level No. 1 by definition allows nitrogen levels to increase in Puget Sound in violation of the antidegradation policy and federal law.
- Ecology states that sewage treatment "[p]lants seeing increased growth rates must make a concerted effort to plan and adopt nutrient reduction solutions faster than those who are not growing as quickly." Preliminary Draft at 10. How does Ecology intend to enforce this demand?
- Ecology's decision to exclude private facilities and municipal sewage discharges to freshwaters is misguided and inconsistent with its rationale to issue the general permit. All sources of nitrogen must be controlled through NPDES permit requirements and Ecology has not advanced a logical reason to limit the tepid requirements proposed in this general permit to only some sources.
- Ecology should attempt to make its approach more readily understandable perhaps by

significantly improving the organization of the "fact sheet." It is certainly harder to follow when the Action Levels do not correspond to the Tier actions, as in Action Level No. 1 triggers Tier No. 1 Action.

- The 14 plants that Ecology identifies as having discharges with concentrations of total inorganic nitrogen under 10 mg/L should not be exempt from any of the proposed steps as these sources are causing and contributing to violations. In particular, while Ecology relies on the notion that it cannot establish numeric effluent limits for nitrogen until it has completed numerous years of model runs, in this Preliminary Draft it acts as if it has already decided that these lower concentration facilities are less likely to require such effluent limits regardless of their geographic location, their population projections, and their actual loading. This is illogical and is merely Ecology trying to make itself look "fair," which is a concept that is not embodied in applicable federal or state law. Fairness is in the eye of a given beholder (e.g., bigger/smaller; upstream/downstream; growing/stagnant; proactive/reactive; rich/poor) and is constantly changing.
- Optimization is not the equivalent of meeting federal requirements for an NPDES permit. Ecology cannot even define what optimization means because it is attempting to do so in the context of a general permit that pertains to scores of different facilities. *See id.* at 19 ("Ecology cannot specify a single low cost threshold due to the variety of treatment plants under permit coverage.").
- "Adaptive management," *id.*, is inconsistent with state and federal law and has no place in the NPDES program.
- Ecology has saved millions of dollars for sewage treatment operators, at the expense of Puget Sound and the people and species that depend upon it, by failing to require standardized monitoring over the last few decades that would have allowed a more timely resolution of the excess nitrogen discharges to Puget Sound. Now is not the time to continue this failure by allowing sources to reduce required monitoring over the course of a five-year permit. We also strongly disagree with requiring less frequent monitoring for facilities that discharge lower levels of nitrogen.
- If the various plans required by the general permit are enforceable effluent limits, Ecology must allow public comment on those plans. *See Waterkeeper Alliance v. EPA*, 399 F.3d 486 (2d Cir. 2005).
- Since Tier 3 does not require any actual construction, why does Ecology propose to hold back from requiring all facilities to engage in this planning now? Ecology has already stated that "work must begin now to meaningfully assess point source nutrient reduction opportunities." Preliminary Draft at 25.
- Ecology's model runs have already demonstrated that 8-10 mg/L is an inadequate level of treatment, at least for many or most facilities. Therefore, omitting facilities that currently achieve this level from the planning requirements is poor policy. Asking facilities to plan for a range of "3-4 mg/L" makes no sense. Ecology should require all sources to evaluate down to both the limits of technology, namely 3.0 mg/L, to address state AKART requirements, and down to zero because at this time it does not know that anything above

- zero will be required to meet water quality standards through a water quality-based effluent limit.
- Why does Ecology not take a different approach to requiring planning where facilities have already done serious engineering investigations into reducing nitrogen discharges?
 - If "existing treatment systems have already been upgraded or where nutrient removal pilot studies have been implemented," Preliminary Draft at 26, both AKART in state law and the requirements of the CWA mean, at a minimum, the nutrient levels that can be achieved must be required as numeric limits.
 - Nothing about either proposed regional study is sufficient to support pollution trading so Ecology should remove these hints from its nutrient general permit. *See id.* at 27-28. Why is Ecology suggesting that a technology investigation is the basis for trading?
 - The distinction between the two types of regional studies is not clear. Also not clear is the relationship of the Regional Collaboration for Technology Exploration to the engineering reports for individual facilities. And what is the timeline for implementation between the two?
 - What does Ecology mean from the standpoint of a legally binding NPDES permit when it states that "[e]ach facility required to obtain coverage under this general permit has the responsibility to stay within the action level thresholds calculated by Ecology." *Id.* at 28.
 - If Ecology is seeking to propose a course of action that the public can comment on, it should include a glossary.
 - Who decides if sidestream treatment is "financially viable," as described *id.* at 29?
 - Ecology includes "pilot stud[ies]" and "pilot testing" without any explanation of what it means. *See id.* at 29.
 - Ecology appears to have put this Preliminary Draft out before it has completed its thinking. *See id.* at 30 ("Ecology would like to expand the suite of Tier 3 actions in the general permit so that permittees can choose between more than two options. The siting of satellite treatment plants, additional source reduction and implementation of other 'outside the fence' solutions are examples of Tier 3 actions under consideration by Ecology."). It is unclear if this description of "actions" includes real actions. The first "action" described is a "planning option," *id.* at 28, with "a schedule for design and implementation," *id.* at 29, but no action. The second option under Tier 3 is "additional Nutrient Reduction Evaluation work" followed by the selection of a treatment technology and a pilot study. *Id.* However, no time frame is given for these "actions" and it certainly unclear if Ecology intends for them to be implemented on the ground in the permit term.

In conclusion, this Preliminary Draft merely demonstrates that Ecology has no intention of complying with state and federal law, and that it does not have a clear idea of what it is doing to ensure the most timely resolution to the problem of nutrient pollution in Puget Sound.

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Ellie Ott
March 15, 2021
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Sincerely,

A handwritten signature in black ink that reads "Nina Bell". The signature is fluid and cursive, with the first name "Nina" being more prominent than the last name "Bell".

Nina Bell
Executive Director

Attachments: Letter from Nina Bell, NWEA, to Water Quality Permit Coordinator, Ecology Northwest Office, Re: Preliminary Determination to Issue a Puget Sound Nutrients General Permit (Oct. 9, 2019)

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