

NORTHWEST ENVIRONMENTAL ADVOCATES



October 9, 2019

Water Quality Permit Coordinator
Department of Ecology, Northwest Regional Office
3190 160th Avenue SE
Bellevue, WA 98008-5452

Via Online Public Comment Form

Re: Preliminary Determination to Issue a Puget Sound Nutrients General Permit

To whom it may concern:

This letter constitutes Northwest Environmental Advocates' comments on the Washington Department of Ecology's preliminary determination to issue a Puget Sound Nutrients General Permit (hereinafter "Permit") as described in the publication entitled Focus on: Water Quality Permitting to Control Nutrients in Puget Sound (Aug. 2019)(hereinafter "Focus On"). Ecology is soliciting "feedback on whether a general permit is an appropriate tool to control and reduce nutrients in discharges from WWTPs to Puget Sound." *Id.* at 2.

In the context in which Ecology is posing this question, the answer to whether a general permit is an appropriate tool is "no." The primary reason for this is that there is no evidence that Ecology, despite the way in which it has posed this question, is prepared to "control and reduce nutrients" in this permit. Instead, Ecology proposes to take that critical and legally-required action of reducing pollution in perhaps the third iteration of this conceptual general permit—some 15 years from when it first issues the permit. Ecology may not, however, conflate the issuance of the first, second, or third iterations of the proposed general permit and thereby conclude that the first iteration will be sufficient, either legally or environmentally.

The second reason why the answer is "no" is that Ecology has not attempted to demonstrate that a general permit is, in fact, the appropriate vehicle for controlling and reducing nutrient discharges. There are key questions that pertain to the use of general NPDES permits, such as whether Ecology can identify specific categories or subcategories of sewage treatment dischargers that are subject to the same water quality-based effluent limitations. It is impossible for citizens to comment on whether Ecology can make that identification in light of Ecology's assertion that it need not comply with the Clean Water Act by including such water quality-based effluent limitations in the first instance. If

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Ecology were to change its position to agree that these dischargers require nutrient water quality-based effluent limitations regardless of whether the regulatory vehicle is a general permit or a series of individual permits, then there is something to discuss. But as things stand now, Ecology continues to issue individual permits without nutrient effluent limits (with the exception of the LOTT facility), allowing the discharge of pollutants that cause and contribute to violations of water quality standards in Puget Sound.

In fact, Ecology has a public comment period that closes on October 10, 2019 for re-issuance of the NPDES permit for Skagit County Sewer District No. 2 (Big Lake Wastewater Treatment Plant), NPDES Permit No. WA0030597. The proposed permit for a facility that is “capable of removing nitrogen, which may be of benefit as new nutrient restrictions are issued in the region,” does not have a nitrogen limit because, Ecology asserts, “[f]uture permitting actions, still under development, will address capping [nitrogen “at current levels”] and planning conditions.” Ecology, Fact Sheet for NPDES Permit No. WA0030597 (Sept. 10, 2019) at 8, 26. This discharger is on Ecology’s list of sewage treatment plans that might be subject to the general permit. Ecology, Potential Permittee List For a Puget Sound Nutrients General Permit (Aug. 7, 2019) at 3. According to this fact sheet, Ecology is planning on issuing a permit to Big Lake without the limits required by law regardless of whether it decides in the future that Big Lake will not be covered under the general permit or that it will not issue a general permit at all. Yet Ecology has also already admitted, by including Big Lake on this list, that this is a source that is causing or contributing to violations of water quality standards in Puget Sound for which it intends to issue a permit without the requisite effluent limitations.

In considering both issues—the nutrient limits that are required and Ecology’s ability to put dischargers into categories based on those nutrient limits—Ecology is not well equipped to make the findings that a general permit is appropriate because, by its own definition, it does not have sufficient information on which to make this determination. That is precisely why, ostensibly, it is defining the regulatory obligations of the dischargers as limited to monitoring, capping at current levels, and starting planning evaluations. It cannot maintain both assertions at once, that it has sufficient information to conclude that the discharges, or categories of dischargers, can be subject to the same effluent limitations and that it has insufficient information upon which to identify what the effluent limitations are.

Ecology has taken the position that addressing all the direct dischargers to Puget Sound of nutrients in treated sewage in one regulatory action, namely a general permit, must inherently be the best process. We agree that the most expeditious approach to regulating nutrient dischargers is the best. But an expeditious process is only “best” so long as it is also sufficient to ensure that these discharges are restricted as required by the Clean Water Act, that is sufficient to protect Puget Sound. For the reasons explained below, the proposed permit will not achieve that goal.

I. ECOLOGY'S PROPOSAL TO ISSUE A PUGET SOUND NUTRIENTS GENERAL PERMIT

In this fact sheet, Ecology states that the Permit would:

- Create a single coordinated public engagement process, allowing more stakeholder collaboration during permit development.
- Place WWTPs on a similar schedule rather than staggering requirements based on individual permit reissuance schedules.
- Provide a foundation for communities to work together to achieve nutrient controls across Puget Sound.

Focus On at 1.

Ecology further states that if it were to move forward with the Permit, the process of developing the Permit would determine:

- Which specific domestic WWTPs will be regulated by the proposed permit. A potential WWTP permittee list is available.
- How to cap nutrient loading. A cap could be expressed as a numeric effluent limit or other similar value against which effluent quality would be compared.
- What planning efforts are needed to evaluate nutrient reduction targets. Planning efforts might involve near-term WWTP optimization to reduce nutrients where possible with existing treatment infrastructure. Additional planning considerations may include infrastructure upgrade feasibility assessments, foundational work for water quality trading programs, or other collaborative water quality improvement efforts.
- How to specify numeric effluent limits that reflect treatment efficiency of existing WWTPs consistent with facility-specific engineering reports.

Id. at 2. What Ecology's *Focus On* document does not say is what Ecology's Rachel McCrea, Water Quality Section Manager of Ecology's Northwest Regional Office, stated at the August 7, 2019 forum in a presentation entitled Permitting Options for Controlling Nutrients into Puget Sound From Domestic Wastewater Treatment Plans (hereinafter "McCrae Presentation"). In her presentation, Ms. McCrae stated that examples of potential types of requirements include the following:

- Data collection
- Nutrient loading caps
- Treatment process optimization

- Long -term planning for major upgrades
- Technology feasibility assessments
- Facility-specific design-based treatment outcomes
- Collaboration for water quality trading program development
- Numeric effluent limits

McCrae Presentation at 12. In her oral presentation, Ms. McCrae stated that Ecology is considering only “near-term” items for the first 5-year Permit and she named three of those items: data collection, optimization of treatment, and long-term planning. (This is confirmed by the speaker’s version of this Powerpoint that includes her script.) When I asked her to confirm this list during the question and answer period, she confirmed that only those three were on the list. Orally at that meeting, Ecology staff also stated that the agency expects a total of three iterations of general permits—or 15 years of general permits—before sewage treatment plants discharging to Puget Sound would be covered with numeric permit limits known as Water Quality-Based Effluent Limits (WQBELs). Ecology staff stated further during this presentation that the agency would expect an appeal of the issuance of such a general permit and that a revised permit would be issued two to three years thereafter. In other words, Ecology is well aware that it is proposing to issue an illegal general permit such that it would be forced to revise it. Finally, in this vein, Ecology is proposing that its final Permit would be issued in the “Spring/Summer 2021.” *McCrae Presentation* at 15.

II. FEDERAL AND STATE NPDES REGULATIONS DEMONSTRATE THAT ECOLOGY’S PLANNED GENERAL PERMIT WILL BE ILLEGAL

A. Applicable Federal Regulations

All discharges are covered by the requirements of the Clean Water Act and its implementing regulations. While specific rules govern the issuance of general permits, such general permits must also meet the requirements that apply to individual permits.

1. Federal Regulations Pertaining to General Permits

Federal regulations allow states to regulate discharges using general NPDES permits. 40 C.F.R. §§ 122.28, 123.25. For sources that are not stormwater sources, general permits may only regulate sources or “treatment works treating domestic sewage” within each established category or subcategory if all of the sources:

- (A) Involve the same or substantially similar types of operations;
- (B) Discharge the same types of wastes or engage in the same types of sludge use

- or disposal practices;
- (C) Require the same effluent limitations, operating conditions, or standards for sewage sludge use or disposal;
- (D) Require the same or similar monitoring; and
- (E) In the opinion of the Director, are more appropriately controlled under a general permit than under individual permits.

40 C.F.R. § 122.28(a)(2)(i). More important to Ecology’s proposal, the federal regulations also require that “[w]here sources within a specific category or subcategory of dischargers are subject to water quality-based limits imposed pursuant to § 122.44, the sources in that specific category or subcategory shall be subject to the same water quality-based effluent limitations.” 40 C.F.R. § 122.28(a)(3)(emphasis added).

Where a general NPDES permit has already been issued, the basis for a permitting agency to require a source to obtain an individual permit instead of coverage under the general permit includes that the “discharge(s) is a significant contributor of pollutants.” 40 C.F.R. § 122.28(b)(3)(G). The determination that leads a permitting agency to that conclude an individual permit is necessary under this provision may include evaluating the location, size, and quantity and nature of the pollutants contained in discharge(s). 40 C.F.R. § 122.28(b)(3)(G) (1)–(3).

2. Requirements Pertaining to All Discharges Including Those Covered by General Permits

a. *Water Quality-Based Effluent Limitations Are Required Where a Source is Causing or Contributing to a Violation of Water Quality Standards*

All dischargers are required to meet the requirements set out in the Clean Water Act and federal regulations, regardless of whether they are covered under an individual or general permit. If the technology-based limits required by the statute and regulations are not sufficient to ensure that a discharge will not cause or contribute to violations of water quality standards, permits must include water quality-based effluent limits (WQBEL). 33 U.S.C. §§ 1311(b)(1)(C), 1342(a)(2) (“[T]here shall be achieved . . . any more stringent limitation, including those necessary to meet water quality standards . . . established pursuant to any State law or regulations [.]”); *see also, id.* §§ 1311(e), 1312(a), 1313(d)(1)(A), (d)(2), (e)(3)(A); 40 C.F.R. §§ 122.4(a), (d).¹ The agency issuing an

¹ The federal regulations are made applicable to states by 40 C.F.R. § 123.25(a).

NPDES permit “is under a specific obligation to require that level of effluent control which is needed to implement existing water quality standards without regard to the limits of practicability.” S. Rep. No. 92-414, at 43 (1971). Because WQBELs are set irrespective of costs and technology availability, they further the technology-forcing policy of the CWA. *See NRDC v. U.S. E.P.A.*, 859 F.2d 156, 208 (D.C. Cir. 1987) (“A technology-based standard discards its fundamental premise when it ignores the limits inherent in the technology. By contrast, a water quality-based permit limit begins with the premise that a certain level of water quality will be maintained, come what may, and places upon the permittee the responsibility for realizing that goal.”); *see also Riverkeeper, Inc. v. U.S. E.P.A.*, 475 F.3d 83, 108 (2d Cir. 2007) (Sotomayor, J.) (referencing the Act’s “technology-forcing imperative”), *rev’d sub nom by Entergy Corp*, 556 U.S. 208.

WQBELs must be set at a level that achieves water quality standards developed by the states for waters within their boundaries. *See* 33 U.S.C. §§ 1313(a)(3), (c)(2)(a); 40 C.F.R. Part 131; *PUD No. 1 of Jefferson Cnty. v. Wash. Dept. of Ecology*, 511 U.S. 700, 704–707 (1994); WAC 173-220-130(1)(b)(i) and (iii), (2), (3)(b); *Port of Seattle v. Pollution Control*, 90 Pd.3d 659, 677 (Wash. 2004) (“NPDES permits may be issued only where the discharge in question will comply with state water quality standards.”); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163 (9th Cir. 1999). Such water quality standards consist of designated uses for waters and water quality criteria (both numeric and narrative) necessary to protect those uses. 33 U.S.C. § 1313(c)(2)(a); 40 C.F.R. §§ 131.10–.11. Under the CWA’s “antidegradation policy,” state standards must also protect existing uses of waters and prevent their further degradation. 40 C.F.R. § 131.12; *see also* WAC 173-201A-010(1)(a) (“All surface waters are protected by numeric and narrative criteria, designated uses, and an antidegradation policy.”).

EPA’s permitting regulations mirror the statutory requirement for WQBELs. 40 C.F.R. § 122.44(d). NPDES effluent limitations must control all pollutants that 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 water quality standard, including State narrative criteria for water quality.” 40 C.F.R. § 122.44(d)(1)(i). Accordingly, WQBELs in NPDES permits must be “derived from” and comply with all applicable water quality standards. 40 C.F.R. § 122.44(d)(1)(vii). WQBELs are typically expressed numerically, but when “numeric effluent limitations are infeasible,” a permit may instead require “[b]est management practices (BMPs) to control or abate the discharge of pollutants.” 40 C.F.R. § 122.44(k)(3). However, “[n]o permit may be issued: . . . [w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States.” 40 C.F.R. § 122.4(d).

When EPA or states establish WQBELs, they must translate applicable water quality standards into permit limitations. *See Trustees for Alaska v. U.S. E.P.A.*, 749 F.2d 549, 556–57 (9th Cir. 1984)

(holding that a permit must do more than merely incorporate state water quality standards—it must translate state water quality standards into the end-of-pipe effluent limitations necessary to achieve those standards). As the D.C. Circuit put it, “the rubber hits the road when the state-created standards are used as the basis for specific effluent limitations in NPDES permits.” *American Paper Inst., Inc. v. U.S. E.P.A.*, 996 F.2d 346, 350 (D.C. Cir. 1993). NPDES “permits authorizing the discharge of pollutants may issue only where such permits *ensure* that every discharge of pollutants will comply with all applicable effluent limitations and standards[.]” *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 498 (2d Cir. 2005) (emphasis in original).

Although numeric criteria are easier to translate into a permit limitation, permit writers must also translate state narrative standards. *See id.* EPA regulations clearly specify that narrative criteria must be evaluated and must be met, and that limits must be established to ensure they are met. *See* 40 C.F.R. §§ 122.44(d)(1) (limits must be included to “[a]chieve water quality standards established under section 303 of the CWA, *including State narrative criteria* for water quality”); 122.44(d)(1)(i) (limitations must include all parameters “*including State narrative criteria* for water quality”); 122.44(d)(1)(ii) (reasonable potential must be evaluated for “in-stream excursion *above a narrative* or numeric criteria”); 122.44(d)(1)(v) (WET tests required where reasonable potential exists to cause or contribute to a narrative criterion excursion unless chemical-specific pollutants are “sufficient to attain and maintain applicable numeric and *narrative State water quality standards*”); 122.44(d)(1)(vi) (options for establishing limitations where reasonable potential exists for a discharge to cause or contribute to an excursion *above a narrative criterion*) (emphases added). As the court in *American Paper* found, when it upheld EPA’s permitting regulations pertaining to narrative criteria, faced with the conundrum of narrative criteria “some permit writers threw up their hands and, *contrary to the Act*, simply ignored water quality standards including narrative criteria altogether when deciding upon permit limitations. *Id.* at 350 (emphasis added); *see also, id.* at 353, “[EPA’s] initiative seems a preeminent example of gap-filling in the interest of a continuous and cohesive regulatory regime[.]”.

EPA has explained that a WQBEL is “[a]n effluent limitation determined by selecting the most stringent of the effluent limits calculated using all applicable water quality criteria (e.g., aquatic life, human health, wildlife, translation of narrative criteria) for a specific point source to a specific receiving water.” EPA, *NPDES Permit Writers’ Manual*, Appendix A at A-17 (Sept. 2010) (hereinafter “EPA Manual”).² The first step in establishing a WQBEL is determining if one is required. 40 C.F.R. § 122.44(d)(1) (“Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines 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 water quality

² Available at http://www.epa.gov/npdes/pubs/pwm_app-a.pdf.

standard, including State narrative criteria for water quality.”). Because one requirement in issuing a WQBEL is both to determine if the discharge, collectively with other sources of the same pollutant, are causing or contributing to violations of water quality standards, and to limit that discharge accordingly, the federal regulations require the permit writer to assess the role of other sources in causing the violation. *Id.* at § (d)(1)(ii) (“When determining whether a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard, the permitting authority shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water.”). If, having conducted this evaluation, the permit writer determines that a discharge “causes, has the reasonable potential to cause, or contributes to an instream excursion above the allowable above the allowable ambient concentration of a State numeric criteria within a State water quality standard for an individual pollutant, the permit must contain effluent limits for that pollutant.” *Id.* at § (d)(1)(iii). Where a state finds a reasonable potential to cause or contribute to a violation of narrative criteria for which the state has no numeric criteria, the federal regulations establish methods for establishing effluent limits. *Id.* at § (d)(1)(vi)(A-C).

The matter of determining whether a discharge is causing or contributing to a violation of standards is not resolved by the permit writer’s merely looking at the point of discharge and whether it is on the state’s 303(d) list for a parameter or pollutant discharged or affected by a parameter or pollutant in the discharge. First, there is a question of the nature of the parameter or pollutant discharged and how it is anticipated to affect water quality. Nitrogen discharges are among those pollutants that have a far-field effect, creating impacts on dissolved oxygen and algal growth—which can be both deleterious by itself and contribute to lowered dissolved oxygen—far away from the point of discharge. *See, e.g.*, EPA Manual at 176 (“Nutrients are another class of pollutants which would be examined for impacts at some point away from the discharge. The special concern is for those water bodies quiescent enough to produce strong algae blooms. The algae blooms create nuisance conditions, dissolved oxygen depletion, and toxicity problems (i.e., red tides or blue-green algae); *id.* at 198 (“[pollutants] such as BOD may not reach full effect on dissolved oxygen until several days travel time down-river.”).

For pollutants such as nutrients, the Environmental Appeals Board (EAB) has held that:

The plain language of the regulatory requirement (that a permit issuer determine whether a source has the “reasonable potential to cause or contribute” to an exceedance of a water quality standard) does not require a conclusive demonstration of “cause and effect.” *See In re Upper Blackstone Water Pollution Abatement Dist.*, NPDES Appeal Nos. 08-11 through 08-18 & 09-06, slip op. at 31-34 & n.29 (EAB May 28,

2010), 14 E.A.D. ____.

In re Town of Newmarket, NPDES Appeal No. 12-05, slip op. at 54 n.23 (EAB Dec. 2, 2013) (emphasis added). In other words, the fact of a source's contributing to loading of a pollutant that has been identified to be causing a water quality impairment is sufficient to support a reasonable potential determination.

Second, there is a question as to whether a waterbody must actually be impaired in order for a discharge to present a reasonable potential to cause or contribute to violations of water quality standards. Again, the EAB provides assistance on the plain meaning of the permitting regulations and the policy rationale behind them:

NPDES regulations do not support the City's contention that a permit authority must include effluent limits only for the pollutants discharged into receiving waters that are identified as impaired on the state's 303(d) list.

* * *

NPDES permitting under CWA section 301 applies to individual discharges and represents a more preventative component of the regulatory scheme [than 303(d)] in that, under section 301, no discharge is allowed except in accordance with a permit. Moreover, the CWA's implementing regulations require the Region to include effluent limits in discharge permits based on the reasonable potential of a discharge facility to cause or contribute to exceedances of water quality standards, even if the receiving water body is not yet on a state's 303(d) list. *See* 40 *C.F.R.* § 122.44(d)(1)(i). Although a 303(d) listing could presumably establish that water quality standards are being exceeded, necessitating an appropriate permit limit, the Region is not constrained from acting where a water body has not yet been placed on the 303(d) list. *Id.*; *see also In re Upper Blackstone Water Pollution Abatement Dist.*, 14 E.A.D. 577, 599 (EAB 2010) (explaining that the NPDES regulations require a "precautionary" approach to determining whether the permit must contain a water quality-based effluent limit for a particular pollutant), *aff'd*, 690 F.3d 9 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2382 (2013).

In re City of Taunton at 38-39.

Third, there is the question of whether a permit writer can simply not include an effluent limit because to do so is challenging. Clearly the statute and regulations demonstrate that the answer is "no." Federal courts agree. Not long ago, the Second Circuit cited with approval its decision in *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 498 (2d Cir. 2005) for the proposition that "NPDES permits 'may issue

only where such permits *ensure* that every discharge of pollutants will comply with all applicable effluent limitations and standards.” *N.R.D.C. v. U.S. EPA* 808 F.3d 556, 578 (2d Cir. 2015) (emphasis in original). Moreover:

Even if determining the proper standard is difficult, EPA cannot simply give up and refuse to issue more specific guidelines. *See Am. Paper Inst., Inc. v. EPA*, 996 F.2d 346, 350 (D.C. Cir. 1993) (articulating that, even if creating permit limits is difficult, permit writers cannot just “thr[o]w up their hands and, contrary to the Act, simply ignore[] water quality standards including narrative criteria altogether when deciding upon permit limitations”). Scientific uncertainty does not allow EPA to avoid responsibility for regulating discharges. *See Massachusetts v. EPA*, 549 U.S. 497, 534 (2007) (“EPA [cannot] avoid its statutory obligation by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time.”).

Id.. The First Circuit and EAB have agreed that uncertainty does not excuse the permit writer from its obligation to set permit limits. *Upper Blackstone Water Pollution Abatement District v. U.S. EPA*, 690 F.3d 9 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2382 (2013); *In re City of Taunton* at 61-62.

Fourth, there is a question as to whether in the absence of a Total Maximum Daily Load (TMDL) a permit must comply with the statute and regulations that require compliance with water quality standards. There is no question that it must; the lack of a TMDL is no defense for a failure to find reasonable potential and to establish a WQBEL. As the First Circuit has explained,

TMDLs take time and resources to develop and have proven to be difficult to get just right; thus, under EPA regulations, permitting authorities must adopt interim measures to bring water bodies into compliance with water quality standards. *Id.* § 1313(e)(3); 40 C.F.R. § 122.44(d); *see also, e.g.*, 43 Fed. Reg. 60,662, 60,665 (Dec. 28, 1978) (“EPA recognizes that State development of TMDL’s and wasteload [WLA] allocations for all water quality limited segments will be a lengthy process. Water quality standards will continue to be enforced during this process. Development of TMDL’s . . . is not a necessary prerequisite to adoption or enforcement of water quality standards . . .”).

Upper Blackstone Water Pollution Abatement District v. U.S. EPA, 690 F.3d 9 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2382 (2013) n 8. The First Circuit also explained that waiting for the completion of exhaustive studies is equally unacceptable:

[N]either the CWA nor EPA regulations permit the EPA to delay issuance of a new permit indefinitely until better science can be developed, even where there is some uncertainty in the existing data. . . . The Act’s goal of “eliminat[ing]” the discharge of pollutants by 1985 underscores the importance of making progress on the available data. 33 U.S.C. § 1251(a)(1).

Id. Likewise, the EAB recently held the same:

Where TMDLs have not been established, water quality-based effluent limitations in NPDES permits must nonetheless comply with applicable water quality standards. In discussing the relationship between NPDES permitting and TMDLs, EPA has explained that the applicable NPDES rules require the permitting authority to establish necessary effluent limits, even if 303(d) listing determinations and subsequent TMDLs lag behind. 54 Fed. Reg. 23,868, 23,878, 23,879 (June 2, 1989); *see also In re Upper Blackstone Water Pollution Abatement Dist.*, 14 E.A.D. 577, 604-05 (EAB 2010) (expressly rejecting the idea that the permitting authority cannot proceed to determine permit effluent limits where a TMDL has yet to be established), *aff’d*. 690 F.3d 9 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2382 (2013).

In re: City of Taunton Department of Public Works, NPDES Appeal No. 15-08, slip op. at 11 (EAB May 3, 2016); *see also id.* at 40-41 (citing, *inter alia*, 54 Fed. Reg. 23,868, 23,879 (June 2, 1989) (clarifying in the preamble to 40 C.F.R. § 122.44 that subsection (d)(1)(vii) “do[es] not allow the permitting authority to delay developing and issuing a permit if a wasteload allocation has not already been developed and approved”); *see also Ecology, Water Quality Program Permit Writer’s Manual* (Jan. 2015) (hereinafter “Ecology Manual”) at 193 (“In the absence of a basin TMDL and the resultant WLA, the permit writer must develop an individual WLA.”).³

³ This statement is immediately contradicted on the next page in the Ecology Manual, which incorrectly asserts that a “basic principle” of permitting is that:

A point source discharging to a water body with multiple sources (point and nonpoint) of impairment, which is a minor source of the impairment, and may gain relief from a TMDL is not required to have a final limitation as the numeric water quality criteria before a TMDL is completed.

Id. at 194. In fact, there is no such exemption for minor sources in the statute or the regulations nor is there any provision for a permit writer to determine whether a TMDL may provide “relief” to a

In its Permit Writer's Manual, Ecology misstates the law by creating an exemption that is not justified or supported by the statute, federal or state regulations, or case law:

If the pollutant is a far-field pollutant, is present in the discharge and is the subject of a TMDL in progress, the permit writer may defer any water quality-based limits on the pollutant until the TMDL is completed and a WLA is assigned. When the WLA is assigned the permit writer may modify the permit or incorporate the WLA at the next reissuance, depending on timing.

Id. at 196.⁴ Similarly, the Ecology guidance states that if a TMDL has not been started yet, the permit writer may ask the question: "Can the effluent be treated or can the effluent or pollutant(s) be removed seasonally at a cost which is economically achievable or reasonable"? *Id.* at 197 fig. 23. This question and the options that flow from its answers are not supported in federal law. There is no provision in the statute or regulations for deferring needed WQBELs based on TMDLs' being in progress. In fact, delaying an effluent limit due to the time needed to develop a TMDL is parallel to allowing a compliance schedule to meet an effluent limit due to the time needed to develop a TMDL—an approach EPA has determined is prohibited.⁵

Fifth, in the absence of a TMDL, is the permit writer obligated to assess the individual discharger's responsibility to cease contributing to violations of water quality standards? Not only do the federal

discharger. Ecology cites no law to support its principle.

⁴ *See also, id.* at 177 ("Suspected water quality problems due to nutrients are best handled by a TMDL process conducted by the EA Program.") While this may very well be true, if Ecology does not develop TMDLs its permit writers must still meet federal and state regulatory requirements when issuing NPDES permits.

⁵ *See* Memorandum from James A. Hanlon, Director, Office of Wastewater Management, EPA, to Alexis Strauss, Director, Water Division, EPA Region 9 Re: *Compliance Schedules for Water Quality-Based Effluent Limitations in NPDES Permits* (May 10, 2007) at 3 ("A compliance schedule based solely on time needed to develop a Total Maximum Daily Load is not appropriate, consistent with EPA's letter of October 23, 2006 to Celeste Cantu, Executive Director of the California State Water Resources Control Board, in which EPA disapproved a provision of the Policy for Implementation of Toxic Standards for Inland Waters, Enclosed Bays, and Estuaries for California.").

regulations explain that the answer is clearly “yes,” as discussed above, but so has the First Circuit.⁶

The Act’s TMDL and interim planning process both contemplate pollution control where multiple point sources cause or contribute to water quality standard violations. 33 U.S.C. § 1313(d), (e). Under earlier legislation, including the 1965 Federal Water Pollution Control Act, when a water body failed to meet its state- designated water quality standards, pollution limits could not be strengthened against any one polluter unless it could be shown that the polluter’s discharge had caused the violation of quality standards. *See EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202-03 (1976). This standard was ill- suited to the multifarious nature of modern water pollution and prevented the imposition of effective controls. *Id.* In 1972, Congress declared that the system was “inadequate in every vital aspect,” and had left the country’s waterways “severely polluted” and “unfit for most purposes.” S. Rep. No. 92-414, at 3674 (1971). The CWA rejected the earlier approach and, among other things, introduced individual pollution discharge limits for all point sources. 33 U.S.C. 1311(b). To maintain state water quality standards, the Act establishes the TMDL and continuing planning processes, which target pollution from multiple sources. *Id.* § 1313(d), (e). . . . We thus reject the notion that in order to strengthen the District’s discharge limits, the EPA must show that the new limits, in and of themselves, will cure any water quality problems.

Upper Blackstone Water Pollution Abatement District v. U.S. EPA, 690 F.3d 9 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2382 (2013). The law clearly establishes that an NPDES permit may not be issued for discharges that may cause or contribute to violations of water quality standards. While “cause” may be considered to refer to the sole source of a violation, “contribute” sweeps all sources of a pollutant into the regulatory requirements, including the permittees being considered for this potential Permit. Federal regulations provide only very limited exceptions. For example, 40 C.F.R. § 122.44(d)(1)(ii) requires that in determining reasonable potential a permit authority “use procedures which account for existing controls on point and nonpoint sources of pollution.”

⁶ Ecology has not even committed to using its modeling results for Puget Sound to develop a TMDL that would lead to wasteload allocations for dischargers such as this. *See, e.g.*, Ecology, *South Puget Sound Dissolved Oxygen Study Water Quality Model Calibration and Scenarios* (March 2014) at 22 (“Ecology may not conduct a TMDL if alternative management approaches are used to address violations.”). The agency cannot simultaneously refuse to develop a TMDL and claim that it is waiting to complete a TMDL before it develops wasteload allocations for specific dischargers’ NPDES permits.

Last, there is a question related to whether the waterbody is impaired but is not currently listed on the state's EPA-approved 303(d) list.⁷ The key here is impairment, not the technicality of 303(d) listing. *See In re: City of Taunton Department of Public Works*, at 38 (“NPDES regulations do not support the City’s contention that a permit authority must include effluent limits only for the pollutants discharged into receiving waters that are identified as impaired on the state’s 303(d) list.”). Moreover, the finding of reasonable potential has repeatedly been deemed to be a low bar in order to ensure that NPDES permits protect water quality. EPA regulations require that NPDES limits “*must* control all pollutants” that “*may be* discharged at levels” that will cause or contribute to violations. 40 C.F.R. § 122.44(d)(1)(i) (emphasis added). The emphasis is regulation of discharges that *may* be a problem. As the EAB observed of EPA’s action of issuing a permit with nutrient limits,

the Region observed that “[e]ven if the evidence is unclear that a pollutant is currently causing an impairment, a limit may be required if the pollutant has the reasonable potential to cause, or contribute to an exceedance of a water quality standard (i.e., the permit limit may be preventative).” Response to Comments at 36. The Region also noted that “the pollutant need not be the sole cause of an impairment before an NPDES limit may be imposed; an effluent limit may still be required, if the pollutant ‘contributes’ to a violation.” *Id.* (citing *In re Town of Newmarket*, NPDES Appeal No. 12-05, slip op. at 54 n.23 (EAB Dec. 2, 2013), 16 E.A.D. ____). Ultimately, the Region concluded that the City’s discharges cause, have a reasonable potential to cause, or contribute to nitrogen-related water quality violations in the Taunton Estuary and Mount Hope Bay. . . . As such, CWA regulations required the Region to impose a nitrogen limit in the Permit. *See* 40 C.F.R. § 122.44(d)(1)(vi)[.]

In re City of Tauton at 37.

⁷ Ecology’s Permit Writer’s Manual incorrectly states the law in asserting two “basic principles.” The first assertion is that “[a] water body listed on the 303(d) list is not a presumption of impairment unless the listed section is the point of discharge.” *Id.* at 194. While this statement is less than clear, it appears to suggest that a discharge to a non-listed segment that flows into a downstream listed segment is not a discharge that contributes to a violation of water quality standards. This is incorrect. Washington’s water quality standards require that “[u]pstream actions must be conducted in manners that meet downstream water body criteria.” WAC173-201A-260(3)(b); *see also* 40 C.F.R. § 131.10(b) (“the State shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters.”).

b. *Water Quality Standards Applicable to Sources of Nitrogen Discharged to Puget Sound*

Water quality standards are defined as the designated beneficial uses of a water body, in combination with the numeric and narrative criteria to protect those uses and an antidegradation policy. 40 C.F.R. § 131.6. The CWA requires numeric criteria adopted in water quality standards to protect the “most sensitive use.” 40 C.F.R. § 131.11(a)(1).

However, since that is not always possible, the task of evaluating whether standards have been met also requires an assessment of the impacts to designated beneficial uses. In *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 114 S. Ct. 1900, 1912 (1994), the U.S. Supreme Court underscored the importance of protecting beneficial uses as a “complementary requirement” that “enables the States to ensure that each activity—even if not foreseen by the criteria—will be consistent with the specific uses and attributes of a particular body of water.” The Supreme Court explained that numeric criteria “cannot reasonably be expected to anticipate all of the water quality issues arising from every activity which can affect the State’s hundreds of individual water bodies.” *Id.*⁸ In short, a permitting agency cannot ignore the

⁸ EPA regulations implementing section 303(d) of the CWA reflect the independent importance of each component of a state’s water quality standards:

For the purposes of listing waters under §130.7(b), the term “water quality standard applicable to such waters” and “applicable water quality standards” refer to those water quality standards established under section 303 of the Act, including numeric criteria, narrative criteria, waterbody uses, and antidegradation requirements.

40 C.F.R. § 130.7(b)(3). When EPA adopted these regulations it clearly stated the expectations it had of states:

In today’s final action the term “applicable standard” for the purposes of listing waters under section 303(d) is defined in § 130.7(b)(3) as those water quality standards established under section 303 of the Act, including numeric criteria, narrative criteria, waterbody uses and antidegradation requirements. In the case of a pollutant for which a numeric criterion has not been developed, a State should interpret its narrative criteria by applying a proposed state numeric criterion, an explicit State policy or regulation (such as applying a translator procedure developed pursuant to section 303(c)(2)(B) to derive numeric criteria for priority toxic pollutants), EPA national water quality criteria

narrative criteria and use only numeric criteria where either numeric criteria do not exist or where the numeric criteria fall short of providing full support for designated uses.

Washington's water quality standards for marine waters including Puget Sound are intended to be "consistent with public health and public enjoyment of the waters and the propagation and protection of fish, shellfish, and wildlife, pursuant to the provisions of chapter 90.48 RCW." WAC 173-201A-010(1). As in federal law, Washington's regulations make the legal definition of a water quality standard very clear: "All surface waters are protected by numeric and narrative criteria, designated uses, and an antidegradation policy." WAC 173-201A-010(1)(a). In addition, the state rules clarify that:

Compliance with the surface water quality standards of the state of Washington requires compliance with chapter 173-201A WAC, Water quality standards for surface waters of the state of Washington, chapter 173-204 WAC, Sediment management standards, and applicable federal rules.

WAC 173-201A-010(4). The designated uses for marine waters are set out at WAC 173-201A-612, Table 612.

Currently applicable dissolved oxygen criteria applicable to Puget Sound waters are set out at WAC 173-201A-210(1)(d). In addition, the following standards apply:

Upstream actions must be conducted in manners that meet downstream water body criteria. Except where and to the extent described otherwise in this chapter, the criteria associated with the most upstream uses designated for a water body are to be applied to headwaters to protect nonfish aquatic species and the designated downstream uses.

WAC 173-201A-260(3)(b). The following narrative criterion also applies:

Toxic, radioactive, or deleterious material concentrations must be below those which

guidance developed under section 304(a) of the Act and supplemented with other relevant information, or by otherwise calculating on a case-by-case basis the ambient concentration of the pollutant that corresponds to attainment of the narrative criterion. Today's definition is consistent with EPA's Water Quality Standards regulation at 40 CFR part 131. EPA may disapprove a list that is based on a State interpretation of a narrative criterion that EPA finds unacceptable.

have the potential, either singularly or cumulatively, to adversely affect characteristic water uses, cause acute or chronic conditions to the most sensitive biota dependent upon those waters, or adversely affect public health[.]

WAC 173-201A-260(2)(a) (hereinafter “narrative criterion”).

Finally, Washington’s water quality standards contain an antidegradation policy, the purpose of which is to “[r]estore and maintain the highest possible quality of the surface waters of Washington” and “apply to human activities that are likely to have an impact on the water quality of a surface water.” WAC 173-201A-300(2)(a), (c). To ensure this outcome, Tier I of the antidegradation policy “is used to ensure existing and designated uses are maintained and protected and applies to all waters and all sources of pollution.” *Id.* (2)(e)(i). Tier I requires:

- (1) Existing and designated uses must be maintained and protected. No degradation may be allowed that would interfere with, or become injurious to, existing or designated uses, except as provided for in this chapter.
- (2) For waters that do not meet assigned criteria, or protect existing or designated uses, the department will take appropriate and definitive steps to bring the water quality back into compliance with the water quality standards.

WAC 173-201A-310. Federal regulations explain the meaning of “existing uses” that may not be designated uses: Tier I requires the maintenance and protection of “[e]xisting instream water uses and the level of water quality to protect the existing uses[.]” 40 C.F.R. § 131.12(a)(1). Existing uses are “those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards.” 40 C.F.R. § 131.13(e).

B. Applicable State Regulations

In state law, issuance of general NPDES permits is authorized by Ecology regulations at WAC 173-226-050. This provision allows general permits where a category of dischargers meet “all of the following requirements”:

- (i) Involve the same or substantially similar types of operations;
- (ii) Discharge the same or substantially similar types of wastes;
- (iii) Require the same or substantially similar effluent limitations or operating conditions, and require similar monitoring; and
- (iv) In the opinion of the director are more appropriately controlled under a general permit than under individual permits.

WAC 173-226-050(3)(b). Ecology’s regulations include other restrictions. First, general permits issued by Ecology “shall apply and insure compliance with . . . [t]echnology-based treatment requirements and standards reflecting all known, available, and reasonable methods of prevention, treatment, and control required under RCW 90.48.010, 90.48.520, 90.52.040, and 90.54.020[.]” WAC 173-226-070. This includes discharge standards contained in chapters 173-221 and 173-221A WAC, WAC 173-226-070(1)(b), which in turn requires that:

Waters of the state shall be of the highest possible quality. Regardless of the quality of the waters of the state, all wastes and other materials and substances proposed for discharge into said waters shall be provided with all known, available, and reasonable methods of treatment prior to discharge. Even though standards of quality established for the waters of the state would not be violated, wastes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except (1) in those situations where it is clear that overriding considerations of the public interest will be served, and (2) they receive all known, available, and reasonable methods of treatment prior to discharge.

WAC 173-221-020. Second, WQBELs in general permits “must control all pollutants or pollutant parameters which the department determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion of state ground or surface water quality standards.” WAC 173-226-070(2)(b). And, WQBELs must include:

[a]ny more stringent limitations or requirements, including those necessary to:

- (a) Meet water quality standards, sediment quality standards, treatment standards, or schedules of compliance established pursuant to any state law or regulation under authority preserved to the state by section 510 of the FWPCA;

* * *

- (c) Implement any legally applicable requirements necessary to implement total maximum daily loads established pursuant to section 303(d) and incorporated in the continuing planning process approved under section 303(e) of the FWPCA and any regulations and guidelines issued pursuant thereto;

WAC 173-226-070(3). Finally, each general permit for domestic sewage treatment plants must specify “average weekly and monthly quantitative concentration and mass limitations, or other such appropriate limitations for the level of pollutants and the authorized discharge.” WAC 173-226-070(6)(b).

III. ECOLOGY HAS IDENTIFIED NUTRIENT DISCHARGES FROM SEWAGE TREATMENT PLANTS AS CAUSING OR CONTRIBUTING TO VIOLATIONS OF WATER QUALITY STANDARDS IN PUGET SOUND

Ecology has already determined that nutrient discharges from sewage treatment plants discharging to Puget Sound are causing or contributing to violations of water quality standards in Puget Sound. In fact, this determination is the basis for the proposed Permit in which Ecology states that these sources are “significantly contributing” to such violations:

Excess nutrients can cause too much plant and algae growth which ultimately depletes dissolved oxygen (oxygen). Many parts of Puget Sound have oxygen levels that fall below the concentrations needed for marine life to thrive and are below our state’s water quality criteria. 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.

Focus On at 1. This determination is extensively documented. *See, e.g.*, the following documents and their attachments, all of which are in the possession of Ecology: Northwest Environmental Advocates, *Petition for Corrective Action or Withdrawal of Authorization from the State of to Issue National Pollutant Discharge Elimination System Permits* (Feb. 13, 2017); Northwest Environmental Advocates, *Petition for Rulemaking to the Department of Ecology Seeking a Total Maximum Daily Load and Wasteload Allocations for Nitrogen in Puget Sound* (Oct. 10, 2017); Northwest Environmental Advocates, *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).

IV. A GENERAL PERMIT IS NOT THE CORRECT VEHICLE TO ADDRESS OVER 70 INDIVIDUAL NPDES-PERMITTED SOURCES THEREFORE ECOLOGY SHOULD STOP ITS PLAN TO ISSUE AN ILLEGAL GENERAL PERMIT NOW

A. Use of a General Permit for Nutrient Pollution Discharges from Sewage Treatment Plants to Puget Sound is Inconsistent with Federal and State Law

Ecology has stated that it intends the Permit to apply to approximately 70 sewage treatment plants that discharge directly to Puget Sound. *McCrae Presentation* at 11. Each of these treatment plants is causing or contributing to violations of water quality standards in Puget Sound. In some instances, an individual sewage treatment plant or group of sewage treatment plants are likely known—due to

Ecology’s modeling exercises—to have a particular impact on the water quality of, for instance, a specific inlet or bay. For example, Ecology knows that the sewage treatment plants that discharge to Budd Inlet are contributing to violations of water quality standards in the inlet. In addition, all of the facilities contribute varying amounts of nutrient pollutants to the whole of or substantial portions of Puget Sound at this time.

Ecology has asserted its intent to use the Permit to address nutrient pollutants without meeting the federal and state laws discussed above that prohibit the issuance of a permit—individual or general—that authorizes a discharge or discharges that will cause or contribute to violations of water quality standards. As Ecology has already asserted its intent to limit the Permit to “near-term” issues such as and including data collection, optimization of treatment, and long-term planning, none of which is a WQBEL as required by federal and state law, it is impossible to tease apart the general notion of Ecology’s *intent* to use a general permit from *how* Ecology intends to use a general permit. It is certainly irrelevant that Ecology states that some day, a future general permit will include numeric effluent limits. Federal and state law do not include any exception for future regulatory efforts.

As set out above, general permits may only regulate sewage treatment plants as a category of sources if all of the sources meet five criteria. 40 C.F.R. § 122.28(a)(2)(i)(A)–(E). While all sewage treatment plants discharge the same type of waste and involve the same or substantially similar types of operations and could—if Ecology chooses to—require the same or similar monitoring, there is nothing in the information before Ecology that suggests that all of these sources will “[r]equire the same effluent limitations, [or] operating conditions,” 40 C.F.R. § 122.28(a)(2)(i)(D), or that even if put into different categories, “the sources in that specific category or subcategory shall be subject to the same water quality-based effluent limitations,” 40 C.F.R. § 122.28(a)(3). While Ecology has agreed that “a water quality-based approach is necessary to address dissolved oxygen impairments caused by excess nutrient loading to Puget Sound and its tributaries,” it has already asserted recently that nutrient controls are “no[t] necessary for all wastewater treatment plants” and that the Salish Sea Model “will inform the spatial water quality response from different discharges located throughout Puget Sound.” Letter from Maia Bellon, Ecology Director, to Nina Bell, NWEA Re: 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 (Jan. 11, 2019) (hereinafter “AKART Denial Letter”) at 1, 2. Ecology has not stated in its preliminary determination for this Permit that it will have completed the “[f]urther model iterations . . . to define discharger-specific nutrient loading limits based on localized and far-field impacts” that it stated were necessary in the AKART Denial Letter in time to issue this Permit such that it might be able to establish various subcategories of discharger that were subject to the “same water quality-based effluent limitations,” as required by federal law. In fact, the timeframe for completing a draft Permit for public comment—“Fall 2020”—is approximately when Ecology will be completing its “Year 1” modeling scenarios by basin, according to

the *McCrea Presentation* at 15 and the Ecology, Puget Sound Nutrient Forum Packet for July 17, 2019 at 2.

Likewise, where a general NPDES permit has already been issued, the basis for a permitting agency to require an individual permit instead of coverage under the general permit includes that the “discharge(s) is a significant contributor of pollutants.” 40 C.F.R. § 122.28(b)(3)(G). As set out above, this determination may include evaluating the location, size, and quantity and nature of the pollutants contained in discharge(s). 40 C.F.R. § 122.28(b)(3)(G)(1)–(3). Here, Ecology has already determined that collectively sewage treatment plants “significantly contribut[e] to low oxygen levels in Puget Sound,” *Focus On* at 1, therefore it stands to reason that at the very least, the largest among them are significant contributors of pollutants that should be covered under individual permits. The obvious reason for this distinction is that larger sources are contributing more loading and a general permit is a one-size-fits-all approach.

B. Capping Nitrogen Discharges at Current Levels in Lieu of Issuing WQBELs is Both Illegal and is Inherently Individual

Ecology has asserted its intent to “cap” discharges of nitrogen to Puget Sound. *See, e.g., Focus On* at 2. Since the intent of a cap—as Ecology is discussing it—is to maintain current levels of a pollutant, *see e.g., AKART Denial Letter* at 2, by definition “a cap” varies with the individual sources, each of which has a different estimated loading of nutrient pollution. *See e.g., Ecology, Potential Permittee List for a Puget Sound Nutrients General Permit* (Aug. 7, 2019). A cap at current loading is not a WQBEL and, therefore, does not comply with federal or state law given that Ecology knows that many or all of the sources of nitrogen discharged to Puget Sound cause or contribute to violations of water quality standards to differing degrees. Moreover, Ecology states that “[a] cap could be expressed as a numeric effluent limit or other similar value against which effluent quality would be compared.” *Focus On*. However, a numeric effluent limit that is not a WQBEL that prevents a discharge from causing or contributing to violations of water quality standards is not consistent with the law as set out above. Moreover, since each source requires “average weekly and monthly quantitative concentration and mass limitations, or other such appropriate limitations,” WAC 173-226-070(6)(b), each source will have a different numeric effluent limit for the level of nutrients authorized under a cap, which by definition precludes the use of a general permit. And, Ecology has already stated that the caps will be established individually. In its response to NWEA’s AKART petition, Ecology stated that it would “through the individual permitting process . . . [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.” *AKART Denial Letter* at 2. Unless Ecology can demonstrate that it will be setting nutrient pollutant caps as the same effluent limit for each facility or even subcategories of facilities, a general permit is not the appropriate vehicle in which to issue numeric

permit limits in the form of different caps for up to 70 different sources because they are not “the same or substantially similar effluent limitations.” WAC 173-226-050(3)(b)(i); *see also* 40 C.F.R. § 122.28(a)(2)(i)(C). If Ecology intends to establish caps that are not WQBELs in the meaning of federal law, a general permit that includes such caps is not consistent with federal law and should not be issued.

Caps are also inconsistent with the antidegradation policy in Washington’s water quality standards. As explained above, the purpose of this policy includes “restor[ing] . . . the highest possible quality of the surface waters of Washington,” WAC 173-201A-300(2)(a), which means “[f]or waters that do not meet assigned criteria . . . the department will take appropriate and definitive steps to bring the water quality back into compliance with the water quality standards.”

WAC 173-201A-310(2). Capping a pollutant or pollutants at current levels when they are known by Ecology to be causing or contributing to violations of water quality standards is not taking appropriate and definitive steps to bring the waters back into compliance with those standards; it is merely maintaining the status quo.

C. Ecology’s Rationale for Using a General Permit is Sound but the Approach is Misguided

Ecology has stated that one benefit of using a general permit for nutrient discharges is that it would “[p]lace WWTPs on a similar schedule rather than staggering requirements based on individual permit reissuance schedules.” *Focus On* at 1. We agree that this is a benefit given the extraordinary foot-dragging Ecology has engaged in to date. However, the following are also true. First, Ecology does not, we think, intend for all facilities to undergo the construction of nutrient controls at the same time. While it would be desirable environmentally for all facilities to have WQBELs and initiate nutrient controls as soon as possible, it is unclear that funding resources are available to support such an outcome. Therefore, arguably, staggering the new requirements on the basis of permit expiration and renewal is not necessarily a bad idea. Second, there is nothing that prevents Ecology from adding permit conditions to current NPDES permits through modifications pursuant to 40 C.F.R. § 122.62, a process that could be done at one time if Ecology sought to address all 70-odd sources at once.

Federal regulations allow for Ecology to modify NPDES permits “only if the information was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and would have justified the application of different permit conditions at the time of issuance.” 40 C.F.R. § 122.62(a)(2). Ecology may claim that the information upon which it intends to proceed to issue this Permit was not available at the time it issued individual permits, or it may issue new rules that become the basis for the necessary nutrient controls, or it may issue guidance to that effect. Significantly, in addition, Ecology is not precluded from administering this provision of the

federal regulations in such a way as “to impose more stringent requirements.” 40 C.F.R. § 123.25(a). In fact, Ecology’s regulations do allow for more stringent requirements. *See* WAC 173-220-150(1)(d) (requiring all permits to require that “the permit may be modified or revoked in whole or in part during its terms for cause including, but not limited to, the following”); *id.* at (iii) (“A change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge”); *id.* at (iv) (“A determination that the permitted activity endangers human health or the environment, or contributes to water quality standards violations”). Current permits issued by Ecology include conditions that reflect these state and federal regulations allowing Ecology to make such modifications. For those permits that have been administratively extended and for which modifications are therefore not permitted, Ecology may simply reissue those permits with the necessary controls.

A second rationale is that the Permit would “[p]rovide a foundation for communities to work together to achieve nutrient controls across Puget Sound.” It is unclear what this means but we take this as a vague allusion to the use of pollution credits and pollution trading in part because the presentation about the general permit states that “[p]otential permit conditions can support water quality trading[.]” *McCrae Presentation* (with script) at 10. This is very misleading. Ecology is suggesting that it can assign pollution credits and allow for pollution trading without a TMDL or any other regulatory structure in place. It is absurd to suggest that at this point, when Ecology has not even expressed an interest in assigning WQBELs to the sources, that those sources may be able to engage in trading.

V. ECOLOGY’S APPARENT ATTEMPTS TO FOLLOW IN THE FOOTSTEPS OF THE VIRGINIA WATERSHED GENERAL PERMIT IGNORE SIGNIFICANT DIFFERENCES BETWEEN THE TWO SITUATIONS

Ecology appears to be attempting to follow the lead of the Commonwealth of Virginia, which issued its first watershed general permit for nutrient pollutants first effective in 2007. *See* Ecology, Puget Sound Nutrient Forum Agenda (March 6, 2019). The problem in doing so, however, is that Ecology completely ignores the significant statutory and regulatory underpinning of Virginia’s regulatory actions including the issuance of the general permit. Specifically, in 2005, the Virginia legislature passed a law that required that by January 1, 2006, or as soon as possible thereafter, the State Water Control Board (“Virginia Board”) issue the watershed general permit to authorize point source discharges of nitrogen and phosphorus to Chesapeake Bay and its tributaries. *See* Va. Code Ann. § 62.1-44.19:14 (2005). This legislation required the general permit to include wasteload allocations for these pollutants that reflect the individual WQBELs. *Id.* at (C)(1). The legislation was based on the 2000 Chesapeake Bay Agreement and other initiatives that “establish[ed] allocations for nitrogen and phosphorus delivered to the Chesapeake Bay and its tidal tributaries to meet applicable water quality standards and (ii) place caps on the loads of these nutrients that may be discharged into the Chesapeake Bay watershed.” *Id.* § 62.1-44.19:12. The Chesapeake Bay Agreement called for beginning the “implementation of revised

Tributary Strategies to achieve and maintain the assigned loading goals,” strategies that were first issued in 1996, with subsequent strategies in 1999 and 2000 for the remaining basins, and a revised set of strategies in 2005. Virginia, *Chesapeake Bay Nutrient and Sediment Reduction Tributary Strategy* (Jan. 2005) at 2–3.⁹ In August 2004, the state issued a policy calling for the achievement of nutrient reductions set out in the Agreement and the use of “currently available, stringent nutrient reduction technologies” at sewage treatment plants. *Id.* at 6–7. This policy was amended to become Virginia’s first set of regulations. *Id.* at 7; *see also* 21 Va. Register 3236 (July 25, 2005).

After the legislature acted, the Virginia Board proceeded to establish rules that:

revise the existing point source policy for nutrient enriched waters to establish technology-based, annual average total nitrogen and total phosphorus concentration requirements for certain dischargers located in Virginia's Chesapeake Bay watershed, and (ii) revise the Water Quality Management Planning Regulation to establish total nitrogen and total phosphorus annual waste load allocations for certain dischargers within Virginia's portion of the Chesapeake Bay Watershed, and authorize a trading and offsets program to assist in the achievement and maintenance of the waste load allocations.

22 Va. Register 370 (Oct. 17, 2005). Starting in 2005, these rules established technology-based effluent concentration limitations for nutrient discharges using state-of-the-art technology. *See, e.g., id.* at 371–372 (9 VAC 25-40-70(A)(3)(b) (discharges over 100,000 gallons into tidal waters must achieve an annual average effluent concentrations of 3.0 mg/L total nitrogen and 0.3 mg/L total phosphorus). Note that these regulations are amendments to what was a previous formal policy.

Ecology’s proposal to issue a general permit that contains no technology-based effluent limits and no water quality-based effluent limits is in no way like the first general permit for nutrient and sediment pollution issued by Virginia in 2005. Ecology has already announced that it does not intend to require technology-based limits requiring use of state-of-the-art technology when it denied NWEA’s petition, in contrast to Virginia’s regulatory requirement to apply technology-based limits. *See AKART Denial Letter*. Unlike in Virginia, Ecology’s proposed action of issuing a general permit to address nutrient discharges is not based on any regulatory foundation whatsoever—not a formal policy, not a set of regulations, and not a statutory mandate. Instead, the proposed Permit is just based on an idea floating around in the ether that a general permit can address nutrient pollution without any required load

⁹ Available at <https://www.deq.virginia.gov/Portals/0/DEQ/Water/ChesapeakeBay/Trib%20Strat/tsstatewide01-07-05.pdf> (last accessed Sept. 24, 2019).

reductions, completely untethered to federal or state law.

In addition, the Virginia Board established water quality-based effluent limits. *See, e.g.*, 9 VAC 25-720-50 (nitrogen and phosphorus wasteload allocations for the Potomac, Shenandoah River basin); 22 Va. Register 373 (Oct. 17, 2005). Virginia described this as follows: “Individual WLA were assigned to each of Virginia’s 125 bay watershed Significant Dischargers, and an allowance (“Permitted Design Capacity”) for the Nonsignificant Discharger’s was included in 2005 legislation establishing the Nutrient Credit Exchange Program (VA Code §62.1-44.19:12).” Virginia, *Chesapeake Bay TMDL Phase I Watershed Implementation Plan: Revision of the Chesapeake Bay Nutrient and Sediment Reduction Tributary Strategy* (Nov. 29, 2010) at 23.¹⁰ Later, after the development of a TMDL, the allocations and watershed implementation plans were adjusted to meet the requirements of the TMDL. *See id.* at 31 (“Additional reductions, below the current allocations in State regulations, are proposed from the significant dischargers in the James for total nitrogen and total phosphorus, and for total phosphorus in the York through more stringent treatment requirements. These modifications will be reflected in the Watershed General Permit and are further detailed after Table 4.1.1.”).

Unlike Virginia, which adopted a policy; a statute; two sets of regulations, one requiring minimum treatment technology based on facility size and one with wasteload allocations; a general permit; a TMDL; and provisions for credits and intra-basin trading, here Ecology intends to establish a general permit without any regulatory framework to support it (and without the content that will make it comply with the Clean Water Act). This is in part because Ecology has made clear that it does not intend to include nutrient limits sufficient to meet water quality standards in its general permit. Virginia was able to take an approach in which it phased in various requirements—based on facilities’ updates and expansions, for example—and allowed pollution credits because those phases and credits took place within an overall regulatory framework that was aimed at meeting water quality standards and actually reducing nutrient pollution. Here, Ecology seeks to avoid establishing technology-based requirements that would aim at the limits of technology *and* seeks to avoid establishing a TMDL that contains wasteload allocations necessary to meet water quality standards, leaving it without any basis for choosing effluent limits to apply to the various sources to be covered under the Permit. Moreover, Ecology does not intend to choose non-TMDL-based wasteload allocations but, rather, some sort of “cap” that was described by the AKART Denial Letter as “set[ting] 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 the Puget Sound’s impaired status.” What Ecology does not seem to understand is that it cannot simultaneously conclude that nutrient sources must reduce their

¹⁰ Available at <https://www.deq.virginia.gov/Portals/0/DEQ/Water/TMDL/Baywip/vatmdlwipphase1.pdf> (last accessed Sept. 24, 2019).

contributions of nutrient pollution because it is causing and contributing to violations of water quality standards in Puget Sound and issue any kind of NPDES permit that allows that level of nutrient pollution to continue at those levels. The only way that Ecology can proceed is to determine what levels do not cause or contribute to violations, include those as effluent limits in NPDES permits, and put sources on a compliance schedule that complies with federal regulations. In sum, making out like Ecology is copying Virginia is ignoring the facts.

VI. IF ECOLOGY WANTS TO ISSUE A GENERAL PERMIT TO COVER NUTRIENT POLLUTION FROM SEWAGE TREATMENT PLANTS DISCHARGING TO PUGET SOUND, PROMULGATING REGULATIONS REQUIRING ADVANCED NUTRIENT REMOVAL TECHNOLOGY IS THE ONLY SOUND WAY TO GO

It should be obvious to Ecology that the use of a general permit is best where there is a regulatory foundation requiring minimum technology-based controls. As we have demonstrated, that is the approach taken in Virginia, understanding that water quality-based controls by statute, regulation, and TMDL are an essential overlay in Virginia's regulatory program. In other words, if Ecology wants to control nutrient discharges to Puget Sound in the near term using a general permit, its course of action is clear: reverse the denial of the NWEA petition seeking AKART for sewage treatment discharges to Puget Sound to be defined as state-of-the-art nutrient removal technology and proceed to rulemaking on that basis.

Second, it should also be obvious that Ecology's "coordinated permitting strategy to reduce anthropogenic point source nutrient discharges to Puget Sound," comprised of only three elements—monitoring, capping nitrogen at current levels, and near- and long-term planning—whether as described in the Big Lake fact sheet or the AKART Denial Letter is not sufficient to meet the Clean Water Act and to protect and restore Puget Sound. Instead, Ecology is mandated to identify to the best of its ability what water quality-based effluents are required and to include them in any NPDES permit it issues, whether that is a general permit or many individual permits. The best way to do this would be to proceed to quickly complete a TMDL, or phase one of a TMDL, that establishes wasteload allocations for sewage treatment plants rather than to continue its procrastination based on the need to obtain the ever-elusive perfect science that is, in any event, contrary to the Clean Water Act mandate to incorporate a margin of safety and move on.

In sum, if Ecology prefers the regulatory efficacy of a general permit, it must be prepared to take the regulatory steps that are necessary to support it.

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Conclusion

Frankly, it defies the imagination how Ecology can put in the same paragraph the two concepts that (1) nutrient discharges to Puget Sound from sewage treatment plants are causing and contributing to violations of water quality standards and (2) Ecology must require controls of nutrient discharges consistent with the Clean Water Act and then go on to draw the conclusion that it may issue an NPDES permit that does not include effluent limitations that reduce nutrient pollution. This is such a fundamental misreading of the law that it boggles the imagination. Given Ecology's own public observation that it not only expects an appeal of this Permit but it expects that it will be forced to revise it, the only conclusion one can draw is a cynical one: that Ecology is proposing to issue what it knows is an illegal permit for the purpose of delaying the regulatory actions it is required to take under the Clean Water Act and state laws to control the nutrient pollution that is destroying Puget Sound.

NWEA proposes an alternative. Ecology has long recognized the growing crisis in Puget Sound. Now is the time to act. Ecology must, either through a lawful general permit or individual NPDES permits, impose on all sewage treatment plants the required and necessary technology-based and water quality-based effluent limits to control the discharge of nutrients to the Sound. To do any less is willful abrogation of the agency's legal and moral responsibilities.

"A leader takes people where they want to go. A great leader takes people where they don't necessarily want to go, but ought to be." – Rosalynn Carter

Sincerely,

A handwritten signature in black ink, appearing to read "Nina Bell". The signature is fluid and cursive, with a large, sweeping initial "N".

Nina Bell
Executive Director