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Supreme Court No. 100309-9

Court of Appeals No. 80685-8-I

SUPREME COURT OF THE STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES OF THE
STATE OF WASHINGTON,

Respondent,

v.

PHILLIPS 66 COMPANY dba PHILLIPS 66 COMPANY
REFINERY,

Petitioner.

**PETITIONER'S ANSWER TO *AMICI CURIAE*
WESTERN STATES PETROLEUM ASSOCIATION AND
NORTHWEST PULP & PAPER ASSOCIATION**

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I. IDENTITY AND INTEREST OF AMICI CURIAE

Petitioner Phillips 66 Company dba Phillips 66 Company Refinery (“Phillips 66” or “Petitioner”) agrees with the identification of amici curiae Western States Petroleum Association and Northwest Pulp & Paper Association (“Amici”). Petitioner agrees that Amici have a legitimate interest in this dispute.

II. STATEMENT OF THE CASE

Phillips 66 relies on the statement of the case presented in its Petition for Review.

III. INTRODUCTION

Phillips 66 answers Amici to provide further context for Amici’s arguments, and to emphasize that it joins in and adopts those arguments. Specifically, while Amici’s argument based on the Regulatory Reform Act was not made in as many words in Phillips 66’s petition for discretionary review, Amici’s

thoughtful treatment of the Regulatory Reform Act¹ is only a different way of analyzing an issue Phillips 66 has argued throughout this litigation: the unlawfulness of treating an expressly “non-mandatory” appendix to a regulation as a mandatory compliance obligation.²

IV. ARGUMENT

A. Throughout This Litigation, Phillips 66 Has Denied That It May Lawfully Be Required to Comply with WAC 296-67-291, an Expressly “Non-mandatory” Interpretive Guideline.

Throughout this litigation Phillips 66 has expressly advocated that it is unlawful for an expressly non-mandatory appendix to a regulation to be treated as a mandatory compliance obligation. It would therefore be plain error for the Department of Labor & Industries’ (“Department”) to argue that this issue was not raised below.

¹ Ch. 403, Laws of 1995, as amended and relevant portion codified at RCW 34.05.328.

² Phillips 66 also agrees with and adopts Amici’s arguments demonstrating the error of the Court of Appeals’ failure to analyze the Board of Industrial Insurance Appeals’ (the “Board’s”) findings of fact under the unchallenged substantial evidence test. Petitioner will not further argue that point.

To the contrary, Phillips 66 has dedicated substantial argumentation to this issue from the beginning of this dispute before the Board. See, e.g., AR 22301-02, 22337-38. Petitioner has continued to fully present this issue to the Superior Court and the Court of Appeals. In its briefing before the Whatcom County Superior Court, Phillips 66 argued that the Department attempted to engage in improper rulemaking by asking the Board to expand the scope of the Washington Safety Standards for Process Safety Management of Highly Hazardous Chemicals (“PSM rules”) and that the Board was correct in refusing to apply non-mandatory Occupational Safety and Health Administration (“OSHA”) guidance as mandatory regulatory requirements. See CP 86, 88. Phillips 66 maintained this theory in its responsive brief before the Court of Appeals. See Phillips 66’s Respondent’s Brief, No. 80685-8-I (filed July 13, 2020), pp. 16, 27-30, 32, 34-35, 37.

B. As Persuasively Argued by Amici, the Regulatory Reform Act Is Merely an Additional Authority Supporting Phillips 66's Consistent Argument.

“The purpose of an amicus brief is to help the court with points of law.” *Ochoa Ag Unlimited, L.L.C. v. Delanoy*, 128 Wn. App. 165, 172, 114 P.3d 692, 695 (2005).

Amici's thorough analysis delving into the history and purpose of the Regulatory Reform Act bolsters the arguments Phillips 66 advanced before the Board, Superior Court, and Court of Appeals. If the *issue* has been properly raised below, parties are not strictly limited to the precise same *arguments* made before. *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992). In *Yee*, the plaintiffs raised a Fifth Amendment takings claim. *Yee*, 503 U.S. at 534-35. However, before the Supreme Court, they argued a different way in which the government's actions could constitute a taking. *Id.* The Supreme Court held the difference in form was immaterial because the appealing party asked both

courts to evaluate the same fundamental question: whether the challenged acts constituted a taking. *Id.*

As a matter of Washington law, it is plainly improper for an agency to treat an expressly interpretive guideline such as WAC 296-67-291 (an “interpretive rule” as defined in RCW 34.05.328(5)(c)(ii)) as a “significant legislative rule” which would subject an alleged violator to a penalty or sanction. RCW 34.05.328(5)(c)(iii). The Department did not pretend to go through the process required by RCW 34.05.328 before converting WAC 296-67-291 from an interpretive rule to a significant legislative rule. Although Amici’s memorandum offers a different lens, the focal point remains the same—it is unlawful to require mandatory compliance with expressly non-mandatory guidance.

V. CONCLUSION

For eight years, Phillips 66 has maintained that it is unlawful to mandate compliance with non-mandatory

interpretive guidance. Amici's thorough briefing on one aspect of this subject only serves to assist the Court by providing additional legislative and statutory context.

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