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SUPREME COURT OF THE STATE OF WASHINGTON

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DEPARTMENT OF LABOR AND INDUSTRIES OF THE  
STATE OF WASHINGTON,

*Respondent,*

vs.

PHILLIPS 66 COMPANY dba PHILLIPS 66 COMPANY  
REFINERY,

*Petitioner.*

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**MEMORANDUM OF *AMICI CURIAE* WESTERN  
STATES PETROLEUM ASSOCIATION AND  
NORTHWEST PULP & PAPER ASSOCIATION IN  
SUPPORT OF PETITION FOR REVIEW**

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ANDREW COOK (WSBA No. 34004)  
andrew.cook@orrick.com  
ROBERT M. MCKENNA (WSBA No. 18327)  
rmckenna@orrick.com  
ORRICK, HERRINGTON & SUTCLIFFE LLP

701 5<sup>th</sup> Ave., Suite 5600  
Seattle, WA 98104  
Telephone: +1 206 839 4300

*Attorneys for Amici*

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**I. IDENTITY AND INTEREST OF *AMICI CURIAE***

Western States Petroleum Association (“WSPA”) is a non-profit trade association representing the companies that account for petroleum exploration, production, refining, transportation, and marketing in Arizona, California, Nevada, Oregon, and Washington. WSPA is dedicated to ensuring Americans continue to have safe and reliable access to petroleum products through policies that are socially, economically, and environmentally responsible.

WSPA members are regulated by the Washington Safety Standards for Process Safety Management of Highly Hazardous Chemicals (“PSM rules”), Chap. 296-67 WAC. WSPA and its members are committed to complying with the PSM rules and to protecting members’ workers, contractors, and neighbors. WSPA works closely with the Washington Department of Labor and Industries (“L&I”) regarding the enforcement and implementation of the current PSM rules.

The Northwest Pulp & Paper Association (“NWPPA”) is a non-profit trade association representing ten member companies and fifteen pulp and paper mills in Washington, Oregon, and Idaho. NWPPA members produce nearly eight million tons of paper products a year and provide approximately 10,000 predominantly union jobs. Being at the forefront of science and advanced technology, NWPPA members are committed to attainable and sustainable regulatory practices.

NWPPA members are similarly committed to complying with PSM rules and providing safe work environments for their employees, contractors, communities, and neighbors.

*Amici* request that this Court grant the Petition for Review because the court below erred by: 1) holding that Phillips 66’s fire water system is subject to the mechanical integrity rule and the process hazard analysis rule, contrary to a plain reading of applicable L&I regulations; 2) enforcing and applying nonmandatory interpretative rules contained in

Appendix C (WAC 296-67-291) of the PSM rules, contrary to clear statutory language and decisions by this and other courts; and 3) remanding the case to the Board of Industrial Appeals (“Board”) despite the Board’s findings of fact being supported by substantial evidence, contrary to Washington’s Administrative Procedure Act (Cha. 34.05 RCW) (“APA”) and well-established case law.

## **II. STATEMENT OF THE CASE**

*Amici* relies on the facts presented in the Appellant’s Petition for Review.

## **III. INTRODUCTION**

Recognizing the need for regulatory reform, the Washington Legislature enacted comprehensive legislation known as the Regulatory Reform Act of 1995. Engrossed Substitute House Bill 1010, Chapter 403, Laws of 1995 (partial veto), July 23, 1995.<sup>1</sup> As explained in the legislative findings

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<sup>1</sup> <https://app.leg.wa.gov/documents/billdocs/1995-96/Htm/Bills/Session%20Laws/House/1010-S.SL.htm>

section of the legislation, “[o]ne of [the legislature’s] fundamental responsibilities... is the protection of public health and safety, including health and safety in the workplace....” *Id.* According to the bill’s legislative findings section, “[e]ssential to this mission is the delegation of authority to state agencies to implement the policies established by the legislature,” while, at the same time, agencies that are delegated such authority must adopt administrative rules which “assure that these policies are clearly understood, fairly applied, and uniformly enforced.” *Id.* The Legislature further explained that to meet the intent of the legislation, state agencies must “better coordinate their regulatory efforts to avoid confusing and frustrating the public with overlapping or contradictory requirements.” *Id.*

As part of Regulatory Reform Act, the Legislature explicitly defined and made clear the difference between “significant legislative rules,” which are binding on the public and have the force of law, and “interpretative rules,” which do

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“not subject a person to a penalty or sanction.” RCW

34.05.328(5)(c) (ii)-(iii).<sup>2</sup>

L&I’s enforcement of the PSM rules against Phillips 66, and the Court of Appeals decision overturning the Board’s decision based on the interpretative rule, run counter to the clear directives provided by the 1995 Regulatory Reform Act. Instead of providing consistency and regulatory certainty, the Court of Appeals’ decision permitting enforcement of the nonbinding interpretative language in the Appendix of the PSM rules is clear error and has created significant regulatory uncertainty.

The Court of Appeals further erred by holding that the refinery’s fire water system is subject to the PSM’s mechanical integrity rule, even though the system does not hold, nor does it transport, highly hazardous chemicals under the PSM rules. Creating further regulatory uncertainty and inconsistency, the

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<sup>2</sup> Engrossed Substitute House Bill 1010, Chapter 403, Laws of 1995 (partial veto), July 23, 1995, Section 201 (5)(c)(ii)-(iii).

Court of Appeals overturned both the Board and Superior Court by issuing a novel ruling that a fire water system is subject to the PSM rules covering process hazard analyses.

Finally, the Court of Appeals erred by overturning the Board's express findings of fact and remanding the case to the Board, despite clear statutory language and case law requiring appellate courts to accept factual findings supported by substantial evidence.

While the appellate court's decision affects the oil industry, it will also significantly affect numerous industries that have fire water systems regulated by the PSM rules. Thus, this case is a matter of substantial public interest and this Court should grant the Petition for Review.

#### IV. ARGUMENT

##### A. **The Court of Appeals Erred When It Held the Refinery’s Fire Water System Was Subject to the Mechanical Integrity Regulation Based on Non-Mandatory Interpretative “Guidelines” Contained in the PSM Rules’ Appendix**

The Court of Appeals, reversing decisions by the Industrial Appeals Judge, the Board, and the Superior Court, and overturning long-standing Board precedent, held that the mechanical integrity rule applied to the refinery’s fire water equipment. In its decision, the Court of Appeals held that L&I’s self-described “nonmandatory” interpretive rule in Appendix C of the PSM rules “clearly contemplates that the fire water system should be included as process equipment.” *Dep’t of Labor & Indus. v. Phillips 66 Co.*, 18 Wn. App. 2d 57, 71, 489 P.3d 1153 (2021). Based on this incorrect application of the nonbinding interpretative language in Appendix C, the Court of

Appeals remanded the case to the Board to “determine Phillips 66’s compliance with the regulation.” *Id.* at 72.

The Court of Appeals’ reliance on the nonmandatory, nonbinding interpretative rule in Appendix C of the PSM rules is erroneous and is a matter of substantial public interest that should be determined by this Court. *Ass’n of Wash. Bus. (AWB) v. State of Wash.*, 155 Wn.2d 430, 447, 120 P.3d 46 (2005); *see also Marcum v. Dep’t of Social & Health Servs.*, 172 Wn. App. 546, 552, 290 P.3d 1045 (2012).

Washington’s APA explicitly delineates the legal difference between a “significant legislative rule” and an “interpretative rule.” A “significant legislative rule” is defined as:

[A] rule other than a procedural or interpretive rule that (A) adopts substantive provisions of law pursuant to delegated legislative authority, the violation of which subjects a violator of such rule to a penalty or sanction; (B) establishes, alters, or revokes any qualification or standard for the issuance, suspension, or revocation of a license or permit; or (C) adopts a new, or makes significant amendments to, a policy or regulatory program.

RCW 34.05.328(5)(c)(iii) (emphasis added).

The APA further defines an “interpretative rule” as “a rule, the violation of which does not subject a person to a penalty or sanction, that sets forth the agency’s interpretation of statutory provisions it administers.” RCW 34.05.328(5)(c)(ii) (emphasis added).

In applying the definitions provided by the APA, this Court has made clear that interpretative rules, like the one relied on by L&I and the Court of Appeals, are not binding on the public nor can they be used to “punish the public.” *AWB*, 155 Wn.2d at 447.

In *AWB*, the plaintiff-business association challenged regulations published in the Washington Administrative Code by the Department of Revenue (“DOR”), alleging the agency did not have statutory authority to adopt the rules. Specifically, the plaintiff argued that DOR did not have authority under the enabling statute to adopt interpretative rules.

This Court held that DOR had statutory authority to publish interpretative rules under the APA. In reaching its decision, this Court explained the difference between “significant legislative rules” and “interpretative rules” as follows:

Technically, interpretive rules are not binding on the public. They serve merely as advance notice of the agency’s position should a dispute arise and the matter result in litigation. The public cannot be penalized or sanctioned for breaking them. They are not binding on the courts and are afforded no deference other than the power of persuasion.

*Id.* (emphasis added).

Here, despite clear statutory language and controlling case law, the Court of Appeals relied on the “nonmandatory” language contained in Appendix C, WAC 296-67-291(9), to sanction Phillips 66 for alleged violations of the PSM rules. In reversing the lower court, the Court of Appeals stated that this nonmandatory “guidance clearly contemplates that the fire water system should be included as process equipment.”

*Phillips 66*, 18 Wn. App. 2d at 71. Thus, the Court of Appeals

held that the “Board erred in concluding that Phillips 66’s fire water system was not subject to the mechanical integrity system.” *Id.*

The Industrial Judge for the Board of Industrial Insurance Appeals highlighted the problem with L&I applying the nonbinding interpretative rule in Appendix C as binding authority on Phillips 66. Addressing the “alleged violations” pertaining to Phillips 66’s fire water system based on Appendix C, Judge Mitchell T. Harada explained that “it is unfair to penalize an employer for failing to follow a non-mandatory regulation, when, presumably, the agency has the rule-making authority to make a particular ‘suggested’ or non-mandatory employer action mandatory.”<sup>3</sup> The judge further added, “if [L&I] considered such a policy of as high importance as ‘regular’ provisions of the administrative code, it ought to take

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<sup>3</sup> *In re: Phillips 66 Company DBA Phillips Company Refinery*, Citation & Notice Nos. 317037216, 317278570 & 317271856, Docket Nos. 14 W0211, 14 W0213 & 14 W1459, Proposed Decision and Order, at 17, May 11, 2018.

such action so as to see that a system (e.g., firewater) that would also mitigate the effects of consequences of a fire or explosion, would be a mandatory provision under WAC 296-67-017 and WAC 296-67-037.”<sup>4</sup>

L&I has not officially adopted the nonbinding interpretative rules in Appendix C to promulgate the language as “significant legislative rules” as required by under the APA. Thus, the language in Appendix C of the PSM rules is not binding on Phillips 66. Moreover, L&I clearly understands that Appendix C is nonbinding as is evidenced by its current rulemaking which seeks to adopt much of the same language in Appendix C as binding “significant legislative rules.”<sup>5</sup>

The Court of Appeals erred by relying on an interpretative rule in reversing the Board’s decision and

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<sup>4</sup> *Id.*

<sup>5</sup> See Draft Proposed PSM rule, at [https://lni.wa.gov/safety-health/grants-committees-partnerships/advisory-committees/\\_psmdocs/PSM-DraftProposedLanguageOTS-1344.6.pdf](https://lni.wa.gov/safety-health/grants-committees-partnerships/advisory-committees/_psmdocs/PSM-DraftProposedLanguageOTS-1344.6.pdf) (last visited 12/6/21).



remanding the case. The Court of Appeals decision conflicts with decisions of this Court and other published court of appeals decisions. Additionally, it is a matter of substantial public interest as allowing interpretative rules to impose an affirmative obligation on an ad hoc basis would create regulatory uncertainty and chaos.

**B. The Court of Appeals' Failure to Properly Apply the Substantial Evidence Standard Conflicts with Washington Supreme Court Decisions and Is an Issue of Substantial Public Interest**

Despite the overwhelming supporting evidence cited by both the Industrial Appeals Judge and the Board, the Court of Appeals summarily dismissed the Board's order and findings of fact with virtually no analysis and remanded the case for further proceedings. In so doing, the Court of Appeals ignored the APA's substantial evidence standard.

The APA provides in relevant part that the "court shall grant relief from an agency order in an adjudicative proceeding only if it determines that" the "order is not supported by

evidence that is substantial when viewed in light of the whole record before the court....” RCW 34.05.570(3)(e). Courts review challenged findings of fact for substantial evidence, defined as “a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.” *King Cnty. v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000) (quoting *Callegod v. Wash. State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510 (1997)). Evidence is substantial if it is sufficient to persuade a reasonable person of the truth or correctness of the order. *Ancier v. Dep't of Health Med. Quality Assur. Comm'n*, 140 Wn. App. 564, 572-73, 166 P.3d 829 (2007). “As to the findings of fact, it is not the function of an appellate court to substitute its judgement for that of the trial court or to weigh the evidence or the credibility of witnesses. *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 124, 615 P.2d 1279 (1980).

Despite clear statutory language and case law, the Court of Appeals substituted its judgment for that of the Industrial

Appeals Judge and the Board regarding the credibility of the parties' witnesses and the weight granted to the conflicting evidence. For example, the Court of Appeals determined that both parties "offered conflicting testimony regarding Phillips 66's fire water system's conformance with RAGAGEP [recognized and generally accepted good engineering practices]," and then ruled that "[a]lthough the Board concluded Phillips 66 complied with the mechanical integrity regulation, it did not identify the proper RAGAGEP or proper conformance with the regulation's additional requirements." *Phillips 66*, 18 Wn. App. 2d at 72.

As explained in the Petitioner's brief, the Court of Appeals decision does not meet the substantial evidence standard established by this Court.

First, the record is replete with evidence establishing that Phillips 66 complied with mechanical integrity rule and process hazard analysis rule. The Board's Finding of Fact Number 7 explicitly states "the inspections of the fire water system at the

Ferndale Refinery follow recognized and generally accepted [good] engineering practices,” based on the testimony of the experts.<sup>6</sup> The Board further found that L&I failed to establish that either the mechanical integrity or the process hazard analysis sections of the PSM rules applied to Phillips 66’s fire water system.<sup>7</sup>

Second, the Court of Appeals’ analysis does not meet the substantial evidence standard set forth in the statutes and applied by this Court and other courts. The Court of Appeals in this case provided no analysis of how Board’s order “is not supported by evidence that is substantial when viewed in light of the whole record.” RCW 34.05.570(3)(e). Instead, the Court of Appeals substituted its judgment for the Board’s regarding

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<sup>6</sup> *In re: Phillips 66 Company DBA Phillips 66 Co. Refinery*, Docket Nos. 14 W0211, 14 W0213 & 14 W1459, *Board of Industrial Insurance Appeals, Decision and Order*, at 5, Sept. 26, 2018.

<sup>7</sup> *Id.*

the credibility of the witnesses, and it weighed the conflicting testimony of the experts, contrary to well-established case law.

The Court of Appeals decision conflicts with decisions issued by this Court and other courts of appeals. Moreover, its erroneous decision, which fails to apply substantial evidence review as required by Washington law and this Court, will have significant implications for the regulated community and thus is a matter of substantial public interest.

#### **V. CONCLUSION**

Given the implications of L&I's and the Court of Appeals' misapplication of the law and the effects it will have on a broad range of businesses, *Amici* respectfully urge this Court to grant the petition for review.

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Respectfully submitted

ORRICK, HERRINGTON & SUTCLIFFE  
LLP

By: /s/Robert M. McKenna

Robert M. McKenna (WSBA No.  
18327)

Andrew Cook (WSBA No. 34004)  
andrew.cook@orrick.com

701 5<sup>th</sup> Ave., Suite 5600  
Seattle, WA 98104  
Telephone: +1 206 839 4300  
Facsimile: +1 206 839 4301

*Attorneys for Amici*

**ORRICK, HERRINGTON & SUTCLIFFE LLP**

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- tim.oconnell@stoel.com
- williamf.henry@atg.wa.gov

**Comments:**

Memorandum of Amici Curiae Western States Petroleum Association and Northwest Pulp & Paper Association in Support of Petition to Review

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Sender Name: Malissa Tracey - Email: mtracey@orrick.com

**Filing on Behalf of:** Robert M. Mckenna - Email: rmckenna@orrick.com (Alternate Email: sea\_wa\_appellatefilings@orrick.com)

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