No. 98025-0

SUPREME COURT
OF THE STATE OF WASHINGTON

BROOKS MANUFACTURING CO.

Appellant,

vs.

NORTHWEST CLEAN AIR AGENCY

Respondent.

NORTHWEST CLEAN AIR AGENCY'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner Brooks Manufacturing Co. (Brooks) was obligated by RCW 70.94.153 to obtain approval from Northwest Clean Air Agency (NWCAA or the Agency) before it overhauled the air pollution controls on its boiler in 2014. It failed to do so. When called to account by NWCAA, Brooks responded in part with a narrow and abstract interpretation of the Washington Clean Act that would have relieved it of any obligation to NWCAA for that past work, and presumably for any future work as well.

The Court of Appeals rejected Brooks' novel legal argument and concluded there was substantial evidence supporting the underlying findings of fact. Brooks brings only its legal theory before this Court, having conceded the adequacy of the factual record. Brooks' Petition for Review nevertheless offers its own twist on the record facts and reargues the appeal on the merits, but avoids any substantive discussion of the criteria for discretionary review.

The Court of Appeals made a straightforward decision: the control equipment on the Brooks boiler is "emission control technology" and the work that Brooks did on that equipment constituted "replacement" within the meaning of RCW 70.94.153. In reaching its decision, the Court of Appeals correctly interpreted the Act in accordance with fundamental principles of statutory interpretation. The decision is fact-bound and does

not create any legal controversy among the associated entities involved in complying with the Act. The Supreme Court should therefore deny review.

II. IDENTITY OF RESPONDENT

Respondent NWCAA is the local clean air agency organized under the Washington Clean Air Act, ch. 70.94 RCW, to serve Island, Skagit and Whatcom Counties. NWCAA issued the Notice of Violation and Corrective Action Order to Appellant Brooks that is the underlying subject of this appeal.

III. COURT OF APPEALS DECISION

Brooks has provided a citation to the Court of Appeals' September 16, 2019, decision in *Brooks Manufacturing Co. v. Northwest Clean Air Agency*, No. 79645-3-1, and submitted a copy of the slip opinion, as well as a copy of the Court of Appeals' order to publish that opinion. The reporter citations for the decision are not yet available.

IV. ISSUES PRESENTED FOR REVIEW

NWCAA does not wish to seek review of any issue that is not raised in the petition for review.

V. STATEMENT OF THE CASE

Brooks uses a device called a "baghouse" to control particulate air emissions from its wood-fired boiler. Slip Op. at 2. In 2014, Brooks replaced almost all of the baghouse parts that come into contact with exhaust gases. Slip Op. at 3. Brooks made the changes to its baghouse without first seeking approval from NWCAA. Slip Op. at 3. RCW 70.94.153 and NWCAA Regulation 300.13 required Brooks to submit a Notice of Construction application to NWCAA before replacing or substantially altering the emission control technology on the boiler.

NWCAA discovered that Brooks had made changes to its baghouse during an inspection in 2014. RP 19; CR 127-128. During that inspection Brooks informed the inspector that it had replaced the baghouse on the wood-fired boiler with "like for like" equipment. *Id.*; RP 24-25. A NWCAA permit engineer determined, based on information provided by the inspector, that the baghouse had been "replaced" within the meaning of RCW 70.94.153 and NWCAA Regulation 300.13. RP 124. NWCAA then issued a Notice of Violation and Corrective Action Order to Brooks based on that determination, requiring Brooks to submit a Notice of Construction application for the boiler baghouse project. CR 1194-96; Ex. R-11.

Brooks appealed to the Pollution Control Hearings Board (PCHB), which affirmed NWCAA's determination, concluding that "the work

performed in 2014 on the Brooks baghouse constituted replacement and therefore a notice of construction application was required." Slip Op. at 4. Brooks appealed the PCHB's decision to the superior court, which affirmed the PCHB. *Id.* Brooks then appealed to the Washington Court of Appeals, which also affirmed the PCHB, concluding: "The baghouse is emissions control technology, and Brooks replaced it." Slip Op. at 16.

VI. ARGUMENT

Petitions for review are governed by the four considerations under RAP 13.4(b). Brooks argues that their Petition for Review (Petition) meets a single consideration: that the Petition involves an issue of substantial public interest. RAP 13.4(b)(4); Petition at 8. Brooks fails to satisfy this criteria.

A. Washington Clean Air Act Background and RCW 70.94.153 Requirements

The legislature created the Washington Clean Air Act (Act), ch. 70.94 RCW, in 1967. *Ass'n of Washington Bus. v. Dep't of Ecology*, 95885-8, ___ Wn.2d ___, 2020 WL 240321, at *1 (Wn. Jan. 16, 2020) (citing Laws of 1967, ch. 238). Recognizing air pollution as "the most serious environmental threat in Washington state," the legislature significantly revised the Act in 1991 to better "preserve, protect, and enhance the air quality for current and future generations." *Id.* (citing LAWS OF 1991, ch

199, §§ 101, 102; RCW 70.94.011). The legislature explicitly declared that "[i]mproving air quality is a matter of statewide concern and is in the public interest." LAWS OF 1991, ch. 199, § 102; RCW 70.94.011.

To serve these ends, RCW 70.94.153 provides that "any person proposing to replace ... the emission control technology installed on an existing stationary source emission unit *shall* file a notice of construction application with the jurisdictional permitting authority." (emphasis added). This provision imposes an obligation on the emissions source to apply to the permitting authority[1] and obtain its approval before replacing the controls on an existing emission unit. It also sets the parameters for the permitting authority's review.

The permitting authority must first review the application for completeness. RCW 70.94.153. Thereafter, the authority must issue an order that either approves the applicant's proposal, or proposes a "reasonably available control technology" (RACT) determination for the proposed project. *Id.*; *see also* RCW 70.94.141(3). RACT is defined as: "[T]he lowest emission limit that a particular source or source category is capable of meeting by the application of control technology that is

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[1] "Authority" is defined as "any air pollution control agency whose jurisdictional boundaries are coextensive with the boundaries of one or more counties." RCW 70.94.030(5).

reasonable available considering technological and economic feasibility." RCW 70.94.030(20) (*see* appendix).

When the permitting authority opts to propose a RACT determination, that means the agency has the opportunity to decide—before the applicant makes a significant investment in replacing or substantially altering its existing control equipment—whether the money would be better spent on a new control method or refinements to the existing controls that can achieve lower emissions. *See* RCW 70.94.154(5) (requiring authority to utilize factors in RCW 70.94.030, and other relevant factors in determining RACT). In this way, the agency is authorized to (1) require RACT for the affected emission unit so as to keep up with the evolution of emission controls and (2) prescribe reasonable operation and maintenance conditions for the control equipment. RCW 70.94.153.

To summarize, RCW 70.94.153 makes it is unlawful [1] "to replace or substantially alter the [2] emission control technology installed on an existing stationary source emission unit" unless the applicant complies with two basic procedural requirements under RCW 70.94.153: first, file a complete "notice of construction application" for the permitting authority's review and approval, and second receive proper authorization to commence the project. RCW 70.94.153. This process of agency review, and employing RACT determinations when necessary, helps protect air quality

from "sources [that] may contribute" to air emissions. *See* RCW 70.94.011, .153.

B. Review under RAP 13.4(b)(4) should be denied because Brooks fails to identify an issue of substantial public interest that frequently recurs

For nearly three decades, RCW 70.94.153 has imposed procedural requirements on permittees, and the local air agencies. LAWS OF 1991, ch. 199, § 303; RCW 70.94.153. Since its enactment, there have been no other cases or disputes, other than the one at hand, necessitating judicial interpretation of the terms "technology" and "replace." The statute has been in place and routinely applied by the local air authorities and permittees for decades.

After receiving a notice of violation and corrective order regarding its 2014 work on the baghouse, and after the corrective action order was affirmed by the PCHB the Thurston County Superior Court, and the Court of Appeals, Brooks now asserts that the repeated rejection of its interpretation of RCW 70.94.153 raises an issue of substantial public interest. Yet, Brooks points to no instance where any other permittee has tried to raise the same issue. Indeed, the Court of Appeals Division I is the first appellate court to address the novel reading of RCW 70.94.153 offered by Brooks. The Court of Appeals' decision analyzed a factual issue in deciding that "RCW 70.94.153 obligated Brooks to file a notice of

construction." Slip Op. at 16. The Court of Appeals, like the PCHB, and the Thurston County Superior Court, adopts a common sense interpretation RCW 70.94.153 that is likewise consistent with the Act's purpose. Given the absence of similar issues pending before Washington courts and administrative boards, the disputed issues are not of recurring importance.

Instead of providing "direct and concise" reasons for review under the substantial public interest criteria, Brooks resorts to claiming that the Court's analysis "could have far-reaching effects on regulated industry in the State." Petition at 8; *See* RAP 13.4(c)(7). Brooks' claim is conclusory. In an attempt to meet the standard, Brooks appears to make three primary assertions. First, Brooks asserts that the Court of Appeals erroneously analyzed the term "technology," and could therefore "skew all legal authority on this issue." Petition at 12. Second, Brooks asserts that the Court of Appeals adopted an erroneous definition for the term "replace." Petition at 16. Third, Brooks claims that the Court of Appeals failed to provide guidance for the term "replace," and as a consequence grants the air agency "unfettered" permitting discretion. *Id.* As discussed below, Brooks' arguments fail to meet the standard for review by this Court.

C. The Court of Appeals properly held that Brooks' baghouse was "emission control technology" and therefore did not result in the adoption of an erroneous rule of law

Brooks failed to comply with RCW 70.94.153; Brooks' attempt to render the statute inapplicable based on its novel interpretation of "technology" does not warrant Supreme Court review. *See* Slip Op. at 3. Brooks urges acceptance of review that their offered dictionary interpretation of "technology" is the only correct one—the same interpretation rejected by the PCHB, the Thurston County Superior Court, as well as the Court of Appeals. Petition at 10; *See* Slip Op. at 1-2.

The Court of Appeals correctly held that Brooks' baghouse is an "emission control technology" subject to the requirements under RCW 70.94.153. Slip Op. at 10. In reaching its decision, the Court of Appeals evaluated "technology" through fundamental principles of statutory interpretation. Slip Op. at 5. Specifically, the Court's analysis gives effect to the legislature's intent,[2] and ascertains the plain language of the RCW 70.94.153 by "considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the

[2] Contrary to the fundamental objective to carry out the legislature's intent, Brooks' analysis fails to acknowledge, let alone effectuate the Act's declared purpose to protect the public interest—improving air quality—through coordinated statewide air quality permit programs. RCW 70.94.011; Petition at 11.

statutory scheme as a whole." Slip Op. at 5 (citing *TracFone Wireless, Inc. v. Dep't of Revenue,* 170 Wn.2d 273, 281 (2010); *State v. Evans*, 177 Wn.2d 186, 192 (2013)). Consistent with the principles of statutory interpretation, the Court adopted a broad definition for "technology"—a definition that harmonizes the statute's use of the term to include both tangible physical equipment and concepts of applied science. Slip Op. at 8-9.

The Petition provides no RAP 13.4(b)(4) basis for review of that holding. Instead, Brooks claims that the Court's analysis has the potential to "skew all" future legal authority on this issue. Petition at 12. But rather than attempt to discuss how the Court's analysis can possibly impact "all" future analogous issues, if any, Brooks turns to repeating its appellate arguments for narrow interpretation of "technology". Petition at 12.

Brooks' return to the merits of their argument also fails to justify review. Brooks argued that "technology" should only mean an "abstract" concept that "does not include tangible objects." Slip Op. at 8. The Court of Appeals explained that the abstract narrow interpretation would frustrate the Act's express purpose "to enhance the air quality for current and future generations." Slip Op. at 10. It also is inconsistent with the plain language of RCW 70.94.153. *Id.* at 8-9.

As is clear from Brooks' Petition, Brooks argues for a narrow reading of "technology" so as to avoid compliance with the Act's

application requirements. Petition at 8. It becomes more evident when Brooks' fails to reconcile how its dictionary definition is consistent with the Act's declared purpose to protect the public interest—improving air quality—through coordinated statewide air quality permit programs. RCW 70.94.011.

In any event, the Petition also shows that Brooks fails to recognize that the phrase "control technology" is used in different ways in different parts of the Act. The Petition recites the Act's three technology-based emissions standards: "Best available control technology" (BACT), "Reasonably available control technology" (RACT), and "Best available retrofit technology" (BART), Pet. at 14-15, as if they refer to the same thing as "emission control technology" under RCW 70.94.153. But BACT, RACT, and BART all describe the criteria for emission limits that are derived from the expected control efficiency of a type or category of devices or equipment, work practices, and design characteristics. *See* RCW 70.94.030(6), (7), (20). Once these concepts are applied to determine the emission limit for a particular source, the concept translates to a tangible object: "the" baghouse that is used to control emissions from a specific piece of equipment. *See* RCW 70.94.153 ("emission control technology installed on an existing stationary source") (emphasis added); Slip Op. at 9-10. The use of different prefaces to the term "control technology" in

different places in the Act creates a distinction between concepts like what is "reasonably available" and concrete applications like the "emission control technology" installed on an individual emission unit. Brooks' attempt to conflate these different uses of the term neither satisfies the appropriate standard of review nor shows the Court of Appeals adopted an erroneous interpretation of "technology."

Even setting aside those substantive problems, Brooks' additional claims are unhelpful on review. Brooks wrongly asserts that "no appellate court has ever construed [RCW 70.94.153]." Pet. at 3. That allegation ignores the opinion of the Court of Appeals that is the subject of this Petition, an opinion that will now be published in response to Brooks' request, establishing the durable precedent that Brooks wrongly claims is missing.

Brooks presents this Court with a series of groundless arguments that largely focuses on Brooks' unsuccessful claim on the merits. Brooks' arguments are creative to a degree but do not warrant the Supreme Court's attention. Put simply, it is not the subject of significant statewide importance.

D. The Court of Appeals Properly Held that Brooks' Baghouse was "Replaced"

The Court of Appeals made a straightforward decision on a fact-specific and nonrecurring issue by applying the Act to the circumstances of this case. The Court properly held the substantial evidence supports that Brooks "replaced" its emission control technology, and was therefore obligated to file a notice of construction under RCW 70.94.153. Slip Op. at 16.

In an effort to create controversy where none exists, Brooks selectively quotes portions of the Act, the Court's decision, and factual record. Petition at 16-17, 19. Brooks' select quotes, when read in isolation, imply that the issue of "replace" is of substantial interest because (1) the court allegedly gave no guidance on the definition; and (2) the court's interpretation now grants "unfettered discretion" to the agency regarding the permitting process under RCW 70.94.153. Petition at 16. Neither provides a basis for review.

First, the decision does provide guidance[3] to regulated sources and authorities on the term "replace". The Court expressly defines "replace" to

[3] The issue of how industry may achieve compliance pursuant to RCW 70.94.153 was not before the court of appeals, and therefore was not fully briefed and argued. The issue is certainly not essential to the outcome regarding replacement under the substantial evidence standard.

mean "to place again: restore to a former place, position, or condition." Slip Op. at 13-14 (citing Webster's Third New International Dictionary 1925 (2002)). The decision is clear that the term "replace" is to be given its plain dictionary meaning. Slip Op. at 15. Furthermore, Brooks' desire for guidance from the court was satisfied when the Court of Appeals granted Brooks' motion to publish its decision.

Without any citation to authority, Brooks argues that the term "replace" should be defined as "the entire subject must be replaced—not just parts of it." Pet. at 15-16. Brooks fails to explain how such a definition would advance the Act's purpose. *Id.* at 17, 20. Nor does Brooks identify a single source of authority for its definition. Pet. at 15-16.

Assuming Brooks' interpretation as correct would lead to absurd results. Here, the Court of Appeals found substantial evidence in the record that Brooks had replaced 90 percent of its baghouse. Slip Op. at 11-12. Brooks does not seek review of that conclusion, instead arguing that, even though it is true, that is not enough to trigger review under RCW 70.94.153.

Under the definition of "replace" proffered by Brooks, it would not only evade review of the rebuilding of its baghouse in 2014, but could continue to manipulate future work at its facility in such a manner that it would never be subject to review. An emission unit would not be required to improve its performance, even if better controls become available, and

even though the facility spends substantial amounts to keep its original emission controls functioning. *See* Petition at 15. Brooks' interpretation would enable a facility to avoid RCW 70.94.153 requirements, and ultimately RACT determinations, so long as the facility replaces "just parts of [the facility]". That is the opposite of what RCW 70.94.153 seeks to achieve.

Second, Brooks' wrongly assumes the decision gives air agencies "unfettered discretion" to decide when an emission control technology is "replaced." Pet. at 16. The dictionary definition of "replace" adopted by the Court of Appeals does not result as Brooks claims – in every change to emission controls triggering the statute because, as Brooks acknowledges absent citation to the rules, longstanding regulations adopted by the Department of Ecology and NWCAA exempt routine work from review: "Replacement or substantial alteration of control technology does not include routine maintenance, repair or similar parts replacement." WAC 173-400-114; NWCAA Regulation 300.13. Brooks argued below that the work conducted on its baghouse was "routine," but having lost that argument repeatedly it chose not to advance it again to this Court.

Finally, defining "replace" as "restore to a former place, position, or condition," Slip Op. at 14, does not – as Brooks asserts – render meaningless

the term "substantially alter." Pet. at 17. That term applies when the work is not intended to restore the controls to their former condition.

The remainder of the Petition's argument regarding the meaning of "replace" largely recites the factual record and a fact-bound and nonprecedential judgment. Brooks fails to show how the fact-bound nature of the decision ultimately addresses an issue of statewide significance. As a consequence, the issues are insignificant for review.

VII. CONCLUSION

The decision of the Court of Appeals does not involve a matter of substantial interest warranting review under RAP 13.4(b)(4). Accordingly, the Northwest Clean Air Agency respectfully request the Supreme Court to deny the petition.

Dated: January 23, 2020 NOSSAMAN LLP

By: _____

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APPENDIX

RCW 70.94.030
Definitions

(20) "Reasonably available control technology" (RACT) means the lowest emission limit that a particular source or source category is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility. RACT is determined on a case-by-case basis for an individual source or source category taking into account the impact of the source upon air quality, the availability of additional controls, the emission reduction to be achieved by additional controls, the impact of additional controls on air quality, and the capital and operating costs of the additional controls. RACT requirements for a source or source category shall be adopted only after notice and opportunity for comment are afforded.

RCW 70.94.153
Existing stationary source—Replacement or substantial alteration of emission control technology.

Any person proposing to replace or substantially alter the emission control technology installed on an existing stationary source emission unit shall file a notice of construction application with the jurisdictional permitting authority. For projects not otherwise reviewable under RCW 70.94.152, the permitting authority may (1) require that the owner or operator employ reasonably available control technology for the affected emission unit and (2) may prescribe reasonable operation and maintenance conditions for the control equipment. Within thirty days of receipt of an application for notice of construction under this section the permitting authority shall either notify the applicant in writing that the application is complete or notify the applicant in writing of all additional information necessary to complete the application. Within thirty days of receipt of a complete application the permitting authority shall either issue an order of approval or a proposed RACT determination for the proposed project. Construction shall not commence on a project subject to review under this section until the permitting authority issues a final order of approval. However, any notice of construction application filed under this section shall be deemed to be approved without conditions if the permitting authority takes no action within thirty days of receipt of a complete application for a notice of construction.

Northwest Clean Air Agency Regulations

Regulation 200 – Definitions

REASONABLY AVAILABLE CONTROL TECHNOLOGY (RACT)

The lowest emission limit that a particular stationary source or source category is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility. RACT is determined on a case-by-case basis for an individual stationary source or source category taking into account the impact of the stationary source upon air quality, the availability of additional controls, the emission reduction to be achieved by additional controls, the impact of additional controls on air quality, and the capital and operating costs of the additional controls. RACT requirements for any stationary source or source category shall be adopted only after notice and opportunity for comment are afforded.

Regulation300.13

Replacement or Substantial Alteration of Emission Control Technology at an Existing Stationary Source.

a) Any person proposing to replace or substantially alter the emission control technology installed on an existing stationary source or emission unit shall file a Notice of Construction application with the NWCAA. Replacement or substantial alteration of control technology does not include routine maintenance, repair or similar parts replacement.

b) For projects not otherwise reviewable under NWCAA Section 300, the NWCAA may:

1) Require that the owner or operator employ RACT for the affected emission unit;

2) Prescribe reasonable operation and maintenance conditions for the control equipment; and

3) Prescribe other requirements as authorized by chapter 70.94 RCW.

c) Within thirty (30) days of receipt of a Notice of Construction application under this section the NWCAA shall either notify the applicant in writing that the application is complete or notify the applicant in writing of all

additional information necessary to complete the application. Within thirty (30) days of receipt of a complete Notice of Construction application under this section the NWCAA shall either issue an Order of Approval or a proposed RACT determination for the proposed project.

d) Construction shall not "commence," as defined in NWCAA Section 200, on a project subject to review under this section until the NWCAA issues a final Order of Approval. However, any Notice of Construction application filed under this section shall be deemed to be approved without conditions if the NWCAA takes no action within thirty (30) days of receipt of a complete Notice of Construction application.

e) Approval to replace or substantially alter emission control technology shall become invalid if construction is not commenced within eighteen months after receipt of such approval, if construction is discontinued for a period of eighteen months or more, or if construction is not completed within a reasonable time. The NWCAA may extend the eighteen-month period upon a satisfactory showing that an extension is justified. This provision does not apply to the time period between construction of the approved phases of a phased construction project; each phase must commence construction within eighteen months of the projected and approved commencement date.

CERTIFICATE OF SERVICE

I hereby certify that on January 23 2020, I electronically filed the foregoing NORTHWEST CLEAN AIR AGENCY'S ANSWER TO PETITION FOR REVIEW with the Clerk of the Court for the Washington State Supreme Court by using the appellate CM/ECF system which will send notification of such filing to participants in the case who are registered CM/ECF users.

Dated this 23rd day of January 2020.

s/ Svend Brandt-Erichsen
Svend Brandt-Erichsen
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NOSSAMAN

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