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No. 79645-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BROOKS MANUFACTURING CO.

Appellant,

vs.

NORTHWEST CLEAN AIR AGENCY

Respondent.

PETITION FOR REVIEW

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A. Identity of Petitioner.

Petitioner Brooks Manufacturing Co. (“Brooks”) was the appellant in the Court of Appeals as well as before the Superior Court, which affirmed a decision by the Pollution Control Hearings Board (“PCHB”).

B. Court of Appeals Decision.

Petitioner seeks review of the Court of Appeals’ decision of September 16, 2019, which was ordered published on November 26, 2019, *Brooks Manufacturing Co., v. Northwest Clean Air Agency*, ___ Wn. App. ___, ___ P.3d ___ (2019) (cited as “Slip Op.” and attached as Appendix A). The Order Granting Motion to Publish is attached as Appendix B.

C. Issues Presented for Review.

Did the Court of Appeals err in holding that:

1. the statutorily undefined term “emission control technology” in RCW 70.94.153 is an “umbrella term” with more than one meaning depending on where it appears in the statutory scheme, thereby subjecting Brooks to a Notice of Violation and Corrective Action Order?
2. the work performed on Brooks’s baghouse fits within the statutorily undefined term “replace” in RCW 70.94.153, thereby subjecting Brooks to a Notice of Violation and Corrective Action Order?

D. Statement of the Case.¹

The underlying facts are described in detail in Petitioner’s Opening Brief in the Court of Appeals. *See*, Appellant’s Opening Brief, at 2-20 (Attached as Appendix C). This includes a detailed explanation of the wood-fired boiler and its exhaust system at issue here.

This is an appeal of a Notice of Violation and Corrective Action Order issued by the Respondent Northwest Clean Air Agency (“NWCAA”) against Brooks. Brooks is in the business of engineering and manufacturing wood products for telephone poles, but not the poles themselves. (Slip Op. at 2). A large amount of wood by-product—sawdust and shavings—is generated in this process. (*Id.*) Brooks uses steam to heat dry-kilns which dry the lumber they use in manufacturing. That steam is generated by a boiler that burns the wood by-product. (*Id.*).

The wood-fired boiler and the emission control equipment attached to it are regulated by the NWCAA. One of those emission control devices is a “baghouse” – essentially, a large filter. (*Id.*). In 2008, and again in 2014, Brooks installed like-for-like replacement parts on its baghouse to

¹ The record on appeal consists of the Certified Record from the PCHB and the Transcript of the two-day hearing before the PCHB. The Certified Record of the PCHB is paginated separately from the Clerk’s Papers and is cited as (CR ____). The Transcript from the PCHB hearing is cited as (RP ____). The Clerk’s Papers are cited as (CP ____) and Superior Court VRP as (Sup. Ct. RP ____).

repair corrosion caused by heat and moisture. (*Id.* at 3). Both times, the repair used exact replica parts manufactured to within 1/8 of an inch of the original. (RP 301-302). The 2014 parts were made of stainless steel instead of mild steel.

RCW 70.94.153 requires anyone proposing to “substantially alter or replace emission control technology” to submit a “Notice of Construction Application” to their local air agency. In 2014, the NWCAA cited Brooks for performing the 2014 work without filing a Notice of Construction Application. The issue in this case is whether the repairs Brooks performed fall within RCW 70.94.153. No appellate court has construed this statute.

1. The Baghouse. In 1989, Brooks converted its boiler, enabling it to burn not only natural gas, but wood shavings. (Slip Op. at 2). In doing so, Brooks re-designed the entire system, installing a cyclone and a baghouse, which both capture fine particulate matter emitted from the wood-fired boiler. (*Id.*). Maintenance of the baghouse takes place on a daily basis; millwrights check and record the pressure readings, the inlet temperature, and the air tank. (CR 905, FOF 13; RP 263-64). They also check the pulse jets (if operating correctly), the bottom hopper (ensure ash is coming out), and examine the ash (to confirm complete combustion in the boiler). They also observe the exhaust gas exiting the baghouse to

observe if any particulate is emitted. *Id.* Additional maintenance and system monitoring are performed on a monthly basis. (CR 905, FOF 13).

The entire boiler and exhaust system are completely shut down at least once a year for several weeks. (CR 905, FOF 13). The baghouse is opened and inspected in its entirety for corrosion (an ongoing concern). (CR 905, FOF 13). Bags are removed and inspected and, if need be, cleaned or replaced. The bags and cages are replaced every two to four years. *Id.*

2. The 2008 and 2014 Work on the Baghouse. In 2007, Brooks observed that the baghouse was suffering from significant corrosion; rust was causing deterioration in the baghouse outer skin and the hopper. (CR 906, FOF 14). Brooks contacted Superior Systems, Inc. to evaluate the options for repairing the baghouse. (RP 269). Superior Systems has designed, installed, and manufactured baghouses since 1980. (CR 298-299).

Employees of Superior spent the better part of a Saturday crawling around the baghouse and measuring every component to within 1/8th of an inch.² (RP 301-302). Superior Systems ultimately submitted a written

² FOF 19 outlines the detail and exact replica nature of the parts manufactured and installed by Superior Systems.

proposal to repair the baghouse. (CR 906, FOF 14). Superior performed the work in July 2008. (*Id.*).

The baghouse/boiler logbook that Brooks maintains pursuant to the 1989 Permit contains an entry that the boiler was shut down and a “New Ash Baghouse” was installed. (*Id.*; CR 930). Due to the corrosion, the walls and exterior skin of the baghouse were replaced. (RP 270). However, many parts were re-used, including the ladder/catwalk, the sprinkler system, the purge parts, the airlock, the magnehelic, the support structure, the receiver tank, the electronic controls, and all of the piping and inlet configuration. (RP 270-271). The NWCAA did not require a Notice of Construction Application for the 2008 work on the baghouse.

In 2013, Brooks again noticed that the baghouse was severely corroding. (CR 906, FOF 16). Brooks again contacted Superior Systems, who assisted in determining what parts were needed to repair the baghouse. (RP 273; RP 287). Superior Systems suggested that this time Brooks use stainless steel to combat corrosion. (RP 272-273).

Superior Systems used the exact same drawings from 2007 to create its 2013 job file. (RP 288). The goal of the 2013 job was to re-use as many of the existing parts as possible, to save on costs. (RP 287). Superior Systems performed the work in August 2014; the repair work took only

three days of Brooks's regularly scheduled annual two-week maintenance shutdown. (CR 907, FOF 17). Superior Systems testified "We didn't change anything that would affect the performance ... same bag[s], same cages, same cleaning cycle, same stand, everything bolted right back up to it. We just replaced the parts that needed to be replaced so that they could continue to operate the way it's supposed to." (RP 320).

3. Notice of Violation and Appeal. In November of 2014, NWCAA inspector Bob Uhrich conducted an annual inspection of the Brooks facility. (CR 908, FOF 20). Brooks's Technical Director told Mr. Uhrich that there had been a "like-for-like" replacement of parts on the baghouse. (*Id.*). Uhrich then observed the baghouse, noting that work had been done. (CR 909, FOF 21). He did not ask what specific parts were repaired or replaced. (RP 38-39; RP 229).

Uhrich did not determine whether Brooks had violated any regulations or laws. Instead, he filled out a form entitled "NWCAA Case Investigation for NSR Determination." (CR 909, FOF 22). He forwarded the form to Dan Mahar, the "new source review lead" at the NWCAA. (*Id.*). The information Mr. Mahar had was very limited. (CR 909, FOF 22).

Dan Mahar reviewed the one-page NSR Determination form. (CR 910, FOF 23). The form stated that Brooks had done a like-for-like parts

replacement, and the baghouse was the “same design and size, with the only difference being it was constructed of stainless steel.” (*Id.*). From this limited information, Mahar concluded that Brooks “intended to replace or substantially alter emission control technology.” (*Id.*).

Based on Mahar’s determination, Uhrich prepared an enforcement report which was reviewed by Uhrich’s supervisor, NWCAA Compliance Director and wife of Dan Mahar, Toby Mahar. (CR 910, FOF 24). Toby Mahar agreed with Dan Mahar’s determination, because a “significant portion of the baghouse had been replaced.” (*Id.*).

In December 2014, the NWCAA issued a Notice of Violation and Corrective Action Order requiring Brooks to submit a Notice of Construction Application. (CR 911, FOF 25). Brooks appealed that order to the PCHB, and after a two-day evidentiary hearing in January 2016, the PCHB issued its Findings of Fact, Conclusions of Law and Order Affirming the NWCAA’s actions. (CR 900-924).

Brooks appealed the PCHB’s order to the Thurston County Superior Court. (CP 6-11). The Superior Court affirmed the PCHB on October 12, 2017. (CP 163-164). Brooks then appealed to the Court of Appeals, (CP 165-167)³ which affirmed the Superior Court. This Petition now follows.

³ This case was transferred from Division II to Division I on February 21, 2019.

4. No Increased Emissions. The work on the baghouse did not affect its performance. In August 2015, Emission Technologies, Inc. performed a test for particulate matter on the baghouse, demonstrating that the baghouse exhaust met the existing permit standards/limitations for emissions of particulate. (FOF 26; CR 912).

E. Argument Why Review Should Be Accepted.

1. Standard of Review.

Petitioner seeks review under RAP 13.4(b)(4) because this case “involves an issue of substantial public interest that should be determined by the Supreme Court.” RCW 70.94.153 is a critical provision of Washington’s Clean Air Act dictating when any regional air agency can invoke permit review. No Washington appellate court has ever construed this statute. The Court of Appeals’ analysis is incorrect, incomplete, and could have far-reaching effects on regulated industry in the State. Review should be granted.

This appeal specifically raises errors under RCW 34.05.570(3)(d) “The agency has erroneously interpreted or applied the law” and RCW 34.05.570(3)(e) “The order is not supported by evidence that is substantial when viewed in a light of the whole record before the court, which includes the agency record for judicial review...” The substantive standards of

review for these alleged errors were appropriately outlined by the Court of Appeals in its published opinion. (Slip Op. at 4-5).

2. The Court of Appeals Erroneously Held that the Brooks Baghouse was “Emission Control Technology.”

If the baghouse is not deemed “Emission Control Technology,” then a Notice of Construction Application was not required. RCW 70.94.153 states in pertinent part:

“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.”

The terms “replace,” “substantially alter,” and “emission control technology” are not defined. (CR 915, COL 3). Both the Department of Ecology (“DOE”) and the NWCAA adopted regulations which repeat the above statutory language, and then supplement it with the following:

“Replacement or substantial alteration of control technology does not include routine maintenance, repair, or similar parts replacement.”⁴ (CR 915-916, COL 4-5).

Neither the DOE’s or NWCAA’s regulations define the terms “replace,” “substantially alter,” “emission control technology,” “routine,” “maintenance,” “repair,” or “similar parts replacement.” (CR 915-916, COL 4-5).

⁴ WAC 173-400-114; NWCAA Reg. 300.13

This Court has routinely held that “in the absence of a statutory definition, we will give the term its plain and ordinary meaning ascertained from a standard dictionary.” *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002); *accord*, *State v. Sullivan*, 143 Wn.2d 162, 175, 19 P.3d 1012 (2001) (*citations omitted*). “Technology” is defined in the dictionary as:

1. The science or study of the practical or industrial arts, applied sciences, etc.
2. The terms used in a science, etc.; technical terminology;
3. Applied science;
4. A method, process, etc. for handling a specific technical problem;
5. The system by which a society provides its members with those things needed or desired.⁵

The dictionary definition of technology does not include specific equipment, and it certainly does not support the definition adopted by the NWCAA, the PCHB, and the Court of Appeals. Rather, the dictionary definition of “technology” is in accord with Brooks’s understanding of the word; “emission control technology” is a more abstract term, referring to the application of science, a method, study, or a process.

The Court of Appeals rejected this plain meaning and instead adopted a chameleon-like definition which changes based on where and

⁵ Webster’s New World Collegiate Dictionary, Fourth Edition.

how the term is used in the statute. “[T]he legislature used "emission control technology" as "an umbrella term that includes the equipment and devices used for emission control and the more abstract concept of the applied science upon which the equipment and devices are based." (Slip Op. at 10).

The Court of Appeals deviated from the plain meaning and used a definition concocted by the NWCAA, because it believed the plain meaning was not supported by “the text of RCW 70.94.153 and the quoted purpose of the [Clean Air] Act supported by the PCHB’s interpretation.” In explaining this reasoning, the Court first noted that RCW 70.94.153 refers to “emission control technology” as being “installed on an existing stationary source emission unit.” (Slip Op. at 8). The Court reasoned that the legislature’s use of the word “installed” “makes it clear that it considered ‘emission control technology’ to include tangible objects that one could attach to a stationary emission unit.” (Slip Op. at 8-9). The Court then stated (incorrectly) that Brooks had failed to address how “one could attach “science, a method, study, or a process” to an existing stationary emission unit” (Slip Op. at 10) when that very issue had been addressed in its briefing. (*See*, Reply Brief of Appellant at pg. 8-9).

The Court of Appeals also held that Brooks’s “narrow abstract” meaning of “emission control technology” was “nonsensical” and failed to harmonize the term as it is used throughout the statutory scheme. (Slip Op. at 9-10). As an issue of first impression, the Court of Appeals’ analysis is fatally flawed and must be reversed, because it has the potential to skew all future legal authority on this issue.

The Court of Appeals’ analysis is flawed for three distinct reasons. First, the terms “control technology” and “control equipment” both appear in the same sentence within RCW 70.94.153:

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**. (Emphasis Added).

Statutes are to be read together, wherever possible, to achieve a ‘harmonious total statutory scheme... which maintains the integrity of the respective statutes.’ *Washington State Dept. of Revenue v. Federal Deposit Ins. Corp.*, 190 Wn. App. 150, 157-58, 359 P.3d 913 (2015) (cited in the Slip Op. at pg 9). The Court of Appeals’ definition of “control technology” encompasses “control equipment.” Under this rationale, the phrase “control equipment”

is afforded no meaning. This alone is contrary to how statutes should be construed. *Id.*, citing, *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (“We must construe statutes such that all of the language is given effect.”).

Second, use of the word “installed” in RCW 70.94.153 is actually harmonious with the plain and ordinary meaning of “control technology.” This is particularly so when viewed in the context of all the other instances where the phrase “control technology” is used.⁶ Under the plain meaning of the word “technology,” “a” baghouse would be “control technology” which would be installed by installation of “the” baghouse to an exhaust system. “Control technology” can be “installed” in other real-world situations when defined as a process, method, or technique. For example—anti-lock brakes. The technology of anti-lock brakes and the anti-lock brake system are installed when an ABS system is placed in a car. The theory of “an” ABS system is the “control technology.” But, “the” ABS system—the actual equipment installed in the car—is “control device.” As a result, the dictionary definition of the term “technology” cannot be

⁶ The undefined phrase “control technology” appears throughout the Clean Air Act: RCW 70.94.030(6) (Definition of “Best Available Control Technology”); RCW 70.94.030(20) (Definition of “Reasonably Available Control Technology”).

summarily discarded simply because the word “installed” appears in the statute.

Third, throughout the Clean Air Act, the phrase “control technology” is used in a manner wholly consistent with the plain and ordinary meaning that Brooks applies. The PCHB even acknowledged that the legislature used the term “technology” in a manner consistent with Brooks’s position: “There are also times, however, when emission control technology is used in the Washington Clean Air Act in a manner more similar to the dictionary definition advocated by Brooks.” (CR 921, COL 16). In fact, the dictionary definition of “technology” works in all other instances where the term appears.

In RCW 70.94.030(6), “Best available control technology” (BACT) is defined as “an emission limitation...that the permitting authority...determines is achievable... through application of production processes and available methods, systems, and techniques....”

In RCW 70.94.030(20), “Reasonably available control technology” (RACT) “means the lowest emission limit that a particular source . . . is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility...”

In RCW 70.94.030(6), “Best available retrofit technology” (BART) is defined as “an emission limitation based on the degree of reduction achievable through the application of the best system of continuous emission reduction for each pollutant that is emitted by an existing stationary facility. The emission limitation must be established...taking into consideration the technology available...”

The term “emission control technology” is unambiguous under its plain and ordinary meaning. That plain and ordinary meaning can be harmonized with all other instances of where the term appears in the Clean Air Act. The Court of Appeals erred when it held otherwise.

3. The Court of Appeals Erroneously Held that the Brooks Baghouse was “Replaced.”

Because the Court of Appeals held that the baghouse constituted “emission control technology,” it was also required to analyze whether Brooks had “replaced” it.⁷ The Court acknowledged that both Brooks and the NWCAA proposed reasonable definitions for the undefined term “replace” and held that it was thus ambiguous. (Slip Op. at 13). Brooks advocates a definition that means the entire subject must be replaced—not

⁷ The NWCAA conceded that Brooks did not “substantially alter” emission control technology. (Slip Op. at 13).

just parts of it.⁸ The Court of Appeals adopted a definition that has no boundaries, giving zero guidance to those regulated by the Clean Air Act.

The Court of Appeals acknowledges that the term “replace” on its own “does not describe when a company replaces enough parts of an *emission control device* for its action to qualify as a replacement.”⁹ (Slip Op. at 13). We also know from the NWCAA and DOE regulations, that “Replacement or substantial alteration of control technology does not include routine maintenance, repair, or similar parts replacement.” Replacing parts is thus allowed before a piece of control “technology” is “replaced.” Here, the Court of Appeals has failed to provide any cognizable framework or guiding principles on what “replace” actually means. Certainly, the word “replace” is not so amorphous as to require applying an “I know it when I see it” approach.¹⁰

As the law now stands under this case, this State’s air agencies have unfettered discretion to decide when something is “replaced” or not. Certainly, the legislature did not intend to delegate authority so broad that

⁸ It is a verity on appeal that the entire baghouse was not replaced. Many parts of the baghouse were not replaced (magnehelic; controls; electrical; legs; inlet; piping; catwalk; ladder; filter bags; cages; pulse header; and valves. (Slip Op. at 3).

⁹ (Emphasis Added). The Court’s use of the term “control device” rather than “control technology” should not go unnoticed.

¹⁰ *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964) (referencing Justice Potter Stewart’s famous definition of pornography).

no business (or their counsel) could review the applicable law and determine what it means and whether they have to submit a Notice of Construction.

The Court of Appeals' amorphous description of the term "replace" is also contrary to the statutory scheme because it renders the term "substantially alter" meaningless. Using the Court's umbrella definition of "control technology" (which includes "control equipment") and its fluid definition of "replace" (which means replace only "some" of the control technology), no circumstance arises where the phrase "substantially alter" would occur which would also not constitute "replace."¹¹

But, under the facts here, even using the Court of Appeals' definition of "emission control technology", the emission control technology in this case was not "replaced." The NWCAA conceded that many of the parts of the baghouse that were not replaced were in fact required for the baghouse to operate properly. (RP 105 (T. Mahar testimony); RP 308 (M. Wolfe testimony)). If the baghouse would not work properly without the parts that were re-used, it cannot be said to have been "replaced," particularly in light

¹¹ The Court of Appeals' strained analysis would be obviated if the Court had adopted the dictionary definition of "control technology." Replacing "control technology" would mean switching the theory, method, or process behind the control equipment—such as changing from a baghouse to an electrostatic precipitator. Likewise, "substantially altering" "control technology" would mean changing a baghouse from a 121 bag pulse jet, to say, a 50 bag pulse jet. But, fixing a baghouse by replacing worn out parts with like-for-like parts that do not in any way affect its function, would do neither. Thus, the need to concoct a fluid and confusing meaning to the term "replace" only arises when the "umbrella" definition of "control technology" is adopted.

of the fact that routine maintenance, repair and similar parts replacement is in fact allowed.

The baghouse was not replaced, it was repaired—maintained. Replacing functional parts of a baghouse as Brooks did is routine in the industry. The NWCAA even acknowledged this: “While it may be common in an industry to replace the rusted out parts of a baghouse, at some point the changes are extensive enough to cross the line and become replacement of the control technology.” (Resp. Br. at 21). The PCHB concurred with this “fear” in its Conclusion of Law No. 11:

If, as advocated by Brooks, an entity can replace, at one time, almost all of the parts including the house of a baghouse under the regulatory language of ‘similar parts replacement’ without filing a notice of construction application, the regulatory exception would be inconsistent with the statute.” (COL11, CR919).

The logical fallacy of using this premise to mis-shape the definitions of “control technology” and “replace” was poignantly pointed out by the Court of Appeals and the NWCAA’s counsel at oral argument:

THE COURT: Let's say instead of what they did, they replaced ten percent of this each year over nine years; do they get to keep doing that forever then?

MR. BRANDT-ERICHSEN: Well, it would -- basically, that's a factual determination. So you're taking --

THE COURT: Well, let's -- just to make it easy, assume that the number of pieces they replace each year is below the threshold for what is a replacement.

MR. BRANDT-ERICHSEN: Mm-hmm.

THE COURT: And they continue to use the very same technology that, in terms of methodology, that the original system did.

MR. BRANDT-ERICHSEN: And there are -

THE COURT: Can they do that forever?

MR. BRANDT-ERICHSEN: There are -- if the control equipment continues to work and functions and meets the emission limits, then yes, they can.¹²

This short colloquy, and the fact that the NWCAA answered “Yes” to the Court’s question, exemplifies the paradox created by the Court of Appeals’ ultimate reasoning. This inquiry unequivocally demonstrated that the statutory scheme does not prevent a business from doing what Brooks did here. The Court’s holding only prevents a business from doing what Brooks did all at one time, so long as the equipment is functioning, and the emissions limits are being met. Thus, here, Brooks’s only “mistake” was to do the work all at once.

¹²(<https://www.courts.wa.gov/content/OralArgAudio/a01/20190412/2.%20Brooks%20Manufacturing%20Co.%20v.%20Northwest%20Clean%20Air%20Agency%20%20%20796453.mp3>) Oral Argument, at 10:12.

The Court of Appeals' interpretation and application of RCW 70.94.153 does not "maintain the integrity of the respective statutes" or evince the legislative intent as made clear by the statutory scheme as a whole. *Washington State Dept. of Revenue v. Federal Deposit Ins. Corp.*, 190 Wn. App. at 157-58. The plain and ordinary meaning of the term "control technology" must be used, and *the* baghouse at Brooks is not "control technology" but instead, "control equipment" or a "control device." Under this plain and ordinary meaning, no conflict or further interpretation is of the term "replace" is required, because a plain and ordinary meaning of that word works and gives credence to the term "substantially alter."

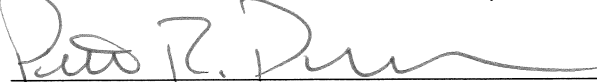
Using the plain and ordinary meanings, the statutory scheme of the Clean Air Act is honored, and predictability and certainty prevail in applying the Clean Air Act.

F. Conclusion.

This Court should grant review and reverse the Court of Appeals.

Respectfully submitted this 24th day of December 2019.

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BROOKS MANUFACTURING CO.,)	
a Washington corporation,)	No. 79645-3-I
)	
Appellant,)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
NORTHWEST CLEAN AIR AGENCY,)	
)	
Respondent.)	FILED: September 16, 2019

LEACH, J. — Brooks Manufacturing Company appeals a superior court order affirming the Pollution Control Hearings Board (PCHB). RCW 70.94.153 requires a person to file a notice of construction application when he intends to replace emission control technology on a stationary source emission unit. Brooks did not do this before it replaced its baghouse, the device it uses to control emissions escaping from its burning of wood shaving by-products. The Northwest Clean Air Agency (NWCAA) issued Brooks a notice of violation and corrective action order. Brooks appealed to the PCHB, which affirmed the notice. The superior court affirmed the PCHB.

Brooks claims that the baghouse was not “emission control technology” and that it did not replace the baghouse. Because Brooks does not show that

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the PCHB erred in its interpretation and application of the statute and substantial evidence supports the PCHB's challenged finding of fact, we affirm.

FACTS

Brooks is a Bellingham, Washington, company that makes engineered wood products for utilities and produces wood shavings as a by-product. Brooks uses a boiler to provide steam for its lumber-drying kiln. In 1989, it converted the boiler from gas fired to wood burning to allow it to burn the wood shaving by-product to produce steam for the kiln. The baghouse captures fine particulate matter emitted from the wood-fired boiler.

In 2007, Brooks's baghouse was corroding, and its skin and hopper were deteriorating from rust. Superior Systems Inc. submitted a bid to "supply & install a replacement baghouse" for Brooks's existing boiler. Superior installed the replacement baghouse in 2008.

Brooks noticed that the baghouse was in failing condition again in 2013. Superior submitted a bid to "supply & install a replacement baghouse." Its bid stated that it would "dismantle the existing filter and install the new [one] in the same location." It said it would reuse the "existing service platform access ladder and lower support structure. All the rest of the [baghouse would] be fabricated new."

In August 2014, Superior replaced the mild steel baghouse shell with a stainless steel one. It installed the new shell in the existing support structure. Superior replaced all of the parts that came into contact with exhaust air from the boiler with identically sized stainless steel parts. These included the baghouse collector housing, the exhaust outlet, the clean gas plenum, the tube sheet, the gas inlet, and the hopper. It did not replace parts that did not come into contact with exhaust air, including the magnehelic, controls and electrical conduit, inlet piping, catwalks, and ladder. It also did not replace the existing filter bags and cages, the pulse air header, or the valves.

Brooks did not contact the NWCAA before or after Superior did the baghouse work in August 2014. In November 2014, an NWCAA inspector examined the baghouse and talked with Brooks's technical director. The inspector then relayed a description of the changes to an NWCAA engineer to determine whether Brooks was required to file a notice of construction for the baghouse work. The inspector wrote, "Facility said that this [was a] like-for-like replacement for the baghouse that was permitted March 10, 1989. The new baghouse is the same design and size with the only difference . . . being that it was constructed of stainless steel. This baghouse collects ash from the 250 hp wood fired boiler exhaust."

The engineer concluded that Brooks “replaced” the baghouse, making its action subject to the requirements of RCW 70.94.153. The NWCAA director of compliance agreed. On December 15, 2014, the NWCAA issued Brooks a notice of correction and corrective action because it did not submit the statutorily required notice of construction application before replacing the baghouse in 2014.

Brooks appealed the notice to the PCHB. After a fact-finding hearing, the PCHB affirmed the 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.” Brooks appealed this decision to the superior court, which affirmed the PCHB. Brooks again appeals.

STANDARD OF REVIEW

The Washington Administrative Procedure Act (WAPA)¹ governs review of PCHB orders.² This court reviews the PCHB’s action from the same position as the superior court.³ We apply WAPA standards directly to the record created before the PCHB.⁴ When we review agency action under WAPA, the party

¹ Ch. 34.05 RCW.

² RCW 43.21B.180; Port of Seattle v. Pollution Control Hr’gs Bd., 151 Wn.2d 568, 587, 90 P.3d 659 (2004); RCW 34.05.510, .526.

³ Port of Seattle, 151 Wn. 2d at 587; Skagit Hill Recycling, Inc. v. Skagit County, 162 Wn. App. 308, 317-18, 253 P.3d 1135 (2011); RCW 34.05.558.

⁴ Port of Seattle, 151 Wn. 2d at 587; Skagit Hill Recycling, 162 Wn. App. at 317-18; RCW 34.05.558.

challenging the action has “[t]he burden of demonstrating the invalidity of agency action.”⁵

We interpret statutes de novo.⁶ When we interpret a statute, our goal is to “give effect to the legislature’s intent.”⁷ So we look first to the legislation’s plain language, “considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole.”⁸ If the plain language of the statute results in two or more reasonable interpretations, it is ambiguous.⁹ Only if the statute is ambiguous do we apply traditional techniques of statutory construction.¹⁰

A court must grant relief from a PCHB order if the party challenging it shows that the order was not supported by substantial evidence “when viewed in light of the whole record before the court.”¹¹ Substantial evidence is “a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.”¹² We will overturn an agency’s findings only if they are clearly erroneous and the court is “definitely and firmly convinced that a mistake has

⁵ RCW 34.05.570(1)(a); Port of Seattle, 151 Wn.2d at 587.

⁶ Port of Seattle, 151 Wn.2d at 587.

⁷ TracFone Wireless, Inc. v. Dep’t of Revenue, 170 Wn.2d 273, 281, 242 P.3d 810 (2010).

⁸ State v. Evans, 177 Wn.2d 186, 192, 298 P.3d 724 (2013).

⁹ City of Seattle v. Winebrenner, 167 Wn.2d 451, 456, 219 P.3d 686 (2009).

¹⁰ Cerrillo v. Esparza, 158 Wn.2d 194, 201, 142 P.3d 155 (2006).

¹¹ RCW 34.05.570(3)(e).

¹² Callecod v. Wash. State Patrol, 84 Wn. App. 663, 673, 929 P.2d 510 (1997).

been made.”¹³ This court does “not weigh the credibility of witnesses or substitute our judgment for the PCHB’s with regard to findings of fact.”¹⁴ We review de novo whether the PCHB correctly applied the law to its findings.¹⁵

ANALYSIS

Brooks makes two challenges to the PCHB decision. First, it contends that the PCHB “erroneously interpreted . . . the law”¹⁶ about the terms “emission control technology” and “replacement or substantial alteration” contained in RCW 70.94.153. And these asserted misinterpretations resulted in the PCHB erroneously applying the law to the facts.¹⁷ Second, it claims that substantial evidence did not support the PCHB’s finding of fact 30.¹⁸ And Brooks concludes by claiming that given the legislative intent of RCW 70.94, it is entitled to operate under its 1989 permit indefinitely. Because Brooks’s arguments fail, we affirm.

The Baghouse Is Emission Control Technology

First, Brooks contends that the baghouse is not “emissions control technology” under the Washington Clean Air Act (Act).¹⁹ We disagree.

The legislature adopted the Act with the intent

¹³ Port of Seattle, 151 Wn.2d at 588 (quoting Buechel v. Dep’t of Ecology, 125 Wn.2d 196, 202, 884 P.2d 910 (1994)).

¹⁴ Port of Seattle, 151 Wn.2d at 588 (citing Bowers v. Pollution Control Hr’gs Bd., 103 Wn. App. 587, 596, 13 P.3d 1076 (2000)).

¹⁵ Port of Seattle, 151 Wn.2d at 588.

¹⁶ RCW 34.05.570(3)(d).

¹⁷ RCW 34.05.570(3)(d).

¹⁸ RCW 34.05.570(3)(e).

¹⁹ Ch. 70.94 RCW; see RCW 70.94.440.

to secure and maintain levels of air quality that protect human health and safety, including the most sensitive members of the population, to comply with the requirements of the federal clean air act, to prevent injury to plant, animal life, and property, to foster the comfort and convenience of Washington's inhabitants, to promote the economic and social development of the state, and to facilitate the enjoyment of the natural attractions of the state.^[20]

The legislature declared as one of the purposes of the Act "to safeguard the public interest through an intensive, progressive and coordinated statewide program of air pollution prevention and control."²¹ Consistent with this goal, RCW 70.94.153 requires that

[a]ny 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 [governing the notice requirements for the construction of a new contaminant source], 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.

(Emphasis added.)

The parties agree that RCW 70.94.153 applies to the baghouse work only if the baghouse is "emission control technology." They also agree that the Act does not define "emission control technology." They offer competing interpretations of this term.

²⁰ RCW 70.94.011.

²¹ RCW 70.94.011.

The PCHB interpreted the phrase to be “an umbrella term that includes the equipment and devices used for emission control and the more abstract concept of the applied science upon which the equipment and devices are based.” And, quoting a dictionary definition of “technology,”²² Brooks asserts that “emission control technology” has a narrower meaning and includes only abstract things like “science, a method, study, or a process” and does not include tangible objects. In particular, it does not include the actual equipment used to capture or filter the emissions. The text of RCW 70.94.153 and the quoted purpose of the Act support the PCHB’s interpretation.

First, Brooks contends that the Act’s plain language does not support a broad meaning for “emission control technology.” In response, PCHB notes that the first sentence of RCW 70.94.153 describes “emission control technology” as something that can be “installed on an existing stationary source emission unit.” The legislature’s use of the word “installed” makes clear that it considered “emission control technology” to include tangible objects that one could attach to

²² Webster's New World College Dictionary 1470 (4th ed. 2000) defines “technology” as

1 The science or study of the practical or industrial arts, applied sciences, etc. 2 the terms used in a science, etc.; technical terminology 3 applied science 4 a method, process, etc. for handling a specific technical problem 5 The system by which a society provides its members with those things needed or desired

a stationary emission unit. So, the plain language of the statute supports the PCHB's interpretation.

Second, Brooks points to the legislature's use of the phrase in other sections of the Act as supporting its interpretation. For example, RCW 70.94.030(6) defines "[b]est available control technology" as "an emission limitation . . . that the permitting authority . . . determines is achievable . . . through application of production processes and available methods, systems, and techniques." Similarly, RCW 70.94.030(20) defines "[r]easonably available control technology" as "the lowest emission limit that a particular source . . . is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility."

But these examples and the others cited by Brooks do not support a narrow definition of "emission control technology." Because we look for a meaning that harmonizes all the legislature's uses of the same phrase in the Act,²³ the different ways it used this phrase demand a broad definition, not a narrow one. And we must avoid an interpretation that creates an inconsistency among the various statutes using the phrase.²⁴ The narrow abstract meaning advanced by Brooks would make RCW 70.94.153 nonsensical. Brooks does not

²³ Dep't of Revenue v. Fed. Deposit Ins. Corp., 190 Wn. App. 150, 157-58, 359 P.3d 913 (2015).

²⁴ State v. Bash, 130 Wn.2d 594, 602, 925 P.2d 978 (1996).

explain how one could attach “science, a method, study, or a process” to an existing stationary emission unit. But his offered definition would make this the event triggering the need for a notice of construction application.

Requiring review of devices used to control emissions when existing devices need replacement furthers the legislatively declared “public policy to preserve, protect, and enhance the air quality for current and future generations.”²⁵ The interpretation of “emission control technology” advanced by Brooks would allow a polluter to use and replace once-approved devices forever, regardless of advances in technology occurring during the useful life of an approved device. This would frustrate using technological advances to “enhance the air quality for current and future generations.”

We agree with the PCHB that the legislature used “emission control technology” as “an umbrella term that includes the equipment and devices used for emission control and the more abstract concept of the applied science upon which the equipment and devices are based.” The PCHB did not err in concluding that “emission control technology” includes the baghouse.

Brooks Replaced the Baghouse

Brooks also claims that RCW 70.94.153 does not apply because it did not “replace” the baghouse. Brooks challenges the sufficiency of the evidence

²⁵ RCW 70.94.011.

supporting the PCHB's finding that it replaced the baghouse. It also challenges the PCHB's conclusions of law that "the work performed in 2014 on the Brooks baghouse constitutes replacement," that it was not a "similar parts replacement," and that "[t]he replacement of 90 percent of a baghouse, using mostly new parts and a new shell fabricated from a different, more expensive, and much longer lasting material, constitutes replacement of emission control technology." We reject these claims.

i. Substantial Evidence Supports the PCHB Finding That Brooks Replaced the Baghouse

Brooks challenges the sufficiency of the evidence to support finding of fact

30:

At the hearing, after having an opportunity to review additional information, including all of the information about exactly which parts were replaced and the cost of the replacement, Mr. Mahar's opinion remained unchanged that the alteration of the Brooks baghouse constituted a replacement of the baghouse that required a notice of construction application. Mr. Mahar's original opinion was bolstered by: (1) that the fabrication took place off site and what he considered the replacement baghouse was then brought on site; (2) that Brooks made a substantial investment in stainless steel to extend the life of the baghouse; and (3) that the parts that were not replaced were primarily parts that did not come into contact with exhaust air, were not parts that were involved in the control of air emission, or were parts that had already been replaced recently because they were consumable, such as the filter bags. Overall, Mr. Mahar summed up the situation by saying the baghouse had been 90 percent replaced and he still concludes that the work constituted replacement of the baghouse. D. Mahar Testimony, Ex. R-31.

Brooks first contends that this finding was not supported by substantial evidence because the PCHB based it on a single statement by Daniel Mahar.²⁶ This does not matter. Brooks cites no authority for the proposition that one witness's testimony is insufficient to support a finding of fact. And no witness directly contradicted Mahar. The finding accurately summarizes Mahar's testimony. Mahar stated, "90 percent of the baghouse was replaced," the "whole baghouse" was "basically rebuilt," and the metal used was "a significant portion of the baghouse that makes it work and contains all the dirty air and functions to clean it." He said, "[T]o me it was replaced."

Brooks directs this court to Mahar's testimony identifying "all of the parts that were [reused], including the structure, the ladder and catwalk, the airlock, the blow pipes, and even the bags and cages." But these statements do not contradict his testimony that the baghouse was replaced. Rather, Mahar listed these as examples of "options that you add on there to make it convenient to service the equipment" or equipment that is "replaced on a regular basis" to support his contention that the more functionally important parts of the baghouse were replaced.

Brooks also points to the diagram of the parts replaced and the parts not replaced on the baghouse and a portion of Mark Wolfe's testimony that Superior

²⁶ Daniel Mahar is a professional environmental engineer or permit engineer at NWCAA.

reused some of the baghouse parts.²⁷ But this evidence is not inconsistent with the PCHB's finding. And in asserting that this evidence contradicts this finding, Brooks ask this court to reweigh evidence and determine credibility, which this court will not do.²⁸ Brooks does not show the lack of substantial evidence to support the court's finding.

ii. Brooks's Baghouse Work Is a Replacement Subject to RCW 70.94.153

Brooks claims its baghouse work is not a replacement that triggers the application requirement of RCW 70.94.153.

This statute obligates "[a]ny 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."²⁹ NWCAA does not claim that Brooks "substantially altered" its emissions with its baghouse work. It claims that Brooks's baghouse work falls within the actions the legislature described with the word "replace."

The Act does not define "replace." And it does not describe when a company replaces enough parts of an emission control device for its action to qualify as replacement. The parties assert different, reasonable interpretations of the statute, making it ambiguous. To interpret an ambiguous statute, we may

²⁷ Mark Wolfe is the general manager and part owner of Superior Systems Inc.

²⁸ Port of Seattle, 151 Wn.2d at 588 (citing Bowers, 103 Wn. App. at 596).

²⁹ RCW 70.94.153 (emphasis added).

look to a dictionary definition of an undefined term.³⁰ Merriam Webster's Third New International Dictionary defines "replace" as "to place again : restore to a former place, position, or condition."³¹

Brooks's work on the baghouse restored it to its former condition and more. The new parts put the corroded baghouse in a condition superior to its condition before the corrosion. Superior replaced mild steel parts exposed to exhaust with more expensive stainless steel parts. These last longer and extended the baghouse's useful life longer, perhaps indefinitely. For this reason, we reject Brooks's claim that it was merely a similar parts replacement.

And Superior described its work as "dismantle the existing [baghouse] and install [a] new [one] in the same location." It said that it would reuse the "existing . . . platform, access ladder and lower support structure" but that "[a]ll the rest of the [baghouse would] be fabricated new."

In addition, Brooks does not challenge the PCHB finding that "[t]he boiler was shut down for two weeks in August 2014. . . . During the shutdown, the old baghouse shell was removed from the Brooks site and the new one, fabricated by Superior out of stainless steel, was brought in and placed into the existing support structure."

³⁰ Buchheit v. Geiger, 192 Wn. App. 691, 696, 368 P.3d 509 (2016) (citing Cornu-Labat v. Hosp. Dist. No. 2, 177 Wn.2d 221, 231-32, 298 P.3d 741 (2013)).

³¹ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1925 (2002).

Dan Mahar testified that the “whole baghouse” was “basically rebuilt” and that the metal used was “a significant portion of the baghouse that makes it work and contains all the dirty air and functions to clean it.” The parts of the baghouse Superior did not exchange for new parts were “options that you add on there to make it convenient to service the equipment” such as the ladder or equipment that is “replaced on a regular basis,” such as the bags.

Using a plain dictionary definition of the word “replace,” the unchallenged findings and the evidence of Superior and Mahar show that Brooks’s baghouse work was a replacement subject to the application requirements of RCW 70.94.153.

Brooks Is Not Entitled To Operate Indefinitely under Its 1989 Permit

Brooks contends that it is entitled to operate under its 1989 permit indefinitely. It claims that “once a permit is issued, it is ‘good forever.’” As noted above, the legislature intended the Act to “secure and maintain levels of air quality that protect human health and safety” through “an intensive, progressive, and coordinated statewide program of air pollution prevention and control.”³² A “good forever” permit to emit pollutants would frustrate this purpose. Brooks makes no persuasive argument to the contrary.

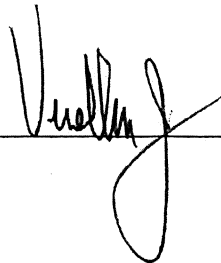
³² RCW 70.94.011.

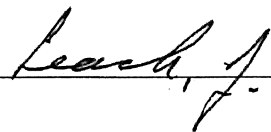
Instead, Brooks raises the specter of environmental review. It states that by filing a notice of construction application, it may trigger the State Environmental Policy Act³³ or that its baghouse may be subject to a reasonably available control technology analysis that could result in a change of its operating permit conditions. But the issue before this court is whether RCW 70.94.153 obligated Brooks to file a notice of construction. We conclude that it was. Brooks's fear of regulatory review has no place in our analysis.

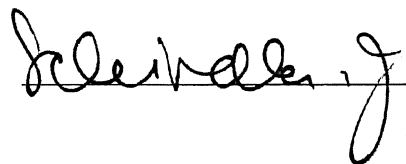
CONCLUSION

We affirm. Brooks fails to establish that the PCHB made a finding unsupported by substantial evidence or misapplied the law. The baghouse is emissions control technology, and Brooks replaced it. This action subjected Brooks to the requirements of RCW 70.94.153, which obligated it to file a notice of construction.

WE CONCUR:







³³ Ch. 43.21C RCW.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BROOKS MANUFACTURING CO.,)
a Washington corporation,)
)
Appellant,)
v.)
)
NORTHWEST CLEAN AIR AGENCY,)
)
Respondent.)
_____)

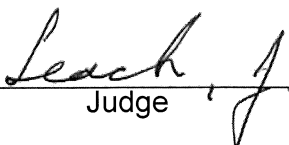
No. 79645-3-I

ORDER GRANTING MOTION
TO PUBLISH OPINION

The appellant, Brooks Manufacturing Company, having filed a motion to publish opinion, and the respondent, Northwest Clean Air Agency, having filed an answer, and the hearing panel having reconsidered its prior determination and finding that the opinion will be of precedential value; now, therefore, it is hereby:

ORDERED that the unpublished opinion filed September 16, 2019, shall be published and printed in the Washington Appellate Reports.

FOR THE COURT:



Judge

APPENDIX C

permit conditions. Brooks maintains that the work performed neither “substantially altered” or “replaced” the control technology.

II. ASSIGNMENT OF ERROR

Did the Pollution Control Hearings Board (and Superior Court on appeal) err in affirming the Northwest Clean Air Agency’s Notice of Violation and Corrective Action Order requiring Appellant to submit a Notice of Construction Application?

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the baghouse at issue in this case falls within the definition of “Emission Control Technology” in RCW 70.94.153?
2. If the baghouse at issue in this case is “Emission Control Technology,” did the work on the baghouse in 2014 constitute “Replacement or Substantial Alteration” under RCW 70.94.153?
3. Whether the Northwest Clean Air Agency’s interpretation of RCW 70.94.153 is contrary to the legislative intent of the Clean Air Act?

IV. STATEMENT OF THE CASE¹

A. Procedural History.

The Northwest Clean Air Agency (“Air Agency”) issued a Notice of Violation and Corrective Action Order (“Order”) to Brooks

¹ In addition to the typical clerk’s papers and transcript from Superior Court, the record on appeal here consists of the Certified Record from the PCHB and the Transcript of the two-day hearing before the PCHB. The administrative Certified Record is indexed and paginated separately from the clerks papers and will be cited herein as (CR ____). The Transcript from the PCHB hearing will be cited as (RP ____). The Clerk’s Papers will be

Manufacturing Co. dated December 15, 2014. (CR 911; FOF 25).² The Order required Brooks to submit to the Air Agency a “Notice of Construction” application (“NOC”) by January 30, 2015 for work it had done on a baghouse. Brooks timely appealed the Order to the Pollution Control Hearings Board (“PCHB” or “Board”). (CR 1-6).

In December 2015, the Board ruled on a summary judgment motion filed by the Air Agency. (CR 914). The Board dismissed one issue and then held that the evidence submitted was insufficient to determine “whether the work done on the baghouse required a Notice of Construction.” (CR 914; CR 843). The Board ordered an evidentiary hearing be held.

That hearing was held on January 19-20, 2016 in Tumwater. On March 4, 2016, the PCHB issued its Findings of Fact, Conclusions of Law and Order affirming the Air Agency’s issuance of the Order in December 2014. (CR 900-924).³

Brooks appealed the PCHB’s decision to the Superior Court of Thurston County via Petition for Review pursuant to RCW Chapter 34.05

cited as (CP ____) and Superior Court VRP as (Sup. Ct. RP ____).

² Citing CR 1196 (Hrg Exhibit R-11). A copy of the Order is attached to this brief as Appendix A.

³ The Findings of Fact, Conclusions of Law and Order are found at CR 900-924 and will be referenced by CR page number as well as referencing specific numbered finding (FOF) or conclusion (COL).

et seq. (CP 6-11). A hearing was held on August 25, 2017 where the Hon. Judge Skinder affirmed the PCHB's Decision. (CP 162). His oral decision was formalized by entry of an Order on October 12, 2017. (CP 163-164). A Notice of Appeal to this Court was timely filed on October 30, 2017. (CP 165-167).

B. Facts.

1. Brooks's Wood-Fired Boiler System. The Brooks facility is located in Bellingham and manufactures engineered wood products for utilities. (CR 901, FOF 1). It manufactures virtually all wood parts of a telephone pole or the transmission structure, including crossarms and bracing, but not the poles themselves. (*Id.*; RP 220). This manufacturing process results in Brooks creating a significant amount of wood shavings by-product. (*Id.*, FOF 2).

Brooks uses steam to run the kilns for drying lumber. (*Id.*). This steam is generated by a boiler, which up until 1989, burned natural gas. (*Id.*). In 1989, the boiler was converted to burn the wood shavings Brooks was generating. (*Id.*). This conversion required Brooks to obtain approval from the Air Agency because burning wood shavings produces "combustion products" which is a contaminant regulated by the Air Agency. (CR 901, FOF 3). The 1989 application and permit file,

including the permit itself (“1989 Permit”), are part of the record on appeal. (CR 1072-1175).⁴

Converting the boiler from gas to wood burning required a complete system designed to control the emissions. (RP 256; CR 1125). “Pollutant reduction is accompanied [sic] in several ways. First, the burner design utilizes uniform wood particles at low moisture content...Secondly, the particle collectors in a series, a multi-clone and baghouse, are employed to remove the particulate matter remaining...” (CR 1125). The system starts with a structure that enabled Brooks to store the wood shavings. (RP 256).⁵ The wood shavings are ground into a fine particulate matter, the consistency of flour. (RP 256; RP 222). The wood fuel is not permitted to exceed 10% moisture content, to ensure complete combustion. (CP 1125). The powder is then blown into the “flash gasifier” and burned. (RP 256; CR 1085 -1092). The emissions from the boiler are controlled by a “multi-clone” and a “baghouse.”

John Mitchell, Brooks’s Technical Director, provided a comprehensive description of the system. (RP 220-227; CR 1016–1031(Exh. A15-A3 photos); also attached hereto as Appendix C. The

⁴ The 1989 Permit that was issued is found at CR 1122-1123, a copy of which is attached hereto as Appendix B. At that time, permits were issued in a letter form and not given a number.

shavings from the drills, planers, and other manufacturing equipment are deposited into a large silo. (RP 220; 222; CR 1016-1020 (photos)). The shavings are moved with air pressure from fans and placed into a grinder. (RP 222). The wood powder is then blown into the gasifier where it is burned. (RP 223-224).

The exhaust gases created by the combustion are directed up and then over a neighboring building, into a heat exchanger or “economizer.” (RP 224-225; CR 1021-1026 (photos)).⁶ The air is then pulled through an induction draft fan (“ID fan”) and sent to the multi-clone. (RP 226; CR 1025-1027 (photos)). After the multi-clone, the exhaust air is blown downstream to the baghouse. (RP 226-227).

A multi-clone consists of multiple cyclones which set the exhaust air into a spiral motion. (CR 903; FOF 7). This removes larger particles from the air, including those that are still burning/embers. (*Id.*). A collector and airlock are located at the bottom of the multi-clone to collect and empty the particles removed. (RP 226). The multi-clone serves to both clean the exhaust air, as well as foster fire prevention by keeping

⁵ A schematic of the entire system from the original permit file is found at CR 1077.

⁶ The heat exchanger was not part of Brooks’s original 1989 permit; it was added later by wood-fired boiler expert Dave Sharpe. (RP 325-326). The heat exchanger cools the exhaust air to reduce the chance of fire, and it pre-heats the water going into the boiler. (RP 225-226).

embers from the baghouse. (CR 903; FOF 7). Dave Sharpe, an industry expert on the design, manufacture, and installation wood-fired boilers and their exhaust systems (and who worked on Brooks's system in the past), testified a multi-clone is virtually required prior to a baghouse on a wood-fired boiler. (RP 323-326).

A baghouse is essentially a large filter. (CR 903; FOF 8). The baghouse at Brooks is a 121 bag pulse-jet baghouse (herein "Baghouse"). The Baghouse itself is a collector housing which holds the exhaust air around filter bags. *Id.* The bags are held in place by a "tube sheet" with cages that the bags are slipped over. (RP 83).⁷ The bags are the filters. (RP 86-87; CR 903, FOF 8). The Baghouse is called a "pulse jet" because pulses of compressed air knock particulate off of the bags. *Id.* Too much particulate on the bags will cause the Baghouse to not work as efficiently and cause back pressure. *Id.* The pressure differential between the top plenum (after the bags) and the collector housing (before the bags) is measured by a device called a "magnehelic." The particulate that is knocked off the bags falls into the hopper and is automatically removed

⁷ The Air Agency introduced a cut-away diagram that depicts the Baghouse and its components. (CR 1246). This diagram was identified as accurate, but-for the date, as the work on Brooks's Baghouse took place in 2014, and the fact that the outer skin of the Baghouse was replaced in 2007 as well. (RP 85 (objection); RP 269-271 (Doug Reynolds re: 2007 maintenance)).

from the Baghouse through the airlock. *Id.* The clean air then exits the top of the Baghouse.

2. Maintenance of the Boiler System including the Baghouse. Doug Reynolds has been in charge of maintenance for Brooks since 1999, working for Brooks for 30 years in varying capacities. (CR 905, FOF 13; RP 263). Maintenance of the entire system at issue here falls within his duties. *Id.* Reynolds explained that on a daily basis, the millwrights check and record the pressure readings on the magnehelic, the inlet temperature, and the air receiving tank. (*Id.*; RP 264). They also check the Baghouse pulse jets to see if they are pulsing correctly, check the bottom hopper to ensure ash is coming out of the Baghouse properly, and examine the ash to ensure it is the proper color. They then observe the exhaust gas emitting from the Baghouse to see if there is any observable particulate. *Id.*

On a monthly basis, millwrights review the logbook and all the daily magnehelic readings to ensure that the readings are not too low or too high. (CR 905, FOF 13; RP 265). An elevated magnehelic reading typically means the bags are not being pulsed or cleaned adequately. (RP 266). If this happens, Brooks employees would open the top of the Baghouse and make sure the pulses of air are properly cleaning particulate

off the bags. (RP 265). They would re-examine the ash, to ensure it is exiting the airlock correctly, and open the bottom of the hopper to see if ash is clinging to the sides. (RP 266). If, on the other hand, the magnehelic readings were too low they would shut the system down completely and do a detailed internal inspection. (RP 267).

The entire boiler system is completely shut down at least once a year. (CR 905, FOF 13). The boiler is opened up, and the combustion chamber is inspected and changed out if necessary. (RP 268). The Baghouse is opened and inspected in its entirety for corrosion, which is an ongoing maintenance consideration. (CR 905, FOF 13). Bags are removed and inspected and, if need be, cleaned or replaced. The bags and cages are replaced every two to four years. *Id.*

3. Details of the 2007 and 2014 Work on the Baghouse. In 2007, Brooks observed that the Baghouse was suffering from significant corrosion, and rust was causing deterioration in the Baghouse outer skin and the hopper. (CR 906, FOF 14). Doug Reynolds contacted Superior Systems, Inc. to evaluate the options for repairing the Baghouse. (RP 269). Superior Systems eventually submitted a written bid/proposal to repair the problems; that letter stated that they offered to “supply & install a replacement baghouse.” (CR 906, FOF 14, Exh. R-4 at CR 1176-77).

Mark Wolfe, part owner of Superior Systems and the man who wrote that bid letter, had no knowledge of the regulations and was not using the word “replace” in that context. (RP 300). He testified he could have easily written “a replacement of these parts on your baghouse.” (RP 316).

The work by Superior was done on the Baghouse in July 2008. (CR 906, FOF 15). The Baghouse/Boiler logbook that Brooks maintains pursuant to the 1989 Permit contains an entry on that date indicating the boiler was shut down and a “New Ash Baghouse” was installed. (*Id.*; CR 930 (Exh. A-1)). The work that was done replaced the walls and exterior skin of the Baghouse, due to rust. (RP 270). Many parts were re-used: the ladder and catwalk, the sprinkler system, some of the purge parts, the airlock, the magnehelic, the support structure, the receiver tank for compressed air, and the electronic controls for the pulse system. (RP 270-271). The repair work done on the Baghouse in 2007 allowed Brooks to re-use all of the piping and inlet configuration.

Superior Systems has designed, installed, and manufactured baghouses since 1980. (CR 298-299). The company is part owned by Mark Wolfe and was started by his father. (*Id.*).⁸ He testified that prior to doing the work, he and a co-worker spent the better part of a Saturday

⁸ Mark Wolfe’s qualifications as an expert are found at CR 1058, and his background

crawling around the Baghouse and measuring every component to within 1/8th of an inch.⁹ (RP 301-302). He made field drawings, which were then turned into detailed shop drawings. (RP 303). Superior's file and drawings are detailed in Exhibit A-31. (CR 1035-1055).

In 2013, Doug Reynolds again noticed that the Baghouse was experiencing extreme corrosion. (RP 272; CR 906, FOF 16). The top tube sheet and inner walls were rusting badly. (RP 272). Parts of the rust were dropping down and falling into the airlock, making it malfunction. (RP 272). He again reached out to Superior Systems, this time working with Trev Summerfelt. Summerfelt worked with Reynolds to figure out what parts needed to be re-manufactured and reinstalled again. (RP 273; RP 287). Summerfelt wrote a letter in 2013, which was basically copied from Mark Wolfe's 2007 letter. (RP 286-87). In using the word "replace," he too was not considering any regulations or statutes. (RP 286-87). Superior Systems suggested that to combat corrosion, this time, they use stainless steel rather than mild steel. (RP 272-273).

Trev Summerfelt used Mark Wolfe's drawings from 2007 to create his 2013 job file. (RP 288). They were the same shop drawings, just with

testimony at RP 298.

⁹ FOF 19 outlines the detail and exact replica nature of the parts manufactured and installed by Superior Systems.

new dates and a few new markings indicating “stainless steel.” (RP 289-90). The point of the 2013 job was to re-use as much of the existing parts as possible, to save on costs. (RP 287).

The work Superior Systems bid in 2013 was performed in August 2014, during the routine summer maintenance shutdown. (CR 907, FOF 17; RP 232). The installation took approximately three days of the annually scheduled two-week shutdown. (*Id.*). Summerfelt agrees with the Air Agency’s Exhibit R-31 (CR 1246) that the yellow highlighted portions represent what was replaced. (RP 291). He did note in testimony that while the 2013 bid indicated “bags and cages” were replaced, they were not. (RP 295).¹⁰ His boss, Mark Wolfe testified that in 2014, “We didn’t change anything that would affect the performance ... same bag[s], same cages, same cleaning cycle, same stand, everything bolted right back up to it. We just replaced the parts that needed to be replaced so that they could continue to operate the way it’s supposed to.” (RP 320).

4. November 2014 Inspection and Notice of Violation. The Air Agency conducted its standard annual compliance check/inspection of

¹⁰ Finding of Fact No. 19 by the Board appears to be accurate, but-for the statement: “all parts that come into contact with exhaust air were replaced...” (CR 908). It is undisputed that while the 2013 bid for the work done in 2014 listed that bags and cages were to be replaced, the bags and cages in fact were *not* replaced in 2014. (RP 295; RP 322).

Brooks on November 19, 2014, when inspector Bob Uhrich showed up at the facility. (CR 908, FOF 20). At the beginning of the inspection, Uhrich met with Brooks's Technical Director, John Mitchell, and reviewed the equipment the Agency had documented with details from the last inspection. (*Id.*). Uhrich asked Mitchell his standard questions about the facility, and Mitchell responded that there had been a "like-for-like" replacement of parts on the Baghouse. (*Id.*).¹¹ Mr. Uhrich proceeded with his inspection, and observed the Baghouse, noting it appeared that work had been done. (CR 909, FOF 21). He did not ask Mitchell what specific parts were repaired or replaced, and he does not recall if he asked him how much the work cost or what a new baghouse would cost. (RP 38-39; RP 229).

To prepare for his inspection, Mr. Uhrich used the Air Agency's "Source Information Sheet" which lists the Source's equipment. (RP 22; RP 45). Brooks is a minor "source" in Air Agency terminology. (RP 97). He then uses the previous year's inspection report as a template for how to conduct the current inspection. (RP 22; CR 1185 (Exh. R-8)). He

¹¹ The record reflects that Uhrich believes Mitchell said "replacement" because that is what appears in his report, but neither have a specific recollection of what was specifically said. (RP 37-38 (Uhrich)).

handwrites notes on this template, enters the information into the computer back at the office, and discards his notes. (RP 36).

Uhrich did not determine whether Brooks had violated any regulations or laws. Instead, he filled out a form entitled “NWCAA Case Investigation for NSR Determination.” (CR 909, Finding 22; RP 25-26; CR 1192 (Exh. R-9)). He forwarded the form to Dan Mahar, who is the “new source review lead” at the Air Agency. (*Id.*; RP 26; RP 125). Uhrich gave the form to Dan Mahar; the information Mr. Mahar had was very limited. (CR 909, FOF 22; RP 42-43; RP 137).

Dan Mahar reviewed the one-page NSR Determination form in which Uhrich had said that the facility (Brooks) told him it was a “like-for-like replacement for the Baghouse that was permitted March 10, 1989...” (CR 910, FOF 23). The NSR Determination form stated that it was the “same design and size, with the only difference being it was constructed of stainless steel.” (*Id.*). From this small bit of information, Mahar determined that Brooks needed to submit an NOC Application. (*Id.*). Mahar handwrote his determination at the bottom of the NSR Determination form “Replacement of existing control device is required by NWCAA 300.13.” (CR 1192). He noted that the Brooks Baghouse

“replacement” was similar to one recently done at Mt. Baker Products in Bellingham.

At hearing, Mahar admitted that the only similarity between Brooks and Mt. Baker Products was that they were both in Bellingham, they both have wood-fired boilers, and they both have a multi-clone followed by a baghouse. (RP 138-139). In actuality, the Mt. Baker Products baghouse replacement (where an NOC was submitted) clearly involved replacing or substantially altering emission control technology; three baghouses were replaced with two new and differently designed baghouses. (RP 109; CR 956-968 (Exh. A-9)). Superior Systems (who did the work) detailed how the work at Mt. Baker was nothing like that done at Brooks. (RP 305-308).

Based on Mahar’s determination, Uhrich prepared an enforcement report which was then reviewed by Uhrich’s supervisor, Air Agency Compliance Director and wife of Dan Mahar, Toby Mahar. (CR 910, FOF 24). Toby Mahar (having the same information Dan Mahar had) agreed with Dan Mahar’s determination, because a “significant portion of the baghouse had been replaced.” (*Id.*). The Order that is the subject of this appeal was issued shortly thereafter. (CR 911, FOF 25).

5. The Air Agency Inconsistently Applies the Law. Before the PCHB, the Air Agency argued that Brooks had an obligation to call the Air Agency to determine if a NOC was required. However, Brooks's history with the Air Agency, as well as a review of the Agency's historical application of the applicable law, demonstrates that Brooks was reasonable in not even considering an NOC Application would be required.

a. 2001 New Baghouse at Brooks. Brooks has more than one baghouse. Prior to 2001, Brooks had a wood bunker with four cyclones for controlling the sawdust from its planer. (RP 273-275). In 2001, Brooks replaced the three cyclone system with a baghouse that worked much better. (RP 275). The old cyclone system was one of the control devices at Brooks. (RP 45-46; CR 932-936 (Exh. A-3)). In 2001, Bob Uhrich, then a new employee at the agency, performed an inspection of Brooks. (RP 44; CR 932-936 (Exh. A-3)). During that inspection he discovered that Brooks had removed the cyclones and built a new baghouse. (RP 46). Uhrich explained that the Source Information Form on the left column shows the emission source, and on the right column the control device(s) associated with that source. (RP 46). The Source Information Sheet from 2001 shows the "Saw and Planing Area" used the

four cyclones; the form has handwritten marks and notations indicating “new baghouse 2001.” (CR 932).

In an email to Toby Mahar in July of 2015, Uhrich explained what he recalled from that situation. (CR 931; RP 47). The email states:

...I found they had installed a new baghouse (Superior Systems 416 bag w/ reverse pulse) on 3/5/02 during that year’s inspection. I remember talking to Lester about it and asking if they needed a permit. At that time he said that it was ok. That determination changed over the course of several months in the office. Review of NSR rules and discussions in-house made it clear that Like-for-Like replacements did require NSR. During my next annual inspection (4/29/03) at Brooks I discussed with them the change in determination and mailed them a NOC packet on 4/30/03. That is why there is a discrepancy in the amount of time it took between discovery and their submittal of the application. (CR 931)

Uhrich admitted that his use of the phrase “like-for-like” was incorrect. (RP 47).

Uhrich’s April 29, 2003 Source Information Sheet states “1/18/02 - Julie spoke with John Clark about submitting a packet for the baghouse that was installed without a permit so that our tech staff could review the project and determine if a permit was required.” (CR 942). “Julie” is Julie O’Shaughnessy, the Compliance Manager at the time, and Toby Mahar’s predecessor. (RP 48). This baghouse was ultimately permitted after the fact, and no violation or corrective orders were issued. (RP 48).

b. 2002 Demister Reconfigured. The Brooks facility pressure treats much of the wood it manufactures. Pressure treating requires placing that wood into a large pressure chamber, called a “retort.” (RP 48-49). One end of the retort opens, and the lumber is put inside for treatment, which uses diesel as a carrier oil. (RP 50). When the pressure is released from the retort, air containing those pollutants is released and must be cleaned. The demister is the control device used to clean that air. (CR 932; RP 277).

In 2002, the demister was reconfigured. The previous version was made up of wood and metal and had a water containment pit at the bottom. (RP 277). The demister would run heated water down all four sides of the cooling tower where the retort fumes would be pushed through by a fan. (*Id.*). The fumes passing through the cooling water would cause the contaminants to drop down into the containment area. The water would then be pumped back up and reheated. (RP 278). A fan at the top helped with the evaporation. (*Id.*)

The demister was reconfigured into a “fume condenser.” (RP 279). The exhaust gas is now pulled through a series of two-inch tubes, which are cooled with cooling fans and a water spray on the outside. (RP 279). The contaminated air, at about 180 degrees, is put through the tubes and

quickly cooled, which causes the contaminants to condense out and fall into the bottom, where they are collected and recycled for use in the retort. (RP 279).

Bob Uhrich again inspected Brooks's facility in April of 2003. In his compliance report from that inspection on (CR 944 (Exh. A-5)), he wrote:

Demister was moved from a horizontal to vertical tower configuration and now uses three cooling fans in a rebuilt plenum. System uses the same demister path and expansion chamber. The purpose of the modification was for maintenance reasons, though, efficiency has been increased according to Clark. Discussed the modification with Lynn Billington and she said that an NOC application would not be necessary since the modification was for maintenance and was not a substantial alteration of emission control technology as defined in WAC 173-400-114. (emphasis added).

Lynn Billington was the Director of Engineering at the Air Agency at the time of this inspection. (RP 51). No NOC was required for this "reconfiguration" of the demister, because it was deemed "maintenance" by the Air Agency. (RP 51).

c. Oeser Company Cyclone Replaced. Oeser Company pressure treats telephone poles in Bellingham. (RP 54-55). In March 2002, Bob Uhrich inspected their site, which at the time had a cyclone as the air pollution control device for a hog fuel hopper. (CR 1056; CR 1057); RP 55-57). Uhrich indicates in his report that the

cyclone was replaced for maintenance purposes during the previous year. (RP 55). No NOC was filed for this replacement cyclone, and no violations were issued. (RP 55; RP 57).

V. STANDARDS OF REVIEW

A. **Appellate Review of Superior Court.**

This Court stands in the shoes of the superior court, reviewing the underlying agency's order, not the superior court's decision. *Pal v. Washington State Dep't of Soc. & Health Servs.*, 185 Wn. App. 775, 780–81, 342 P.3d 1190 (2015).

B. **The Administrative Procedures Act.**

Judicial review of the Pollution Control Hearings Board is governed by the Administrative Procedure Act (“APA”). *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004). Judicial review is confined to the administrative record below. *Id.*, and RCW 34.05.558. The burden of demonstrating invalidity of the agency action is on Brooks. RCW 34.05.570(1)(a). The agency action is subject to reversal if it meets one of the standards met in RCW 34.05.570(3). *Port of Seattle*, 151 Wn.2d at 587-89.

This appeal specifically raises errors under RCW 34.05.570(3)(d) “The agency has erroneously interpreted or applied the law” and RCW

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