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**COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON

NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION, a
non-profit trade association,

Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Appellant.

**BRIEF OF RESPONDENT, NATIONAL ELECTRICAL
MANUFACTURERS ASSOCIATION**

K&L GATES LLP

John Bjorkman, WSBA #13426
Ben Mayer, WSBA #45700
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
Telephone: 206-623-7580
Facsimile: 206-623-7022
John.Bjorkman@klgates.com
Ben.Mayer@klgates.com

Attorneys for Respondent,
National Electrical
Manufacturers Association

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I. INTRODUCTION

Energy-efficient electrical lighting systems (“ELS”)¹ are an integral part of the United States’ efforts to conserve energy and reduce emissions of carbon dioxide, mercury, nitrogen dioxide, and other pollutants. CP 64 (Kohorst Decl., ¶5). Lighting consumes up to 17% of the electrical energy generated for residential and commercial purposes in the United States. *Id.* Under normal operating conditions, energy-efficient ELS use 70-80% less electricity than traditional incandescent lighting. *Id.*² When fossil fuels such as coal and natural gas are used to generate electricity, use of ELS thus helps reduce smog, acid rain, and the emission of heat-trapping climate change gases. CP 65 (Kohorst Decl., ¶6).

Importantly, coal-burning electrical generation plants emit mercury. According to both the United States Environmental Protection Agency and the Department of Energy, the use of ELS over traditional

¹ For purposes of this case, ELS include mercury-containing high-intensity discharge lamps, linear fluorescent lamps (the familiar elongated tubes widely used in retail, office, and industrial applications) and compact fluorescent lights. CP 64-65 (Kohorst Decl., ¶3).

² Ecology’s claim, Opening Br., 6, that Congress has phased-out “standard” incandescent bulbs could be easily misunderstood. Congress has mandated increased energy efficiency requirements for incandescent bulbs which are, and will remain, widely available. 10 C.F.R. § 430.32(x); *see also* U.S. Dep’t of Energy, Frequently Asked Questions: Lighting Choices to Save You Money, <http://energy.gov/energysaver/articles/frequently-asked-questions-lighting-choices-save-you-money>.

incandescent lights reduces overall mercury emissions by up to 70% per equivalent unit of light output, irrespective of the method of disposal of the spent lamp. *Id.* Thus, even if consumers improperly disposed of all of their spent ELS, the amount of mercury released to the environment would still be much less than if the ELS had not been used at all.

As a matter of technical necessity, mercury remains “an essential component of many energy efficient lights.” RCW 70.275.010(1) and CP 65 (Kohorst Decl., ¶7). Producers have evaluated substitute materials, but they do not produce the energy efficiency that the small amount of mercury achieves. CP 65 (Kohorst Decl., ¶7). Notwithstanding this fact, over the past two decades, the members of Respondent National Electrical Manufacturers Association (“NEMA”) have reduced the amount of mercury in energy-efficient ELS by over 80%, and in some fluorescent lamps by up to 92%. *Id.* (Kohorst Decl., ¶8). For example, compact fluorescent lights now typically contain less than 3 milligrams of mercury, an amount that easily sits on the tip of a ball point pen, and some as little as 1.5 milligrams or less. *Id.*

In 2010, Governor Gregoire signed into law Engrossed Substitute Senate Bill (“ESSB”) 5543, Chapter 130, Laws of Washington 2010, now codified at Chapter 70.275 RCW (the “Law”). The Law provides that every ELS producer must participate either in what the Department of

Ecology (“Ecology”) calls its “Standard Plan” recycling program or in an “Independent Plan” program. RCW 70.275.030(2)(a), (b); WAC 173-910-100 (definitions). Ecology contracts with a private product stewardship organization to run its Standard Plan program and a producer or group of producers would design and implement their own Independent Plan program. RCW 70.275.050; CP 178-79 (Steward Decl., ¶2-3). While the law contains a single reference to a general obligation on the part of every producer to “fully finance” the program in which it participates, the Legislature specifically caps Standard Plan producers’ full costs at \$15,000 per year. RCW 70.275.050(2) (“Each producer shall pay fifteen thousand dollars to the department to contract for a product stewardship program to be operated by a product stewardship organization.”) (emphasis added). Ecology is to “retain” \$5,000 of this annual fee for its administration and enforcement costs, and use the \$10,000 balance to contract with the private product stewardship organization for the Standard Plan program. *Id.* The Law does not authorize Ecology to charge Standard Plan producers in excess of \$15,000 per year.

The Legislature anticipated that the recycling program would develop over a period of many years. RCW 70.275.010(3). As such, the Law directs Ecology to report back annually to the Legislature on progress made and possible changes to the Law. RCW 70.275.140(3) - .140(6). In

light of the capped amount of annual funding, the Legislature also recognized that in some years annual fees might not generate enough funding to implement the most comprehensive Standard Plan program. In anticipation of this fact, the Legislature authorized Ecology to prioritize the Standard Plan's recycling work to match the available funds. RCW 70.275.120 (“The department [of Ecology] may prioritize the work to implement this chapter if the fees are not adequate to fund all costs of the program.”) (emphasis added). The Legislature did not authorize Ecology to write a Rule increasing the amount of this fee. In fact, as the legislation moved through committee, the Legislature expressly removed this power from Ecology (*see* Section III.E, pp. 35-39 below). In its testimony during the legislative process and in its official documents after enactment, Ecology repeatedly acknowledged that the \$15,000 fee was a capped annual fee and that if Ecology found the funding to be insufficient, its remedy was to report back to the Legislature (*see* Section III.D.ii, pp.25-26 below).

When Ecology promulgated Washington's new Mercury-containing Lights Product Stewardship rule, Chapter 173-910 WAC (the “Rule”), however, it created a funding mechanism for the Standard Plan program that completely ignored the \$15,000 cap on annual fees, the Law's instruction to report back annually regarding progress made and

possible changes to the Law, and the Law's directive to prioritize work to implement the chapter if fees are inadequate. Instead, Ecology wrote a Rule that imposed significantly higher fees on producers based upon their relative market share. CP 341 (uncontested Finding of Fact No. 5). While Ecology claims its Rule merely "fills the gap" in an otherwise ambiguous statute, as shown below no such ambiguity exists. Ecology's Rule instead improperly attempts to rewrite the Law and to strike a different balance between program scope and cost than the Legislature chose.

For these reasons, NEMA asks this Court to affirm the trial court's declaratory judgment invalidating portions of Ecology's Rule as beyond its statutory authority.

II. ISSUES PRESENTED

1. Whether Ecology exceeded its statutory authority by adopting a rule requiring Standard Plan producers to pay a fee in excess of the Law's express \$15,000 annual cap.
2. Whether Ecology has properly assigned error to essential trial court findings and conclusions.

III. ARGUMENT

A. Standard of Review

While the party contesting the validity of an agency rule carries the burden of proof, *Wash. Fed'n of State Emps. v. State Dep't of Gen.*

Admin., 152 Wn. App. 368, 378, 216 P.3d 1061 (Div. 2, 2009), courts possess ultimate authority to interpret statutes. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 716, 153 P.3d 846 (2007). “When reviewing an agency’s interpretation or application of a statute, [a court] uses the error of law standard and may substitute its interpretation of the law for the agency’s.” *Densley v. Dep’t of Ret. Sys.*, 162 Wn.2d 210, 217, 173 P.3d 885 (2007) (citations and quotations omitted). A reviewing court defers to an agency’s interpretation of a statute only if the agency is charged with its enforcement, the statute is ambiguous, and the statute falls within the agency’s expertise. *Bostain*, 159 Wn.2d at 716. The funding provision of RCW 70.275.050(2) is neither ambiguous, nor does Ecology have any particular expertise regarding it. The \$15,000 cap on Standard Plan fees is a simple legislative mandate that has nothing to do with the agency’s ecological sciences capabilities. Even if this Court were to find the statute ambiguous, it is not obligated to give any particular consideration to Ecology’s interpretation.

Washington law is settled that “[a]dministrative agencies are creatures of the legislature without inherent or common-law powers and may exercise only those powers conferred either expressly or by necessary implication.” *Human Rights Comm’n v. Cheney Sch. Dist.*, 97 Wn.2d 118, 125, 641 P.2d 163 (1982) *quoting with approval State v. Munson*, 23

Wn. App. 522, 524, 597 P.2d 440 (Div. 2, 1979) (invalidating Commission decision to award damages as beyond its statutory authority). The same rule applies in the context of agency rule making: “An agency may not promulgate a rule that amends or changes a legislative enactment.” *Edelman v. State of Wash., ex rel Public Disclosure Comm’n*, 152 Wn.2d 584, 591, 99 P.3d 386 (2004) (invalidating Public Disclosure Commission rule on campaign contribution limits by organizational affiliates). As provided for in the Administrative Procedure Act, RCW 34.05.570(2)(c), “[i]f an enabling statute does not authorize either expressly or by necessary implication a particular regulation, that regulation must be declared invalid despite its practical necessity or appropriateness.” *Wash. Indep. Tele. Ass’n. v. Telecomms. Ratepayers Ass’n*, 75 Wn. App. 356, 363, 880 P.2d 50 (Div. 2, 1994) (invalidating Utilities and Transportation Commission rule regarding Community Calling Fund fees as outside of the agency’s statutory authority).

Our Supreme Court has not hesitated to invalidate Ecology’s rules that exceed its statutory authority. *Swinomish Indian Tribal Community v. Wash. State Dept. of Ecology*, No. 87672-0, 2013 Wash. LEXIS 768 (Wash. Oct. 3, 2013) (invalidating amended rule reserving water from the Skagit River system as inconsistent with statute); *Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 428, 833 P.2d 375 (1992) (invalidating

Department of Ecology rule under Model Toxics Control Act, Chapter 70.105D RCW, that was beyond its statutory authority).

B. Ecology's Appeal is Narrowly Limited to Two Issues.

Ecology makes only two assignments of error, neither of which challenges a specific Finding of Fact as RAP 10.3(g) requires. Therefore, all Findings are deemed verities on appeal. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 692, 41 P.3d 1175 (2002). Relevant to this appeal is the undisputed fact that "Ecology's Rule ... will result in annual fees to some producers well in excess of \$15,000." CP 341 (uncontested Finding of Fact No. 5). Thus, if this Court holds the Legislature intended to cap Standard Plan fees at \$15,000 per year, Ecology's Rule necessarily exceeds its statutory authority and the Court should affirm the trial court.

Ecology's Assignments of Error and Issues Pertaining to Assignments of Error uniformly challenge only the \$10,000 portion of the \$15,000 Standard Plan fee that RCW 70.275.050(2) requires. Opening Br., 4-5. Thus, under no reading of its brief has Ecology appealed Conclusions of Law 2 and 5 with respect to the \$5,000 portion of the \$15,000 fee that Ecology retains for its administrative and enforcement activities:

2. The Legislature intended the \$15,000 fee set out in RCW 70.275.050(2) for producers participating in Ecology's Standard Plan program to be an annual fee, and to be the only fee that producers owe each year to participate in the Standard Plan program.

5. Pursuant to RCW 70.275.050(2) and Chapter 70.275 RCW generally, Ecology has no statutory authority to set annual fees above \$15,000 for producers participating in its Standard Plan.

CP 342 (Conclusions of Law 2 and 5). Therefore, it is the law of the case that this portion of the fee is annual and capped at the \$5,000 amount.

King Aircraft Sales, Inc. v. Lane, 68 Wn. App. 706, 716-17, 846 P.2d 550

(Div. 1, 1993) ("An unchallenged conclusion of law becomes the law of

the case.") (citations omitted); *see also Greater Harbor 2000 v. City of*

Seattle, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997) (appeal dismissed

because appellant failed to assign error to trial court's finding on summary

judgment that "no genuine issue of material fact [existed] on any of the

causes in General Harbor's Complaint.") (addition original). This leaves

the balance of Ecology's appeal regarding the \$10,000 portion of the fee

difficult for the Court to reconcile. The Legislature intended either all of

the \$15,000 fee to be annual and limited to that amount, or none of it, but

now the best Ecology can achieve is a mixed result in which the Court's

decision would, in effect, re-write the Law. This Court should affirm the

trial court if for no other reason than Ecology's assignments of error leave

the Court unable to render a legally consistent decision in its favor.

Ecology did not assign error to Conclusion of Law No. 4 (Opening Br., 4-5) nor discuss it in its brief (*e.g.*, Opening Br., 29-33):

4. As used in RCW 70.275.120, “the work to implement this chapter” includes all of the Standard Plan program work and not merely Ecology’s administration and enforcement.

CP 342. As the law of the case, this Conclusion is fatal to Ecology’s argument (Opening Br., 29-33) that the second sentence of RCW 70.275.120 is limited to prioritizing its own administration and enforcement costs (*see* Section III.E, pp. 27-39 below). Thus, this Court should proceed to decide this appeal assuming that the Law requires Ecology to prioritize all Standard Plan program work if the fees generated are insufficient.

Finally, Ecology did not assign error to Conclusion of Law No. 7 (Opening Br., 4):

7. The Law as presently drafted does not entitle Ecology to collect market share data from producers.

CP 343. While Ecology made an oblique reference to market share data in its first Issue Pertaining to Assignment of Error, it did so only in the context of its claimed ability to “fill a gap” in the Law with this obligation. Opening Br., 5. But the law of the case is that Chapter 70.275 RCW does not allow Ecology to collect market share data – there is no gap to fill. Thus, regardless of the balance of its decision, this Court should affirm the trial court as to its decision that Ecology may not collect market share data or apportion costs based upon market share.

C. Ecology Misconceives This Law as a Mandate to Require Recycling of All Energy Efficient Mercury-Containing Lights at Any Price.

Ecology and NEMA disagree about the full scope of the Law. While the Legislature created a robust recycling obligation, it placed necessary limits on these programs and what producers had to pay. Its reason was to avoid driving producers of these socially beneficial products out of the Washington market by making them unprofitable to sell.³ The Legislature set a “goal” of recycling all mercury-containing ELS by 2020; it did not provide Ecology a mandate to write a Rule that guaranteed this result at any price. RCW 70.275.010(3). Producers are to play a “significant” role, not an exclusive role, in funding the Standard Plan recycling costs. RCW 70.275.010(4).⁴ For example, the Legislature did not include within the Standard Plan an obligation that producers pay for the more convenient (and more expensive) options of mail-back and curbside collection of spent ELS. RCW 70.275.030(3). The Legislature defined the obligation of “product stewardship” to be to “manage and

³ It is not helpful to suggest producers can simply pass the cost of the recycling programs on to consumers. There are other available lighting options, including incandescent lights, and the price of ELS must remain competitive to encourage consumers to switch and to realize their energy-saving and pollution-reducing benefits.

⁴ Ecology’s suggestion that this limitation relates to other spent lamp collection programs, Opening Br., 33 and n. 11, does not follow. “[N]o-cost collection programs” (*i.e.*, no cost to consumers) are the Standard Plan and Independent Plan programs, not the other more convenient fee-based programs to which the Law refers.

reduce,” not eliminate, health, safety and environmental risks. RCW 70.275.020(14). As discussed in detail below, the Legislature also established a cap of \$15,000 for producer fees for the Standard Plan, imposed on Ecology an obligation to prioritize program work if the funding were insufficient in any given year, and directed Ecology to report back about recommended changes to the Law if funding was inadequate.

Ecology claims the \$290,000 that these capped fees generated is “grossly inadequate” or will “cripple” its efforts to implement the Standard Plan program. Opening Br., 3, 29. Ecology, however, did not raise this issue below and therefore may not do so on appeal. *Peoples Nat'l Bank for Wash. v. Peterson*, 82 Wn.2d 822, 829-30, 514 P.2d 159 (1973) (applying the general rule that issues and theories not raised in the trial court cannot be raised on appeal). Further, Ecology cites to nothing in the record to support this assertion other than the fact that the Plan that its contractor did design cost much more. Opening Br., 3, 29. But Ecology admits, for example, that its Standard Plan contractor set up 191 collection sites throughout the State, Opening Br., 11, more than double

the minimum that the Law requires.⁵ There is no evidence that the Law requires everything Ecology and its contractor designed into their Standard Plan, nor is there evidence that \$290,000 is an insufficient amount for Ecology to run a functionally compliant Standard Plan program.

Instead, the undisputed record demonstrates that even the \$10,000 portion of the fee to be used to fund the Standard Plan program costs caused some producers to abandon sales in our State. In 2010, Ecology invoiced over 100 potential producers and only 32 responded and paid the \$5,000 administrative portion of the fee. CP 179 (Steward Decl., ¶4-5). In January 2012, Ecology invoiced 53 producers for the \$10,000 balance and only 29 were still selling ELS in Washington and willing to pay the fees. CP 180 (Steward Decl., ¶6-7). According to Ecology's Program Lead for the ELS recycling programs, "[s]everal of these companies discontinued sales in Washington in order not to pay the fees required by law." CP 184 (Steward Decl., ¶15).

⁵ The Law mandates a collection center in each county and in each city with a population over 10,000. RCW 70.275.030(5). According to the 2010 census, there are 74 such cities in Washington, <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>, and 16 counties without a city that size. 31 2013 Washington State Yearbook 137-72 (Scott D. Dwyer & Mary B. Dwyer eds.). Courts may take judicial notice of undisputed matters of public record such as census information and population statistics. *State v. Balzer*, 91 Wn. App. 44, 58-59, 954 P.2d 931 (Div. 2, 1998) (appellate court may take judicial notice of legislative facts *sua sponte*). This should especially be the case when NEMA is forced to respond to an issue Ecology did not raise below.

The Court may also fairly conclude that Ecology's failed plan to pro rate Standard Plan fees based upon market share⁶ would have had no appreciable impact on the risk of losing producers who sell ELS into the Washington market. At \$1.2 million in proposed costs, any producer with just 0.83% of total market share would owe more than the \$10,000 portion of the fee that the Legislature directed to program costs.⁷

Throughout its brief, Ecology argues producers must "fully" and "directly" finance the Standard Plan program, and must pay their "fair share" which is necessary "to achieve a desired end." But these arguments are not proof that a compliant Standard Plan program actually costs \$1.2 million or anything close to it. They beg the question: Is Ecology's entire \$1.2 million of Standard Plan program cost really necessary to efficiently accomplish the Legislature's goals, or could it be done within the amount that results from what the Law provides? Ecology cites to no proof to support its argument, and the record contains none. It is the Legislature's prerogative to strike the balance between program scope and costs, and between costs and the risk of driving producers of these energy-saving and pollution-reducing products out of the Washington market. Ecology's

⁶ As noted above (Section III.B, p. 10) Ecology did not assign error to Conclusion of Law No. 7 and therefore it is the law of the case that Ecology cannot collect market share data in order to pro rate program fees.

⁷ \$1.2 million ÷ \$10,000 = 0.0083

Rule invades that prerogative, and therefore this Court should affirm the declaratory judgment invalidating portions of the Rule.

D. Because Ecology’s Rule Purports to Charge Standard Plan Participants in Excess of \$15,000 per Year, it Exceeds Ecology’s Statutory Authority as Set Out in Chapter 70.275 RCW.

Ecology’s first Assignment of Error asserts that the \$15,000 Standard Plan fee the Legislature established in RCW 70.275.030(2) is not a limit on what Ecology can charge, and is not an annual fee. Opening Br., 4. Throughout its brief, Ecology argues that its Rule merely “fills the gap” left by an ambiguous statute. Ecology, however, must labor hard to imagine that ambiguity, as the Law is clear enough that Standard Plan producers’ fees are capped at \$15,000 per year. Ecology’s Rule does not “fill a gap,” but contradicts the Legislature’s intent (an intent Ecology consistently acknowledged before it wrote its Rule). “Whether [the Rule] is valid depends, ultimately, on whether Ecology has correctly interpreted and implemented” the authorizing Law. *Swinomish Indian Tribal Community*, 2013 Wash. LEXIS 768, at *6. For the reasons set out below, Ecology has failed this ultimate test and this Court should affirm the trial court’s declaratory judgment.

i. The \$15,000 fee in RCW 70.275.030(2) is a Cap on Individual Standard Plan Costs.

A court's analysis of a statute begins with its language. *State v. Gray*, 174 Wn.2d 920, 926-27, 280 P.3d 1110 (2012). The statutory provisions creating the Standard Plan and its funding mechanism are clear and closely parallel each other:

Every producer must: . . . [p]articipate in a product stewardship program approved by the department [of Ecology] and operated by a product stewardship organization contracted by the department.

RCW 70.275.030(2)(a).

Using the same language, the Legislature expressly capped producers' fees for the Standard Plan program at \$15,000:

(2) Each producer shall pay fifteen thousand dollars to the department to contract for a product stewardship program to be operated by a product stewardship organization.

RCW 70.275.050(2) (emphasis added). The word "'shall' when used in a statute, is presumptively imperative and creates a mandatory duty unless a contrary legislative intent is shown." *Goldmark v. McKenna*, 172 Wn.2d 568, 575, 259 P.3d 1095 (2011). Ecology cannot rebut this presumption. The language of subsection .050(2) does not authorize Ecology to collect market data or to establish producer fees based upon market share or any other equitable formula. It does not contemplate Ecology's creation of a program and funding system charging producers hundreds of thousands of

dollars each year. CP 341 (uncontested Finding of Fact No. 5); CP 67 (Kohorst Decl. ¶ 11). The only fee the Law authorizes Ecology to charge Standard Plan producers is \$15,000.

The Legislature created separate funding obligations for producers participating in the Standard Plan program as opposed to those creating their own Independent Plan programs. This difference confirms that the Standard Plan fee is capped at \$15,000. The Legislature placed its tailored funding directives in RCW 70.275.050. While subsection .050(2) provides that Standard Plan producers “shall pay fifteen thousand dollars to the department[.]” subsection .050(3), on the other hand, provides that producers designing and “participating in an independent plan . . . must pay the full cost of operation.” RCW 70.275.050(3) (emphasis added). “The legislature’s choice of different words in another subsection of the same statute . . . shows that a different meaning is intended”. *Swinomish Indian Tribal Community*, 2013 Wash. LEXIS 768, at *17; *State v. Flores*, 164 Wn.2d 1, 14, 186 P.3d 1038 (2008) (“when the legislature uses different words in statutes relating to a similar subject matter, it intends different meanings”). The Legislature intended different funding obligations for programs under the Standard Plan as opposed to those under the Independent Plan, *i.e.*, one is capped, while the other is not. Ecology’s Rule erases this intentional distinction.

The foundation for Ecology's Rule and its argument to this Court is its misreading of subsection .030(1)'s requirement that "every producer . . . must fully finance" a product stewardship program. Ecology assumes "every producer" describes a collective obligation that all Standard Plan producers must fulfill together, and "fully finance" means the entire cost of whatever program Ecology and its contractor design. In construing a statute, however, this Court's obligation is to carry out legislative intent by looking first to the statute's language. *In re Detention of Danforth*, 173 Wn.2d 59, 67, 264 P.3d 783 (2011). Where the statute does not otherwise define a term, courts may look to the dictionary to ascertain its meaning. *Id.* Subsection .030(1)'s reference to "every" producer means "each individual" producer's individual obligation; it does not describe a joint obligation held by all producers together. WEBSTER'S THIRD NEW INT'L DICTIONARY OF THE ENGLISH LANGUAGE (Unabridged), 788 (Philip B. Gove et al. eds., 1986) (definition of "every"). "Fully finance" does not mean the entire cost of Ecology's program, as the Legislature did not obligate "each individual" producer to separately pay the program's entire cost (otherwise, Ecology would collect 29 times the necessary funds). In context, "fully finance" means each individual producer is to pay in full its statutorily defined individual obligation. "Fully" means "in a full manner," *id.* at 919, and "full" means "having the normal or intended

capacity supplied.” *Id.* at 918-19. For each Standard Plan producer, the Legislature defined its normal or intended contribution as \$15,000 as specifically set out in RCW 70.275.050(2). And an Independent Plan producer “fully finance[s]” its defined financing obligation when it “pay[s] the full cost of operation” of the program that it individually designed and implements. RCW 70.275.050(3).

This Court’s obligation is, where possible, to give meaning and effect to all statutory language rather than render some of it superfluous. *Cox v. Helenius*, 103 Wn.2d 383, 387-88, 693 P.2d 683 (1985). If the “fully finance” language in subsection .030(1) means that some Standard Plan producers must pay many times the statutory \$15,000 fee, CP 341 (uncontested Finding of Fact No. 5) and CP 67 (Kohorst Decl., ¶11), then the \$15,000 Standard Plan fee that producers “shall” pay is meaningless. In context, the general direction to “fully finance” means only that all producers must pay those more specific funding obligations that the Legislature went on to impose, *i.e.*, \$15,000 for Standard Plan producers or all costs of operating a producer’s Independent Plan program.

Contrary to Ecology’s suggestion, only subsection .030(1) states producers must “fully” finance a product stewardship program (an imperative that subsection .050(3) reiterates, but only as to independent plan producers who must pay the “full cost of operation” of their programs

which they design and implement on their own). All other operative provisions of the Law consistently state that Standard Plan producers are only to provide “financing” or “finance” the Standard Plan program. RCW 70.275.010(4), .020(14), .020(16), .030(2)(a), .030(2)(b), .030(3), .040(1)(f), and .050(1). Even if “fully finance” has the meaning Ecology proposes, there is no reason to elevate this one statutory provision over all the others or over the Legislature’s express direction that Standard Plan producers “shall pay fifteen thousand dollars.” RCW 70.275.050. Instead, both “finance” and “fully finance” logically mean that Standard Plan producers are to pay the designated \$15,000 annual fee, not whatever amount Ecology itself decides is necessary.

Even if subsection .030(1)’s general obligation to “fully finance” a program were irreconcilable with the specific subsection .050(2) obligation to pay \$15,000, the latter would take precedence over the former. Where there is “an ‘inescapable conflict’ between a statute’s general and specific terms, the specific terms prevail.” *City of Spokane v. Taxpayers of City of Spokane*, 111 Wn.2d 91, 102, 758 P.2d 480 (1988) (quoting 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.05 (Sands, 4th ed. 1984)). Further, “as between two conflicting parts of a statute, that part latest in order of position will prevail” *State ex rel. Graham v. San Juan Cnty.*, 102 Wn.2d 311,

320, 686 P.2d 1073 (1984) (citations omitted). Subsection .030(1)'s general obligation to “fully finance” must yield to the later, more specific, subsection .050(2) directive to pay \$15,000.

Ecology's other arguments about the generalized purpose and object of the Law, Opening Br. 15-25, do not conflict with its plain language. The two references to “fair share,” Opening Br., 22-24, impose proportionality between the obligations of multiple programs, not between individual producers' funding obligations. RCW 70.275.020(16) (a product stewardship “program” includes the obligation to collect “a fair share of orphan product”) and .030(6) (“all product stewardship programs . . . must recover their fair share” of ELS). These sections prevent producers from forming an independent plan on the cheap that does little or nothing, and do not suggest that each Standard Plan producer must pay a tailored amount reflecting its market share. Ecology cannot create an ambiguity by taking words in a statute out of context when the language and context reveal a different clear meaning. *State v. Lilyblad*, 163 Wn.2d 1, 9, 177 P.3d 686 (2008); *Herrington v. David D. Hawthorne, CPA, P.S.*, 111 Wn. App. 824, 839, 47 P.3d 567 (Div. 1, 2002).

The fact that all ELS producers must “finance” and “participate” in a program and pay “all administration and operational costs” does not give Ecology license to have its contractor write a Plan that does more than the

Law requires. *See* Section III.C, p. 11 and fn. 5 above. Ecology needs to try to run its program with the money the Law provides. If the available funding is insufficient to operate the comprehensive program Ecology wants, it must prioritize the program work and report back to the Legislature. Whether to require more than the \$15,000 fee is the Legislature's decision, not Ecology's, and such a decision requires a careful balancing of costs and benefits to ensure more producers do not exit the Washington market.

ii. The \$15,000 Fee is an Annual Fee to Operate the Standard Plan Program, not a One-Time Fee for Writing a Plan.

Ecology argues that subsection .050(2) does not state that the producers are to pay the \$15,000 fee “annually.” The Law, however, also does not state that it is merely a “one-time” fee or due “in the first year” as Ecology proposes to write into the law.⁸ This Court must read subsection .050(2) in context with the balance of the Law, *State v. Gray*, 174 Wn.2d at 927, and that reading confirms each producer's \$15,000 fee is annual.

Section .120, which applies to both the Standard Plan and any Independent Plans, requires as follows:

All producers shall pay the department annual fees to cover the cost of administering and enforcing this chapter.

⁸ *Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 801-04, 123 P.3d 88 (2005) (rejecting argument that the omission of “annual” therefore meant “one time” when the statute and circumstances suggested otherwise).

RCW 70.275.120 (emphasis added). For Independent Plan programs, subsection .050(3) reiterates that producers must pay Ecology an “annual” \$5,000 fee. For Standard Plan producers, subsection .050(2) states that Ecology will “retain” \$5,000 for its administrative and enforcement costs from a producer’s \$15,000 Standard Plan fee. Producers operating under the Standard Plan program can only pay Ecology’s administration costs annually as section .120 requires if Ecology “retains” their \$5,000 shares from an annual \$15,000 fee. When the Court reads the statutory sections together, the \$15,000 fee can only be an annual fee, not a “one-time” fee as Ecology proposes to write into section .050.

This Court must also avoid reading a statute to create absurd results. *State v. Ervin*, 169 Wn.2d 815, 823-24, 239 P.3d 354 (2010). Ecology offers no explanation why Independent Plan producers would annually pay \$5,000 for administration, but Ecology could only “retain” an administrative fee once from Standard Plan producers’ one-time payments; nor does it offer any explanation why Standard Plan producers would pay the \$10,000 portion of the \$15,000 fee only once, but Ecology would somehow “retain” \$5,000 for administration every year. There is no “gap” to fill here, as the Legislature has expressly provided the mechanism for Ecology’s retention of its administration and enforcement

costs. All producers must annually pay Ecology's administration and enforcement costs. RCW 70.275.120 . Because Ecology "retains" this \$5,000 charge from a Standard Plan producer's \$15,000 fee, the \$15,000 fee must be annual.

Further, the Law provides that "[e]ach producer shall pay fifteen thousand dollars to the department to contract for a product stewardship program to be operated by a product stewardship organization." RCW 70.275.050(2) (emphasis added). The Law defines "product stewardship program" as the actual methods devoted to transporting, recycling and disposing of unwanted product. RCW 70.275.020(16).⁹ Thus, "program" is an ongoing, annual activity. Subsection .050(2) does not state Ecology is to use the monies raised by the \$15,000 fee to write "a product stewardship plan," which the Law defines differently to mean "a detailed plan describing the manner in which a product stewardship program will be implemented." RCW 70.275.020(15). Developing a "plan" is a one-time activity.

If the Court still finds these words ambiguous, then it may look to legislative history to construe them. *State v. Sweany*, 174 Wn.2d 909, 915,

⁹ "'Product stewardship program' or 'program' means the methods, systems, and services financed and provided by producers of mercury-containing lights generated by covered entities that addresses product stewardship and includes collecting, transporting, reusing, recycling, processing, and final disposition of unwanted mercury-containing lights, including a fair share of orphan products." RCW 70.275.020(16).

281 P.3d 305 (2012). At the February 17, 2010 hearing before the House Environmental Health Committee, Pam Madson, staff counsel for the committee, summarized the bill in her testimony as follows:

Producers must finance the implementation of a product stewardship program . . . They do that by paying the amount of, annually, \$15,000 to the Department of Ecology, \$10,000 of which is used to cover the cost of the product stewardship program and \$5,000 to pay the administrative costs of the Department of Ecology.

CP 70, 150 (Bjorkman Decl., ¶7) (emphasis added).

Ms. Madsen again appeared before the House General Government Appropriations Committee on February 25, 2010, and repeated her summary of the Law indicating that producers were obligated to pay a “\$15,000 annual fee each,” with “\$10,000 going to the program and \$5,000 to the Department of Ecology for administering and enforcing the program.” CP 70, 154 (Bjorkman Decl., ¶9).

Both before and after enactment of the Law, Ecology repeatedly admitted that it understands that the \$15,000 Standard Plan fee is an annual fee. Just days before Governor Gregoire signed ESSB 5543 into law, Jay Shepard of Ecology answered the following questions from Keith Phillips who was writing a bill analysis:

Sec 5(3). Is this payment in addition to the payment required of all producers under Sec 5(2)? No. If a producer or groups of producers are approved to operate an independent program, they must each pay the agency

\$5000 for administration and enforcement. Independent programs must pay all costs for collection, transportation and processing of products by themselves. The \$15,000 is for producers participating in the contracted program.

Is the \$15 K or \$5 K one time, or annual? It is an annual fee.

RF 000325-27 (bold in original, underline added). On the eve of becoming Law, Ecology acknowledged the \$15,000 fee is annual.

After enactment, Ecology published a 2010 Legislative Implementation Plan that states “[t]he bill requires each producer of mercury-containing lights to pay the Department \$15,000 annually.” CP 70-71, 163. Ecology continues to post this official publication on its website today. CP 70-71 (Bjorkman Decl., ¶12).

Similarly, in an Operating Decision Package for the 2011-13 Biennium, Ecology again acknowledged that the \$15,000 cap on Standard Plan fees is an annual charge:

Ecology would contract for a statewide product stewardship program for mercury-containing lights and bill, collect, and track a \$15,000 fee per year from producers that sell mercury-containing lights in or into Washington State.

CP 71, 166 (Bjorkman Decl., ¶13) (emphasis added).

The legislative history as well as Ecology’s own admissions support a plain reading of the statute: Standard Plan producers owe a capped \$15,000 annual fee. Ecology shall “retain” \$5,000 of the \$15,000

annual fee for its administrative and enforcement costs, and it must use the balance to contract with a product stewardship organization to run the Standard Plan program. RCW 70.275.050(2). It may take up to a decade to achieve the goal of 100% recycling. RCW 70.275.010(3). If the funds are not adequate to perform all of the desired work, for example, in the program's early years as it gains efficiencies and consumer acceptance, Ecology is authorized to prioritize the work to be done, but it may not raise fees. RCW 70.275.120. If the program funding is insufficient, Ecology should so inform the Legislature during its annual report. RCW 70.275.140.¹⁰

E. Because Ecology's Rule Fails to Acknowledge That it Must Prioritize the Work to Implement the Chapter if Standard Plan Fees are Insufficient in any Given Year, Ecology's Rule Exceeds its Statutory Authority as Set Out in Chapter 70.275 RCW.

Ecology's second Assignment of Error asserts that RCW 70.275.120 does not obligate it to prioritize Standard Plan program work if the \$15,000 Standard Plan fees are insufficient in any given year. For the reasons set out below, Ecology is again wrong.

¹⁰ Ecology contends that this subsection is not a specific directive on inadequate funding. Opening Br., 33, n.12. But subsection .140(3) is not a specific directive on any one provision of the Law. Instead, it is a general directive about all provisions of the Law, and therefore includes funding. RCW 70.275.140(3).

The Legislature contemplated the possibility that Ecology would set up a Standard Plan program that in any given year might cost more than the money raised with the \$15,000 producer fees. To account for this, the Legislature expressly authorized Ecology to prioritize the Standard Plan program work, but it did not authorize increased fees:

The department may prioritize the work to implement this chapter if fees are not adequate to fund all costs of the program.

RCW 70.275.120. Again, this Court must interpret the Law so as not to render any part of it superfluous. *Cox*, 103 Wn.2d at 387-88. Section .120 is meaningless if Ecology can, beginning in the first and in every succeeding year, invoice producers for the entire cost of whatever Standard Plan program it creates or pays a contractor to create.

Ecology contends that this second sentence of RCW 70.275.120 applies only to its administration and enforcement costs. Opening Br., 29-33. Uncontested Conclusion of Law No. 4, however, states that “the work to implement this chapter” that Ecology may prioritize includes both Standard Plan program work as well as Ecology’s administration and enforcement costs. As well as being legally correct, this Conclusion is the law of the case. *King Aircraft*, 68 Wn. App. at 716-17. Ecology, therefore, cannot now sustain its argument. The second sentence of

section .120 empowers Ecology to prioritize the work to implement the Standard Plan program, not just its administration and enforcement costs.

Further, Ecology cannot explain away the plain meaning of “program” in section .120 through an appeal to context. Opening Br., 30-33. “Program” is a defined term and means the actual transporting, recycling and disposing of spent ELS. RCW 70.275.020(16). It does not mean Ecology’s administration and enforcement costs as Ecology now claims. Ecology otherwise agrees that the Law treats funding for its “administration and enforcement” costs separately from funding for program work.¹¹ The Legislature intended the same distinction when it used “program” in section .120.

Ecology’s contextual argument about section .120’s use of the word “fees” is unavailing. Opening Br., 31-32. RCW 70.275.050(2) creates a single \$15,000 Standard Plan fee that Ecology divides between program costs (\$10,000) and its own administration and enforcement costs (\$5,000), so it is unsurprising that the Legislature used the word “fees” in section .120 to describe the funding for both.

The Legislature’s failure to use separate paragraphs for the two sentences in subsection .120 is also of no consequence. Opening Br., 31.

¹¹ Opening Br., 30-31 (“Similarly, RCW 70.275.050(2) distinguishes the \$10,000 payment that the department is to use ‘to contract for a product stewardship program to be operated by a product stewardship organization’ from the \$5,000 that is to be retained by the department ‘for administration and enforcement costs.’”)

Ecology concedes that RCW 70.275.050(2) creates two separate functions for the single \$15,000 fee (\$10,000 for program implementation and \$5,000 for Ecology's administration and enforcement costs). Opening Brief, 30-31. Subsection .050(2) does so using two consecutive sentences without separate paragraphs,¹² just as the Legislature made the same distinction in RCW 70.275.120 in consecutive sentences without paragraph separation. Ecology provides no explanation for why it agrees the Legislature can successfully distinguish these two functions with consecutive sentences in subsection .050(2), but could not do so in section .120.

Further, by using the definite article "the" in section .120, the Law differentiates between "the" cost of Ecology's administration and enforcement costs and "all" other costs of the program. As Ecology agrees, administration and enforcement is a mere subset of producers' overall costs. Opening Br., 30. In using the phrase "all costs of the program" in section .120, the Legislature intended to encompass more than "the" cost of administration and enforcement. RCW 70.275.120 (emphasis added).

¹² "Each producer shall pay fifteen thousand dollars to the department to contract for a product stewardship program to be operated by a product stewardship organization. The department shall retain five thousand dollars of the fifteen thousand dollars for administration and enforcement costs." RCW 70.275.050(2).

Equally fatal to Ecology's position is its own argument that subsection .050(2) creates a gap regarding the amount a Standard Plan producer must pay Ecology for administration and enforcement after the first year. Opening Br., 25. To fill that alleged gap, Ecology says it wrote a Rule requiring Standard Plan producers to pay an annual \$5,000 administration fee that automatically adjusts for inflation. *Id.* But if Ecology could always write a rule to fill the gap with a fee that would cover its own costs, it would never have to prioritize its own administrative and enforcement work rendering section .120 superfluous. Thus, according to Ecology's narrow interpretation of section .120, the second sentence is meaningless unless Ecology writes its own rule to underfund itself. This Court should avoid such absurd results.

Further, the legislative history and Ecology's own statements again uniformly conflict with Appellant's present litigation posture. Jay Shepard from Ecology's Waste 2 Resources Program, which is responsible for managing the product stewardship program under the Law, testified to the Legislature that Ecology had lingering concerns about the amount of revenue the Law would raise, but that Ecology was satisfied that the reporting features allowed Ecology to come back to the Legislature if funding proved inadequate:

We worked very hard with the Senate on ESSB 5543 and other interested parties to work out this compromise bill. We still have a little concern about 5543 being able to generate enough revenue to cover the costs of the contracted program, however, there's a section in the bill that requires us to come back and report to you annually until a year after actual program implementation where we let you know our research and findings about the implementation of the bill and whether the resources will be available. So I think that we can work through that.

CP 70, 152 (Bjorkman Decl., ¶8) (emphasis added). Ecology's own testimony to the Legislature regarding the Law is entirely inconsistent with its Rule. Ecology knows the funding is limited, and that its remedy is to report back to the Legislature with proposed changes to the Law if the funds raised are insufficient to run a compliant program.

Margaret Shields, a stakeholder in the development of the legislation from the Local Hazardous Waste Management Program in King County, testified that the Law was the result of comprehensive negotiations among stakeholders and presented a "set amount" of funding. She echoed Mr. Shepard's earlier testimony to the House Environmental Health Committee that any concerns about the level of funding could be addressed through the Law's requirement for reporting back to the Legislature in the years after enactment:

As a result of the negotiations with the Electrical Manufacturer's Association, the amount that lighting producers will contribute to the contracting product stewardship organization has been defined at a set amount.

This is the result of a carefully negotiated agreement and it's what the electrical manufacturers insisted upon. . . . We feel we need to get this state-wide recycling program going. Get it started with the level of funding that's specified in the bill. The bill has requirements for quite a bit of reporting back to the legislature, so there are going to be plenty of opportunities in the future where we can look at the effectiveness of the program and also the adequacy of the funding levels provided by lighting producers.

CP 70, 156 (Bjorkman Decl., ¶10) (emphasis added).

After the House made the final amendment to the bill on February 17, 2010, Ecology wrote the following in its formal Bill Analysis:

The amendments remove authority of the Department to adopt rules allowing a product stewardship organization to adjust fees paid by producers to implement a product stewardship program, ... Ecology should remain concerned that the amount of revenue authorized under the bill will fall short of expected needs to support a successful program . . . Can't support (funding). Ecology cannot support due to the budget impact. That aside, the bill will provide a good start for recycling mercury containing lights from residences.

CP 70, 159 Bjorkman Decl., ¶11. Ecology clearly understood that it lacks authority to promulgate rules adjusting the \$15,000 fee, which is exactly what it has done with its Rule. While it would not support the bill because of concern that the capped \$15,000 fee would be inadequate, it nevertheless agreed that the bill as passed would be a good start on a stewardship program.

Contrary to Ecology's argument, "statements of individual lawmakers and others before the [legislature] . . . can be instructive in showing the reasons for the changes in the legislation." *In re Marriage of Kovacs*, 121 Wn.2d 795, 807, 854 P.2d 629 (1993). In *Marriage of Kovacs*, the Court determined that the Parenting Act did not create a presumption of placement with the existing primary care giver. The Court exhaustively reviewed and relied upon prior versions of the Parenting Act, parent advocates' criticism of an earlier version of the bill, a representative's explanation of the bill, and the testimony of attorneys representing state and local bar associations. *Id.* at 805-09. *See also Manna Funding, LLC v. Kittitas Cnty.*, 173 Wn. App. 879, 295 P.3d 1197 (Div. 3, 2013) (relying on legislative history including an industry bill summary contained in the Committee files as well as the Committee's Bill Analysis).

While "the comments of a single legislator are generally considered inadequate to establish legislative intent," *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 461, 832 P.2d 1303 (1992), NEMA here cites extensive testimony, contemporaneous bill analyses, and documents such as Ecology's own Legislative Implementation Plan. CP 70-71, 149-172 (Bjorkman Decl., ¶¶7-13, Exs. F-L). Ecology has not directed the Court to any contemporaneous statement to support its position. Indeed,

Ecology's prior statements to the Legislature and its own publications after enactment uniformly contradict its Rule and position in this case.¹³

The various amendments to the draft legislation also reveal that the Legislature expressly removed a provision that would have allowed Ecology to write a rule increasing the annual \$15,000 fee. The proposed legislation was first introduced in the 2009 legislative session as Senate Bill ("SB") 5543. Among other things, the bill obligated producers selling ELS, either individually or jointly, to operate their own product stewardship program and to finance the entire cost of the program. It contained no reference to a dollar limit on costs. SB 5543, §5(2) and (3); CP 69, 79-94 (Bjorkman Decl., ¶3). That bill did not progress.

An amended version of the legislation was re-introduced in the Senate Environment, Water and Energy Committee during the 2010 legislative session as Substitute Senate Bill ("SSB") 5543. The bill now limited a producer's fee to no more than \$10,000 in a program's first year of operation. SSB 5543, § 5(2); CP 69, 102 (Bjorkman Decl., ¶4). The bill also expressly authorized Ecology to promulgate rules allowing the product stewardship organization managing the program to raise the

¹³ Ecology's other case law is unpersuasive. *W. Telepage, Inc. v. City of Tacoma Dep't of Fin.*, 140 Wn.2d 599, 611, 998 P.2d 884 (2000) (the declaration of a lobbyist submitted *seventeen years after a statute was enacted* was of little value in determining legislative intent); *Tobin v. Dep't of Labor & Indus.*, 145 Wn. App. 607, 616-18, 187 P.3d 780 (Div. 2, 2008) (the agency's own *self-serving testimony* to the Legislature is unpersuasive in subsequent litigation in which the agency again proffers the same statutory interpretation).

amount of the annual fee that each producer pays if the costs of the program exceed the total amount of fees collected. SSB 5543, § 5(4); CP 69, 102 (Bjorkman Decl., ¶4).

On February 15, 2010, the Senate Rules Committee amended the bill as Engrossed Substitute Senate Bill (“EB”) 5543 making a number of changes. For the first time, the law obligated Ecology to contract with a product stewardship organization to run a program (now the Standard Plan program). EB 5543, § 3(2)(a); CP 70, 118 (Bjorkman Decl., ¶5). Further the Senate Rules Committee eliminated the first-year \$10,000 cap on fees, and instead obligated producers to pay \$15,000, EB 5543, § 5(2), but continued to authorize Ecology to promulgate rules that would allow the product stewardship organization managing the program to raise the amount of the \$15,000 fee each producer would pay if the cost of the program exceeded the total amount of fees collected:

The department [of Ecology] shall adopt rules regarding how the product stewardship organization may adjust the fee above or below the limits provided in subsection (2) of this section [\$15,000] should product stewardship costs exceed available revenues.

EB 5543, § 5(4); CP 70, 121 (Bjorkman Decl., ¶5).

On February 17, 2010, the House Environmental Health Committee further amended the legislation (“House Amnd. 5543”) and reintroduced the concept of a cap on producer fees, but this time not just

for the first year of program operation. The House deleted the provision for charging fees with no monetary limit (that producers be “assessed a fee by the stewardship organization to cover the cost of implementing the program.”). House Amnd. 5543, § 5(2); Bjorkman Decl., ¶6. Further, the House deleted subsection 5(4) quoted above that granted Ecology authority to promulgate rules that would allow the product stewardship organization to raise fees. Compare House Amnd. 5543, § 5 with EB 5543, § 5; CP 70, 121, 138 (Bjorkman Decl., ¶5-6). Instead, the House’s amendment capped producers’ Standard Plan fees at \$15,000, House Amnd. 5543, § 5, and contained the language that is now codified at RCW 70.275.120 authorizing Ecology to prioritize the program work if the fees were not adequate to do more. House Amnd. 5543, § 12; Bjorkman Decl., ¶6.

The Senate passed the amended House version of the legislation and Governor Gregoire signed it into law on March 19, 2010. In summary, the Law progressed from one that obligated producers in all cases to operate their own programs and to pay for them, to a system with a presumptive “Standard Plan” program that Ecology would operate under contract with a product stewardship organization. By the time of final passage, the Law eliminated all provisions that allowed Ecology to promulgate rules to increase fees for the Standard Plan. Instead, the Law

capped the fees owed and authorized Ecology to prioritize the amount of work done under the program to match the amount of fees collected.

While two earlier versions of the law, SSB 5543, § 5(3) and EB 5543, § 5(4), expressly authorized Ecology to promulgate rules that would allow its product stewardship organization to increase fees, the Legislature stripped this provision out of the Law before passage. The Washington Supreme Court relies upon such legislative history showing the removal of language in bills and statutes to ascertain legislative intent. *State v. Cleppe*, 96 Wn.2d 373, 379-380, 635 P.2d 435 (1981) (deletion in final legislation of “knowing or intentionally” contained in early drafts of bill was determinative of legislative intent); *Marriage of Kovacs*, 121 Wn.2d at 807 (citing and relying upon testimony from advocates that the removal of any presumption from prior bill allowed them to support the legislation); *Johnson v. Ottomeier*, 45 Wn.2d 419, 427, 275 P.2d 723 (1954) (“If any legislative history is entitled to be regarded as significant, we think it should be this deliberate act in removing the exclusionary language from the statute.”).¹⁴ The fact that the Legislature had

¹⁴ The Court of Appeals decision in *Baker v. Snohomish Cnty.*, 68 Wn. App. 581, 841 P.2d 1231 (Div. 1, 1993) does not support Ecology’s remarkable suggestion that it nevertheless still has the power to write rules to increase the statutorily defined \$15,000 fee. *Baker* involved a narrow decision that turned upon a legal presumption against state preemption of local authority to regulate surface mining. The Court should reject Ecology’s attempt to obscure the *Baker* court’s true motivation and to create a specific legal presumption out of the language of Chapter 70.275 RCW where the Legislature has not expressly included one. Opening Br., 39, n.17.

previously granted Ecology the power to write rules changing the statutory fee amount and then removed that language from the Law is strong evidence that the Legislature did not intend to give Ecology the authority to write the Rule it did.

Ecology's arguments about the final changes to the text of the Law, Opening Br., 36-39, do not alter the plain meaning of section .120, uncontested Conclusion of Law No. 4, and the statutory definition of "program." Even if the Senate Rules Committee intended its EB 5543 § 11 to authorize Ecology to prioritize only its own administration and enforcement costs rather than actual costs of "the work to implement this Chapter," it is speculative to suggest that the House gave the language the same meaning in House Amnd. 5543 § 12 after it made other changes to the bill or that members in voting on the final law or the Governor in signing it intended the word "program" to have anything other than its statutory meaning. The Court should follow the statutory definition of "program" absent conclusive evidence the Legislature intended something else, and Ecology's argument about the timing of the addition does not provide it. The second sentence of subsection .120 does not address the agency's administration and enforcement costs. "Program" still means "program," just as the Law and Ecology's own regulations expressly define it. RCW 70.275.020(16); WAC 173-910-100 (definition of

“product stewardship program” or “program”). That is the only reasonable conclusion that successfully harmonizes the Legislature’s explicit choice of words in this sentence, including “the work to implement this chapter,” “all costs” (in contrast to “the cost” in the first sentence), and “program.” RCW 70.275.120.

F. Ecology Violated the Administrative Procedure Act’s Concise Explanatory Statement Requirement.

While NEMA presented argument to the trial court concerning Ecology’s violation of the concise explanatory statement (“CES”) requirements of the Washington Administrative Procedures Act (“APA”), RCW 34.05.325(6)(a)(iii), the trial court did not rule on the issue in either its oral ruling or its Declaratory Judgment. CP 339-344; Opening Br., 13. Further, Ecology did not preserve this issue in an assignment of error. Opening Br., 4. This issue is not properly part of this appeal.

If the Court nevertheless wants to hear argument on this issue, NEMA asks the Court to consider the following:

Pursuant to the APA, RCW 34.05.320, Ecology published notice of its proposed rule on June 26, 2012. CP 52 (Answer to Petition, ¶43). NEMA timely filed comments on the proposed rule, RCW 34.05.325(1), including a comment that Ecology had failed to:

[c]larify how the department intends to ‘prioritize the work to implement this chapter if fees are not adequate to fund all costs of the program,’ if that should ever happen (RCW 70-275-120).

RF 000317. On November 16, 2012, Ecology promulgated its final Rule and published its CES, including its response to comments. RF 000354-472. The CES is a mandatory document for rule-making:

Before it files an adopted rule with the code reviser, an agency shall prepare a [CES] of the rule:

...
(iii) summarizing all comments received regarding the proposed rule, and responding to comments by category or subject matter indicating how the final rule reflects agency consideration of the comments, or why it fails to do so.

RCW 34.05.325(6)(a).

Ecology’s CES, however, was facially deficient. Ecology did not summarize, by category or subject matter, NEMA’s comment regarding the proposed rule’s failure to describe how Ecology would prioritize the work to implement the Law if the fees collected are not adequate to do more. Ecology further failed to indicate “how the final rule reflects agency consideration of [NEMA’s] comments, or why it fails to do so.”

RCW 34.05.325(6)(a)(iii); RF 000361-80. Ecology simply ignored NEMA’s comment, which specifically highlights the Rule’s inconsistency with the Law.

The APA provides that “[i]n a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds . . . the rule was adopted without compliance with statutory rule-making procedures” RCW 34.05.570(2)(c).¹⁵ Notice and comment procedures such as the CES are an essential part of the administrative process. *Simpson Tacoma Kraft Co. v. Dep’t of Ecology*, 119 Wn.2d 640, 835 P.2d 1030 (1992). The Court in *Simpson Tacoma Kraft* invalidated Ecology’s rule regarding discharge standards for dioxin for failure to follow rule-making procedures. *Id.*

The purpose of . . . rule-making procedures is to ensure that members of the public can participate meaningfully in the development of agency policies which affect them. . . . In enacting the 1988 APA, the Legislature intended to provide greater public access to administrative decisionmaking. *See* RCW 34.05.001

Id. at 649. Ecology’s actions violated these basic principles.

When interpreting the APA, courts look to decisions interpreting similar provisions of the federal Administrative Procedure Act, 5 U.S.C.

¹⁵ Ecology argued below that its violation of RCW 34.05.325(6)(a) is inconsequential absent substantial prejudice. RCW 34.05.570(1)(d), however, applies to quasi-judicial proceedings, not to judicial review of a rule. *Qwest Corp. v. Wash. Utils. & Transp. Comm’n*, 140 Wn. App. 255, 259-60, 166 P.3d 732 (Div. 2, 2007); *Densley*, 162 Wn.2d at 226 (applying the substantial prejudice standard to review of an agency’s final order); *Rauch v. Fisher*, 39 Wn. App. 910, 912-14, 696 P.2d 623 (Div. 2, 1985) (applying “substantial rights” analysis under prior APA to claim that an administrative law judge committed error). Judicial review of an agency rule is subject to RCW 34.05.570(2). *Qwest*, 140 Wn. App. at 260. Ecology’s rule-making here is a quasi-legislative proceeding that interfered with NEMA’s legal right to meaningfully participate in that process. The substantial prejudice standard is inapplicable.

§§ *et seq.* (“federal APA”), for guidance. RCW 34.05.001; *Somer v. Woodhouse*, 28 Wn. App. 262, 272, 623 P.2d 1164 (Div. 2, 1981). As with Washington’s APA, federal agency rules are void if not promulgated in accordance with federal APA rule-making requirements. *Nat’l Labor Relations Bd. v. Wyman-Gordon Co.*, 394 U.S. 759, 764-65, 89 S. Ct. 1426, 22 L. Ed. 2d 709 (1969), abrogated on other grounds by *Nat’l Labor Relations Bd. v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294, 94 S. Ct. 1757, 40 L. Ed. 2d 134 (1974), as recognized in *Snohomish Cnty. Pub. Transp. Benefit Area v. State Pub. Emp’t. Relations Comm’n*, 173 Wn. App. 504, 520, 294 P.3d 803 (Div. 2, 2013).

The federal APA requires an agency to “incorporate in the rule[] adopted a concise general statement of [its] basis and purpose.” 5 U.S.C. § 553(c). In *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977), the court held a Food and Drug Administration (“FDA”) rule on smoked whitefish invalid because, among other things, the agency’s concise general statement was inadequate. The statement failed to address the Bureau of Fisheries’ comment that the rule needed a more commercially feasible method to achieve its goals. *Id.* at 245. The FDA also did not address appellant Nova Scotia’s comment that the whitefish rule would completely destroy its product. *Id.* The court found that “[i]t is not in keeping with the rational process to leave vital

questions, raised by comments of cogent materiality, completely unanswered.” *Id.* at 252. This rational process includes a concise explanatory statement that “will enable [the court] to see what major issues of policy were ventilated by the [rule-making process] and why the agency reacted to them as it did.” *Id.*

Like the FDA in *Nova Scotia*, Ecology here failed to respond to all comments, and thus failed to address a material question: how Ecology intended to comply with the Legislature’s directive in RCW 70.725.120. Ecology’s response was necessary so that a reviewing court could determine whether Ecology acted in compliance with the APA and the Law. Absent Ecology’s response, it is unclear whether Ecology even considered NEMA’s comment and the vital issue it raised.

While courts “do not function to strike down agency action because of merely formal or technical flaws[,]” *Somer*, 28 Wn. App. at 272 (internal citation omitted), the APA’s notice and comment requirements are integral to its purpose and errors as to those procedures justify invalidating the Rule. For example, in *City of New York v. Diamond*, 379 F. Supp. 503 (S.D.N.Y. 1974), the court invalidated a rule published on the same day it was to take effect. *Id.* at 518. The simultaneous publication/effect date violated section 553(d) of the federal APA requiring publication of a rule at least 30 days before its effective

date. *Id.* at 515-16. The rule's provision inviting interested persons to submit comments after publication did not cure this fault, as it denied the public the opportunity "to influence the rule making process in a meaningful way." *Id.* at 517.

Agencies may not abbreviate the APA's notice and comment requirements, including the obligation to rationally respond to comments. APA procedures embody legislative policy choices that favor public participation and meaningful access to agency decision-making. *Simpson Tacoma Kraft*, 119 Wn.2d at 649. The purpose of the statutorily-mandated CES is twofold: "(1) to assure the agency actually considered all arguments made and (2) to facilitate court review." *Anderson, Leech, & Morse, Inc. v. Wash. State Liquor Control Bd.*, 89 Wn.2d 688, 693, 575 P.2d 221 (1978). The CES ensures the opportunity for meaningful public influence in the rule-making process and proper review of agency rule-making by courts. Because Ecology failed to respond to NEMA's comment, this Court cannot know how Ecology considered NEMA's comment or whether Ecology considered NEMA's comment at all.

Ecology's CES was deficient because it failed to summarize all comments regarding the proposed rule. Specifically, it failed to respond to NEMA's vital comment of cogent materiality regarding Ecology's lack of

statutory authority to enact its proposed rule. As such, Ecology's Rule is invalid.

Ecology's argument that its violation of RCW 34.05.325(6)(a)(iii) is inconsequential because it is not required to engage in legal argument in a CES is also without merit. Opening Br., 46-47. The APA makes no exception for what Ecology dismisses as "legal argument." RCW 34.05.325(6)(a)(iii) (requiring the agency to summarize *all* comments received). Indeed, where "lack of statutory authority is advanced as a principal reason against the adoption of the regulation that argument should be addressed by the agency in the concise statement." *Anderson, Leech & Morse, Inc.*, 89 Wn.2d at 693 (interpreting a similar provision under a prior version of the APA). Thus, Ecology was required to articulate how its Rule complies with RCW 70.275.120.

Finally, Ecology's reliance on *Somer*, 28 Wn. App. 262, is misplaced. Ecology cites to *Somer* for the proposition that an agency can satisfy the statutory mandate for a CES by providing such information during subsequent litigation. Opening Br., 47. Importantly, *Somer* involved the challenge to a rule adopted under a prior version of the APA by a party requesting a statement of purpose, not a CES, only *after it had commenced litigation*. *Id.* at 271-73. NEMA, on the other hand, complied with all APA commenter requirements. RCW 34.05.325(1). How, if at

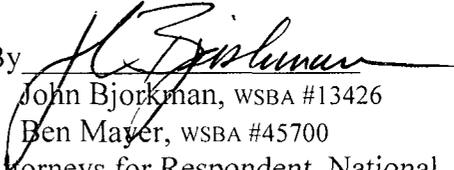
all, Ecology considered NEMA's comment regarding the statutory basis for Ecology's Rule remains unclear.

IV. CONCLUSION

For the foregoing reasons, Ecology's Rule is beyond its statutory authority, and this Court should affirm the trial court's order declaring portions of Chapter 173-910 WAC invalid.

DATED this 4th day of October, 2013.

K&L GATES LLP

By 

John Bjorkman, WSBA #13426

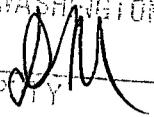
Ben Mayer, WSBA #45700

Attorneys for Respondent, National
Electrical Manufacturers Association

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DECLARATION OF SERVICE

Kathy Jacobson declares as follows:

On October 4, 2013, I caused the foregoing *Brief of Respondent*,
National Electrical Manufacturers Association to be served on the
following named person(s), at the addresses indicated by pdf/email and by
U. S. Mail, first-class postage prepaid:

Jonathan C. Thompson
Assistant Attorney General
P.O. Box 40117
Olympia, WA 98504-0117
JonaT@ATG.WA.GOV
TriciaK@ATG.WA.GOV

I hereby declare under penalty of perjury under the laws of the
State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington, this 4th day of October, 2013.

By: 
Kathy Jacobson, Legal Secretary
K&L Gates LLP