No. 51451-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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BROOKS MANUFACTURING CO.

Appellant,

vs.

NORTHWEST CLEAN AIR AGENCY

Respondent.

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# NORTHWEST CLEAN AIR AGENCY'S RESPONSE BRIEF

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**



**Statutes**

**Other Authorities**

## I. INTRODUCTION

Appellant Brooks Manufacturing Co. ("Brooks") uses a device called a "baghouse" to control particulate air emissions from its wood-fired boiler. In 2014, Brooks replaced almost all of the parts of the baghouse that come into contact with exhaust gases without first asking Respondent Northwest Clean Air Agency ("NWCAA" or "Agency") to confirm whether the level of control on particulate emissions achieved by the baghouse still met regulatory requirements. RCW 70.94.153 and NWCAA Regulation 300.13 required Brooks to submit a Notice of Construction application to NWCAA before replacing or substantially altering emission control technology on the boiler.

NWCAA learned of the work Brooks had performed on its baghouse, which Brooks characterized as a "like-for-like" replacement, during a routine inspection of the Brooks facility. NWCAA determined that the work constituted replacement of the emission control technology for Brooks' boiler and issued a Notice of Violation and Corrective Action Order that required Brooks to submit a Notice of Construction Application for the baghouse work.

Brooks appealed to the Pollution Control Hearings Board ("PCHB"), which affirmed NWCAA's Notice of Violation and Corrective Action Order. Brooks appealed to the superior court for Thurston County, which affirmed the PCHB decision, and then appealed again to this Court.

In its opening brief in this appeal, Brooks has failed to identify any legitimate errors of fact or law in the PCHB's Findings, Conclusions and Order in this matter. The PCHB correctly interpreted and applied RCW 70.94.153 and NWCAA Regulation 300.13. The PCHB's findings of fact that Brooks has contested are supported by substantial evidence in the record.

## II. ASSIGNMENT OF ERROR

NWCAA accepts Brooks' statement of its Assignment of Error (Section II of Brooks' opening brief) but would rephrase the Issues Pertaining to Assignment of Error that Brooks has listed in Section III of its opening brief as follows:

1. Whether the baghouse installed to control air emissions from Brooks' boiler is "emissions control technology" within the meaning of RCW 70.94.153 and NWCAA Regulation 300.13?

2. If the baghouse is "emission control technology," in 2014 did Brooks "replace or substantially alter" the baghouse within the meaning of RCW 70.94.153 and NWCAA Regulation 300.13?

3. Was the work Brooks performed on the baghouse in 2014 excused from the requirements of RCW 70.94.153 and NWCAA Regulation 300.13 because it constituted "routine maintenance, repair or similar parts replacement"?

## III. STATEMENT OF THE CASE

### A. The baghouse controls particulate emissions from Brooks' boiler.

Brooks' baghouse is designed to control the emission of fine particulate matter generated by the combustion of wood in Brooks' boiler. Exhibit R-32 depicts a schematic of Brooks' boiler exhaust system. CR 1247-48. The baghouse consists of a metal housing that looks like a large box, which collects and holds exhaust air around a set of filter bags. The filter bags slip over cages that hang down from a "tube sheet" near the top of the collector housing. Ex. R-30, CR 1246. The exhaust air from the boiler enters the collector housing and passes through the fabric of the filter bags, leaving fine particulates collected on the filter fabric. The clean (filtered) exhaust air then exits through the clean gas plenum at the top of the baghouse and into the atmosphere. T. Mahar, RP 81; Ex. R-30, CR 1245-46; Ex. R-32, CR 1247-48; FOF 7&8, CR 903. Pulses of compressed air knock the collected particles off the filter bags and they fall to the

cone-shaped hopper at the bottom of the collector housing. RP 86-87; CR 903; FOF 8. The particles are removed from the hopper through an airlock valve. R-30, CR 1246. Performance of the baghouse is monitored using a "magnahelic," which measures the difference in air pressure before and after the filter bags. RP 86-87; CR 903; FOF 8. Filter bags are consumables – they regularly wear out or tear and have to be replaced – and the cages that hold them are usually replaced every two or three bag cycles. RP 141.

**B. The changes Brooks made to its baghouse in 2014.**

In late 2013, Brooks needed to replace its baghouse because it was failing structurally; the roof and tube sheet were rusted and failing and the degradation affected how well the baghouse collected particulates and was a safety issue for personnel during the replacement of filters. R-7, CR 1183; RP 272. The top tube sheet and inner walls were rusting badly. RP 272. Rust was dropping down and falling into the airlock, making it malfunction. *Id.* A representative of Superior Systems Inc. ("Superior"), the firm that Brooks hired to work on the baghouse, characterized the condition of some parts of the baghouse as "Swiss cheese." RP 293.

In 2008, Superior had "suppl[ied] & install[ed] a replacement baghouse" for the Brooks boiler, which Superior fabricated out of mild steel.[1] Ex. R-4, CR 1176-77; CR 906; R-6, CR 1181. Since the equipment installed in 2008 had rusted out in five years, Brooks and Superior decided to construct the new baghouse components out of longer-lasting stainless steel. R-6, CR 1181.

Brooks and Superior characterized the 2014 work as removal and replacement of the old baghouse (until they later realized the regulatory

[1] Brooks did not notify NWCAA of the changes made to the baghouse in 2008 and so NWCAA did not have the opportunity to determine whether that work triggered requirements of RCW 70.94.153 and NWCAA Regulation 300.13.

significance of "replacement"). Superior sent Brooks a letter quote for the work, stating it would "supply and install a replacement baghouse for your existing boiler-ash baghouse," indicating that the quote did not include disposal of "old baghouse." Ex. R-5, CR 1179; FOR 16, CR 907. The bid amount was $42,610 for the baghouse and an additional $12,625 to "dismantle the existing filter and install the new in the same location." *Id.*

Brooks accepted the bid and retained Superior to fabricate the replacement baghouse. RP 273. Superior proceeded to fabricate the baghouse components offsite, remove the old baghouse, bring the newly fabricated components in and install them on the old support structure, and attach the old ladder, catwalk and instrumentation to the new baghouse housing. RP 142; RP 283; FOF 17, CR 907.

Almost all of the baghouse parts that come into contact with the exhaust gas stream from the boiler were replaced in 2014. T. Mahar, RP 86. NWCAA Compliance Manager Toby Mahar testified, while reviewing Exhibit R-31, CR 1246, that the parts that were replaced were: (1) the collector housing (the main body of the baghouse); (2) the hopper at the bottom of the baghouse; (3) the portion of the inlet gas piping that runs into the hopper; (4) the clean gas plenum (the baghouse roof), through which filtered exhaust air exits the baghouse; (5) and the tube sheet, from which the cages and bags are suspended inside the collector housing. RP 86.

The parts of the baghouse that were re-used in 2014 were: (1) the existing filter bags and cages, which had been replaced in 2012; (2) the pulse air header and valves, which had been replaced in 2007; (3) the airlock valve, which had been replaced recently; (4) instrumentation and electrical conduit; and (5) external components - the access ladder, catwalk, and the balance of the inlet piping. RP 86-87. These re-used parts were either recently replaced or were parts that do not come into contact with the exhaust gas stream from the boiler. RP 281-282.

### C. Approval required before replacing or substantially altering emission control technology.

The Washington Clean Air Act requires the owner of an existing source of air emissions to obtain approval from the applicable air permitting authority before replacing or substantially altering the emission control technology installed on an emission unit at the source. RCW 70.94.153 (*see* appendix for full text of this statute). As a condition of the air agency's approval, it may require the facility to employ "reasonably available control technology for the affected emission unit," as well as prescribe operation and maintenance conditions for the emissions control equipment. *Id.*

"Reasonably available control technology," or "RACT," is defined as:

> [T]he lowest emission limit that a particular source or source category is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility. RACT is determined on a case-by-case basis … taking into account the impact of the source on air quality, the availability of additional controls, the emission reduction to be achieved by additional controls, the impact of additional controls on air quality, and the capital and operating costs of the additional controls.

RCW 70.94.030(20) (*see* appendix). Thus, when RCW 70.94.153 authorizes an air agency to require that a source employ RACT, that means the agency has the opportunity to determine – before the source makes a significant investment in replacing or substantially altering its existing control equipment – whether the money would be better spent on a new control method or refinements to the existing controls that can achieve lower emissions. *See* RCW 70.94.030(20) & 70.94.153. In this way, existing sources can be required to keep up with the evolution of emission controls, but the obligation is triggered only when the source makes the decision to replace or substantially alter its existing controls.

NWCAA regulations incorporate the statutory definition of RACT and RCW 70.94.153's requirement that an existing source obtain approval before

replacing or substantially altering the control technology installed on the source. NWCAA Regulation 200 (RACT) & 300.13 (Replacement or Substantial Alteration of Emission Control Technology at an Existing Stationary Source) (both appear in full in the appendix to this brief). NWCAA also has limited RCW 70.94.153 by excluding routine maintenance, repair and replacement: "Replacement or substantial alteration of control technology does not include routine maintenance, repair or similar parts replacement." NWCAA Regulation 300.13(a). The Washington Department of Ecology has adopted the same "routine maintenance" exception in its regulation implementing RCW 70.94.153. *See* WAC 173-400-114(1).

### D. NWCAA Notice of Violation and Correction Order

Brooks did not apply to NWCAA for approval before conducting the 2014 work on its baghouse. NWCAA inspector Bob Uhrich performed an inspection of Brooks facility in 2014. RP 19; CR 127-128. During that inspection Brooks informed Mr. Uhrich that it had replaced the baghouse on the wood-fired boiler with "like for like" equipment. *Id.*; RP 24-25. Mr. Uhrich advised Brooks that a Notice of Construction Application and Order of Approval to Construct may be required. *Id.* Mr. Uhrich prepared his inspection report and case investigation for a determination on this question. *Id.*; CR 1184-90; CR 1193-94.

Dan Mahar, a professional engineer employed by NWCAA, reviewed the documents prepared by Mr. Uhrich and determined that the baghouse had been "replaced" within the meaning of RCW 70.94.153 and NWCAA Regulation 300.13. RP 124. Mr. Uhrich prepared an enforcement report based upon Dan Mahar's assessment and that report was reviewed by Mr. Uhrich's supervisor, Toby Mahar, the NWCAA Compliance Manager. CR 1194; RP 28-29. Toby Mahar signed and issued to Brooks a Notice of Violation and Corrective Action

Order, dated December 15, 2014, requiring Brooks to submit a Notice of Construction application for the boiler project. Ex. R-11, CR 1195-1196.

## IV. ARGUMENT

### A. Standard of Review.

This Court stands in the shoes of the superior court and reviews the PCHB's decision in this matter; it does not directly review the underlying NWCAA Order or the superior court's decision. *See Port of Seattle v. Pollution Control Hearings Board*, 151 Wn. 2d 568, 587, 90 P.3d 659, 669 (2004). As Brooks has acknowledged, the Court's review of the PCHB decision is governed by Washington's Administrative Procedures Act ("APA"). *Id.*

Under the APA, The Court may grant relief if the PCHB order is "outside the statutory authority or jurisdiction" of the PCHB or if the PCHB has "erroneously interpreted or applied the law." *Port of Seattle*, 151 Wn.2d at 587, 90 P.3d at 669, *citing* RCW 34.05.570(3)(b), (d). Where statutory construction is necessary, the Court will interpret statutes de novo. *Id.* "However, if an ambiguous statute falls within the agency's expertise, the agency's interpretation of the statute is 'accorded great weight, provided it does not conflict with the statute.'" *Id.* (*quoting Pub. Util. Dist. No. 1of Pend Oreille County v. Dep't of Ecology,* 146 Wn.2d 778, 790, 51 P.3d 744 (2002)).

The Court's review of the facts is confined to the record created before the PCHB. *Port of Seattle*, 151 Wn.2d at 587-88, 90 P.3d at 669; RCW 34.05.558. The Court "may grant relief if the PCHB's order is 'not supported by evidence that is substantial when viewed in light of the whole record before the court.'" *Port of Seattle*, 151 Wn.2d at 88, 90 P.3d at 669, (quoting RCW 34.05.570(3)(e)). The Washington Supreme Court has described the "substantial evidence" test as "whether the record contains a sufficient quantity of evidence to persuade a fair-

minded person of the truth or correctness of the order" of the agency. *Id.* (internal quotations omitted). The Court should overturn the PCHB's factual findings only if they are clearly erroneous and it is "definitely and firmly convinced that a mistake has been made." *Id.* (citations and internal quotations omitted). Further, the Court "do[es] not weigh the credibility of witnesses or substitute [its] judgment for the PCHB's with regard to findings of fact." *Id.*

### B. Deference to NWCAA interpretation of statute and regulations.

The central legal issues in this appeal concern the meaning of: (1) the terms "control technology" and "replace" in RCW 70.94.153 and NWCAA Regulation 300.13; and (2) the meaning of the phrase "routine maintenance, repair or similar parts replacement" in NWCAA Regulation 300.13.

Brooks argues that NWCAA is not entitled to deference to its interpretation of RCW 70.94.153 and NWCAA Regulation 300.13. Brooks' Br. at 23-24. First, Brooks points out that no deference is due if the statute and regulation are unambiguous. *Id.* This is true, as far as it goes: if a statute's meaning is plain on its face, then the Court must give effect to that plain meaning as expression of legislative intent. *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001). However, should the Court conclude that the statute and regulation are ambiguous, then the Washington Supreme Court has directed that the agency's interpretation of the statute be accorded great weight. *Port of Seattle*, 151 Wn.2d at 587, 90 P.3d at 669.

Brooks also argues that NWCAA's interpretation of both the statute and regulation should not be given deference because, Brooks claims, NWCAA regulation 300.13 is an "interpretive rule." Brooks' Br. at 24. That is incorrect. The case Brooks relies upon for this argument, *Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 446-47, 120 P.3d 46 (2005), concerns interpretation of

RCW 34.05.328, a provision of Washington's APA that sets requirements for certain agencies (not including NWCAA) prior to their adoption of a "significant legislative rule." That case, and the provision of the APA it interprets, have nothing to do with the deference agencies are given in interpreting their own rules or the statutes they are charged with implementing (discussed above). The main distinction this statute makes between a "significant legislative rule" and an "interpretive rule" is that a violation of an "interpretive rule" does not subject a person to a penalty or sanction. *Compare* RCW 34.05.328(5)(c)(ii) and (c)(iii). This appeal concerns a regulatory order that NWCAA issued to Brooks for its violation of Regulation 300.13; that regulatory order is a sanction and Regulation 300.13 is not an "interpretive rule" within the meaning of RCW 34.05.328(5)(c)(ii), even if that statute were relevant to the question before this Court.

### C. Brooks' baghouse is "Emission Control Technology."

Brooks asserts that that the changes it made to its baghouse are not subject to review under RCW 70.94.153 because the baghouse is not "emission control technology" within the meaning of the statute and NWCAA Regulation 300.13. Brooks' Br. at 25-31. The trigger for review under RCW 70.94.153 is in the statute's first sentence, which provides: "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 first sentence of NWCAA regulation 300.13 is the same, except that it substitutes "NWCAA" for "jurisdictional permitting authority."

### 1. The plain meaning of "emission control technology" is readily apparent from an understanding of the statutory scheme.

Here, both parties agree that the plain meaning of "emission control technology" can be discerned from the statute and is not ambiguous; the parties simply disagree on the meaning. The plain meaning of a term like "emission control technology" is derived from "all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Dept. of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). A term in a regulation should not be read in isolation but rather within the context of the regulatory and statutory scheme as a whole; likewise, statutory provisions must be read in their entirety and construed together, not in piecemeal fashion. *ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 807, 863 P.2d 64 (1993); *Thurston Cty. v. Cooper Point Ass'n*, 148 Wn.2d 1, 12, 57 P.3d 1156, 1162 (2002). Thus, the starting point of the analysis should be to consider RCW 70.94.153 and the term "emission control technology" in the broader context of the Washington Clean Air Act. *See ITT Rayonier*, 122 Wn.2d at 807.

RCW 70.94.153 is a companion to RCW 70.94.152, which requires air agency approval prior to establishing a new source of air emissions, a process commonly referred to as "New Source Review." The Act defines "new source" for this purpose as "the construction or modification of a stationary source that increases the amount of any air contaminant emitted by such source or that results in the emission of any air contaminant not previously emitted." RCW 70.94.030(17)(a). It further defines modification as "any physical change in, or change in the method of operation of, a stationary source …." RCW 70.94.030(15). Thus, New Source Review is required prior to establishing a new source or modifying an existing source, if the planned construction would result

in an increase in air emissions.[2] NWCAA has adopted regulations to implement New Source Review under RCW 70.94.152, *see* NWCAA Regulation 300.1, as has the Washington Department of Ecology. WAC 173-400-110.

Sources that are subject to New Source Review are required to achieve "best available control technology," also referred to as "BACT." RCW 70.94.152(10). BACT is defined as:

> [A]n emission limitation based on the maximum degree of reduction for each air pollutant subject to regulation under this chapter emitted from any new or modified stationary source, that the permitting authority on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such a source or modification through application of production processes and available methods, systems, and techniques … for control of each such a pollutant.

RCW 70.94.030(6). There are many concepts packed into this definition, but most relevant to this appeal is that BACT is an emission limit based on the best performing pollution controls ("maximum degree of reduction") that are economically feasible.

RCW 70.94.153 is a complement to New Source Review and the BACT emission limit imposed on new and modified emissions sources. As discussed in Section III.C., above, it applies when an existing source proposes to "replace or substantially alter the emission control technology installed on an existing source emission unit." RCW 70.94.153. It only applies when the change to the control technology is not expected to result in an emissions increase; if the change would increase emissions it would be subject to new source review under RCW 70.94.152 – which is why the second sentence of RCW 70.94.153 starts: "For projects not otherwise reviewable under RCW 70.94.152, …."

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[2] States are required by the federal Clean Air Act to have in place a New Source Review permitting program for the "modification and construction of any stationary source within" the state. 42 U.S.C. § 7410(a)(2)(C).

Thus, when the owner or operator of a source plans to make significant changes to the controls on emissions from an existing source ("replace or substantially alter") but the change will not increase emissions, New Source Review and its more stringent BACT requirement do not apply. However, when RCW 70.94.153 is triggered, the second sentence of the statute provides that the permitting authority may require that the owner or operator "employ" RACT, which is an emission limit achievable by the existing source using "control technology that is reasonably available considering technological and economic feasibility." RCW 70.94.030(20).

**2. The emission controls constituting RACT change over time.**

The permitting agency may require that the replaced or altered control technology be capable of achieving a level of emission control that the agency determines is RACT, as of the date of review.[3] This means the permitting agency is given an opportunity to consider through a RACT review whether controls on the source could be improved, as equipment or methods may have become more readily available since the existing emission controls on the source were last reviewed. *See* FOF 31, CR 913-914. What constitutes RACT changes over time as industry advances. RP 113:1-23; RP 193-94. Thus, as a result of the RACT review, the source may be required to meet a more stringent emission limit, which in turn forces the source to install different emission controls from what it originally intended.

As RACT is based on emission control technology that is "reasonably available," rather than the "maximum degree of reduction" required for BACT, RACT is a less stringent emission standard than BACT. RACT also allows

[3] The second clause allows the permitting agency impose conditions on the use and maintenance of the emission control equipment.

greater flexibility in balancing the emission reductions to be achieved by additional controls and the capital and operating costs of those controls. RCW 70.94.030(20). So, if the controls on a source were considered BACT when they were first installed, significant advances in emission controls may be needed before those controls would be considered less than RACT.

Consider Brooks' baghouse: when it was installed in 1989, as part of the conversion of Brooks' boiler from burning natural gas and oil to burning wood, CR 1074, the Agency concluded that the emission controls on the boiler incorporated BACT. CR 1125. In 2014, when Brooks replaced almost all of the baghouse components that come in contact with exhaust gases, twenty-five years had passed. That was an appropriate juncture, before Brooks invested $55,000 on replacing the baghouse with components of the same design, to evaluate whether emission controls have advanced to the point that what was the best available control in 1989 has been surpassed by improvements in baghouses, or whether alternative controls have become reasonably available in 2014. If emission control methods have moved on, RCW 70.94.153 allows air agencies to require that emission controls be updated rather than perpetuating outdated equipment that emits more pollution than the controls that have become "reasonably available."

### 3. The PCHB correctly concluded that "emission control technology" refers to specific equipment and to the scientific principles on which that equipment is based.

The PCHB concluded that the Washington legislature used the term "technology" in different ways across various provisions of the Washington Clean Air Act. It pointed to the first sentence of RCW 70.94.153, which refers to emission control technology "installed" on an existing stationary source, indicating a particular piece of equipment. COL 15, CR 920-921. It then referred

to the Act's definitions of emissions standards like BACT and RACT as emission limits achievable through "application of production processes and available methods, systems, and techniques …," which contemplates technologies that are not limited to control equipment or control devices. COL 16, CR 921-22.

Recognizing the different ways in which the Washington Clean Air Act uses the term, the PCHB accepted the definition offered by NWCAA, that "emission control technology includes devices or equipment, work practices and design characteristics." COL 17, CR 922. It further concluded that the term "emission control technology" is used in the Act 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." COL 17, CR 922.

Turning to the question of whether changes to the Brooks baghouse could trigger RCW 70.94.153, the PCHB concluded that "emission control technology" is an umbrella term that refers to both a control method and a particular piece of equipment, and that Brooks' baghouse constitutes emission control technology for the boiler and also is an emission control device. COL 17-18, CR 922.

#### 4. Brooks fails to recognize the different ways that "control technology" is used in different parts of the Washington Clean Air Act.

Brooks asks the Court to reject the PCHB's interpretation and to instead conclude that "emission control technology" is only an abstract concept and not any particular piece of equipment. Brooks' Br. at 26-27. According to Brooks, replacing every part of the baghouse with parts that were the same would not change the "control technology," as it remains a baghouse. Brooks' Br. at 30; RP 238. Brooks argues that RCW 70.94.153 and NWCAA Regulation 300.13 would only be triggered if it was proposing to use an entirely different approach to

controlling emissions from the boiler or substantially altered the function of the baghouse. Brooks' Br. at 30-31.

In support of its position, Brooks accepts that the term "emission control technology" is unambiguous, cites to a dictionary definition of "technology," and refers to the Washington Clean Air Act's definitions of three emissions standards that also use the term "control technology." Brooks' Br. at 25-31.

The fundamental flaw in Brooks' argument is its failure to recognize that the term "control technology" is used in different ways in different parts of the Washington Clean Air Act. The PCHB recognized that in discussing emissions standards, like BACT and RACT, the Act uses "control technology" to refer to types or categories of emission control equipment, as well as operating practices and other techniques for controlling emissions. *See* COL 16, CR 921-22. That is appropriate when the Act is describing an emission limit that is based on the level of control achievable by the "best available" or "reasonably available" control equipment. The emission limit is not derived from the performance of a particular piece of equipment, but rather from what can be expected from a type of equipment or control method.

But in RCW 70.94.153, the term "emission control technology" refers to something "installed on an existing stationary source emission unit." The PCHB concluded that, used in this way, the term does not refer to an abstract application (i.e., a type of emission control technology). COL 15, CR 920-21. It refers to specific equipment. The PCHB's reading is reinforced by the statute's use of the term "emission unit" in the phrase "installed on an existing stationary source emission unit." An "emission unit" is "any part of a stationary source or source which emits … any pollutant subject to regulation …." WAC 173-400-030(29). It is further reinforced by the final clause of the statute, authorizing "reasonable operation and maintenance conditions *for the control equipment*." RCW

70.94.153 (emphasis added). Several elements of the statute demonstrate that, as used in RCW 70.94.153, "emission control technology" refers to controls installed on a particular emission unit, like the baghouse Brooks has installed to control emissions from its boiler, and is not being purely conceptual.

**D. Brooks replaced the baghouse.**

Brooks asserts that the PCHB was wrong to conclude that its baghouse was "replaced" within the meaning of RCW 70.94.153 because, Brooks contends, the Board's conclusion 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," COL 20, CR 923, is not supported by substantial evidence. Brooks' Br. at 31-33. To succeed on this claim, Brooks would have to demonstrate that the record does not contain "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness" of the PCHB's conclusion that the baghouse had been replaced. *See Port of Seattle*, 151 Wn.2d at 88, 90 P.3d at 669. Brooks cannot meet this burden.

After describing the work that was performed in 2014 and the role the parts that Brooks reused, NWCAA permit engineer Dan Mahar's testimony characterized the work as replacing 90 percent of the baghouse. RP 140-142. After recounting the changes made to the baghouse, the PCHB referenced Mr. Mahar's comment as a summation of the situation. FOF 20, CR 913. Brooks did not take issue with Mr. Mahar's characterization of the replaced portion of the baghouse during its cross examination of Mr. Mahar. RP 151-169. Nor did any witness called by Brooks directly contradict his characterization. Nevertheless, in its argument to this Court Brooks quibbles that the replacement parts amounted to less than 90 percent of the baghouse. Brooks' Br. at 32.

The actual scope of the work performed in 2014 is more important than how the scale of that work is characterized and the facts regarding that work provide substantial support for the PCHB's conclusion that the baghouse was replaced. The PCHB's Finding of Fact 30 recounts three key elements of Mr. Mahar's testimony: "(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." FOF 30, CR 913. All of those facts are supported by Mr. Mahar's testimony. RP 140-142. Toby Mahar's testimony also detailed the parts replaced and those that were re-used, including the recent replacement of some of the re-used parts. RP 86, referencing Exhibits R-30, R-31, and R-32, CR 1243-1250. The PCHB's conclusion also is reinforced by testimony from engineers for two other regional air agencies, Paul Mairose of Southwest Clean Air Agency, RP 184-875, and Mark Goodin of Olympic Regional Clean Air Agency, RP 106. For example, Mr. Mairose testified that the parts that were re-used are items that will wear out as part of normal use and are often kept on hand to replace as needed, RP 186, and that the re-used parts are not major components of the baghouse. RP 187.

Brooks' objection to the PCHB's findings faces a stringent test, which Brooks has not met. Brooks has failed to demonstrate that the PCHB's findings are clearly erroneous, such that this Court could be "definitely and firmly convinced that a mistake has been made." *See Port of Seattle*, 151 Wn.2d at 88, 90 P.3d at 669. Further, in reviewing the evidentiary support for the PCHB's findings, the Court "do[es] not weigh the credibility of witnesses or substitute [its]

judgment for the PCHB's with regard to findings of fact." *Id.* The PCHB's findings of fact supporting its conclusion that Brooks replaced its baghouse within the meaning of RCW 70.94.153 are backed by ample record testimony and exhibits.

### E. The replacement of the baghouse was not "routine maintenance, repair, or similar parts replacement."

NWCAA Regulation 300.13 contains a limitation that is not stated in RCW 70.94.153: "Replacement or substantial alteration of control technology does not include routine maintenance, repair or similar parts replacement."[4] The PCHB recognized that this provision of the regulation is an interpretation of activity that the legislature did not intend to capture within the phrase "replace or substantially alter." COL 4, CR 915.

Brooks argues that the work it had done was "routine similar parts replacement" because it is common to replace the parts of a baghouse that have worn out.[5] Brooks' Br. at 34-36. The thrust of Brooks' argument is that anything short of scrapping the entire structure and replacing every part of a baghouse should be considered "routine." *Id.* ("The Brooks baghouse was not at the end of its useful life and did not need to be completely replaced."). Brooks' characterization of the condition of the baghouse in 2013 is counterfactual; its own witnesses testified that parts of the baghouse were like "Swiss cheese," RP 293, and that major components were so severely compromised they posed a safety risk to personnel maintaining the baghouse. RP 272.

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[4] The Department of Ecology's counterpart regulation, WAC 173-400-114, applicable elsewhere in Washington, contains the same limitation.

[5] Brooks also offers a prelude to its argument on this point, suggesting that there may be some level of work that is not "routine" but nevertheless does not rise to the level of "replacement." Brooks' Br. at 33-34. However, Brooks does not develop this thought and in any event, as discussed in the prior section, the PCHB's determination that Brooks did, in fact, replace its baghouse is supported by substantial evidence.

Brooks also asserts that its witness Mark Wolfe had testified that Brooks' replacement of baghouse parts was routine maintenance, repair, or similar parts replacement. Brooks' Br. at 35, citing RP 314, 308-09. However, Mr. Wolfe further testified that he was not offering any opinions regarding how NWCAA's regulations should be interpreted, and more specifically, that he was not offering an opinion as to whether the work that was done on the Brooks baghouse constituted a routine similar parts replacement within the meaning of NWCAA's rules. RP 310, 317. Rather, Mr. Wolfe testified that by "routine" he meant work that is "a common practice in the industry." RP 314.

NWCAA's Dan Mahar offered the PCHB a four factor common-sense framework for evaluating whether changes made to control equipment – whether common in an industry or not – should be considered "routine." RP 133-35. The four factors he identified were: (1) nature and extent of the action (for example: whether performed in-house or by outside contractors; whether the parts are kept in stock; whether the project impacts company operations); (2) purpose of the project (maintaining current operations or extending the life of the equipment); (3) frequency (how often is the work done); and (4) cost. *Id.* Mr. Mahar further testified that these factors are based on Environmental Protection Agency guidance for implementing a federal rule's exception for routine maintenance and repair. RP 135. EPA identified these factors for use in answering the same question posed by NWCAA Regulation 300.13: how to differentiate routine and non-routine work performed on emission control equipment. *See id.*

The PCHB summarized Mr. Mahar's testimony regarding his suggested approach, FOF 27-28, CR 911-12, and adopted it as a framework for its analysis. COL 7, CR 917. The PCHB concluded that the work done on the baghouse was not "routine" because: (1) it was extensive and contracted out, rather than performed by an in-house maintenance crew; (2) the boiler had to be shut down

for three days; (3) "[o]ver 90 percent of the old baghouse was removed from the site and an effectively new baghouse was brought in and installed using the same support structure"; (4) the cost (over $55,000) was substantial; (5) stainless steel was selected as the material to extend the life of the baghouse. *Id.*

Brooks does not take issue with any of the factual underpinnings of the PCHB's analysis. Rather, Brooks objects to the PCHB's use of the four factors offered by Mr. Mahar on grounds that they were developed for the "routine maintenance" exception to a federal regulatory scheme that is triggered by an increase in emissions from a source. Brooks' Br. at 36-38. Brooks' theory is that this is a "strict and detailed test" that is appropriate for "much more significant actions" but imposes more scrutiny than is warranted for work performed on emission controls that do not result in an emissions increase. *Id.* at 38.

Brooks' objection is groundless. The four factors in question are neither strict nor detailed; they provide a simple framework for considering whether particular work should be considered routine, without assigning specific weight to any factor or setting any hard-and-fast criteria, such as a capital cost threshold. Nor does the distinction Brooks has attempted to draw – whether the work in question results in an emissions increase – have any bearing on whether the emission controls in question are out of date.

Notably, the only alternative approach Brooks has offered for evaluating whether a particular change is "routine similar parts replacement" is whether it is a common occurrence in the industry. The PCHB correctly responded:

> If, as advocated by Brooks, an entity can replace, at one time, almost all of the parts including the housing 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.

COL 11, CR 919. In other words, the exception would swallow the rule. 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 becomes replacement of the control technology. Brooks failed to offer a means for finding that line; the framework offered by NWCAA does serve that purpose, and serves it quite well. The PCHB correctly concluded that the changes Brooks made to its baghouse were not "routine similar parts replacement."

### F. Brooks is not entitled to operate indefinitely under its 1989 Permit, without regard to changes Brooks makes to the emission controls on its boiler's emissions.

Brooks' final argument seems to be that it should not be subjected to a RACT review because the approval it received in 1989 when it changed its boiler fuel and installed the baghouse should be "good forever." Brooks' Br. at 39-41. This argument ignores the basic structure of the Washington Clean Air Act, and more specifically the express requirements of RCW 70.94.153 that are central to this appeal.

The Act does allow a source to continue operating indefinitely under the conditions of its most recent Notice of Construction Application and Order of Approval to Construct – until the owner or operator of the source proposes to make a change to the source. As discussed above (Sec. IV.C), if the change proposed by the owner will increase emissions, then New Source Review under RCW 70.94.152 and NWCAA Regulation 300.1 must be completed before the change is implemented. And, even if they do not intend to increase emissions, an application that may result in a RACT review is required if the emission control technology installed on the source will be replaced or substantially altered. RCW 70.94.153.

Brooks has amply demonstrated that it does not want to undergo a RACT review of the emission controls on its boiler. However, Brooks has brought that outcome upon itself by replacing almost all the parts of its baghouse without first applying to NWCAA, as was plainly required by RCW 70.94.153.

## V. CONCLUSION

Brooks has failed to identify any errors of fact or law in the PCHB's Findings, Conclusions and Order in this matter. Accordingly, this Court should affirm the PCHB's decision, which affirmed NWCAA's Notice of Violation and Corrective Action Order issued to Brooks on December 15, 2014.

Dated: May 7, 2018

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## APPENDIX

**RCW 70.94.030**
**Definitions**

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

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

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

**Northwest Clean Air Agency Regulations**

**Regulation 200 – Definitions**

**REASONABLY AVAILABLE CONTROL TECHNOLOGY (RACT)**

The lowest emission limit that a particular stationary source or source category is capable of meeting by the application of control technology that is reasonably

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

**Regulation**

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

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

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

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

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

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

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

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

e) Approval to replace or substantially alter emission control technology shall become invalid if construction is not commenced within eighteen months after

receipt of such approval, if construction is discontinued for a period of eighteen months or more, or if construction is not completed within a reasonable time. The NWCAA may extend the eighteen-month period upon a satisfactory showing that an extension is justified. This provision does not apply to the time period between construction of the approved phases of a phased construction project; each phase must commence construction within eighteen months of the projected and approved commencement date.

## CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing Northwest Clean Air Agency's Response Brief to the parties as indicated below on May 7, 2018:

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