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**SUPREME COURT OF THE STATE OF WASHINGTON**

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ASSOCIATION OF WASHINGTON BUSINESS, et al.,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Appellant,

and

WASHINGTON ENVIRONMENTAL COUNCIL, et al.,

Intervenor-Appellants.

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**BRIEF OF APPELLANT WASHINGTON STATE  
DEPARTMENT OF ECOLOGY**

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**Other Authorities**

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Richard L. Settle, *The Washington State Environmental Policy Act:  
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## I. INTRODUCTION

In 2015, the Governor directed the Department of Ecology to use existing statutory authority to regulate greenhouse gas emissions after the Legislature failed to pass comprehensive climate legislation. In response, Ecology adopted the Clean Air Rule to reduce greenhouse gas emissions from the state's most carbon-polluting industries. The rule sets emission standards for large polluting facilities and for combustible fossil fuels such as petroleum products and natural gas.

The Clean Air Rule is a proper exercise of Ecology's statutory authority to adopt emission standards "for the control or prohibition of emissions to the outdoor atmosphere of radionuclides, dust, fumes, mist, smoke, other particulate matter, vapor, gas, odorous substances, or any combination thereof." RCW 70.94.331(2)(c). However, Thurston County Superior Court invalidated the rule after concluding that Ecology lacks statutory authority to apply emission standards to fossil fuels. In doing so, the superior court narrowly and erroneously interpreted the Legislature's broad grant of authority to Ecology in the state Clean Air Act.

The court then compounded its error in three ways. First, the court gave no effect to the Clean Air Rule's severability clause and invalidated the entire rule, declining to sever the portions it found invalid from those the court determined Ecology *did* have authority to adopt. Second, the

court struck down several amendments to the state greenhouse gas reporting requirements (most of which were never challenged) without making any findings or conclusions regarding the basis for its decision. Finally, in ruling that the issue of statutory interpretation was dispositive, the court declined to reach several additional issues identified by Industry Petitioners that challenged the rule, resulting in a decision that is both overbroad and incomplete. The Court should correct these errors and reinstate the Clean Air Rule in its entirety.

## **II. ASSIGNMENTS OF ERROR**

(1) The superior court erred in Conclusions of Law 8, 9, and 10 of its Order Granting Petition for Judicial Review.

(2) The superior court erred in Conclusions of Law 11 and 12 in its Order Granting Petition for Judicial Review.

(3) The superior court erred in Conclusion of Law 13 in its Order Granting Petition for Judicial Review.

(4) The superior court erred in its Order Denying Department of Ecology's Request to Sever.

(5) The superior court erred in its Order Denying Department of Ecology's Motion to Supplement the Record.

(6) The superior court erred in Conclusions of Law 12–18 in its Conclusions of Law and Order on Ecology's CR 12(c) Motion to Dismiss.

### III. ISSUES RELATING TO ASSIGNMENTS OF ERROR

(1) Does the Department of Ecology have statutory authority to adopt greenhouse gas emission standards for fossil fuels that cause most of the state's greenhouse gas emissions?

(2) Does Ecology have statutory authority to allow parties to comply with the Clean Air Rule through multiple means, including the use of "emission reduction units" created by the rule?

(3) If Ecology exceeded its statutory authority by adopting emission standards for fossil fuels, should portions of the Clean Air Rule be severed in light of the rule's severability clause and because the rule can still function as intended?

(4) Did the superior court err in striking down greenhouse gas reporting rule amendments in their entirety when Petitioners challenged only one provision of those amendments and the court never reached the validity of that provision?

(5) Can Ecology impose greenhouse gas reporting requirements on petroleum product producers and importers who are regulated under the Clean Air Rule?

(6) Does the Clean Air Rule impose an unconstitutional tax under article VII, section 5 of the Washington Constitution even though the rule does not require monetary payments by regulated parties?

(7) Do Petitioners have standing to challenge Ecology's State Environmental Policy Act (SEPA) determination when they allege economic rather than environmental concerns as the basis for challenging the rule and, if so, was Ecology's SEPA determination clearly erroneous?

(8) Is the cost-benefit analysis arbitrary and capricious when it concluded, through consideration of the social cost of carbon, that the benefits of the rule exceed its costs?

(9) Is the least-burdensome alternatives analysis arbitrary and capricious when the rulemaking record contains documentation of Ecology's efforts to ease the burden of the rule on regulated parties?

#### **IV. STATEMENT OF THE CASE**

##### **A. Legislative Actions Preceding Adoption of the Clean Air Rule**

In 2015, Governor Inslee submitted a bill to the Legislature seeking authority for the Department of Ecology to adopt a cap-and-trade program to reduce greenhouse gas emissions. H.B. 1314, 64th Leg., Reg. Sess. (Wash. 2015); S.B. 5283, 64th Leg., Reg. Sess. (Wash. 2015). “Cap-and-trade” refers to a specific type of carbon reduction program whereby the regulator sets an overall cap on greenhouse gas emissions and regulated entities submit an “allowance” for each ton of greenhouse gas emitted, with the cap matching the number of available allowances in any given compliance period. AR 3943.

The Legislature failed to enact the Governor’s cap-and-trade bill. In response, wanting to take meaningful action on climate change, Governor Inslee directed Ecology to use its existing authority under the state Clean Air Act to set greenhouse gas emission standards for a broad range of emitting sources. AR 20229–30.

##### **B. Development and Adoption of the Clean Air Rule**

Following the Governor’s directive, Ecology began rulemaking to adopt greenhouse gas emission standards under RCW 70.94.331(2)(c). AR 2–3. From September through December 2015, Ecology held 4 public meetings; 4 webinars; and 44 stakeholder meetings, including meetings

with most of the Petitioners as well as conservation organizations and environmental justice advocates. AR 4965.

After this public outreach, Ecology issued a draft rule in January 2016. *Id.* During the public comment period that followed, Ecology received substantive comments from a variety of stakeholders. Ecology determined that it should make major revisions to the rule based on this feedback, and it withdrew the rule to do so. AR 3769, 4965.

Ecology then engaged in another extensive round of meetings with businesses, trade associations, government entities, conservation organizations, the public, and others. AR 4965. Ecology issued a new draft rule in May 2016. AR 239–42, 4965. Ecology held a second public comment period during which Ecology received 3,179 comments on the revised draft. AR 4973.

Ninety-five commenters opposed the rule in whole or in part. *See generally* AR 5103–240. Some commenters believed that landfill gas or cement production should be exempt from the rule. AR 5012–13, 5028–31. Some commenters, including some of the Petitioners, questioned Ecology’s legal authority to adopt the rule. AR 4977–82. Some argued that “[g]lobal warming has been largely debunked” and “this [rule] is unneeded.” AR 5144–45.

At least 2,789 commenters urged Ecology to adopt a stronger rule. *See generally* AR 5103–240. Many of these commenters urged Ecology to adopt a rule that required businesses to reduce annual greenhouse gas emissions by more than the 1.7 percent that the rule requires. *See, e.g.*, AR 16668, 21504. Other commenters were disappointed that Ecology’s rule wasn’t a cap-and-trade program. AR 3943, 4531.

Most of the remaining commenters either supported the rule or were neutral but wanted clarification on how the rule would work. *See generally* AR 5103–240. The supporters included the United Steelworkers, whose local president noted that “the rule will effectively curtail the production of greenhouse gases and help preserve jobs.” AR 4788; *see also* 21972–73. Supporters also included a coalition of seafood producers, fishing communities, and tribes who noted that their members “all would benefit from a sound policy that delivers verifiable, cost-effective reductions in carbon emissions.” AR 22026.

At the end of the public comment period, Ecology made changes to the rule to clarify its effect or respond to the comments received. AR 4967–72. Ecology adopted the final rule in September 2016. AR 243.

### **C. Overview of the Clean Air Rule**

The Clean Air Rule sets greenhouse gas emission standards for the largest stationary sources of emissions in the state, and for fossil fuels that

emit greenhouse gases when combusted. WAC 173-442-010. The rule requires certain companies that sell, distribute, or import petroleum products and natural gas to meet the emission standards for these fossil fuels, thus ensuring that they internalize some of the environmental costs associated with the products from which they profit. AR 4977.

The rule applies to the largest generators of greenhouse gases—initially, to those that annually emit, or are responsible for, at least 100,000 metric tons. WAC 173-442-030(3). The 100,000-ton threshold then ratchets down through 2035, at which point 70,000 annual metric tons becomes and remains the threshold for regulation. *Id.*

The rule requires most covered parties to reduce their emissions annually by 1.7 percent from their baseline value beginning in 2017. WAC 173-442-060(1)(b).<sup>1</sup> Compliance is measured through three-year “compliance periods.” WAC 173-442-020(1)(g). At the end of each period, covered parties must demonstrate that they have decreased their emissions by the required amount relative to their baseline or have otherwise caused emissions to be reduced by that amount. WAC 173-442-200. A business that decreases emissions by more than the required amount acquires an “emission reduction unit” for each additional ton of

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<sup>1</sup> Petroleum importers and energy-intensive trade-exposed industries do not have to start reducing emissions until 2020. WAC 173-442-030(2).

greenhouse gas reduced. WAC 173-442-110(1). Covered parties can then bank these units for future years, or sell them to other covered parties for compliance purposes. WAC 173-442-130, -140.

There are multiple ways to comply with the rule. Stationary sources and other covered parties with in-state facilities can reduce emissions on-site at their facilities. AR 5066. Covered parties can acquire emission reduction units from businesses that have decreased their emissions beyond what is required. AR 5066; WAC 173-442-140. They can acquire emission reduction units from in-state projects or programs that reduce greenhouse gas emissions. AR 5077–80; WAC 173-442-160. They can also purchase allowances from approved cap-and-trade programs in other jurisdictions with each allowance equaling a single emission reduction unit. AR 5066, 5080; WAC 173-442-170. Regulated parties may use any one or combination of these alternatives to meet their obligations. AR 4977–78.

In addition, the Clean Air Rule establishes a reserve of emission reduction units that Ecology can use to accommodate growth of existing businesses or to allow new businesses to enter the Washington market. WAC 173-442-240. The rule places 2 percent of each covered party's reduction obligation, plus emission reductions resulting from curtailment of operations or decreases in production, into the reserve. WAC 173-442-

240(1). Ecology can allocate units in the reserve to businesses that are expanding production or opening a new facility in Washington, thus ensuring an overall decrease in statewide emissions while allowing for business growth. WAC 173-442-240(4); AR 4983, 5230. This feature of the rule was added to support economic development in response to concerns raised by some stakeholders.

**D. Costs and Benefits of the Clean Air Rule**

Ecology prepared a cost-benefit analysis and a secondary economic impacts analysis for the Clean Air Rule. AR 244–355, 461–92. The cost-benefit analysis concluded that the 20-year costs of the program would range from \$400 million at the low end to \$6.8 billion at the high end. AR 293. In assessing benefits, Ecology’s economist used the “social cost of carbon” tool developed by the federal government. AR 297. The tool assigns a monetary value to greenhouse gas reductions based on the economic benefit of avoiding the impacts of climate change. *Id.* Using this tool, the economist determined that the quantitative benefits of the rule ranged from \$2 billion at the low end to \$18 billion at the high end. AR 306. Ecology found that the rule provided significant unquantified (qualitative) benefits as well. AR 306–07. Ecology thus concluded that the benefits of the rule exceeded its costs. AR 320–22.

The secondary economic-impacts analysis looked at costs that would be passed through regulated parties to Washington consumers and households. AR 461–92. That analysis estimated that residential natural gas rates would increase by 0.0 to 0.8 percent by 2020 and to 0.3 to 5.6 percent by 2035. AR 5000, 473–74. Industrial natural gas prices would increase by 0.1 to 1.4 percent by 2020 and by 0.5 to 10.2 percent by 2035. *Id.* Residential and industrial electricity rates would increase by 0.1 to 1.4 percent by 2020 and 0.5 to 9.2 percent by 2035. *Id.* The cost of gasoline and diesel would increase by 0.0 to 0.5 percent by 2020 and 0.2 to 3.3 percent by 2035. AR 473–74.

**E. Ecology’s Determination of Nonsignificance Under SEPA**

Before adopting the rule, Ecology was required to make a SEPA threshold determination to decide whether to prepare an environmental impact statement (EIS). *See* WAC 197-11-310. After completing a SEPA environmental checklist, Ecology determined that the Clean Air Rule would likely not have significant adverse environmental impacts and therefore issued a threshold determination of nonsignificance (DNS) rather than an EIS. AR 28395–436.

Before issuing its DNS, Ecology considered but ultimately rejected Petitioners’ arguments that the rule would result in significant adverse environmental impacts due to (1) fuel shifting based on increase in natural

gas prices; (2) shifting of energy resources from natural gas to higher-emitting coal; and (3) manufacturers moving their businesses out of Washington. AR 2870–75. Ecology concluded that the modest natural gas price increase over the next 18 years was unlikely to result in significant fuel shifting. AR 5000, 5013. Ecology also concluded that there wouldn't be widespread shifting of in-state energy resources to out-of-state coal power because power generators would be subject to the Clean Air Rule only for a few years before shifting to the federal Clean Power Plan, which provides for greenhouse gas reductions on a regional rather than state-specific basis.<sup>2</sup> AR 4985–86. Last, Ecology determined that the rule's accommodations for energy-intensive trade-exposed industries made it unlikely that Washington's manufacturers would move production to other states. AR 5012.

#### **F. Appeals of the Clean Air Rule and Procedural History**

Eight industry groups led by the Association of Washington Businesses (AWB) immediately challenged the Clean Air Rule under the Administrative Procedure Act (APA), RCW 34.05. Three days later, four natural gas local distribution companies (Gas Companies) also challenged the rule. The AWB and Gas Companies (collectively, Petitioners) alleged

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<sup>2</sup> Although the current federal administration has announced plans to repeal the Clean Power Plan, the Clean Air Rule was adopted before the 2016 election and before the current administration took office.

that the rule should be invalidated because it exceeded Ecology's statutory authority, constituted an impermissible tax, and was arbitrary and capricious. Clerk's Papers (CP) 298–99, 355. The AWB challenged one amendment to WAC 173-441 requiring petroleum product producers and importers to report their emissions to Ecology using the same methods they use when reporting emissions to the federal Environmental Protection Agency (EPA). CP 320–26. The superior court consolidated the two appeals. Three conservation organizations (Washington Environmental Council, Climate Solutions, and Natural Resources Defense Council) intervened in defense of Ecology's authority to adopt the rule. CP 403.

Ecology filed a Civil Rule (CR) 12(c) motion for judgment on the pleadings, arguing that Petitioners failed to establish standing to pursue their SEPA claims. Petitioners responded by moving to amend their petitions for review, which the superior court granted at the same time that it denied Ecology's CR 12(c) motion. CP 647–52.

After briefing and a hearing on the merits, the superior court ruled that the Clean Air Rule exceeds Ecology's statutory authority under the state Clean Air Act. The court reasoned that Ecology's authority to set emission standards extends only to facilities, or "stationary sources," of emissions and not directly to fossil fuels. The superior court declined to reach the other issues identified by Petitioners.

Before entry of a final order, Ecology moved to sever the portions of the rule that apply to fossil fuels and preserve the remainder of the rule as applied to facilities. CP 689–735. The court denied Ecology’s motion. CP 787–88. The parties’ proposed final orders to the court were identical with one exception: the Petitioners’ order struck down the greenhouse gas reporting amendments in their entirety; Ecology’s order preserved those amendments since the court did not address them and no party challenged them. *Compare* CP 797–802 to CP 821–26. The court signed Petitioners’ order invalidating the entire Clean Air Rule and all amendments to the reporting requirements. CP 835–40. Ecology now seeks direct review.

## V. ARGUMENT

### A. Standard of Review

Agency rules are reviewed under the APA. RCW 34.05.570(2). The Court sits in the same position as the superior court and applies the APA standards of review to the administrative record. *Cornelius v. Dep’t of Ecology*, 182 Wn.2d 574, 585, 344 P.3d 199 (2015). A rule can be declared invalid only if the reviewing court finds that the rule “violates constitutional provisions; . . . exceeds the statutory authority of the agency; . . . was adopted without compliance with statutory rule-making procedures; or . . . is arbitrary and capricious.” RCW 34.05.570(2)(c). Rules are presumed valid and are upheld if reasonably consistent with the

statute being implemented. *See Wash. Pub. Ports Ass'n v. Dep't of Rev.*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003); RCW 34.05.570(1)(a).

**B. Ecology Has Statutory Authority to Adopt Greenhouse Gas Emission Standards for Fossil Fuels**

The Legislature has vested Ecology “with very broad authority and responsibility for managing this state’s environment.” *Weyerhaeuser Co. v. Dep't of Ecology*, 86 Wn.2d 310, 315, 545 P.2d 5 (1976). Ecology is specifically responsible for administering the state Clean Air Act, the purpose of which is to “preserve, protect, and enhance the air quality for current and future generations.” RCW 70.94.011. The Act directs Ecology to implement a statewide program of air pollution prevention and control and “to provide for the use of all known, available, and reasonable methods to reduce, prevent, and control air pollution.” *Id.* As an environmental statute, it should be interpreted liberally and in a manner that best advances the statute’s purpose of environmental protection. *See Quinault Indian Nation v. Imperium Terminal Servs., LLC*, 187 Wn.2d 460, 470, 387 P.3d 670 (2017).

Despite Ecology’s broad Clean Air Act authority, the superior court found that Ecology could set emission standards only for “sources that directly emit air contaminants,” rather than the fossil fuels that cause

the majority of in-state greenhouse gas emissions. CP 838. But the statute’s plain language is not so limited.

Statutory interpretation is a question of law reviewed de novo. *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The primary objective of statutory interpretation is to ascertain and give effect to the Legislature’s intent. *Id.* Courts begin by examining the plain language of a statute: the ordinary meaning of the language, the context of the statute, related provisions, the statutory scheme as a whole, and any statement of legislative purpose. *G-P Gypsum Corp. v. Dep’t of Rev.*, 169 Wn.2d 304, 309–10, 237 P.3d 256 (2010). If a statute is ambiguous (i.e., subject to more than one reasonable interpretation), this Court adopts the interpretation that best advances the statutory purpose. *Weyerhaeuser*, 86 Wn.2d at 315.

“Emission standard” is statutorily defined as:

[A] requirement established under the federal clean air act or this chapter that limits the quantity, rate, or concentration of emissions of air contaminants on a continuous basis, *including* any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice, or operational standard adopted under the federal clean air act or this chapter.

RCW 70.94.030(12) (emphasis added). Ecology may set emission standards “based upon a system of classification by types of emissions *or*

types of sources of emissions, *or* combinations thereof, which [Ecology] determines most feasible for the purposes of this chapter.” RCW 70.94.331(2)(c) (emphasis added).

Under plain statutory language, the Clean Air Rule is a lawfully adopted requirement “that limits the quantity, rate, or concentration of emissions of air contaminants on a continuous basis” based on “types of emissions” (i.e., greenhouse gases). Instead of applying this plain language, the superior court narrowly interpreted the definition of “emission standard” as applying only to sources that directly emit contaminants into the air.<sup>3</sup> CP 839. The court thus interpreted “emission standard” as if the statute read as follows:

~~[a] requirement established under the federal clean air act or this chapter that limits the quantity, rate, or concentration of emissions of air contaminants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice, or operational standard adopted under the federal clean air act or this chapter.~~

This erroneous interpretation gives effect to only one clause in the definition—a clause that provides an example of the definition but is not itself the definition. “Emission standard” *includes* (but is not limited to)

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<sup>3</sup> “Source” is defined, in pertinent part, as “all of the emissions units including quantifiable fugitive emissions, that are located on one or more contiguous or adjacent properties, and are under the control of the same person, or persons under common control.” RCW 70.94.030(22).

“any requirement relating to the operation or maintenance of a source[.]”  
*See, e.g., Pub. Util. Dist. No. 1 of Pend Oreille Cty. v. Dep’t of Ecology*,  
146 Wn.2d 778, 807 n.7, 51 P.3d 744 (2002) (“including” is a term of  
expansion not limitation.) The definition also *includes* (but is not limited  
to) “any design, equipment, work practice, or operational standard[.]”  
These are simply examples of “emission standards” which are defined  
overall as “a requirement . . . that limits the quantity, rate, or concentration  
of emissions on a continuous basis[.]” Limiting the quantity and rate of  
greenhouse gas emissions on a continuous basis is exactly what the Clean  
Air Rule does, and the superior court erred in concluding otherwise.

The superior court’s interpretation not only ignores plain statutory  
language but also renders key phrases superfluous. “Emission standard”  
includes both “operation . . . of a source” and any “operational standard.”  
If the entire definition applies only to sources, then the reference to  
“operational standard” as a separate example is meaningless. Likewise, if  
Ecology only has authority to adopt emission standards for sources that  
“directly introduce contaminants into the air,” then the statute’s allowance  
for emission standards based on types of emissions, or a combination of  
emissions and sources, is meaningless. *See RCW 70.94.331(2)*. But  
statutes are interpreted so that no portion is rendered superfluous. *Ralph v.*  
*Dep’t of Nat. Res.*, 182 Wn.2d 242, 248, 343 P.3d 342 (2014).

If this Court determines that the statute is ambiguous and susceptible to more than one meaning, the Court should then adopt the interpretation that best advances the Clean Air Act's purpose of preserving, protecting, and enhancing air quality for current and future generations. RCW 70.94.011. The Clean Air Rule advances this purpose by ensuring that the entities responsible for the bulk of Washington's greenhouse gas emissions do their part to reduce harmful emissions linked to the sale of their products.<sup>4</sup> Both a plain language interpretation and the rules of statutory construction support the Clean Air Rule. It should be upheld.

**C. Ecology Did Not Exceed Its Statutory Authority by Allowing Emission Reduction Units as an Alternative Compliance Tool**

Below, Petitioners challenged Ecology's authority to let parties use emission reduction units as an alternative means of complying with the rule. The superior court did not reach the issue but this Court can do so because it sits in the same position as the trial court and applies the APA standards of review directly to the agency record. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993).<sup>5</sup>

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<sup>4</sup> See AR 3223 (emissions from petroleum products comprise over 45 percent of statewide emissions); AR 3220 (natural gas and oil comprise over 22 percent of statewide emissions).

<sup>5</sup> Indeed, since the superior court's ruling has already delayed enforcement of the rule by three years, this Court should reach issues that the superior court declined to reach to avoid even more delay through remand. Ecology's Statement of Grounds at 7.

The Legislature set a goal of reducing greenhouse gas emissions “at the lowest cost to Washington’s economy, consumers, and businesses.” RCW 70.235.005(3)(c). Emission reduction units help meet this goal by giving businesses multiple means of complying with the rule. *See* AR 5066 (Response 229), 5072 (Response 244), 5077 (Response 262).

Agencies have those powers expressly granted to them and those necessarily implied from their statutory delegation of authority. *See, e.g., Ass’n of Wash. Bus. v. Dep’t of Rev.*, 155 Wn.2d 430, 437, 120 P.3d 46 (2005). As discussed above, Ecology has broad authority to set emission standards. RCW 70.94.331(2)(c). Because the statute does not spell out how regulated parties can comply with emission standards, Ecology can fill the gap to determine the best means of compliance. *See, e.g., Armstrong v. State*, 91 Wn. App. 530, 538, 958 P.2d 1010 (1998) (agencies may adopt rules to fill in the gaps of a statute if necessary to effectuate the statutory scheme). Ecology’s decision to allow emission reduction units as a means of compliance is consistent with legislative purpose, is consistent with the Clean Air Act, and should be upheld.

**D. This Court Should Sever Any Invalid Portions of the Clean Air Rule**

The entire Clean Air Rule should be upheld. If not, invalid portions of the rule should be severed from the valid portions. The superior court erred by refusing to do so.

**1. Ecology would have adopted the rule even without the portions that the superior court declared invalid**

Washington does not have an established test for severability of regulations. The test for severability of statutes, however, is instructive. *See Mader v. Health Care Auth.*, 149 Wn.2d 458, 472, 70 P.3d 931 (2003). That test directs courts to determine (1) whether the constitutional and unconstitutional portions of a statute are so connected that the Legislature could not have believably passed one without the other, and (2) whether the eliminated portion renders an act useless for accomplishing the Legislature's purpose. *Hall v. Niemer*, 97 Wn.2d 574, 582, 649 P.2d 98 (1982).

The federal test for severability of regulations is similar to Washington's test for severability of statutes and provides a helpful analytical framework.<sup>6</sup> A party seeking severance must show (1) that severance and invalidation will not impair the function of the statute being

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<sup>6</sup> Absent state cases, this Court frequently looks to federal cases for guidance. *See, e.g., Dep't of Ecology v. City of Kirkland*, 84 Wn.2d 25, 29, 523 P.2d 1181 (1974).

implemented as a whole, and (2) there is no indication that the regulation would not have been passed but for the invalid provisions. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294, 108 S. Ct. 1811, 100 L. Ed. 2d 313 (1988). Both parts of the test are met here.

**a. Severing the provisions of the Clean Air Rule that regulate fossil fuels will not impair the function of the Clean Air Act or the remainder of the rule**

The first prong of the severability test requires the court to examine how the severed rule will function after the severed portions have been removed. *See K Mart Corp.*, 486 U.S. at 294; *Davis Cty. Solid Waste Mgmt. v. U.S. E.P.A.*, 108 F.3d 1454, 1460 (D.C. Cir. 1997) (*Davis II*).

Severability is proper when the “remainder of the regulation could function sensibly without the stricken provision.” *MD/DC/DE Broads. Ass’n v. Fed. Commc’ns Comm’n*, 236 F.3d 13, 22 (D.C. Cir. 2001).

Because the Clean Air Rule regulates covered parties on an individual basis, the provisions that adopt greenhouse gas emission standards for facilities can operate independently of the provisions that pertain to fossil fuels. *See* WAC 173-442-050, -060, -070 (establishing individual baseline and individual emission reduction requirement for each covered party).

After removing fossil fuel distributors, the rule would still apply to approximately 48 facilities that directly emit greenhouse gases. AR 11793. Minimal language would need to be severed from the rule to preserve the

portions that apply to facilities. *See* CP 707–35. The superior court nevertheless ignored the severability clause. This was error because removing provisions related to fossil fuels from the rule would not change the way the rule works. The rule would still require annual emission reductions from the state’s largest stationary sources of emissions. The rule regulates each covered party separately, with each party having its own compliance obligation. For example, Ecology establishes baseline emissions and emission reduction requirements for each covered party without reference to any other covered party. WAC 173-442-050, -060, -070. In addition, each covered party is required to report individually, to verify its emissions individually, and to meet reduction requirements individually, without reference to what other parties are doing. WAC 173-442-200, -210, -220. Under this framework, striking the fossil fuels language has no effect on what the rule requires of the remaining 48 emitters. The first part of the severability test is met.

**b. Ecology would have adopted the Clean Air Rule even if it could not directly regulate fossil fuels**

Severability is proper where, as here, there is no indication that the regulation would not have been passed but for the invalid provisions. *K Mart Corp.*, 486 U.S. at 294. Courts look to an agency’s intent to determine if the remaining provisions of a severed rule can sensibly serve

the intent of the rule. *Davis II*, 108 F.3d at 1459. This entails examining the specific purpose and structure of the rule, and other indicia of agency intent. *MD/DC/DE Broads. Ass'n v. Fed. Commc'ns Comm'n*, 253 F.3d 732, 734–35 (D.C. Cir. 2001).

Here, there is strong evidence that Ecology would have adopted a severed version of the Clean Air Rule had that been necessary. First, Ecology included a severability clause. WAC 173-442-370. Although not determinative, a severability clause is evidence that valid provisions of a rule would have been adopted without the invalid provisions. *See State v. Abrams*, 163 Wn.2d 277, 286, 178 P.3d 1021 (2008). The rule's severability clause would have been superfluous if Ecology had intended to adopt the Clean Air Rule only if each and every aspect of the rule was upheld. *See Bravern Residential, II, LLC v. Dep't of Rev.*, 183 Wn. App. 769, 777, 334 P.3d 1182 (2014) (regulations, like statutes, must be read so that no portion is rendered superfluous).

Second, Ecology's intent in adopting the rule was to reduce Washington's greenhouse gas emissions. AR 5048, 4963. Even a severed version of the rule serves Ecology's purpose because the rule would still reduce emissions, albeit by a lesser amount. As noted by Ecology's senior economist, the rule's benefits outweigh its costs even if portions deemed invalid by the superior court are removed. CP 682–84. There is thus no

reason to conclude that Ecology would not have adopted the rule if it could regulate only some, rather than all, of the parties that it initially sought to regulate. The second step of the severability test is met.

**2. Contrary to what the AWB argued below, the cost-benefit analysis supports severance**

Below, the AWB argued that the Clean Air Rule cannot be severed because the cost-benefit and least-burdensome analyses were prepared for the rule as a whole, and therefore cannot be relied upon to support a severed rule. CP 740–42. That is incorrect. The existing cost-benefit analysis contains all the information necessary to determine the costs and benefits of a severed version of the rule.

To show that the benefits of a severed rule still exceed its costs, Ecology’s economist removed fossil fuel distributors from her original spreadsheet and recalculated total quantifiable costs and benefits. CP 682. The recalculations showed that costs of compliance for a severed rule would range between \$148 million and \$2.0 billion compared to quantifiable benefits of \$2.8 billion. CP 683.

The superior court, without analysis, refused to consider the declaration of Ecology’s economist in deciding the severability issue. CP 785–86. This was error because declarations by agency experts are useful at the severance stage of proceedings. *See Davis II*, 108 F.3d at

1457–58. The APA expressly allows for supplementation of the agency record if the new information relates to material facts that were not required to be determined on the agency record. RCW 34.05.562(1)(c). Since the issue of severability did not arise until after Ecology adopted the rule, it is an issue that was not required to be determined on the agency record. The superior court erred in concluding otherwise, and this Court should consider the economist’s declaration even though the superior court refused to do so.

The least-burdensome alternatives analysis is likewise still valid as applied to a severed Clean Air Rule. The rule’s flexible compliance options would remain in place, as would the delayed compliance timeline and efficiency-based reduction requirements for energy-intensive trade exposed industries. WAC 173-442-030(2), -070(3). These were some of the main elements of the rule underlying Ecology’s determination that the rule was “the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives” of the Clean Air Act. RCW 34.05.328(1)(e); *see also* AR 326–27.

In sum, the entire rule should be upheld as consistent with Ecology’s statutory authority. If not, however, this Court should conduct the severability analysis that the superior court refused to conduct and should allow valid portions of the rule to remain in effect.

**E. The Superior Court Erred in Striking Down Unchallenged Amendments to the Greenhouse Gas Reporting Rule**

When it adopted the Clean Air Rule, WAC 173-442, Ecology also amended requirements in its existing greenhouse gas reporting requirements, WAC 173-441, which were initially adopted in 2011. AR 243, 404–30. The AWB challenged just one of the amended provisions: a requirement that petroleum product producers and importers report their greenhouse gas emissions to Ecology using the same information that they use when reporting to EPA. *See* WAC 173-441-120.<sup>7</sup> Ecology adopted this amendment in order to track covered parties' compliance with the Clean Air Rule. The AWB raised no additional claims, nor made any argument, regarding the other amendments. *See* CP 320–26, 547–49.

Despite the AWB's narrow challenge, the superior court signed the AWB's proposed order invalidating *all* amended provisions of the greenhouse gas reporting rule, including those that operate independently of the Clean Air Rule. Although Ecology objected to entry of the AWB's order because it invalidated reporting rules that had not been challenged, the court nevertheless signed the order. CP 803–10, 840.

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<sup>7</sup> Ecology addresses this issue below in section V.F.

In accepting the AWB’s order, the court made none of the findings the APA requires. The APA requires reviewing courts to “make a separate and distinct ruling on each material issue on which the court’s decision is based . . . .” RCW 34.05.570(1)(c). When invalidating a rule, the court must “set out in its findings and conclusions, as appropriate, each violation or error by the agency under the standards for review set out in [the APA] on which the court bases its decision and order.” RCW 34.05.574(1).

Here, the superior court did neither. CP 835–40. Rather, the court’s order simply invalidates the amendments, most of which operate independently of the Clean Air Rule, and as such are not encompassed by the superior court’s ruling on Ecology’s statutory authority to regulate fossil fuels. For example, Ecology amended WAC 173-441-086 to allow the agency to assign a greenhouse gas emission level if a reporting party fails to submit a complete annual report, or if Ecology discovers a discrepancy in the report. Ecology also amended WAC 173-441-110, which eliminated a reporting fee for transportation fuel suppliers.

Ecology had no opportunity to defend these and other amendments because of the AWB’s narrow challenge to WAC 173-441-120. CP 320–26, 547–48. Because the superior court’s order is overbroad and does not comply with the APA, this Court should reverse the order’s invalidation of all amendments to WAC 173-441.

**F. Ecology Has Authority to Require Petroleum Product Producers and Importers to Report Their Emissions Using the Same Methods Currently Reported to EPA**

As noted above, the AWB challenged a single amendment to the greenhouse gas reporting rule: the amendment requiring petroleum product producers and importers to report emissions using the same methods that they already report to the EPA under federal reporting requirements. WAC 173-441-120; 40 C.F.R. pt. 98, subpt. MM. Although the superior court never reached this issue, this Court can and should.

The Clean Air Act requires entities to report their greenhouse gas emissions to Ecology when emissions from a single facility, source, or site, or from fossil fuels sold in Washington by a single supplier, meet or exceed 10,000 tons of greenhouse gases annually, measured in carbon dioxide equivalent. RCW 70.94.151(5)(a). Transportation fuel suppliers report their emissions based on data they provide to the Department of Licensing to calculate their annual tax obligation. RCW 70.94.151(5)(a)(iii). Ecology cannot “require suppliers to use additional data to calculate greenhouse gas emissions other than the data the suppliers report to the department of licensing.” *Id.*

The AWB contends that the amended version of WAC 173-441-120 conflicts with this limitation because it requires petroleum product

producers and importers to report to Ecology the same information they are already reporting to EPA. CP 320–26, 547–49. The AWB is wrong.

First, although there is definitional overlap, the “petroleum product producers and importers” regulated under the Clean Air Rule are not synonymous with the “suppliers” required to report under RCW 70.94.151(5). Under RCW 70.94.151(5)(h)(ii), a “supplier” includes “[a] motor vehicle fuel supplier or a motor vehicle fuel importer . . . a special fuel supplier or a special fuel importer . . . and . . . a distributor of aircraft fuel . . . .” RCW 70.94.151(5)(h)(ii).<sup>8</sup> Under the state Fuel Tax Act, “suppliers” are entities that hold federal certificates of registry under the internal revenue code and engage in tax-free transactions of fuel in the bulk transfer-terminal system (i.e., refineries, pipelines, vessels, and terminals). Former RCW 82.36.010(17) (2007), *repealed by* Laws of 2013, ch. 225, § 501; former RCW 82.38.020(27) (2002), *repealed by* Laws of 2013, ch. 225, § 102.<sup>9</sup> “Importers” are entities that bring fuel into the state by a means other than the bulk transfer-terminal system. Former RCW 82.36.010(16) (2007); former RCW 82.38.020(26) (2002); *now at* RCW 82.38.020(18). This reporting framework only applies to fuels used for specified transportation uses.

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<sup>8</sup> The Clean Air Rule does not apply to aircraft fuel. AR 5051.

<sup>9</sup> This definition of supplier is now found at RCW 82.38.020(30). Laws of 2013, ch. 225, § 102.

In contrast, the Clean Air Rule regulates emissions from “petroleum products producers and importers” which includes emissions from “Suppliers of Petroleum Products” as defined in federal greenhouse gas reporting regulations. WAC 173-442-020(1)(j)(ii) (citing 40 C.F.R. pt. 98, subpt. MM). Unlike the state Fuel Tax Act, the federal regulations do not distinguish between fuels brought in via the bulk transfer-terminal system, and those that are not. Subpart MM of the federal regulations applies to all refineries, plus importers and exporters of petroleum products and natural gas liquids equivalent to 25,000 tons of carbon dioxide. 40 C.F.R. §§ 98.390, 98.2. “Importer” includes “any person, company, or organization of record that for any reason brings a product into Washington state from a different state or foreign country, excluding introduction into Washington state jurisdiction exclusively for United States military purposes.” WAC 173-441-120(2)(h)(ii)(D) (incorporating and modifying the definition of “importer” from 40 C.F.R. § 98.6). This method of reporting includes all products distilled from crude oil, including transportation fuels not covered by Licensing, home heating fuels, and industrial fuels and chemicals.

Due to the definitional differences, several transportation fuel suppliers that currently report emissions under RCW 70.94.151(5) do not report emissions to EPA, and are not required to report under the new

reporting requirements. AR 5057. Likewise, there are “petroleum products producers and importers” who report to EPA and are required to report under the new requirements, but have never reported their emissions under RCW 70.94.151(5). Simply put, the Clean Air Rule and the new reporting requirements do not regulate the same categories of entities required to report under RCW 70.94.151(5).

This difference is further shown by the fact that the new reporting requirements for petroleum products producers and importers regulate at a different point in the distribution and sale of fossil fuels than the Department of Licensing’s taxes on fuel sales in Washington. The Clean Air Rule regulates companies that physically make or bring petroleum products to the state, rather than the mid-level distributors who pay fuel taxes under RCW 70.94.151. AR 5055–56. EPA’s Subpart MM attributes emissions to the same point of petroleum production and distribution as the Clean Air Rule. AR 5055. The Clean Air Rule’s point of regulation is distinct from that contemplated in RCW 70.94.151(5).

Next, the category of products covered by Subpart MM is broader than emissions from fuels being reported under RCW 70.94.151(5). Under the EPA’s regulations, “petroleum product” means, in relevant part, “all refined and semi-refined products that are produced at a refinery by processing crude oil and other petroleum-based feedstocks, including

petroleum products derived from co-processing biomass and petroleum feedstock together, but not including plastics or plastic products.”

40 C.F.R. § 98.6. In contrast, the transportation fuel supplier emissions reported under RCW 70.94.151 are limited to emissions from gasoline, diesel, ethanol, and biodiesel used for on-road purposes. AR 5051; *see also* former RCW 82.38.020(23) (2002), former RCW 82.36.010(19) (2007). The Clean Air Rule regulates the broad range of “petroleum products” rather than the narrower range of transportation fuels covered by RCW 70.94.151. There is no conflict between WAC 173-441-120 and RCW 70.94.151(5).

Finally, the purpose of reporting under RCW 70.94.151 is different than the purpose of determining compliance with an emission standard established under RCW 70.94.331(2)(b) and (c). Greenhouse gas reporting under RCW 70.94.151(5) supports the state registration and reporting program, the purpose of which is to develop and maintain a current and accurate record of contaminant sources. WAC 173-400-099. Although this serves an important function, emissions reported under RCW 70.94.151 may be insufficient to demonstrate compliance with a regulatory standard.

The reporting required by RCW 70.94.151(5) is a good case in point. The State taxes all on-road fuels at the same rate, and the Department of Licensing therefore does not require detailed or consistent

reporting of emissions by product code. AR 5057. The resulting data do not reflect precise usage and combustion of fuels by specific type, a factor that is crucial in accurately calculating greenhouse gas emissions under the Clean Air Rule. AR 5058. For example, according to Licensing-based data, biodiesel use has been in the negative millions of gallons for several consecutive years, which is simply not possible. AR 5057. Although reporting under RCW 70.94.151(5) provides a snapshot of transportation fuel-related emissions for inventory purposes, it is insufficient to demonstrate compliance with the Clean Air Rule.

The new reporting requirements for petroleum products producers and importers do not exceed Ecology's authority. As with the other amendments to WAC 173-441, the Court should reinstate the amended version of WAC 173-441-120.

**G. The Clean Air Rule Does Not Impose a Tax and Is Not Subject to Article VII, Section 5 of the Washington Constitution**

As explained above, the Clean Air Rule provides multiple compliance pathways for regulated parties to reduce their average annual emissions. To help achieve compliance, the Clean Air Rule includes a reserve account. Two percent of each party's annual emission reduction units used for compliance are placed in the reserve. WAC 173-442-240. Units from the reserve can be withdrawn and used for re-startup of

curtailed facilities, to allow new entrants into Washington’s market, to accommodate increased production or expanded operations at a current facility, to support projects with positive environmental justice impacts, and other purposes. WAC 173-442-240(4).

In superior court, the AWB argued that the Clean Air Rule “imposes an impermissible tax in-kind” because it allocates 2 percent of a covered party’s required emission reductions to the reserve. CP 326–28. That argument is wrong. A tax is an enforced contribution of money, assessed or charged by a sovereign government for the benefit of the taxing authority. *City of Snoqualmie v. King Cty. Exec. Dow Constantine*, 187 Wn.2d 289, 299, 386 P.3d 279 (2016). The purpose of a tax is to raise revenue. *Covell v. City of Seattle*, 127 Wn.2d 874, 879, 905 P.2d 324 (1995). The Clean Air Rule’s reserve does not involve the enforced contribution of money or any monetary charge at all. Its purpose is not to raise revenue. It is not a tax, and Article VII does not apply. *Constantine*, 187 Wn.2d at 303.

The AWB nevertheless argued below that the reserve constitutes a “tax in-kind” because some covered parties will have to buy emission reduction units to meet their annual 1.7 percent emission reduction, 2 percent of which will be placed in the reserve. CP 549–50. The fact that a party must spend money to comply with a regulatory requirement does

not make the requirement a tax. *See Southwick, Inc. v. City of Lacey*, 58 Wn. App. 886, 890, 795 P.2d 712 (1990).

Even if the reserve did constitute a monetary payment, which it does not, this Court has recognized that “some payments to the government are neither taxes nor regulatory fees.” *Constantine*, 187 Wn.2d at 299. The Court applies a broader version of the three-factor *Covell* test to determine whether a charge constitutes a tax: “the purpose of the cost, where the money raised is spent, and whether people pay the cost because they use the service.” *Id.* at 301. Under these three factors, it is clear that the emission reductions allocated to the reserve are not a tax.

First, the purpose of the Clean Air Rule is to require regulated parties to decrease their harmful greenhouse gas emissions, thereby mitigating for the negative externalities caused by their activities. *See* Hugh D. Spitzer, *Taxes vs. Fees: A Curious Confusion*, 38 Gonz. L. Rev. 335, 345–46 (2003). Where a charge’s purpose is to alleviate a burden to which a regulated party contributes, the charge is more likely not a tax. *Arborwood Idaho, L.L.C. v. City of Kennewick*, 151 Wn.2d 359, 371, 89 P.3d 217 (2004).

Second, the emission reduction units are collected and allocated solely to the regulatory purpose of reducing greenhouse gas emissions, and not to any general fund for broader governmental activities. A charge

is less likely to be a tax if it is allocated for a particular purpose.

*Constantine*, 187 Wn.2d at 301.

Third, the units deposited into the reserve are tied to the burden caused by each covered party. A party that emits less contributes less. This sort of direct relationship between the “charge” and the burden created by the regulated party further demonstrates that the reserve does not impose an unconstitutional tax—“in-kind” or otherwise.

The Clean Air Rule’s reserve is not a tax. This Court should hold that article VII, section 5 does not apply.

#### **H. Ecology Was Not Required to Prepare an Environmental Impact Statement for the Clean Air Rule**

Below, Petitioners argued that Ecology should have prepared an environmental impact statement (EIS) for the Clean Air Rule, rather than issue a determination of nonsignificance (DNS) under the State Environmental Policy Act (SEPA). According to Petitioners, the cost of complying with the Clean Air Rule will cause companies to leave Washington for jurisdictions with more lax environmental regulations, force utilities to purchase more coal power, and drive consumers to switch out high efficiency natural gas furnaces for wood stoves, resulting in a net increase in Washington’s overall greenhouse gas emissions. These speculative claims lack merit.

Ecology considered the Petitioners' arguments, and after consulting other sources (i.e., sources not linked to an economic interest in the fate of the Clean Air Rule), Ecology concluded that environmental regulations are only one of many factors affecting utility and manufacturing markets. Accordingly, Ecology properly issued a DNS for the rule.

**1. SEPA standard of review**

The first step in the SEPA review process is a threshold determination of whether an EIS is required. WAC 197-11-310(1), -797. To make this determination, a SEPA responsible agency must assess whether a project will have any probable significant adverse environmental impacts. WAC 197-11-315(1), -330, -960. Ecology concluded the Clean Air Rule would not have probable significant adverse environmental impacts and issued a DNS rather than an EIS. AR 28437.

Ecology's DNS is entitled to substantial weight. RCW 43.21C.090; *PT Air Watchers v. Dep't of Ecology*, 179 Wn.2d 919, 926, 319 P.3d 23 (2014). This Court reviews a DNS under the clearly erroneous standard, and affirms unless the Court is "left with the definite and firm conviction that a mistake has been committed." *Norway Hill Pres. & Prot. Ass'n v. King Cty. Coun.*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976). Courts generally decline to overturn a threshold determination where the overall

review process was credible, the agency satisfied statutory and administrative requirements, and the determination itself seems intuitively correct. *See* Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis* § 13.01[4][c], at 13-50 (2014).

**2. Petitioners lack standing under SEPA because they assert economic rather than environmental interests**

A threshold question is whether Petitioners, who challenge the Clean Air Rule on economic rather than environmental grounds, have standing to challenge the SEPA determination. Below, the superior court concluded that they did after allowing Petitioners to amend their petitions for review. CP 599–600, 647–52. However, these amended petitions are still insufficient to demonstrate Petitioners’ standing.

This Court reviews de novo a trial court’s decision to grant or deny a CR 12(c) motion. *P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 203, 289 P.3d 638 (2012). To establish standing under SEPA, a party must show (1) the alleged endangered interest falls within the zone of interests protected by SEPA, and (2) an injury in fact. *Kucera v. Dep’t of Transp.*, 140 Wn.2d 200, 212, 995 P.2d 63 (2000). Economic interests are not within the zone of interests protected by SEPA. *Id.* Nor can litigants rely on injury to third parties to establish standing unless they first establish associational standing. *See, e.g., KS Tacoma Holdings, LLC v. Shorelines*

*Hearings Bd.*, 166 Wn. App. 117, 138, 272 P.2d 876 (2012); *Warth v. Seldin*, 422 U.S. 490, 499–500, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).

The Petitioners’ amended petitions for review do not meet the two-part test for standing under SEPA. The AWB asserts that its “goals include to find solutions that protect both the environment and the economy.” CP 603. The AWB claims that it “shares the goal underlying [a state carbon cap-and-trade program], but disagrees that a state-based cap and trade program is an effective or appropriate way to accomplish that goal.” *Id.* It describes the Clean Air Rule’s injuries to its various members as including “increased energy prices,” “increased fuel prices,” “increase[d] production costs,” and “increased . . . prices for Washington State agricultural products on global markets.” CP 604, 606.

The AWB’s interests here are primarily economic. Its desire for “sound environmental policy” is based on an underlying goal of “avoiding unnecessary or otherwise unsound adverse economic effects.” CP 607. Its petition for review makes this clear, as the AWB’s various members all profess fear of harm due to increased costs, rather than adverse *environmental* impacts of the Clean Air Rule. Thus, the AWB cannot meet the “zone-of-interest” element to establish standing under SEPA.

The Gas Companies’ petition for review similarly fails. They claim, “the rule will adversely impact the environment as well as

Petitioners’ property, including their wind farms, manure digesters, hydroelectric projects, and biomass generators.” CP 639. They provide no additional information or facts to support standing. Mere speculation and conclusory statements are insufficient. *Snohomish Cty. Prop. Rights All. v. Snohomish Cty.*, 76 Wn. App. 44, 53–54, 882 P.2d 807 (1994).

The Court should reverse the superior court’s denial of Ecology’s motion for judgment on the pleadings and conclude that Petitioners lack standing to challenge the SEPA determination.

**3. Ecology engaged in a reasoned assessment of the potential environmental impacts of the Clean Air Rule**

If the Court concludes that Petitioners do have standing, the Court should uphold the SEPA determination. Petitioners’ challenge amounts to an argument that Ecology should have believed their research over the independent research that Ecology conducted. When confronted with conflicting expert opinions, it is the agency’s job, and not the job of the reviewing court, to resolve those differences. *City of Des Moines v. Puget Sound Reg’l Coun.*, 108 Wn. App. 836, 852, 988 P.2d 27 (1999). The agency does not have to rebut every aspect of an opposing expert analysis—especially analysis concerning economic competition, which is not an element of the environment under SEPA. *See Indian Trail Prop. Owner’s Ass’n v. City of Spokane*, 76 Wn. App. 430, 444, 886 P.2d 209

(1994). Indeed, this Court has recognized that it is impractical to expect an agency to identify and evaluate every remote and speculative consequence of an action. *Cheney v. City of Mountlake Terrace*, 87 Wn.2d 338, 344, 552 P.2d 184 (1976).

Petitioners argued three categories of alleged impacts: (1) shifting of manufacturing to other jurisdictions, (2) power supply shifting, and (3) fuel shifting. Ecology determined that these alleged impacts were too attenuated to constitute probable significant adverse impacts of the Clean Air Rule. This conclusion was not “clearly erroneous.”

**a. Shifting of manufacturing**

The AWB argues that the Clean Air Rule’s cost of compliance will force “energy-intensive trade-exposed companies” to shift production out of Washington and into states or countries with more lax environmental regulations (commonly termed “leakage” of emissions). CP 329–31. In response to this concern, Ecology adjusted the rule to set efficiency targets for those companies, rather than require mass-based reductions, and gave those companies three extra years to meet their targets. AR 5012; *see also* WAC 173-442-030, -070. This allows these companies to reduce their emissions without adversely impacting their production. Ecology based this approach on comments and suggestions from the companies themselves, and found that it would substantially mitigate against leakage

by allowing them to vary their production without increasing their compliance obligation. AR 5012, 4679 (comment letter from Kaiser Aluminum stating that these provisions are critical to preventing leakage), 4787–88 (same from United Steelworkers).

In *PT Air Watchers*, 179 Wn.2d at 930–31, this Court upheld a DNS issued by Ecology for a cogeneration plant, and rejected arguments similar to those made by Petitioners here. *PT Air Watchers* challenged Ecology’s environmental checklist and DNS, arguing that it did not contain sufficient information for Ecology to evaluate the impacts from carbon dioxide emissions that could result from the project. *Id.* The Court found this argument unpersuasive where Ecology had given parties an opportunity to submit public comment and competing scientific information. The DNS was not clearly erroneous just because Ecology found those comments and information unpersuasive. *See id.* at 929. The Court clarified that “SEPA does not require a statement of the exact amount of carbon dioxide that would be released as a result of the project.” *Id.* It was enough that Ecology had “engaged in a reasoned assessment” in determining that the project would not have significant adverse environmental impacts. *Id.* at 931. The same analysis applies here.

**b. Power supply/generation shifting**

The Gas Companies claim that the Clean Air Rule will increase the price of natural gas, which could result in shifting to more polluting power sources. CP 393–95. The record shows that Ecology considered the potential for power supply shifting, but ultimately determined that it did not constitute a significant risk. AR 4985–86, 5013. Ecology based its determination in part on the assumption that the federal Clean Power Plan would address greenhouse gas emissions from power sources. *Id.* Although the current federal administration has signaled its intent to repeal the Clean Power Plan, it was reasonable for Ecology to assume at the time of rule adoption that federal regulation would comprehensively address power plant emissions. Under the APA, the validity of an agency’s action is assessed at the time the action was taken. RCW 34.05.570(1)(b).

Ecology also evaluated the Gas Companies’ claim that the Clean Air Rule would drive up the price of natural gas to the point that it would negate any environmental benefits of the rule. The agency considered the Seventh Northwest Conservation and Electric Power Plan, which concluded that non-polluting energy efficiency measures, rather than coal-fired power plants, are the least expensive and least economically risky energy resources for the future. AR 29440. The Plan identifies energy efficiency as the “dominant new resource” and notes that, according to

models, energy efficiency has a high potential for meeting all electricity load growth through 2030 without contributing to emissions. AR 29446. Based on this information, it was reasonable for Ecology to conclude that Petitioners' assertion of power supply shifting was speculative.

**c. Fuel shifting and transportation-related emissions**

Finally, Ecology considered, but ultimately rejected, Petitioners' claims that an increased price of natural gas would cause energy customers to burn wood instead of gas or switch to electric heating. AR 4986, 497–98. As explained in the Statement of the Case, this was reasonable in light of Ecology's economic analyses showing very modest price increases in natural gas. AR 5000, 473–74. Ecology also reasonably rejected the Gas Companies' arguments that the Clean Air Rule would deter a shift from petroleum-fired vehicles to natural gas vehicles. CP 397–98. On its face, this argument doesn't make sense because petroleum products are also subject to the Clean Air Rule and will also experience some cost increase comparable to that of natural gas.

The Gas Companies defy common sense when they argue that a rise in electric vehicle use and a shift away from fossil fuel-fired vehicles could somehow be bad for the environment. *Id.* It is well established that the use of electric vehicles reduces greenhouse gases and other air

emissions, even when accounting for upstream electricity emissions.

AR 2849, 2822. This is especially true in Washington where electricity emissions are relatively low due to an abundance of hydropower.

AR 29440. Ecology correctly concluded that a shift towards electric vehicles would not result in significant adverse environmental impacts.

In making its threshold determination, Ecology engaged in a thorough, reasoned analysis of the potential effects of the Clean Air Rule.

The DNS is not clearly erroneous, and it should be upheld.

**I. Ecology’s Cost-Benefit Analysis for the Clean Air Rule Appropriately Considered the Social Cost of Carbon to Conclude that the Benefits of the Rule Exceed Its Costs**

Below, the Industry Petitioners alleged that the Clean Air Rule is arbitrary and capricious because Ecology’s cost-benefit analysis does not comply with the APA. CP 335–40. A rule is arbitrary and capricious if the agency’s action was willful and unreasoning and taken without regard of the attending facts and circumstances. *Wash. Indep. Tel. Ass’n v. Utils. & Transp. Comm’n*, 148 Wn.2d 887, 905, 64 P.3d 606 (2003).

The arbitrary and capricious standard allows for differences of opinion, and a court will not invalidate a rule just because different decision-makers could reach different conclusions based on the evidence. *Rios v. Dep’t of Labor & Indus.*, 145 Wn.2d 483, 501, 39 P.3d 961 (2002). Moreover, this Court affords “substantial judicial deference,” to an agency

whose determination is based on factual matters that are complex, technical, and close to the heart of the agency's expertise, such as the regulation of greenhouse gas emissions. *See Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 396, 932 P.2d 139 (1997).

Before adopting a significant legislative rule, an agency must prepare a cost-benefit analysis that evaluates the quantitative and qualitative benefits and costs of a rule, and the specific directives of the statute that the rule implements. RCW 34.05.328(1)(d). The agency must conclude that the benefits of the rule outweigh its costs before it can adopt the rule. *Id.* The Court should uphold an agency's cost-benefit analysis unless it finds that there is insufficient documentation in the rulemaking file to persuade a reasonable person that the cost-benefit analysis is justified. RCW 34.05.328(2).

Ecology prepared a thorough analysis of the costs and benefits of the Clean Air Rule. First, Ecology calculated the high and low costs of complying with the Clean Air Rule over the next 20 years. AR 273–75. Ecology set up two “strawman”-style bookends meant to account for the best and worst-case compliance scenarios for regulated parties. The agency assumed that in the lowest-cost, best-case scenario, all regulated parties would be able to meet their compliance obligation through the purchase of renewable energy credits at a cost of \$400 million. AR 282. In

the highest-cost scenario, Ecology assumed all parties would have to meet their compliance obligation through on-site emissions reductions at a cost of \$6.7 billion. *Id.* Adding ancillary costs, Ecology estimated the costs of the Clean Air Rule between approximately \$445 million and \$6.845 billion. AR 293–94. Ecology applied a 2.5 percent discount rate to account for inflation over the next 20 years to avoid underestimating the pass-through costs of the rule to consumers. AR 297–98.

To assess the rule’s benefits, Ecology relied on the social cost of carbon, which measures the economic damage caused by greenhouse gas emissions. AR 14157. The social cost of carbon tool was developed by a wide range of federal and international experts. AR 297-98. Using this measure, Ecology determined that the total benefits of the rule would be approximately \$10 billion. AR 317.

Below, the AWB complained that it was improper for Ecology to compare the compliance costs of the Clean Air Rule with the benefits derived from the social cost of carbon because the social cost of carbon looks at global rather than local benefits. CP 338. The U.S. Court of Appeals for the Seventh Circuit addressed and rejected this exact argument in *Zero Zone, Inc. v. U.S. Dep’t of Energy*, 832 F.3d 654 (7th Cir. 2016). In that case, manufacturers challenged two rules adopted by the U.S. Department of Energy that set efficiency standards for

commercial refrigeration equipment. There, as here, the manufacturers contended that the agency could not use the social cost of carbon to measure the rules' benefits. *Id.* at 679. In affirming the agency's use of the social cost of carbon, the Seventh Circuit noted that climate change "involves a global externality, meaning that carbon released into the United States affects the climate of the entire world." *Id.* (internal quotation marks omitted). In light of the global effects of national energy policy, the court agreed that it was appropriate for the agency to consider global effects in its analysis. *Id.* The manufacturers could point to no global costs that the agency should have considered alongside the benefits. *Id.*

Ecology likewise started its analysis from the premise that local emissions contribute to global climate change, which causes global and local impacts. AR 299. Ecology determined the social cost of carbon was an appropriate way to measure the Clean Air Rule's benefits given the "unique nature of carbon and climate change." *Id.* The AWB did not below, and cannot here, point to global costs that Ecology overlooked in its analysis. Like the Seventh Circuit, this Court should hold that Ecology's use of the social cost of carbon was reasonable.

The AWB also argued below that even though the plain language of the APA directs agencies to weigh *all* costs and benefits of a potential

rule, RCW 34.05.328(1)(d), Ecology could only look at “in-state” benefits because of language in the uncodified legislative findings of the 1995 Regulatory Reform Act. CP 338. Legislative findings, while helpful in determining the Legislature’s intent, do not supplant the plain language of a statute. *See HJS Dev., Inc. v. Pierce Cty. ex rel. Dep’t of Planning & Land Servs.*, 148 Wn.2d 451, 480 & n.125, 61 P.3d 1141 (2003). Nothing in the plain language of the APA, or the Regulatory Reform Act, prohibits the use of global benefits like the social cost of carbon in preparing a cost-benefit analysis.

The cost-benefit analysis is not arbitrary and capricious and is not a basis to invalidate the rule.

**J. The Clean Air Rule Minimizes the Burden on Regulated Parties**

Finally, the AWB claimed below that Ecology’s least-burdensome alternatives analysis is arbitrary and capricious. Before adopting the Clean Air Rule, Ecology was required to determine that the rule is the least-burdensome alternative for those required to comply that will still achieve the goals and objectives of the statute the rule is implementing.

RCW 34.05.328(1)(e). Ecology was required to place in the rulemaking file sufficient documentation to persuade a reasonable person that its determination is justified. RCW 34.05.328(2).

Here, Ecology included documentation in the rulemaking file that is more than sufficient to persuade a reasonable person that Ecology minimized the burden on regulated parties while still meeting the objectives of the rule and the Clean Air Act. In developing the rule, Ecology balanced the interests of the myriad entities covered by the rule to adopt a rule that would significantly reduce greenhouse gas emissions while not disproportionately burdening any particular sector of the economy. Ecology's rulemaking file reflects the many decisions Ecology made to reduce the burden on regulated entities. AR 4968–69. Ecology also documented the changes made to the final rule to address stakeholder comments, AR 4969–72, and described some of the changes made to the rule to accommodate regulated parties. AR 4965–66. These examples document just some of the decisions Ecology made to reduce the burden of the Clean Air Rule. There is ample documentation in the record to support this determination.

## **VI. CONCLUSION**

Ecology has broad authority to set emission standards, including emission standards for fossil fuels. The Clean Air Rule should be upheld in its entirety. Barring that, any invalid portions of the rule should be severed so that the remainder can remain in place and perform the important task of reducing Washington State's greenhouse gas emissions.

RESPECTFULLY SUBMITTED this 9th day of August 2018.

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## CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I caused to be served a true and correct copy of the foregoing document upon the parties using the Appellate Court Portal filing system, which will send electronic notification of such filing to the following:

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# **APPENDIX A**

**Former RCW 82.36.010 (2007)**

## Chapter 82.33 RCW

## ECONOMIC AND REVENUE FORECASTS

## Sections

- 82.33.050 Employment growth forecast and general state revenue estimates. *(Effective July 1, 2008, if the proposed amendment to Article VII of the state Constitution is approved at the November 2007 general election.)*

**82.33.050 Employment growth forecast and general state revenue estimates.** *(Effective July 1, 2008, if the proposed amendment to Article VII of the state Constitution is approved at the November 2007 general election.)* The state economic and revenue forecast council shall perform the state employment growth forecast and general state revenue estimates required by Article VII, section . . . (Senate Joint Resolution No. 8206). [2007 c 484 § 3.]

**Contingent effective date—2007 c 484 §§ 2-8:** See note following RCW 43.79.495.

## Chapter 82.33A RCW

## ECONOMIC CLIMATE COUNCIL

## Sections

- 82.33A.010 Council—Created—Selection of benchmarks—Access to agency information.
- 82.33A.020 Consulting with Washington economic development commission.

**82.33A.010 Council—Created—Selection of benchmarks—Access to agency information.** (1) The economic climate council is hereby created.

(2) The council shall, in consultation with the Washington economic development commission, select a series of benchmarks that characterize the competitive environment of the state. The benchmarks should be indicators of the cost of doing business; the education and skills of the work force; a sound infrastructure; and the quality of life. In selecting the appropriate benchmarks, the council shall use the following criteria:

(a) The availability of comparative information for other states and countries;

(b) The timeliness with which benchmark information can be obtained; and

(c) The accuracy and validity of the benchmarks in measuring the economic climate indicators named in this section.

(3) Each year the council shall prepare an official state economic climate report on the present status of benchmarks, changes in the benchmarks since the previous report, and the reasons for the changes. The reports shall include current benchmark comparisons with other states and countries, and an analysis of factors related to the benchmarks that may affect the ability of the state to compete economically at the national and international level.

(4) All agencies of state government shall provide to the council immediate access to all information relating to economic climate reports. [2007 c 232 § 8; 1998 c 245 § 168; 1996 c 152 § 2.]

**82.33A.020 Consulting with Washington economic development commission.** The economic climate council shall consult with the Washington economic development

commission in selecting benchmarks and developing economic climate reports and benchmarks. The commission shall provide for a process to ensure public participation in the selection of the benchmarks. [2007 c 232 § 9; 1996 c 152 § 4.]

## Chapter 82.36 RCW

## MOTOR VEHICLE FUEL TAX

## Sections

- 82.36.010 Definitions.
- 82.36.020 Tax levied and imposed—Rate to be computed—Incidence—Distribution.
- 82.36.022 Tax imposed—Intent.
- 82.36.025 Motor vehicle fuel tax rate—Expiration of subsection.
- 82.36.026 Tax liability—General.
- 82.36.027 Tax liability of terminal operator.
- 82.36.028 Tax liability—Reciprocity agreements.
- 82.36.031 Periodic tax reports—Forms—Filing.
- 82.36.042 Repealed.
- 82.36.045 Licensees, persons acting as licensees—Tax reports—Deficiencies, failure to file, fraudulent filings, misappropriation, or conversion—Penalties, liability—Mitigation—Reassessment petition, hearing—Notice.
- 82.36.060 Application for license—Federal certificate of registry—Investigation—Fee—Penalty for false statement—Bond or security—Cancellation.
- 82.36.080 Penalty for acting without license—Separate licenses for separate activities—Default assessment.
- 82.36.160 Records to be preserved by licensees.
- 82.36.180 Examinations and investigations.
- 82.36.247 Exemption—Racing fuel.
- 82.36.273 Repealed.
- 82.36.305 Repealed.
- 82.36.320 Information may be required.
- 82.36.340 Examination of books and records.
- 82.36.360 Repealed.
- 82.36.370 Refunds for fuel lost or destroyed through fire, flood, leakage, etc.
- 82.36.373 Repealed.
- 82.36.380 Violations—Penalties.
- 82.36.407 Repealed.
- 82.36.450 Agreement with tribe for fuel taxes.

**82.36.010 Definitions.** The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Blended fuel" means a mixture of motor vehicle fuel and another liquid, other than a de minimis amount of the liquid, that can be used as a fuel to propel a motor vehicle.

(2) "Bond" means a bond duly executed with a corporate surety qualified under chapter 48.28 RCW, which bond is payable to the state of Washington conditioned upon faithful performance of all requirements of this chapter, including the payment of all taxes, penalties, and other obligations arising out of this chapter.

(3) "Bulk transfer" means a transfer of motor vehicle fuel by pipeline or vessel.

(4) "Bulk transfer-terminal system" means the motor vehicle fuel distribution system consisting of refineries, pipelines, vessels, and terminals. Motor vehicle fuel in a refinery, pipeline, vessel, or terminal is in the bulk transfer-terminal system. Motor vehicle fuel in the fuel tank of an engine, motor vehicle, or in a railcar, trailer, truck, or other equipment suitable for ground transportation is not in the bulk transfer-terminal system.

(5) "Department" means the department of licensing.

(6) "Director" means the director of licensing.

(7) "Evasion" or "evade" means to diminish or avoid the computation, assessment, or payment of authorized taxes or fees through:

(a) A knowing: False statement; misrepresentation of fact; or other act of deception; or

(b) An intentional: Omission; failure to file a return or report; or other act of deception.

(8) "Export" means to obtain motor vehicle fuel in this state for sales or distribution outside the state.

(9) "Highway" means every way or place open to the use of the public, as a matter of right, for the purpose of vehicular travel.

(10) "Import" means to bring motor vehicle fuel into this state by a means of conveyance other than the fuel supply tank of a motor vehicle.

(11) "International fuel tax agreement licensee" means a motor vehicle fuel user operating qualified motor vehicles in interstate commerce and licensed by the department under the international fuel tax agreement.

(12) "Licensee" means a person holding a motor vehicle fuel supplier, motor vehicle fuel importer, motor vehicle fuel exporter, motor vehicle fuel blender, motor vehicle distributor, or international fuel tax agreement license issued under this chapter.

(13) "Motor vehicle fuel blender" means a person who produces blended motor fuel outside the bulk transfer-terminal system.

(14) "Motor vehicle fuel distributor" means a person who acquires motor vehicle fuel from a supplier, distributor, or licensee for subsequent sale and distribution.

(15) "Motor vehicle fuel exporter" means a person who purchases motor vehicle fuel in this state and directly exports the fuel by a means other than the bulk transfer-terminal system to a destination outside of the state. If the exporter of record is acting as an agent, the person for whom the agent is acting is the exporter. If there is no exporter of record, the owner of the motor fuel at the time of exportation is the exporter.

(16) "Motor vehicle fuel importer" means a person who imports motor vehicle fuel into the state by a means other than the bulk transfer-terminal system. If the importer of record is acting as an agent, the person for whom the agent is acting is the importer. If there is no importer of record, the owner of the motor vehicle fuel at the time of importation is the importer.

(17) "Motor vehicle fuel supplier" means a person who holds a federal certificate of registry that is issued under the internal revenue code and authorizes the person to enter into federal tax-free transactions on motor vehicle fuel in the bulk transfer-terminal system.

(18) "Motor vehicle" means a self-propelled vehicle designed for operation upon land utilizing motor vehicle fuel as the means of propulsion.

(19) "Motor vehicle fuel" means gasoline and any other inflammable gas or liquid, by whatsoever name the gasoline, gas, or liquid may be known or sold, the chief use of which is as fuel for the propulsion of motor vehicles or motorboats.

(20) "Person" means a natural person, fiduciary, association, or corporation. The term "person" as applied to an association means and includes the partners or members thereof, and as applied to corporations, the officers thereof.

(21) "Position holder" means a person who holds the inventory position in motor vehicle fuel, as reflected by the records of the terminal operator. A person holds the inventory position in motor vehicle fuel if the person has a contractual agreement with the terminal for the use of storage facilities and terminating services at a terminal with respect to motor vehicle fuel. "Position holder" includes a terminal operator that owns motor vehicle fuel in their terminal.

(22) "Rack" means a mechanism for delivering motor vehicle fuel from a refinery or terminal into a truck, trailer, railcar, or other means of nonbulk transfer.

(23) "Refiner" means a person who owns, operates, or otherwise controls a refinery.

(24) "Removal" means a physical transfer of motor vehicle fuel other than by evaporation, loss, or destruction.

(25) "Terminal" means a motor vehicle fuel storage and distribution facility that has been assigned a terminal control number by the internal revenue service, is supplied by pipeline or vessel, and from which reportable motor vehicle fuel is removed at a rack.

(26) "Terminal operator" means a person who owns, operates, or otherwise controls a terminal.

(27) "Two-party exchange" or "buy-sell agreement" means a transaction in which taxable motor vehicle fuel is transferred from one licensed supplier to another licensed supplier under an exchange or buy-sell agreement whereby the supplier that is the position holder agrees to deliver taxable motor vehicle fuel to the other supplier or the other supplier's customer at the rack of the terminal at which the delivering supplier is the position holder. [2007 c 515 § 1; 2001 c 270 § 1; 1998 c 176 § 6. Prior: 1995 c 287 § 1; 1995 c 274 § 20; 1993 c 54 § 1; 1991 c 339 § 13; 1990 c 250 § 79; 1987 c 174 § 1; 1983 1st ex.s. c 49 § 25; 1981 c 342 § 1; 1979 c 158 § 223; 1977 ex.s. c 317 § 1; 1971 ex.s. c 156 § 1; 1967 c 153 § 1; 1965 ex.s. c 79 § 1; 1961 c 15 § 82.36.010; prior: 1939 c 177 § 1; 1933 c 58 § 1; RRS § 8327-1; prior: 1921 c 173 § 1.]

**Severability—2007 c 515:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [2007 c 515 § 35.]

**Effective date—2007 c 515:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 15, 2007]." [2007 c 515 § 36.]

**Severability—1990 c 250:** See note following RCW 46.16.301.

**Effective date—1987 c 174:** "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect June 1, 1987." [1987 c 174 § 8.]

**Severability—Effective date—1983 1st ex.s. c 49:** See RCW 36.79.900 and 36.79.901.

**Effective date—1981 c 342:** "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1981. This act shall only take effect upon the passage of Senate Bills No. 3669 and 3699, and if Senate Bills No. 3669 and 3699 are not both enacted by the 1981 regular session of the legislature this amendatory act shall be null and void in its entirety." [1981 c 342 § 12.] Senate Bills No. 3669 and 3699 became 1981 c 315 and 1981 c 316, respectively.

**Severability—1981 c 342:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1981 c 342 § 13.]

# **APPENDIX B**

**Former RCW 82.38.020 (2002)**

tional tax upon the business of manufacturing, selling, or distributing motor vehicle fuel, and no city, town, county, township or other subdivision or municipal corporation of the state shall levy or collect any excise tax upon or measured by the sale, receipt, distribution, or use of motor vehicle fuel, except as provided in RCW 82.80.010 and 82.47.020. [1991 c 173 § 4; 1990 c 42 § 204; 1979 ex.s. c 181 § 5; 1961 c 15 § 82.36.440. Prior: 1933 c 58 § 23; RRS § 8327-23.]

**Effective date—1991 c 173:** See note following RCW 82.47.010.

**Purpose—Headings—Severability—Effective dates—Application—Implementation—1990 c 42:** See notes following RCW 82.36.025.

**Effective date—1979 ex.s. c 181:** "This 1979 act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1979." [1979 ex.s. c 181 § 10.]

**Severability—1979 ex.s. c 181:** "If any provision of this 1979 act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1979 ex.s. c 181 § 8.]

**82.36.450 Agreement with tribe for imposition, collection, use.** The department of licensing may enter into an agreement with any federally recognized Indian tribe located on a reservation within this state regarding the imposition, collection, and use of this state's motor vehicle fuel tax, or the budgeting or use of moneys in lieu thereof, upon terms substantially the same as those in the consent decree entered by the federal district court (Eastern District of Washington) in *Confederated Tribes of the Colville Reservation v. DOL, et al.*, District Court No. CY-92-248-JLO. [1995 c 320 § 2.]

**Legislative recognition, belief—1995 c 320:** "The legislature recognizes that certain Indian tribes located on reservations within this state dispute the authority of the state to impose a tax upon the tribe, or upon tribal members, based upon the distribution, sale, or other transfer of motor vehicle and other fuels to the tribe or its members when that distribution, sale, or other transfer takes place upon that tribe's reservation. While the legislature believes it has the authority to impose state motor vehicle and other fuel taxes under such circumstances, it also recognizes that all of the state citizens may benefit from resolution of these disputes between the respective governments." [1995 c 320 § 1.]

**Severability—1995 c 320:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1995 c 320 § 4.]

**Effective date—1995 c 320:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [May 11, 1995]." [1995 c 320 § 5.]

**82.36.460 Motor vehicle fuel tax cooperative agreement.** The department of licensing may enter into a motor vehicle fuel tax cooperative agreement with another state or Canadian province for the administration, collection, and enforcement of each state's or Canadian province's motor vehicle fuel taxes. [1998 c 176 § 49.]

**82.36.800 Rules—1998 c 176.** The department of licensing shall adopt rules necessary to implement chapter 176, Laws of 1998 and shall seek the assistance of the fuel tax advisory committee in developing and adopting the rules. [1998 c 176 § 87.]

**82.36.900 Findings—1998 c 176.** The legislature finds and declares that:

(1) The health, safety, and welfare of the people of the state of Washington are dependent on the state's ability to properly collect the taxes enacted by the legislature;

(2) The current system for collecting special fuel taxes and motor vehicle fuel tax has allowed many parties to fraudulently evade paying the special fuel taxes and motor vehicle fuel tax due the state; and

(3) By changing the point of collection of the special fuel taxes and motor vehicle fuel tax from distributors to suppliers, the department of licensing will have fewer parties to collect tax from and enforcement will be enhanced, thus leading to greater revenues for the state. [1998 c 176 § 1.]

**82.36.901 Effective date—1998 c 176.** This act takes effect January 1, 1999. [1998 c 176 § 91.]

## Chapter 82.38

### SPECIAL FUEL TAX ACT

#### Sections

- 82.38.010 Statement of purpose.
- 82.38.020 Definitions.
- 82.38.030 Tax levied and imposed—Rate to be computed—  
Incidence—Allocation of proceeds.
- 82.38.032 Payment of tax by users and persons licensed under international fuel tax agreement or reciprocity agreements.
- 82.38.035 Remittance of tax.
- 82.38.045 Liability of terminal operator for remittance.
- 82.38.047 Liability of terminal operator for remittance—Removal of special fuel in combination with indication that fuel is dyed or marked in accordance with internal revenue service requirements.
- 82.38.050 Tax liability on leased motor vehicles.
- 82.38.060 Tax computation on mileage basis.
- 82.38.065 Dyed special fuel use—Authorization, license required—  
Imposition of tax.
- 82.38.066 Dyed special fuel—Requirements—Marking—Notice.
- 82.38.070 Credit for sales for which no consideration was received—  
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- 82.38.071 Refund for worthless accounts receivable—Rules—  
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- 82.38.075 Natural gas, propane—Annual license fee in lieu of special fuel tax for use in motor vehicles—Schedule—Decal or other identifying device.
- 82.38.080 Exemptions.
- 82.38.081 Exemptions—Motor vehicle fuel used for racing.
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- 82.38.245 Bankruptcy proceedings—Notice.
- 82.38.250 Remedies cumulative.
- 82.38.260 Administration and enforcement.
- 82.38.265 Administration, collection, and enforcement of taxes pursuant to chapter 82.41 RCW.
- 82.38.270 Violations—Penalties.
- 82.38.275 Investigatory power.
- 82.38.280 State preempts tax field.
- 82.38.285 Tax liability of user—Exceptions.
- 82.38.289 Liability, payment, and report of taxes due before March 2000—Inventory report—Penalties, interest.
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- 82.38.320 Bulk storage of special fuel by international fuel tax agreement licensee—Authorization to pay tax at time of filing tax return—Schedule—Report—Exemptions.
- 82.38.350 Fuel tax cooperative agreement.
- 82.38.800 Rules—1998 c 176.
- 82.38.900 Section captions.
- 82.38.910 Short title.
- 82.38.920 Severability—1971 ex.s. c 175.
- 82.38.930 Effective date—1971 ex.s. c 175.
- 82.38.940 Findings—1998 c 176.
- 82.38.941 Effective date—1998 c 176.

**82.38.010 Statement of purpose.** The purpose of this chapter is to supplement the Motor Vehicle Fuel Tax Act, chapter 82.36 RCW, by imposing a tax upon all fuels not taxed under said Motor Vehicle Fuel Tax Act used for the propulsion of motor vehicles upon the highways of this state. [1979 c 40 § 1; 1971 ex.s. c 175 § 2.]

**82.38.020 Definitions.** The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Blended special fuel" means a mixture of undyed diesel fuel and another liquid, other than a de minimis amount of the liquid, that can be used as a fuel to propel a motor vehicle.

(2) "Blender" means a person who produces blended special fuel outside the bulk transfer-terminal system.

(3) "Bond" means a bond duly executed with a corporate surety qualified under chapter 48.28 RCW, which bond is payable to the state of Washington conditioned upon faithful performance of all requirements of this chapter, including the payment of all taxes, penalties, and other obligations arising out of this chapter.

(4) "Bulk transfer-terminal system" means the special fuel distribution system consisting of refineries, pipelines, vessels, and terminals. Special fuel in a refinery, pipeline, vessel, or terminal is in the bulk transfer-terminal system. Special fuel in the fuel tank of an engine, motor vehicle, or

in a railcar, trailer, truck, or other equipment suitable for ground transportation is not in the bulk transfer-terminal system.

(5) "Bulk transfer" means a transfer of special fuel by pipeline or vessel.

(6) "Bulk storage" means the placing of special fuel into a receptacle other than the fuel supply tank of a motor vehicle.

(7) "Department" means the department of licensing.

(8) "Dyed special fuel user" means a person authorized by the internal revenue code to operate a motor vehicle on the highway using dyed special fuel, in which the use is not exempt from the special fuel tax.

(9) "Evasion" or "evade" means to diminish or avoid the computation, assessment, or payment of authorized taxes or fees through:

(a) A knowing: False statement; omission; misrepresentation of fact; or other act of deception;

(b) An intentional: Failure to file a return or report; or other act of deception; or

(c) The unlawful use of dyed special fuel.

(10) "Export" means to obtain special fuel in this state for sales or distribution outside the state.

(11) "Highway" means every way or place open to the use of the public, as a matter of right, for the purpose of vehicular travel.

(12) "Import" means to bring special fuel into this state by a means of conveyance other than the fuel supply tank of a motor vehicle.

(13) "International fuel tax agreement licensee" means a special fuel user operating qualified motor vehicles in interstate commerce and licensed by the department under the international fuel tax agreement.

(14) "Lessor" means a person: (a) Whose principal business is the bona fide leasing or renting of motor vehicles without drivers for compensation to the general public; and (b) who maintains established places of business and whose lease or rental contracts require the motor vehicles to be returned to the established places of business.

(15) "Licensee" means a person holding a license issued under this chapter.

(16) "Motor vehicle" means a self-propelled vehicle designed for operation upon land utilizing special fuel as the means of propulsion.

(17) "Natural gas" means naturally occurring mixtures of hydrocarbon gases and vapors consisting principally of methane, whether in gaseous or liquid form.

(18) "Person" means a natural person, fiduciary, association, or corporation. The term "person" as applied to an association means and includes the partners or members thereof, and as applied to corporations, the officers thereof.

(19) "Position holder" means a person who holds the inventory position in special fuel, as reflected by the records of the terminal operator. A person holds the inventory position in special fuel if the person has a contractual agreement with the terminal for the use of storage facilities and terminating services at a terminal with respect to special fuel. "Position holder" includes a terminal operator that owns special fuel in their terminal.

(20) "Rack" means a mechanism for delivering special fuel from a refinery or terminal into a truck, trailer, railcar, or other means of nonbulk transfer.

(21) "Refiner" means a person who owns, operates, or otherwise controls a refinery.

(22) "Removal" means a physical transfer of special fuel other than by evaporation, loss, or destruction.

(23) "Special fuel" means and includes all combustible gases and liquids suitable for the generation of power for propulsion of motor vehicles, except that it does not include motor vehicle fuel as defined in chapter 82.36 RCW, nor does it include dyed special fuel as defined by federal regulations, unless the use is in violation of this chapter. If a person holds for sale, sells, purchases, or uses any dyed special fuel in violation of this chapter, all dyed special fuel held for sale, sold, purchased, stored, or used by that person is considered special fuel, and the person is subject to all presumptions, reporting, and recordkeeping requirements and other obligations which apply to special fuel, along with payment of any applicable taxes, penalties, or interest for illegal use.

(24) "Special fuel distributor" means a person who acquires special fuel from a supplier, distributor, or licensee for subsequent sale and distribution.

(25) "Special fuel exporter" means a person who purchases special fuel in this state and directly exports the fuel by a means other than the bulk transfer-terminal system to a destination outside of the state.

(26) "Special fuel importer" means a person who imports special fuel into the state by a means other than the bulk transfer-terminal system. If the importer of record is acting as an agent, the person for whom the agent is acting is the importer. If there is no importer of record, the owner of the special fuel at the time of importation is the importer.

(27) "Special fuel supplier" means a person who holds a federal certificate issued under the internal revenue code and authorizes the person to tax-free transactions on special fuel in the bulk transfer-terminal system.

(28) "Special fuel user" means a person engaged in uses of special fuel that are not specifically exempted from the special fuel tax imposed under this chapter.

(29) "Terminal" means a special fuel storage and distribution facility that has been assigned a terminal control number by the internal revenue service, is supplied by pipeline or vessel, and from which reportable special fuel is removed at a rack.

(30) "Terminal operator" means a person who owns, operates, or otherwise controls a terminal.

(31) "Two-party exchange" or "buy-sell agreement" means a transaction in which taxable special fuel is transferred from one licensed supplier to another licensed supplier under an exchange or buy-sell agreement whereby the supplier that is the position holder agrees to deliver taxable special fuel to the other supplier or the other supplier's customer at the rack of the terminal at which the delivering supplier is the position holder. [2002 c 183 § 1; 2001 c 270 § 4; 1998 c 176 § 50; 1995 c 287 § 3; 1994 c 262 § 22; 1988 c 122 § 1; 1979 c 40 § 2; 1971 ex.s. c 175 § 3.]

**82.38.030 Tax levied and imposed—Rate to be computed—Incidence—Allocation of proceeds.** (*Effective unless Referendum Bill No. 51 is approved at the November 2002 general election.*) (1) There is hereby levied and imposed upon special fuel users a tax at the rate computed

in the manner provided in RCW 82.36.025 on each gallon of special fuel, or each one hundred cubic feet of compressed natural gas, measured at standard pressure and temperature.

(2) The tax imposed by subsection (1) of this section is imposed when:

(a) Special fuel is removed in this state from a terminal if the special fuel is removed at the rack unless the removal is to a licensed exporter for direct delivery to a destination outside of the state, or the removal is to a special fuel distributor for direct delivery to an international fuel tax agreement licensee under RCW 82.38.320;

(b) Special fuel is removed in this state from a refinery if either of the following applies:

(i) The removal is by bulk transfer and the refiner or the owner of the special fuel immediately before the removal is not a licensee; or

(ii) The removal is at the refinery rack unless the removal is to a licensed exporter for direct delivery to a destination outside of the state, or the removal is to a special fuel distributor for direct delivery to an international fuel tax agreement licensee under RCW 82.38.320;

(c) Special fuel enters into this state for sale, consumption, use, or storage if either of the following applies:

(i) The entry is by bulk transfer and the importer is not a licensee; or

(ii) The entry is not by bulk transfer;

(d) Special fuel is sold or removed in this state to an unlicensed entity unless there was a prior taxable removal, entry, or sale of the special fuel;

(e) Blended special fuel is removed or sold in this state by the blender of the fuel. The number of gallons of blended special fuel subject to tax is the difference between the total number of gallons of blended special fuel removed or sold and the number of gallons of previously taxed special fuel used to produce the blended special fuel;

(f) Dyed special fuel is used on a highway, as authorized by the internal revenue code, unless the use is exempt from the special fuel tax;

(g) Dyed special fuel is held for sale, sold, used, or is intended to be used in violation of this chapter;

(h) Special fuel purchased by an international fuel tax agreement licensee under RCW 82.38.320 is used on a highway; and

(i) Special fuel is sold by a licensed special fuel supplier to a special fuel distributor, special fuel importer, or special fuel blender and the special fuel is not removed from the bulk transfer-terminal system.

(3) The tax imposed by this chapter, if required to be collected by the licensee, is held in trust by the licensee until paid to the department, and a licensee who appropriates or converts the tax collected to his or her own use or to any use other than the payment of the tax to the extent that the money required to be collected is not available for payment on the due date as prescribed in this chapter is guilty of a felony, or gross misdemeanor in accordance with the theft and anticipatory provisions of Title 9A RCW. A person, partnership, corporation, or corporate officer who fails to collect the tax imposed by this section, or who has collected the tax and fails to pay it to the department in the manner prescribed by this chapter, is personally liable to the state for the amount of the tax. [2002 c 183 § 2; 2001 c 270 § 6; 1998 c 176 § 51; 1996 c 104 § 7; 1989 c 193 § 3; 1983 1st

# **APPENDIX C**

**Excerpt of AR 11793 “All Parties” Tab  
(showing number of covered parties)**

**AR 11793--Excerpt of "All Parties" Tab**

A		B	C	D	DO
		City	NAICS	First Year that Reductions are Required	
1	<b>Covered Party</b>				
2	Agrium Kennewick Fertilizer Operations (KFO) - Kennewick	Kennewick	325311	2020	
3	JR Simplot - Othello	Othello	311411	2026	
4	McCain Foods - Othello	Othello	311411	2023	
5	Boeing Commercial Airplanes - Everett	Everett	336411	2035	
6	WaferTech LLC - Camas	Camas	334413	2020	
7	Alcoa Intalco Works - Ferndale	Ferndale	331312	2020	
8	Alcoa Wenatchee Works - Malaga	Malaga	331312	2020	
9	Nucor Steel Seattle, Inc. - Seattle	Seattle	331111	2020	
10	Kaiser Aluminum Washington, LLC (Trentwood Works) - Spokane Valley	Spokane Valley	331315	2020	
11	REC Silicon - Moses Lake	Moses Lake	331419	2020	
12	Ash Grove Cement Company - Seattle	Seattle	327310	2020	
13	Ardagh Glass Inc. - Seattle	Seattle	327213	2032	
14	Cardinal FG Company - Winlock	Winlock	327211	2020	
15	Boise Paper - Wallula	Wallula	322121	2020	
16	Georgia-Pacific Consumer Products LLC - Camas	Camas	322121	2020	
17	Longview Fibre Paper and Packaging, Inc/KapStone Kraft - Longview	Longview	322130	2020	
18	Port Townsend Paper Corporation - Port Townsend	Port Townsend	322121	2032	
19	RockTenn Tacoma Mill - Tacoma	Tacoma	322130	2020	
20	Weyerhaeuser NR Company - Longview	Longview	322121	2020	
21	BP Cherry Point Refinery - Blaine	Blaine	324110	2017	
22	Phillips 66 Ferndale Refinery - Ferndale	Ferndale	324110	2017	
23	Shell Puget Sound Refinery - Anacortes	Anacortes	324110	2017	
24	Tesoro Refining & Marketing Company LLC - Anacortes	Anacortes	324110	2017	
25	U.S. Oil & Refining Co. - Tacoma	Tacoma	324110	2017	
26	Enwave - Seattle	Seattle	221330	2035	
27	H.W. Hill Landfill Gas Power Plant - Roosevelt	Roosevelt	221119	2026	
28	King County Solid Waste Cedar Hills Landfill - Maple Valley	Maple Valley	562212	2017	
29	Land Recovery Landfill Industrial - Graham	Graham	562212	2017	
30	Roosevelt Regional Landfill - Roosevelt	Roosevelt	562212	2017	
31	Terrace Heights Landfill - Yakima	Yakima	562212	2017	

	A	B	C	D	DO
32	Cowlitz County Headquarters Landfill - Castle Rock	Castle Rock	562212	2017	
33	Spokane Waste to Energy Facility - Spokane	Spokane	526213	2017	
34	Gas Transmission Northwest Compressor Station 6 - Rosalia	Rosalia	486210	2029	
35	Gas Transmission Northwest Compressor Station 8 - Wallula	Wallula	486210	2020	
36	Northwest Pipeline C/S - Sumas	Sumas	486210	2029	
37	University of Washington Seattle Campus - Seattle	Seattle	611310	2029	
38	US Army Joint Base Lewis-McChord - Pierce Co.	Pierce Co.	928110	2029	
39	Frederickson Power LP - Tacoma	Tacoma	221112	2017	
40	Grays Harbor Energy Center - Elma	Elma	221112	2017	
41	PacifiCorp Energy - Chehalis Generating Facility - Chehalis	Chehalis	221112	2017	
42	Puget Sound Energy - Encogen Generating Station - Bellingham	Bellingham	221112	2017	
43	Puget Sound Energy - Ferndale Generating Station - Ferndale	Ferndale	221112	2017	
44	Puget Sound Energy - Goldendale Generating Station - Goldendale	Goldendale	221112	2017	
45	Puget Sound Energy - Mint Farm Generating Station - Longview	Longview	221112	2017	
46	Puget Sound Energy - Sumas Generating Station - Sumas	Sumas	221112	2017	
47	River Road Generating Plant - Vancouver	Vancouver	221112	2017	
48	Cascade Natural Gas Corporation LDC - statewide**	statewide	221210	2017	
49	Puget Sound Energy LDC - statewide**	statewide	221210	2017	
50	Avista Corporation LDC - statewide**	statewide	221210	2017	
51	NW Natural - Washington - statewide**	statewide	221210	2017	
52	BP Cherry Point Refinery - Blaine*	Blaine	324110	2017	
53	Shell Puget Sound Refinery - Anacortes*	Anacortes	324110	2017	
54	Tesoro Refining & Marketing Company LLC - Anacortes*	Anacortes	324110	2017	
55	Phillips 66 Ferndale Refinery - Ferndale*	Ferndale	324110	2017	
56	U.S. Oil & Refining Co. - Tacoma*	Tacoma	324110	2017	
57	Petroleum Fuel Importers	NA - Aggregate, not enough info		2020	
58	<b>TOTALS</b>				
59	Tyson Fresh Meats, Inc. - Wallula	Wallula	311611	NA - close and trending up	
60	Puget Sound Energy - Fredonia Generating Station - Mount Vernon	Mount Vernon	221112	NA - close and trending up	
61					
62					
63	Total	baseline covered at any point			

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**August 09, 2018 - 3:53 PM**

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