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NO. 95885-8

SUPREME COURT OF THE STATE OF WASHINGTON

ASSOCIATION OF WASHINGTON BUSINESS,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Appellant,

and

WASHINGTON ENVIRONMENTAL COUNCIL, et al.,

Intervenor-Appellant.

BRIEF OF RESPONDENTS AVISTA CORPORATION,
CASCADE NATURAL GAS CORPORATION, NORTHWEST
NATURAL GAS COMPANY, and PUGET SOUND ENERGY, INC.

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INTRODUCTION

Climate change poses a serious challenge to our global society. For this reason, many national, state, and local governments throughout the world collectively and individually have taken, and continue to take, lawful action to address this challenge. But the question before the Court is not whether climate change is a problem. Nor is it whether the Department of Ecology's goal to reduce greenhouse gas emissions through the Clean Air Rule is laudable. Instead, this case is only about the lawfulness of Ecology's Rule. The Rule is ultra vires as applied to natural gas distributors, who have no emissions of their own to reduce and cannot reduce their customers' emissions. The Rule was improperly based on arbitrary analyses that disregarded its costs and inflated its benefits. And the Rule unlawfully bypassed required environmental review. This case centers on these three narrow legal issues.

Through the Clean Air Act, the Washington State Legislature enacted a legislative framework to address air quality issues. Under this framework, the Washington State Department of Ecology ("Ecology") adopts air quality standards to "limit[] the aggregate concentrations of contaminants in the ambient air to avoid air pollution." *ASARCO, Inc. v. Puget Sound Air Pollution Control Agency*, 112 Wash. 2d 314, 320, 771 P.2d 335, 339 (1989) (emphasis omitted). Relatedly, Ecology may "adopt

emission standards to control the release of contaminants from any individual source.” *Id.* at 320-21, 771 P.2d at 339 (emphasis omitted). By legislative prescription, emission standards regulate emitting sources that release contaminants into the ambient air.

In 2016, Ecology promulgated the Clean Air Rule (“the Rule”)—a purported “emission standard” under the Clean Air Act that seeks to address climate change concerns by requiring greenhouse gas emissions reductions from covered parties. Covered parties include Respondents: four local utilities that operate pipelines to transport and distribute natural gas to homes, schools, and businesses throughout Washington (“local distribution companies” or “LDCs”).

LDCs are not challenging the vast majority of the Rule, which limits the amount of greenhouse gases that actual emitters—such as refineries, landfills, and large industrial facilities—may emit. Instead, LDCs contend that the Rule exceeds the statutory authority delegated to Ecology by (1) imposing “emission standards” on LDCs that merely distribute natural gas and do not emit greenhouse gases; and (2) attributing to LDCs the emissions of end-users, when LDCs have no ability to limit end-use consumption and, in fact, are statutorily obligated to meet all demand for natural gas. If revived, the *ultra vires* Rule would penalize LDCs when their customers’ emissions exceed applicable emission standards, force LDCs to purchase

scarce and expensive offsets (emission reduction units), and—contrary to the Rule’s purpose—actually degrade air quality.

The Superior Court correctly held that the Rule exceeded Ecology’s statutory authority as applied to non-emitters like LDCs. The power to set emissions standards does not authorize Ecology to regulate non-emitters who have no way to control their customers’ emissions. The Clean Air Act’s plain language, applicable case law, and Ecology’s own regulations and past practice compel this conclusion. No matter the Rule’s laudable goals, Ecology’s authority is circumscribed by the Clean Air Act.

Beyond the lack of authority, the evidence before Ecology during its rulemaking showed that imposing “emissions standards” on natural gas distributors in Washington would harm the environment by shifting use away from natural gas to lower-cost, higher-emitting energy sources. Ecology did not adequately address this evidence in its cost-benefit analysis or environmental review. For these reasons and others discussed below, this Court should affirm the invalidation of the Rule as it applies to LDCs.

ISSUES PRESENTED

1. Whether Ecology exceeded its statutory authority to impose “emissions standards” on emitting sources by imposing greenhouse gas “emissions standards” on non-emitting utilities that merely distribute natural gas for use by others.

2. Whether Ecology acted arbitrarily and capriciously by failing to give due consideration to the Rule's true costs and limited benefits, instead relying on perfunctory and incomplete analyses designed to support Ecology's predetermined outcome.
3. Whether LDCs have sufficiently pled standing to survive Ecology's Civil Rule 12(c) motion to dismiss LDCs' challenge to Ecology's State Environmental Policy Act ("SEPA") determination, and, if yes, whether Ecology clearly erred in determining that the Rule would have no probable significant, adverse environmental impacts.

STATEMENT OF THE CASE

LDCs are utilities that operate pipelines and related infrastructure to transport and distribute natural gas to customers for various uses including electricity generation, manufacturing, space heating, hot water, cooking, and other purposes. Unlike a power plant, a chemical manufacturer, or other stationary sources, LDCs generally do not themselves burn fossil fuels and do not emit greenhouse gases at the levels needed to trigger the Rule.¹ *See, e.g.,* AR005022, 5061-62 (Ecology stating "[n]atural gas distributors . . .

¹ LDCs have only minor emissions associated with transporting natural gas to end-users by pipeline (*e.g.*, fugitive emissions or pipeline leaks) that are well below the Rule's applicability thresholds. *See* AR020192; AR020158; *see also* AR003226 (noting that, in 2011, combined fugitive greenhouse gas emissions from methane leakage and venting of natural gas pipelines, petroleum systems, and coal mining amounted to approximately 0.8 percent of Washington's overall greenhouse gas emissions). LDCs actively monitor to reduce leaks.

cover natural gas emissions from smaller homes, businesses, and organizations” and that “natural gas distribution companies are not ‘stationary sources’”). LDCs believe reducing greenhouse gas emissions is important. Indeed, LDCs voluntarily participate in a myriad of environmental initiatives to reduce emissions and promote renewable energy systems.²

Unlike an emitting source whose greenhouse gas emission baseline comes from that source’s historic emissions, WAC 173-442-050(2)(a), LDCs have no relevant greenhouse gas emissions of their own³—LDCs’ baseline instead comes from “the CO₂ emissions that *would* result from the complete combustion or oxidation of the annual volumes of natural gas *provided to end-users* on their distribution systems.” 40 C.F.R. 98.402(b) (Subpart NN) (emphasis added); *see* WAC 173-442-020(1)(j)(iii)(A); WAC 173-442-050(2)(a). The Rule thus *attributes* the emissions from consumers of natural gas to the non-emitting LDCs that transport that natural gas.⁴

² These initiatives include, for example, implementing energy efficiency programs (AR020152); supporting renewable energy programs (AR020152); instituting practices to reduce emissions from excavations (AR021520); instituting a leak reduction program (AR021520); and developing a voluntary offset program (AR021790).

³ One LDC, Cascade Natural Gas Corporation, has a natural gas-fired compressor station near Mt. Vernon, Washington that compresses natural gas to a specified pressure to allow the gas to continue flowing through the pipeline. The station has operated about 400 hours per year or less, with annual emissions below Rule threshold-triggering levels.

⁴ Emissions from LDC customers using natural gas amount to 11 percent of greenhouse gas emissions in Washington State. AR005027.

Contrary to Ecology's narrative, LDCs cannot fairly be deemed to be "responsible for" greenhouse gas emissions from natural gas consumed by their customers. LDCs are statutorily obligated to fill customer demand and therefore cannot limit how much natural gas their customers consume. Ecology's Opening Br. at 7 ("Ecy. Br."). Ecology recognized that emission reduction units are "essential" for LDCs because "there are likely limited or no options for on-site reductions" and LDCs "have no direct control over the emissions associated with . . . natural gas combusted in the state." AR004996; AR005049. *But see* Ecy. Br. at 7-8 (claiming LDCs have "multiple ways to comply with the rule").

Although covered parties may acquire emission reduction units in three ways, these units would be scarce. *See, e.g.*, AR020174-77 (indicating that Puget Sound Energy would face an emission reduction unit shortfall of 800,000 by 2017); AR021534. First, emission reduction units can be generated from engaging in or investing in specified activities, WAC 173-442-110, but the limited units available from these activities would not come close to satisfying LDCs' demand. *See* AR020176; AR021473-75. Second, units can be acquired from approved out-of-state programs, WAC 173-442-110, but over time, Ecology restricts out-of-state allowances until they may be used to meet no more than *five percent* of a covered party's compliance goals, and Ecology has failed to identify any approvable

program. WAC 173-442-170(2)(a). Third, LDCs can purchase units from covered parties achieving emissions reductions below reduction pathway levels, WAC 173-442-110; however, Ecology grossly overestimated the number of these units that would be available. *See* AR020175-86 (analyzing emission reduction unit market uncertainty and shortfalls compared to demand); AR021473-76 (same); AR021539-48 (same); AR021554-63 (same). The Rule thus holds LDCs responsible for their customers' emissions, without affording LDCs any viable path for compliance.

PROCEDURAL HISTORY

LDCs filed a Petition for Review and Declaratory Judgment on September 30, 2016 in Thurston County Superior Court. *See* Clerk's Papers ("CP") at 836 (Order Granting Petition for Review). LDCs advanced three challenges to Ecology's Rule. LDCs argued that Ecology (1) lacked statutory authority to enact the emission standards as applied to LDCs; (2) acted arbitrarily and capriciously in enacting the Rule, in violation of the Washington Administrative Procedure Act ("APA"); and (3) violated SEPA by prematurely and erroneously determining that the Rule would have no probable significant adverse impact on the environment. *See* CP at 624-46 (LDCs' Am. Compl.).

On October 21, 2016, the Superior Court consolidated LDCs' case with a separate petition filed by the Association of Washington Business and other trade associations ("AWB"). *See* CP at 836 (Order Granting Petition for Review). On January 31, 2017, the Superior Court granted three environmental advocacy organizations' motion to intervene ("Intervenors"). *See* CP at 402-403 (Order Granting Motion to Intervene).

On November 10, 2016, Ecology filed a motion for judgment on the pleadings under Civil Rule 12(c), moving to dismiss for lack of standing the separate SEPA claims made by LDCs and AWB. CP at 89-96 (Motion for Judgment on the Pleadings). On July 27, 2017, the Superior Court denied Ecology's motion, finding that LDCs had standing to bring claims under SEPA because LDCs alleged, *inter alia*, that the Rule would cause increased emissions from electric generation, exacerbating risks to LDCs' interests, including the health of LDCs' customers, shareholders, and employees, as well as to LDCs' property. CP at 652 (July 27, 2017 Rule 12(c) Motion Order ¶ 16); *see also* CP at 638-39 (LDCs' Am. Compl. ¶¶ 37-39).

The petition proceeded to oral argument on the merits on December 15, 2017. Following oral argument, the Superior Court invalidated the Rule, concluding that Ecology exceeded its statutory authority. *See* CP at 787 (Mar. 14, 2018 Order Denying Ecology's Request to Sever). The

Superior Court signed an order to that effect on April 27, 2018. CP at 835-40. (Apr. 27, 2018 Order Granting Petition for Review).

Ecology and Intervenors filed Notices of Direct Review with this Court on May 11, 2018 and May 16, 2018, respectively. As relevant to LDCs, Ecology and Intervenors⁵ seek review of (1) the July 27, 2017 order denying Ecology's Civil Rule 12(c) motion challenging LDCs' standing under SEPA, and (2) the April 27, 2018 order invalidating Ecology's Rule.

ARGUMENT

The Superior Court correctly held that the Rule was invalid because the Clean Air Act ("the Act") limits the application of emission standards to emitting sources. If this Court disagrees, however, the Superior Court's decision merits affirmance on several independent grounds: (1) the Rule is *ultra vires* because it is not an emission standard as applied to LDCs, (2) Ecology's cost-benefit analysis was unlawfully arbitrary, and (3) SEPA required Ecology to prepare an environmental impact statement ("EIS"), which the agency failed to do. *See State v. Carroll*, 81 Wash. 2d 95, 101, 500 P.2d 115, 119 (1972).

⁵ This brief refers to Ecology and Intervenors collectively as "Appellants."

I. ECOLOGY’S RULE IS *ULTRA VIRES*.

Whether Ecology exceeded its authority by adopting the Rule is a question of “[s]tatutory interpretation [and is] reviewed de novo.” *Jametsky v. Olsen*, 179 Wash. 2d 756, 761–62, 317 P.3d 1003, 1006 (2014). “[T]he judiciary has ultimate authority to construe statutes” and “*an administrative interpretation . . . is never authoritative.*” *Nelson v. Appleway Chevrolet, Inc.*, 160 Wash. 2d 173, 184, 157 P.3d 847, 852 (2007) (emphasis added). While courts “generally accord substantial deference to agency decisions, [courts] *do not defer to an agency the power to determine the scope of its own authority,*”⁶ and typical presumptions of validity are inapplicable. *See Lenander v. Washington State Dep’t of Ret. Sys.*, 186 Wash. 2d 393, 409, 377 P.3d 199, 208 (2016) (internal quotation marks and citation omitted; emphasis added); *Fahn v. Cowlitz Cty.*, 93 Wash. 2d 368, 374, 610 P.2d 857, 860 (1980) (indicating that only “administrative rules adopted pursuant to a legislative grant of authority are presumed to be valid”).

Courts must declare invalid an agency rule that “exceeds the statutory authority of the agency.” RCW 70.94.331(2). “[A]n administrative agency . . . is a creature of statute,” and “literally has no power to act . . . unless and until [the Legislature] confers power upon it.”

⁶ Intervenors’ argument for deference is inconsistent with this governing standard and must be rejected. *See* Intervenors’ Opening Br. at 37-38 (“Int. Br.”).

Sunshine Heifers, LLC v. Washington State Dep't of Agric., 188 Wash. App. 960, 968 n.5, 355 P.3d 1204, 1209 n.5 (2015); *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374–75 (1986). Lawful agency action is therefore strictly “limited to the powers and authority granted . . . by the [L]egislature.” *Fahn*, 93 Wash. 2d at 374, 610 P.2d at 860. Stated differently, agencies must operate within the statutory bounds established by the Legislature. Accordingly, an agency rule that operates outside of the “framework [or] policy” delineated by the Legislature in the applicable statute is unlawful. *Swinomish Indian Tribal Community v. Washington State Dep't of Ecology*, 178 Wash.2d 571, 580, 311 P.3d 6, 10 (2013).

A. Ecology Lacks Authority to Impose Emission Standards on Non-Emitting Utilities Like LDCs.

The Legislature has recognized that global climate change is a problem and that there is a need “to preserve, protect, and enhance the air quality for current and future generations.” RCW 70.94.011. LDCs agree. But agency rules addressing air pollution still “must be written within the framework and policy of the applicable statutes.” *Swinomish Indian Tribal Cmty.*, 178 Wash. 2d at 580, 311 P.3d at 10. Global environmental concerns cannot justify, as Appellants call for, rewriting the Act. Indeed, courts must resolutely “resist the temptation to rewrite an unambiguous statute to suit [their] notions of what is good public policy, recognizing the principle that

the drafting of a statute is a legislative, not a judicial, function.” *State v. Jackson*, 137 Wash. 2d 712, 725, 976 P.2d 1229, 1235 (1999) (quotation marks and citation omitted).

Adhering to the judicial axioms described above leads to one conclusion: as applied to LDCs, Ecology’s Rule falls outside of the legislatively prescribed framework set forth in the Act. Although that framework authorizes Ecology to establish emission standards, it also unambiguously restricts the application of those standards to emitting “sources,” or emitters, which do not include LDCs. The Court’s past decision in *ASARCO*, and Ecology’s regulations and decades-old understanding of the Act, also show that emission standards apply only to emitting sources and not to non-emitters like LDCs. Nothing short of rewriting Washington statutes could remedy the Rule’s shortcomings. The Superior Court’s decision must therefore be affirmed.

1. The Act unambiguously limits the application of emission standards to emitting sources.

As a threshold matter, with respect to the Superior Court’s decision on the issue, Ecology frames the *ultra vires* question incorrectly. The question is not whether Ecology may “adopt greenhouse gas emission standards for fossil fuels,” but whether Ecology has authority to apply emission standards to LDCs, which merely distribute natural gas and are

not sources that combust the fuel and release related emissions. *Compare* Ecy. Br. at 14 *with* Order Granting Petition for Judicial Review. The Act plainly does not grant Ecology this authority.

“If the meaning of the statute is plain on its face, the court must give it effect.” *Douglass v. Shamrock Paving, Inc.*, 189 Wash. 2d 733, 739, 406 P.3d 1155, 1158 (2017). “When ascertaining the plain meaning, the court considers the ordinary meaning of words, basic rules of grammar, and statutory context.” *Id.* Statutory context includes “the entire statute in which the particular provision is found, related statutory provisions, and the statutory scheme as a whole.” *See Finch v. Thurston Cty.*, 186 Wash. 2d 744, 749, 381 P.3d 46, 48 (2016). In determining their plain meaning, “statutes should be construed so that all of the language used is given effect, and no part is rendered meaningless or superfluous.” *City of Bellevue v. Lorang*, 140 Wash. 2d 19, 25, 992 P.2d 496, 499 (2000).

Ecology’s sole claimed authority to promulgate the Rule is RCW 70.94.331. Ecy. Br. at 14-18 (relying entirely on proposed interpretation of “emission standards” as its authority to adopt the Rule). According to the agency, that provision “authorizes Ecology to adopt ‘emission standards’ for air pollutants” and to apply those standards to non-emitting utilities. *See* AR004977. LDCs agree that Ecology may, under the Act, “adopt by rule . . . emission standards for the control or prohibition of emissions to the

outdoor atmosphere.” RCW 70.94.331(2)(c). But the Act’s definition of “emission standard” unambiguously provides that it only applies to *emitting sources*. “Emission standard” means “a requirement . . . that limits the quantity, rate, or concentration of emissions of air contaminants on a continuous basis.” See RCW 70.94.030(12). It then goes on to provide two examples following the word “including”:

- (1) “any requirement relating to the operation or maintenance of *a source* to assure continuous emission reduction, and”
- (2) “any design, equipment, work practice, or operational standard adopted under the federal clean air act or this chapter.”

See id. (emphasis added).

The basic language, grammar, and syntactical structure of this definition make two points clear. *First*, the Legislature intended an “emission standard” to encapsulate two types of requirements that each work to limit “the quantity, rate, or concentration of emissions”: numerical limits that assure continuous emissions reductions at a source (*e.g.*, emit no more than x tons of pollutants), and standards relating to design, equipment, work practice, or operations of a source (*e.g.*, procedures for startup of a facility).⁷ *See id.*

⁷ In fact, the Legislature chose to define “Emission standard” and “Emission limitation” using the same definition. See RCW 70.94.030(12).

Second, the sole object to which Ecology may lawfully apply those two types of requirements is an emitting “source.”⁸ For example, design or work practice standards can only apply to a facility or source, not a fuel. This plain-meaning interpretation is internally harmonious within the definition and logical, as only an emitter can “limit[] the quantity, rate, or concentration of emissions” Further, this reading renders no term superfluous and is consistent with the Legislature’s intent to reduce emissions of air pollutants.

2. The Court’s decision in *ASARCO* and Ecology’s decades-old regulations and agency practice confirm this interpretation.

The Court has already acknowledged that emission standards apply to sources and to nothing else. In *ASARCO*, the Court considered whether an air pollution control agency and Ecology had statutory authority to enforce opacity regulations under the Act. *See generally ASARCO*, 112 Wash. 314, 771 P.2d 335. To reach its conclusion that Ecology could regulate emissions opacity, the Court interpreted the plain language of the Act and distinguished between the role of “emission standards” and “air

⁸ Sources, by definition, refer to emitters—or those entities that combust fuels and release resulting emissions—and to those things that, by design, have the potential to emit. *See, e.g.*, RCW 70.94.030(22)-(23); WAC 173-400-030(29); *see also* RCW 70.94.030(11) (“‘Emission’ means a release of air contaminants into the ambient air.”).

quality standards.” *Id.* at 320-21, 771 P.2d at 338-39. The Court explained the independent roles and relationship of these two standards as follows:

[Ecology] must adopt an air quality standard sufficiently limiting the *aggregate* concentrations of contaminants in the ambient air to avoid air pollution [and] must adopt emission standards to control the release of contaminants from any *individual* source.

Id. at 320, 771 P.2d at 339.

Per *ASARCO*, the role of emission standards is thus to control the release of air contaminants (*i.e.*, emissions) from *sources*, and the application of this interpretation “effectuate[s] the Legislature’s purpose of preventing air pollution.” *Id.* (emphasis added); *id.* at 320-21, 771 P.2d at 339 (emphasizing the need to “prevent the aggregate discharge of contaminants by any two or more individual sources from causing air pollution”). The Court’s plain-meaning interpretation of “emission standard” and description of the Act’s framework in *ASARCO* is consistent with the Superior Court’s decision that emission standards apply only to emitting sources and therefore cannot be applied to LDCs.

Ecology’s existing regulations and past practice also validate the Superior Court’s decision. By Ecology’s own terms, the purpose of its regulations implementing the Act is to establish rules based on “reasonably attainable standards” (*e.g.*, emission standards) that “control” and “prevent”

emissions by “provid[ing] for the systematic control of air pollution from air contaminant sources.” WAC 173-400-010(1)-(2). Indeed, a review of Ecology’s regulations shows that the agency has understood and effectuated its purpose by applying emission standards to *sources of emissions*. See, e.g., WAC 173-400-070; WAC 173-400-040. Thus, the Superior Court’s decision precluding emission standards from being applied to LDCs as non-emitters is consistent with Ecology’s longstanding regulations and practice.

3. Appellants’ proposed statutory interpretations are inconsistent with the plain language of the Act, ASARCO, and Ecology’s regulations and past practice.

Appellants’ statutory arguments are tantamount to asking this Court to rewrite the Act. The Court must decline this invitation, as the plain meaning of the Act cannot be stretched to support Appellants’ interpretive preferences.

According to Ecology, the Superior Court’s decision renders certain clauses of the definition of emission standard inoperative. Ecy. Br. at 16. Ecology specifically claims that if the requirements in the statutory definition apply only to emitting sources, then the phrase “operational standard [of a source]” would be duplicative of the phrase mentioning limits to the “operation . . . of a source.” *Id.* at 17. Not so. The statute provides for two types of requirements that limit emissions: numerical limits that

assure continuous reduction (*e.g.*, a requirement that no more than 70,000 tons of greenhouse gases be emitted per year), and design, equipment, work practice, or operational standards that do not set numerical limitations but also work to limit emissions. There is therefore no duplication.

Next, Intervenors assert that restricting the application of requirements (*i.e.*, numerical limits and standards) to sources would be improper because the Legislature is silent on this question. Int. Br. at 18-20, 22. This “legislative silence,” Intervenors contend, means that there is a statutory gap for Ecology to fill, and that the Rule does just this. *Id.* at 20; *but see generally* Ecy. Br. at 14-18 (not arguing that there is any statutory gap for the agency to fill). Intervenors’ argument mischaracterizes the statute—the Legislature is not silent on this issue. Indeed, the Legislature specifically identifies “a source” as the sole object in the definition to which requirements could apply. It is well-established that “[w]here a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature.” *Washington Nat. Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 77 Wash. 2d 94, 98, 459 P.2d 633, 636 (1969). Appellants offer nothing capable of rebutting this presumption. Thus, the Superior Court’s decision does not “add[] to the clear language of

the statute,” and there is no gap to fill related to the objects to which emission standards may apply.⁹ *But see* Int. Br. at 23.

Appellants also contend that the Superior Court’s interpretation is inconsistent with the principle that “emission standards . . . may be based upon a system of classification by types of emissions or types of sources of emissions, or combinations thereof.” RCW 70.94.331(2). Appellants base their contention on the incorrect notion that this provision expands, through statutory export to RCW 70.94.030(12), the scope of things to which Ecology may apply emission standards. Ecy. Br. at 17; Int. Br. at 23. This provision merely provides Ecology with a mechanism for regulatory efficiency by allowing the agency to apply emission standards to categories of sources, or to categories of emissions from sources, rather than having to impose emission standards one source at a time.

Indeed, Ecology has used this provision for these purposes. *See, e.g.*, WAC 173-400-070 (setting emission standards for sources by types of sources or “certain source categories,” such as wigwam and silo burners,

⁹ Intervenors’ insinuation that an agency may expand a statutory framework unless the Legislature specifically prohibits that expansion is refuted by the basic principle that agencies are creatures of statute and have only the powers the Legislature specifically grants to them. *Compare Swinomish Indian Tribal Cmty.*, 178 Wash. 2d at 580, 311 P.3d at 10 (providing agency rules “must be written within the framework and policy of the applicable statutes”), and *Sunshine Heifers*, 188 Wash. App. at 968 n.5, 355 P.3d at 1209 n.5, with Int. Br. at 20 (“In the absence of any explicit limitation” the “choice is left to Ecology.”), and *id.* at 22 (“Nothing in this plain text prohibits Ecology from applying greenhouse gas emission standards to entities that sell and profit from combustible fuels.”).

hog fuel burners, and sulfuric acid plants); WAC 173-400-040 (setting emission standards for sources based on classification system by types of emissions, including visible emissions, fallout, fugitive emissions, and odor). These and all other Ecology emission standards apply only to sources, and Ecology has not, and cannot, identify an example where it has applied an emissions standard to a non-source.

4. No other statutory authority can sustain the Rule.

The Court should reject Intervenors' suggestion that RCW Chapter 70.235 grants Ecology additional authority or provides other legal support for the Rule. Ecology has unequivocally stated that it did not rely on Chapter 70.235 to promulgate emission standards contained in the Rule. AR004981 ("While the reductions in the [Rule] are linked to the statutory limits in RCW 70.235.020, that statutory provision is not the legal authority for Ecology to adopt emission standards. Again, the legal authority is in the state CAA."). Moreover, Ecology cannot, and non-agency intervenors certainly cannot, provide *post hoc* justifications in an attempt to save the Rule. *In re Dyer*, 143 Wash. 2d 384, 410, 20 P.3d 907, 920 (2001) ("An agency's action may only be upheld on the basis articulated by the agency itself" at the time of action, and not based on "post hoc rationalizations for agency action.").

Regardless, with respect to achieving greenhouse gas reductions, RCW Chapter 70.235 provides no grant of authority to enact emission standards or otherwise regulate non-emitting utilities. Instead, this Chapter sets several greenhouse gas reduction goals and directs Ecology to develop and submit “a plan for review and approval to the legislature” on actions necessary to achieve these goals “by using existing statutory authority and any additional authority granted by the legislature.” RCW 70.235.020(1)(b). Thus, this Chapter does not, as Intervenors contend, “strongly support[] upholding Ecology’s authority” to promulgate the Rule.¹⁰ Int. Br. at 25.

5. General appeals to broad authority, liberal construction, and statutory evolution cannot change the Act’s language.

To find an interpretive solution to their plain-language problem, Appellants attack the Superior Court’s decision with token invocations of Ecology’s “broad authority and responsibility” to manage the State’s air quality programs, the need for “liberal construction” of the Act, and the policies and purposes of the Act. Ecy. Br. at 14; Int. Br. at 19. Specifically, Appellants inappropriately ask the Court to use Ecology’s “broad authority and responsibility” over the State’s air quality program to derive, from the

¹⁰ To date, a greenhouse gas reduction plan has never been adopted.

Act's broad purpose statements, the authority necessary to uphold the Rule. The Court should reject this unlawful proposal.

To be sure, the Legislature acknowledged Ecology's "broad authority and responsibility" in the agency's organic statute. RCW 43.21A.020. But Appellants ignore the Legislature's clarifying statement that Ecology was created "to undertake . . . the air regulation and management program [then] performed by the state air pollution control board." *Id.* Contrary to Appellants' position, neither this provision nor any other grants Ecology plenary authority to take the legislative pen and rewrite the statutory framework (*i.e.*, the "management program") of the Act.

Continuing in their pursuit of new authority to sustain the Rule, Appellants rely heavily on the notion that environmental statutes "should be interpreted liberally" and be "broadly construed to achieve the statute's goals." Ecy. Br. at 14; Int. Br. at 18. But it is well established that "liberal construction . . . does not give [the Court] license to rewrite the [Clean Air Act]." *See In re Anderson*, 824 F.2d 754, 759 (9th Cir. 1987); *United States v. Floyd*, 992 F.2d 498, 502 (5th Cir. 1993) ("[T]his command for a liberal construction does not authorize us to amend by interpretation.").

Appellants' proposal must be rejected. Courts, no matter how well-intentioned, "cannot replace the actual [statutory] text with speculation as to [the Legislature's] intent" like Appellants suggest. *Magwood v.*

Patterson, 561 U.S. 320, 334 (2010). Indeed, “it [would] frustrate[] rather than effectuate[] legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.” *Rodriguez v. United States*, 480 U.S. 522, 526 (1987). *But see* Ecy. Br. at 14 (calling for the Court to interpret the Act, not according to its text, but “in a manner that best advances the statute’s purpose of environmental protection”). Besides being interpretatively dangerous, rewriting the Act would also violate constitutional principles.¹¹ The Court should dismiss these arguments.

Separately, Intervenors ask this Court to adopt the novel proposition that the Act was written in broad terms and “should be read to evolve with time” so Ecology can better address climate change. Int. Br. at 32-33. Besides being unsupported by legal authority, Intervenors’ argument concedes that Ecology lacks authority under existing statutory text to promulgate the Rule. *See Sprague v. Spokane Valley Fire Dep’t*, 189 Wash.

¹¹ *See Hillis v. State, Dep’t of Ecology*, 131 Wash. 2d 373, 389–90, 932 P.2d 139, 147–48 (1997) (“The separation of powers doctrine ensures that the fundamental functions of each branch of government remain inviolate.”); *Barry & Barry, Inc. v. State Dep’t of Motor Vehicles*, 81 Wash. 2d 155, 159, 500 P.2d 540, 542–43 (1972) (explaining that, to avoid delegation issues, the Legislature must provide “standards or guidelines which define in general terms what is to be done” and “[p]rocedural safeguards . . . to control arbitrary administrative action and any administrative abuse of discretionary power.”); *see also City of Oakland v. B.P. P.L.C. et al*, 2018 WL 3109726 at *9 (N.D. Cal. June 25, 2018) (dismissing claims premised on harms caused by climate change, despite “accept[ing] the science behind global warming” and agreeing that the harms alleged “will continue,” because “courts must also respect and defer to the other co-equal branches of government when the problem at hand clearly deserves a solution best addressed by those branches”).

2d 858, 876, 409 P.3d 160, 172 (2018) (dismissing arguments “not cit[ing] any law establishing” litigant’s position); *Puget Sound Plywood, Inc. v. Mester*, 86 Wash. 2d 135, 142, 542 P.2d 756, 761 (1975) (same). Legislatures write statutes, and statutes do not evolve organically over time simply because they contain “broad” provisions.

Intervenors cite inapposite cases to support their “statutory evolution” theory. None of these cases support the proposition that statutory text evolves organically. Instead, these cases stand for the unremarkable principle that existing statutory frameworks can be applied, within the bounds set by the relevant legislature, to circumstances that were not foreseen when those frameworks were originally enacted. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 528-29 (2007); *Browder v. United States*, 312 U.S. 335, 339 (1941); *Consumer Electronics Ass’n v. F.C.C.*, 347 F.3d 291, 298 (D.C. Cir. 2003).

Courts must “apply faithfully the law [the Legislature] has written, [and] it is never [their] job to rewrite . . . statutory text under the banner of speculation about what [the Legislature] might have done had it faced a question that . . . it never faced.” *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017). *Jackson*, 137 Wash. 2d at 725, 976 P.2d at 1235 (stating courts must “resist the temptation to rewrite an unambiguous statute to suit [their] notions of what is good public policy”). Thus,

Intervenors' "statutory evolution" theory is legally infirm and cannot provide Ecology with authority to impose emission standards on LDCs.

6. Statutory ambiguity would not change the interpretive outcome.

Appellants do not argue that the relevant Clean Air Act provisions are ambiguous because, as discussed above, they are not. Nevertheless, according to Ecology, if the Court determines an applicable provision is ambiguous, it must adopt the interpretation that best advances the Act's purpose of preserving, protecting, and enhancing air quality for current and future generations." Ecy. Br. at 18. Accepting Ecology's position at face value would be improper because it contradicts the applicable standard of review, is oversimplified, and ignores competing statutory purposes.

Agency positions receive no deference related to *ultra vires* issues. See *Lenander*, 186 Wash. 2d at 409, 377 P.3d at 208. Were this not the case, courts could rely on broad interpretive principles and deference to enlarge an agency's statutory authority without legislative permission.

Ecology's proposition also wrongly suggests that a court facing ambiguity may select the interpretation that would provide the greatest environmental benefit, even if it falls outside of the legislatively prescribed framework. Not so. Agencies are creatures of statute and their rules "must be written within the framework and policy of the applicable statutes."

Swinomish Indian Tribal Cmty., 178 Wash. 2d at 580, 311 P.3d at 10. General statutory purposes are qualified and limited by the legal frameworks the Legislature sets forth to accomplish them, and contrary to Ecology’s suggestion, “lawful ends [never] justify unlawful means.” *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 n.* (2018). Choosing the interpretation that “best advances” the purpose of the Act cannot save the *ultra vires* Rule, no matter how well-intentioned the Rule may be.

Regardless, the Superior Court’s invalidation of the Rule as applied to LDCs is consistent with the purposes and policies of the Act. LDCs are not emitting sources, so applying the Rule to LDCs does not actually reduce, prevent, or control air pollution at the source. *See infra* § I.B; *cf.* RCW 70.94.011. Instead, it is those consuming, and dictating the combustion of, natural gas that are the sources. *See also* RCW 70.94.011 (providing that the Legislature “recognizes that air emissions from thousands of small individual sources are major contributors to air pollution” and that *those sources* should be regulated to reduce their emissions).

Appellants’ appeals to regulatory flexibility and convenience are meritless. Int. Br. 23-24; AR005027 (Ecology explaining that the Rule regulates LDCs for regulatory and administrative convenience); AR005022. The Act provides sufficient mechanisms for Ecology to regulate relevant sources of greenhouse gas emissions. RCW 70.94.331(2). With these

flexibilities, and all the other “weapons at [Ecology’s] command, it is difficult to follow the argument that the [agency] should be allowed to improvise on the powers granted by [the Legislature] in order to preserve administrative flexibility.” *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 330 (1961).

In sum, Appellants’ proffered “solutions” to Ecology’s lack of authority to promulgate the Rule must be rejected. The Court cannot, “without doing violence to the fair meaning of the words used” in the Act, evade what the Legislature has enacted. *Grenada County Supervisors v. Brogden*, 112 U.S. 261, 269 (1884).

B. The Rule Is Not an Emission Standard as Applied to LDCs.

The Rule is *ultra vires* as applied to LDCs because it does not and cannot operate as an emission standard for utilities merely distributing natural gas to end-users. By statutory definition, an emission standard must be applied to a source for the sole purpose of reducing emissions. With respect to LDCs, Ecology can neither remedy the Rule’s functional deficiency nor prevent its perverse results—the Rule cannot reduce emissions from LDCs, does not require LDCs’ customers to use less gas, and likely will increase regional emissions from the electric sector. The

Court should therefore affirm the Superior Court’s holding recognizing the same.

LDCs are utilities and, as such, provide essential public services, including supplying homes, schools, and businesses with natural gas.¹² Utilities’ provision of affordable natural gas to residents is a state priority. RCW 80.28.074. Consistent with this priority, LDCs have a unique duty to maintain service during winter months—when consumption and related emissions are the highest—even for persons unable to pay their bills. *See* RCW 80.28.010. LDCs, being heavily regulated, are subject to a variety of other strict and enforceable statutory obligations. LDCs must, for example, “furnish and supply” natural gas service in a safe, adequate, efficient, just, and reasonable manner to all who request it. RCW 80.28.010(2); RCW 80.28.110; RCW 80.28.190. The Rule’s demands on LDCs conflict with LDCs’ statutory obligations as utilities providing essential public services.

By all accounts, including Ecology’s, the Rule should operate as an emission standard “that limits the quantity, rate, or concentration of air contaminants on a continuous basis.” *Ecy. Br.* at 16. The Act’s provision allowing Ecology to adopt emission standards by rule was the sole basis of

¹² Natural gas is a critically important fuel for, among other things, supporting renewable energy growth and maintaining system reliability, while also improving air quality. The Legislature has recognized the importance of natural gas in improving air quality. *See, e.g.*, RCW 80.28.280(1).

the agency's claimed authority. AR004981. The Rule is therefore lawful only to the extent that it is, facially and in application, an emission standard.

The Rule, as applied to LDCs, is not an emission standard. The Act authorizes Ecology to “adopt by rule . . . emission standards for the *control or prohibition of emissions* to the outdoor atmosphere.” RCW 70.94.331(2)(c) (emphasis added). An emission standard is “a requirement that . . . *limits the quantity, rate, or concentration of emissions* of air contaminants,” where an emission is “a release of air contaminants to the ambient air.” RCW 70.94.030(11)-(12) (emphasis added). An emission standard for greenhouse gas emissions, therefore, must impose requirements on a source that control, prohibit, or limit that source's release of greenhouse gases into the ambient air.

The Rule as applied to LDCs does not satisfy these statutory requirements. First, the Rule does not regulate emissions at the source—*i.e.*, the point where air contaminants are released into the air. *See, e.g.*, AR005022, 5061-62 (Ecology stating “[n]atural gas distributors . . . cover natural gas emissions from smaller homes, businesses, and organizations” and that “natural gas distribution companies are not ‘stationary sources’”). Second, and relatedly, LDCs merely distribute natural gas; they do not combust fuel and release related greenhouse gases into the ambient air.

Accordingly, as applied to LDCs, the Rule does not control, prohibit, or limit LDCs' release of these gases.¹³

Another irreconcilable problem of the Rule as applied to LDCs is that LDCs cannot comply with the Rule by reducing greenhouse emissions because they do not produce the emissions at issue.¹⁴ It is end-users who generate these emissions through their consumption (and associated combustion) of natural gas. LDCs have no control over these end-users. To the contrary, state statutes compel LDCs, as public utilities, to sell and transport as much natural gas as end-users reasonably demand. To comply with the Rule, LDCs must purchase scarce and expensive offsets, or emissions reduction units. *See* AR020179-80; CP at 383 (LDCs' Op. Br. (Fig. 1)). Ecology's convoluted scheme thus turns the Act into a statute that would be "unrecognizable to the [Legislature] that designed it." *Utility Air Regulatory Group v. E.P.A.*, 134 S. Ct. 2427, 2444 (2014) (internal quotation marks omitted); RCW 70.94.011.

¹³ Intervenors contend that "[a]llowing covered parties to meet their emission limits through offsite reductions" in the form of emission reduction units "changes *where* the reductions occur, but nonetheless limits the 'quantity' of emissions." Int. Br. at 41 (citing RCW 70.94.030(12)). But this reading of the statute would extend Ecology's authority to regulating virtually every item in commerce with any conceivable connection to the release of greenhouse gas emissions, so long as an emission reduction occurred "somewhere." Allowing "this would be so wide a departure" from the plain statutory text "that the legislature would hardly be deemed to have intended it without plainly expressing such intention." *Slauson v. Schwabacher*, 4 Wash. 783, 788 (1892).

¹⁴ *See supra* Statement of the Case.

Ecology's application of the Rule to LDCs not only distorts the plain meaning of emission standard, but also alters the legislatively prescribed framework of the Act, which is centered on the regulation of sources to reduce *their emissions*. Ecology's Rule expands that framework well beyond its breaking point by allowing the agency to regulate any commodity that when used is capable of releasing air contaminants into the ambient air, regardless of where those commodities are found in relation to the time and place where they generate emissions. Had the Legislature intended to grant Ecology such authority, the statute would have expressed that intent in plain terms. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (A legislature does not "hide elephants in mouseholes."). The closest Ecology can come to citing a "product-based" emission standard in the Act is its emission performance standards for woodstoves. *See* WAC 173-433. Even then, the products subject to those standards are "woodstoves and other solid fuel burning devices"—*i.e.*, *devices that emit*. *Id.*

The proper analogy to the Rule would be an emission standard for *wood itself* that made the lumber company *selling* that wood, or the trucker *delivering* that wood, pay for the emissions of their customers who burn it. *See* Ecy. Br. at 14 (claiming it has authority to impose emission standards on fossil fuels, without providing any limitation). This result would be

absurd. The Court should therefore affirm the Superior Court and hold that the Rule is *ultra vires* as applied to LDCs. *Cent. Puget Sound Reg'l Transit Auth. v. WR-SRI 120th N. LLC*, 422 P.3d 891, 902 (Wash. 2018) (stating the Court “must interpret statutes to avoid absurd results”); *Swinomish Indian Tribal Cmty.*, 178 Wash. 2d at 588-602, 311 P.3d at 14-21 (rejecting Ecology’s statutory interpretation because it gave Ecology too much discretion, too much authority, and was inconsistent with statutory scheme); *Wash. State Hosp. Ass’n v. Dep’t of Health*, 183 Wash. 2d 590, 597, 353 P.3d 1285, 1289 (2015) (finding agency exceeded its authority in issuing rule that expanded the meaning of terms “in a manner that is not consistent with the statute”).

II. ECOLOGY’S COST-BENEFIT ANALYSIS FOR THE RULE WAS ARBITRARY AND CAPRICIOUS.

Courts must invalidate an agency rule that “is arbitrary and capricious.” RCW 34.05.570(2)(c). Whether Ecology’s cost-benefit analysis, and the Rule predicated on that analysis, were arbitrary and capricious is reviewed *de novo*. *Wash. Indep. Tel. Ass’n v. Wash. Utilities & Transp. Comm’n*, 149 Wash. 2d 17, 26, 65 P.3d 319, 322 (2003). Agency action is arbitrary and capricious if (1) the action “is willful and unreasoning and taken without regard to the attending facts or circumstances,” *id.*, or (2) the agency has not deliberated on the action “honestly, fairly, and upon due

consideration.” *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.*, 155 Wash. 2d 612, 635, 121 P.3d 1166, 1178 (2005).

Before adopting a significant legislative rule, agencies must “[d]etermine that the probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented.” RCW 34.05.328(1)(c)-(d). Deference to an agency’s cost-benefit analysis extends only to areas of that agency’s expertise. *See Kovacs v. Dep’t of Labor & Indus.*, 186 Wash. 2d 95, 100, 375 P.3d 669, 672 (2016).

LDCs argued below that Ecology arbitrarily and capriciously relied upon a flawed cost-benefit analysis. The Superior Court did not address this argument because it held that the Rule was *ultra vires*. Should this Court hold otherwise and decide to address the cost-benefit analysis issue in the first instance,¹⁵ it should affirm the Superior Court’s decision because Ecology unreasonably and unfairly disregarded credible and important evidence related to the costs and benefits of the Rule.¹⁶

¹⁵ Whether Ecology’s cost-benefit analysis was arbitrary and whether its decision not to prepare an EIS was clear error (discussed below) are complex, fact-intensive issues that are best decided by the Superior Court in the first instance. *Barsten v. Dep’t of Interior*, 896 F.2d 422, 424 (9th Cir. 1990).

¹⁶ Ecology’s brief primarily addresses AWB’s argument below—that Ecology’s use of the social cost of carbon to calculate the Rule’s costs and benefits was arbitrary. *See Ecology’s Opening Br.* at 45. LDCs did not advance this argument below.

A. Ecology arbitrarily inflated the Rule’s probable benefits.

Ecology inflated the Rule’s benefits by considering only emission *reductions* that might result from the Rule, without also considering Rule-induced emission *increases*. LDCs provided Ecology with reliable evidence detailing how the Rule would inadvertently increase net regional greenhouse gas emissions from the electric sector. *See* AR020171. Ecology summarily dismissed this evidence and plowed forward with its skewed cost-benefit analysis. AR005013. By not taking a “‘hard look’ at the salient problems” detailed by LDCs in their public comments, Ecology acted arbitrarily and capriciously, rendering the Rule unlawful. *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992).¹⁷

LDCs’ comments, employing reliable modeling methods and common industry knowledge, explained how the Rule would produce the perverse result of increased net regional greenhouse gas emissions. Power sectors are regional in nature, and Washington’s electric grid is a part of the Western Interconnection, which stretches from western Canada to northern Mexico and extends eastward across many of the Great Plains states. AR020169. All electric utilities therein are linked. Because Washington

¹⁷ RCW 34.05.001 (stating that the APA is intended to be “consisten[t] with other states and the federal government in administrative procedure”); *Hoffer v. State*, 113 Wash. 2d 148, 151, 776 P.2d 963, 964 (1989) (acknowledging interpretation of federal APA is “often persuasive,” albeit not necessarily controlling).

utilities, including LDCs, are legally obligated to provide “least-cost” electricity to their customers, utilities must draw from cheaper, out-of-state sources to fulfill this obligation when in-state sources are more expensive. *See* WAC 480-100-238(1); AR000295; AR020169-70.

This is exactly what will happen under the Rule. The Rule will force Washington utilities to draw from cheaper, out-of-state sources which largely are higher-emitting coal-fired and natural gas-fired plants subject to less stringent emissions requirements.¹⁸ AR020170. Washington has one of the strictest thermal combustion CO₂ emission performance standards and lowest greenhouse gas emission rates in the U.S. Its emission rate for electricity is less than half that of states from which it is likely to import power—Montana, Wyoming, and Utah—which have no state-based carbon restraints on power plants. AR020210. Even at the lowest cost estimates, the Rule would cause an increase in cumulative regional greenhouse gas regional emissions from the electric sector of between 9 and 16 million tons through 2035—an increase of between at least 250,000 and 650,000 tons per year. *See* AR020171; AR005016-17.

¹⁸ Washington electric utilities will reduce operation of their Washington power plants; generate and sell emission reduction units; and buy power from the wholesale market from sources that are not covered by the Rule. *See* WAC 480-100-238(1) (requiring least-cost power supply); *see also* CP at 588 (LDCs’ Reply Br., n.44 (providing real-world example)).

Without analysis or explanation, Ecology implausibly “concluded” that “there is not a likelihood of an increase in imported power or other shifts in regional power generation as a result of [the Rule].”¹⁹ AR004985. Relying only on *ipse dixit*, Ecology dismissed any “theoretically possible” generation shifting and attendant increases in regional greenhouse gas emissions as “speculative” and “unlikely to occur,” and as “short term and limited” to the extent that they would occur. AR004985-86, AR005013. Ecology’s unsupported conclusion not only “runs counter to the evidence before the agency,” but is also “so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

B. Ecology capriciously deflated the Rule’s costs.

Ecology consciously disregarded the Rule’s true costs in preparing the cost-benefit analysis. LDCs presented Ecology with abundant and reliable evidence that the Rule would drive up the cost of natural gas in Washington and that those costs would be passed along to LDCs’ ratepayers. But Ecology dismissed the evidence of high costs without explanation, again skewing the cost-benefit analysis to support its Rule.

¹⁹ Ecology blindly relied on the Clean Power Plan to address regional greenhouse gas emissions, *see* AR005013; AR005008, but this reliance was misplaced. *See infra* § III.B.1.

LDCs warned Ecology the Rule would cause significant increases in natural gas service prices, harming Washington consumers.²⁰ LDCs explained that, because they do not have emissions to reduce, they would depend on emission reduction units to comply with the Rule.²¹ LDCs detailed Ecology's gross underestimation of available units and how those scarce units would come at great costs that would be shared by LDC customers.²² *See, e.g.*, AR020174-77 (indicating that Puget Sound Energy would face an emission reduction unit shortfall of 800,000 by 2017); AR021534; *see also* AR000338 (Ecology admitting that a "significant level" of the Rule's compliance costs would be passed onto LDC customers). Ecology cursorily dismissed this effect on LDCs' consumers as "relatively modest." AR005000.

Ecology's failure to fairly and honestly account for these realities renders its cost-benefit analysis and the Rule unlawful. *See* AR005077-80.

²⁰ Ecology agreed that its Rule would drive up the cost of natural gas. Ecology projected that LDCs' average compliance costs would be up to 15.4 times higher than the cost faced by other covered parties. AR000295. Ecology further estimated a 10.2 percent rate increase in customers' natural gas rates. Ecy. Br. at 10; *see also* AR020169-72, 20179-82, 20185; AR021478; AR021522, 21554-63.

²¹ LDCs presented Ecology with extensive analysis and evidence supporting this. *See* AR020169-72, 20179-82, 20185; AR021478; AR021522, 21554-63.

²² Instead of accepting the modeling results provided by LDCs in their comments or conducting alternative and reliable modeling, Ecology simplistically calculated emission reduction units demand (need) in an Excel spreadsheet. *See* AR011793. The calculations in this spreadsheet were replete with errors and bad assumptions that led the agency to significantly underestimate the number of units LDCs would need to comply with the Rule. *See id.*; *see* CP at 584-587 (LDCs' Reply Br. at 14-17).

Due to shortages, for example, emission reduction units could range from five to thirty-five times greater than Ecology's lowest projection of roughly three dollars—potentially causing natural gas service prices to spike by 40 percent by 2035.²³ Compare AR021478, and AR020171, and AR021522, with AR000274-75; see also AR020179. Yet Ecology's cost-benefit analysis purports a potential increase in natural gas rates of only up to 10.2 percent. Ecy. Br. at 10.

Ecology's significant underestimation is caused, in part, by its failure to consider easily accessible, publicly available data regularly generated by utilities. For example, to calculate emission reduction unit demand for 2017, Ecology unreasonably assumed that LDC customer emissions would increase by a mere 0.75% above the baseline for 2017. See AR011793. This figure is less than half of industry standards used by LDCs and approved by the Washington Public Utilities Commission and is inconsistent with how utilities forecast demand in their integrated resource

²³ Ecology has no basis for its claim that covered parties can purchase allowances from approved cap-and-trade programs in other jurisdictions to acquire emission reduction units. See Ecy. Br. at 8. California's cap-and-trade program is currently the *only* possible qualifying source of allowances, but California requires out-of-state entities to enter into an agreement for those allowances to be exchanged. See 17 CA ADC § 95943(c). California has not at this time—or ever—entered into an exchange agreement with Washington.

plans.²⁴ *See, e.g.,* AR011993 (showing LDCs commonly use a growth factor of 1.5-1.7%, in part, to account for variable weather patterns).

Compounding this faulty formula, Ecology's calculations were replete with additional errors and missteps, including:

- Subtracting *all* industrial and electric customer emissions from LDCs' emission baselines, when only the emissions from industrial and electric customers who themselves are covered parties under the Rule (i.e., who emit above 70,000 metric tons of CO₂ per year) should have been deducted (WAC 173-442-050(3)(c));²⁵
- Using *out-of-state* renewable energy credit markets to determine the cost of emission reduction units when Ecology's rules will require units to be generated *in state* (*compare* AR000275 *with* AR020175);

²⁴ Utilities are required to develop integrated resource plans at least every four years and investor-owned utilities must submit those plans to the Utilities and Transportation Commission. RCW 19.280.030(1); RCW 19.280.040. Each plan is "an assessment that estimates electricity loads and resources over a defined period of time." RCW 19.280.010, -020(15).

²⁵ *See* AR011793 for Ecology's actual calculations. Ecology reduced Cascade's baseline emissions by about 79%, but Cascade estimates emissions from covered customers are only about 50% of its reported emissions. Ecology reduced NW Natural's baseline emissions by about 26%, but NW Natural estimates emissions from covered customers are only about 3% of its reported emissions. Cascade consequently estimates its baseline to be more than two times higher than Ecology's estimate (rendering its baseline roughly 27% higher than Ecology's estimate). Similarly, Ecology reduced Avista's baseline emissions by about 23%, but Avista estimates that emissions from its covered customers are only about 9% of its reported emissions (rendering its baseline roughly 16-17% higher than Ecology's estimate).

- Using *current* renewable energy credit market prices to determine the cost of units, thereby failing to account for the fact that Ecology’s Rule *itself* will impact emission reduction unit supply and demand and drive up prices even more (AR020176); and
- Assuming that covered parties will be able to obtain allowances from out-of-state markets, like California, and failing to account for price impacts that will result if the Rule increases the demand for these external allowances (AR020178, AR020180).

Principles of deference cannot cover Ecology’s repeated and significant missteps in its cost-benefit analysis. Assuming deference could save the analysis, however, no deference is warranted. To be sure, modeling energy supply and demand—which Ecology should have done before forecasting unit demand—is a “complex” and “technical” matter. *Cf.* Ecy. Br. at 45-46 (citing *Hillis*, 131 Wash.2d at 396. But as evident from its cost-benefit analysis and statutory charge, Ecology “has no particular expertise” with these matters and therefore receives no deference related to them. *See Kovacs*, 186 Wash. 2d at 100, 375 P.3d at 671–72. Even if Ecology had expertise in these matters, Ecology did not apply that expertise because it did not rationally engage or explain its disagreement with the evidence

provided by LDCs—public utilities who are statutorily required to submit complex supply and demand forecasts to the Washington Utilities and Transportation Commission. RCW 19.280.010, -020(15). Ecology’s Rule is therefore invalid on this additional ground. *See Business Roundtable v. S.E.C.*, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011) (holding that an agency’s cost-benefit analysis was arbitrary for “opportunistically fram[ing] the costs and benefits” and “fail[ing] to respond to substantial problems raised by commenters”).

III. ECOLOGY’S FAILURE TO PREPARE AN EIS VIOLATED SEPA.

The parties disputed below whether LDCs had standing to bring a SEPA claim, and, if so, whether Ecology violated SEPA when it found that the Rule would have no “significant probable adverse environmental impacts.” Should the Court reach LDCs’ SEPA claim, it should affirm the Superior Court’s holding that LDCs have standing and hold that Ecology violated SEPA by failing to prepare an EIS.

A. The superior court properly denied Ecology’s Civil Rule 12(c) motion because LDCs have standing under SEPA.

Ecology only argues that LDCs lack standing for its SEPA claims in connection with Ecology’s motion to dismiss, Ecy. Br. at 38, but Ecology cannot meet the stringent requirement for dismissal under Civil Rule

12(c).²⁶ Dismissal under Civil Rule 12(c) is reviewed de novo and appropriate if “[i]t appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.” *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wash. 2d 107, 120, 744 P.2d 1032, 1046 (1987); *P.E. Sys., LLC v. CPI Corp.*, 176 Wash. 2d 198, 203, 289 P.3d 639, 641 (2012). The Court accepts as true plaintiffs’ allegations, may consider hypothetical facts not included in the record, and views all facts in the light most favorable to the non-moving party (LDCs). *See, e.g., Postema v. Pollution Control Hearings Bd.*, 142 Wash. 2d 68, 119, 11 P.3d 726, 754 (2000); *Tenore v. AT & T Wireless Servs.*, 136 Wash.2d 322, 330, 962 P.2d 104, 107 (1998).

A party has standing under SEPA if alleging (1) an endangered interest that falls within the zone of interests protected by SEPA and (2) an injury in fact. *See Kucera v. Dep’t of Transp.*, 140 Wash.2d 200, 212, 995 P.2d 63, 70 (2000). SEPA’s zone of interests is concerned with “broad questions of environmental impact” and “identification of unavoidable

²⁶ Although Ecology did not challenge LDCs’ standing on the merits, the record is replete with unchallenged facts supporting LDC’s standing. *See* AR000259-60, AR000299, 306-07 (Ecology’s description of the threats, including environmental and public health consequences, to Washington of increased greenhouse gases and climate change); *see* AR020192, AR021470, AR011836-37, AR021520, AR011984-85, AR021790, AR012651, AR012653, AR020152-53, AR012970-72 (describing LDCs’ property and customers within Washington that would be subject to such environmental and public health consequences); *see* AR021476-77, AR021538, AR021790, AR020153, AR020160, AR020170-72, AR020191-92, (analyzing the probable effects of the Rule in increasing regional greenhouse gases and other pollutants).

adverse environmental effects.” *Id.* at 212-13, 995 P.2d at 70 (internal quotation marks omitted).

LDCs’ Amended Petition straightforwardly alleges that the Rule will cause environmental harm endangering their interests. *See, e.g.*, CP at 637-39 (LDCs’ Am. Compl. ¶¶ 36-39). LDCs allege the Rule likely will increase harmful emissions “exacerbating health risks” to LDCs’ “customers, shareholders, and employees.” *Id.* at 638. LDCs also allege that the Rule “will adversely impact the environment as well as [LDCs’] property, including their wind farms, manure digesters, hydroelectric projects, and biomass generators.” *Id.* at 639. Contrary to Ecology’s conclusory claims that LDCs’ allegations are “mere speculation” and thus “insufficient” to confer standing, the environmental harms alleged by LDCs are concrete and exactly the type of “identification of unavoidable adverse environmental effects” that fall within SEPA’s zone of interest. *Compare Kucera*, 140 Wash.2d at 212-13, 995 P.2d at 70, *with Ecy. Br.* at 40.

Ecology’s arguments that LDCs have asserted only economic—as opposed to environmental—concerns also lack merit. While “purely economic interests” are not within SEPA’s zone of interests, being economically motivated does not render a properly pleaded SEPA claim invalid. *Kucera*, 140 Wash.2d at 212-13, 995 P.2d at 70 (finding property owners motivated by economic interests had SEPA standing because their

claim was “based on the State’s alleged failure to consider *environmental* effects.”). Like plaintiffs in *Kucera*, LDCs have alleged environmental harms—increased harmful emissions—that are not “purely economic” interests and fall squarely within SEPA’s zone of interests. The Superior Court thus correctly concluded that LDCs’ alleged injuries were within SEPA’s zone of interests and that LDCs had standing to bring their SEPA claim. CP at 652 (July 27, 2017 Rule 12(c) Motion order ¶¶ 16-18).

B. Ecology’s issuance of a determination of non-significance was clear error.

When evaluating possible environmental impacts of proposed rules, SEPA initially requires agencies to determine whether they must prepare an EIS. WAC 197-11-704(2)(b)(i); WAC 197-11-330. If a proposed rule has *any* “probable significant, adverse environmental impact[s],” the agency must prepare an EIS. RCW 43.21C.031; WAC 197-11-340.

The threshold for requiring an EIS under SEPA is low and is met whenever there is a “reasonable probability” that a proposed rule will have “more than a moderate [adverse] effect on the quality of the environment.” WAC 197-11-782; WAC 197-11-794(1); *Norway Hill Pres. & Prot. Ass’n v. King Cty. Council*, 87 Wash. 2d 267, 278, 552 P.2d 674, 680-81 (1976). The agency *may not* consider “whether the beneficial aspects of a proposal outweigh its adverse impacts” WAC 197-11-330(5); WAC 197-11-

782; WAC 197-11-794(1). Even “proposals designed to improve the environment . . . such as pollution control requirements[] may . . . also have significant adverse environmental impacts” requiring an EIS. WAC 197-11-330(5). This court reviews a failure to issue an EIS for clear error. *King Cty. v. Wash. State Boundary Review Bd. for King Cty.*, 122 Wash. 2d 648, 661, 80 P.2d 1024, 1031-32 (1993).

Ecology’s determination of non-significance constituted clear error because unrebutted evidence showed a reasonable probability that the Rule would have more than a moderate adverse impact on the environment. SEPA thus required Ecology to prepare an EIS.

1. Power supply and generation shifting concerns required Ecology to develop an EIS.

LDCs presented valid and unrebutted evidence that the Rule would, among other things, significantly increase net regional greenhouse gas emissions by causing shifts in power supply and generation. *See infra* § II.A. Nevertheless, Ecology summarily dismissed this evidence, contravening SEPA’s mandates and the agency’s past practice.²⁷ *See* WAC

²⁷ Ecology thoroughly considered potential greenhouse gas emissions increases in Asia when evaluating the construction of the Millennium Bulk Terminal-Longview project in Cowlitz County. *See* Millennium Bulk Terminals-Longview Environmental Impact Statement, Volume I at 5.8-17, 5.8-22, 8.8-25 (Apr. 28, 2017), available at: https://www.millenniumbulkeiswa.gov/assets/mdbl_sep_final-eis_volume_i_04252017_web_sm2.pdf (“Greenhouse gases affect the atmosphere equally, regardless of where they are emitted, and thus they are global pollutants. A ton of CO₂ emissions in Asia affects the global atmosphere to the same degree as a ton of CO₂ emissions in the United States.”).

197-11-060(4)(b) (SEPA requires agency to consider extra-jurisdictional impacts); AR021477 (Ecology requiring SEPA review to consider out-of-state and global impacts); AR004985-86, AR005013. This unrefuted evidence that the Rule—*intended to reduce greenhouse gas emissions*—would instead *significantly increase* them required Ecology to develop an EIS. WAC 197-11-330.

Ecology’s contention that “power supply shifting was speculative” is misplaced. Instead, it is Ecology’s reliance on the Clean Power Plan (“CPP”) that was speculative, as the U.S. Supreme Court stayed the CPP *three months before* Ecology proposed the Rule, and the stay *remains in effect today*. *Chamber of Commerce v. E.P.A.*, 136 S. Ct. 999 (Feb. 9, 2016); *State of W. Va. et al. v. E.P.A.*, No. 15-1363 (D.C. Cir.). *But see* Ecy. Br. at 43 (wrongly stating reliance on the CPP was reasonable “at the time” Ecology acted). Even if this were not the case, compliance under the CPP would not have been required until 2022—five years after the Rule’s applicability date. *See* 80 Fed. Reg. 64664 (Oct. 23, 2015). Ecology’s reliance on the CPP was thus unreasonable.

Ecology’s contention that the Seventh Northwest Conservation and Electric Power Plan justifies the agency’s disregard for LDCs’ generation-shifting concerns is equally unreasonable. First, Ecology cannot reasonably rely on this plan—which addressed merely *four of the twelve* U.S. states

feeding into the Western Interconnection—to provide a complete and realistic forecast. Second, the plan’s conclusion that energy efficiency will be less expensive than coal in the future refers to *new coal plants* and ignores the relative cost of power of *existing* coal plants (and natural gas plants in other states). AR 029440. Third, and finally, Ecology conveniently ignores the plan’s prediction of increased use of existing natural gas generation and its recognition of natural gas’s role in meeting carbon reduction goals. AR 029445. Ecology thus clearly erred by relying on cherry-picked conclusions from an inapposite report to justify its failure to complete an EIS as SEPA requires.

2. Fuel-shifting and transportation-related concerns required Ecology to develop an EIS.

LDCs presented reliable evidence that the Rule will increase greenhouse gas emissions by incentivizing consumers to switch from natural gas to wood or electricity for heating. Ecology’s sole rebuttal is that its “economic analyses show[] very modest [sic] price increases in natural gas.” Ecy. Br. at 44. These analyses, however, were skewed by the agency’s flawed assumptions.

Ecology does not dispute that fuel-shifting would significantly increase greenhouse gas emissions. Nor could it, as the agency has recognized “wood burning devices put out hundreds of times more air

pollution than other sources of heat such as natural gas or electricity.” AR021476. Moreover, it is well-established that heat *from electricity* produced by natural gas has less than 50 percent efficiency and has a 40-60 percent higher carbon footprint (and higher emissions of other pollutants) than direct heat *from natural gas*, which has greater than 90 percent efficiency. *See* AR020160, -91; AR021477. Accordingly, there is a reasonable probability that fuel-shifting caused by the Rule would increase greenhouse gas emissions and require Ecology to develop an EIS.

Even operating under Ecology’s flawed assumptions (discussed in § II.B, *supra*), evidence in the record shows that some residential customers will substitute lower-cost, higher-emitting fuels, such as wood and electricity, for natural gas heating. *See* AR020160, AR020192; AR021538. Additional evidence shows that natural gas cost increases resulting from Ecology’s Rule will “likely be significant enough to . . . prevent potential new customers from making the decision to move from burning wood to natural gas.” *See* AR021477. The Court should not allow Ecology to hide the empirical realities and attendant environmental harms of fuel shifting behind its self-serving and erroneous cost projections. *See* AR000464.

Ecology also erroneously disregarded evidence that the Rule would increase greenhouse gas and other harmful emissions in the transportation sector—by far Washington’s highest-emitting sector. *Compare* AR020189

with AR005087. By increasing costs for natural gas, the Rule likely will deter the use of lower-emitting natural gas-powered vehicles, such as compressed natural gas and liquified natural gas trucks.²⁸ AR020160. Ecology’s contention that this concern “doesn’t make sense because petroleum products are also subject to” the Rule ignores Ecology’s own analysis demonstrating that LDCs’ compliance costs will be roughly 50-90% *higher* than the petroleum products sector. *Compare* Ecy. Br. at 44 *with* AR000294-95.

This Court “on the record can firmly conclude a mistake has been committed” by Ecology in issuing a determination of non-significance for the Rule. *See Norway Hill*, 87 Wash.2d at 275, 552 P.2d at 679 (internal quotation marks omitted). Ecology arbitrarily disregarded evidence of the Rule’s reasonably probable, significant adverse environmental impacts. By

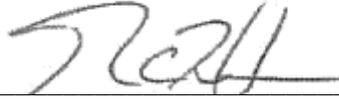
²⁸ Ecology anticipates the Rule will cause a meaningful shift from gas-powered vehicles to electric vehicles, AR000500 (SEPA Addendum); AR028408 (SEPA Checklist at 12). Ecology states that it would “defy common sense” for this shift to increase emissions, especially given available hydropower in Washington. Ecy. Br. at 44-45. This is a strawman argument. LDCs do not argue, as Ecology claims, “that a rise in electric vehicle use and a shift away from fossil fuel-fired vehicles could somehow be bad for the environment.” Ecy. Br. at 44. LDCs’ concern is not with how the Rule may affect a transition from petroleum- to electric-powered vehicles, but rather, a transition from petroleum- to natural gas-powered vehicles. Natural gas can—and does—power long-haul trucks, trailers, and marine vessels. The transition of these heavy-duty vehicles to natural gas is crucial for reducing emissions in Washington’s transportation sector.

doing so, Ecology bypassed SEPA's protections and issued an invalid determination of non-significance.

CONCLUSION

LDCs do not dispute Ecology's authority to impose emissions standards limiting the greenhouse gas emissions of the sources actually releasing those contaminants into the ambient air, and Ecology may regulate under this authority to combat climate change. Ecology may not by administrative fiat, however, expand its authority to regulate LDCs, which are not emitting greenhouse gases and are statutorily obligated to supply natural gas to their customers who are. The Court should reject Ecology's *ultra vires* attempt at a regulatory shortcut by affirming the Superior Court's decision.

RESPECTFULLY SUBMITTED this 10th day of October, 2018.



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APPENDIX A

RCW 70.94.011 – Declaration of public policies and purpose.

It is declared to be the public policy to preserve, protect, and enhance the air quality for current and future generations. Air is an essential resource that must be protected from harmful levels of pollution. Improving air quality is a matter of statewide concern and is in the public interest. It is the intent of this chapter to secure and maintain levels of air quality that protect human health and safety, including the most sensitive members of the population, to comply with the requirements of the federal clean air act, to prevent injury to plant, animal life, and property, to foster the comfort and convenience of Washington's inhabitants, to promote the economic and social development of the state, and to facilitate the enjoyment of the natural attractions of the state.

It is further the intent of this chapter to protect the public welfare, to preserve visibility, to protect scenic, aesthetic, historic, and cultural values, and to prevent air pollution problems that interfere with the enjoyment of life, property, or natural attractions.

Because of the extent of the air pollution problem the legislature finds it necessary to return areas with poor air quality to levels adequate to protect health and the environment as expeditiously as possible but no later than December 31, 1995. Further, it is the intent of this chapter to prevent any areas of the state with acceptable air quality from reaching air contaminant levels that are not protective of human health and the environment.

The legislature recognizes that air pollution control projects may affect other environmental media. In selecting air pollution control strategies state and local agencies shall support those strategies that lessen the negative environmental impact of the project on all environmental media, including air, water, and land.

The legislature further recognizes that energy efficiency and energy conservation can help to reduce air pollution and shall therefore be considered when making decisions on air pollution control strategies and projects.

It is the policy of the state that the costs of protecting the air resource and operating state and local air pollution control programs shall be shared as equitably as possible among all sources whose emissions cause air pollution.

It is also declared as public policy that regional air pollution control programs are to be encouraged and supported to the extent practicable as essential instruments for the securing and maintenance of appropriate levels of air quality.

To these ends it is the purpose of this chapter to safeguard the public interest through an intensive, progressive, and coordinated statewide program of air pollution prevention and control, to provide for an appropriate distribution of responsibilities, and to encourage coordination and cooperation between the state, regional, and local units of government, to improve cooperation between state and federal government, public and private organizations, and the concerned individual, as well as to provide for the use of all known, available, and reasonable methods to reduce, prevent, and control air pollution.

The legislature recognizes that the problems and effects of air pollution cross political boundaries, are frequently regional or interjurisdictional in nature, and are dependent upon the existence of human activity in areas having common topography and weather conditions conducive to the buildup of air contaminants. In addition, the legislature recognizes that air pollution levels are aggravated and compounded by increased population, and its consequences. These changes often result in increasingly serious problems for the public and the environment.

The legislature further recognizes that air emissions from thousands of small individual sources are major contributors to air pollution in many regions of the state. As the population of a region grows, small sources may contribute an increasing proportion of that region's total air emissions. It is declared to be the policy of the state to achieve significant reductions in emissions from those small sources whose aggregate emissions constitute a significant contribution to air pollution in a particular region.

It is the intent of the legislature that air pollution goals be incorporated in the missions and actions of state agencies.

APPENDIX B

RCW 70.94.030 – Definitions.

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

(1) "Air contaminant" means dust, fumes, mist, smoke, other particulate matter, vapor, gas, odorous substance, or any combination thereof.

(2) "Air pollution" is presence in the outdoor atmosphere of one or more air contaminants in sufficient quantities and of such characteristics and duration as is, or is likely to be, injurious to human health, plant or animal life, or property, or which unreasonably interfere with enjoyment of life and property. For the purpose of this chapter, air pollution shall not include air contaminants emitted in compliance with chapter 17.21 RCW.

(3) "Air quality standard" means an established concentration, exposure time, and frequency of occurrence of an air contaminant or multiple contaminants in the ambient air which shall not be exceeded.

(4) "Ambient air" means the surrounding outside air.

(5) "Authority" means any air pollution control agency whose jurisdictional boundaries are coextensive with the boundaries of one or more counties.

(6) "Best available control technology" (BACT) means an emission limitation based on the maximum degree of reduction for each air pollutant subject to regulation under this chapter emitted from or that results from any new or modified stationary source, that the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such a source or modification through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of "best available control technology" result in emissions of any pollutants that will exceed the emissions allowed by any applicable standard under 40 C.F.R. Part 60 and Part 61, as they exist on July 25, 1993, or their later enactments as adopted by reference by the director by rule. Emissions from any source utilizing clean fuels, or any other means, to comply with this subsection shall not be allowed to increase above levels that would have been required under the definition of BACT as it existed prior to enactment of the federal clean air act amendments of 1990.

(7) "Best available retrofit technology" (BART) means an emission limitation based on the degree of reduction achievable through the application of the best system of continuous emission reduction for each pollutant that is emitted by an existing stationary facility. The emission limitation must be established, on a case-by-case basis, taking into consideration the technology available, the costs of compliance, the energy and nonair quality environmental impacts of compliance, any pollution control equipment in use or in existence at the source, the remaining useful life of the source, and the degree of improvement in visibility that might reasonably be anticipated to result from the use of the technology.

(8) "Board" means the board of directors of an authority.

(9) "Control officer" means the air pollution control officer of any authority.

(10) "Department" or "ecology" means the department of ecology.

(11) "Emission" means a release of air contaminants into the ambient air.

(12) "Emission standard" and "emission limitation" mean 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.

(13) "Fine particulate" means particulates with a diameter of two and one-half microns and smaller.

(14) "Lowest achievable emission rate" (LAER) means for any source that rate of emissions that reflects:

(a) The most stringent emission limitation that is contained in the implementation plan of any state for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable; or

(b) The most stringent emission limitation that is achieved in practice by such class or category of source, whichever is more stringent.

In no event shall the application of this term permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under applicable new source performance standards.

(15) "Modification" means any physical change in, or change in the method of operation of, a stationary source that increases the amount of any air contaminant emitted by such source or that results in the emission of any air contaminant not previously emitted. The term modification shall be construed consistent with the definition of modification in Section 7411, Title 42, United States Code, and with rules implementing that section.

(16) "Multicounty authority" means an authority which consists of two or more counties.

(17) "New source" means (a) the construction or modification of a stationary source that increases the amount of any air contaminant emitted by such source or that results in the emission of any air contaminant not previously emitted, and (b) any other project that constitutes a new source under the federal clean air act.

(18) "Permit program source" means a source required to apply for or to maintain an operating permit under RCW 70.94.161.

(19) "Person" means an individual, firm, public or private corporation, association, partnership, political subdivision of the state, municipality, or governmental agency.

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

(21) "Silvicultural burning" means burning of wood fiber on forestland consistent with the provisions of *RCW 70.94.660.

(22) "Source" means 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, whose activities are ancillary to the production of a single product or functionally related group of products.

(23) "Stationary source" means any building, structure, facility, or installation that emits or may emit any air contaminant.

(24) "Trigger level" means the ambient level of fine particulates, measured in micrograms per cubic meter, that must be detected prior to initiating a first or second stage of impaired air quality under RCW 70.94.473.

APPENDIX C

RCW 70.94.331 – Powers and duties of department.

(1) The department shall have all the powers as provided in RCW 70.94.141.

(2) The department, in addition to any other powers vested in it by law after consideration at a public hearing held in accordance with chapters 42.30 and 34.05 RCW shall:

(a) Adopt rules establishing air quality objectives and air quality standards;

(b) Adopt emission standards which shall constitute minimum emission standards throughout the state. An authority may enact more stringent emission standards, except for emission performance standards for new woodstoves and opacity levels for residential solid fuel burning devices which shall be statewide, but in no event may less stringent standards be enacted by an authority without the prior approval of the department after public hearing and due notice to interested parties;

(c) Adopt by rule air quality standards and 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. Such requirements may be based upon a system of classification by types of emissions or types of sources of emissions, or combinations thereof, which it determines most feasible for the purposes of this chapter. However, an industry, or the air pollution control authority having jurisdiction, can choose, subject to the submittal of appropriate data that the industry has quantified, to have any limit on the opacity of emissions from a source whose emission standard is stated in terms of a weight of particulate per unit volume of air (e.g., grains per dry standard cubic foot) be based on the applicable particulate emission standard for that source, such that any violation of the opacity limit accurately indicates a violation of the applicable particulate emission standard. Any alternative opacity limit provided by this section that would result in increasing air contaminants emissions in any nonattainment area shall only be granted if equal or greater emission reductions are provided for by the same source obtaining the revised opacity limit. A reasonable fee may be assessed to the industry to which the alternate opacity standard would apply. The fee shall cover only those costs to the air pollution control authority which are directly related to the determination on the acceptability of the alternate opacity standard, including testing, oversight and review of data.

(3) The air quality standards and emission standards may be for the state as a whole or may vary from area to area or source to source, except that emission performance standards for new woodstoves and opacity levels for residential solid fuel burning devices shall be statewide, as may be appropriate to facilitate the accomplishment of the objectives of this chapter and to take necessary or desirable account of varying local conditions of population concentration, the existence of actual or reasonably foreseeable air pollution, topographic and meteorologic conditions and other pertinent variables.

(4) The department is directed to cooperate with the appropriate agencies of the United States or other states or any interstate agencies or international agencies with respect to the control of air pollution and air contamination, or for the formulation for the submission to the legislature of interstate air pollution control compacts or agreements.

(5) The department is directed to conduct or cause to be conducted a continuous surveillance program to monitor the quality of the ambient atmosphere as to concentrations and movements of air contaminants and conduct or cause to be conducted a program to determine the quantity of emissions to the atmosphere.

(6) The department shall enforce the air quality standards and emission standards throughout the state except where a local authority is enforcing the state regulations or its own regulations which are more stringent than those of the state.

(7) The department shall encourage local units of government to handle air pollution problems within their respective jurisdictions; and, on a cooperative basis provide technical and consultative assistance therefor.

(8) The department shall have the power to require the addition to or deletion of a county or counties from an existing authority in order to carry out the purposes of this chapter. No such addition or deletion shall be made without the concurrence of any existing authority involved. Such action shall only be taken after a public hearing held pursuant to the provisions of chapter 34.05 RCW.

(9) The department shall establish rules requiring sources or source categories to apply reasonable and available control methods. Such rules shall apply to those sources or source categories that individually or collectively contribute the majority of statewide air emissions of each regulated pollutant. The department shall review, and if necessary, update its rules every five years to ensure consistency with current reasonable and

available control methods. The department shall have adopted rules required under this subsection for all sources by July 1, 1996.

For the purposes of this section, "reasonable and available control methods" shall include but not be limited to, changes in technology, processes, or other control strategies.

AVISTA

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