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No. 95885-8

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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ASSOCIATION OF WASHINGTON BUSINESS, et al.,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Appellant,

and

WASHINGTON ENVIRONMENTAL COUNCIL, et al.,

Intervenor-Appellant

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**RESPONSE BRIEF BY ASSOCIATION OF WASHINGTON  
BUSINESS, ET AL.**

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## I. INTRODUCTION

This case involves a challenge to a new regulatory program promulgated by the Washington Department of Ecology (“Ecology”) at WAC chapter 173-442 (the “Clean Air Rule” or “CAR”) and associated reporting amendments implementing the CAR at WAC chapter 173-441 (the “Reporting Rule amendments”). The CAR is a first-of-its-kind program, developed by Ecology and intended to operate on an “economy-wide” basis to cap and reduce greenhouse gases (“GHGs”) in Washington. *See* Administrative Record (“AR”) 5024. Ecology embarked on this regulatory experiment without approval or authority from the legislature or the voters.

A coalition of business groups led by the Association of Washington Business (“AWB”) challenged the CAR as illegal rulemaking. The primary argument raised by AWB (and the sole issue decided by the superior court below) is whether the legislature granted Ecology the authority to impose this sweeping new program. Although Ecology may have well-intentioned policy objectives with respect to climate change, neither good intentions nor legislative inaction authorize the agency to regulate. Rather, the agency must have statutory authority for the regulations it wants to issue.

The superior court below reviewed the Washington Clean Air Act and found no such grant of authority. The superior court followed settled precedent from this Court that ““an administrative agency is limited to the powers and authority granted to it by the legislature,”” and invalidated the

CAR. CP 799 (Order Granting Petition for Review) (quoting *Fahn v. Cowlitz County*, 93 Wn.2d 368, 374, 610 P.2d 857 (1980)).

The superior court's conclusion was well supported by both bedrock principles of administrative law and the specific facts presented in the record here. In 2008, the legislature set ambitious GHG reduction targets for the state and instructed Ecology to "submit a greenhouse gas reduction plan for review and approval to the legislature" to reach those targets. RCW 70.235.020(1)(b). Ecology twice came back with plans "for review and approval" in 2009 and again in 2015, expressly asking for the authority to create a "carbon pollution market program," and both times the legislature rejected the proposed plan. See H.B. 1314 § 3, 64<sup>th</sup> Leg., Reg. Sess. (2015). After that second failed plan, Governor Inslee declared that he was "fed up" with the legislature and ordered Ecology to promulgate the CAR anyway as an "executive action" utilizing unspecified authority in "Washington's Clean Air Act and other relevant statutes." AR 20257, 20229.

The superior court correctly concluded that Ecology's existing authority under the Washington Clean Air Act did not include the authority to establish a comprehensive, economy-wide, market-based program. Although Ecology strained to squeeze this expansive new program into the confines of a 40-year-old authorization to set "emission standards," that square-peg, round-hole effort fell flat for obvious reasons. Principally, two of the three categories of regulated entities (petroleum product producers and importers and natural gas distributors), which

accounted for nearly 80 percent of the CAR’s anticipated benefits, *have no emissions*. Those entities just sell products. As the superior court explained in both a detailed oral ruling and written order, the authority to set “emission standards” did not extend to entities that merely “sell commodities,” because those entities do not have “emissions.” CP 756, 800-801. And since this (improper) regulation of the sale of products accounted for as much as 80 percent of the expected reductions and was “fundamental to the entire Clean Air Rule,” the superior court set aside the entire rule. CP 801-802.

Ecology and Intervenors Washington Environmental Council et al. (“WEC”) now seek review of this decision, and further ask this Court to decide, in the first instance, multiple other issues that the superior court found unnecessary to reach. For the reasons set forth below, the Court need not reach these additional issues and should affirm the superior court’s straightforward holding that Ecology lacked statutory authority to promulgate the CAR.

## **II. STATEMENT OF THE CASE**

### **A. GHG Emissions in Washington**

“It is undisputed that GHG emissions [are] not a localized problem endemic to Washington, but a global occurrence.” *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1147 (9th Cir. 2013). Once emitted, GHGs from natural and man-made sources around the world “mix quickly” and “are undifferentiated in the global atmosphere.” *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 868 (9th Cir. 2012). Because of global

dispersion and mixing, a ton of carbon dioxide emitted in China has the same effect on climate change in Washington as a ton emitted in Wenatchee. Ecology states that “establishing a causal relationship between local GHG emissions and local impacts is inherently impossible.” AR 4987. Washington accounts for a tiny fraction of the world’s GHG emissions, and even the complete elimination of all GHG emissions from Washington would likely have a “scientifically indiscernible” effect on climate change. *Bellon*, 732 F.3d at 1144.

GHG emissions in Washington are, according to Ecology, “on a downward trend,” in part due to the state’s commitment to hydropower resources and cleaner-burning natural gas power plants. AR 3219. Washington’s legislature has enacted laws requiring (1) new electric power plants to mitigate their GHG emissions, RCW 80.70.020(4), (2) large utilities to obtain 15% of their electricity from renewable sources such as solar by 2020, RCW 19.285.040(2)(a)(iii), and (3) the only coal-fired power plant in the state to shut down by 2025, RCW 80.80.040(3)(c)(i). The bulk of Washington’s GHG emissions currently come from transportation (e.g., cars), and Washington has adopted the most stringent GHG emission standards for vehicles allowed by law. RCW 70.120A.010.

Many industry sources, too, have taken action to reduce their GHG emissions at significant costs. For example, the pulp and paper industry in Washington between 2004 and 2012 reduced its GHG emissions by 300,000 metric tons. AR 4458-4459. Utilities have invested heavily in

renewable energy projects and efficiency and conservation measures. AR 20183. Other industries, such as steel and petroleum refining, have invested in a variety of conservation and efficiency measures to reduce energy inputs. AR 4299. All told, Washington businesses and utilities are some of the most aggressive in the nation with respect to reducing their carbon footprint. AR 3926. As a result, many “companies in Washington State are industry leaders in efficiency, meaning they emit less GHG per unit of production than their counterparts out of state.” AR 28400.

The legislature has carefully considered requiring more, but has declined to do so. The legislature in 2013 formed the Climate Legislative and Executive Workgroup, which reported its findings in 2014. AR 3066-3114. The Workgroup’s independent consultant reported that Washington is already a low carbon producing state, with total emissions in Washington presently in decline and estimated at 82.6 million metric tons of CO<sub>2</sub> equivalent (about 0.26% of the approximately 31.5 billion metric tons of CO<sub>2</sub> equivalent emitted globally). AR 3100. The Workgroup was unable to reach a majority recommendation on a GHG reduction plan because, *inter alia*, the costs associated with potential legislative solutions “such as a cap-and-trade program, a carbon tax, and a low carbon fuel standard” were not supported by the anticipated benefits. AR 3100-3101. Moreover, the Workgroup faced concerns that state-based reduction programs might only shift emissions to out-of-state sources, a phenomenon referred to as “leakage.” AR 3082.

## **B. The History of the CAR**

The history of the CAR began in 2008 with the passage of Engrossed Second Substitute House Bill 2815. That legislation set ambitious GHG reduction targets for the state and instructed Ecology to develop a plan “for review and approval” to reach those goals. RCW 70.235.020. Although in its earlier versions of the bill the legislature considered giving Ecology the outright authority to “develop and implement a program to limit greenhouse gases emissions to achieve” the state’s goals,<sup>1</sup> the legislature ultimately withheld that authority in favor of a requirement that Ecology “shall submit a greenhouse gas reduction plan for review and approval to the legislature, describing those actions necessary to achieve the emission reductions” required by the legislature. RCW 70.235.020(1)(b). It is undisputed that Ecology never received that “approval” and the legislature repeatedly refused to adopt proposed greenhouse gas reduction plans, including authority for a “carbon pollution market program.” *See* HB 1819, 61st Leg., Reg. Sess. (2009); SB 5735, 61st Leg., Reg. Sess. (2009); HB 1314, § 3, 64th Leg., Reg. Sess. (2015).

In response, Governor Inslee in 2015 stated that the legislature’s failure to enact his proposed carbon pollution market program legislation was “stunning.” AR 20257. Without legislative approval, Governor Inslee ordered Ecology to develop and implement a carbon pollution

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<sup>1</sup> HB 2815, § 3, 60th Leg., Reg. Sess. (original bill as introduced 2008).

market program anyway, and provided guidance on what that program should include. AR 20229.

After the Governor’s announcement, Senate Majority Leader Mark Schoesler stated that the “64th Legislature thoroughly considered bills proposing to establish various programs for restricting greenhouse gas emissions,” held hearings, and “took votes” on the issue, but “ultimately decided not to pass a bill establishing the program that was proposed.” AR 16666. He further explained that after “unfruitful efforts to persuade the legislature to adopt the governor’s preferred program, the department is doing by rule what the legislature decided the department should not do—operate a costly, economy-wide cap-and-trade program.” *Id.* This unilateral action is “treading on the first principles of our constitutional system.” AR 16667.

During the rulemaking process, Ecology received public comments and studies showing that the CAR will cause significant emission leakage out-of-state. *See, e.g.* AR 4298-4344. Numerous entities from utilities to industry groups explained that the increased costs associated with the CAR would have the unintended consequence of shifting production of power and products out-of-state to areas with higher GHGs per unit of production. *See, e.g.*, AR 4171, 4298, 4459, 20160.

Ecology promulgated the CAR on September 15, 2016. The CAR regulates three broad categories: “certain stationary sources located in Washington State, petroleum product producers and importers, and natural gas distributors.” AR 393. The CAR assigns those regulated entities a

GHG emission cap, and then requires those entities to account for a reduction from that cap of about 1.7% per year, beginning in 2017 for most parties, subject to heavy civil penalties for missing a reduction target. WAC 173-442-020, -030, -060, -070, -340.

Although the CAR purports to regulate *emissions*, many of the regulated entities (specifically, petroleum product producers and importers, and natural gas distributors) are regulated by the CAR because they sell products. Ecology concedes that these fuel sellers “can’t control how their product will be used—and how much emissions will result.” AR 5083. Ecology labels these product sellers “indirect emitters” and requires those sellers to account for a 1.7% annual emission reduction anyway. AR 5049, 5083. The CAR contemplates that “roughly 75-80 percent of the emission reductions required in the program” must come from these entities that “lack ability to reduce those emissions directly.” AR 5083.

Because fuel sellers have no emissions, they cannot, by definition, meet the required emission reduction targets. To solve this inherent problem, the CAR requires those fuel sellers to acquire a newly-created category of carbon credits called “emission reduction units” (“ERUs”). WAC 173-442-020(1)(n); CP 800 (Conclusion of Law No. 9) (fuel sellers “must buy [ERUs]”). ERUs can be generated by third-parties through voluntary GHG emission reductions beyond required levels, through emission reduction projects and programs in Washington, and through the acquisition and retirement of “allowances” (emission credits) from multi-sector GHG emission reduction programs (outside of Washington). WAC

173-442-110, -170. WAC 173-442-130, -140. In other words, rather than reduce their own emission (a conceded impossibility), fuel sellers must acquire credits from someone else's reduced emissions. For fuel sellers, the "only way . . . to comply with the regulations at issue is to buy ERUs." CP 800 (Conclusion of Law No. 9).

The CAR also sets up a reserve "account" ("Reserve") at WAC 173-442-240. Ecology takes 2% of all emission reductions earned or purchased by regulated entities and places them in the Reserve, which acts as a "bank." AR 5093. The CAR gives Ecology vast discretion in how to deploy the ERUs in the Reserve and creates an Environmental Justice Advisory Committee to help spend the Reserve. WAC 173-442-240(3)(b)(i).

**C. AWB's Challenge to the Clean Air Rule**

Petitioners in this case are the AWB, Industrial Customers of Northwest Utilities, Northwest Food Processors Association, Northwest Industrial Gas Users, Northwest Pulp and Paper Industry Association, Washington Farm Bureau, Washington Trucking Association, and Western States Petroleum Association. Petitioner members include businesses directly regulated by the CAR and thousands of businesses statewide that will be harmed by increased fuel and electricity costs within the state. CP 603-608.

These direct costs to Washington businesses are significant. By Ecology's estimate, the direct costs of compliance for Washington businesses are as high as \$7 billion. AR 4986. The CAR will result in an

annual average reduction in statewide sales transactions of approximately \$2.7 billion, an annual average loss of 12,548 jobs, and a decline in sales, excise, and property taxes of \$110 million. AR 20333. Once the CAR is fully implemented in 2035, the economic impact will reach \$7.3 billion in reduced sales transactions and the loss of 34,000 jobs. *Id.* Petitioners and their members' economic, regulatory, environmental, and procedural interests are directly and materially impacted by the CAR. CP 603-608.

AWB filed its challenge in superior court on September 27, 2016, and a second petition was filed by natural gas suppliers (collectively the "LDCs") on September 30, 2016. AWB identified multiple legal errors in the CAR, including the lack of statutory authority for the program. CP 1-19 (Petition), 601-621 (Amended Petition). The superior court reviewed the extensive briefing in the case and the voluminous administrative record, held a hearing on December 15, 2017, and issued a detailed oral ruling that the CAR "exceeds statutory authority of the agency conferred by law," and that the rule was therefore "invalid." CP 757-758. Ecology moved to sever portions of the rule, but then declined to appear for its own motion, and the motion was denied. CP 787-788. The Court declined to reach the other errors in the CAR identified by AWB because it had no need to do so; the lack of statutory authority "is dispositive." CP 758. The court issued its final written order granting AWB's Petition on April 19, 2018. CP 797.

### III. ISSUES ON APPEAL

Ecology raises *nine* issues on appeal, only two of which are joined by WEC (Ecology/WEC Issues 1 and 2). Ecology makes no effort to narrow the field of issues for this Court's review and instead asks the Court to review virtually *everything* including multiple issues that the superior court found unnecessary to decide.

The Court need not accept Ecology's invitation to address issues not decided below.<sup>2</sup> The Court can, just as the superior court did below, start and stop with a conclusion that Ecology lacks statutory authority (Ecology Issue 1) because that issue is dispositive in this case. If needed, the most effective and efficient course as to the remaining issues is to remand them to the superior court to decide the other substantive challenges to the CAR (Ecology Issues 2, 5, 6, 7, 8, and 9) in the first instance. *See Barsten v. Dep't of Interior*, 896 F.2d 422, 424 (9th Cir. 1990) (declining to consider issue and "believing that the wiser course is to allow the district court to rule on it in the first instance").

Accordingly, AWB's briefing below focuses on the core legal issue of Ecology's statutory authority for the CAR (Ecology/WEC Issue 1). Although the other issues necessarily receive less detailed treatment by AWB, that practical result is not a reflection of the importance of those issues to AWB. To the extent the Court finds it necessary or appropriate

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<sup>2</sup> Ecology cites *Tapper v. Employment Security Department*, 122 Wn.2d 397, 858 P.2d 494 (1993), to support its position that the Court should reach these issues in the first instance. *Tapper* is inapposite as it addresses the standard of review, not whether the higher court should reach issues that were not decided by the superior court. 122 Wn.2d at 402.

to address these other issues, AWB’s briefing below directs the Court to more detailed briefing on these issues in the Clerk’s Papers.

#### IV. ARGUMENT

##### A. **The Superior Court Correctly Concluded that the CAR Exceeds Ecology’s Statutory Authority (Ecology/WEC Issue 1).**

This appeal ultimately turns on a straight-forward principle of administrative law. Ecology, as a state agency, “is limited to the powers and authority granted to it by the legislature.” *Fahn v. Cowlitz County*, 93 Wn.2d 368, 374, 610 P.2d 857 (1980). Thus, in order to develop and implement the CAR—a first-of-its-kind, comprehensive, “economy-wide” program imposing billions in costs and requiring the development of a new kind of emission credit (ERUs), a new oversight process for certification of credits, a new Reserve bank, and a new Advisory Committee to allocate credits from the Reserve bank—Ecology must have authority from the legislature. The superior court below appropriately found no such grant of authority, and that decision should be affirmed.

##### 1. **No Statute Expressly Authorizes the CAR.**

It is well settled that “[a]dministrative agencies are ‘creatures of the legislature without inherent or common-law powers.’” *Wash. Indep. Tel. Ass’n v. Telecomms. Ratepayers Ass’n for Cost-Based & Equitable Rates*, 75 Wn. App. 356, 363, 880 P.2d 50 (1994) (citation omitted). Thus, “[i]f an enabling statute does not authorize a particular regulation, either expressly or by necessar[y] implication, ‘that regulation must be declared invalid despite its practical necessity or appropriateness.’” *In re*

*Impoundment of Chevrolet Truck, WA License #A00125A ex rel. Registered/Legal Owner*, 148 Wn.2d 145, 156–57, 60 P.3d 53 (2002). Washington courts do not “defer to an agency the power to determine the scope of its own authority” and have not hesitated to strike down regulations based on supposed implied authority. *Id.* (internal quotations omitted); *Wash. Indep. Tel. Ass’n*, 75 Wn. App. at 368–69; *Wash. Fed’n of State Emps. v. State Dep’t of Gen. Admin.*, 152 Wn. App. 368, 383, 216 P.3d 1061 (2009).

These well-settled limitations on agency authority for rulemaking are further limited by statute. In the Regulatory Reform Act of 1995, the legislature stated its “intent” that “substantial policy decisions affecting the public be made by those directly accountable to the public, namely the legislature, and that state agencies not use their administrative authority to create or amend regulatory programs.” Laws of 1995, ch. 403, § 1(2)(a) (reproduced at Appendix G). Accordingly, in 1995, the legislature limited Ecology’s rulemaking authority, stating that Ecology “may not adopt rules after July 23, 1995, that are based solely on a section of law stating a statute’s intent or purpose, on the enabling provisions of the statute establishing the agency, or on any combination of such provisions, for statutory authority to adopt the rule.” RCW 43.21A.080. Simply put, “if an enabling statute does not authorize a particular regulation,” a court “must declare the regulation invalid.” *Littleton v. Whatcom County*, 121 Wn. App. 108, 117, 86 P.3d 1253 (2004) (striking down Ecology regulation).

Here, Ecology has no express grant of authority for the CAR. No statute authorizes Ecology to set up a market-based GHG reduction program. No statute authorizes Ecology to create ERUs or establish certification criteria. No statute authorizes Ecology to create a Reserve bank, force contributions into that Reserve bank, or set up an Advisory Committee and empower that committee to spend the resources collected in that Reserve bank. This complex, billion-dollar, “economy-wide” program was made wholly without authority, approval, or instruction from the legislature. *See Wash. Indep. Tel. Ass’n*, 75 Wn. App. at 368 (rejecting regulation because no statute authorized the “Commission to set up a fund, such as the CCF, to which all LECs are required to contribute”).

Far from granting Ecology such authority, the legislature expressly withheld it. As set forth above, the legislature in 2008 told Ecology that it needed to “submit a greenhouse gas reduction plan for review and approval to the legislature.” RCW 70.235.020(1)(b). Ecology never received “approval” for the CAR. The legislature instead *rejected* similar plans submitted by Ecology that would create a “carbon pollution market program,” create a credit system, create a “carbon pollution reduction account,” and create an “advisory committee” to help implement the program. HB 1314, § 3, 64th Leg., Reg. Sess. (2015).<sup>3</sup> In so doing, the legislature reserved for itself difficult policy choices and decisions

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<sup>3</sup> WEC tries to marginalize this history of failed approvals by arguing that the programs rejected are different from the CAR. That distinction between the proposals is hardly relevant; what is critical here is the lack of approval for *any* program.

involved in a comprehensive GHG reduction program, including a desire to “minimize the potential to export pollution, jobs, and economic opportunities; and . . . reduce emissions at the lowest cost to Washington’s economy, consumers, and businesses.” RCW 70.235.005(3). The CAR is therefore *ultra vires*.

Ecology tries to avoid this express requirement for legislative approval by noting RCW 70.235.020(1)(b) also states that “[a]ctions taken using existing statutory authority may proceed prior to approval of the greenhouse gas reduction plan.” But Ecology concedes in its Concise Explanatory Statement that the “statutory provision [at RCW 70.235.020] is not the legal authority for Ecology to adopt” the CAR. AR 4981. Ecology’s present citation to that statutory provision therefore only begs the question of what “existing statutory authority” Ecology possesses. Ecology does have express authority to take certain “actions” to reduce GHG emissions, including the authority to set: reasonably available control technology standards to control emissions for specific sources (RCW 70.94.154); GHG “performance standards” for baseload power plants (RCW 80.80.040); emission standards for motor vehicles (RCW ch. 70.120A); and statewide “goals to reduce annual per capita vehicle miles traveled by 2050” (RCW 47.01.440). But there is no similar express authority for the CAR.

The CAR is not some interim “action”—it is, in Ecology’s own words, “Washington’s first-ever multi-sector limit on carbon pollution” (AR 28398) and touted by Ecology as “one of the most progressive

greenhouse gas rules in the nation” (CP 317 (quoting Ecology declaration)). Ecology has no authority for such a program.

In short, the legislature told *all* agencies in the Regulatory Reform Act that they should *never* be making these kinds of policy decisions without legislative approval, and specifically told Ecology in RCW 70.235.020 that it cannot make *this exact policy decision without approval from the legislature*. Ecology did it anyway because the Governor was “fed up.” AR 20257.<sup>4</sup> The Governor’s impatience with the democratic process cannot create legislative authority where none exists.

**2. The Superior Court Correctly Concluded that the CAR Is Not an “Emission Standard.”**

Lacking any express authority for the CAR program, Ecology cites a 40-year-old provision of the Washington Clean Air Act that authorizes it to set “emission standards” under RCW 70.94.331. That provision states that Ecology may “[a]dopt emission standards which shall constitute minimum emission standards throughout the state.” RCW 70.94.331(2)(b). The statute further defines “emission” as a “release of air contaminants into the ambient air,” and an “emission standard” as a requirement “that limits the quantity, rate, or concentration of emissions of air contaminants on a continuous basis.” RCW 70.94.030(11)-(12). The superior court correctly concluded that “emission standards” regulate

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<sup>4</sup> WEC (not joined by Ecology) incorrectly attempts to limit all of RCW 70.235.020 to a plan to enter a multi-state cap-and-trade program. Although portions of RCW chapter 70.235 do discuss entering such a program (*e.g.*, RCW 70.235.030), the restrictions in RCW 70.235.020 relevant here apply to Ecology’s “greenhouse gas reduction plan.” While that “plan” could include entering into a multi-state cap-and-trade program, it is plainly not limited to such action.

emissions, and that the CAR did not fall within the definition of an emission standard.

The fundamental flaw with Ecology's reasoning, as the superior court explained, is that two of the three categories of regulated entities (natural gas distributors and petroleum product producers and importers) do not have emissions and "do not introduce contaminants into the air." CP 838 (Conclusion of Law 8). To avoid this obvious flaw, Ecology created a new category that it called "indirect emitters," composed of those entities that do not have emissions but instead sell products. These "indirect emitters" account for "75-80 percent of the emissions reductions required in the program," and because these entities "lack ability to reduce emissions directly" they must purchase ERUs. CP 838-839 (Conclusions of Law 9, 11 (quoting AR 5083-5084)). The superior court concluded that "emission standards" do not apply to so-called indirect emitters who "do not introduce contaminants into the air" and who "cannot reduce emissions directly." CP 838-839 (Conclusions of Law 8, 9). This decision was correct for at least the following four reasons.

*First*, Ecology effectively conceded on the record that the "indirect emitters" are not actual "emitters" in that they "can't control how their product will be used—and how much emissions will result," and that these indirect emitters "cannot make direct emission reductions." AR 5049, 5083. Instead, in its own words, Ecology is trying to regulate the market by ensuring an "appropriate price signal on fuel." AR 5020. But a "price signal" is not an emission standard. It is a policy choice to impose the

economic burden of GHG emissions on entities that “can’t control . . . how much emissions will result.” AR 5083. This policy choice was never delegated to Ecology. While the *legislature* has considered taxing the sale of fuels to send a “price signal” to the market, it has so far declined to do so.<sup>5</sup> Ecology has no statutory authority for such a regulation *anywhere* and especially not in RCW 70.94.331, which authorizes limitations on *emissions*.

*Second*, Ecology’s invented term—“indirect emitter”—is not found in the federal or Washington Clean Air Act.<sup>6</sup> Ecology “cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.” *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). Ecology’s authority is to “[a]dopt emission standards,” not to set *indirect* “emission standards.” RCW 70.94.331(2)(b). Indeed, the concept of an “indirect emitter” ultimately has no bounds; virtually every human activity indirectly contributes to GHG emissions. The authority to regulate “indirect” emissions is simply outside the scope of legislative approval. *State v. Munson*, 23 Wn. App. 522, 525, 597 P.2d 440 (1979) (“Administrative rules which have the effect of extending . . . the agency’s enabling act do not represent a valid

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<sup>5</sup> See HB 2230, 65th Leg., 3d Spec. Sess. (2017) (failed bill proposing a carbon tax with an evaluation of the effects of the “price signal” from that tax).

<sup>6</sup> The legislature previously defined “indirect emissions” (but not “indirect emitters”) as part of RCW chapter 70.235 and required Ecology to track indirect emissions. See Laws of 2008, ch. 14, § 2. The legislature repealed that definition in 2010 (AR 20396), explaining: “The GHG reporting rules no longer require: reporting of indirect emissions. . . . Obsolete definitions are removed.” Final Bill Report on SSB 6373, at 3 (2010).

exercise of authorized power, but constitute an attempt by the administrative body to legislate.”).

*Third*, Ecology’s effort to characterize the CAR as an “indirect” emission standard is plainly inconsistent with numerous other provisions of the Washington Clean Air Act. *See State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) (“In determining the plain meaning of a provision, we look to . . . the statutory scheme as a whole.” (internal quotation marks and citation omitted)). The Act expressly includes several other programs that regulate emissions through “indirect” means, including restrictions on the sale of certain commodities and programs to reduce vehicle miles traveled on state highways. None of these programs are called “emission standards,” and each has its own separate statutory authority. *See* RCW 70.94.460 (ban on sale of unapproved woodstoves); RCW 70.94.980(2) (ban on sale of “[n]onessential consumer products” that contain ozone-depleting chemicals); RCW 70.94.037 (prohibition on funding transportation projects that degrade air quality); RCW 70.94.531 (requirement that employers in urban areas establish commute trip reduction programs to reduce automotive emissions by providing incentives for their employees to use mass transit and other commuting options). Although indirect means of reducing emissions may be one policy choice *that the legislature could make*, it has only done so in the Washington Clean Air Act in specific situations.

*Fourth*, Ecology’s interpretation of RCW 70.94.331 renders meaningless the legislature’s instruction in RCW 70.235.020(1)(b) to

“submit a greenhouse gas reduction plan for review and approval to the legislature,” and to return with a request for “any additional authority” needed from the legislature to carry out that program. If RCW 70.94.331 already provided Ecology essentially unbridled discretion to develop a new comprehensive cap-and-trade program without such approval or additional authority, then this instruction is superfluous. Courts, of course, must “avoid interpretations of a statute that would render superfluous a provision of the statute.” *In re Estate of Mower*, 193 Wn. App. 706, 720, 374 P.3d 180 (2016) (citation omitted).

Not only does RCW 70.235.020 *require* Ecology to return to the legislature with a plan for the program and a request for “any additional authority” needed from the legislature, Ecology *has in fact done so*. As discussed above, Governor Gregoire made a comprehensive legislative request in 2008 (HB 1819), and Governor Inslee sought enactment of a comprehensive statutory scheme in 2015 (HB 1314).<sup>7</sup> If the emissions standards provisions of the Washington Clean Air Act already provided statutory authority for Ecology to promulgate a comprehensive, market-based, GHG reduction program, there would have been no need to include them in the proposed legislation. The record is clear that the legislature chose not to approve either of these statutory requests. The record is equally clear now that Ecology is “doing by rule what the legislature

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<sup>7</sup> In 2015, Governor Inslee specifically proposed to give Ecology the authority to create a “carbon pollution market program,” which was *essentially the authority that was stripped from the final version of House Bill 2815 in 2008, as codified at RCW 70.235.020*.

decided the department should not do—operate a costly, economy-wide cap-and-trade program.” AR 16666.

Courts refuse to interpret existing statutes in a way that would find an implied authority that the legislature has declined to provide. *See, e.g., United Cook Inlet Drift Ass’n v. Nat’l Marine Fisheries Serv.*, 837 F.3d 1055, 1063 (9th Cir. 2016) (reviewing history of “repeatedly rejected proposals” to Congress and concluding that “[w]e decline the government’s invitation to vest in [a state] the very authority that Congress abjured”); *see also Littleton*, 121 Wn. App. at 118 (finding that “the legislature’s decision to remove the term ‘manure’ from the statute’s coverage one year after it was adopted” was compelling evidence that Ecology cannot regulate manure). Yet, that is precisely what Ecology has done here. Ecology purports to find implicit power to regulated entities that generate no emissions by establishing a new, comprehensive, economy-wide cap-and-trade program with billions of dollars in economic impact, solely on the basis of the “emission standard” provisions that have been in the Washington Clean Air Act since 1969. *See* Laws of 1969, 1st Ex. Sess., ch. 168, § 34 (adding “emission standard” authority to Washington Clean Air Act). The legislature “knows how to explicitly grant” that kind of authority and “would not make such a great step by implication.” *City of Auburn v. Gauntt*, 174 Wn.2d 321, 331, 274 P.3d 1033 (2012).

Courts have cautioned against such newly found authority. As the Supreme Court explained in limiting EPA’s expansion of a federal Clean

Air Act permitting program to include GHGs, “[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy,’ we typically greet its announcement with a measure of skepticism.” *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444, 189 L. Ed. 2d 372 (2014) (citation omitted). Instead, “[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’” *Id.* (citation omitted). Here, the legislature did not “speak clearly” to any intent in RCW 70.94.331 to adopt a comprehensive, market-based, carbon reduction program imposing billions in costs, or to regulate “indirect” emissions. Rather, it spoke clearly in RCW 70.235.020 that Ecology’s authority was limited to proposing a GHG regulatory program to the legislature for approval. Ecology’s newfound reliance on RCW 70.94.331 is incompatible with its own repeated and unsuccessful attempts to obtain legislative approval or statutory authority to enact a comprehensive GHG regulatory program.

The CAR is not an emission standard; it is a comprehensive *program* intended to carry out Ecology’s policy choices. Ecology itself publicly described the CAR as “one of the most progressive greenhouse gas rules in the nation,” and claims the CAR “is the only economy-wide greenhouse cap regulation in the United States other than the cap-and-trade program in California,” which the CAR *exceeds* by “nearly fifty

percent” on a per capita basis.<sup>8</sup> California, of course, has express statutory authority for its economy-wide program. *See* Cal. Health & Safety Code §§ 38500-38599 (California Global Warming Solutions Act of 2006). Ecology does not. The superior court, therefore, correctly invalidated the CAR.

**3. The Statutory and Policy Justifications Put Forth by Ecology and WEC Lack Merit.**

Ecology’s lead argument relies on the broad purpose of the Clean Air Act at RCW 70.94.011 and case law from 1976 for the proposition that Ecology’s powers should be construed broadly. Ecology Brief at 14. WEC likewise argues that Ecology’s powers should be broadly construed based on the Clean Air Act’s stated policy and purpose, and that this purpose “should evolve with time.” WEC Brief at 32. These arguments simply ignore the 1995 Regulatory Reform Act where the legislature made clear that “substantial policy decisions” should be made by the legislature, and state agencies should “not use their administrative authority to create or amend regulatory programs.” Laws of 1995, ch. 403, § 1(2)(a). The Act prohibited Ecology from adopting rules “based solely on a section of law stating a statute’s intent or purpose, on the enabling provisions of the statute establishing the agency, or on any combination of such provisions, for statutory authority to adopt the rule.” RCW 43.21A.080. The broad construction of the Washington Clean Air Act cannot overcome this

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<sup>8</sup> CP 317 (quoting Declaration of William Drumheller, ¶¶ 6, 10 (Dec. 28, 2016), filed in *Foster v. Washington Department of Ecology*, No. 14-2-25295-1 (King Cty. Super. Ct.)).

specific prohibition. Ecology lacks the specific statutory authority to adopt the CAR.<sup>9</sup>

Ecology below tried to avoid the prohibition in the Regulatory Reform Act by claiming that it did not rely “solely” on the Clean Air Act’s statement of purpose and intent; it also relied on its authority to adopt emission standards under RCW 70.94.331. This circular reasoning goes nowhere. Ecology is citing and relying on the policy provisions of the Clean Air Act precisely because there is no way to read the plain language of RCW 70.94.331 authorizing emission standards as applying to entities or activities that have no emissions. Certainly the Regulatory Reform Act did not contemplate that Ecology could avoid the prohibition on relying on a purpose and intent section by claiming that the purpose and intent section *sub silentio* expands some other substantive part of the Act.

Ecology and WEC claim that the superior court erred by “narrowly interpret[ing] the definition of ‘emission standard’ as applying only to sources.” Ecology Brief at 16. Ecology’s “sources” argument is simply off point and misreads the superior court’s holding. An “emission” is

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<sup>9</sup> Ecology and WEC cite *Quinault Indian Nation v. Imperium Terminal Services, LLC*, 187 Wn.2d 460, 470, 387 P.3d 670 (2017), for the proposition that environmental laws should be “broadly construed to achieve the statute’s goals.” Broad construction is not a blank check to Ecology to amend the Act or to create an entirely new program without legislative approval, especially when as here, the legislature *expressly* stated it wanted Ecology to submit its plan for “review and approval.” RCW 70.235.020. No court in this state has endorsed the creation of a new regulatory program by implication. See *Wash. Indep. Tel. Ass’n*, 75 Wn. App. at 368 (rejecting regulation because no statute authorized the “Commission to set up a fund, such as the CCF, to which all LECs are required to contribute”); *In re Impoundment of Chevrolet Truck*, 148 Wn.2d at 157 (rejecting argument that statute “delegates authority to promulgate such regulations by necessary implication”).

defined as “a release of air contaminants into the ambient air” (RCW 70.94.030(11)) and an “emission standard,” as the superior court explained, is 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 . . . .” CP 838 (Conclusion of Law 6 (quoting RCW 70.94.030(12))). The superior court concluded that “‘indirect emitters’ are entities that do not introduce contaminants into the “air” and therefore cannot be regulated through “emission standards” under RCW 70.94.331. CP 838, 839 (Conclusions of Law 8, 10). Accordingly, “Ecology’s authority under RCW 70.94.331(2) is limited to entities who directly introduce contaminants into [the] air, not entities who sell commodities, the ‘indirect emitters.’” CP 839 (Conclusion of Law 10). Emission standards must, by definition, limit emissions and cannot apply to entities that (as Ecology has conceded) do not have emissions.

Without any meaningful statutory basis to impose burdensome and costly emission standards on entities that do not have emissions, Ecology and WEC essentially resort to a policy justification to support the CAR, claiming that it is “reasonable” to regulate GHGs at “the point of sale.” WEC Brief at 27; Ecology Brief at 18. But whether regulation at the point of sale is “reasonable” is a policy choice for the legislature, not Ecology or WEC. There is no statutory authority (and WEC and Ecology cite none) allowing Ecology to regulate future GHG emissions at the “point of sale.” Again, the opposite is true. In 2016, Washington voters rejected a ballot initiative that would have imposed a carbon tax, and the legislature

repeatedly failed to advance bills that would have imposed a carbon tax on fuel sales.<sup>10</sup>

At bottom, Ecology’s expansive reading of the Clean Air Act tramples on basic separation of power principles. It is well-settled that “[a]n administrative agency must be strictly limited in its operations to those powers granted by the legislature,” and “cannot amend its statutory framework under the guise of interpretation.” *Cole v. Washington Utilities & Transp. Comm’n*, 79 Wn.2d 302, 306, 485 P.2d 71, 74 (1971). No matter how well-intentioned Ecology’s actions are or the “practical necessity or appropriateness” of Ecology’s actions, Ecology must have statutory authority for the regulations it wants to issue. *In re Impoundment of Chevrolet Truck*, 148 Wn.2d at 156–57. Ecology has no legislative authority for the CAR and its decision here to stop waiting for the legislature and take matters into its own hands is *ultra vires* and must be set aside.

In sum, Ecology has based what it refers to as “Washington’s first-ever multi-sector limit on carbon pollution” (AR 28398) on its authority to set “emission” limits that has been in the Clean Air Act since 1969, even though three-quarters of the program reductions come from regulated entities that “do not control the amount of fuel or gas burned, and so cannot make direct emission reductions” (AR 5049). Ecology’s sudden

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<sup>10</sup> See, e.g., Initiative 732 (2016) (carbon tax proposal receiving 59% “no” vote); HB 1314 (failed house bill that would have given Ecology the authority to create a “carbon pollution market program”); HB 2230 (failed bill that would have created carbon tax on sales); SB 6203, 65th Leg., Reg. Sess. (2018) (same).

discovery of “unheralded power” found in a “long-extant statute” should be rejected. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444.

**B. Ecology Does Not Have Statutory Authority to Create Emission Reduction Units (Ecology/WEC Issue 2).**

As part of its argument below that Ecology lacked statutory authority to develop the CAR, AWB also argued that there was no specific legislative approval for Ecology to develop and market ERUs. CP 318-320; CP 545-546. AWB pointed out that the legislature elsewhere specifically authorized the use of an “emission credits banking program” for certain sources, and “carbon credits” for other sources, both of which Ecology conceded did not authorize ERUs. *See* RCW 70.94.850, 80.70.020. There was no similar grant of authority for ERUs, and this lack of authority undermines Ecology’s present claim that it had the sweeping authority to enact the CAR. The legislature knows how to authorize Ecology to develop a specific emission banking program, but did not do so here for the CAR. *See Pope Res., LP v. State Dep’t of Nat. Res.*, 190 Wn.2d 744, 758, 418 P.3d 90 (2018) (“When the legislature wishes to define an agency as a landowner, it knows how to do so.”).

Although the superior court never addressed this argument, Ecology and WEC now call this argument out as a separate issue and effectively ask for a declaratory ruling that, assuming that Ecology has implied legislative authority for the CAR, it also has implied authority to create ERUs as a compliance pathway for the CAR. This argument fails for the simple reason that Ecology has no authority for the CAR at all (and

more specifically no authority over fuel sales under RCW 70.94.331), and thus no implied authority to create an ERU banking and trade program to help implement an illegal rule.

In any event, Ecology's implied justification goes beyond all reason. Ecology has taken a statutory provision that allows it to regulate *emissions* (RCW 70.94.331), applied it to entities that have *no emissions* (fuel sellers and natural gas distributors), and required those entities to reduce their (non-existent) emissions by 1.7% per year. Having by its own admission created an impossible requirement, Ecology then finds an implied gap-filling authority to create a compliance solution that allows those fuel sellers to purchase off-site ERUs. This is not gap filling. It is legislation in the guise of rulemaking, and cannot stand. *Munson*, 23 Wn. App. at 525 (rejecting "attempt by the administrative body to legislate").

**C. The Superior Court Appropriately Invalidated the Entire CAR (Ecology Issue 3).**

The superior court invalidated the CAR in its entirety, finding that the invalid provisions related to "indirect emitters" were "fundamental to the entire Clean Air Rule." CP 801. Ecology (not joined by WEC) seeks reversal. According to Ecology, the CAR is legal with respect to "direct emitters" and the superior court should have judicially red-lined the CAR. The judicially-revised CAR requested by Ecology would (arbitrarily) cap emissions on only 48 sources, and would do so without affording the

public process required by law before adopting or amending significant legislative rules. Ecology's severance request fails for many reasons.<sup>11</sup>

Ecology's entire severance argument is premised on the incorrect assumption that it has statutory authority to impose the CAR on direct emitters. That is not so. While it is true that Ecology can set "emission standards" on the 48 direct emitters covered by the rule, and in fact *has done so already* for many of these sources (*see, e.g.*, WAC ch. 173-485 (setting GHG emission standards for refineries)), the CAR is not an "emission standard." It is a comprehensive market-based *program* for which Ecology needs, but does not have, "approval" from the legislature under RCW 70.235.020. Ecology's discovery of the power it asked for, but did not receive, tucked away within a 1969 provision to set "emission standards" is not credible; the legislature "does not . . . hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001). Because Ecology lacks statutory authority for the CAR altogether, Ecology's severability arguments are entirely misplaced.

Even if Ecology has statutory authority to impose a carbon market pollution program that applies only to direct emitters, the public was never presented an opportunity to comment on the social, economic and

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<sup>11</sup> Ecology filed a motion to sever the CAR, but then failed to appear at the hearing for its own motion. CP 907. The court's notice form (submitted by Ecology) states that "[i]f you do not go to the hearing, the court may sign orders without hearing your side." CP 904. Ecology did not appear at the hearing, and the court proceeded to deny Ecology's request to sever. Having failed to appear at hearing, Ecology has abandoned this issue.

environmental consequences of a market-based rule that would so narrowly single out only 48 sources. As set forth in AWB’s briefing below on the issue of severance (CP 736-760), the Administrative Procedure Act (“APA”) subjects Ecology’s rulemaking authority for “significant legislative rules” to strict notice requirements, and substantive requirements to show that (a) “the probable benefits of the rule are greater than its probable costs” and (b) “the rule ... is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives” set forth in the notice of rulemaking. RCW 34.05.328(1)(d)-(e). These determinations must be made “[b]efore adopting a rule,” and Ecology must “place in the rule-making file documentation of sufficient quantity and quality so as to persuade a reasonable person that the determinations are justified.” RCW 34.05.328(1), (2).

Ecology’s request for a judicial rewrite of the CAR violates these fundamental APA requirements. There is no cost-benefit analysis supporting Ecology’s 48 sources rule, and no public opportunity to comment on any such cost-benefit analysis.<sup>12</sup> Even more problematic, Ecology’s existing “least burdensome alternative” analysis considered and *rejected* eliminating indirect sources from the rule. AR 326-327. As

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<sup>12</sup> Ecology tries to save its cost-benefit analysis with an extra-record declaration that reviews “difficult to interpret [] spreadsheets” in the cost-benefit analysis with the aid of an expert economist. CP 675, 681. The superior court appropriately declined to supplement the record to include this declaration (CP 785-786), and for the reasons briefed by AWB below (CP 762-768) this decision was entirely correct.

Ecology explained, such an alternative “would dramatically reduce the scope of the GHG emissions reduction program,” and “reduce” the rule’s effectiveness. *Id.* Ecology is now asking the Court to impose by judicial fiat a regulatory alternative that Ecology itself expressly rejected because *it would not meet the intended purpose of the rule in the first instance.*

Ecology should not be allowed to circumvent the APA through severance. Tellingly, all of Ecology’s severance examples are from either state statutes or federal regulations, *none of which* are subject to the strict requirements for rulemaking set forth in Washington’s APA.

Even if severance did not violate the APA, it is still not appropriate in this case. Severance of statutes is not appropriate when the invalidated provision “represents the heart and soul of the Act,” or renders the Act “virtually worthless.” *Leonard v. City of Spokane*, 127 Wn.2d 194, 202, 897 P.2d 358 (1995). That is precisely what severance would do here. CP 801 (“indirect emitters” were “fundamental to the entire Clean Air Rule”). It would take supposedly economy-wide program that attempts to cap and reduce *total* GHGs in Washington, and turn it into an arbitrary cap on 48 sources that account for a small segment of the state’s GHG emissions. Such a program is arbitrary, unfair, and “virtually worthless.” *Id.*

Ecology leans heavily on the presence of a severability clause in the CAR. But, “the ultimate determination of severability will rarely turn on the presence or absence” of a severability clause. *Gary v. United States*, 499 A.2d 815, 822 (D.C. 1985) (citation omitted). Such a routine clause “is not necessarily dispositive on the question of whether the

legislative body would have enacted the remainder of the act.” *League of Women Voters of Wash. v. State*, 184 Wn.2d 393, 412, 355 P.3d 1131 (2015), *as amended on denial of reconsideration* (Nov. 19, 2015). Even with a severability clause, Washington courts will not sever statutes where (a) “it cannot be reasonably believed that the legislative body would have passed the remainder of the act’s provisions without the invalid portions,” and (b) “elimination of the invalid part would render the remaining part useless to accomplish the legislative purposes.” *Id.* at 411-12.

In the case of the CAR it is clear that Ecology would not have adopted a version of the CAR regulating only “direct sources.” Ecology considered, but rejected, alternatives that would eliminate the regulation of indirect emitters from the CAR, because those alternatives “would severely limit the ability to achieve the goals and objectives of the authorizing statutes” and therefore did not meet the requirements of Washington law. AR 326. It is highly unlikely that Ecology would have enacted an alternative that it expressly rejected as “severely” limiting. If Ecology now believes, despite its earlier statements in the record to the contrary, that a rule limited to only 48 sources would serve important statutory goals and objectives, then it needs to take that new rule to the public and follow the process set forth in the APA.

**D. The Superior Court Properly Invalidated the Reporting Rule Amendments as Part of the CAR (Ecology Issue 4).**

AWB challenged both the Clean Air Rule and the associated Reporting Rule amendments to WAC chapter 173-441 that implement the

Clean Air Rule. In Ecology's words, these amendments to WAC chapter 173-441 were intended to make the existing reporting rule "align with" the CAR (AR 393), to "facilitate requirements and compliance set by the new [CAR]" (AR 270), and to "coordinate with the new rule" (AR 493). Simply put, the purpose of the Reporting Rule amendments was to carry out the CAR. But Ecology has no statutory authority for the CAR, and thus no statutory authority for the Reporting Rule amendments that implement the CAR. That is why, the superior court explained, its ruling on the lack of statutory authority was "dispositive" on this issue. CP 758.

Ecology's brief claims that this ruling is not fair because AWB challenged only one part of the Reporting Rule amendments, and most of the amendments "operate independently of the Clean Air Rule." That is not true. Ecology told the public in its rulemaking notice that it was merely trying to "align with" the CAR, not making new reporting requirements *independent* of the CAR. AR 393. Indeed, virtually all of the Reporting Rule amendments, with the exception of a few cross-reference updates, are (as Ecology stated in the record) intended to implement the CAR. *See, e.g.*, WAC 173-441-120(2)(h), Table 120-1 (adding new definitions of importer and exporter and GHG reporting requirements for petroleum product producers and importers and natural gas distributors to align with regulated entities under the CAR); WAC 173-441-085 (adding third party verification of GHG reporting requirements for covered parties subject to the CAR); WAC 173-441-086 (adding a procedure for Ecology to assign a GHG emissions level to

covered parties subject to the CAR that have not fulfilled their reporting requirements). With the CAR invalidated, those orphaned Reporting Rule amendments serve no purpose, and the superior court found that the lack of statutory authority for the CAR was “dispositive” of all issues.

Ecology also makes a procedural claim, arguing that the superior court did not make “findings” under the APA. Ecology Brief at 27. But Ecology *never asked* for detailed findings from the superior court (and has declined to submit the court’s oral ruling on this issue), and therefore that issue is waived. *Silver Hawk, LLC v. KeyBank Nat’l Ass’n*, 165 Wn. App. 258, 265, 268 P.3d 958 (2011) (“argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal”); CP 803-813 (Ecology’s objections to form of the order). In any event, the superior court did make sufficient findings. It found that the “Clean Air Rule,” which (as the final order states) includes “amendments to Chapter 173-441,” was invalid for lack of statutory authority. CP 835, 839. Nothing more is required. The validity and necessity of the Reporting Rule amendments hinge on the validity of the program created by WAC chapter 173-442, which is now invalidated as *ultra vires*. The Reporting Rule amendments are therefore without legal authority.

**E. The CAR’s Reporting Requirements for GHG Emissions from Fuel Combustion Violate the Washington Clean Air Act (Ecology Issue 5).**

AWB’s briefing below also fully demonstrated that Ecology’s new reporting requirements at WAC 173-441-120 violated express limitations on transportation-related GHG data collection set forth at RCW

70.94.151(5)(a)(iii). CP 320-326; CP 547-548. That statute expressly limits Ecology’s data collection authority, stating that Ecology “shall not require” certain defined categories of “fuel suppliers” to provide “additional data to calculate greenhouse gas emissions” beyond what is already provided to the Department of Licensing (“DOL”) for tax purposes. RCW 70.94.151(5)(a)(iii). This limitation comes out of some specific history, whereby the legislature was attempting to gather transportation-related GHG data, but was struggling with how to do so in a cost-effective manner. CP 320-322. The legislature ultimately decided to authorize Ecology to gather data from “fuel suppliers,” but restricted collection to data that these suppliers were already reporting to DOL. RCW 70.94.151(5)(a)(iii). The reason, as one proponent explained, is that “[t]he numbers are already generated through the [DOL] and therefore there should be no additional costs associated with the reporting requirements of fuel.” Senate Bill Report on SSB 6373, S. Comm. on Env’t, Water & Energy, at 4 (Jan. 19, 2010) (reproduced at AR 20394).

The CAR violates this express limitation by requiring some of the same “suppliers” identified by RCW 70.94.151(5)(a)(iii) to submit “additional data to calculate greenhouse gas emissions” beyond what is already provided to the DOL. Specifically, Ecology added a new reporting system for “suppliers of petroleum products.” WAC 173-441-120, Table 120-1. There is no dispute that the “suppliers” subject to the new reporting rule at WAC 173-441-120 include some of the same “suppliers” protected by RCW 70.94.151(5)(a)(iii). *See* AR 5050

(Ecology conceding “there is some overlap between these two categories” of suppliers); Ecology Brief at 29 (admitting that “there is a definitional overlap”). Ecology also concedes that the data required by the new reporting rule at WAC 173-441-120 is different from, and in addition to, what is authorized by RCW 70.94.151(5)(a)(iii). AR 5056-5057. Thus, the new requirements at WAC 173-441-120 plainly *require* what RCW 70.94.151(5)(a)(iii) *prohibits* by requiring companies protected by the statute to submit additional GHG data not required by DOL. Because “an agency cannot promulgate rules that amend or change legislative enactments,” *Edelman v. State ex rel. Pub. Disclosure Comm’n*, 116 Wn. App. 876, 882, 68 P.3d 296 (2003), a “rule that conflicts with a statute is beyond an agency’s authority,” *Devine v. State, Dep’t of Licensing*, 126 Wn. App. 941, 956, 110 P.3d 237 (2005). Invalidation of the rule is the proper remedy. *H & H P’ship v. State*, 115 Wn. App. 164, 170, 62 P.3d 510 (2003).

Ecology’s opposition now (and below) begins with the false premise that all it is doing is requiring “product producers and importers to report using the same methods that they already report to EPA under federal reporting requirements” at 40 C.F.R. part 98, subpart MM. Ecology Brief at 28. That is not true at all. Ecology’s reporting requirements in WAC chapter 173-441 have some overlap with EPA reporting requirements, but Ecology created in the Reporting Rule amendments *different definitions* of “importer” and “exporter” (e.g., importer or exporter to the state rather the United States). *See* WAC 173-

441-120(2)(h)(ii). Thus, by definition, both the entities that report to EPA *and* the data submitted to EPA are not the same as the data required by the CAR. These new CAR reporting requirements create serious accounting problems and difficulties for reporting entities (*see* AR 4502-4503, 4505-4506), which is precisely what the legislature sought to avoid in passing RCW 70.94.151(5)(a)(iii).

Ecology also tries to play musical chairs with various definitions of “supplier” that it claims are not “synonymous.” Ecology Brief at 29-30. This too is a distraction. It is undisputed that there are certain companies (e.g., all five of Washington’s refineries (AR 5050)) that are “suppliers” under RCW 70.94.151(5)(a)(iii), and therefore subject to the protections of that statute. It is undisputed that amendments to WAC 173-441-120 require those same suppliers (e.g., all five of Washington’s refineries) to provide additional GHG data beyond that submitted to the DOL. Ecology cannot take away that statutory protection with overlapping definitions.

Likewise, Ecology proves too much by claiming that its new reporting requirements “regulate at a different point in the distribution and sale of fossil fuels than the DOL taxes on fuel sales in Washington.” Ecology Brief at 31. That is precisely what the legislature was trying to prevent with RCW 70.94.151(5)(a)(iii): avoid burdensome costs by using data that is “already generated through the Department of Licensing.” Senate Bill Report on SSB 6373 at 4 (AR 20394).

Finally, Ecology resorts to policy arguments that the DOL data is insufficient to support the CAR. It should be no surprise that existing data

requirements do not support the CAR, given that the legislature never gave Ecology authority for the CAR in the first place. If, as Ecology claims, the DOL data has “design issues,” then Ecology needs to obtain from the legislature an amendment to RCW 70.94.151(5). This is precisely what the legislature instructed Ecology to do with RCW 70.235.020(1)(b): “submit a greenhouse gas reduction plan for review and approval to the legislature,” *and* return with a request for “any additional authority” needed from the legislature to carry out that program. Ecology cannot “modify or amend” the statute on its own, and its attempt to do so here by redefining the term “supplier” must be set aside. *Littleton*, 121 Wn. App. at 117.

**F. The CAR’s ERU Reserve Provisions Impose an Unconstitutional Tax (Ecology Issue 6).**

AWB argued below that the ERU Reserve provisions of the CAR in WAC 173-442-240 establish a “tax in-kind” scheme that takes 2% of all acquired ERUs to fund projects selected by Ecology or its Environmental Justice Advisory Committee. CP 326-328; CP 549-551.

Washington’s Constitution prohibits taxation without express statutory authority. Wash. Const. art. VII, § 5 (“No tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied.”). Taxes do not have to be a “cash” payment; they can be a tax “in-kind.” *Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 697, 49 P.3d 860 (2002); *see also Southwick, Inc. v. City of Lacey*, 58 Wn. App.

886, 890, 795 P.2d 712 (1990) (“Direct money payments to the city are not required for the exaction to be classified a tax—payment-in-kind may also be a tax.”). A regulation imposes a tax if its “primary purpose . . . is to accomplish desired public benefits which cost money.” *Hillis Homes, Inc. v. Snohomish County*, 97 Wn.2d 804, 809, 650 P.2d 193 (1982) (internal quotation marks and citation omitted). Thus, as the Court in *San Telmo Associates v. City of Seattle* held, “[r]equiring a developer either to construct low income housing or ‘contribute’ to a fund for such housing gives the developer the option of paying a tax in kind or in money.” 108 Wn.2d 20, 24, 735 P.2d 673 (1987). This payment does not “regulate the demolition of low income housing units,” but instead is for “shifting the public responsibility of providing such housing to a limited segment of the population.” *Id.*

The CAR’s “Reserve” program imposes an impermissible tax in-kind. The CAR shaves 2% off of all emissions reductions and places them in a “reserve account” controlled by Ecology for public benefit. WAC 173-442-240(3)(b)(iii) (creating Environmental Justice Advisory Committee that can award ERUs based on “environmental justice criteria determined by the committee”); AR 5093; AR 23888 (stating that “[a] small portion of the carbon reductions achieved by businesses regulated under the Clean Air Rule will be set aside in a special reserve account managed by Ecology”). These ERUs “cost money,” *Hillis Homes*, 97 Wn.2d at 809, and all indirect emitters must acquire ERUs because that is their “only way . . . to comply with” the CAR, CP 800. The CAR’s

Reserve acts as a tax on those transactions, taking 2% of the ERUs and placing them in a bank controlled by Ecology.

Ecology below defended the Reserve program on the grounds that the Constitution only prohibits it from imposing “monetary charges.” CP 525-526. Ecology now abandons that argument, instead claiming that the ERU is more like a “charge” or a “fee” than a “tax” because the Reserve attempts to “mitigate negative externalities caused by *their activities*” such that “a party that *emits* less contributes less.” Ecology Brief at 35-36 (emphasis added). But that is not true at all. As Ecology concedes, 80% of the emission reductions in the CAR come from entities that sell products but have no emissions. Ecology has just decided, as a policy matter, to “shift[] the public responsibility” for GHG reductions onto fuel suppliers, by first forcing the suppliers to acquire ERUs and then taking 2% of those ERUs for public benefit. This forced contribution is a tax.

Moreover, Ecology’s argument that the CAR Reserve is a “fee” or “charge” is self-defeating. Ecology has no more authority to assess a “fee” on GHG emissions than a tax. The Washington Clean Air Act narrowly circumscribes Ecology’s fee authority, and Ecology cites no statute that authorizes it to impose a “fee” on GHG emissions. *See, e.g.*, RCW 70.94.151(2) (authorizing Ecology to collect a “fee” for registration, but specifically limiting the nature and use of that fee). Thus, regardless of whether the Reserve is a tax or a fee, Ecology plainly lacks statutory authority to impose it.

**G. Ecology Failed to Comply with SEPA (Ecology Issue 7).**

AWB also demonstrated in its briefing below that Ecology violated the State Environmental Policy Act (“SEPA”) by preparing a perfunctory determination of non-significance (“DNS”) that failed to account for environmental effects associated with “leakage.” *See* CP 328-335; CP 553-557. “Leakage” is a well-recognized effect that occurs when costs of complying with a regulation drive up production costs, putting an industry at a competitive disadvantage with production in jurisdictions not subject to that regulation. AR 5012 n.25 (Ecology definition of leakage). These businesses lose market share as a result, and the emission reductions achieved in-state are offset by increased emissions out-of-state. Leakage is a big problem for Washington because, as discussed above, it has one of the lowest GHG emissions profiles in the country, meaning that Washington companies “emit less GHG per unit of production than their counterparts out of state.” AR 28400.

While creating the CAR, Ecology was presented with a detailed study of leakage risk for Nucor Steel. *See* ERM-West, Inc., *Steel Industry Emission Leakage Risk from the proposed Washington Clean Air Rule*, (July 16, 2016) (AR 4313). The ERM study concludes that the CAR would drive up Nucor’s production costs by 2.5%, and that cost increase would in turn cause Nucor to lose 5.2% of its market share for its finished steel products. AR 4313, 4317. That lost market share will be replaced by out-of-state steel production (including some from China) with a significantly higher GHG emissions profile. *Id.* The global effect from

just that 5% production shift for *one* manufacturer is a *net increase* in global GHG emissions of 1.2 million metric tons over 21 years. *Id.* The result is a “lose-lose proposition” whereby Nucor Steel pays money to buy ERUs, only to lose market share and *increase* global GHGs. AR 4312.

Other companies demonstrated similar leakage effects. The entire Washington pulp and paper industry emits about 1.07 million tons of GHGs per year. AR 20316. Shifting only 5% of the pulp and paper industry production to virtually any other state would *increase the total GHG emissions by 146,198 tons per year*, and leakage of that 5% to China would *increase total GHG emissions by 297,618 tons per year*. *Id.* And these increases do not even include emissions associated with the increased transportation of those goods over longer distances. *See* AR 4169 (comments by Ash Grove Cement Company showing 327,000-ton increase in GHG emissions associated with importing cement from China). Thus, shifting even small amounts of industrial production has the potential to create significant increases in GHG emissions. AR 20316.<sup>13</sup>

Ecology failed to meaningfully address these potentially adverse environmental consequences before issuing a DNS. The “record” supporting a DNS “must show ‘that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA.’” *Sisley v. San Juan County*,

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<sup>13</sup> The LDCs likewise submitted significant data showing that the CAR would increase emissions as a result of power supply shifting in the Western Regional power grid. AR 20146, 20160, 20170-20171. For additional discussion of other forms of leakage, see AWB’s briefing below. CP 328-335.

89 Wn.2d 78, 84, 569 P.2d 712 (1977) (quoting *Juanita Bay Valley Cmty. Ass'n v. City of Kirkland*, 9 Wn. App. 59, 73, 510 P.2d 1140 (1973)). The DNS “determination must be based upon information reasonably sufficient to determine the environmental impact of a proposal.” *Pease Hill Cmty. Grp. v. County of Spokane*, 62 Wn. App. 800, 810, 816 P.2d 37 (1991). Thus, an agency has “an affirmative duty to demonstrate its justification for a negative declaration under SEPA.” *Gardner v. Pierce Cty. Bd. of Comm'rs*, 27 Wn. App. 241, 245, 617 P.2d 743 (1980).

That required record is absent here. Ecology in the record did not disagree with (or even address) the ERM study about leakage from Nucor Steel or any of the other information submitted about leakage. Instead, Ecology actually admits “that leakage is a concern in any carbon program that directly or indirectly places an additional cost on GHG emissions from industry.” AR 5012. But Ecology counters that leakage will not occur because it included rules for certain energy-intensive trade-exposed (“EITE”) companies in the CAR that “will substantially mitigate against leakage.” *Id.* This response is legally flawed for two reasons.

*First*, Ecology’s bald assertion that its regulations for EITE companies will mitigate leakage fails to meet its burden of providing “prima facie compliance with the procedural requirements of SEPA.” *Sisley*, 89 Wn.2d at 85 (internal quotation marks and citation omitted). SEPA “require[s] *actual consideration of* environmental factors before a determination of no environmental significance can be made.” *Norway Hill Pres. & Prot. Ass'n v. King Cty. Council*, 87 Wn.2d 267, 275, 552

P.2d 674 (1976) (emphasis added). Ecology must provide a “clear record” and “demonstrate a justification” for its determination. *Gardner*, 27 Wn. App. at 246. Ecology has not provided that record. It has not provided any analysis of how the CAR will impact regulated entities (and has ignored studies from regulated entities estimating that impact) and has provided no analysis of how the EITE rules will “mitigate” that impact. Instead it provides only *ipse dixit* that “Ecology has concluded” that its approach will substantially mitigate against leakage.

Moreover, Ecology’s conclusory assertion that its regulations for EITE entities will “substantially mitigate against leakage” fundamentally misses the point of the comments filed. Even if Ecology’s regulations have mitigated against *some of the effects* of leakage, Ecology makes no claim to have *eliminated* leakage. As demonstrated above, even *small amounts* of leakage can lead to significant increased emissions, given that Washington’s energy supply is one of the cleanest in the world. AR 20316. Ecology was required to explain, in the DNS, why any leakage that will not be mitigated will be insignificant. It has not done so, and therefore vacatur of the DNS is required.

*Second*, Ecology’s claims that its regulations “substantially mitigate against leakage” are plainly overstated and contradicted by Ecology’s position elsewhere in the record. Refineries are recognized as EITE entities susceptible to leakage. AR 5020. But the CAR’s EITE provisions do not apply to Washington’s refineries because Ecology decided as a matter of policy that it was better to “place an appropriate

price signal on fuel” from refineries. *Id.* Accordingly, the CAR will result in leakage from Washington’s refineries, and Ecology was required to, but did not, analyze the environmental impacts of that leakage. Ecology’s unsubstantiated mitigation claims cannot substitute for “actual consideration of [these] environmental factors.” *Norway Hill*, 87 Wn.2d at 275.

Without a record, Ecology summarily claims that it need not address “speculative impacts” and that it was free to rely on its own experts to conclude that public comments were “unpersuasive.” Ecology Brief at 41-42. This is just *post hoc* rationalization. Ecology, in the record, never disagreed with the ERM study (or similar facts submitted in public comment) or found these comments to be speculative. This is not an issue of conflicting experts. This is a failure to properly document the grounds for a DNS as required by SEPA.

Lastly, Ecology tries to avoid the SEPA issue altogether by arguing that the AWB lacks standing. Ecology’s presentation of this issue is misleading. Ecology below moved to dismiss for lack of standing *on the pleadings* under CR 12(c). CP 89-96. The superior court easily disposed of Ecology’s motion under the lenient standards applicable to a motion to dismiss *on the pleadings*. CP 647-653; *see also* CP 97-114 (AWB opposition). As the superior court explained, it may not grant a motion to dismiss on the pleadings unless “[i]t appears beyond doubt that the plaintiffs can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.” CP 650 (quoting *Haberman v.*

*Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1988)). The court then (i) applied that standard to allegations in AWB's amended petition for judicial review alleging that the CAR would "cause probable significant adverse environmental impacts" as a result of leakage and that AWB's members are directly affected by these "environmental burdens," and (ii) denied the CR 12(c) motion. CR 651-652. There was no error, and Ecology's present argument tellingly does not even discuss the CR 12(c) standard.

Importantly, Ecology did not dispute AWB's standing beyond the pleading stage and ultimately withdrew its standing challenge. Although AWB offered declarations with its merits briefings to make a factual demonstration of standing (CP 860-880), Ecology argued that those declarations were unnecessary because standing was "no longer . . . a disputed issue" and instructed the court that it could "disregard the standing arguments" in Ecology's brief (CP 883-884). The superior court agreed, and found it unnecessary to include AWB's declarations. CP 903. Beyond Ecology's picayune arguments on the pleadings, there is no standing issue here.

**H. Ecology's Cost-Benefit Analysis Is Arbitrary and Capricious and Fails to Comply with the APA (Ecology Issue 8).**

The 1995 Regulatory Reform Act amended the APA and requires Ecology to prepare a cost-benefit analysis before adopting a significant legislative rule. RCW 34.05.328(1)(c). Ecology must "[d]etermine that the probable benefits of the rule are greater than its probable costs," RCW

34.05.328(1)(d), and “must place in the rule-making file documentation of sufficient quantity and quality so as to persuade a reasonable person that the determinations are justified.” RCW 34.05.328(2).

AWB demonstrated below that Ecology’s cost-benefit analysis has two fatal flaws. CP 335-340; CP 557-558. *First*, Ecology’s complete failure to consider *increased* GHG emissions associated with leakage that will result from the CAR makes the cost-benefit analysis largely a wasted exercise. Ecology’s “benefit” is measured by the “avoided social cost of carbon” and that benefit may be entirely illusory or significantly overstated if leakage will actually lead to *increased carbon emissions*. Having failed to consider these increased emissions, Ecology “[made] rules without considering their effect on [its] goals” to reduce GHG emissions, thereby violating the APA. *Puget Sound Harvesters Ass’n v. Wash. State Dep’t of Fish & Wildlife*, 157 Wn. App. 935, 950, 239 P.3d 1140 (2010) (finding rules allocating fish harvest arbitrary because the agency ignored considerable information and failed to consider the impact of gear efficiency and the rules’ effect on its goal of fair allocation).<sup>14</sup>

*Second*, Ecology improperly tips the scales of the cost-benefit analysis by comparing the “state” costs with “global” benefits. Ecology

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<sup>14</sup> Ecology below tried to distinguish *Puget Sound Harvesters* by claiming that “there is no uncontested data in the record that Ecology has ignored.” CP 505. But that is not accurate. As discussed above, Ecology has no credible answer to the leakage problem, and just ignored data for Nucor Steel and others showing the impacts of leakage. Under these circumstances, “it is not rational for [Ecology] to ignore the considerable information that it does have.” *Puget Sound Harvesters*, 157 Wn. App at 950.

justifies this apples-to-oranges comparison, claiming that the APA does not prohibit it from doing so. But the legislative findings are replete with references to the benefits and burdens enjoyed by and imposed on the people of the *state*. The legislature directly references its responsibility to act “to the benefit of *all the citizens of the state*,” to protect “the extraordinary natural environment with which *Washington is endowed*,” and to avoid imposing excessive regulation because such regulation “detrimentally affects *the economy of the state and the well-being of our citizens*.” Laws of 1995, ch. 403, § 1(1)(a), (c) (emphasis added). Thus, the legislature’s instruction in RCW 34.05.328 was plainly referring to state-only impacts. *Hunter v. Univ. of Wash.*, 101 Wn. App. 283, 293, 2 P.3d 1022 (2000) (relying on legislative findings to interpret APA); *Dep’t of Nat. Res. v. Marr*, 54 Wn. App. 589, 593, 774 P.2d 1260 (1989) (“legislative findings” reflect “the Legislature’s intent in enacting” statute). Indeed, Ecology itself conceded that in every other context “Ecology uses Washington-State-only values.” AR 299.

Ecology’s argument that its global benefits approach has been approved as reasonable by the Seventh Circuit is also entirely misplaced because the federal court decision neither interprets nor applies the Washington APA. Ecology Brief at 47-48. While federal agencies may take a more global perspective, Washington’s APA is fundamentally (and appropriately) more parochial in scope and targeted at benefits for “the citizens of the state” and the “environment with which Washington is endowed.” Law of 1995, ch. 403, § 1(1)(a).

**I. Ecology’s Least Burdensome Alternative Analysis Fails to Comply with the APA (Ecology Issue 9).**

AWB’s briefing below demonstrated that Ecology also violated the APA by failing to provide an adequate “least burdensome alternative” analysis. CP 340-43; CP 558-559. The APA expressly requires Ecology to determine that “the rule being adopted is the least burdensome alternative for those required to comply” that will achieve the general goals and specific objectives of the statute that the rule implements. RCW 34.05.328(1)(e). As is the case with the cost-benefit analysis, Ecology must sufficiently document that analysis in the rulemaking file (RCW 34.05.328(2)) to ensure that the agency “was rigorous and deliberative,” and that “the agency took a hard look at the rule before its adoption.” Laws of 1995, ch. 403, § 1(2)(e).

Here, Ecology’s least burdensome analysis is entirely perfunctory. The CAR itself imposes 30 pages of new regulations with \$7 billion in compliance costs, but the entire least burdensome analysis consists of only four pages of bullet points. AR 325-328. These bullet points are, at best, conclusory, and without any real explanation. This is not the “hard look” contemplated by the legislature. Courts applying the “hard look” standard in other contexts have rejected “perfunctory description,” *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998), and bare conclusions “without any apparent study or supporting documentation,” *Marble Mountain Audubon Soc’y v. Rice*, 914 F.2d 179, 182 (9th Cir. 1990).

The reality here is that Ecology never intended to meaningfully consider alternatives, let alone the least burdensome alternative. As Ecology conceded in an internal memorandum: “Alternatives were not considered because the Department of Ecology was directed by Governor Inslee to develop and adopt a rule ....” AR 5. However, the Governor’s directive provides no exception to statutory requirements. Ecology’s analysis violates the APA, and the CAR must be set aside.

## V. CONCLUSION

The decision of the superior court should be affirmed. The legislature has not delegated Ecology the authority to develop and implement a market-based, GHG reduction program, or to make the sweeping policy choices reflected in the CAR. The CAR is *ultra vires* and the superior court correctly set aside the CAR in its entirety.

RESPECTFULLY SUBMITTED this 10th day of October, 2018.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on October 10, 2018, I caused to be served *RESPONSE BRIEF BY ASSOCIATION OF WASHINGTON BUSINESS, ET AL.* in the above-captioned matter upon the parties herein via the Appellate Court filing portal and by electronic mail:

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# **APPENDIX A**

**RCW 34.05.328 (excerpts)**

**Significant legislative rules,  
other selected rules.**

## **RCW 34.05.328**

### **Significant legislative rules, other selected rules.**

(1) Before adopting a rule described in subsection (5) of this section, an agency must:

(a) Clearly state in detail the general goals and specific objectives of the statute that the rule implements;

(b) Determine that the rule is needed to achieve the general goals and specific objectives stated under (a) of this subsection, and analyze alternatives to rule making and the consequences of not adopting the rule;

(c) Provide notification in the notice of proposed rule making under RCW 34.05.320 that a preliminary cost-benefit analysis is available. The preliminary cost-benefit analysis must fulfill the requirements of the cost-benefit analysis under (d) of this subsection. If the agency files a supplemental notice under RCW 34.05.340, the supplemental notice must include notification that a revised preliminary cost-benefit analysis is available. A final cost-benefit analysis must be available when the rule is adopted under RCW 34.05.360;

(d) Determine 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;

(e) Determine, after considering alternative versions of the rule and the analysis required under (b), (c), and (d) of this subsection, that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives stated under (a) of this subsection;

(f) Determine that the rule does not require those to whom it applies to take an action that violates requirements of another federal or state law;

(g) Determine that the rule does not impose more stringent performance requirements on private entities than on public entities unless required to do so by federal or state law;

\* \* \*

(2) In making its determinations pursuant to subsection (1)(b) through (h) of this section, the agency must place in the rule-making file documentation of sufficient quantity and quality so as to persuade a reasonable person that the determinations are justified.

\* \* \* \*

# **APPENDIX B**

**RCW 43.21A.080**

**Rule-making authority.**

**RCW 43.21A.080**

**Rule-making authority.**

The director of the department of ecology is authorized to adopt such rules and regulations as are necessary and appropriate to carry out the provisions of this chapter: PROVIDED, That the director may not adopt rules after July 23, 1995, that are based solely on a section of law stating a statute's intent or purpose, on the enabling provisions of the statute establishing the agency, or on any combination of such provisions, for statutory authority to adopt the rule.

# **APPENDIX C**

**RCW 70.94.030 (excerpts)**

**Definitions.**

**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.

\* \* \*

(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.

\* \* \* \*

# **APPENDIX D**

## **RCW 70.94.151 (excerpts)**

**Classification of air contaminant  
sources - Registration - Fee -  
Registration program defined -  
Adoption of rules requiring  
persons to report emissions of  
greenhouse gases.**

## **RCW 70.94.151**

### **Classification of air contaminant sources—Registration—Fee— Registration program defined—Adoption of rules requiring persons to report emissions of greenhouse gases.**

(1) The board of any activated authority or the department, may classify air contaminant sources, by ordinance, resolution, rule or regulation, which in its judgment may cause or contribute to air pollution, according to levels and types of emissions and other characteristics which cause or contribute to air pollution, and may require registration or reporting or both for any such class or classes. Classifications made pursuant to this section may be for application to the area of jurisdiction of such authority, or the state as a whole or to any designated area within the jurisdiction, and shall be made with special reference to effects on health, economic and social factors, and physical effects on property.

(2) Except as provided in subsection (3) of this section, any person operating or responsible for the operation of air contaminant sources of any class for which the ordinances, resolutions, rules or regulations of the department or board of the authority, require registration or reporting shall register therewith and make reports containing information as may be required by such department or board concerning location, size and height of contaminant outlets, processes employed, nature of the contaminant emission and such other information as is relevant to air pollution and available or reasonably capable of being assembled. In the case of emissions of greenhouse gases as defined in RCW 70.235.010 the department shall adopt rules requiring reporting of those emissions. The department or board may require that such registration or reporting be accompanied by a fee, and may determine the amount of such fee for such class or classes: PROVIDED, That the amount of the fee shall only be to compensate for the costs of administering such registration or reporting program which shall be defined as initial registration and annual or other periodic reports from the source owner providing information directly related to air pollution registration, on-site inspections necessary to verify compliance with registration requirements, data storage and retrieval systems necessary for support of the registration program, emission

inventory reports and emission reduction credits computed from information provided by sources pursuant to registration program requirements, staff review, including engineering or other reliable analysis for accuracy and currentness, of information provided by sources pursuant to registration program requirements, clerical and other office support provided in direct furtherance of the registration program, and administrative support provided in directly carrying out the registration program: PROVIDED FURTHER, That any such registration made with either the board or the department shall preclude a further registration and reporting with any other board or the department, except that emissions of greenhouse gases as defined in RCW 70.235.010 must be reported as required under subsection (5) of this section.

All registration program and reporting fees collected by the department shall be deposited in the air pollution control account. All registration program fees collected by the local air authorities shall be deposited in their respective treasuries.

\* \* \*

(5)(a) The department shall adopt rules requiring persons to report emissions of greenhouse gases as defined in RCW 70.235.010 where those emissions from a single facility, source, or site, or from fossil fuels sold in Washington by a single supplier meet or exceed ten thousand metric tons of carbon dioxide equivalent annually. The department may phase in the requirement to report greenhouse gas emissions until the reporting threshold in this subsection is met, which must occur by January 1, 2012. In addition, the rules must require that:

- (i) Emissions of greenhouse gases resulting from the combustion of fossil fuels be reported separately from emissions of greenhouse gases resulting from the combustion of biomass;
- (ii) Reporting will start in 2010 for 2009 emissions. Each annual report must include emissions data for the preceding calendar year and must be submitted to the department by October 31st of the year in which the report is due. However, starting in 2011, a person who is required to report greenhouse gas emissions to the United States environmental protection

agency under 40 C.F.R. Part 98, as adopted on September 22, 2009, must submit the report required under this section to the department concurrent with the submission to the United States environmental protection agency. Except as otherwise provided in this section, the data for emissions in Washington and any corrections thereto that are reported to the United States environmental protection agency must be the emissions data reported to the department; and

(iii) Emissions of carbon dioxide associated with the complete combustion or oxidation of liquid motor vehicle fuel, special fuel, or aircraft fuel that is sold in Washington where the annual emissions associated with that combustion or oxidation equal or exceed ten thousand metric tons be reported to the department. Each person who is required to file periodic tax reports of motor vehicle fuel sales under \*RCW 82.36.031 or special fuel sales under \*\*RCW 82.38.150, or each distributor of aircraft fuel required to file periodic tax reports under \*\*\*RCW 82.42.040 must report to the department the annual emissions of carbon dioxide from the complete combustion or oxidation of the fuels listed in those reports as sold in the state of Washington. The department shall not require suppliers to use additional data to calculate greenhouse gas emissions other than the data the suppliers report to the department of licensing. The rules may allow this information to be aggregated when reported to the department. The department and the department of licensing shall enter into an interagency agreement to ensure proprietary and confidential information is protected if the departments share reported information. Any proprietary or confidential information exempt from disclosure when reported to the department of licensing is exempt from disclosure when shared by the department of licensing with the department under this provision.

(b)(i) Except as otherwise provided in this subsection, the rules adopted by the department under (a) of this subsection must be consistent with the regulations adopted by the United States environmental protection agency in 40 C.F.R. Part 98 on September 22, 2009.

(ii) The department may by rule include additional gases to the definition of "greenhouse gas" in RCW 70.235.010 only if the gas has been designated as a greenhouse gas by the United States congress or by the

United States environmental protection agency. Prior to including additional gases to the definition of "greenhouse gas" in RCW 70.235.010, the department shall notify the appropriate committees of the legislature. Decisions to amend the rule to include additional gases must be made prior to December 1st of any year and the amended rule may not take effect before the end of the regular legislative session in the next year.

(iii) The department may by rule exempt persons who are required to report greenhouse gas emissions to the United States environmental protection agency and who emit less than ten thousand metric tons carbon dioxide equivalent annually.

(iv) The department must establish a methodology for persons who are not required to report under this section to voluntarily report their greenhouse gas emissions.

(c) The department shall review and if necessary update its rules whenever the United States environmental protection agency adopts final amendments to 40 C.F.R. Part 98 to ensure consistency with federal reporting requirements for emissions of greenhouse gases. However, the department shall not amend its rules in a manner that conflicts with (a) of this subsection.

(d) The department shall share any reporting information reported to it with the local air authority in which the person reporting under the rules adopted by the department operates.

(e) The fee provisions in subsection (2) of this section apply to reporting of emissions of greenhouse gases. Persons required to report under (a) of this subsection who fail to report or pay the fee required in subsection (2) of this section are subject to enforcement penalties under this chapter. The department shall enforce the reporting rule requirements unless it approves a local air authority's request to enforce the requirements for persons operating within the authority's jurisdiction. However, neither the department nor a local air authority approved under this section are authorized to assess enforcement penalties on persons required to report under (a) of this subsection until six months after the department adopts its reporting rule in 2010.

(f) The energy facility site evaluation council shall, simultaneously with the department, adopt rules that impose greenhouse gas reporting requirements in site certifications on owners or operators of a facility permitted by the energy facility site evaluation council. The greenhouse gas reporting requirements imposed by the energy facility site evaluation council must be the same as the greenhouse gas reporting requirements imposed by the department. The department shall share any information reported to it from facilities permitted by the energy facility site evaluation council with the council, including notice of a facility that has failed to report as required. The energy facility site evaluation council shall contract with the department to monitor the reporting requirements adopted under this section.

(g) The inclusion or failure to include any person, source, classes of persons or sources, or types of emissions of greenhouse gases into the department's rules for reporting under this section does not indicate whether such a person, source, or category is appropriate for inclusion in state, regional, or national greenhouse gas reduction programs or strategies. Furthermore, aircraft fuel purchased in the state may not be considered equivalent to aircraft fuel combusted in the state.

(h)(i) The definitions in RCW 70.235.010 apply throughout this subsection (5) unless the context clearly requires otherwise.

(ii) For the purpose of this subsection (5), the term "supplier" includes: (A) A motor vehicle fuel supplier or a motor vehicle fuel importer, as those terms are defined in \*RCW 82.36.010; (B) a special fuel supplier or a special fuel importer, as those terms are defined in \*\*\*\*RCW 82.38.020; and (C) a distributor of aircraft fuel, as those terms are defined in RCW 82.42.010.

(iii) For the purpose of this subsection (5), the term "person" includes: (A) An owner or operator, as those terms are defined by the United States environmental protection agency in its mandatory greenhouse gas reporting regulation in 40 C.F.R. Part 98, as adopted on September 22, 2009; and (B) a supplier.

# **APPENDIX E**

**RCW 70.94.331**

**Powers and duties of  
department.**

## **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.

# **APPENDIX F**

**RCW 70.235.020**

**Greenhouse gas emissions  
reductions - Reporting  
requirements.**

## **RCW 70.235.020**

### **Greenhouse gas emissions reductions—Reporting requirements.**

(1)(a) The state shall limit emissions of greenhouse gases to achieve the following emission reductions for Washington state:

(i) By 2020, reduce overall emissions of greenhouse gases in the state to 1990 levels;

(ii) By 2035, reduce overall emissions of greenhouse gases in the state to twenty-five percent below 1990 levels;

(iii) By 2050, the state will do its part to reach global climate stabilization levels by reducing overall emissions to fifty percent below 1990 levels, or seventy percent below the state's expected emissions that year.

(b) By December 1, 2008, the department shall submit a greenhouse gas reduction plan for review and approval to the legislature, describing those actions necessary to achieve the emission reductions in (a) of this subsection by using existing statutory authority and any additional authority granted by the legislature. Actions taken using existing statutory authority may proceed prior to approval of the greenhouse gas reduction plan.

(c) Except where explicitly stated otherwise, nothing in chapter 14, Laws of 2008 limits any state agency authorities as they existed prior to June 12, 2008.

(d) Consistent with this directive, the department shall take the following actions:

(i) Develop and implement a system for monitoring and reporting emissions of greenhouse gases as required under RCW 70.94.151; and

(ii) Track progress toward meeting the emission reductions established in this subsection, including the results from policies currently in effect that have been previously adopted by the state and policies adopted in the future, and report on that progress.

(2) By December 31st of each even-numbered year beginning in 2010, the department and the \*department of community, trade, and economic development shall report to the governor and the appropriate committees of the senate and house of representatives the total emissions of greenhouse gases for the preceding two years, and totals in each major source sector. The department shall ensure the reporting rules adopted under RCW 70.94.151 allow it to develop a comprehensive inventory of emissions of greenhouse gases from all significant sectors of the Washington economy.

(3) Except for purposes of reporting, emissions of carbon dioxide from industrial combustion of biomass in the form of fuel wood, wood waste, wood by-products, and wood residuals shall not be considered a greenhouse gas as long as the region's silvicultural sequestration capacity is maintained or increased.

# **APPENDIX G**

**Excerpts of Laws of 1995,  
ch. 403, §§ 1 and 103**

CERTIFICATION OF ENROLLMENT  
**ENGROSSED SUBSTITUTE HOUSE BILL 1010**

Chapter 403, Laws of 1995  
(partial veto)

54th Legislature  
1995 Regular Session

REGULATORY REFORM

EFFECTIVE DATE: 7/23/95

Passed by the House April 18, 1995  
Yeas 89 Nays 8

CLYDE BALLARD

**Speaker of the  
House of Representatives**

Passed by the Senate April 14, 1995  
Yeas 38 Nays 10

JOEL PRITCHARD

**President of the Senate**

Approved May 16, 1995, with the  
exception of sections 110, 112, 113-  
116, 119 and 504, which are vetoed.

MIKE LOWRY

**Governor of the State of Washington**

CERTIFICATE

I, Timothy A. Martin, Chief Clerk of  
the House of Representatives of the  
State of Washington, do hereby certify  
that the attached is **ENGROSSED  
SUBSTITUTE HOUSE BILL 1010** as passed  
by the House of Representatives and  
the Senate on the dates hereon set  
forth.

TIMOTHY A. MARTIN

**Chief Clerk**

FILED

May 16, 1995 - 9:45 p.m.

**Secretary of State  
State of Washington**

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**ENGROSSED SUBSTITUTE HOUSE BILL 1010**

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AS AMENDED BY THE SENATE

Passed Legislature - 1995 Regular Session

**State of Washington                      54th Legislature                      1995 Regular Session**

**By** House Committee on Government Operations (originally sponsored by Representatives Reams, Horn, Lisk, Cairnes, Dyer, Van Luven, Ballasiotes, Buck, Casada, D. Schmidt, B. Thomas, Chandler, L. Thomas, Brumsickle, Sehlin, Sherstad, Carlson, Benton, Skinner, Kremen, Hargrove, Cooke, Delvin, Schoesler, Johnson, Thompson, Beeksma, Goldsmith, Radcliff, Hickel, Backlund, Crouse, Elliot, Pennington, Mastin, Carrell, Mitchell, K. Schmidt, Chappell, Basich, Grant, Smith, Robertson, Foreman, Honeyford, Pelesky, Blanton, Koster, Lambert, Mulliken, Boldt, McMorris, Clements, Fuhrman, Campbell, Sheldon, Huff, Mielke, Talcott, Silver, McMahan, Stevens, Morris and Hymes)

Read first time 01/20/95.

1            AN ACT Relating to regulatory reform; amending RCW 43.21A.080,  
2 43.70.040, 82.01.060, 46.01.110, 50.12.040, 76.09.040, 77.04.090,  
3 48.02.060, 48.30.010, 48.44.050, 48.46.200, 34.05.310, 34.05.320,  
4 34.05.313, 34.05.325, 19.85.030, 19.85.040, 34.05.660, 42.40.010,  
5 42.40.020, 42.40.030, 18.104.155, 49.17.180, 70.94.431, 70.105.080,  
6 70.132.050, 70.138.040, 86.16.081, 90.03.600, 90.48.144, 90.58.210,  
7 90.58.560, 90.76.080, 34.05.230, 34.05.330, 34.05.370, 34.05.570,  
8 34.05.534, and 19.02.075; adding new sections to chapter 43.12 RCW;  
9 adding a new section to chapter 43.20A RCW; adding new sections to  
10 chapter 43.23 RCW; adding new sections to chapter 43.24 RCW; adding new  
11 sections to chapter 43.22 RCW; adding a new section to chapter 70.94  
12 RCW; adding new sections to chapter 34.05 RCW; adding new sections to  
13 chapter 19.85 RCW; adding a new section to chapter 43.30 RCW; adding a  
14 new section to chapter 43.70 RCW; adding a new section to chapter  
15 43.300 RCW; adding a new section to chapter 1.08 RCW; adding new  
16 sections to chapter 4.84 RCW; adding a new section to chapter 43.88  
17 RCW; adding a new section to chapter 19.02 RCW; adding a new chapter to  
18 Title 43 RCW; creating new sections; repealing RCW 34.05.355 and  
19 19.85.060; and prescribing penalties.

20 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

1        NEW SECTION.    **Sec. 1.**    (1) The legislature finds that:

2        (a) One of its fundamental responsibilities, to the benefit of all  
3 the citizens of the state, is the protection of public health and  
4 safety, including health and safety in the workplace, and the  
5 preservation of the extraordinary natural environment with which  
6 Washington is endowed;

7        (b) Essential to this mission is the delegation of authority to  
8 state agencies to implement the policies established by the  
9 legislature; and that the adoption of administrative rules by these  
10 agencies helps assure that these policies are clearly understood,  
11 fairly applied, and uniformly enforced;

12        (c) Despite its importance, Washington's regulatory system must not  
13 impose excessive, unreasonable, or unnecessary obligations; to do so  
14 serves only to discredit government, makes enforcement of essential  
15 regulations more difficult, and detrimentally affects the economy of  
16 the state and the well-being of our citizens.

17        (2) The legislature therefore enacts chapter . . . , Laws of 1995  
18 (this act), to be known as the regulatory reform act of 1995, to ensure  
19 that the citizens and environment of this state receive the highest  
20 level of protection, in an effective and efficient manner, without  
21 stifling legitimate activities and responsible economic growth. To  
22 that end, it is the intent of the legislature, in the adoption of this  
23 act, that:

24        (a) Unless otherwise authorized, substantial policy decisions  
25 affecting the public be made by those directly accountable to the  
26 public, namely the legislature, and that state agencies not use their  
27 administrative authority to create or amend regulatory programs;

28        (b) When an agency is authorized to adopt rules imposing  
29 obligations on the public, that it do so responsibly: The rules it  
30 adopts should be justified and reasonable, with the agency having  
31 determined, based on common sense criteria established by the  
32 legislature, that the obligations imposed are truly in the public  
33 interest;

34        (c) Governments at all levels better coordinate their regulatory  
35 efforts to avoid confusing and frustrating the public with overlapping  
36 or contradictory requirements;

37        (d) The public respect the process whereby administrative rules are  
38 adopted, whether or not they agree with the result: Members of the  
39 public affected by administrative rules must have the opportunity for

1 a meaningful role in their development; the bases for agency action  
2 must be legitimate and clearly articulated;

3 (e) Members of the public have adequate opportunity to challenge  
4 administrative rules with which they have legitimate concerns through  
5 meaningful review of the rule by the executive, the legislature, and  
6 the judiciary. While it is the intent of the legislature that upon  
7 judicial review of a rule, a court should not substitute its judgment  
8 for that of an administrative agency, the court should determine  
9 whether the agency decision making was rigorous and deliberative;  
10 whether the agency reached its result through a process of reason; and  
11 whether the agency took a hard look at the rule before its adoption;

12 (f) In order to achieve greater compliance with administrative  
13 rules at less cost, that a cooperative partnership exist between  
14 agencies and regulated parties that emphasizes education and assistance  
15 before the imposition of penalties; and

16 (g) Workplace safety and health in this state not be diminished,  
17 whether provided by constitution, by statute, or by rule.

18 **PART I**

19 **GRANTS OF AUTHORITY**

20 NEW SECTION. **Sec. 101.** A new section is added to chapter 43.12  
21 RCW to read as follows:

22 For rules adopted after the effective date of this section, the  
23 commissioner of public lands may not rely solely on a section of law  
24 stating a statute's intent or purpose, on the enabling provisions of  
25 the statute establishing the agency, or on any combination of such  
26 provisions, for statutory authority to adopt any rule.

27 NEW SECTION. **Sec. 102.** A new section is added to chapter 43.20A  
28 RCW to read as follows:

29 For rules adopted after the effective date of this section, the  
30 secretary may not rely solely on a section of law stating a statute's  
31 intent or purpose, on the enabling provisions of the statute  
32 establishing the agency, or on any combination of such provisions, for  
33 statutory authority to adopt any rule.

34 **Sec. 103.** RCW 43.21A.080 and 1970 ex.s. c 62 s 8 are each amended  
35 to read as follows:

1       The director of the department of ecology is authorized to adopt  
2 such rules and regulations as are necessary and appropriate to carry  
3 out the provisions of this chapter: PROVIDED, That the director may  
4 not adopt rules after the effective date of this section that are based  
5 solely on a section of law stating a statute's intent or purpose, on  
6 the enabling provisions of the statute establishing the agency, or on  
7 any combination of such provisions, for statutory authority to adopt  
8 the rule.

9       NEW SECTION. Sec. 104. A new section is added to chapter 43.23  
10 RCW to read as follows:

11       For rules adopted after the effective date of this section, the  
12 director of agriculture may not rely solely on a section of law stating  
13 a statute's intent or purpose, on the enabling provisions of the  
14 statute establishing the agency, or on any combination of such  
15 provisions, for statutory authority to adopt any rule.

16       **Sec. 105.** RCW 43.70.040 and 1989 1st ex.s. c 9 s 106 are each  
17 amended to read as follows:

18       In addition to any other powers granted the secretary, the  
19 secretary may:

20       (1) Adopt, in accordance with chapter 34.05 RCW, rules necessary  
21 to carry out the provisions of (~~this act~~) chapter 9, Laws of 1989 1st  
22 ex. sess.: PROVIDED, That for rules adopted after the effective date  
23 of this section, the secretary may not rely solely on a section of law  
24 stating a statute's intent or purpose, on the enabling provisions of  
25 the statute establishing the agency, or on any combination of such  
26 provisions, for statutory authority to adopt any rule;

27       (2) Appoint such advisory committees as may be necessary to carry  
28 out the provisions of (~~this act~~) chapter 9, Laws of 1989 1st ex.  
29 sess. Members of such advisory committees are authorized to receive  
30 travel expenses in accordance with RCW 43.03.050 and 43.03.060. The  
31 secretary and the board of health shall review each advisory committee  
32 within their jurisdiction and each statutory advisory committee on a  
33 biennial basis to determine if such advisory committee is needed. The  
34 criteria specified in RCW 43.131.070 shall be used to determine whether  
35 or not each advisory committee shall be continued;

**STOEL RIVES LLP**

**October 10, 2018 - 1:34 PM**

**Transmittal Information**

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**Appellate Court Case Number:** 95885-8  
**Appellate Court Case Title:** Association of Washington Business, et al. v. Washington State Department of Ecology, et al.  
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