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No. 95885-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ASSOCIATION OF WASHINGTON BUSINESS, et al.,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Appellant,

and

WASHINGTON ENVIRONMENTAL COUNCIL, et al.,

Intervenor-Appellant

**ASSOCIATION OF WASHINGTON BUSINESS, ET AL.'S
RESPONSE TO BRIEF *AMICUS CURIAE* BY PUGET SOUND
CLEAN AIR AGENCY**

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I. INTRODUCTION

Respondents the Association of Washington Business, et al., hereby file this response to the brief *amicus curiae* submitted by the Puget Sound Clean Air Agency (“PSCAA”). For the reasons stated below, PSCAA’s arguments misunderstand the record, are otherwise unpersuasive, and provide no credible grounds for overturning the Superior Court’s reasoned decision.

II. ARGUMENT

The Legislature passed Washington’s Clean Air Act, Chapter 70.94 RCW (“CAA”), 40 years ago. The CAA provides that the Department of Ecology (“Ecology”) may “[a]dopt *emission standards* which shall constitute minimum emission standards throughout the state.” RCW 70.94.331(2)(b) (emphasis added). The CAA defines “*emission*” as a “release of air contaminants into the ambient air”; “ambient air” is defined as “the surrounding outside air”; and “*emission standard*” is defined as a requirement “that limits the quantity, rate, or concentration of *emissions of air contaminants* on a continuous basis.” RCW 70.94.030(4), (11)-(12) (emphases added). The Superior Court correctly read the CAA’s plain terms as the Legislature defined them: Ecology is authorized to set the “emission standards” that apply “to entities who directly introduce contaminants into [the] air.” CP 839.

PSCAA weighs in as Ecology's *amicus curiae* and faults the Superior Court for making the distinction between "direct" and "indirect" emitters, which PSCAA says does not appear in the CAA. PSCAA's *Amicus* Brief, at 2, 7-8. PSCAA is unfamiliar with the record. The terms "direct" and "indirect" were used **by Ecology** as a justification for placing emission standards on entities that have no emissions. *See, e.g.*, AR 5049 (Ecology explaining that "indirect emitters, which constitute approximately three quarters of the emissions covered by the CAR, do not control the amount of fuel or gas burned, and so cannot make direct emission reductions" (underlining added)); *id* at 5083 ("The second type of emissions – where the regulated party has no ability to directly control how much is emitted – are called indirect emissions."). Indeed, Ecology's own observation that entities that have no emissions (however labelled) have no ability to control emission levels only reinforces the soundness of the Superior Court's ruling. Ecology's narrow authority to regulate "emissions" (and entities that produce them) does not extend to entities that have no "emissions."

PSCAA's second argument fails for similar reasons. PSCAA argues that greenhouse gases ("GHGs") are "air contaminants" under the CAA and that Ecology used "different approaches" to regulate "different air contaminants" in the past. PSCAA's *Amicus* Brief, at 5-7. But

PSCAA fails to explain how Ecology’s past regulation of “contaminants” being released into the ambient air (defined in the CAA as “emissions”) justifies Ecology’s attempt to go far beyond this practice and regulate entities that release no contaminants into the ambient air.

In sum, neither of the two CAA defined terms PSCAA relies on – “emissions” or “contaminants” – supports its attempt to paint the Clean Air Rule (“CAR”) as a continuation of Ecology’s previous role of setting emission standards under the CAA. The CAR does not limit the release of emissions into the surrounding outside air and therefore is not an emission standard. Far from it, the CAR establishes a comprehensive new “economy-wide” program intended to cap and reduce greenhouse gases in Washington. AR 5024.

The program reflects new and far-reaching policy choices by Ecology. As to the entities that directly emit contaminants into the ambient air, the CAR does not actually limit their emissions, but instead requires them *to account for* emission reductions. See AR 5068 (Ecology explanation that emission reduction units “are an accounting mechanism for covered parties to track emission reductions obtained from other entities”). And as to the entities that have no emissions, such as fuel importers, distributors and suppliers, Ecology states that “[p]roducts that emit GHGs impose costs on society,” and the CAR “ensures that product

distributors and suppliers internalize some of the costs associated with the products they sell.” AR 4977. The latter category (those with no emissions that sell “products”) constitutes the majority of the CAR’s purported emission reductions.

But the CAA does not authorize Ecology to regulate “products.” The choice to do so, if any, is reserved to the Legislature and the voters. RCW 70.235.020(1)(b) (requiring Ecology to submit by December 1, 2008, “a greenhouse gas reduction plan *for review and approval to the legislature*” (emphasis added)).¹ The Legislature has grappled with this choice but has to date been unable to come to a consensus, rejecting executive-sponsored proposals for a cap and trade program in 2009 and 2015, and failing to advance a carbon tax proposal in 2018. The Legislature is presently considering alternative action regarding GHGs associated with power generation in Senate Bill 5116 and House Bill 1211. These are exactly the kinds of “substantial policy decisions

¹ 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, 64th Leg., Reg. Sess. (2015). After that second failed plan, Governor Inslee 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.

affecting the public” that should “be made by those directly accountable to the public, namely the legislature.” Laws of 1995, ch. 403, § 1(2)(a).²

Like Ecology, PSCAA has the authority to set “emission standards” under the CAA. RCW 70.94.331(2)(b). And, like Ecology, PSCAA apparently seeks (or believes it already has) broader authority, including the authority to regulate any activity or commodity that may *lead to* GHG emissions, even indirectly. Examples would include requiring airports (e.g., SeaTac) to account for the emissions from cars travelling to the airport, or requiring business hubs to account for the emissions from vehicles headed to their facilities.³

While PSCAA, like Ecology, may have well-intentioned objectives with respect to climate change, an agency must have statutory authority for the regulations it wishes to issue. The Superior Court below found no such grant of authority in the CAA for Ecology’s adoption of the CAR. CP 799 (“an administrative agency is limited to the powers and authority granted to it by the legislature” (quoting *Fahn v. Cowlitz County*, 93 Wn.2d 368, 374, 610 P.2d 857 (1980))). The Superior Court’s conclusion

² Moreover, voters twice rejected similar policy choices, rejecting the carbon tax by wide margins in 2016 (Initiative 732) and 2018 (Initiative 1631), after the Superior Court invalidated the CAR.

³ See PSCAA, Candidate Actions to Reduce Transportation Greenhouse Gas Emissions (June 2018), https://www.pscleanair.org/DocumentCenter/View/3314/Evaluation-Report_Transportation-Actions_June2018?bidId=

was well supported by both familiar principles of administrative law and the record.

PSCAA's *amicus* brief merely claims that it has (or wishes for) the same authority as Ecology, but offers no basis for a different result. There is none. Washington courts do not “defer to an agency the power to determine the scope of its own authority.” *In re Impoundment of Chevrolet Truck, WA License #A00125A ex rel. Registered/Legal Owner*, 148 Wn.2d 145, 157, 60 P.3d 53 (2002) (citation omitted). The authority Ecology attempted to give itself in the CAR (and PSCAA claims for itself as an *amicus*) must come from the Legislature.

III. CONCLUSION

PSCAA's *amicus curiae* brief is unpersuasive, and the decision of the Superior Court should be affirmed.

DATED this 5th day of March, 2019.

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I certify under penalty of perjury under the laws of the state of Washington that on March 5, 2019, I caused to be served *ASSOCIATION OF WASHINGTON BUSINESS, ET AL. 'S RESPONSE TO BRIEF AMICUS CURIAE BY PUGET SOUND CLEAN AIR AGENCY* in the above-captioned matter upon the parties herein via the Appellate Court filing portal and by electronic mail:

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