

NO. 45022-4

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION, a
non-profit trade association,

Respondent,

v.

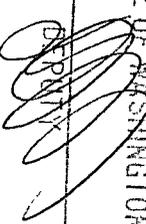
STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Appellant.

DEPARTMENT OF ECOLOGY'S OPENING BRIEF

ROBERT W. FERGUSON
Attorney General

JONATHAN C. THOMPSON
Assistant Attorney General
WSBA #26375
PO Box 40117
Olympia, WA 98504-0117
(360) 586-6770

BY 
STATE OF WASHINGTON

2013 SEP -6 PM 1:29

FILED
COURT OF APPEALS
DIVISION II

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR4

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....5

IV. STATEMENT OF THE CASE5

 A. Requirements For Producers of Mercury-Containing
 Lights Under RCW 70.2755

 B. Ecology’s Rules and Approach to Implementation10

 C. Procedural History12

V. ARGUMENT13

 A. Standard of Review.....13

 B. Ecology’s Rules Reasonably Interpret the Statute and
 Advance its Purpose that Producers Must Finance the
 Department-Contracted Product Stewardship
 Organization Fully, Directly, and According to Their Fair
 Share15

 1. Full and direct financing by producers.....16

 2. Producer financing according to a fair share.....22

 C. The One-Time \$10,000 per Producer Payment to Ecology
 Required by RCW 70.275.050(2) is not a Limit on
 Producers’ Responsibility to Fully Finance and Provide
 Product Stewardship26

 D. The Legislative History Does Not Alter the Express
 Language of the Statute34

E.	NEMA Fails to Show that Ecology Failed to “Substantially Comply” with the Requirement to Prepare a Concise Explanatory Statement	43
VI.	CONCLUSION	48

TABLE OF AUTHORITIES

Cases

<i>Anderson, Leech, & Morse, Inc. v. Liquor Control Bd.</i> , 89 Wn.2d 688, 575 P.2d 221 (1978).....	45, 47
<i>Armstrong v. State</i> , 91 Wn. App. 530, 958 P.2d 1010 (1998).....	14
<i>Baker v. Snohomish County Planning Dep't</i> , 68 Wn. App. 581, 841 P.2d 1321 (1993).....	38, 39
<i>Bowie v. Dep't of Revenue</i> , 171 Wn.2d 1, 248 P.3d 504 (2011).....	15
<i>Burton v. Lehman</i> , 153 Wn.2d 416, 103 P.3d 1230 (2005).....	34
<i>Duke v. Boyd</i> , 133 Wn.2d 80, 942 P.2d 351 (1997).....	27
<i>Green River Community College v. Higher Educ. Personnel Bd.</i> , 95 Wn.2d 108, 622 P.2d 826 (1980).....	14
<i>Hama Hama Co. v. Shorelines Hearings Bd.</i> , 85 Wn.2d 441, 536 P.2d 157 (1975).....	14
<i>In re F.D. Processing, Inc.</i> , 119 Wn.2d 452, 832 P.2d 1303 (1992).....	41
<i>In re Marriage of Kovacs</i> , 121 Wn.2d 795, 854 P.2d 629 (1993).....	41, 42
<i>Lake v. Woodcreek Homeowners Ass'n</i> , 169 Wn.2d 516, 243 P.3d 1283 (2010).....	15
<i>Somer v. Woodhouse</i> , 28 Wn. App. 262, 623 P.2d 1164 (1981).....	47

<i>State ex rel. Evergreen Freedom Foundation v. Washington Educ. Ass'n</i> , 140 Wn.2d 615, 999 P.2d 602 (2000).....	14, 25, 33
<i>State v. Chester</i> , 133 Wn.2d 15, 940 P.2d 1374 (1997).....	27
<i>State v. Cooper</i> , 156 Wn.2d 475, 128 P.2d 1234 (2006).....	27
<i>State v. Flores</i> , 164 Wn.2d 1, 186 P.3d 1038 (2008).....	32
<i>State v. Taylor</i> , 97 Wn.2d 724, 649 P.2d 633 (1982).....	27
<i>Tobin v. Dep't of Labor & Indus.</i> , 145 Wn. App. 607, 187 P.3d 780 (2008).....	41, 42
<i>Verizon Nw., Inc. v. Empl. Sec. Dep't</i> , 164 Wn.2d 909, 194 P.3d 255 (2008).....	13
<i>Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n</i> , 123 Wn.2d 621, 869 P.2d 1034 (1994).....	13
<i>Western Telepage, Inc., v. City of Tacoma</i> , 140 Wn.2d 599, 998 P.2d 884 (2000).....	41
<i>Weyerhaeuser Co. v. Dep't of Ecology</i> , 86 Wn.2d 310, 545 P.2d 5 (1976).....	16, 33, 34
<i>Wilmot v. Kaiser Aluminum & Chem. Corp.</i> , 118 Wn.2d 46, 821 P.2d 18 (1991).....	41, 42

Statutes

RCW 34.05.325(6).....	43
RCW 34.05.375	46
RCW 34.05.570(2)(c)	46

RCW 70.275	3, 5, 7, 11, 15, 16, 18, 23, 29, 39, 42
RCW 70.275.010(1).....	6
RCW 70.275.010(3).....	7, 33, 39
RCW 70.275.010(4).....	18, 33, 39
RCW 70.275.020	32, 35, 44
RCW 70.275.020(14).....	9, 16, 18, 22, 23, 28, 35-37
RCW 70.275.020(16).....	17, 18, 23, 28, 37
RCW 70.275.020(24).....	17, 18
RCW 70.275.020(3).....	7
RCW 70.275.030	4, 7, 21, 26, 28, 29, 32, 35, 36
RCW 70.275.030(1).....	9, 16, 18, 20, 23, 28, 30, 37
RCW 70.275.030(2).....	19
RCW 70.275.030(2)(a)	8, 19
RCW 70.275.030(2)(b)	8
RCW 70.275.030(3).....	9, 17, 18, 20, 22, 37
RCW 70.275.030(3)-(6).....	28
RCW 70.275.030(4).....	7
RCW 70.275.030(5).....	7, 21, 37
RCW 70.275.030(6).....	8, 23
RCW 70.275.030(9).....	8
RCW 70.275.040	4, 28, 29, 32, 35, 36

RCW 70.275.040(2).....	19, 20
RCW 70.275.040(2)(e)	22
RCW 70.275.040(2)(f).....	18
RCW 70.275.050	32, 35, 37
RCW 70.275.050(1).....	18, 37
RCW 70.275.050(2).....	1, 2, 9, 10, 13, 25-28, 30, 31, 36
RCW 70.275.050(3).....	25, 27, 31
RCW 70.275.060	4, 7, 22, 28, 29
RCW 70.275.060(1).....	8
RCW 70.275.060(2).....	8
RCW 70.275.070(1).....	7
RCW 70.275.080	7
RCW 70.275.090	10, 19, 32
RCW 70.275.100	9
RCW 70.275.120	4, 25, 28-32, 35, 36, 39, 44
RCW 70.275.140(1).....	9, 38
RCW 70.275.140(2).....	22
RCW 70.275.140(3).....	33
RCW 70.275.900	33, 39

Other Authorities

Energy Independence and Security Act of 2007, Pub. L. 110-140, §§
321, 322 6

ESSB 5543 35, 36, 40

ESSB 5543 Sec. 11 39

ESSB 5543 Sec. 3(2)(a) 36

ESSB 5543 Sec. 5 37

ESSB 5543 Sec. 5(2)..... 36

ESSB 5543 Sec. 5(4)..... 39

Wash. St. Reg. 12-23-049 11

Webster’s Third New International Dictionary 851 (1993) 19

Regulations

WAC 173-910..... 2, 3, 11-13

WAC 173-910-100..... 8

WAC 173-910-310..... 11

WAC 173-910-310(2)..... 12, 24

WAC 173-910-310(2)(a)(i)..... 25

WAC 173-910-310(2)(a)(ii)..... 25

WAC 173-910-310(3)..... 12, 24

I. INTRODUCTION

Fluorescent light bulbs and tubes contain the toxic heavy metal mercury. The lights typically break during conventional disposal and the mercury that is released poses risks to human health and the environment. As a result, the legislature has prohibited disposal of mercury-containing lights in the garbage. Instead the lights must be recycled in a way that safely contains and recovers the mercury. The legislature also required that producers of mercury-containing lights provide “product stewardship” for their products by either: (1) financing and participating in a recycling program contracted for by the Department of Ecology (Ecology), or (2) developing their own, independent light recycling programs, subject to Ecology approval.

Where a producer of mercury-containing lights opts to participate in the Ecology-contracted program, the legislature has required them to make an initial payment of \$15,000—\$10,000 for Ecology to contract with a recycling program operator, and \$5,000 to finance Ecology’s administration and enforcement. RCW 70.275.050(2). The statute does not, however, dictate the mechanism for ongoing financing of the Ecology-contracted program. Rather, the Legislature left these details to be spelled out in Ecology’s implementing rules.

Under Ecology's rules, the Ecology-contracted recycling organization develops a total cost proposal for meeting the producers' statutory mandates after exhaustion of the funds from the initial payments. The contractor also develops a division of that total cost among participating producers based on market share or another equitable method. WAC 173-910. Once Ecology approves this proposal, each participating light producer must pay its share. Each producer also retains the option, under the statute, of developing an independent plan to operate on its own or jointly with other producers.

The National Electrical Manufacturers Association (NEMA), a trade organization representing large producers of mercury-containing lights, challenges Ecology's rules. Specifically, NEMA asserts that the legislature intended the \$15,000 per producer payment, required by RCW 70.275.050(2), to be an "annual fee" on producers, and the sole source of funding for producers' product stewardship obligations. According to NEMA, if the revenue thus provided is inadequate to achieve the statutory product stewardship requirements, then Ecology must scale back those requirements, even though the legislature mandated full recycling of mercury-containing lights in order to protect the public from the adverse effects of mercury.

If NEMA's argument were accepted, the financing shortfall would be crippling to the achievement of the legislature's objectives. The product stewardship organization that Ecology contracted to develop the initial stewardship plan estimated total annual costs of about \$1.2 million for a program that would meet the obligations of all producers as set forth in RCW 70.275. By comparison, the revenue from a \$10,000 per producer "annual fee" would only be about \$290,000. CP 314-16, 329. Moreover, if producers were required to pay equal annual amounts, rather than annual amounts calibrated according to their market share, that too would undermine the plain legislative intent. NEMA's argument cannot be reconciled with the statute's plain meaning or its purposes. Because Ecology's rules are fully consistent with the terms of the statute as well as the statute's purposes, this court should uphold them.

Relying on the same reasoning, NEMA also petitioned to invalidate portions of WAC 173-910 based on the alleged inadequacy of Ecology's concise explanatory statement for its rules. NEMA asserts that the statement should have included a specific response to NEMA's recommendation that Ecology explain how it would reduce the work of the department-contracted product stewardship program if the revenue from the \$10,000 per producer "annual fee" proved inadequate. Ecology did not include this recommendation in its final rule because the agency

disagreed with the statutory interpretation on which the recommendation was premised, a fact that was evident from the final rule and plainly understood by NEMA. Ecology responded to all of NEMA's specific comments on Ecology's draft rules, and to all other public comments, and therefore substantially complied with the requirement to prepare a concise explanatory statement for its rule. As such, the rule should be upheld.¹

II. ASSIGNMENTS OF ERROR

1. The trial court erred by interpreting the \$10,000 payment required by RCW 70.275.030(2) as an "annual fee" and as a limitation on mercury-containing light producers' obligation to fully finance and participate in a product stewardship program for their products.
2. The trial court erred by interpreting the second sentence in RCW 70.275.120 as authorizing and directing Ecology to reduce or eliminate some part of the product stewardship services required by RCW 70.275.030, .040, and .060 if the revenue received from the alleged "annual fee" of \$10,000 per producer was not enough to cover the cost of the services.

¹ The trial court did not reach the issue of the adequacy of the concise explanatory statement because it declared the financing provisions of the rule invalid based on NEMA's statutory authority argument.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Do Ecology's rules reasonably fill a gap in the Mercury-Containing Lights statute, RCW 70.275, by specifying that, after exhaustion of a one-time \$10,000 per producer payment for Ecology to contract with a product stewardship program, producers participating in the department-contracted program must finance the full cost of that program, with each producer providing funds in proportion to its market share or other equitable allocation?
2. Did Ecology substantially comply with the Administrative Procedure Act's requirement to prepare a concise explanatory statement for its rules where Ecology's statement responded to all comments the agency received on its draft rule, including all of NEMA's written comments with the exception of a proposal that was premised on a statutory interpretation on which NEMA and Ecology obviously disagreed?

IV. STATEMENT OF THE CASE

A. Requirements For Producers of Mercury-Containing Lights Under RCW 70.275

Fluorescent lights, including compact fluorescent bulbs and fluorescent tubes, require less energy than traditional incandescent light bulbs to produce the same illumination. Clerk's Papers (CP) 64-65.

Because of the availability of more efficient alternatives to the incandescent bulb, including fluorescent lights, Congress enacted energy-efficiency standards that have resulted in the phase-out of standard incandescent bulbs starting January 2011 and concluding January 2014. Energy Independence and Security Act of 2007, Pub. L. 110-140, §§ 321, 322.

For all of their energy-saving advantages however, fluorescent lights contain the heavy metal mercury. Mercury can be toxic to humans and can lead to a variety of nervous system effects. It also persists in the environment once released and accumulates in fish to levels that can harm humans and wildlife that consume the fish. Certified Appeal Board Record (Rulemaking File or RF) 264. The mercury is released when lights disposed of in the trash are broken or crushed during garbage collection, transportation, handling, or disposal. Elevated airborne levels of mercury can exist in the vicinity of recently broken bulbs, and under certain conditions, mercury concentrations could exceed occupational exposure limits. *Id.*

Recognizing the problems associated with disposal of energy-efficient mercury-containing lights through municipal solid waste collection and disposal systems, RCW 70.275.010(1), the Washington legislature in 2010 enacted a law that prohibited, starting in

January 1, 2013, anyone from disposing of mercury-containing lights in the garbage, and instead mandated that the lights be recycled, RCW 70.275.080. Recycling, in this context, means carefully transporting the bulbs to a facility where the mercury is recovered through a process called “retorting,” after which the residual material can be safely reused or disposed of. RCW 70.275.060.

RCW 70.275 provides for the development of infrastructure for the separate collection, recycling, and disposal of spent mercury-containing lights, with the goal of achieving one hundred percent recycling of the lights by 2020. RCW 70.275.010(3). Most importantly for purposes of this case, the statute requires producers of mercury-containing lights that are sold for residential use in Washington to finance and provide “product stewardship programs” for their products. RCW 70.275.030. All product stewardship programs, in turn, must:

- collect unwanted mercury-containing lights from “covered entities” (i.e., household consumers and any person that delivers no more than 15 lights in a 90 day period) for reuse, recycling, processing, or final disposition, and not charge a fee when lights are dropped off or delivered into the program, RCW 70.275.030(4), .020(3);
- provide, at a minimum, no cost collection services in all cities in the state with populations greater than ten thousand and all counties of the state on an ongoing, year-round basis (operators of these collection locations must follow protocols for spill and release response, worker safety, and safe packaging and shipping), RCW 70.275.030(5), .070(1);

- ensure that all mercury-containing lights collected are recycled and that any process residuals are managed in compliance with applicable laws, RCW 70.275.060(1); and
- ensure that mercury recovered from retorting is recycled or placed in a properly permitted hazardous waste landfill, or placed in a properly permitted mercury repository, RCW 70.275.060(2).

Product stewardship programs must be fully implemented by January 1, 2013. RCW 70.275.030(9).

Producers may meet these product stewardship program requirements in one of two ways. As a default requirement, producers must “finance and participate” “in a product stewardship program approved by the department and operated by a product stewardship organization contracted by the department,” RCW 70.275.030(2)(a) (called the “standard plan” in Ecology’s rules, WAC 173-910-100). Alternatively, an individual producer or group of producers may seek department approval for an independent plan. If approved, the sponsoring producer or producers must finance and operate that independent program. RCW 70.275.030(2)(b). If there are multiple product stewardship programs, then “[a]ll product stewardship programs operated under approved plans must recover their fair share of unwanted covered products as determined by the department.” RCW 70.275.030(6).

Whether they participate in the department-contracted program, or an independent program, producers are responsible for financing and providing the operational elements necessary to their product stewardship programs. RCW 70.275.020(14), .030(1), .030(3).

Ecology provides administrative oversight and enforcement of the statute's requirements. For example, Ecology may impose penalties against producers, RCW 70.275.100, and has broad authority to "adopt rules necessary to implement, administer, and enforce this chapter." RCW 70.275.140(1).

The statute also requires each producer to "pay fifteen thousand dollars to the department to contract for a product stewardship program to be operated by a product stewardship organization." RCW 70.275.050(2). From this payment, Ecology "shall retain five thousand dollars of the fifteen thousand dollars for administration and enforcement costs." *Id.* Ecology ultimately concluded that the payment must be construed as a one-time initial payment to begin financing for the department-contracted product stewardship program, and to provide initial revenue for Ecology's own implementation of the statute, including administration and enforcement. CP 180-183. How producers would be expected to fulfill their ongoing obligation to fully finance and provide for all aspects of

product stewardship, after exhaustion of the one-time payment, remained to be defined through rulemaking.

B. Ecology's Rules and Approach to Implementation

In December 2010, Ecology billed each producer the \$5,000 portion of the \$15,000 payment required by RCW 70.275.050(2), to be used for Ecology's administration and enforcement costs. CP 179. After Ecology received no proposal from any producer for an independent plan, in January 2012 Ecology billed each producer the remaining \$10,000 portion of the \$15,000 payment required by RCW 70.275.050(2) for Ecology to contract with a product stewardship organization. CP 180. Ecology ultimately collected payments of \$10,000 each from 29 producers, for a total of \$290,000. CP 180.

Because the department-contracted product stewardship program requires a department-approved product stewardship plan,² Ecology solicited proposals and contracted with PCA Product Stewardship, Inc. ("Product Care") to develop the "standard plan" for the department-contracted stewardship organization. CP 180-181. Product Care is a not-for-profit company that manages product stewardship programs for products including mercury-containing lights in three Canadian provinces.

² See RCW 70.275.090: "As of January 1, 2013, no . . . person may distribute, sell, or offer for sale mercury-containing lights for residential use to any person in this state unless the producer is participating in a product stewardship program *under a plan approved by the department.*" (Emphasis added).

Id. Ecology ultimately paid Product Care \$175,000 from the participating producers' \$10,000 payments for the completion of tasks under the program start-up contract. CP 181. In addition to developing a standard plan, Product Care set up the program infrastructure including securing intent contracts with 191 collection sites, developing operational standards for collectors and processors, creating a program website, drafting public outreach and education materials, and completing its own request for proposals to select a program recycling company. *Id.*

Ecology adopted rules implementing RCW 70.275 effective December 17, 2012.³ The rules provided detail as to how producers are to fully finance and participate in the department-contracted product stewardship program after the one-time \$10,000 per producer payment is exhausted. WAC 173-910-310.

On March 7, 2013, Ecology contracted with EcoLights Northwest, LLC, using the remaining funds from the producers' \$10,000 payments (approximately \$115,000) to begin implementation of the standard plan. CP 182-183. Under Ecology's rules, the contractor is required to develop a proposal for a total program cost during the term of the contract (after exhaustion of the funds generated by the one-time \$10,000 per producer payments), and for each participating producer's share of that overall

³ Wash. St. Reg. 12-23-049; WAC 173-910.

cost.⁴ WAC 173-910-310(2). Once approved by Ecology, each participating producer must pay its share of the total cost (called the “producer share cost”) to the organization. *Id.* The rules afford producers an opportunity for agency review and adjustment of their producer share cost assessment. WAC 173-910-310(3).

As a condition of contract renewal for an additional year, the product stewardship organization must submit to Ecology, for the agency’s review and approval, cost justification for its proposed program cost for the next year based on a fully-detailed budget. CP 183. Ecology may accept the proposal and extend the contract for an additional one-year period (up to five times) or Ecology may issue a new request for competing proposals for ongoing implementation of the standard plan. *Id.*

C. Procedural History

The National Electrical Manufacturers Association (NEMA), a trade organization representing the larger producers such as General Electric, OSRAM/Sylvania, and Philips Lighting, CP 184, filed a petition for judicial review with the trial court under RCW 34.05.570(2), seeking a declaration that Ecology exceeded its statutory authority in adopting the financing provisions of the WAC 173-910. CP 3-18. NEMA argued that

⁴ Under Ecology’s contract, the product stewardship program is required to organize and launch a producer advisory board to gather information on rate setting, data confidentiality, program improvements and cost controls. CP 182-183.

the \$15,000 per producer payment required by RCW 70.275.050(2) is an “annual fee” on producers, and is the sole source of funding for producers’ product stewardship obligations. According to NEMA, if the revenue thus provided is inadequate to achieve the statutory product stewardship requirements, then Ecology must scale back those requirements. NEMA also petitioned to invalidate portions of WAC 173-910 based on the alleged inadequacy of Ecology’s concise explanatory statement for its rules. The trial court ruled that Ecology had exceeded its statutory authority and therefore declared invalid the financing provisions of WAC 173-910. CP 347-352. The trial court did not reach the issue of the adequacy of Ecology concise explanatory statement. Ecology appeals.

V. ARGUMENT

A. Standard of Review

Because this case is a rule challenge, the Court sits in the same position as the Superior Court and applies the APA standards directly to the administrative record. *Verizon Nw., Inc. v. Empl. Sec. Dep’t*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008). Interpreting a statute presents a question of law subject to de novo review. *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm’n*, 123 Wn.2d 621, 627, 869 P.2d 1034 (1994).

“Administrative rules adopted pursuant to a legislative grant of authority are presumed to be valid and should be upheld on judicial review

if they are reasonably consistent with the statute being implemented.”
State ex rel. Evergreen Freedom Foundation v. Washington Educ. Ass’n,
140 Wn.2d 615, 634-35, 999 P.2d 602 (2000) citing *Green River
Community College v. Higher Educ. Personnel Bd.*, 95 Wn.2d 108, 112,
622 P.2d 826 (1980). “A party attacking the validity of an administrative
rule has the burden of showing compelling reasons that the rule is in
conflict with the intent and purpose of the legislation.” *Id.*

An agency’s authority to adopt rules includes those powers
expressly granted by statute plus those powers necessarily implied by the
statutory grant of authority. *E.g. Armstrong v. State*, 91 Wn. App. 530,
538, 958 P.2d 1010 (1998). An agency’s statutory authority is primarily a
question of law subject to *de novo* review by the court. *Id.* at 536.
Although an agency does not have the power to promulgate rules which
amend or change legislative enactments, the agency may adopt rules
which “fill in the gaps” if those rules are necessary to effectuate a general
statutory scheme. *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d
441, 448, 536 P.2d 157 (1975).

B. Ecology's Rules Reasonably Interpret the Statute and Advance its Purpose that Producers Must Finance the Department-Contracted Product Stewardship Organization Fully, Directly, and According to Their Fair Share

RCW 70.275 includes numerous expressions of legislative intent that each participating producer is required to finance the department-contracted product stewardship organization fully, directly, and according to its fair share. Ecology's rules provide a reasonable mechanism to ensure that these statutory objectives will be met and the rules should be upheld.

The primary objective of construing a statute is to ascertain and carry out the intent of the Legislature. *Bowie v. Dep't of Revenue*, 171 Wn.2d 1, 10-11, 248 P.3d 504 (2011). The first source for determining legislative intent is the statutory text. *Id.* If the plain language of the statute is unambiguous, the statute is given its plain meaning and no further construction is needed. *Id.*

Plain meaning is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. While we look to the broader statutory context for guidance, we must not add words where the legislature has chosen not to include them, and we must construe statutes such that all of the language is given effect.

Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (internal citations omitted). "Where there are two reasonable

interpretations of statutory language, the interpretation which better advances the overall legislative purpose should be adopted[.]” *Weyerhaeuser Co. v. Dep’t of Ecology*, 86 Wn.2d 310, 321, 545 P.2d 5 (1976).

1. Full and direct financing by producers.

A central requirement of RCW 70.275 is that: “Every producer of mercury-containing lights sold in or into Washington state for residential use must *fully finance and participate* in a product stewardship program for that product, including the department’s costs for administering and enforcing this chapter.” RCW 70.275.030(1) (emphasis added).

The statutory definition of “product stewardship” adds to the basic requirement that a producer must “fully finance and participate” in a product stewardship program:

“Product stewardship” means *a requirement for a producer of mercury-containing lights to manage and reduce adverse safety, health, and environmental impacts of the product throughout its life cycle, including financing and providing for the collection, transporting, reusing, recycling, processing, and final disposition of their products.*

RCW 70.275.020(14) (emphasis added). The “financing and providing for” language is mirrored in the definition of “product stewardship program”:

“Product stewardship program” or “program” means the *methods, systems, and services financed and provided by*

producers of mercury-containing lights generated by covered entities that addresses product stewardship and includes collecting, transporting, reusing, recycling, processing, and final disposition of unwanted mercury-containing lights, including a fair share of orphan products.

RCW 70.275.020(16) (emphasis added). The requirement that producers of mercury-containing lights must finance and provide for the specific operational costs of product stewardship is carried forward in more detail in RCW 70.275.030(3):

A producer, group of producers, or product stewardship organization funded by producers *must pay all administrative and operational costs associated with their program or programs, . . .* For collection locations, including household hazardous waste facilities, charities, retailers, government recycling sites, or other suitable locations, a producer, group of producers, or product stewardship organization *shall finance the costs of collection, transportation, and processing of mercury-containing lights collected at the collection locations.* (Emphasis added.)

Finally, the statute specifies that product stewardship organizations act as the agents of their participating producers:

“Stewardship organization” means an organization designated by a producer or group of producers to act as an agent on behalf of each producer to operate a product stewardship program.

RCW 70.275.020(24).

Regardless of whether a producer participates in the program operated by the department-contracted stewardship organization, or in an independent plan, the statutory language contemplates direct producer

responsibility for ensuring the organization meets the requirements imposed by the law. First, the statute defines “product stewardship” and “product stewardship program” as requiring producers themselves to “provid[e]” all aspects of the stewardship services, specifically including “collecting, transporting, reusing, recycling, processing, and final disposition of unwanted mercury-containing lights.” RCW 70.275.020(14), (16). Second, the statute defines a “stewardship organization” as “an agent on behalf of each producer to operate a product stewardship program.” RCW 70.275.020(24). Thus, producers are directly responsible for *fully financing* and *directly providing* all “methods, systems, and services” necessary to product stewardship, even when the producers opt to satisfy their obligations through participation in the department-contracted product stewardship program. While Ecology may be responsible for contracting for such a program, producers remain responsible for financing and providing the wherewithal necessary for the department-contracted organization to satisfy the producers’ obligations.

The words “financing” or “finance” are used seven times in RCW 70.275 to describe the responsibility of all producers in regard to the services provided by products stewardship organizations, both department-contracted or independent, RCW 70.275.010(4), .020(14), .020(16), .030(1), .030(3) (twice), .040(2)(f), and .050(1); and once in specific

reference to the responsibility of producers to the department-contracted program, RCW 70.275.030(2)(a). Webster's Dictionary defines "finance" as "to raise or provide funds or capital for" or "to furnish with necessary funds in order to achieve a desired end." *Webster's Third New International Dictionary* 851 (1993). The second clause is particularly consistent with the legislature's intent—that is, "to furnish with *necessary* funds in order *to achieve a desired end.*"

The statute clearly contemplates a "desired end" of protecting the public through a comprehensive recycling system for mercury containing lights that must be provided by the producers through product stewardship organizations. Product stewardship organizations must provide residential and other users of mercury-containing lights a designated number of drop-off sites throughout Washington, where at no charge, users may leave up to 15 unwanted lights during any 90 day period. Safe collection and transportation of the lights, and their proper recycling, processing and disposal must be assured. A product stewardship plan⁵ must indicate "how the public will be informed about the recycling program."

⁵ Product stewardship plans are required of both the department-contracted stewardship program (Standard Plan) and the independent product stewardship programs. In either case, the plan must be approved by the department. For instance, RCW 70.275.030(2) provides that "All producers must finance and participate in *the plan* operated by the product stewardship organization [contracted by the department]." RCW 70.275.090 provides that "As of January 1, 2013, [no one] may distribute, sell, or offer for sale mercury-containing lights for residential use to any person in this state unless the producer is participating in a product stewardship program *under a plan approved by the department.*"

RCW 70.275.040(2). Thus, the statute, when read as a whole, reflects plain legislative intent to require a comprehensive recycling program that would be fully funded by product producers.

In addition to the “fully finance” and “provide for” language discussed above, there are other indications that producers must pay whatever costs are necessary to achieve the required ends. Without distinction between the department-contracted organization and independent programs,⁶ producers “must pay all administrative and operational costs associated with their program or programs,” with one specific exception. RCW 70.275.030(3).⁷ The same subsection requires that producers “shall finance the costs of collection, transportation, and processing of mercury-containing lights collected at the collection locations.” *Id.* This requirement parallels the “fully finance and participate” language of RCW 70.275.030(1) and directly links the financing requirement to specific administrative and operational costs of the producers’ product stewardship program. By referring to specific categories of costs necessary to product stewardship, this sentence

⁶ The phrase “producer, group of producers, or product stewardship organization funded by producers” in RCW 70.275.030(3) is designed to capture every manner in which a producer may satisfy its obligation to fully fund and participate in a product stewardship organization, including through an independent program run by the producer itself or jointly with others, or through a product stewardship organization contracted by the department and funded by producers.

⁷ Producers are not required to pay for curbside and mail-back collection services for mercury-containing lights that may be offered as for-payment services by providers of traditional garbage collection services.

employs the word “finance” in the sense of “to furnish with necessary funds in order to achieve a desired end.”

The Legislature’s intent that a producer’s funding obligation be sufficient to achieve the basic statutory objectives for stewardship organizations—instead of being a simple requirement to pay a fixed tax or fee to the state as NEMA argues—is exemplified by the requirement that product stewardship programs “shall provide, *at a minimum*, no cost services in all cities in the state with populations greater than ten thousand and all counties of the state on an ongoing, year-round basis,” RCW 70.275.030(5) (emphasis added). The meaning of this can only be that product stewardship organizations may not reduce costs by, for example, limiting collection sites to just a few locations throughout the state. The statute’s plain language establishes that this minimum requirement must be met and cannot be scaled back.

In sum, the statute requires producers to provide necessary funds to their product stewardship organizations, which in turn must provide no-cost collection and recycling and disposal of mercury-containing lights throughout the state. RCW 70.275.030. Product stewardship organizations must also make adequate efforts to inform the public of their services, and may be required to meet department-promulgated performance standards to show the efficacy of their efforts.

RCW 70.275.040(2)(e), .140(2). The producers' product stewardship organizations must ensure transportation of collected lights to facilities that recover the mercury and ensure proper disposal of residual waste. RCW 70.275.030(3), .060. None of the foregoing sections include words of qualification, such as "within available funds."

2. Producer financing according to a fair share.

The 29 producers identified by Ecology vary greatly in terms of the number of mercury-containing lights they sell in Washington. The largest three producers collectively account for over two thirds of the market, while some of the remaining 26 producers (many of them non-NEMA members) account for only a miniscule share. CP 184-185. Consequently, another important policy embodied in the statute is that each individual producer, or combination of producers participating in a particular product stewardship program (whether independent or department-contracted), must recover a quantity of lights commensurate with the producer or producers' own products. This policy is evident from the definition of "product stewardship" as "a requirement for *a producer* of mercury-containing lights to manage and reduce adverse safety, health, and environmental impacts of the product throughout its life cycle, including financing and providing for the collection, transporting, reusing, recycling, processing, and final disposition *of their products.*"

RCW 70.275.020(14) (emphasis added). Similarly, “[e]very producer of mercury-containing lights sold in or into Washington state for residential use must fully finance and participate in a product stewardship program *for that product.*” RCW 70.275.030(1) (emphasis added). And finally, “[a]ll product stewardship programs operated under approved plans must recover *their fair share* of unwanted covered products as determined by the department.” RCW 70.275.030(6) (emphasis added).

These provisions evidence the legislature’s intent that producers should bear responsibility for product stewardship not in equal amounts for each firm, but in proportion to their own products, or their “fair share” of products collected.⁸ In other words, each producer must provide the financing necessary for the collection, transport, recycling and disposal of a share of all lights collected that is commensurate with the number of its own lights. If the funding of the department-contracted program were set at an equal amount for each producer, then the fair share policy would be thwarted.

Ecology’s rules reasonably fill a gap in RCW 70.275’s financing provisions by providing a mechanism for calculating each producer’s

⁸ See also RCW 70.275.020(16) (emphasis added) providing that “‘Product stewardship program’ or ‘program’ means the methods, systems, and services financed and provided by producers of mercury-containing lights generated by covered entities that addresses product stewardship and includes collecting, transporting, reusing, recycling, processing, and final disposition of unwanted mercury-containing lights, *including a fair share of orphan products.*”

share of the annual cost of the required stewardship program. Ecology's rules require all product stewardship organizations, including the department-contracted organization, to estimate the total program cost for the coming year, to determine each participating producer's "producer share cost" based on market share or other equitable formula, and to submit the program cost and producer share cost to the department for review, adjustment, and approval. WAC 173-910-310(2). Thereafter, the stewardship organization is to invoice each producer for its department-approved producer share cost for the product stewardship program cost. Each producer must pay the invoiced amount within sixty days, but may request review by the department of its producer share cost assessment. WAC 173-910-310(2), (3). Through this mechanism, the rules ensure that each producer fully finances, provides for, and pays all of its administrative and operational costs associated with its program. Although this arrangement is not typical of state contracting, where a contractor would generally receive payment from the state agency rather than third parties, it is consistent with the product stewardship obligations that the statute imposes on each producer in regard to its products, and with the definition of product stewardship organizations as the agents of their participating producers.

Another gap the rules fill is to specify the amount of the annual fee that producers participating in the department-contract stewardship program must pay to cover Ecology's administrative and enforcement costs after exhaustion of the \$5,000 payment required for that purpose by RCW 70.275.050(2). Although the fee for Ecology's administrative and enforcement costs for *independent* plan participants is specified at \$5,000 annually by RCW 70.275.050(3), and RCW 70.275.120 requires an annual fee from *all* producers to cover Ecology's administrative and enforcement costs, no annual fee amount is specified for participants in the department-contracted product stewardship program (notwithstanding the one-time \$5,000 payment under RCW 70.275.050(2)). Ecology's rules set the fee at \$5,000 with an adjustment for inflation. WAC 173-910-310(2)(a)(i), (ii).

Because Ecology's rules are *at least* "reasonably consistent with the statute being implemented," *Evergreen Freedom Found.*, 140 Wn.2d at 634-35, the court should uphold them. As discussed below, NEMA fails to meet its burden of showing "compelling reasons that the rule is in conflict with the intent and purpose of the legislation." *Id.*

C. The One-Time \$10,000 per Producer Payment to Ecology Required by RCW 70.275.050(2) is not a Limit on Producers' Responsibility to Fully Finance and Provide Product Stewardship

Despite the many indications of legislative intent that each producer must fully finance and directly provide product stewardship for its own products, NEMA argues that the producers' annual obligation is limited to the \$10,000 per producer payment to the department required by RCW 70.275.050(2). NEMA's argument relies on the theory that RCW 70.275.050(2) is the "specific" definition that controls over the "general" requirement of subsection (1) of that section,⁹ and also apparently over all other statements in the act regarding producers' direct financing obligations. NEMA's statutory interpretation would treat the statutory statements regarding producers' obligation to fully finance and provide all aspects of product stewardship as meaningless surplus at best, or misleading window-dressing at worst. The court should reject NEMA's interpretation and uphold Ecology's rules.

NEMA's argument fails because it requires reading words into the statute that are conspicuously absent and therefore must be assumed to have been intentionally omitted. The supreme court has repeatedly declined the invitation to amend statutory language under the guise of

⁹ "All producers that sell mercury-containing lights in or into the state of Washington are responsible for financing the mercury-containing light recycling program required by RCW 70.275.030."

interpretation or construction. “Where the Legislature omits language from a statute, intentionally or inadvertently, this court will not read into the statute the language that it believes was omitted.” *State v. Cooper*, 156 Wn.2d 475, 480, 128 P.2d 1234 (2006). “The court may not add language to a clear statute, even if it believes the Legislature intended something else but failed to express it adequately.” *State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997). A court should apply the literal meaning of a statute and not question wisdom of a statute even if its results seem unduly harsh. *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997). *But see, State v. Taylor*, 97 Wn.2d 724, 728-29, 649 P.2d 633 (1982) (The court will not read into a statute words it believed the legislature inadvertently omitted, unless doing so is “imperatively required to make it a rational statute”).

While RCW 70.275.050(2) requires each producer to make a \$15,000 payment to Ecology, it omits any statement that the payment is to be an annual or otherwise recurring fee. Unlike subsection (3) of RCW 70.275.050, where the legislature established “an *annual fee* of five thousand dollars to the department for administration and enforcement costs,” (emphasis added), subsection (2) merely provides that “[e]ach producer shall pay fifteen thousand dollars to the department to contract

for a product stewardship organization.”¹⁰ The legislature did not characterize the \$15,000 as an “annual” fee, even though it certainly knew how to do so.

RCW 70.275.050(2) also omits any words of limitation to indicate that the \$15,000 payment is intended to define or limit the producer’s obligation to finance the services required by RCW 70.275.030, .040, and .060. In order for the language of the statute to support NEMA’s interpretation, there would need to be a signal such as: “However, producers shall pay no more than \$15,000 each, per year.” Even then, a further indication would be needed that all of the responsibilities imposed on producers under RCW 70.275.020(14), (16); RCW 70.275.030(1), (3)-(6); RCW 70.275.040; and RCW 70.275.060 would shift to Ecology and its contractor upon the producer’s payment of its \$15,000 “annual fee.”

This is not a case in which it is “imperatively required” to insert the words “annually” or words of limitation in order make the statute rational. Nor is it a simple case of specific language controlling over more general statements. As described above, the statute as a whole contemplates ongoing producer responsibility for full financing and provision of product stewardship. Although the services of a default

¹⁰ Similarly, RCW 70.275.120 requires that “[a]ll producers shall pay the department *annual fees* to cover the cost of administering and enforcing this chapter.” (Emphasis added.)

product stewardship program operator are retained under contract by Ecology, that organization is nonetheless the agent of the producers for the statewide collection, transportation, and recycling services required by RCW 70.275.030, .040, and .060. In light of these mandates, it is simply too radical a reversal of the meaning of “product stewardship” to interpret the \$10,000 per producer payment as a tax or fee that defines the producer’s sole financial obligation under the law.

Moreover, the amount of funding generated would be grossly inadequate. The amount of financing that would be provided by a \$10,000 per producer “annual fee” on the 29 producers that are known to be selling mercury-containing lights in Washington would be \$290,000. CP 179-80, 184-85. This is substantially less than the \$1.1 to \$1.2 million in annual stewardship organization operating costs that Ecology estimates to be necessary to meet the obligations of all producers as set forth in RCW 70.275. CP 314-16, 329.

In an attempt to lend credence to its interpretation, NEMA urges a contrived interpretation of the second sentence of RCW 70.275.120. According to NEMA, that sentence is to be read as a directive for Ecology to scale back the department-contracted product stewardship program if the (allegedly annual and exclusive) \$10,000 per producer payment under

RCW 70.275.050(2) provides inadequate revenue. The full text of

RCW 70.275.120 states:

All producers shall pay the department annual fees to cover the cost of administering and enforcing this chapter. The department may prioritize the work to implement this chapter if fees are not adequate to fund all costs of the program.

The second sentence does not support the meaning that NEMA would ascribe to it. It is apparent from the first sentence of RCW 70.275.120 that the section is concerned with the regulatory “fees” that producers must pay annually to Ecology to cover the department’s own administrative and enforcement costs, and not with producers’ financing of product stewardship programs.

Throughout the act, the department’s cost of “administering and enforcing” or “implementing” the chapter is consistently called out distinctly from the financing or funding of product stewardship organizations. RCW 70.275.030(1) states that every producer “must fully finance and participate in a product stewardship program for that product, including the department’s costs for administering and enforcing this chapter.” In that sentence, “the department’s costs for administering and enforcing this chapter” represent a subset of the costs producers are responsible for, and are distinct from the administrative and operational costs of the product stewardship programs. Similarly,

RCW 70.275.050(2) distinguishes the \$10,000 payment that the department is to use “to contract for a product stewardship program to be operated by a product stewardship organization” from the \$5,000 that is to be retained by the department “for administration and enforcement costs.” Finally, RCW 70.275.050(3) states that producers participating in an independent plan must pay the full cost of operation of the plan, and “shall pay an annual fee of five thousand dollars to the department for administration and enforcement costs.” The first sentence of RCW 70.275.120 follows the same pattern by requiring producers to pay the department “annual fees to cover the cost of administering and enforcing this chapter.” Thus, it is clear that the “fees” the producers are to pay the department to cover the cost of administering and enforcing the chapter are distinct from the “financing” producers are required to provide for the product stewardship organizations’ own administrative and operational costs.

The second sentence in RCW 70.275.120 also refers to “fees” and is not separated into its own paragraph or subsection, nor is presented with any clear signal to differentiate its subject from that of the sentence it follows. Thus, the only plausible interpretation is that the sentence refers to the department’s prerogative to prioritize *its own* work to administer and enforce the chapter—and is not a directive for Ecology to nullify part

of the producers' statutorily imposed stewardship requirements in the event of inadequate financing from producers. The word "program" in RCW 70.275.120 is used in the sense of the department's program for administration and enforcement of the chapter, and not to refer to a "product stewardship program," let alone to the even more specific "department-contracted product stewardship organization" as NEMA argues. See RCW 70.275.020 ("The definitions in this section apply throughout this chapter unless context clearly requires otherwise."). See e.g., *State v. Flores*, 164 Wn.2d 1, 12, 186 P.3d 1038 (2008) ("a court should take into consideration the meaning naturally attaching to [words] from the context, and . . . adopt the sense of the words which best harmonizes with the context.").

It is important to note that RCW 70.275.120 is separated by considerable distance from sections .030, .040, and .090, where the specific requirements of each product stewardship program are stated, and from section .050 where the allegedly limited source of financing is provided for. If the Legislature had wanted to make it clear that the product stewardship requirements were contingent on a limited source of funding, that qualification would surely have been included in one of those other sections.

Finally, the statute states that it is to be "liberally construed to

carry out its purposes and objectives.” RCW 70.275.900. “The purpose [of the law] is to achieve a statewide recycling goal of recycling all end-of-life mercury-containing lights by 2020” and that producers of mercury-containing lights “must play a significant role¹¹ in financing no-cost collection and processing programs for mercury-containing lights.” RCW 70.275.010(3), (4). NEMA’s suggestion that the producers’ responsibility to finance the product stewardship program can be limited or capped is contrary to the legislature’s stated purpose.¹²

NEMA failed to meet its burden of demonstrating that Ecology’s rules are in conflict with the intent and purpose of the legislation or that its interpretation better advances the overall legislative purpose. As a result, the court should reject NEMA’s claim that Ecology’s rules are invalid and reverse the trial court. *Evergreen Freedom Found.*, 140 Wn.2d at 635; *Weyerhaeuser*, 86 Wn.2d at 321. Even if the Court were to conclude that both NEMA and Ecology propose reasonable interpretations of the statute, because Ecology’s interpretation best advances the overall legislative purpose of full and direct producer financing of product stewardship

¹¹ The reason the statute refers to producers playing a “significant” rather than exclusive role is, at least in part because the findings section envisions “increased support for [existing] household hazardous waste facilities” as well as “a network of additional collection locations” funded by producers. RCW 70.275.010(3).

¹² Ecology’s obligation to report back annually to the legislature including any “recommendations for changes to the provisions of this chapter,” RCW 70.275.140(3), does not evidence a legislative intent to change producers’ financing obligation over time. The section says nothing about financing.

according to the producer's fair share, Ecology's rules should be upheld. *Weyerhaeuser*, 86 Wn.2d at 321.

D. The Legislative History Does Not Alter the Express Language of the Statute

Because the language of the statute is unambiguous, it is unnecessary for the court to look to legislative history. "A statute is ambiguous only if susceptible to two or more reasonable interpretations, but a statute is not ambiguous merely because different interpretations are conceivable." *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005). However, if the court should find it necessary to resolve any ambiguity in the statute through reference to legislative history, the court must nonetheless conclude that: (1) prior drafts of the bill do not support NEMA's argument about the meaning of the statute, (2) the committee testimony NEMA cites should be assigned little weight, and is contradicted by the language of the statute, and (3) the agency staff's subjective belief about the meaning of the bill at the time of its enactment is even less probative of legislative intent.

In the court below, NEMA argued that changes in successive drafts of the bill support its preferred statutory construction. NEMA points to differences between prior bill drafts and the version of the bill that was ultimately enacted—a House Environmental Health Committee striking

amendment¹³—to argue that the legislature’s intent was to restrict producers’ financing responsibility to a fee of \$15,000 annually. Contrary to NEMA’s arguments, the prior bill drafts show that language now codified in RCW 70.275.020, .030, and .040, regarding the producers’ responsibility to fully finance product stewardship costs, was drafted with the intention Ecology’s rules ascribe to it: that producers must collectively, and in proportion to their fair share, provide the funds necessary to achieve the requirement of statewide collection, transportation, recycling and disposal of mercury-containing lights. In every draft prior to the final, including ESSB 5543¹⁴ (the bill that immediately preceded the striking amendment), there is no dispute that producers would have been obligated to finance the full cost of the statutorily required product stewardship program, at least after a specified payment for the first year of operation. Much of the language of ESSB 5543 is identical to the enacted bill—sections 2, 3, 4, 5 and 11 of ESSB 5543 were precursors to RCW 70.275.020, .030, .040, .050, and .120, respectively. The only one of those sections that was significantly altered by the House committee’s striking amendment was Sec. 5 (precursor to RCW 70.275.050). This shows that it was undeniably the legislature’s intent under sections 2, 3, 4, and 11 of ESSB 5543 (codified at

¹³ CP 131-148

¹⁴ CP 113-130.

RCW 70.275.020, .030, .040, and .120), that producers participating in the department-contracted product stewardship program should be collectively responsible for fully funding the product stewardship program required in section 3 (now RCW 70.275.030).

Under ESSB 5543, the language now in RCW 70.275.050(2) was present, stating that “Each producer shall pay fifteen thousand dollars to the department to contract for a product stewardship program to be operated by a product stewardship organization.” Under ESSB 5543, this language plainly referred to a provisional, initial payment to Ecology by producers for the purpose of contracting with a product stewardship organization. This direct payment to Ecology was to be supplemented by fees assessed by the department-contracted product stewardship organization that might be higher or lower than \$15,000 per producer to cover the cost of implementing the plan.¹⁵ Consequently, the language requiring the \$15,000 per producer payment includes no reference to being annual, and the striking amendment did not change this.

¹⁵ Compare first sentence in ESSB 5543 Sec. 5(2) (“Producers participating in the stewardship program required under 3(2)(a) of this act [i.e., the department-contracted product stewardship program] must be assessed a fee *by the stewardship organization* to cover the cost of implementing the plan”) with the next sentence (“Each producer shall pay fifteen thousand dollars *to the department* to contract for a product stewardship organization.”). The juxtaposition of these sentences shows that the \$15,000 payment to the department was to *initiate* the contract with the product stewardship organization, after which, assessments would be made by the organization itself, rather than Ecology.

Instead, the final striking amendment deleted language from section 5 of ESSB 5543¹⁶ that would have expressly required the department-contracted stewardship organization to assess producers a fee to cover the cost of implementing the plan, and that would have required Ecology to adopt rules governing how the product stewardship organization should set its assessments either higher or lower than the initial payment of \$15,000 per producer if “product stewardship program costs exceed available revenue.” But significantly, the striking amendment added no words of limitation with regard to the \$15,000 payment to Ecology, nor did it indicate that the payment should be annual.

The only dispute, therefore, concerns whether the deletion of language in what is now RCW 70.275.050 somehow transformed the producers’ plenary funding responsibility for necessary collection, transportation, recycling and disposal costs—expressed in RCW 70.275.020(14), (16); RCW 70.275.030(1), (3), (5); and RCW 70.275.050(1)—into a fixed and uniform annual fee or tax. NEMA’s argument is that, through a subtle change in some of the bill’s internal details, the meaning of the entire statutory scheme was transformed from one in which producers were directly responsible for stewardship of their products, including providing sufficient financing for all

¹⁶ Compare CP 120-121 and CP 138.

aspects of product stewardship required in the law, to one in which producers are simply allowed to pay a fixed annual fee or tax and all product stewardship responsibilities are transferred to the state agency.

In essence, NEMA equates the striking amendment's deletion of language from the final bill as if it were an express prohibition against Ecology establishing a mechanism for producers' ongoing funding of the department-contracted product stewardship program. NEMA's argument ignores Ecology's broad and unqualified authority to "adopt rules necessary to implement . . . this chapter," RCW 70.275.140(1). NEMA also makes the same faulty use of legislative history that the court rejected in *Baker v. Snohomish County Planning Dep't*, 68 Wn. App. 581, 841 P.2d 1321 (1993). In *Baker*, the issue presented was whether the state Surface Mining Act preempted local regulation of surface mining. While the Act did not explicitly state that local regulation was preempted, the parties advocating for that interpretation relied on legislative history which showed that prior drafts of the enacted bill had explicitly provided for a local government regulatory role, while that provision was deleted from the final. The court rejected this approach to statutory construction:

The legislative history, at most, establishes that at one time each house of the Legislature intended to explicitly recognize concurrent local control but that such provision was omitted from the statute. An intentional decision to forbid any local control does not follow as a matter of legal

logic from a decision not to explicitly provide for local control.

Id. at 588.¹⁷ For these same reasons, the court should reject NEMA’s similar argument.

The prior bill drafts particularly undermine NEMA’s argument that the second sentence in RCW 70.275.120 requires Ecology to scale down the department-contracted stewardship program in the event of inadequate revenue. That is because the sentence was not added by the striking amendment, but was already present in Section 11 of ESSB 5543. As with all prior drafts, ESSB 5543 imposed full financing responsibility on producers for necessary product stewardship costs. *Compare* ESSB 5543 Sections 5(4) and 11. Thus, the prior bill draft supports the plain language interpretation that the sentence is referring to Ecology’s authority to prioritize *its own administrative and enforcement work* if fees collected from producers to cover those costs are inadequate.¹⁸

¹⁷ Although the court in *Baker* also relied for its reasoning on an interpretive presumption against state preemption of local regulation, this court should likewise employ a presumption against interpretations of RCW 70.275 that would impede the stated purposes and objectives of the statute, which explicitly include “a statewide goal of recycling all end-of-life mercury-containing lights by 2020,” through “the development of a comprehensive, safe, and convenient collection system that includes . . . a network of additional collection locations,” and that “[p]roduct producers must play a significant role in financing no-cost collection and processing programs for mercury-containing lights.” RCW 70.275.010(3), (4). By its terms, RCW 70.275 “must be liberally construed to carry out its purposes and objectives.” RCW 70.275.900.

¹⁸ Further, Sec. 11 of ESSB 5543 replaced language in a prior draft that specified an “initial annual fee” to cover the department’s cost of administering and enforcing the chapter, then stated that the “department shall adopt rules to establish fees in amounts to fully recover and not exceed expenses *incurred by the department* to

NEMA's legislative history arguments focus on oral statements at two House committee hearings¹⁹ as support for NEMA's assertion that the legislature intended to cap or restrict the producer's responsibility. Ecology concedes that this appears to have been the subjective intent of the Ecology and King County witnesses and of the NEMA lobbyist who testified at the House committee hearing on the striking amendment. However, whatever those individuals may have intended or thought about the effect of the striking amendment, their subjective intentions simply are not reflected in the statute that was voted into law. NEMA's interpretation is at odds with the interpretation that a legislator or member of the public who was not present at those committee hearings would likely reach upon reading the act as a whole. In addition, NEMA's argument relies on a philosophy of statutory construction that would elevate the enforcement of

implement this chapter for the third and ensuing years." (Emphasis added.) This language is replaced in ESSB 5543, and in the enacted bill, with the language providing that Ecology "may prioritize the work to implement this chapter if fees are not adequate to fund all costs of the program." This history further clarifies that the subject of the sentence is Ecology's administrative and enforcement work—not the work of the department-contracted product stewardship organization.

¹⁹ February 17, 2010, videotaped statement of Pam Madsen, Staff Counsel, House Environmental Health Committee, stating that producers would pay \$15,000 annually to Ecology under the bill. CP 150; February 17, 2010, videotaped testimony of Jay Sheppard, of Ecology, stating that "[w]e still have a little concern about 5543 being able to generate enough revenue to cover the costs of the contracted program" CP 152; February 25, 2010, videotaped statement of Pam Madsen, Staff Counsel, House Environmental Health Committee, describing the \$15,000 payment as an annual fee. CP 154; February 25, 2013, videotaped testimony of Margaret Shields, Local Hazardous Waste Program, King County, stating that, "as a result of negotiations with the Electrical Manufacturer's Association, the amount that lighting producers will contribute to the contracting product stewardship organization has been defined as a set amount." CP 156.

a private “deal”—evidenced only by oral statements before a limited number of House members—above the public statutory language. That philosophy simply has not been embraced by Washington courts. *In re Marriage of Kovacs*, 121 Wn.2d 795, 807, 854 P.2d 629 (1993) (“the statements of individual lawmakers and others before the Senate Judiciary Committee cannot be used to conclusively establish the intent of the Legislature as a whole”); *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 461, 832 P.2d 1303 (1992) (“the comments of a single legislator are generally considered inadequate to establish legislative intent”); *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 64, 821 P.2d 18 (1991) (“testimony before a legislative committee is given little weight”). “Given our reluctance to discern legislative intent from the testimony of a single legislator, we find the view of a lobbyist to be of even less utility in discerning *the Legislature’s* intent in enacting a bill.” *Western Telepage, Inc., v. City of Tacoma*, 140 Wn.2d 599, 611, 998 P.2d 884 (2000) (emphasis in original, internal citation omitted).

An agency staff’s interpretation of the bill at the time it was being considered before the legislature carries little interpretive weight. In *Tobin v. Dep’t of Labor & Indus.*, 145 Wn. App. 607, 187 P.3d 780 (2008), the Court of Appeals rejected the state agency’s use of the testimony of its deputy director and of other interested parties at the

legislative committee hearing in support of the bill (along with the agency's proposed legislation summary, and statements in the agency's contemporaneous fiscal analysis of the bill) as legislative history to prove the agency's preferred interpretation of the statute. *Id.* at 617. The court reasoned:

Although there was some discussion of [the interpretive issue now in dispute before the court] by witnesses before the committees, it does not appear that any of these discussions took place before the full house or senate. More importantly, these discussions do not appear in the legislative report for the bill or bill analysis. [Citing the final bill report.] We note the testimony of an interested party in support of a bill is not suggestive of the legislature's intent in enacting the statute.

Id. (citing *Marriage of Kovacs and Wilmot, supra*).

Finally, the committee staff attorney's oral reference to a "\$15,000 annual fee" (transcribed from video by NEMA's lawyers²⁰) is simply contrary to the statutory language. The final bill report does not reflect her mistaken description of the \$15,000 payment as an "annual fee." CP 175-177.

Properly considered, the legislative history does not support NEMA's proposed interpretation of the producer funding requirements under RCW 70.275.

²⁰ CP 149-150, 153-154.

E. NEMA Fails to Show that Ecology Failed to “Substantially Comply” with the Requirement to Prepare a Concise Explanatory Statement

NEMA asserts that Ecology’s rules should be invalidated because of an alleged inadequacy in Ecology’s “concise explanatory statement” for the rules the agency adopted. In fact, the record shows that Ecology more than substantially complied with the requirement to prepare a concise explanatory statement for its rules. Therefore the rules should be upheld.

RCW 34.05.325(6) requires that before an agency files an adopted rule with the code reviser, the agency must prepare a concise explanatory statement of the rule, “[i]dentifying the agency’s reasons for adopting the rule,” “[d]escribing differences between the text of the proposed rule as published . . . and the text of the rule as adopted, other than editing changes, stating the reasons for differences” and “[s]ummarizing all comments received regarding the proposed rule, and responding to the comments by category or subject matter, indicating how the final rule reflects agency consideration of the comments, or why it fails to do so.”

Ecology published a notice of proposed rules in accordance with RCW 34.05.320 on June 26, 2012. Rulemaking File (RF) 215-247. Numerous interested parties, including NEMA, submitted comments on the proposed rules. RF 273-333. NEMA’s comments began with a six

page legal argument as to why “several paragraphs in the proposed rule that address the financing of the stewardship program . . . exceed the authority of the department established by the legislature” and “conflict with the clear statutory provisions enacted in RCW 70-275-020 [sic] *et seq.*” RF 317-322. The thrust of NEMA’s argument, as here, was that the department-contracted stewardship program can be funded only by an annual payment of no more than \$15,000 per producer. And as here, one of NEMA’s arguments in support of this interpretation (relegated to a footnote in its legal analysis, RF 320, n.2) was that the second sentence of RCW 70.275.120 gives “specific authority” to Ecology to “prioritize the work” (i.e., reduce the scale or scope of the plan) of the department-contracted product stewardship organization in the event that the allegedly annual \$15,000 per producer payment is inadequate. After its legal arguments, NEMA’s comments go on, under a section titled “Specific Comments,” to provide recommendations on the wording of various provisions of the proposed rules. RF 323-324.

Ecology’s concise explanatory statement, RF 354-463, includes a “Commenter Index” in which Ecology’s numbered responses to comments, by subject matter, are cross referenced to the comments of particular commenters. RF 380. From this index and from Ecology’s responses to various categories of comments received, it is apparent that

Ecology responded to all of NEMA's self-described "specific comments" on the draft rules, making changes in response to eight and declining in the case of one proposal.

NEMA specifically asserts that Ecology failed to respond to NEMA's recommendation that Ecology should explain how it would prioritize the work of the department-contracted product stewardship program if revenue from the \$15,000 per producer payment (which NEMA asserted to be annual and exclusive) proved inadequate. RF 317. It is true that Ecology's concise explanatory statement does not directly respond to NEMA's recommendation by explaining why Ecology did not include such an explanation in the final rule. However, Ecology's final rules clearly reflect Ecology's interpretation that the \$15,000 per producer payment is not ongoing or exclusive and that producers remain collectively responsible for paying all costs necessary for the department-contracted stewardship program to provide the collection sites, transportation, and recycling required by the law. Thus, Ecology did not ignore NEMA's comments or arguments – Ecology simply disagreed with NEMA's legal position. *See Anderson, Leech, & Morse, Inc. v. Liquor Control Bd.*, 89 Wn.2d 688, 693, 575 P.2d 221 (1978). Ecology's final rule shows that Ecology thoroughly considered the financing issue and

reached a different interpretation than that asserted by NEMA in its comments.

The most that Ecology might have stated in response to NEMA's comment would have been that the agency was not including NEMA's recommendation in the final rule because it was based on an incorrect interpretation that producers' financing responsibility is limited to paying Ecology \$15,000 each per year. Little would have been served by such a statement. NEMA's comments show that the association was already aware of Ecology's position by, for example, taking issue with the draft rules' quotation of statutory language requiring every producer to "fully finance and participate" in a product stewardship program. RF 321. To the extent that NEMA was entitled to the full details of Ecology's legal analysis for why the agency did not adopt financing provisions reflecting NEMA's preferred interpretation of the statute, those details have been fully aired through this litigation.

Although a court will invalidate a rule if it "was adopted without compliance with statutory rule-making procedures," RCW 34.05.570(2)(c), only substantial compliance is required. RCW 34.05.375. Therefore, if an agency fails to strictly comply with such procedures, that should not result in invalidation of a rule. NEMA can cite to no case law in which a rule was invalidated because an agency did not

include in its concise explanatory statement a sufficiently detailed legal rebuttal of a commenter's argument that an agency lacked authority for its proposed rule.

In *Anderson, Leech, & Morse, Inc.*, 89 Wn.2d at 692-94, decided under the prior Administrative Procedure Act (APA), the Court declined to invalidate a rule of the Liquor Control Board. The Court was satisfied that, in response to commenter's objection that the regulation was not within the board's authority, the board gave a statement of the principal arguments for and against the regulation and cited to a general statute in the board's enabling act. In *Somer v. Woodhouse*, 28 Wn. App. 262, 623 P.2d 1164 (1981), the court rejected a request to invalidate a rule, also under the prior APA, based on the alleged inadequacy of the concise explanatory statement. The court held that the statutory purpose of the concise statement was satisfied when the agency provided the necessary information through discovery in the litigation. *Id.* at 272-73. Consistent with these cases, this court should deny NEMA's request to invalidate Ecology's rules based on the alleged inadequacy of the Ecology's concise explanatory statement.

Ecology substantially complied with the requirement to prepare a concise explanatory statement for its rules and the Court should decline to invalidate the rule.

VI. CONCLUSION

Ecology has adopted rules to implement the Mercury-Containing Lights law that provide a mechanism for producers to meet their statutory obligation to fully finance and provide product stewardship for their products. Ecology's rules adopt a reasonable interpretation of the statute and serve the legislative goals of one hundred percent recycling of mercury-containing lights and protection of the public from needless exposure to toxic mercury. NEMA fails to meet its burden of showing compelling reasons that the rule is in conflict with the intent and purpose of the legislation. This court should uphold Ecology's rules and deny NEMA's petition to declare the rules invalid.

RESPECTFULLY SUBMITTED this 5th day of September, 2013.

ROBERT W. FERGUSON
Attorney General



JONATHAN C. THOMPSON,
WSBA #26375
Assistant Attorney General

Attorneys for Appellant
State of Washington
Department of Ecology
P.O. Box 40117
Olympia, WA 98504-0117
(360) 586-2668

NO. 45022-4-II
**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

NATIONAL ELECTRICAL
MANUFACTURERS ASSOCIATION,
a non-profit trade association,

Respondent,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Appellant.

CERTIFICATE OF
SERVICE

2013 SEP -6 PM 1:29
STATE OF WASHINGTON
BY _____
DEPT. OF ECOLOGY

FILED
COURT OF APPEALS
DIVISION II

Pursuant to RCW 9A.72.085, I certify that on the 5th day of September 2013, I caused to be served Department of Ecology's Opening Brief in the above-captioned matter upon the parties herein as indicated below:

JOHN BJORKMAN
KARI VANDER STOEP
MARIE QUASIUS
K & L GATES LLP
925 FOURTH AVENUE, STE 2900
SEATTLE WA 98104-1158

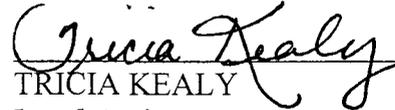
U.S. Mail
 State Campus Mail
 Hand Delivered
 By Email:

john.bjorkman@klgates.com
kari.vanderstoep@klgates.com
marie.quasius@klgates.com
ben.mayer@klgates.com
kathryn.jacobson@klgates.com

the foregoing being the last known address.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 5th day of September 2013, in Olympia, Washington.


TRICIA KEALY
Legal Assistant