

NO. 45022-4

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

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

Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Appellant.

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**DEPARTMENT OF ECOLOGY'S REPLY BRIEF**

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**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. ARGUMENT .....3

    A. Ecology Was Not Required To Assign Error To Each Step In The Trial Court’s Legal Reasoning And None Of The Trial Court’s Superfluous Conclusions Have Become The “Law Of The Case” .....3

    B. While The Court Need Not Defer To Ecology Regarding The Scope Of Its Authority, Deference Is Owed To How Ecology Chose To Fill Statutory Gaps .....7

    C. The Non-Recurring Charge That Producers Must Pay Ecology Under Section .050(2) Is Most Reasonably Interpreted As *Part* Of A Producer’s Obligations Under RCW 70.275, And Not The Full Extent Of Those Obligations.....8

        1. Producers’ responsibilities under the law are broader than the payment of a fee to Ecology.....9

        2. Subsection .050(2)’s \$15,000 payment is not an exclusive statement of a producers’ stewardship obligation for its products.....12

    D. The \$15,000 Payment Required Of A Producer Under Section .050(3) Is Not An “Annual Fee” .....16

    E. The Second Sentence In Section .120 Concerns Ecology’s Prioritization Of Its *Own Work* To Implement The Chapter, Not The Producers’ Or The Department-Contracted Stewardship Organization’s Administrative And Operational Costs.....18

    F. NEMA’s Assertion That RCW 70.275 Includes A Legislative Purpose To Limit Producers’ Financial Obligations Out Of Concern For The Availability Of Mercury-Containing Lights Is Unfounded.....21

G. NEMA And Ecology Agree That It Is Unnecessary For  
The Court To Reach The Question Of The Adequacy Of  
Ecology's Concise Explanatory Statement, Albeit For  
Different Reasons.....24

III. CONCLUSION .....25

## TABLE OF AUTHORITIES

### Cases

<i>Adams v. Dep't of Soc. &amp; Health Servs.</i> , 38 Wn. App. 13, 683 P.2d 1133 (1984).....	3
<i>American Home Assurance Co. v. Cohen</i> , 124 Wn.2d 865, 881 P.2d 1001 (1994).....	22
<i>Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed. 2d 694 (1984).....	8
<i>Concerned Coupeville Citizens v. Town of Coupeville</i> , 62 Wn. App. 408, 814 P.2d 243 (1991).....	4
<i>Greater Harbor 2000 v. City of Seattle</i> , 132 Wn.2d 267, 937 P.2d 1082 (1997).....	5
<i>Hama Hama Co. v. Shorelines Hearing Board</i> , 85 Wn.2d 441, 536 P.2d 157 (1975).....	7, 8, 13
<i>Johnson v. County of Kittitas</i> , 103 Wn. App. 212, 11-P.3d 862 (2001).....	4
<i>King Aircraft Sales, Inc. v. Lane</i> , 68 Wn. App. 706, 846 P.2d 550 (1993).....	5
<i>Lake v. Woodcreek Homeowners Ass'n</i> , 169 Wn.2d 516, 229 P.3d 791 (2010).....	9, 12
<i>Probst v. State Dep't of Retirement Systems</i> , 167 Wn. App. 180, 271 P.3d 966 (2012).....	7
<i>State v. Flores</i> , 164 Wn.2d 1, 186 P.3d 1038 (2008).....	17
<i>State v. Grimes</i> , 92 Wn. App. 973, 966 P.2d 394 (1998).....	5

*Tuerk v. Dep't. of Licensing*,  
 123 Wn.2d 120, 864 P.2d 1382 (1994)..... 7

**Statutes**

RCW 70.275 ..... 1, 2, 5, 7, 9, 11, 21-22

RCW 70.275.020 ..... 9, 12

RCW 70.275.020(10)..... 11

RCW 70.275.020(14)..... 10, 11, 15, 16

RCW 70.275.020(16).....10-11, 15-16, 20

RCW 70.275.020(24)..... 10, 15

RCW 70.275.030 ..... 9, 12

RCW 70.275.030(1).....9-11, 13, 15

RCW 70.275.030(2)..... 6

RCW 70.275.030(3)..... 10, 13, 15

RCW 70.275.030(5)..... 24

RCW 70.275.030(6)..... 15, 16

RCW 70.275.040 ..... 24

RCW 70.275.050 ..... 17, 21

RCW 70.275.050(2).....1, 6, 8, 12-13, 16-20

RCW 70.275.050(3)..... 14, 16, 20

RCW 70.275.090 ..... 10, 24

RCW 70.275.120 ..... 6, 8, 17-21

RCW 70.275.140(1).....	12
RCW 70.275.140(3)-(6).....	22
RCW 70.275.140(5).....	22
RCW 70.95N.300(2).....	16

**Other Authorities**

Webster's Third New International Dictionary 833 (2002) .....	19
---	----

**Rules**

General Order 1998-2 .....	4
RAP 10.3(a)(4).....	4
RAP 10.3(g) .....	4

**Regulations**

WAC 173-910.....	1, 5
WAC 173-910-310.....	2, 11
WAC 173-910-310(3).....	24

## I. INTRODUCTION

Under RCW 70.275, each producer of mercury-containing lights sold in the state must fulfill the product stewardship obligations imposed on it by statute. Key among those obligations is a requirement that each producer “pay all administrative and operational costs associated with their program” for the collection of that producer’s used products from consumers, and a fair share of orphan products. Producers must “fully finance and participate” in their program, which must ensure that the toxic mercury is recovered from the lights collected, preventing release of the mercury to the environment. These requirements apply regardless of whether a producer participates in the default department-contracted product stewardship program, or obtains Ecology approval for an independent producer program.

The Department of Ecology, under the legislature’s express grant of rulemaking authority, has established a mechanism for each producer to fulfill its statutory obligations. WAC 173-910. Ecology is using revenue from the one-time (not annual) \$15,000 payment that was required of each producer by RCW 70.275.050(2) to retain a default product stewardship organization in which producers who have not obtained approval for an independent program may participate. Those producers are thereafter obligated to finance the department-contracted organization directly,

through the process established by WAC 173-910-310. Ecology bases its rules on the plain language of the statute, taken as a whole and filling gaps consistent with the statute's stated purpose "to achieve a statewide goal of recycling all end-of-life mercury-containing lights by 2020."

The National Electrical Manufacturers Association ("NEMA") proposes an interpretation of RCW 70.275 that would significantly limit the financial burden its members could be required to shoulder toward the statute's stated purpose. Under NEMA's interpretation, a producer's exclusive obligation is to make an annual payment of \$15,000 to Ecology, and Ecology is to try to accomplish as much collection and recycling of mercury-containing lights as it can with that revenue. NEMA relies heavily on evidence of a "deal" between NEMA's lobbyists and Ecology and King County staff members, and on those individuals' understanding in regard to an amendment to the bill which was enacted as RCW 70.275. NEMA's interpretation confuses the NEMA and agency representatives' understanding during the legislative process with the *legislature's* intent, and ignores or seeks to minimize and disregard statutory language that contradicts NEMA's preferred interpretation. Regardless of the expectations of the individuals who spoke in favor of an apparently hastily-prepared bill amendment before a House committee, those individuals' understanding cannot trump the plain meaning of the statutory

scheme, considered as a whole.

Ecology asks the Court to uphold its rules, which are based on a reasonable interpretation of the statute, and which serve the statute's overall purpose.

## II. ARGUMENT

### A. **Ecology Was Not Required To Assign Error To Each Step In The Trial Court's Legal Reasoning And None Of The Trial Court's Superfluous Conclusions Have Become The "Law Of The Case"**

Ecology was not required to make separate assignments of error for each step in the trial court's mistaken interpretation of the statute. NEMA argues that Ecology's assignments of error are narrowly limited to only some of the trial court's "conclusions of law" and that certain conclusions not specifically set out in the assignments of error section of Ecology's opening brief have therefore become the "law of the case." This is incorrect.

When a trial court reviews an administrative agency action, the trial court need not enter findings of fact and conclusions of law. *See, Adams v. Dep't of Soc. & Health Servs.*, 38 Wn. App. 13, 15, 683 P.2d 1133 (1984). The appellate court treats any findings and conclusions entered by the trial court as superfluous and determines *de novo* whether the administrative agency's action was erroneous as a matter of law. *Adams*, 38 Wn. App. at 15. *De novo* review assumes that the appellate

court will make its own objective determination based on the record and the applicable law, without regard to the trial court's oral rulings or any written findings of fact and conclusions of law. *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn. App. 408, 413, 814 P.2d 243 (1991). A litigant need not assign error to superfluous findings. *Id.*

Although RAP 10.3(a)(4) requires "A separate concise statement of each error a party contends was made by the trial court," even outside the Administrative Procedure Act context, it does not follow that an appellant must specifically assign error to every step in the trial court's legal reasoning.<sup>1</sup> *See Johnson v. County of Kittitas*, 103 Wn. App. 212, 216 11 P.3d 862 (2001) (appellants' failure to assign error to trial court's specific conclusions of law presented no bar to appellate review of legal issues where appellant assigned error generally to trial court's ultimate conclusion of law regarding the meaning of a particular statute, and appellant's brief articulated his challenge to the trial court's interpretation of that statute). Moreover, whether or not a party sets forth assignments of error for each issue on appeal, the Court of Appeals will reach the merits if the issues are reasonably clear from the brief, the opposing party has not

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<sup>1</sup> In General Order 1998-2 In RE The Matter of Assignments of Error, this Court waived the requirement of a prior version of RAP 10.3(g) that an appellant's brief must separately assign error to each challenged jury instruction, finding of fact, or conclusion of law, and allowed an appellant instead to use a single assignment of error to identify more than one challenged jury instruction, finding of fact, or conclusion of law.

been prejudiced, and Court has not been overly inconvenienced. *State v. Grimes*, 92 Wn. App. 973, 978, 966 P.2d 394 (1998).

The cases cited by NEMA are not to the contrary. *King Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706, 712-716, 846 P.2d 550 (1993) (chief issue on appeal was the remedy for a breach of contract and unchallenged findings of fact and conclusions of law related to the breach itself were law of the case). *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 279-80, 937 P.2d 1082 (1997) (in appeal from summary judgment, appellant's failure to identify any dispute of fact meant the trial court's conclusion that there were no material facts in dispute was the law of the case). In contrast to these cases, Ecology here clearly has controverted and provided argument demonstrating the error of the trial court's interpretation of RCW 70.275.

It was clear from the Ecology's briefing as a whole that Ecology is asking this Court to uphold WAC 173-910 in its entirety, and that those rules interpret the *entire* \$15,000 charge as a one-time payment, not an annual fee or cap on producer financing. Opening Brief (Op. Br.) at 9, 25, 28. Given Ecology's clear arguments, NEMA cannot assert any prejudice. In its response brief, NEMA restated the assignment of error, as it asserts

Ecology should have done, and responded to it accordingly.<sup>2</sup>

Similarly, NEMA argues Ecology failed to assign error to the trial court's conclusion of law No. 4, which states that the phrase "the work to implement this chapter," in the second sentence of section .120, "includes all of the Standard Plan program work and not merely Ecology's administration and enforcement work." Again, it was sufficiently clear from Ecology's broad second assignment of error, Op. Br. 4, that Ecology disputes NEMA's and the trial court's interpretation of the second sentence in section .120. This necessarily includes the phrase highlighted by the trial court's conclusion of law No. 4.

Finally, NEMA argues that Ecology failed to specifically assign error to conclusion of law No. 7, that the "Law as presently drafted does not entitle Ecology to collect market share data from producers." Again, this issue is subsumed in the broader statutory interpretation issue. If the Court concludes that Ecology is authorized to adopt rules specifying that producers must finance their product stewardship organizations in proportion to their market share (or other equitable allocation), then it

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<sup>2</sup> Response Br. 15 ("Ecology's first Assignment of Error asserts that the \$15,000 Standard Plan fee the Legislature established in RCW 70.275.030(2) is not a limit on what Ecology can charge, and is not an annual fee."); *see also, Id.* at 31 (addressing Ecology's argument that \$5,000 portion of the section .050(2) payment is one-time, and there is a gap regarding the amount a Standard Plan producer must pay Ecology for administration and enforcement after the \$5,000 payment).

follows that Ecology is also authorized to require producers to furnish sales data to determine if this requirement is being met.<sup>3</sup>

Ecology has not waived appeal of or conceded any aspects of the trial court's superfluous "conclusions of law."

**B. While The Court Need Not Defer To Ecology Regarding The Scope Of Its Authority, Deference Is Owed To How Ecology Chose To Fill Statutory Gaps**

NEMA correctly states that the party contesting the validity of an agency rule carries the burden of proof, but then incongruently asserts that "[the court] is not obligated to give any particular consideration to Ecology's interpretation." Response Brief (Resp. Br.) at 6. The standard of review is more nuanced than NEMA indicates.

Ecology agrees that the Court need not defer to Ecology regarding the scope of the agency's authority. *Probst v. State Dep't of Retirement Systems*, 167 Wn. App. 180, 186, 271 P.3d 966 (2012). This includes whether the statute in question speaks to a particular issue, or instead leaves the matter to the agency to address through rulemaking. However, if the court finds that RCW 70.275 contains gaps for the agency to fill through rulemaking, then *Hama Hama Co. v. Shorelines Hearing Board*, 85 Wn.2d 441, 448-9, 536 P.2d 157 (1975) instructs that deference is

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<sup>3</sup> "When a power is granted to an agency, everything lawful and necessary to the effectual execution of the power is also granted by implication of law." *Tuerk v. Dep't. of Licensing*, 123 Wn.2d 120, 125, 864 P.2d 1382 (1994) (internal quotations and citations omitted).

owed to Ecology's "gap filling" choices, as the agency charged with implementation of the statute.<sup>4</sup> *See also, Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed. 2d 694 (1984) (if the court determines the statute is "silent or ambiguous" with respect to a certain issue, "the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation").

If the Court agrees that the legislature left gaps in the statute to be filled by the agency through rulemaking, and that those gaps include how producers can meet their obligation to fully finance and pay all administrative and operational costs of the product stewardship program in which they participate,<sup>5</sup> then the Court should give deference to how Ecology's rules fill these gaps. *Hama Hama*, 85 Wn.2d at 448-49.

**C. The Non-Recurring Charge That Producers Must Pay Ecology Under Section .050(2) Is Most Reasonably Interpreted As Part Of A Producer's Obligations Under RCW 70.275, And Not The Full Extent Of Those Obligations**

NEMA's proposed statutory analysis begins from a pair of false premises: (1) that the only language that possibly supports Ecology's

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<sup>4</sup> NEMA points to no case law holding that deference is only due to Ecology on questions of a highly technical nature. In fact, *Hama Hama Co.* contradicts so narrow an interpretation. 85 Wn.2d at 448-49 (giving deference to Ecology's interpretation that the Shorelines Management Act's appeal period for permitting decisions is 45 days).

<sup>5</sup> Another gap for Ecology to fill is the amount of the annual fee, required by RCW 70.275.120, to cover Ecology's administration and enforcement costs for producers that opt to participate in the department-contracted product stewardship organization.

interpretation of producers' financing obligations is subsection .030(1)'s requirement that "[e]very producer of mercury-containing lights" sold in the state "must fully finance and participate in a product stewardship program for that product," and (2) that by providing for a department-contracted product stewardship organization, the statute transfers producers' stewardship obligations wholly onto Ecology to carry out with fee revenue. These two premises are contradicted by the language of the statute. As explained below, NEMA's proposed statutory interpretation, which relies on them, fails to give effect to essential definitional and directive provisions of RCW 70.275. Ecology's interpretation, in contrast, gives meaning and effect to "the statutory scheme as a whole," but without adding words "where the legislature has chosen not to include them," *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 229 P.3d 791 (2010) (citations omitted).

**1. Producers' responsibilities under the law are broader than the payment of a fee to Ecology.**

The product stewardship obligations imposed on producers by RCW 70.275.020 and .030 are different and broader than a fixed payment to the State. The obligation to provide the product stewardship services

under an Ecology-approved plan<sup>6</sup> remains at all times on the producers. The law defines “product stewardship” as “a requirement for a producer” to manage and reduce adverse impacts of its products, “including financing and providing for the collection, transporting, reusing, recycling, processing, and final disposition” of its products. RCW 70.275.020(14). By definition, all product stewardship programs are “financed and provided by producers.” RCW 70.275.020(16). Each producer “must pay all administrative and operational costs associated with their program or programs.” RCW 70.275.030(3). And finally, a “stewardship organization,” regardless of whether it is independent or department-contracted, is “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).

Subsection .030(1)’s directive that each producer must “fully finance and participate in a product stewardship program” for its product is not an isolated statement, but a summation of the above provisions and of the directive that producers “must pay all administrative and operational costs associated with their program.” RCW 70.275.030(3).

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<sup>6</sup> RCW 70.275.090 (No producer may sell its lights in the state “unless the producer is participating in a product stewardship program under a plan approved by the department.”)

Despite what NEMA's suggests, Resp. Br. 18, there is no dispute that subsection .030(1)'s mandate to "fully finance and participate" in a product stewardship program for its product applies to *each* producer, rather than producers collectively. What is in dispute is whether each producer is only responsible to make a uniform annual payment to Ecology, as NEMA contends, or whether each producer is required to take full financial responsibility for the collection and recycling of its *own* products, plus a fair share of orphan products<sup>7</sup> as expressly stated in RCW 70.275.020(14) (producers responsible with regard to "their products") and RCW 70.275.020(16) (product stewardship program includes various services provided by producers in regard to "unwanted mercury-containing lights, including a fair share of orphan products.").

Ecology's rules give effect to the express provisions of RCW 70.275 by establishing a mechanism for direct producer financing of their product stewardship program in proportion to the producer's market share or other equitable allocation. WAC 173-910-310. Thus, when each producer fulfills its individual obligation, consumers should be able to drop off covered products free of charge at one of the mandated collection sites throughout the state, and an organization funded by producers should pay the costs of transporting and recycling.

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<sup>7</sup> RCW 70.275.020(10) (defining orphan products as those lacking a producer's brand).

**2. Subsection .050(2)'s \$15,000 payment is not an exclusive statement of a producers' stewardship obligation for its products.**

When viewed in broader context of the statute, it is illogical to view the \$15,000 payment required by subsection .050(2) as *defining* a producer's product stewardship financing and participation responsibilities.<sup>8</sup> The interpretation that gives meaning and effect to "the statutory scheme as a whole," but without adding words "where the legislature has chosen not to include them," *Lake*, 168 Wn.2d at 526, is that the \$15,000 payment is a one-time payment that is in addition to the producers' basic financing responsibilities in sections .020 and .030.

The legislature's directive to "adopt rules necessary to implement . . . this chapter", RCW 70.275.140(1), provides Ecology the authority to effectuate, in rule, the mandates contained in the definitions of "product stewardship," "product stewardship program," and "stewardship organization" in section .020, and section .030's requirement that producers must "fully finance and participate" and "pay all administrative and operational costs associated with their program or programs."

NEMA emphasizes that the \$15,000 payment in subsection .050(2) is required of producers by the mandatory word "shall," but this argument

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<sup>8</sup> This is the essence of NEMA's argument that even if "fully finance" is irreconcilable with the obligation to pay \$15,000, the latter would take precedence over the former based on the principle that the specific prevails over the general, and that provisions that are later in sequence prevail over those earlier in sequence. Resp. Br. 20.

misses the point. The real question is not whether the payment is *mandatory* (it assuredly is), but whether it is *exclusive*. Does it fully encompass producers' responsibilities under the law? It is unreasonable to conclude that a \$15,000 payment is all that is required of a producer.

Throughout its brief, NEMA uses the word "cap" and "annual fee" to refer to the \$15,000 payment, but it is telling that neither the word "cap" nor any synonym indicating exclusivity is present in subsection .050(2). Nor is the payment identified as "annual" or even as a "fee." Yet, in order to make such intention apparent, the law could easily have been drafted to so state.<sup>9</sup> Neither does the language of the balance of the statute demonstrate an intention for the \$15,000 payment to be exclusive—quite the contrary. *See, e.g.*, RCW 70.275.030(1), (3).

NEMA relies heavily on "legislative history" in its effort to convince the Court to read the omitted words "annual fee" into subsection .050(2) and to interpret that payment as a producer's exclusive obligation under the law. As stated in Ecology's Opening Brief, the prior drafts of the bill that was enacted do not support NEMA's argument about the meaning of the statute and are generally of limited utility. *Hama Hama*, 85 Wn.2d at 449-50 ("Successive bill drafts of a statute are not stages in

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<sup>9</sup> For example, the statute could state that "A producer's responsibility to finance and participate in a product stewardship program for its products shall be limited to an annual payment to the department of \$15,000."

its development” and the fact that one draft succeeded another “gives us little information about the final form”). The statements of stakeholders before the House committees, and the interpretation of Ecology staff around the time this bill was being considered and enacted, are of no value to explain an ambiguity in the bill. The asserted legislative history does not even include a statement of an individual legislator or any written analysis of legislative staff. The committee staff counsel’s oral reference to a \$15,000 annual fee in her introduction of the final bill before committee members is simply contradicted by the language of the statute. Whatever private agreement or understanding the NEMA and agency representatives believed they had struck in the legislative process is not reflected in the public words of the statute on which the full House and Senate voted.

NEMA argues that the exclusivity of the \$15,000 payment as it pertains to producers participating in the Standard Plan may be implied from language in subsection .050(3), which says (by contrast, under NEMA’s theory) that producers participating in an independent plan “must pay the full cost of operation.” While this argument has superficial appeal, it fails to consider other provisions of the statute, discussed above, specifying that *all* producers, whether they participate in the Standard Plan or an independent plan, must fully finance and pay all administrative and

operational costs of their respective programs, and that product stewardship is a mandate on producers, not Ecology. RCW 70.275.030(1), (3); .020(14), (16), (24).

In addition, it would be an absurd result if only those producers that took the initiative to meet their product stewardship obligations through an independent program were required to pay “the full cost of operation” of an approved program, while producers taking no initiative to come forward with their own plan only had to pay a fixed and uniform fee. If this were the case, there would be no incentive for a producer responsible, e.g., for 20 percent of the lights sold, ever to propose its own independent program when it could simply pay a “capped” \$10,000 per year for its product stewardship obligations. That is because even if the annual Standard Plan program only cost a total of \$300,000 per year (as NEMA appears to suggest it should)—a “fair share”<sup>10</sup> for a producer responsible for a 20 percent share of the lights in the marketplace would be \$60,000 (.20 x \$300,000).

NEMA attempts to dismiss the law’s “fair share” requirement as merely preventing an independent program from operating on the cheap. Resp. Br. 21. First, it is not accurate that the statute’s “fair share” concept

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<sup>10</sup> RCW 70.275.030(6) (“All product stewardship programs operated under approved plans must recover their fair share of unwanted covered products as determined by the department.”)

only applies among *programs*, as opposed to among individual *producers*. The very definitions of “product stewardship” and “product stewardship program” require *each producer* to finance and provide stewardship for “their products” “plus a fair share of orphan products.” RCW 70.275.020(14) and (16). Second, the requirement of subsection .030(6) that all product stewardship organizations “must recover their fair share” of products “as determined by the department” indicates an equitable allocation based on something like aggregate market share among the producers participating in each program.<sup>11</sup> The fair share requirements of RCW 70.275.020(16) and .030(6) belie NEMA’s assertion that a uniform \$15,000 per producer payment can define producers’ financing obligations. Producers’ obligations go beyond a payment to Ecology.

**D. The \$15,000 Payment Required Of A Producer Under Section .050(3) Is Not An “Annual Fee”**

NEMA argues that the law does not state that the \$15,000 payment imposed by subsection .050(2) is merely a one time fee. Yet, as Ecology explains in its opening brief, the language of the statute clearly shows that the legislature knew how to say “annual” when that is what it intended,

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<sup>11</sup> See RCW 70.95N.300(2) (concerning product stewardship of certain electronic products other than lighting) which provides for apportionment of charges among producers for that law’s standard plan “based on return share, market share, any combination of return share and market share, or any other equitable method.”

and the case law is abundant for the proposition that a court may not, under the guise of statutory interpretation, supply a word that the legislature has omitted. Op. Br. 26-7.

Recognizing that RCW 70.275.050(2) conspicuously omits any statement that the \$15,000 payment is to be “annual,” NEMA points to section .120’s requirement that all producers must pay the department an annual fee to cover the cost of administering and enforcing the chapter. The flaw with this argument is that it would have been vastly more logical and less obtuse for subsection .050(2) *itself* to state that the \$15,000 payment is an “annual fee” instead of placing that detail in section .120. If section .050 already requires an annual fee, why does section .120 require it again? *State v. Flores*, 164 Wn.2d 1, 14, 186 P.3d 1038 (2008) (“when the legislature uses different words in statutes relating to a similar subject matter, it intends different meanings). On its face, the \$15,000 is a one time payment, from which \$5,000 is retained once, for Ecology’s administration and enforcement. Section .120 requires producers participating in the Standard Plan to pay an annual fee to Ecology for administration and enforcement. The amount of that fee is not specified, but is a gap left to Ecology to fill by rule.

**E. The Second Sentence In Section .120 Concerns Ecology's Prioritization Of Its *Own Work* To Implement The Chapter, Not The Producers' Or The Department-Contracted Stewardship Organization's Administrative And Operational Costs**

NEMA theorizes that the legislature anticipated that in any given year, the Standard Plan program might cost more than the money raised by the purportedly "annual" and exclusive \$15,000 per producer "fee" imposed by subsection .050(2). According to NEMA, section .120 therefore authorizes Ecology to "prioritize" the Standard Plan product stewardship program work. This is not a plausible reading of section .120:

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.

As noted in Ecology's opening brief (at 31-32), the natural reading of this section is that producers must pay an annual fee to cover Ecology's administrative and enforcement costs and if the fee that Ecology sets for this purpose does not cover all such costs in a given year, then Ecology should focus its own implementation work on its highest priorities. The phrase "the work to implement this chapter" in the second sentence is a shorthand reference to the department's "cost of administering and enforcing this chapter" in the first sentence, as is the word "program."

NEMA protests that if Ecology “could always write a rule to fill the gap” regarding the amount of the annual fee to be paid by a participant in the Standard Plan, then Ecology “would never have to prioritize its own administration and enforcement work rendering Section .120 superfluous.” Resp. Br. 31. This is not so. A fee is a fixed charge.<sup>12</sup> Whether it is set by statute or rule, it is not a reimbursement of actual costs incurred. Ecology must set a fixed annual charge it anticipates will cover costs, on average, from year to year. In those years when costs, such as potential enforcement actions, exceed available fees, then the agency can exercise discretion to choose priorities.

When considered critically, NEMA’s interpretation is an extremely improbable reading of the plain language of section .120, and of that section’s place in the statute as a whole. On a general level, NEMA’s interpretation fails because it is based on the false premise that the allegedly annual payment required by subsection .050(2) is the full extent of each producer’s responsibilities and that Ecology, not each producer, is responsible for providing product stewardship. NEMA’s interpretation also fails because it attempts to ascribe a far more specific meaning to the sentence than can reasonably be inferred from its words. First, NEMA

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<sup>12</sup> A common understanding of the term “fee” is “a charge fixed by law or by an institution (as a university) for certain privileges or services <a license [fee]>...” Webster’s Third New International Dictionary 833 (2002).

wants the Court to interpret the word “fee” in the second sentence of section .120 to refer to the \$15,000 payment required by subsection .050(2). Resp. Br. 29. However, subsection .050(3) does not itself call that payment a “fee,” and the word “fee” is only used elsewhere to refer to the payment producers must make annually for the department’s administration and enforcement costs. RCW 70.275.050(3), .120.

Second, NEMA wants the word “program” to mean the department-contracted product stewardship program. But this interpretation also fails because the statute contemplates multiple stewardship *programs*—a department-contracted product stewardship program and independent product stewardship programs.<sup>13</sup> There is no preceding reference to the “department-contracted product stewardship program” for the allegedly shorthand reference “program” to be referring to. In the context of Section .120, the only thing to which “program” can possibly refer is the department’s administration and enforcement program.

Third, NEMA wants the phrase “work to implement this chapter” to refer to Ecology’s administration and enforcement (referred to in the first sentence), *plus* the department-contracted stewardship program’s

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<sup>13</sup> Although “program” is indicated as a possible shorthand reference to “product stewardship program” in the definitions section .020(16), that section also states that its definitions apply “unless context clearly requires otherwise.” In this case, the context does clearly require otherwise.

work to implement the Standard Plan (which NEMA says is the meaning of “program” in the second sentence). Here, NEMA goes well beyond plain language interpretation, attributing a formulaic specificity to general language that cannot support so complex an intent.

NEMA apparently admits that when the section .120 first appeared in a bill draft (exactly as it reads now) the intent of both its sentences was simply to refer to the fee for Ecology’s administration and enforcement cost. Resp. Br. 39; Op. Br. 39. But, NEMA argues, the intent of the section morphed to NEMA’s intricate meaning when an amendment struck some language from what is now *section .050*. NEMA says “it is speculative to suggest that the House gave the language the same meaning . . . after it made the other changes . . . .” Resp. Br. 39. In fact, it is speculative to suggest that any change in meaning was intended to section .120 when no amendment was made to its language.

**F. NEMA’s Assertion That RCW 70.275 Includes A Legislative Purpose To Limit Producers’ Financial Obligations Out Of Concern For The Availability Of Mercury-Containing Lights Is Unfounded**

NEMA posits that because the legislature was concerned the cost of the new stewardship obligations it was considering could reduce the availability of mercury-containing energy efficient lighting, it “capped” the amount each producer must pay at \$15,000 per year, and directed Ecology to report back if revenue proved inadequate. Resp. Br. 12.

The legislature can only express its policies in statutory language.<sup>14</sup> While the statute directs Ecology to report back to it on a number of subjects, RCW 70.275.140(3)-(6), the possible inadequacy of funding is not one of those subjects. On the other hand, the occurrence of any “negative impacts on the availability or purchase of energy efficient lighting within the state” is one of the subjects. .140(5). If any inference can be drawn from Ecology’s reporting assignments, it is that (1) they do not evidence any concern about an alleged cautionary “capping” of producer’s funding responsibilities, and (2) despite the possibility that product stewardship costs might affect the availability of energy efficient lighting, the legislature nonetheless acted to require full producer financing of product stewardship as detailed in the law. It is difficult to imagine that the legislature would have anticipated possible negative impacts on availability of energy efficient lighting if companies’ contribution were limited to only \$15,000 per year.<sup>15</sup>

The significant legislative policy in enacting RCW 70.275 was not to minimize costs on producers, but “to achieve a statewide goal of

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<sup>14</sup> “[P]ublic policy is generally determined by the Legislature and expressed through statutory provisions.” *American Home Assurance Co. v. Cohen*, 124 Wn.2d 865, 875, 881 P.2d 1001 (1994).

<sup>15</sup>The legislature should also be deemed to have been aware that the manufacture of incandescent bulbs was being phased-out nationwide under federal energy efficiency standards. *See Op. Br.*, 6. As such, the possibility of consumers switching to *less efficient* lighting as a result of possible price increases for mercury-containing energy efficient lighting would have been blunted.

recycling all end-of-life mercury-containing lights by 2020.” A “cap” on funding for product stewardship would be inconsistent with this goal.

A related thread is NEMA’s assertion that Ecology has approved a Standard Plan that is needlessly expensive. NEMA suggests that Ecology’s plan includes significantly more collection sites throughout the state than are required by law, and argues there is no “evidence” that a compliant product stewardship program should cost \$1.2 million per year versus the \$290,000 per year that would result if all of the 29 identified producers’ financing obligations were capped at \$10,000 per year.

In fact, the record does include substantial “evidence” that a compliant product stewardship organization may cost around \$1.2 million per year—namely the estimate prepared by the product stewardship organization that provides product stewardship service on behalf of NEMA’s members’ Canadian affiliates in three Canadian provinces. CP 180-182, 329 (Steward Decl. 3, 4). NEMA’s assertion that the department-contracted stewardship program has “set up 191 collection sites throughout the state” and that this is more than double the minimum the law requires is wrong on two counts: the number of sites assumed in the estimate (the actual number is 182 *voluntary* site sponsors), and the number *minimally* required by law (117 is the actual number—one for

each city of 10,000 or greater *and* for each county). CP 316, 330-332 (Standard Plan at 9 and App. B); RCW 70.275.030(5).

In any case, here NEMA has challenged Ecology's rules as exceeding statutory authority, not Ecology's approval of the Standard Plan under RCW 70.275.040 and .090. If NEMA fails to meet its burden in this rule challenge and Ecology's rules are upheld, then NEMA's members will each be required to pay their equitable share of the total cost of operating and administering the department-approved plan. At that time, Ecology's rules will afford each producer an opportunity to seek review of the assessment they are required to pay their product stewardship organization. WAC 173-910-310(3). At that time the producers may try to show that the assessment approved by Ecology is excessively costly.

**G. NEMA And Ecology Agree That It Is Unnecessary For The Court To Reach The Question Of The Adequacy Of Ecology's Concise Explanatory Statement, Albeit For Different Reasons**

NEMA argues that Ecology's concise explanatory statement for its rules is inadequate because it did not respond to NEMA's request that Ecology explain how it would prioritize the Standard Plan work if revenues from the \$15,000 "annual fee" were inadequate. NEMA's argument requires the court first to find that NEMA's interpretation of the statute is correct. But if the court were to so conclude, then the adequacy of Ecology's concise explanatory statement would be a moot point. On

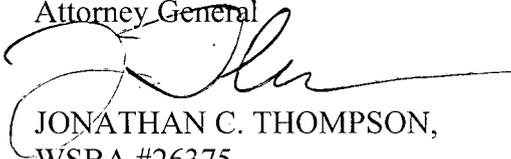
the other hand, if the Court finds that Ecology's rules reasonably interpret the statute, then it should follow that Ecology had no obligation to explain how it would do something that the statute does not require it to do.

### III. CONCLUSION

NEMA has failed to meet its burden of showing compelling reasons that the rule is in conflict with the intent and purpose of the legislation. Ecology respectfully requests that the Court uphold Ecology's rules and deny NEMA's petition to declare the financing provisions of the rules invalid.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of November, 2013.

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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.

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Pursuant to RCW 9A.72.085, I certify that on the 4th day of  
November 2013, I caused to be served Department of Ecology's Reply  
Brief in the above-captioned matter upon the parties herein as indicated  
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 4th day of November 2013, in Olympia, Washington.

  
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