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No. 33236-1-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

TESORO REFINING AND MARKETING COMPANY,

Plaintiff-Appellant

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Defendant-Respondent

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Richard D. Hicks)

APPELLANT'S OPENING BRIEF

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ASSIGNMENTS OF ERROR

1. The Thurston County Superior Court (the "trial court") erred in ruling that Plaintiff and Appellant Tesoro Refining and Marketing Company's ("Tesoro") possession of refinery fuel gas was subject to the Hazardous Substance Tax ("HST"). (CP 320.)¹

2. The trial court erred in denying Tesoro's request for refund of the HST it paid to Defendant and Respondent Department of Revenue ("DOR" or "the Department") on refinery fuel gas for the period January 1, 1999, through June 30, 2003 (the "Refund Period"). (CP 317, 321.)

3. The trial court erred in granting DOR's Motion for Summary Judgment. (CP 321.)

4. The trial court erred in denying Tesoro's Motion for Summary Judgment. (CP 321.)

STATEMENT OF ISSUES

The following issues pertain to all of the Assignments of Error:

1. Whether the HST applies to refinery fuel gas created and entirely consumed during the course of refining crude oil into finished

¹A copy of the trial court's Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment (CP 317-21) ("Order") is attached as Exhibit A of the Appendix to this Brief.

products, given the tax applies only to hazardous substances "possessed" by the taxpayer, and Tesoro does not "possess" refinery gas under the meaning of that word as defined in the statute.

2. Whether the trial court erred in denying Tesoro's refund petition, given the trial court's recognition that Tesoro's interpretation of the HST was reasonable, and the resulting doubt regarding the tax's application should have been resolved in Tesoro's favor. (Assignment of Error Nos. 1-4.)

I.

SUMMARY INTRODUCTION

Tesoro Refining and Marketing Company owns and operates a petroleum refinery in Anacortes, Washington (the "Refinery"), refining crude oil into gasoline, jet fuel, diesel fuel, and other products. During the refining process, an intermediate substance known as "refinery fuel gas" is created (or "yielded"). This gas results from the physical combination of gases and natural chemical reactions that occur in refining crude oil into finished products. Shortly after it is created, the gas is entirely consumed in the boilers and process heaters of the Refinery. This gas is transitory and is not an intended end product of the refinery process.

This case is a tax incidence case. The issue before the Court is whether refinery fuel gas is subject to the Hazardous Substance Tax.

Under well established principles of Washington tax law, any doubt regarding applicability of a tax must be resolved against the taxing authority and in favor of the taxpayer.

The HST is imposed on the "privilege of possession" of hazardous substances in Washington. RCW 82.21.030(1). The tax is intended to apply at the time of the "first possession" of the hazardous substance in this state. RCW 82.21.010. The tax only applies when the substance is "possessed." RCW 82.21.020(3).

The Department of Revenue's duly adopted regulation, WAC 458-20-252,² sets forth the Department's administrative interpretation of the HST, and subpart (7)(b) specifically interprets the "possession" requirement. Subpart (7)(b) states that "intermediate" substances produced and consumed in a manufacturing process are not "possessed" under the HST statutes, and therefore not subject to the tax. Refinery fuel gas is precisely such a substance -- an internally produced, ephemeral byproduct of petroleum refining that is entirely consumed in the manufacturing of products. The Department's regulation is consistent with the underlying history of the HST statute, which demonstrates an intent, first of the Legislature in adopting the original HST, and then of the voters

²A complete copy of WAC 458-20-252 ("Rule 252"), as effective during the Refund Period, is attached as Exhibit B of the Appendix to this Brief.

in passing a modified HST, to exclude substances like refinery gas from the scope of the tax.

The language of the statute, as well as the Department's administrative interpretation of the key concept, "possession," establish that Tesoro's interpretation of the HST statutes is correct -- and eminently reasonable, at the very least. And because this case concerns the incidence of a tax, the HST should not be applied to refinery fuel gas if there is a reasonable doubt as to whether the tax applies to that gas. Accordingly, this Court should reverse, and remand for entry of a refund judgment in favor of Tesoro.

II.

STATEMENT OF THE CASE

A. Tesoro's Business.

Tesoro's Refinery is located near Anacortes, Washington. (CP 40) (Declaration of Russell Crawford ("Crawford Decl.") ¶ 6). The Refinery is a facility consisting primarily of oil-processing equipment, support facilities and storage tanks for the various products manufactured. (CP 40) (Crawford Decl. ¶ 8). The actual manufacturing facility is a series of pipes and equipment, most of which are located above ground and outside of buildings and structures. (Id.) The operation can be described most simply as follows: Crude oil goes in one end of the Refinery, runs

through the processing equipment, and comes out at the other end in various forms of finished product, such as gasoline, diesel and jet fuel, heavy fuel oils, liquefied petroleum gas (propane), and asphalt. (CP 40-41) (Crawford Decl. ¶ 9). These products are then transported from the Refinery for sale to Tesoro's customers. See (CP 41) (Crawford Decl. ¶¶ 11, 12).

B. The Petroleum Refining Process.

The primary feedstock for a petroleum refinery is crude oil, which is first preheated in large process furnaces before being fed to the crude unit. (CP 41) (Crawford Decl. ¶ 13). In a continuous process, heated crude oil is separated into different fractions by distillation. (CP 41) (Crawford Decl. ¶ 14). The lighter boiling components are fractionated and further processed into gasoline blending streams, propane and butane. (CP 41) (Crawford Decl. ¶ 15). Straight run gasoline, naphtha (solvent and cleaning fluid) and distillate range oils are sent to a hydrotreater, which removes sulfur from the streams, prior to being sent to storage or downstream processing units. (Id.)

Downstream from the crude unit, major product upgrading units consisting of a fluid catalytic cracker, alkylation, hydrotreaters, vacuum distillation, and naphtha reformer, enable the Refinery to produce a high proportion of light products, primarily gasoline, diesel and jet fuel.

(CP 41-42) (Crawford Decl. ¶ 16). The lighter products from the vacuum distillation unit are sent to the fluid catalytic cracker for conversion to higher value gasoline range material. (CP 42) (Crawford Decl. ¶ 18). The heavier residue is sent to the vacuum distillation unit for separation into heavy oil products that receive further processing in other units. (CP 42) (Crawford Decl. ¶ 17).

The heaviest oil product from the vacuum distillation unit is primarily routed to the residual oil supercritical extraction unit, or "ROSE," which extracts an additional product suitable for feed to the fluid catalytic cracker, while the heavier ROSE product goes to heavy fuel oil or asphalt production. (CP 42) (Crawford Decl. ¶ 19). The fluid catalytic cracker produces several products other than gasoline, including refinery fuel gas, propane, butane, diesel stock and heavy oil products. (CP 42) (Crawford Decl. ¶ 20). The naphtha reformer and alkylation units produce components for gasoline blending. (Id.)

C. Refinery Fuel Gas.

Refinery fuel gas is an intermediate byproduct of petroleum processing resulting from the processing and conversion of crude oil into gasoline, jet and diesel fuels. (CP 42) (Crawford Decl. ¶ 21). The gas is continuously created from chemical reactions that occur in several refining process units within the Refinery, such as cracking, reforming, and

hydrotreating. (CP 43) (Crawford Decl. ¶ 23). Such reactions are also promoted by the use of various catalysts, which physically contact the hydrocarbon at different temperatures and pressures to produce the desired products. (CP 43) (Crawford Decl. ¶ 24). The byproduct of these chemical reactions is refinery fuel gas, which is continuously "yielded" and immediately consumed (burned) in the process heaters and boilers for heat input into the unit processes. (Id.)

The refinery gas created at Tesoro's Refinery is not a salable product and is immediately consumed to provide heat for the refining processes. (CP 42) (Crawford Decl. ¶ 22). The gas is not a desired yield from crude oil processing, and all of the chemical reactions in the Refinery are optimized to minimize this intermediate byproduct, and then dispose of it as quickly as possible and without venting to the atmosphere (via the refinery flare). See (CP 258) (Second Declaration of Russell Crawford ("Second Crawford Decl.") ¶ 6).

The amount of refinery gas byproduct varies substantially depending on the crude oil type being processed and the severity of the operation of the Refinery to produce gasoline. (CP 259) (Second Crawford Decl. ¶ 8). The gas is not deliberately created, but is unavoidably "yielded" from processing crude by various refining processes. (CP 259) (Second Crawford Decl. ¶ 12). The Refinery cannot

store or sell refinery fuel gas, and it has no facilities to do so. (CP 43) (Crawford Decl. ¶ 27). Refinery gas must either be consumed during the manufacturing process, or vented to the atmosphere (where it will be burned as part of the Refinery's "flaring" process). (CP 25) (Second Crawford Decl. ¶ 11; (CP 43-44) (Crawford Decl. ¶¶ 26 & 33). The processing, flow, and collection of refinery gas does not stop and is not complete until the gas is fully and completely burned in process heaters and boilers. (CP 43) (Crawford Decl. ¶¶ 25, 27).

There are several locations within the Refinery where refinery fuel gas is produced. (CP 43) (Crawford Decl. ¶ 28). The first is the fluid catalytic cracker, which creates large quantities of refinery gas. (Id.) Significant volumes of refinery fuel gas are also created by the naphtha hydrotreater/catalytic reformer complex and the distillate hydrotreater. (CP 44) (Crawford Decl. ¶ 29). The gases are created from heavier molecules as the hydrocarbon streams come into contact with catalysts under controlled temperatures and pressures, in order to promote chemical change (reforming). (CP 44) (Crawford Decl. ¶ 30).

As is true of all refinery fuel gas streams, dry gas from the fluid catalytic cracker is continuously routed into the fuel gas system and flows rapidly to the refinery furnaces. (CP 44) (Crawford Decl. ¶ 31). The gas never comes to rest and the average time for refinery gas to be produced,

enter the fuel gas system, flow through the piping and mix drum, and be consumed in a calculated 30 seconds or less. (CP 44) (Crawford Decl. ¶ 32). Refinery gas is not stored anywhere because there is no refinery gas storage of any kind at the Anacortes Refinery. (CP 44) (Crawford Decl. ¶ 33). The gas is in a vapor state and has to go immediately to the flare if not consumed. (Id.)

D. Other Gases and Fuels.

The refinery fuel gas internally yielded at the Refinery is not sufficient to produce the amount of heat necessary to operate the various equipment. (CP 45) (Crawford Decl. ¶ 37). Thus, other gases or fuels must be purchased to supplement refinery gas. (Id.) For example, a small amount of natural gas, delivered via pipeline, is purchased to supplement the internally produced refinery gas in order to meet the heating requirements for the process units. (CP 45) (Crawford Decl. ¶ 38).

Other fuels purchased to supplement refinery gas include liquid fuel oil, liquid propane and liquid butane, which are purchased and, unlike refinery gas, can be stored and used for fuel in an emergency or special circumstances. (CP 45) (Crawford Decl. ¶ 39). These additional fuels are consumed in place of purchased natural gas, as required or as dictated by economics, or in an emergency (loss of natural gas supply). (Id.) Such products -- fuel oil, propane, and butane -- are stored as liquids and their

consumption as fuel is discretionary, unlike refinery gas, which must either be consumed and burned immediately in refinery furnaces or burned in the flare. (CP 45-46) (Crawford Decl. ¶ 40).

E. Tesoro's Payment of Hazardous Substance Tax.

Tesoro calculates and pays HST on every product produced at the Refinery that survives the manufacturing process (except sulfur, which is expressly exempt from HST). (CP 48) (Declaration of Kerry L. Creager ("Creager Decl.") ¶ 8). At the Department's direction, Tesoro also calculates a value for the refinery fuel gas that is produced, created and consumed at the Refinery. (CP 48) (Creager Decl. ¶ 9).

Refinery fuel gas is not sold; thus, Tesoro must use a value for a similar (but not identical) product -- fuel oil -- in order to value refinery gas for purposes of calculating the HST liability on the gas. (CP 49-50) (Creager Decl. ¶¶ 15, 16). Fuel oil is a product Tesoro purchases to supplement refinery gas, and this valuation method was reviewed and approved by the Department in an audit of Tesoro's business records. (CP 50) (Creager Decl. ¶ 17).

F. Procedural Background.

On October 7, 2003, Tesoro submitted an HST refund petition in the amount of \$884,293 to the Department,³ for taxes paid on refinery fuel gas. (CP 51) (Creager Decl. ¶ 23); see (Declaration of George Mastrodonato ("Mastrodonato Decl.)) (CP 53-54), Exhibit A (CP 55-58)).⁴ Following discussions and correspondence, the Department eventually denied Tesoro's refund claim on February 19, 2004. See (CP 51-52) (Creager Decl. ¶¶ 25-28); (CP 59-63) (Mastrodonato Decl., Exhibit B); (CP 64-65) (Mastrodonato Decl., Exhibit C); see (CP 66-68) (Mastrodonato Decl., Exhibit D).

This refund suit was then filed under RCW 82.32.180 on March 5, 2004. (CP 4-8) (Notice of Appeal and Complaint for Tax Refund). The parties filed cross-motions for summary judgment, memoranda of law, and supporting documents and exhibits, and the case was heard by the Thurston

³Tesoro's letter to the Department stated a total refund claim of \$884,293. (CP 58) (Exhibit A, Page 3). This letter included a schedule of the refund amounts by month. (Id.) However, the amounts shown in the letter actually totaled \$937,885 and the complaint filed in this action stated a refund amount of \$937,889. See (CP 7) (Notice of Appeal and Complaint for Tax Refund ¶ 21). The Department has not disputed Tesoro's refund claim in the amount of \$937,889.

⁴Tesoro acquired the Anacortes Refinery in 1998. VRP 20. Initially, Tesoro did not pay HST on refinery fuel gas, relying on Rule 252(7)(b). (Id.) The Department audited Tesoro in the year 2001 and made an assessment of HST. (Id.) Tesoro paid the assessment and then sought this refund in 2003. (Id. at 20-21.)

County Superior Court (Hon. Richard D. Hicks) on March 18, 2005. See Verbatim Report of Proceedings ("VRP"). At the conclusion of the hearing, Judge Hicks granted the Department's motion for summary judgment of dismissal and denied Tesoro's summary judgment motion for HST refund (CP 316) (VRP 75), but not before acknowledging that "there's a great deal of logic to what [Tesoro] is arguing," and further finding "the logic of [Tesoro] is persuasive" (VRP 73-74). The order was signed by Judge Hicks and entered on April 8, 2005. (CP 317-21.) Tesoro's Notice of Appeal was timely filed on May 9, 2005. (CP 325-31.)

III.

STANDARD OF REVIEW

The construction and meaning of statutes are questions of law that this Court reviews de novo under the error of law standard. Department of Ecology v. Campbell & Gwinn L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002) (citing State v. Breazeale, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001); State v. J.M., 144 Wn.2d 472, 480, 28 P.3d 720 (2001)); see also Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n, 123 Wn.2d 621, 627, 869 P.2d 1034 (1994). "The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." Campbell & Gwinn (supra), 146 Wn.2d at 9-10 (citing

State v. J.M. (supra), 144 Wn.2d at 480). The "plain meaning" of the statute "is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." Campbell & Gwinn, 146 Wn.2d at 10. However, "if, after this inquiry, the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to resort to aids to construction[.]" Campbell & Gwinn, 146 Wn.2d at 11 (citing Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 808, 16 P.3d 583 (2001); Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc., 125 Wn.2d 305, 312, 884 P.2d 920 (1994)).

This case involves the interpretation of tax statutes codified in RCW Chapter 82.21. The trial court resolved this matter on cross-motions for summary judgment, granting the Department's motion and denying Tesoro's motion, and those rulings are subject to de novo review by this Court. See, e.g., Timberline Air Service, 125 Wn.2d at 311.

This case also involves the interpretation and validity of a state agency rule. This Court reviews the validity of a rule promulgated by an agency in accordance with RCW 34.05.570. Under this statute, an agency rule is valid unless it (1) violates constitutional provisions; (2) exceeds the agency's statutory authority; (3) was adopted without compliance to statutory rule-making procedures; or (4) is arbitrary and capricious in that

it could not have been the product of a rational decision-maker. RCW 34.05.570(2)(c); Neah Bay Chamber of Commerce v. Dep't of Fisheries, 119 Wn.2d 464, 469, 832 P.2d 1310 (1992). The extent of an agency's rule-making authority is likewise a question of law, the ultimate resolution of which is vested in the courts. Local 2916, IAFF v. Pub. Employment Relations Comm'n, 128 Wn.2d 375, 379, 907 P.2d 1204 (1996).

IV.

ARGUMENT

A. The Issue Presented -- Is Refinery Fuel Gas Subject to HST? -- Involves the Application of a Tax, and Any Doubt as to the Imposition of That Tax Must Be Resolved in Tesoro's Favor.

This case involves the interpretation and construction of the HST statutes codified in Chapter 82.21 RCW. It is not about a tax exemption, deduction, or credit statute, all of which are to be read strictly and narrowly against the taxpayer. See, e.g., Simpson Investment Co. v. Department of Revenue, 141 Wn.2d 139, 149, 3 P.3d 741 (2000); Lacey Nursing Ctr., Inc. v. Dep't of Revenue, 128 Wn.2d 40, 49, 905 P.2d 338 (1995). Instead, the question here involves tax-imposing statutes, which are to be interpreted in favor of taxpayers, e.g., Duwamish Warehouse Co. v. Hoppe, 102 Wn.2d 249, 254, 684 P.2d 703 (1984); State Dep't of Rev. v. Hoppe, 82 Wn.2d 549, 552, 512 P.2d 1094 (1973), with "any doubt as to the meaning of a tax statute . . . construed against the taxing power."

First American Title Ins. Co. v. Department of Revenue, 144 Wn.2d 300, 303, 27 P.3d 604 (2001) (emphasis added) (citing Duwamish Warehouse Co. v. Hoppe, *supra*); see Weyerhaeuser Co. v. Dep't of Revenue, 106 Wn.2d 557, 566, 723 P.2d 1141 (1986); Shurgard Mini-Storage of Tumwater v. Dep't of Revenue, 40 Wn. App. 721, 727, 700 P.2d 1176 (1985); MAC Amusement Co. v. Dep't of Revenue, 95 Wn.2d 963, 966, 633 P.2d 68 (1981); see also 3A Norman J. Singer, Sutherland Stat. Const., § 66.1 (6th ed. 2003).⁵

Put another way: In the field of taxation, there are two alternative rules of statutory interpretation and construction. In a tax exemption case, any ambiguity in the statute favors the Department; in a tax incidence case, such ambiguity favors the taxpayer. Because this is a tax incidence case, the issue before the Court is whether Tesoro's reading of the statute is reasonable; if so, Tesoro should prevail.

B. The Language, Structure and History of the HST Statutes Support the Exclusion of Refinery Fuel Gas From Tax.

1. HST Is Imposed Only on the "Possession" of a Hazardous Substance, and Tesoro Does Not "Possess" Refinery Fuel Gas, Which Is Generated Only as a Byproduct of the Refining Process. The State of

⁵The principle was most recently reaffirmed in Estate of Hemphill v. Dep't of Revenue, 153 Wn.2d 544, 552, 105 P.3d 391 (2005), and Agrilink Foods, Inc. v. Dep't of Revenue, 153 Wn.2d 392, 399 n.1, 103 P.3d 1226 (2005).

Washington imposes the HST on the "privilege of possession of hazardous substances in this state." RCW 82.21.030(1) (emphasis added). The HST is collected by the Department (RCW 82.21.030(3)) "only once for each hazardous substance possessed in this state." RCW 82.21.010 (emphasis added). The tax applies to "the first possession of all hazardous substances, including substances and products that the department of ecology determines to present a threat to human health or the environment." Id. (emphasis added).

"Possession" is defined in the HST statutes to mean:

the control of a hazardous substance located within this state and includes both actual and constructive possession. "Actual possession" occurs when the person with control has physical possession. "Constructive possession" occurs when the person with control does not have physical possession.

RCW 82.21.020(3) (emphasis added). Thus, the key to having "possession" of a hazardous substance is "control," and the statute defines "control" as follows:

"Control" means the power to sell or use a hazardous substance or to authorize the sale or use by another.

RCW 82.21.020(3).

"Legislative definitions included in the statute are controlling[.]" State v. Watson, 146 Wn.2d 947, 954 n.22, 51 P.3d 66 (2002) (citing State v. Sullivan, 143 Wn.2d 162, 174-75, 19 P.3d 1012 (2001)); In re F.D. Processing, Inc., 119 Wn.2d 452, 458, 832 P.2d 1303 (1992) ("A

legislative definition prevails over a dictionary definition or common understanding of any given term") (citing American Legion Post 32 v. Walla Walla, 116 Wn.2d 1, 8, 802 P.2d 784 (1991); State v. Hickok, 39 Wn. App. 664, 667, 695 P.2d 136 (1985); 1A N. Singer, Statutory Construction §§ 20.08, 27.02 (4th ed. 1985)). The concept of control, as defined in RCW 82.21.020(3), simply is not consistent with the chemical fortuity of the process by which refinery fuel gas is created, and the fashion in which it is disposed. As the undisputed facts establish, refinery gas is continually yielded from the natural chemical reactions that occur in various refining process units within the Refinery, such as cracking, reforming, and hydrotreating. (CP 43) (Crawford Decl. ¶ 23). The byproduct of these chemical reactions is refinery gas, which is continuously produced and immediately consumed (burned) in the process heaters and boilers for heat input into the unit processes. (CP 43) (Crawford Decl. ¶ 24). The gas is not a desired yield from crude oil processing, as all of the chemical reactions in the Refinery are optimized to minimize this intermediate byproduct before it is combusted or burned (oxidation reaction) to recover at least its heating value. (CP 258) (Second Declaration of Russell Crawford ("Second Crawford Decl.") ¶ 6).

In short, refinery gas cannot be avoided, and must be immediately burned after it is yielded internally in the refining process on the premises.

(CP 259) (Second Crawford Decl. ¶ 11). Put another way, refinery gas is simply too ephemeral⁶ a substance to give rise to any meaningful

⁶"Ephemeral" is defined as follows:

ephem·er·al

Function: *adjective*

....

1 : lasting one day only <an *ephemeral* fever>

2 : lasting a very short time <*ephemeral* pleasures>

synonym see TRANSIENT

Merriam-Webster OnLine Dictionary. (For purposes of this brief, Tesoro will use the Merriam-Webster OnLine dictionary, which is found at <http://www.m-w.com/>, since the online version of the dictionary should be readily available to the Court.)

As noted above, the synonym of ephemeral is "transient," which in turn is defined as follows:

tran·sient

....

Function: *adjective*

....

1 a : passing especially quickly into and out of existence : **TRANSITORY** **b** : passing through or by a place with only a brief stay or sojourn

2 : affecting something or producing results beyond itself

....

(continued . . .)

opportunity for "control"; the gas therefore cannot be "possessed" in the HST statutory sense,⁷ and because the gas cannot be "possessed" in that sense, it may not be taxed, either.

(. . . continued)

synonyms TRANSIENT, TRANSITORY, EPHEMERAL, MOMENTARY, FUGITIVE, FLEETING, EVANESCENT mean lasting or staying only a short time. TRANSIENT applies to what is actually short in its duration or stay TRANSITORY applies to what is by its nature or essence bound to change, pass, or come to an end EPHEMERAL implies striking brevity of life or duration MOMENTARY suggests coming and going quickly and therefore being merely a brief interruption of a more enduring state FUGITIVE and FLEETING imply passing so quickly as to make apprehending difficult EVANESCENT suggests a quick vanishing and an airy or fragile quality

Merriam-Webster OnLine Dictionary. It is painfully clear that refinery gas is all of the above -- ephemeral, transient, transitory, momentary, fugitive, fleeting and evanescent.

⁷At the summary judgment hearing, Tesoro, the Department, and the court engaged in a colloquy over the taxability of refinery gas that is burned in the Refinery flare. VRP 17-19, 31-32, 38-39, 47-48 & 50-54. Tesoro alleged that a Department auditor instructed Tesoro that no HST was due and owing on refinery gas that was flared. VRP 47. Tesoro contended that the Department's approach, which was to apply the tax to refinery gas that is totally burned up in the internal process heaters and boilers of the refinery, where the gas poses no danger to human health or the environment, but to exempt the gas when it is burned in the flare, where chemical residues are released into the atmosphere, was nonsensical. VRP 17. Indeed, it would make more sense to exclude from tax the refinery gas that is burned in the boilers and process heaters of the plant, and tax the gas that goes to the flare, under a "more-likely-to-harm-humans-or-the-environment" test. See VRP 17-18. The Department vehemently denied that refinery gas burned in the flare was not taxable. VRP 32, 38-39 & 50-54.

(continued . . .)

2. The Evolution of the HST, From the Legislature's Original Version Through the People's Amendment by Initiative, Shows No Intent to Tax Transitory Manufacturing Process Substances Such as Refinery Fuel Gas. The reasonableness of this conclusion is reinforced when the HST is examined in the historical context of the original and I-97 versions of the tax. The first HST law was passed in 1987, and became effective January 1, 1988. See Laws of 1987, 3d Ex. Sess., ch. 2, §§ 44-48 & 62. See (CP 75-77) (Mastrodonato Decl., Exhibit F). The original law

(... continued)

Under the definitions of "possession" and "control" in RCW 82.21.020(3), refinery gas burned in the flare clearly is not taxable, because Tesoro does not have the necessary "control" to "possess" the refinery gas that is burned in the flare. This interpretation -- that refinery gas burned in the flare is not "possessed" by a petroleum refiner -- is a subtle point buried in the bowels of the HST law, but the DOR auditor advising Tesoro was correct. "Control" is defined to mean, in pertinent part, "the power to sell or use a hazardous substance." RCW 82.21.020(3). When refinery gas is burned in the flare, Tesoro is indisputably not exercising the power to sell or use the gas. Instead, the refinery gas created (yielded) as part of the petroleum refinery process is just burned off. Hence, the necessary "control" over the refinery gas -- selling or using it -- so as to make it taxable under the statute, is not present. Tesoro and the DOR auditor who advised it were correct: Refinery gas burned in the flare is not taxable under the clear, plain and unambiguous statutory definition of the word "control."

As will be shown, the Department recognized the conundrum created if substances like refinery gas that are burned in a flare are not taxable, while the same substances burned in the closed manufacturing system were deemed taxable. This was indeed a ludicrous interpretation to defend, and evidently resulted in the Department's adoption and implementation of Rule 252(7)(b), which is discussed in detail infra.

contained an intent section (RCW 82.22.010) (CP 80),⁸ definitions of "possession" and "control" (RCW 82.22.020(3)) (CP 81), and a tax-imposing statute (RCW 82.22.030(1)) (CP 81), all of which are identical to the intent (RCW 82.21.010), definitions of "possession" and "control" (RCW 82.21.020(3)), and tax-imposing statute (RCW 82.21.030(1)) provisions of I-97, the current law.

The original law also included a section on exemptions, which stated in pertinent part:

The following are exempt from the [HST] tax imposed in this chapter:

.....

(3) Any possession of (a) alumina, (b) natural gas, (c) petroleum coke, (d) liquid fuel or fuel gas used in petroleum processing, or (e) petroleum products that are exported for use or sale outside this state as fuel.

Former RCW 82.22.040 (emphasis added); see (CP 75-77, 79-82) (Mastrodonato Decl., Exhibits F and G). The original HST law thus had a specific exemption for "liquid fuel or fuel gas used in petroleum processing." Id. The original HST law, however, did not define what "liquid fuel or fuel gas" qualified under this exemption.

⁸The intent section of the Legislature's 1987 HST law stated that the tax was to apply to substances "that the department of ecology determines to present a threat to human health or the environment." Former RCW 82.22.010 (Laws of 1987, 3d Ex. Sess., ch. 2, § 44) (CP 80).

The Department adopted the first WAC 458-20-252 (Rule 252) on February 26, 1988, following the enactment of the HST. (A copy of the first adopted rule is included in the Clerk's Papers as Exhibit H to the Mastrodonato Decl., CP 84-97). As initially adopted, Rule 252 contained two sections especially important to this case:

- First, subsection (4) of Rule 252 restated the statutory exemptions set forth in RCW 82.22.040(3), including the exemption for "liquid fuel or fuel gas used in processing petroleum." Former WAC 458-20-252(4)(c)(ii); see (CP 89) (Mastrodonato Decl., Exhibit H at 5).

- Second, former Rule 252 also included subsection (7), the section of the regulation in effect during the Refund Period, and which Tesoro relies upon to exclude refinery gas from HST. Subsection (7)(b), as originally adopted, stated:

When any hazardous substance(s) is first produced during and because of any physical combination or chemical reaction which occurs in a manufacturing or processing activity, the intermediate possession of such substance(s) within the manufacturing or processing plant is not considered a taxable possession if the substance(s) becomes a component or ingredient of the product being manufactured or processed or is otherwise consumed during the manufacturing or processing activity.

Former WAC 458-20-252(7)(b); see (CP 94) (Mastrodonato Decl., Exhibit H at 10) (emphasis added).

In reading these two subsections of former Rule 252 together, it is apparent that the Department recognized two distinct types of fuels and

gases that could be used in manufacturing or processing, including petroleum refining:

- Fuels or gases created outside of the manufacturing or refining process, and which may be added to the manufacturing process; and

- Gases produced within the manufacturing or refining plant, and which either

- (1) became a component or ingredient of the final product, or

- (2) were entirely consumed during the manufacturing or refining process.

Both types of products were deemed exempt from HST. In the petroleum refining context, this meant that fuels like liquid fuel oil, liquid propane and liquid butane (see (CP 45) (Crawford Decl. ¶ 39)) were specifically exempted from HST under former WAC 458-20-252(4)(c)(ii). Substances like refinery fuel gas were not taxable as a matter of incidence under former WAC 458-20-252(7)(b), if they were first created and then consumed all within the manufacturing or refining plant, because a taxable "possession" had not been established.

Rule 252(7)(b) was promulgated by the Department to exempt the second type of substance, those internally produced. The clear intent was

that such substances, when created and consumed within the manufacturing or refining plant, would not be taxable, because such substances or products could be ephemeral or transient, as refinery gas is here, and therefore did not satisfy the statutory definitions of "possession" or "control" (RCW 82.22.020(3)), and posed no danger as hazardous substances to people or the environment outside the plant.

Some environmental groups felt the original HST law was not adequate to the task, so they proposed an alternative law in the form of an initiative to the people. (Excerpts from the I-97 Voters Pamphlet are attached as Exhibit C of the Appendix to this Brief.) The State Legislature then passed a modified version of the original HST law, and both of these measures went before the people of Washington State in the November 1988 general election. Laws of 1988, ch. 112. (A copy of the Legislature's 1988 alternative HST proposal is in the Clerk's Papers as Exhibit I to Mastrodonato Decl., CP 99-102). The proposal supported by the environmental groups (I-97) was adopted by the voters. This new law (and the one still, in all relevant particulars, in existence today) became effective on March 1, 1989, and was codified as Chapter 82.21 RCW. The former law, codified at Chapter 82.22 RCW, went out of existence on March 1, 1989.

As stated, the drafters of I-97 did not change any of the statutory language of the former HST codified at RCW 82.22.010 (intent section),⁹ RCW 82.22.020(3) (definitions of "possession" and "control"), and RCW 82.22.030(1) (imposition of HST). I-97, like its predecessor, had a section on exemptions, but the exemption for all of the items in former RCW 82.22.040(3), including "liquid fuel or fuel gas used in petroleum processing," was deleted.

On May 2, 1989, the Department amended Rule 252 to conform the regulation to the new HST law. (CP 104-22) (Mastrodonato Decl., Exhibit J). In response to the new law, the Department deleted all of subsection (4)(c) of former Rule 252, which again included the previous exemption for "liquid fuel or fuel gas used in processing petroleum." Subpart (ii). But the Department retained subsection (7)(b) of Rule 252, thereby maintaining the nontaxability of transitory substances produced in a self-contained, manufacturing or refining process which are consumed within the manufacturing plant. The Department again made a conscious decision to treat the two products -- (1) liquid fuel or fuel gases brought into the manufacturing process from without, and (2) "intermediate" or

⁹I-97 likewise included a statutory intent section taxing hazardous substances "that the department of ecology determines to present a threat to human health or the environment." RCW 82.21.010 (Laws of 1989, ch. 2, § 8).

transitory substances (e.g., refinery fuel gas) produced within the petroleum refining or manufacturing -- as separate and distinct. The former products (represented by (1)) would now be taxable, but the latter (represented by (2)), including refinery fuel gas, would continue to be nontaxable, because they were not "possessed" in the HST statutory context.

In short, the HST statute was changed by a vote of the people, but the people did not change the definitions of "possession" and "control," and therefore did not change the measure of the incidence of the HST. The people left these statutory sections alone, presumably because the people did not have a problem with those parts of the HST, nor with the Department's interpretation that internally produced and consumed substances were not subject to the HST, as reflected in Rule 252(7)(b). The Department subsequently followed the people's will and made no changes to Rule 252(7)(b). The plain meaning of the statutes can thus be discerned by all that was done by the Legislature, the Department, and voters of the state of Washington, "which disclose . . . intent about the provision[s] in question," Campbell & Gwinn, 146 Wn.2d at 10, and under the meaning established by that evidence of intent, refinery fuel gas should not be subject to HST.

Moreover, even if this interpretation of intent is not conclusive, the HST has still been shown susceptible to more than one reasonable interpretation. The HST therefore must be deemed ambiguous, "and it [becomes] . . . appropriate to resort to aids of construction" to discern intent. See Campbell & Gwinn, 146 Wn.2d at 11 (citing Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 808, 16 P.3d 583 (2001); Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc., 125 Wn.2d 305, 312, 884 P.2d 920 (1994)). Here, the controlling rule of construction is the principle that tax-imposing statutes in a doubtful case are to be interpreted in favor of taxpayers. Therefore, if there is any question or ambiguity concerning whether refinery fuel gas was subject to HST, the resulting "doubt as to the meaning of a tax statute" must be "construed against the taxing power." First American, 144 Wn.2d at 303 (citing Duwamish Warehouse, 102 Wn.2d at 254).

C. The Department's Rule 252 Excludes Internally Produced and Consumed Substances From HST, and Confirms Tesoro's Reading of the Tax's Intended Scope.

The Revenue Act gives the director of the Department authority and power to "[m]ake, adopt and publish such rules as he or she may deem necessary or desirable to carry out the powers and duties imposed upon him or her or the department by the legislature." RCW 82.01.060(2). The law further gives the Department authority to "make and publish rules and

regulations, not inconsistent" with the statutes "necessary to enforce [the] provisions of . . . [RCW Title 82 including RCW Chapter 82.21 (the HST)], which shall have the same force and effect as if specifically included therein, unless declared invalid by the judgment of a court of record not appealed from." RCW 82.32.300. RCW 82.32.300 expressly allows the Department to make legislative rules. RCW 34.05.328(5)(c)(iii); see Ass'n of Washington Business v. Department of Revenue, ____ Wn.2d ____, 120 P.3d 46, 53-54 (Sept. 22, 2005) ("Legislative rules bind the court if they are within the agency's delegated authority, are reasonable, and were adopted using the proper procedure" (citing Weyerhaeuser Co. v. Dep't of Ecology, 86 Wn.2d 310, 314-15, 545 P.2d 5 (1976))).

The HST statutes at issue in this case do not specifically apply the HST tax to refinery gas, nor do the statutes exempt the gas from tax. The statute is ambiguous because, on the one hand, the HST applies to "the first possession of all hazardous substances" (emphasis added), but on the other hand, the tax applies to those "substances and products that the department of ecology determines to present a threat to human health or the environment." RCW 82.21.010; see Agrilink Foods, Inc. v. Dep't of Revenue, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005) (a statute is ambiguous if it is susceptible to two or more reasonable interpretations).

Rule 252(7)(b) was clearly an outgrowth of this fundamental ambiguity in the HST statute regarding the tax's application to substances like refinery gas. But while the statutory language may give rise to an ambiguity, Rule 252(7)(b) is clear and unambiguous in its interpretation of the statute's intended scope:

When any hazardous substance(s) is first produced during and because of any physical combination or chemical reaction which occurs in a manufacturing or processing activity, the intermediate possession of such substance(s) within the manufacturing or processing plant is not considered a taxable possession if the substance(s) becomes a component or ingredient of the product being manufactured or processed or is otherwise consumed during the manufacturing or processing activity.

WAC 458-20-252, Part I, subsection (7)(b) (emphasis added).

"[I]f a regulation is clear and unambiguous, [courts] apply its plain language." Bercier v. Kiga, 127 Wn. App. 809, 816, 103 P.3d 232 (2004) (citing Children's Hosp. & Med. Ctr. v. Washington State Dep't of Health, 95 Wn. App. 858, 868, 975 P.2d 567 (1999), rev. denied, 139 Wn.2d 1021 (2000)). Further, courts will "give 'substantial weight . . . to the agency's view of the law if it falls within the agency's expertise in that special field of law.'" Bercier, 127 Wn. App. at 816 (quoting Children's, 95 Wn. App. at 864 (citing Purse Seine Vessel Owners Ass'n v. Wash. Dep't of Fish & Wildlife, 92 Wn. App. 381, 389, 966 P.2d 928 (1998), rev. denied, 137 Wn.2d 1030 (1999))).

1. The Plain Language of Rule 252 States That HST Does Not Apply to Refinery Fuel Gas. Under the Legislature's grant of authority to "make and publish rules and regulations . . . necessary to enforce" the statute (RCW 82.32.300), the Department adopted Rule 252. Among other things, Rule 252 has always stated (under both the original and I-97 versions of the HST law) that intermediate substances first produced in the manufacturing process and then consumed at the manufacturing plant are not subject to HST. Rule 252(7)(b) clearly and unambiguously excludes from HST any substance produced during and because of physical or chemical changes that occur in a manufacturing process or "activity," when the substance is subsequently consumed within the manufacturing plant. The Department has previously characterized this as Tesoro exercising a "first possession" over the refinery gas. (CP 128) (Defendant's Motion for Summary Judgment at 5) But nothing in the plain language of the Department's rule supports such a reading. Under the plain language of Rule 252(7)(b), HST is not imposed until Tesoro takes an intermediate product outside the refinery gates -- which never happens with refinery gas, as the undisputed facts establish.

That the Department has the delegated authority to adopt a rule interpreting a statute's intent, so long as that interpretation is reasonable, is not disputed. See Ass'n of Washington Business, ____ Wn.2d at ____ (citing Weyerhaeuser, 86 Wn.2d at 314-15). And, "[b]ecause the rule's

plain meaning is clear, [the court] need not look further to determine its meaning." Bercier, 103 P.3d at 236.

The plain meaning of Rule 252(7)(b) confirms that Tesoro's reading of the statutes is reasonable. Any substance created by a manufacturing process, as refinery fuel gas is in petroleum refining, will not be subject to HST if the substance never leaves the plant. Here, refinery gas is an intermediate byproduct of petroleum processing resulting from the processing and conversion of crude oil into gasoline, jet and diesel fuels, among other end products. (CP 42) (Crawford Decl. ¶ 21). The production of refinery gas results from continuous chemical reactions that occur in several refining process units within the Refinery, such as cracking, reforming, and hydrotreating. (CP 43) (Crawford Decl. ¶ 23). The byproduct of these chemical reactions is refinery gas, which is continuously yielded and then immediately consumed (burned) in the process heaters and boilers for heat input into the unit processes. (CP 43) (Crawford Decl. ¶ 24). The processing flow and collection of refinery fuel gas does not stop and is not complete until the gas is fully and completely burned (oxidized) in process heaters and boilers. (CP 43) (Crawford Decl. ¶¶ 25, 27). The average time for refinery fuel gas to be produced, enter the fuel gas system, flow through the piping and mix drum, and be consumed is a calculated 30 seconds or less. (CP 44) (Crawford Decl. ¶ 32).

The plain language of Rule 252 provides that the HST is inapplicable to refinery fuel gas under these facts. The production and consumption of refinery gas is a continuous process, not only within the confines of the manufacturing plant, but within the self-contained processing units that perpetuate the petroleum manufacturing cycle. Refinery gas produced during and because of the physical/chemical changes that occur in the petroleum manufacturing process, is produced and consumed as part of an integrated, constant, manufacturing process. Once produced, refinery gas is then immediately consumed within that process. The trial court ignored this undisputed evidence and upheld the Department's imposition of HST against Tesoro on refinery gas, when the clear language Rule 252 excludes any intermediate substance that is subsequently used and consumed within the manufacturing plant, as refinery gas is produced, used and consumed in Tesoro's plant.

2. Refinery Gas Is Not Withdrawn From the Manufacturing Process for Sale or Transfer Outside the Refinery, and Therefore HST Does Not Apply to Such Gas. Subsection (7)(b)(i) of Rule 252 subjects an intermediate product to HST only when such product is produced, and then withdrawn for sale or transferred outside the manufacturing or processing plant. See WAC 458-20-252, Part I, Subsection (7)(b)(i). This subsection is entirely consistent with Subsection (7)(b) of Rule 252 and the statute. Under

Subsection (7)(b)(i), the substance becomes taxable only when it is sold or transferred outside the manufacturing plant from which it was produced. If the substance is stored and later sold to another party or transferred to another plant or party, it would be subject to HST under (7)(b)(i). But if the substance is produced as an intermediate product, stored at the plant, and then reintroduced into the manufacturing process, it would not be covered by (7)(b)(i) nor subject to HST under the plain reading of the "plant" language of Subsection (7)(b).

The Refinery cannot store or sell refinery fuel gas. (CP 43) (Crawford Decl. ¶ 27). In fact, refinery gas is never withdrawn from Tesoro's manufacturing plant, nor is it ever withdrawn from the refining process. While the gas is constantly yielded in the chemical reaction of the petroleum refining process, it is then immediately consumed within the vessels, pipes, and furnaces, which constitute the integrated manufacturing process of petroleum refining, or it is burned in the refinery flare. Under these facts, Subsection (7)(b)(i) of Rule 252 states that a product produced, but not removed from the manufacturing plant, is not subject to HST.

3. Rule 252(8)(c) Confirms That HST Only Applies to Certain Hazardous Substances Withdrawn From Storage for Sale, Transfer, Manufacture or Consumption. In addition to Subsections (7)(b)

and (7)(b)(i), Rule 252 provides a third reason to conclude refinery fuel gas is not subject to HST. Subsection (8)(c) states as follows:

Special provision for manufacturers, refiners, and processors. Manufacturers, refiners and processors who possess hazardous substances are required to report the tax and take any available exemptions and credits only at the time that such hazardous substances are withdrawn from storage for purposes of their sale, transfer, remanufacture, or consumption.

WAC 458-20-252, Part I, subsection (8)(c) (emphasis added).

Rule 252(8)(c) provides the timing for the imposition of the HST on refiners and manufacturers, and underscores that HST is to be paid only when substances are first stored and then removed or withdrawn from storage for subsequent sale, transfer, remanufacture, or consumption. When read in conjunction with Rule 252(7)(b) and (7)(b)(i), it is clear that Subsection (8)(c) applies only to hazardous substances brought into the manufacturing plant from without. Subsection (8)(c) does not apply at all to intermediate substances produced at the manufacturing plant where the same substance is reintroduced into the manufacturing process for consumption. Those substances, like refinery gas, are covered under Subsection (7)(b). As such, subsections (7)(b) and (8)(c) are completely in harmony with one another. Subsection (8)(c) is obviously applicable to other substances brought into the plant, and does not even apply to a substance like refinery gas that is produced and consumed all within the same manufacturing plant, regardless whether it is produced and then

immediately consumed, or produced, withdrawn, stored and then reintroduced into the manufacturing process and then consumed.

Here, refinery gas is consumed but never stored, because the Refinery does not have storage for this substance. (CP 44) (Crawford Decl. ¶ 33). Instead, refinery gas is constantly yielded in the chemical reaction, piped, and then used (consumed) in a continuous manufacturing process. The gas is in a vapor state and goes immediately to the flare if not consumed. (Id.) Even if refinery gas was stored at Tesoro's plant, Rule 252(7)(b) and (7)(b)(i) still exclude it from HST. This reading of the regulation harmonizes both Subsections (7)(b) and (8)(c).¹⁰

¹⁰The refinery gas internally created by Tesoro is not sufficient to produce the amount of heat necessary to operate the various equipment and other gases or fuels that must be purchased to supplement refinery gas. (CP 45) (Crawford Decl. ¶ 37). For example, a small amount of natural gas (delivered via pipeline) is purchased to supplement the internally produced refinery gas in order to meet the heating requirements for the process units. (CP 45) (Crawford Decl. ¶ 38). Other fuels purchased by the Refinery to supplement refinery fuel gas include liquid fuel oil, liquid propane and liquid butane, which are purchased and, unlike refinery fuel gas, can be and are stored and used for fuel in an emergency or special circumstances. (CP 45) (Crawford Decl. ¶ 39). These fuels are consumed in place of purchased natural gas, as required or as dictated by economics, or in an emergency (loss of natural gas supply). Id. These latter products, fuel oil, propane, and butane, are stored as liquids and their consumption as fuel is discretionary, unlike fuel gas, which must either be consumed immediately and burned in furnaces or the flare. (CP 45-46) (Crawford Decl. ¶ 40). To the extent that the Refinery is the first possessor of these substances -- fuel oil, propane and butane -- Tesoro pays HST because they are purchased and stored substances consistent with subsection (8)(c) of Rule 252.

D. Department Bulletin "ETA 540" Confirms That Refinery Fuel Gas Is Not Subject to HST.

Rule 252 is not the only determination of the Department that grants an HST exemption for refinery fuel gas. The Department published Excise Tax Advisory 540.04.22.252 ("ETA 540"), on August 19, 1988, and reaffirmed and republished it on July 1, 1998. (CP 70-73) (Mastrodonato Decl., Exhibit E).¹¹ ETA 540 recognized that "[o]ther products derived from refining crude oil, . . . are . . . used as fuel, [and] include . . . Volatile Fuels . . . [such as] Export Refinery Fuel Gas." (CP 71) (ETA 540, p. 2) (emphasis added). ETA 540 went on to state as follows:

These listed "other products" used as fuel are entitled to the exemptions of hazardous substance tax when used by the refiner in further processing petroleum, i.e., burned in the refinery plant; and when they are exported for use or sale outside this state as fuel.

Id. (emphasis added); see (CP 71) (Exhibit E).

This language clearly allowed an HST exemption for any fuel (refinery fuel gas) used (burned in the refinery plant) in processing

¹¹Before the trial court, the Department argued that ETA 540 was a publication based upon the original, 1987, HST law, and has no application to the I-97 law or the law in effect during the Refund Period. VRP 34-35. As noted, ETA 540 was republished and therefore reaffirmed by the DOR on July 1, 1998, which is a full 10 years after the I-97 law took effect and, as further noted, remained in effect throughout the Refund Period.

petroleum. ETA 540 also stated in response to the "withdrawal" and "storage" issue, as follows:

None of the products listed above, whether used as fuel or not, are taxable merely because they are possessed as intermediate substances during the oil refining process itself. Their possession is taxable only when they are removed from the refining process for some other, nonexempt, use or sale.

Id., at 3; see (CP 72) (Mastrodonato Decl., Exhibit E) (emphasis added).

The first quoted sentence of ETA 540 states that substances, including those used as fuel, are not taxable merely because they are possessed as intermediate products created during the oil refining process. The statement then goes on to declare that the only substances subject to HST are those removed from the manufacturing process, stored, and then sold or used in a nonexempt way, consistent with Rule 252(7)(b)(i). At Tesoro's Refinery, refinery gas is an intermediate substance created and consumed within the oil refining process. It is never removed from that process nor stored. See (CP 43-44) (Crawford Decl. ¶¶ 26, 27, 33).

Thus, these sections of ETA 540 reinforce subsections (7)(b) and (7)(b)(i) of Rule 252, which state that substances created and consumed in a manufacturing process, without withdrawal or storage, are not subject to HST. Moreover, ETA 540, like Rule 252, clearly and unequivocally says fuel "used by the refiner in further processing petroleum, i.e., burned in the refinery plant," are not taxable. (CP 71) (Mastrodonato Decl.,

Exhibit E at 2). How much more clear can a departmental publication be about the very substance that is the subject of this case? ETA 540 is entirely consistent with Rule 252 in allowing refinery gas to be excluded from the HST.¹²

E. The Department's "End Product" Theory Ignores Rule 252 Itself States That "Intermediate" Products Are Not Subject to HST if They Are Otherwise Consumed During the Manufacturing or Processing Activity, and Refinery Gas Falls Squarely Under This Provision.

1. Refinery Gas Is "Otherwise Consumed During the Manufacturing or Processing Activity" Under the Plain Language of Rule 252(7)(b). The Department will undoubtedly again argue, as it did in the trial court below, that refinery gas is an end product, not an intermediate substance. See (CP 129) (Department's Memorandum at 6). But, as shown, refinery gas is an ephemeral product, not an end product. Moreover, the "end products" Tesoro manufactures include gasoline, jet fuel, and diesel fuel, among others (CP 41-42) (Crawford Decl. ¶ 16), not refinery gas.

¹²While the case was pending before this Court, the Department unilaterally canceled ETA 540. See Appendix, Exhibit 4. In the notice explaining the cancellation of ETA 540, the DOR lists a number of reasons purportedly justifying cancellation, but does not reference this litigation. This Court should view the belated cancellation of ETA 540 by the Department as nothing less than an attempt to alter the historical record of an interpretation of HST irreconcilable with the Department's position in this case.

To support its end product argument, the Department focuses on the word "intermediate" in Rule 252(7)(b), relying on Webster's dictionary.¹³ See (CP 129) (Department's Memorandum at 6). According to the Department, the word "intermediate" is defined as a noun to mean, "A substance formed as a necessary stage in the manufacture of a desired end product." Id.¹⁴ However, the use of the word "intermediate" in

¹³The Department has never stated what version of Webster's dictionary it was citing.

¹⁴The Merriam-Webster OnLine dictionary defines "intermediate" as a noun to mean "a usually short-lived chemical species formed in a reaction as an intermediate step between the starting material and the final product."

Even if the Department's definition of the word "intermediate" as a noun in this context is correct, refinery gas would still qualify as an "intermediate . . . substance" under Rule 252(7)(b). Again, the Department's definition of "intermediate" is "[a] substance formed as a necessary stage in the manufacture of a desired end product." (CP 129) (Department's Memorandum at 6). Refinery gas is a substance formed as a necessary result of chemical reactions occurring in refining crude oil into desired end products (e.g., gasoline, diesel, and jet fuel). See (CP 42) (Crawford Decl. ¶ 21). In the end, the Department's argument on what the word "intermediate" means in Rule 252(7)(b) is pointless.

Moreover, the Merriam-Webster OnLine dictionary definition of "intermediate" as a noun supports Tesoro, not the Department. Again, that definition is, "a usually short-lived chemical species formed in a reaction between the starting material and the final product." Refinery gas is a short-lived (30 seconds or less) chemical species found in petroleum refining formed between the processing of crude oil into final products (gasoline, diesel, jet fuel). (CP 43-44) (Crawford Decl. ¶¶ 23, 32, 35).

The Department also quoted The Facts on File Dictionary of
(continued . . .)

Rule 252 is an adjective, not a noun (subsection (7)(b) states, "the intermediate possession of such substance(s)" (emphasis added)). "Intermediate" is an adjective because it modifies the noun "possession." The Merriam-Webster OnLine definition of the word "intermediate" in this context is, "being or occurring at the middle place, stage, or degree or between extremes." Applying this definition, refinery gas is a byproduct occurring between (and used in) the refining of crude oil into finished products. See (CP 42-43) (Crawford Declaration ¶¶ 21, 23-25). It therefore falls squarely within the definition of "intermediate" as an adjective.

2. The Department and Trial Court Misconstrued the Last Phrase of Rule 252(7)(b). The Department will also argue that refinery

(... continued)

Chemistry (3d ed. 1999) for a definition of "intermediary." See (CP 129-30) (Department's Memorandum at 6-7, fn.19). It is a well established rule of statutory construction that "[t]echnical language should be given its technical meaning when used in its technical field." Wastewater Mgmt. v. Dep't of Revenue, 145 Wn.2d 445, 452, 38 P.3d 1010 (2002) (citing Keeton v. Dep't of Soc. & Health Servs., 34 Wn. App. 353, 361, 661 P.2d 982 (1983), and Hickle v. Whitney Farms, Inc., 107 Wn. App. 934, 945, 29 P.3d 50 (2001)). But even the technical definition of the word "intermediate" -- "[a] transient chemical entity in a complex reaction" -- supports Tesoro's argument. Refinery gas is not a desired yield from petroleum refining. (CP 258) (Second Crawford Decl. ¶ 6). Instead, it is purely ephemeral or transient. The chemical reactions are optimized and the gas is yielded and burned to recover its heating value in the manufacturing process. Id. This meets the technical definition of a transient chemical that is part of a bigger, more complex reaction. Thus, not even the Facts on File technical definition can help the Department.

gas is not an intermediate product, because it does not meet two requirements of Rule 252(7)(b). The Department previously argued:

Refinery gas is not an intermediate substance because it is not an "ingredient or component of the product being manufactured" and it is not "consumed during the manufacturing activity."

(CP 130) (Department's Memorandum at 7 (emphasis added)).

The notion that the substance must become a part of the final product and be consumed is a complete distortion of the rule.¹⁵ The rule uses the word "or," not the word "and." The Department is not giving the rule a full read, or it is disregarding the last part of Rule 252(7)(b), which states, "or is otherwise consumed during the manufacturing activity." In making this argument, the Department believes the entire phrase, "becomes a component or ingredient of the product being manufactured or processed or is otherwise consumed during the manufacturing or

¹⁵The trial court made the same error in attempting to justify its ruling in favor of the Department:

... [E]ven though something might come into being and be possessed, thus subject to tax, it's excluded if it subsequently becomes an ingredient or component. It's also excluded if it subsequently is consumed. But I think that has to be read in the same sense as if it was to become a component, ingredient or consumed, not that it can be bled off and then used, whether it's stored or not, to heat the very process which supports the chemical reaction that's underway.

VRP 74 (emphasis added). However, as will be seen, the regulation does not support such a narrow reading.

processing activity" (Rule 252(7)(b), emphasis added) means only "becomes a component or ingredient of the product being manufactured." If so, then the question becomes, why would the drafters of Rule 252 add the additional language, "or is otherwise consumed in the manufacturing activity," if they were only addressing ingredients or components?

The rule clearly addresses intermediate products or substances that are ingredients and components in the first portion of this phrase. It is just as clear that the second part of this phrase addresses the consumption of something other than ingredients or components of the products being manufactured. And the two phrases are joined by the word "or," a conjunctive, signifying an alternative. See Marriage of Caven, 136 Wn.2d 800, 807, 966 P.2d 1247 (1998) ("The words 'a history of acts of domestic violence' and 'an assault or sexual assault which causes grievous bodily harm or the fear of such harm' are separated by the word 'or' which grammatically is a coordinating particle signifying an alternative").

The following is a dissection of the phrase, "or is otherwise consumed during the manufacturing or processing activity," as set forth in the last phrase of Rule 252(7)(b):

- "OTHERWISE." The word "otherwise" is used as an adverb in the sentence to modify the word "consumed." The Merriam-Webster OnLine definition of the word "otherwise" is, "in a different way or manner." The use of the word "otherwise" in the last part of Rule 252(7)(b) evidences that the rule is departing from the treatment of

the intermediate products in the beginning of the sentence and is moving on to a completely different issue related to the intermediate possession of substances.

- "CONSUMED." The word "consumed" is a verb in this context. The definition from Merriam-Webster OnLine is, "to do away with completely : DESTROY <fire *consumed* several buildings>." From the use of the word "consumed" in the last phrase of Rule 252(7)(b), it is clear that the regulation means that the product is destroyed and does not survive the process. The Department believes that "consumed" in manufacturing is synonymous with "becomes a component or ingredient of the product being manufactured." By using the phrase "otherwise consumed," Rule 252(7)(b) allows for an intermediate possession to occur of something that is produced and consumed in the manufacturing process. This shows that the rule contemplates a product that does not survive the process and is destroyed or used up in the process. There is no requirement in Rule 252(7)(b) that the substance survives as a part, ingredient or component of a product.
- "MANUFACTURING PROCESS." This is the process during which Rule 252(7)(b) requires that the intermediate product be consumed in order for such product to be nontaxable. The only other requirement is that the product or substance being consumed relate to a manufacturing activity. The Department believes that the substance must be directly a part of the reaction that occurs INSIDE the unit to qualify as exempt. But, a plain reading of Rule 252(7)(b) shows there is no requirement for this assertion, and it was apparently conjured up by the Department from thin air. This distinction is argued on page 7, line 18 (CP 130-31), of the Department's Memorandum: "A chemical reaction occurs within the unit, but the refinery gas is not part of the reaction. It is never added to the inside of the unit with the ingredients being heated." Id. But the fact is, the refinery gas is an undesired byproduct of several reactions that take place in the manufacturing process known as refining, and must be immediately consumed (combusted or burned). Without the heat provided by the refinery gas, the reaction would

not occur. It is correct that the refinery gas is not introduced as an ingredient to the reaction, but this is not the standard set by the rule, only that it is consumed during "the manufacturing or processing activity."¹⁶

When the two phrases -- "becomes a component or ingredient of the product being manufactured or processed" and "is otherwise consumed during the manufacturing or processing activity" -- joined by the conjunction "or" are closely examined, it is clear that Rule 252(7)(b) contemplates two distinct avenues by which intermediate products can be exempt from the HST. Marriage of Caven, supra. The Department has a firm grasp on the first -- "becoming a component or ingredient part of the product being manufactured." However, the Department ignores the second -- "or is otherwise consumed in the manufacturing process." As shown, this latter phrase means "consumed or destroyed in the manufacturing process, in a manner that is not becoming an ingredient or component of the item being manufactured." As such, the wording of Rule 252(7)(b) "during the manufacturing process or activity" includes precisely those activities resulting in the creation and consumption of

¹⁶Rule 252(7)(b) also states that the intermediate substance must be created and consumed "within the manufacturing or processing plant." This language clearly negates the Department's argument that the intermediate product must be in the mix that eventually results in the end product. The regulation contemplates that any substance inside the manufacturer's gates which otherwise meets the requirements of the rule, is not taxable.

refinery gas. Rule 252(7)(b) does not provide the narrow interpretation that the Department was able to foist upon the trial court, but this Court should not be similarly swayed.

V.

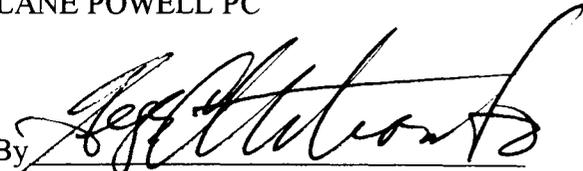
CONCLUSION

Refinery fuel gas is an intermediate and ephemeral substance created in the manufacturing or refining of petroleum products, which is used for producing heat in the refining process and entirely consumed in the refining of petroleum products. Tesoro is producing gasoline and other petroleum products; it is not producing refinery gas. Refinery gas is merely a transient byproduct of the refining process, which just as quickly as it is produced is consumed in the production of true end products. Moreover, even if this Court were to conclude that both Tesoro and the Department have competing reasonable interpretations of the meaning of the HST law as applied to refinery fuel gas, Tesoro prevails, because a tax is being imposed, and any ambiguity in interpreting the language of the statute must be resolved in favor of the taxpayer and against the Department. This Court should reverse the trial court's order granting summary judgment to the Department, grant summary judgment for Tesoro, and remand the case for entry of a judgment in the amount of HST

refund owing to Tesoro on refinery fuel gas wrongfully collected by the
Department during the Refund Period.

RESPECTFULLY SUBMITTED this 28th day of October, 2005.

LANE POWELL PC

By 

George C. Mastrodonato

WSBA No. 07483

Michael B. King

WSBA No. 14405

Attorneys for Appellant

Tesoro Refining and Marketing Company

APPENDIX

- Exhibit A Order Granting Defendant's Motion for Summary
Judgment and Denying Plaintiff's Motion for Summary
Judgment (CP 317-21)
- Exhibit B WAC 458-20-252
- Exhibit C I-97 Voters Pamphlet (Excerpts) (cover, pages 6, 7, 16, 18,
21, 22)
- Exhibit D DOR Notice of Cancellation of ETA 540

1 EXPEDITE
2 No Hearing is Set
3 Hearing is Set
4 Date:
Time:
The Honorable Richard D. Hicks

FILED
SUPERIOR COURT
THURSTON COUNTY WASH
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GETTY J. GOULD CLERK
BY S DEPUTY

8 STATE OF WASHINGTON
9 THURSTON COUNTY SUPERIOR COURT

10 TESORO REFINING &
11 MARKETING CO.,
12 Plaintiff,
13 v.
14 STATE OF WASHINGTON,
15 DEPARTMENT OF REVENUE,
16 Defendant.

NO. 04-2-00440-1
ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT AND
DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

17 On March 18, 2005, the Court heard the parties' cross-motions for
18 summary judgment. The parties requested the following relief:

19 1. The plaintiff filed a complaint requesting refund of Hazardous
20 Substance Tax in the amount of \$937,889.00, plus interest. This amount was
21 paid to the defendant, pursuant to RCW 82.21.030, on a substance referred to as
22 "refinery fuel gas." The tax was paid for the period January 1, 1999 through June
30, 2003.

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

Attorney General of Washington
Revenue Division
905 Plum Street SE, Bldg. 3
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528

EXHIBIT A
SCANNED

0-000000317

1 2. The defendant requested summary judgment dismissing plaintiff's
2 tax refund request.

3 3. The plaintiff moved for summary judgment granting the tax refund.

4 The following documents were filed in support of the cross motions for
5 summary judgment:

6 **Defendant's Motion**

7 1. Motion for Summary Judgment.

8 2. Defendant's brief in support of Motion for Summary Judgment.

9 3. Declaration of Anne Egeler in Support of Motion for Summary Judgment

10 with the following attachments:

11 Attachment A: Transcript of the Deposition of Russell A. Crawford,
12 taken on December 8, 2004.

13 Attachment B: Tesoro's answers to interrogatories posed by the
14 Department of Revenue.

15 Attachment C: Washington Board of Tax Appeals' decision in Shell
16 Oil Co. v. State, BTA Dkt. No. 93-28 (1997).

17 Attachment D: Department of Revenue's Excise Tax Advisory (ETA)
18 540.04.22.252.

19 4. Defendant's Response to Plaintiff's Motion for Summary Judgment.

20 5. Reply Brief in Support of Defendant's Motion for Summary Judgment.

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ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

Plaintiff's Motion

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1. Plaintiff's Motion for Summary Judgment.
2. Plaintiff's Memorandum in Support of Motion for Summary Judgment.
3. Declaration of Russell Crawford.
4. Declaration of Kerry L. Creager.
5. Declaration of George Mastrodonato in Support of Plaintiff's Motion for Summary Judgment, including the following exhibits:
 - Exhibit A: Letter from Tesoro to the Department of Revenue, dated October 7, 2003.
 - Exhibit B: Letter from the Department of Revenue to Tesoro, dated February 7, 2004.
 - Exhibit C: Email from Tesoro to the Department of Revenue, dated February 16, 2004.
 - Exhibit D: Letter from the Department of Revenue to Tesoro, dated February 19, 2004.
 - Exhibit E: Excise Tax Advisory (ETA) 540.04.22.252.
 - Exhibit F: Laws of 1987, 3d Ex. Sess. §§ 44-66.
 - Exhibit G: Chapter 82.22 RCW.
 - Exhibit H: WAC 458-20-252, adopted February 24, 1988.
 - Exhibit I: Laws of 1988, ch. 112.
 - Exhibit J: WAC 458-20-252, adopted May 2, 1989.
6. Defendant's Response to Plaintiff's Motion for Summary Judgment.

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

1 7. Reply to Defendant's Response to Plaintiff's Motion for Summary
2 Judgment.

3 8. Third Declaration of Russell Crawford.

4 9. [Proposed] Order Granting Plaintiff's Motion for Summary Judgment and
5 Denying Defendant's Motion for Summary Judgment.

6 Based on the argument of counsel and material presented, the Court finds:

7 1. No genuine issue of material fact exists regarding the plaintiff's claims for
8 refund of Hazardous Substance Tax paid for the period January 1, 1999 through
9 June 30, 2003.

10 2. Pursuant to chapter 82.21 RCW, Hazardous Substance Tax is due on the
11 first possession in Washington of refinery fuel gas.

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22 ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

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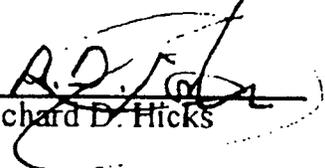
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1 It is therefore ORDERED:

2 1. Defendant's Motion for Summary Judgment is granted.

3 2. Plaintiff's Motion for Summary Judgment and request for refund is denied.

4 DATED this 8th day of April, 2005.

5
6 
Judge Richard D. Hicks

7 Presented by:

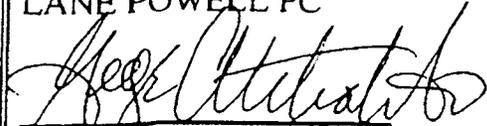
8 ROB MCKENNA
Attorney General

9 

10 Anne E. Egeler
11 WSBA No. 20258
12 Attorneys for Defendant
Department of Revenue

13 Approved as to form and
14 notice of presentation waived:

15 LANE POWELL PC

16 

17 George C. Mastrodonato
18 WSBA No. 07483
19 Attorneys for Plaintiff
20 Tesoro Refining and Marketing Co.

21
22 ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

5

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0-000000321

WAC 458-20-252 Hazardous substance tax and petroleum product tax. PART 1 - HAZARDOUS SUBSTANCE TAX

(1) Introduction. Under the provisions of chapter 82.22 RCW a hazardous substance tax was imposed, effective January 1, 1988, upon the wholesale value of certain substances and products, with specific credits and exemptions provided. This law is significantly changed, effective on March 1, 1989, because of Initiative 97 (I-97) which was passed by the voters in the November 8, 1988 general election. The tax, which is reimposed by I-97, is an excise tax upon the privilege of possessing hazardous substances or products in this state. It is imposed in addition to all other taxes of an excise or property tax nature and is not in lieu of any other such taxes.

(a) I-97, which will be referred to as chapter 2, Laws of 1989, defines certain specific substances as being hazardous and includes other substances by reference to federal legislation governing such things. It also provides authority to the director of the state department of ecology to designate any substances or products as hazardous which could present a threat to human health or the environment. The department of ecology, by duly published rule, defines and enumerates hazardous substances and products and otherwise administers the provisions of the law relating to hazardous and toxic or dangerous materials, waste, disposal, cleanup, remedial actions, and monitoring. (See chapter 173-__ of the WAC.)

(b) Sections 8 through 12 of I-97 consist of the tax provisions relating to hazardous substances and products which are administered exclusively under this section. The tax provisions relate exclusively to the possession of hazardous substances and products. The tax provisions do not relate to waste, releases or spills of any materials, cleanup, compensation, or liability for such things, nor does tax liability under the law depend upon such factors. The incidence or privilege which incurs tax liability is simply the possession of the hazardous substance or product, whether or not such possession actually causes any hazardous or dangerous circumstance.

(c) The hazardous substance tax is imposed upon any possession of a hazardous substance or product in this state by any person who is not expressly exempt of the tax. However, it is the intent of the law that the economic burden of the tax should fall upon the first such possession in this state. Therefore, the law provides that if the tax has not been paid upon any hazardous substance or product the department may collect the tax from any person who has had possession. The amount of tax paid then constitutes a debt owed by the first person having had taxable possession to the person who pays the tax.

(2) Definitions. For purposes of this part the following terms will apply.

(a) "Tax" means the hazardous substance tax imposed under section 10 of I-97.

(b) "Hazardous substance" means anything designated as such by the provisions of chapter 173 WAC, administered by the state department of ecology, as adopted and thereafter amended. In addition, the law defines this term to include:

(i) Any substance that, on March 1, 1989, is a hazardous substance under section 101(14) of the Federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), as amended by Public Law 99-499. These substances consist of chemicals and elements in their purest form. A CERCLA substance which contains water is still considered pure. Combinations of CERCLA substances as ingredients together with nonhazardous substances will not be taxable unless the end product is specifically designated as a hazardous substance by the department of ecology.

(ii) Petroleum products (further defined below);

(iii) Pesticide products required to be registered under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA); and

(iv) Anything else enumerated as a hazardous substance in chapter 173-__ WAC by the department of ecology.

(c) "Product(s)" means any item(s) containing a combination of ingredients, some of which are hazardous substances and some of which are not hazardous substances.

(d) "Petroleum product" means any plant condensate, lubricating oil, crankcase motor oil, gasoline, aviation fuel, kerosene, diesel motor fuel, benzol, fuel oil, residual fuel, asphalt base, liquefied or liquefiable gases, such as butane, ethane and propane, and every other product derived from the refining of crude oil, but the term does not include crude oil.

(i) The term "derived from the refining of crude oil" as used herein, means produced because of and during petroleum processing. "Petroleum processing" includes all activities of a commercial or industrial nature wherein labor or skill is applied, by hand or machinery, to crude oil or any byproduct of crude oil so that as a result thereof a fuel or lubricant is produced for sale or commercial or industrial use. "Fuel" includes all combustible gases and liquids suitable for the generation of energy. The term "derived from the refining of crude oil" does not mean petroleum products which are manufactured from refined oil derivatives, such as petroleum jellies, cleaning solvents, asphalt paving, etc. Such further manufactured products become hazardous substances only when expressly so designated by the director of ecology.

(e) "Possession" means control of a hazardous substance located within this state and includes both actual and constructive possession.

EXHIBIT B

(i) "Control" means the power to sell or use a hazardous substance or to authorize the sale or use by another.

(ii) "Actual possession" occurs when the person with control has physical possession.

(iii) "Constructive possession" occurs when the person with control does not have physical possession.

(f) "Previously taxed hazardous substance" means a hazardous substance upon which the tax has been paid and which has not been remanufactured or reprocessed in any manner.

(i) Remanufacturing or reprocessing does not include the mere repackaging or recycling for beneficial reuse. Rather, these terms embrace activities of a commercial or industrial nature involving the application of skill or labor by hand or machinery so that as a result, a new or different substance or product is produced.

(ii) "Recycling for beneficial reuse" means the recapturing of any used substance or product, for the sole purpose of extending the useful life of the original substance or product in its previously taxed form, without adding any new, different, or additional ingredient or component.

(iii) Example: Used motor oil drained from a crankcase, filtered, and containerized for reuse is not remanufactured or reprocessed. If the tax was paid on possession of the oil before use, the used oil is a previously taxed substance.

(iv) Possessions of used hazardous substances by persons who merely operate recycling centers or collection stations and who do not reprocess or remanufacture the used substances are not taxable possessions.

(g) "Wholesale value" is the tax measure or base. It means the fair market value determined by the wholesale selling price.

In cases where no sale has occurred, wholesale value means the fair market wholesale value, determined as nearly as possible according to the wholesale selling price at the place of use of similar substances of like quality and character. In such cases the wholesale value shall be the "value of the products" as determined under the alternate methods set forth in WAC 458-20-112.

(h) "Selling price" means consideration of any kind expressed in terms of money paid or delivered by a buyer to a seller, without any deductions for any costs whatsoever. Bona fide discounts actually granted to a buyer result in reductions in the selling price rather than deductions.

(i) "State," for purposes of the credit provisions of the hazardous substance tax, means:

(i) The state of Washington,

(ii) States of the United States or any political subdivisions of such other states,

(iii) The District of Columbia,

(iv) Territories and possessions of the United States,

(v) Any foreign country or political subdivision thereof.

(j) "Person" means any natural or artificial person, including a business organization of any kind, and has the further meaning defined in RCW 82.04.030.

(i) The term "natural person," for purposes of the tax exemption provided by section 11(2) of I-97 regarding substances used for personal or domestic purposes, means human beings in a private, as opposed to a business sense.

(k) Except as otherwise expressly defined in this section, the definitions of terms provided in chapters 82.04, 82.08, and 82.12 RCW apply equally for this section. Other terms not expressly defined in these chapters or this section are to be given their common and ordinary meanings.

(3) Tax rate and measure. The tax is imposed upon the privilege of possessing hazardous substances in this state. The tax rate is seven tenths of one percent (.007). The tax measure or base is the wholesale value of the substance, as defined herein.

(4) Exemptions. The following are expressly exempt from the tax:

(a) Any successive possessions of any previously taxed hazardous substances are tax exempt.

(i) Any person who possesses a hazardous substance which has been acquired from any other person who is registered with the department of revenue and doing business in this state may take a written statement certifying that the tax has been previously paid. Such certifications must be taken in good faith and must be in the form provided in the last part of this section. Blanket certifications may

be taken, as appropriate, which must be renewed at intervals not to exceed four years. These certifications may be used for any single hazardous substance or any broad classification of hazardous substances, e.g., "all chemicals."

(ii) In the absence of taking such certifications, the person who possesses any hazardous substance must retain proofs that it purchased or otherwise acquired the substance from a previous possessor in this state. It is not necessary for subsequent possessors to obtain certificates of previously taxed hazardous substances in order to perfect their tax exemption. Documentation which establishes any evidence of previous tax payment by another person will suffice. This includes invoices or billings from in state suppliers which reflect their payment of the tax or simple bills of lading or delivery documents revealing an in state source of the hazardous substances.

(iii) This exemption for taxes previously paid is available for any person in successive possession of a taxed hazardous substance even though the previous payment may have been satisfied by the use of credits or offsets available to the previous person in possession.

(iv) Example. Company A brings a substance into this state upon which it has paid a similar hazardous substance tax in another state. Company A takes a credit against its Washington tax liability in the amount of the other state's tax paid. It then sells the substance to Company B, and provides Company B with a certificate of previously taxed substance. Company B's possession is tax exempt even though Company A has not directly paid Washington's tax but has used a credit against its Washington liability.

(b) Any possession of a hazardous substance by a natural person for use of a personal or domestic nature rather than a business nature is tax exempt.

(i) This exemption extends to relatives, as well as other natural persons who reside with the person possessing the substance, and also to regular employees of that person who use the substance for the benefit of that person.

(ii) This exemption does not extend to possessions by any independent contractors hired by natural persons, which contractors themselves provide the hazardous substance.

(iii) Examples: Possessions of spray materials by an employee-gardener or soaps and cleaning solvents by an employee-domestic servant, when such substances are provided by the natural person for whose domestic benefit such things are used, are tax exempt. Also, possessions of fuel by private persons for use in privately owned vehicles are tax exempt.

(c) Any possession of any hazardous substance, other than pesticides or petroleum products, possessed by a retailer for making sales to consumers, in an amount which is determined to be "minimal" by the department of ecology. That department has determined that the term "minimal" means less than \$1,000.00 worth of such hazardous substances measured by their wholesale value, possessed during any calendar month.

(d) Possessions of alumina or natural gas are tax exempt.

(e) Persons or activities which the state is prohibited from taxing under the United States Constitution are tax exempt.

(i) This exemption extends to the U.S. government, its agencies and instrumentalities, and to any possession the taxation of which has been expressly reserved or preempted under the laws of the United States.

(ii) The tax will not apply with respect to any possession of any hazardous substance purchased, extracted, produced or manufactured outside this state which is shipped or delivered into this state until the interstate transportation of such substance has finally ended in this state. Thus, out-of-state sellers or producers need not pay the tax on substances shipped directly to customers in this state. The customers must pay the tax upon their first possession unless otherwise expressly exempt.

(iii) Out-of-state sellers or producers will be subject to tax upon substances shipped or delivered to warehouses or other in state facilities owned, leased, or otherwise controlled by them.

(iv) However, the tax will not apply with respect to possessions of substances which are only temporarily stored or possessed in this state in connection with through, interstate movement of the substances from points of origin to points of destination both of which are outside of this state.

(f) The former exemption for petroleum products for export sale or use outside this state as fuel was effectively repealed by I-97. There are no exemptions under the law for any possessions of hazardous substances in this state simply because such substances may later be sold or used outside this state.

(g) Though I-97 contains an exemption for persons possessing any hazardous substance where such possession first occurred before March 1, 1989, this exemption applies only to the tax imposed under I-97. It does not apply retroactively to excuse the hazardous substance tax which was imposed under chapter 82.22 RCW in effect from January 1, 1988 until March 1, 1989. However:

(i) **Transitional rule:** Persons who possess stocks or inventories of petroleum products as of March 1, 1989, which are destined for sale or use outside this state as fuel are not subject to tax upon such possessions of preexisting inventories. For periods before March 1,

1989 the former exemption of RCW 82.22.040(3) for export petroleum products applies. For periods on and after March 1, 1989 the exemption for prepossessed hazardous substances explained in subsection (g) above will apply. Records appropriate to establish that such petroleum products were destined for out-of-state sale or use as fuel must be retained by any possessor claiming exemption under this transitional rule.

(5) Credits. There are three distinct kinds of tax credits against liability which are available under the law.

(a) A credit may be taken by any manufacturer or processor of a hazardous substance produced from ingredients or components which are themselves hazardous substances, and upon which the hazardous substance tax has been paid by the same person or is due for payment by the same person.

(i) Example. A manufacturer possesses hazardous chemicals which it combines to produce an acid which is also designated as a hazardous substance or product. When it reports the tax upon the wholesale value of the acid it may use a credit to offset the tax by the amount of tax it has already paid or reported upon the hazardous chemical ingredients or components. In this manner the intent of the law to tax hazardous substances only once is fulfilled.

(ii) Under circumstances where the hazardous ingredient and the hazardous end product are both possessed by the same person during the same tax reporting period, the tax on the respective substances must be computed and the former must be offset against the latter so that the tax return reflects the tax liability after the credit adjustment.

(iii) This credit may be taken only by manufacturers who have the first possession in this state of both the hazardous ingredients and the hazardous end product.

(b) A credit may be taken in the amount of the hazardous substance tax upon the value of fuel which is carried from this state in the fuel tank of any airplane, ship, truck, or other vehicle.

(i) The credit may be claimed only for the amount of tax reported or actually due to be paid on the fuel, not the amount representing the value of the fuel.

(ii) The purpose of this credit is to exclude from taxation any possessions of fuel which remains in the fuel tanks of any carrier vehicles powered by such fuel when they leave this state, regardless of where or from whom such fuel-in-tanks was acquired.

(iii) The nature of this credit is such that it generally has application only for interstate and foreign private or common carriers who carry fuel into this state and/or purchase fuel in this state. The intent is that the tax will apply only to so much of such fuel as is actually consumed by such carriers within this state.

(iv) In order to equitably and efficiently administer this tax credit, any fuel which is brought into this state in carrier vehicle fuel tanks must be accounted for separately from fuel which is purchased in this state for use in such fuel tanks. Formulas approved by the department for reporting the amount of fuel consumed in this state for purposes of this tax or other excise tax purposes will satisfy the separate accounting required under this subsection.

(v) Fuel-in-tanks brought into this state must be fully reported for tax and then the credit must be taken in the amount of such fuel which is taken back out of this state. This is to be done on the same periodic excise tax return so that the net effect is that the tax is actually paid only upon the portion of fuel consumed here.

(vi) The credit for fuel-in-tanks purchased in this state must be accounted for by using a fuel-in-tanks credit certificate in substantially the following form:

**Certificate of Credit for Fuel Carried
from this State in Fuel Tanks**

I hereby certify that the petroleum products specified herein, purchased by or transferred to the undersigned, from (name of seller or transferor), are entitled to the credit for fuel which is carried from this state in the fuel tank of any airplane, ship, truck, or other vehicle operated by a private or common carrier in interstate or foreign commerce. I will become liable for and pay the taxes due upon all or any part of such fuel which is not so carried from this state. This certification is given with full knowledge of, and subject to the legally prescribed penalties for fraud and tax evasion.

Registration No.

(if applicable)

Type of Business
Firm Name
Business Address
Registered Name

(if different)

Tax Reporting Agent

(if applicable)

Authorized Signature

Title

Identity of Fuel

(kind and amount by volume)

Date:

(vii) This certificate may be executed and provided to any possessor of fuel in this state, throughout the chain of distribution, with respect to fuel which ultimately will be sold and delivered into any carrier's fuel tanks in this state. Thus, refiners or manufacturers will take such certificates directly from carriers or from their wholesale purchasers who will sell to such carriers. Similarly, fuel dealers and distributors will take such certificates from carriers to whom they sell such fuel. These certificates must be retained as a permanent part of such seller's business records.

(viii) Persons who execute and provide these credit certificates to their fuel suppliers must retain suitable purchase and sales records as may be necessary to determine the amount of tax for which such persons may be liable.

(ix) Blanket certificates may be used to cover recurrent purchases of fuel by the same purchaser. Such blanket certificates must be renewed every two years.

(c) A credit may be taken against the tax owed in this state in the amount of any other state's hazardous substance tax which has been paid by the same person measured by the wholesale value of the same hazardous substance.

(i) In order for this credit to apply, the other state's tax must be significantly similar to Washington's tax in all its various respects. The taxable incident must be possessing the substance; the tax purpose must be that the substance is hazardous; and the tax measure must be stated in terms of the wholesale value of the substance, without deductions for costs of doing business, such that the other state's tax does not constitute an income tax or added value tax.

(ii) This credit may be taken for the amount of any other state's qualifying tax which has actually been paid before Washington state's tax is incurred because the substance was previously possessed by the same person in another taxing jurisdiction.

(iii) The amount of credit is limited to the amount of tax paid in this state upon possession of the same hazardous substance in this state. Also, the credit may not be applied against any tax paid or owed in this state other than the hazardous substance tax imposed by section 10 of I-97.

(iv) Exchange agreements under which hazardous substances or products possessed in this state are exchanged through any accounts crediting system with like substances possessed in other states do not qualify for this credit. The substance taxed in another state, and for which this credit is sought, must be actually, physically possessed in this state.

(v) Persons claiming this credit must maintain records necessary to verify that the credit taking qualifications have been met. See WAC 458-20-19301, part (9) for record keeping requirements. The department of revenue will publish an excise tax bulletin listing other states' taxes which qualify for this credit.

(6) Newly defined hazardous substances. The director of ecology may identify and designate things as being hazardous substances after March 1, 1989. Also, things designated as hazardous substances may be deleted from this definition. Such actions are done by the adoption and subsequent periodic amendments to rules of the department of ecology under the Washington Administrative Code.

(a) The law allows the addition or deletion of substances as hazardous by rule amendments, no more often than twice in any calendar year.

(b) When such definitions are changed, they do not take effect for tax purposes until the first day of the following month which is at least thirty days after the effective date of rule action by the department of ecology.

(i) Example. The department of ecology adopts or amends the rule by adding a new substance and the effective date of the amendment is June 15. Possession of the substance does not become taxable until August 1.

(ii) The tax is owed by any person who has possession of the newly designated hazardous substance upon the tax effective date as explained herein. It is immaterial that the person in possession on that date was not the first person in possession of the substance in this state before it was designated as hazardous.

(7) Recurrent tax liability. It is the intent of the law that all hazardous substances possessed in this state should incur this tax liability only once unless they are expressly exempt. This is true of hazardous ingredients of products as well as the manufactured end product itself, if designated as a hazardous substance. The exemption for previously taxed hazardous substances does not apply to "products" which have been manufactured or remanufactured simply because an ingredient or ingredients of that product may have already been taxed when possessed by the manufacturer. Instead of an exemption, manufacturers in possession of both the hazardous ingredient(s) and end product(s) should use the credit provision explained at part (5)(a) of this section.

(a) However, the term "product" is defined to mean only an item or items which contain a combination of both hazardous substance(s) and nonhazardous substance(s). The term does not include combinations of only hazardous substances. Thus, possessions of substances produced by combining other hazardous substances upon all of which the tax has previously been paid will not again be taxable.

(b) When any hazardous substance(s) is first produced during and because of any physical combination or chemical reaction which occurs in a manufacturing or processing activity, the intermediate possession of such substance(s) within the manufacturing or processing plant is not considered a taxable possession if the substance(s) becomes a component or ingredient of the product being manufactured or processed or is otherwise consumed during the manufacturing or processing activity.

(i) However, when any intermediate hazardous substance is first produced during a manufacturing or processing activity and is withdrawn for sale or transfer outside of the manufacturing or processing plant, a taxable first possession occurs.

(c) Concentrations or dilutions for shipment or storage. The mere addition or withdrawal of water or other nonhazardous substances to or from hazardous substances designated under CERCLA or FIFRA for the sole purpose of transportation, storage, or the later manufacturing use of such substances does not result in any new hazardous product.

(8) How and when to pay tax. The tax must be reported on a special line of the combined excise tax return designated "hazardous substances." It is due for payment together with the timely filing of the return upon which it is reported, covering the tax reporting period during which the hazardous substance(s) is first possessed within this state. Any person who is not expressly exempt of the tax and who possesses any hazardous substance in this state, without having proof that the tax has previously been paid on that substance, must report and pay the tax.

(a) It may be that the person who purchases a hazardous substance will not have billing information from which to determine the wholesale value of the substance when the tax return for the period of possession is due. In such cases the tax is due for payment no later than the next regular reporting due date following the reporting period in which the substance(s) is first possessed.

(b) The taxable incident or event is the possession of the substance. Tax is due for payment by the purchaser of any hazardous substance whether or not the purchase price has been paid in part or in full.

(c) Special provision for manufacturers, refiners, and processors. Manufacturers, refiners, and processors who possess hazardous substances are required to report the tax and take any available exemptions and credits only at the time that such hazardous substances are withdrawn from storage for purposes of their sale, transfer, remanufacture, or consumption.

(9) How and when to claim credits. Credits should be claimed and offset against tax liability reported on the same excise tax return when possible. The tax return form provides a line for reporting tax on hazardous substances and a line for taking credits as an offset against the tax reported. It is not required that any documents or other evidences of entitlement to credits be submitted with the report. Such proofs must be retained in permanent records for the purpose of verification of credits taken.

(10) Special provision for consumer/first possessors. Under circumstances where the consumer is the first person in possession of any nonexempt hazardous substance (e.g., substances imported by the consumer), or where the consumer is the person who must pay the tax upon substances previously possessed in this state (fuel purchased for export in fuel tanks) the consumer's tax measure will be eighty percent of its retail purchase price. This provision is intended to achieve a tax measure equivalent to the wholesale value.

(11) Hazardous substances or products on consignment. Consignees who possess hazardous substances or products in this state with the power to sell such things, in their own name or on behalf of a disclosed or undisclosed consignor are liable for payment of the tax. The exemption for previously taxed substances is available for such consignees only if the consignors have paid the tax and the consignee has retained the certification or other proof of previous tax payment referred to in part (4)(i) and (ii) of this section. Possession

of consigned hazardous substances by a consignee does not constitute constructive possession by the consignor.

(12) Hazardous substances untraceable to source. Various circumstances may arise whereby a person will possess hazardous substances in this state, some of which have been previously taxed in this or other states and some of which may not. In such cases formulary tax reporting may be used, only upon a special ruling by the department of revenue.

(a) Example. Fungible petroleum products from sources both within and outside this state are commingled in common storage facilities. Formulary reporting is appropriate based upon volume percentages reflecting the ratio of in-state production to out-of-state production or other form of acquisition.

(13) Administrative provisions. The provisions of chapter 82.32 RCW regarding due dates, reporting periods, tax return requirements, interest and penalties, tax audits and limitations, disputes and appeals, and all such general administrative provisions apply equally to the hazardous substance tax. Special requested rulings covering unique circumstances generally will be issued within sixty days from the date upon which complete information is provided to the department of revenue.

(14) Certification of previously taxed hazardous substance. Certification that the hazardous substance tax has already been paid by a person previously in possession of the substance(s) may be taken in substantially the following form:

I hereby certify that this purchase
- all purchases of

(omit one)
..... by,
(identify substance (s) purchased) (name of purchaser)
who possesses,
registration no. (buyer's number, if registered)

consists of the purchase of hazardous substance(s) or product(s) upon which the hazardous substance tax has been paid in full by a person previously in possession of the substance(s) or product(s) in this state. This certificate is given with full knowledge of, and subject to the legally prescribed penalties for fraud and tax evasion, and with the full knowledge and agreement that the undersigned hereby assumes any liability for hazardous substance tax which has not been previously paid because of possession of the hazardous substance(s) or product(s) identified herein.

..... The registered seller named below
.. personally paid the tax upon
possession of the hazardous
substances.

..... A person in possession of the
.. hazardous substances prior to the
possession of the registered seller
named below paid the tax.

(Check the appropriate line.)

Name of registered seller Registration No.

Firm name Address

Type of business

Authorized signature ... Title

.....

Date

PART II - PETROLEUM PRODUCTS TAX

(1) Under the provisions of chapter 383, Laws of 1989, (hereinafter referred to as the law), a petroleum product tax was imposed, effective July 1, 1989, upon the wholesale value of petroleum products in this state with specific credits and exemptions provided. The tax is an excise tax upon the privilege of first possessing petroleum products in this state. It is imposed in addition to all other taxes of an excise or property tax nature, including the hazardous substance tax explained earlier in this section, and is not in lieu of any other such taxes.

(a) Sections 14-18 of the law consist of the tax provisions relating to possession of petroleum products which are administered exclusively under this section. The application of the petroleum product tax with the exceptions noted below, is the same as the hazardous substance tax applications explained in subsection (1)(c) of part 1 of this section.

(b) The petroleum product tax is imposed upon any possession of petroleum products in this state by any person who is not expressly exempt of the tax. However, it is the intent of the law that the economic burden of the tax should fall only upon the first such possession in this state just like the hazardous substance tax.

(2) Definitions. For purposes of this part the following terms will apply.

(a) "Tax" means the petroleum product tax imposed under section 16 of the law.

(b) "Petroleum product" means any plant condensate, lubricating oil, gasoline, aviation fuel, kerosene, diesel motor fuel, benzol, fuel oil, residual fuel oil, asphalt base, liquefied or liquefiable gases, such as butane, ethane and propane, and every other product derived from the refining of crude oil, but the term does not include crude oil.

(c) "Possession" means control of a petroleum product located within this state and includes both actual and constructive possession.

(i) "Control" means the power to sell or use a petroleum product or to authorize the sale or use by another.

(ii) "Actual possession" occurs when the person with control has physical possession.

(iii) "Constructive possession" occurs when the person with control does not have physical possession.

(d) "Previously taxed petroleum products" means petroleum products upon which the petroleum product tax has been paid and which have not been remanufactured or reprocessed in any manner (other than mere repackaging or recycling for beneficial reuse) since the tax was paid.

(e) "Wholesale value" is the tax measure or base. It means the fair market value determined by the wholesale selling price at the place of use of similar products of like quality and character. "Wholesale value" shall be determined in precisely the manner for the petroleum product tax as it is for the hazardous substance tax in part 1, subsection (2)(g) of this section.

(f) "Selling price." See 2(h) of part 1 of this section.

(g) "State," for purposes of the credit provisions of the petroleum product tax, means:

(i) A state of the United States other than Washington, or any political subdivision of such other state,

(ii) The District of Columbia,

(iii) Any foreign country or political subdivision thereof, and

(iv) Territories and possessions of the United States.

(3) Tax rate and measure. The tax is imposed upon the privilege of possession of petroleum products in this state. The tax rate is fifty one-hundredths of one percent (.005). The tax measure or base is the wholesale value of the petroleum products, as defined herein. The tax will apply for first possessions of petroleum products in all periods after its effective date unless the department notifies taxpayers in writing of the department's determination that the pollution liability reinsurance program trust account contains a sufficient balance to cause a moratorium on the tax application. The department will again notify taxpayers in writing if and when the account balance requires reapplication of the tax.

(4) Exemptions. The following are expressly exempt from the tax:

(a) Any successive possessions of any previously taxed petroleum products are exempt in precisely the manner as the same exemption for the hazardous substance tax. (See part 1, subsection (4)(a) of this section.) If the tax is paid by any person other than the first person having taxable possession of a petroleum product, the amount of tax paid shall constitute a debt owed by the first person

having taxable possession to the person who paid the tax.

(b) Any possession of a petroleum product by a natural person for use of a personal or domestic nature rather than a business nature is exempt in precisely the manner as the same exemption for the hazardous substance tax. (See part 1, subsection (4)(b) of this section.)

(c) Any possessions of the following substances are tax exempt:

(i) Natural gas, or petroleum coke;

(ii) Liquid fuel or fuel gas used in processing petroleum;

(iii) Petroleum products that are exported for use or sale outside this state as fuel.

(iv) The exemption for possessions of petroleum products for export sale or use as fuel may be taken by any person within the chain of distribution of such products in this state. To perfect its entitlement to this exemption the person possessing such product(s) must take from its buyer or transferee of the product(s) a written certification in substantially the following form:

Certificate of Tax Exempt Export Petroleum Products

I hereby certify that the petroleum products specified herein, purchased by or transferred to the undersigned, from (seller or transferor), are for export for use or sale outside Washington state as fuel. I will become liable for and pay any petroleum product tax due upon all or any part of such products which are not so exported outside Washington state. This certificate is given with full knowledge of, and subject to the legally prescribed penalties for fraud and tax evasion.

Registration No.
Type of
Business
(If applicable) Firm
Name
Registered Name (If
different)
Authorized
Signature
Title
Identity of Petroleum
Product

(Kind and amount by
volume)
Date:

(v) Each successive possessor of such petroleum products must, in turn, take a certification in this form from any other person to whom such petroleum products are sold or transferred in this state. Failure to take and keep such certifications as part of its permanent records will incur petroleum product tax liability by such sellers or transferrers of petroleum products.

(vi) Persons in possession of such petroleum products who themselves export or cause the exportation of such products to persons outside this state for further sale or use as fuel must keep the proofs of actual exportation required by WAC 458-20-193, parts A or C. Carriers who will purchase fuel in this state to be taken out-of-state in the fuel tanks of any ship, airplane, truck, or other carrier vehicle will provide their fuel suppliers with this certification. Then such carriers will directly report and pay the tax only upon the portion of such fuel actually consumed by them in this state. (With respect to fuel brought into this state in fuel tanks and partially consumed here, see the credit provisions of part 1, subsection (5)(b) of this section.

(vii) Blanket export exemption certificates may never be accepted in connection with petroleum products exchanged under exchange agreements.

(d) Any possession of petroleum products packaged for sale to ultimate consumers. This exemption is limited to petroleum products

which are prepared and packaged for sale at usual and ordinary retail outlets. Examples are containerized motor oil, lubricants, and aerosol solvents.

(5) Credits. There are two distinct kinds of tax credits against liability which are available under the law.

(a) A credit may be taken in the amount of the petroleum product tax upon the value of fuel which is carried from this state in the fuel tank of any airplane, ship, truck, or other vehicle. The credit is applied in precisely the same manner as the hazardous substance tax in part 1, subsection (5)(b) of this section.

The same form of certification as used for the fuel-in-tanks hazardous substance tax credit in subsection (5)(b)(vi) of part 1 of this section may be used.

(b) A credit may be taken against the tax owed in this state in the amount of any other state's petroleum product tax which has been paid by the same person measured by the wholesale value of the same petroleum product tax.

(i) In order for this credit to apply, the other state's tax must be significantly similar to Washington's tax in all its various respects. The taxable incident must be on the act or privilege of possessing petroleum products and the tax must be of a kind that is not generally imposed on other activities or privileges; the tax purpose must be to fund pollution liability insurance; and the tax measure must be stated in terms of the wholesale value of the petroleum products, without deductions for costs of doing business, such that the other state's tax does not constitute an income tax or added value tax.

(ii) The credit is applied in precisely the same manner as the state credit for hazardous substance tax in part 1, subsection (5)(c) of this section. The amount of the credit shall not exceed the petroleum product tax liability with respect to that petroleum product.

(6) The general administrative and tax reporting provisions for the hazardous substance tax contained in part 1 (8) through (14) of this section apply as well for the petroleum products tax of this part in precisely the same manner except the references to "hazardous substance(s)" or "substance(s)" should be replaced with the words, "petroleum products."

[Statutory Authority: RCW 82.32.300. 89-16-091 (Order 89-12), § 458-20-252, filed 8/2/89, effective 9/2/89; 89-10-051 (Order 89-1), § 458-20-252, filed 5/2/89; 88-06-028 (Order 88-2), § 458-20-252, filed 2/26/88.]

1988 VOTERS & CANDIDATES

PAMPHLET

& THE 1988 VOTERS PAMPHLET

NUMBER 10



- Office of the Secretary of State
- King County Division of Records & Elections
- City of Seattle Office of Election Administration

State General Election • November 8, 1988

EXHIBIT C



INITIATIVE MEASURE 97

TO THE LEGISLATURE

Note: the ballot title and explanatory statement were written by the Attorney General as required by law. The complete text of Initiative Measure 97 begins on page 18.

Official Ballot Title:

Shall a hazardous waste cleanup program, partially funded by a 7/10 of 1% tax on hazardous substances, be enacted?

The law as it now exists:

State law enacted in October, 1987 provides for a hazardous waste cleanup program in the State of Washington. The primary responsibility for the cleanup of hazardous waste sites is imposed upon the owner or operator of the site, the person responsible for

Statement for

INITIATIVE 97 MAKES THE POLLUTERS PAY

Polluters should pay to clean up their own mess. Initiative 97 would make them do that. *Polluters are forced to clean up their wastes.* If they don't, tough fines and criminal penalties will follow.

TOUGH LAWS. TOUGH FINES. NO DEALS.

Nearly every week brings news of new toxic catastrophes. *One out of six people who live in Washington could be affected by toxics.* Families around Puget Sound, in Spokane, and in Central Washington *cannot drink their water* because of chemical pollution. Washington is the second worst state west of the Mississippi for hazardous waste sites. Seeping landfills, pesticides, and petroleum products can cause cancer and birth defects. Seniors may be particularly vulnerable. The need for a tough toxics cleanup law now is clear.

THE PEOPLE'S INITIATIVE

For years irresponsible polluters fought hard to avoid a tough law. An initiative was written after polluters blocked legislation to clean up toxic waste. Thousands of volunteers worked very hard to give us the chance to clean up toxics now. *Across the state over 200,000 people signed petitions. Now you have your chance to send a strong message to polluters: You want a tough law, with tough fines and no deals.*

DONT LET BIG CORPORATE POLLUTERS BUY THE ELECTION

Big oil and chemical companies will spend \$1.5 million dollars to convince you to vote against Initiative 97. Don't

be fooled. *Initiative 97 is the stronger toxic cleanup program which will make our environment cleaner and safer, for today and tomorrow, for our children and grandchildren.*

Rebuttal of Statement against

- *Strong citizens' initiative eliminates polluters' loopholes.* It forces polluters to clean up their own mess. No deals. No delays. No watered-down health standards. I-97 has been carefully reviewed and supported by more than 70 groups, dozens of legislators and signed by 215,000 people.

- *Cleanups, not lawsuits.* I-97 makes cleanups happen now—not later. The initiative prohibits polluters from filing lawsuits that delay cleanups.

- *More money for farmers, small businesses and recycling* - to clean up our drinking water now and for the future.

Voters Pamphlet Statement Prepared by:

JOLENE UNSOELD, State Representative; JANICE NIEMI, State Senator; DAVID BRICKLIN, President, Washington Environmental Council.

Advisory Committee: THE REVEREND DR. WILLIAM B. CATE, President, Church Council of Greater Seattle; LAWRENCE KENNEY, President, Washington State Labor Council; HENRY BURTON, Chair, Cascade Chapter Sierra Club; WENDY A. WENDLANDT, Executive Director, Washington Public Interest Research Group; WANDA HAAS, President, League of Women Voters of Washington.

the disposal or release, and the generator or transporter of the waste. The strict liability under the law does not apply to persons who, without negligence and in accordance with State and federal law, apply pesticides or fertilizers for the purpose of growing any crops, trees, nursery plants, or farm animals.

The State Department of Ecology is empowered to investigate, adopt rules, establish standards, classify substances as hazardous substances, require remedial actions, establish priorities for site cleanups, promote hazardous waste reduction and recycling, and provide educational programs. A scientific advisory board is to advise the Department.

The person legally responsible for the cleanup of a hazardous waste site must be given a reasonable opportunity by the Department of Ecology to develop a remedial program, meeting the Department's standards for the cleanup of the site. The Department, before approving such plan and settlement, must give an opportunity for public comment. The plan, when approved, must be filed with the superior court; then there is a thirty-day waiting period for public comment. As part of an approved cleanup plan, the Department can defray some of the costs, agree not to bring suit to compel cleanup in excess of the plan, and certify the completion of the cleanup. Such approved cleanup programs are exempted from various permits that would otherwise be required by law.

The Department of Ecology can, for failure to comply with a Department order, seek from the court civil penalties of up to three times the remedial costs incurred by the State and penalties of up to \$10,000 per day. The State's costs to clean up a hazardous waste site is a debt secured by a lien on the real property. The Department's orders are subject to review in court.

Private persons can sue the Department of Ecology to compel it to perform any nondiscretionary duty under this law. Private persons can also sue to compel potentially liable persons to comply with the law as well as other common-law and statutory actions. Clean-up contractors are not liable unless they are negligent or grossly negligent.

Owners who know that a significant quantity of hazardous materials has been released or spilled on their property must place a notice of that fact in the county real estate records, and must also notify the State Department of Ecology. When the Department of Ecology discovers such a release or spill, the Department is required to place a notice of such fact in the county real estate records.

The Department of Agriculture may dispose of unusable pesticides collected from licensed pesticide operators. And the Department shall implement a pesticide waste disposal program. The Department of Ecology is to adopt rules allowing the Department to

(continued on page 16.)

Statement against

I-97: FLAWED INITIATIVE MAKES FOR BAD LAW

Initiative 97 is full of good intentions, but contains serious flaws that will hurt many groups in Washington. The Initiative's purpose was to encourage the legislature to act. It is not good law and fails to include many important public programs, like household hazardous waste collection.

The Initiative simply did not go through the same scrutiny and public input that the legislature's law did. The legislature worked for three years to create a law that is fair to everyone - 97B.

I-97: DELAYS AND LAWSUITS, NOT CLEANUPS

The Initiative will stop the cleanups that are already taking place under 97B, the new law. Long delays will result and costs will escalate. The Initiative will result in lawsuits, not cleanups.

I-97: HURTS TAXPAYERS, AGRICULTURE, SMALL BUSINESSES

The Association of Washington Cities endorses Legislative Alternative 97B, not the Initiative. Initiative 97 will result in outrageous public cleanup costs with no added protection of public health or the environment.

I-97: LIKE THE FEDERAL SUPERFUND, A 99% FAILURE

I-97 is patterned after the federal superfund law that has produced eight years of costly court battles and virtually no cleanup. Why replace a law that is working and resulting in cleanups (97B), with an initiative (Initiative 97) patterned after a federal failure?

Rebuttal of Statement for

Don't fall for I-97, a toxic scare campaign imported from California and financed by out-of-staters. The Seattle Times charges I-97 backers with "demagogery and phony one-liners," such as "make the polluters pay." 97B is the current law; it's already making the polluters pay and cleaning up toxics now. I-97 would overthrow the law and delay cleanups. Out-of-staters are funding a toxic scare campaign to overthrow the law. Keep the *best* law, vote YES 97B.

For more information, call (206) 448-4972.

Voters Pamphlet Statement Prepared by:

MIKE KREIDLER, State Senator; CLYDE BALLARD, State Representative; DAVE STURDEVANT, Clark County Commissioner.

Advisory Committee: DAN EVANS, U.S. Senator; VICKI MCNEILL, President, Association of Washington Cities; RAY HILL, Master, Washington State Grange; ANDREA BEATTY RINIKER, former Director, Department of Ecology; GILBERT S. OMENN, M.D., Ph.D., Chair, Scientific Advisory Board, Department of Ecology.

(Explanatory statement for Initiative Measure 97 is continued here from page 7.)

collect and dispose of household hazardous wastes. The Department provides grants to local governments for household hazardous waste collection and disposal.

The law also makes it a crime (a felony) to be guilty of toxic endangerment.

Until July 1, 1990, petroleum is not subject to the hazardous waste provisions unless it is an extremely hazardous waste or a solid waste decomposition that presents a substantial threat to human health or environment. Petroleum is, however, not exempt from cleanup orders for spills, leaks and discharges.

A State tax of 8/10 of 1% is imposed on the wholesale value of hazardous substances which includes petroleum products except for natural gas, alumina, petroleum coke and petroleum products exported for use or sale outside the State. 53 percent of the proceeds of that tax is made available to local government and 47 percent to State government for the hazardous waste cleanup program.

The Department of Ecology is to establish fees for water discharge permits to pay the costs of monitoring such permits, but not to exceed a total of \$3,600,000 for the 1987-89 biennium.

The Legislature has appropriated to carry out this program \$41,600,000 for expenditure through June 30, 1989.

If neither Alternative Measure 97B nor Initiative 97 is approved by the voters, then the current law is repealed effective upon certification of the election results.

The effect of Initiative Measure 97, if approved into law:

If Initiative 97 is approved, then the existing law is repealed on March 1, 1989 and the following becomes the new law:

The primary responsibility for the cleanup of hazardous waste sites would be imposed upon the owner or operator of the site, the person responsible for the disposal or release, and the generator, or the transporter of the waste. The strict liability under the Initiative does not apply to persons who, without negligence and in accordance with State and federal law, apply pesticides and fertilizers for the purpose of growing food crops.

The State Department of Ecology is empowered to investigate, adopt rules, establish standards, classify substances as hazardous substances, require remedial actions, establish priorities for site cleanups, promote hazardous waste reduction and recycling and provide educational programs. A scientific advisory board and regional citizen advisory committees are to advise the Department.

Before the Department finds that a person is potentially liable, the person is to be notified and allowed an opportunity for comment. No settlement can be made by the Department of Ecology with any person who is potentially liable for the cleanup of hazardous waste sites unless the Attorney General agrees to the settlement and the Department finds, after a public hearing, the settlement would lead to a more expeditious cleanup of the hazardous substances. A settlement agreement must be entered as a court order. A settlement may later be reopened if factors are discovered which present a previously unknown threat to human health or the environment. The Department can provide financial assistance only in situations which would result in a more expeditious cleanup and prevention of an unfair economic hardship.

The Attorney General can seek from the court, for failure to comply with a Department of Ecology order, civil penalties of up to three times any costs incurred by the State as a result of persons' refusal to comply and penalties of up to \$25,000 a day. The Department's actions are reviewable in court.

Private persons can sue the Department of Ecology to compel it to perform any nondiscretionary duty under this law. Private persons can also pursue common-law and other statutory actions. Cleanup

contractors are held to strict liability but if the contractor is retained by Ecology, the State can be indemnified by the State.

The law also makes it a crime, a felony, to knowingly transport, treat, store, handle or dispose of a hazardous substance in violation of this law. Petroleum in underground storage tanks, in compliance with federal, State and local laws, is not subject to this law unless there is a release from the tank. However, petroleum is subject to the hazardous waste provisions.

A State tax of 7/10ths of 1% is imposed on the wholesale value of hazardous substances which includes petroleum products except for natural gas and alumina. 52.86 percent of the proceeds of that tax is made available to local government and 47.14 percent to State government for the hazardous waste cleanup program. None of these funds can be used for solid waste incineration.

The Department of Ecology is to establish annual fees for water discharge permits and the maximum fee for municipalities shall not exceed five cents per month per residence contributing to the municipality's waste water system.

The Legislature's appropriation of \$41,600,000 for the hazardous waste program will expire March 1, 1989 and expenditures after that date will require a legislative appropriation.

(Explanatory statement for Alternative Measure 97B continued from page 9.)

collect and dispose of household hazardous wastes. The Department provides grants to local governments for household hazardous waste collection and disposal.

The law also makes it a crime (a felony) to be guilty of toxic endangerment.

Until July 1, 1990, petroleum is not subject to the hazardous waste provisions unless it is an extremely hazardous waste or a solid waste decomposition that presents a substantial threat to human health or environment. Petroleum is, however, not exempt from cleanup orders for spills, leaks and discharges.

A State tax of 8/10 of 1% is imposed on the wholesale value of hazardous substances which includes petroleum products except for natural gas, alumina, petroleum coke and petroleum products exported for use or sale outside the State. 53 percent of the proceeds of that tax is made available to local government and 47 percent to State government for the hazardous waste cleanup program.

The Department of Ecology is to establish fees for water discharge permits to pay the costs of monitoring such permits, but not to exceed a total of \$3,600,000 for the 1987-89 biennium.

The Legislature has appropriated to carry out this program \$41,600,000 for expenditure through June 30, 1989.

If neither Alternative Measure 97B nor Initiative 97 is approved by the voters, then the current law is repealed effective upon certification of the election results.

The effect of Alternative Measure 97B, if approved into law:

If Alternative Measure 97B is approved, then the existing law enacted in October, 1987 will remain the same. For an explanation of that law, see the description above under the caption "The Law As It Now Exists" (beginning on page 8).

forming services in a nursing home licensed pursuant to chapter 10.51 RCW, shall be paid wages beginning with September 1, 1975, at a rate of not less than two dollars and ten cents an hour, and beginning the calendar year 1976, at a rate of not less than two dollars and twenty cents an hour, and beginning the calendar year 1977, at a rate of not less than two dollars and thirty cents an hour.

(4) Any individual eighteen years of age or older engaged in performing services in a hospital licensed pursuant to chapter 70.44 RCW, or chapter 71.12 RCW, shall be paid wages beginning with September 1, 1975, at a rate of not less than two dollars and ten cents an hour, and beginning the calendar year 1976, at a rate of not less than two dollars and twenty cents an hour, and beginning the calendar year 1977 at a rate of not less than two dollars and thirty cents an hour.

(5) Any individual eighteen years of age or older employed in a retail or service establishment and who is so employed primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs shall be paid wages beginning with September 1, 1975, at a rate of not less than two dollars an hour, and beginning the calendar year 1976, at a rate of not less than two dollars and twenty cents an hour, and beginning the calendar year 1977, at a rate of not less than two dollars and thirty cents an hour.)

Sec. 3. Section 15, chapter 16, Laws of 1973 2nd ex. sess. and RCW 49.12.121 are each amended to read as follows:

The committee, or the director, may at any time inquire into wages, hours, and conditions of labor and minors employed in any trade, business or occupation in the state of Washington and may adopt special rules for the protection of the safety, health and welfare of minor employees (such minimum wages not to exceed the state minimum wage as prescribed in RCW 49.46.020, as now or hereafter amended). The minimum wage for minors shall be as prescribed in RCW 49.46.020. The committee shall issue work permits to employers for the employment of minors, after being assured the proposed employment of a minor meets the standards set forth concerning the health, safety and welfare of minors as set forth in the rules and regulations promulgated by the committee. No minor person shall be employed in any occupation, trade or industry subject to this 1973 amendatory act, unless a work permit has been properly issued, with the consent of the parent, guardian or other person having legal custody of the minor and with the approval of the school which such minor may then be attending.

NEW SECTION. Sec. 4. A new section is added to chapter 49.46 RCW to read as follows:

Beginning January 1, 1991, and prior to January 1 of each odd-numbered year thereafter, the office of financial management shall review the state minimum wage and make recommendations to the legislature and the governor regarding its increase.

NEW SECTION. Sec. 5. This act shall take effect January 1, 1989.



COMPLETE TEXT OF Initiative 97

AN ACT Relating to the environment; amending RCW 43.218; adding a new chapter to Title 70 RCW; adding a new chapter to Title 82 RCW; adding a new section to chapter 70.105 RCW; adding a new section to chapter 70.105A RCW; adding a new section to chapter 90.48 RCW; creating new sections; repealing RCW 90.48.460; prescribing penalties; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

NEW SECTION. Sec. 1. DECLARATION OF POLICY. (1) Each person has a fundamental and inalienable right to a healthful environment, and each person has a responsibility to preserve and enhance that right. The beneficial stewardship of the land, air, and waters of the state is a solemn obligation of the present generation for the benefit of future generations.

(2) A healthful environment is now threatened by the irresponsible use and disposal of hazardous substances. There are hundreds of hazardous waste sites in this state, and more will be created if current waste practices continue. Hazardous waste sites threaten the state's water resources, including those used for public drinking water. Many of our municipal landfills are current or potential hazardous waste sites and present serious threats to human health and environment. The costs of eliminating these threats in many cases are beyond the financial means of our local governments and ratepayers. The main purpose of this act is to raise sufficient funds to clean up all hazardous waste sites and to prevent the creation of future hazards due to improper disposal of toxic wastes into the state's land and waters.

(3) Many farmers and small business owners who have followed the law with respect to their uses of pesticides and other chemicals nonetheless may face devastating economic consequences because their uses have contaminated the environment or the water supplies of their neighbors. With a source of funds, the state may assist these farmers and business owners, as well as those persons who sustain damages, such as the loss of their drinking water supplies, as a result of the contamination.

(4) Because it is often difficult or impossible to allocate responsibility among persons liable for hazardous waste sites and because it is essential that sites be cleaned up well and expeditiously, each responsible person should be liable jointly and severally.

NEW SECTION. Sec. 2. DEFINITIONS. (1) "Department" means the department of ecology.

(2) "Director" means the director of ecology or the director's designee.

(3) "Facility" means (a) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, vessel, or aircraft, or (b) any site or area where a hazardous substance, other than a consumer product in consumer use, has been deposited, stored, disposed of, or placed, or otherwise come to be located.

(4) "Federal cleanup law" means the federal comprehensive environmental response, compensation, and liability act of 1980, 42 U.S.C. Sec. 9601 et seq., as amended by Public Law 99-499.

(5) "Hazardous substance" means:

(a) Any dangerous or extremely hazardous waste as defined in RCW 70.105.010(5) and (6), or any dangerous or extremely dangerous waste designated by rule pursuant to chapter 70.105 RCW;

(b) Any hazardous substance as defined in RCW 70.105.010(14) or any hazardous substance as defined by rule pursuant to chapter 70.105 RCW;

(c) Any substance that, on the effective date of this section, is a hazardous substance under section 101(14) of the federal cleanup law, 42 U.S.C. Sec. 9601(14);

(d) Petroleum or petroleum products; and

(e) Any substance or category of substances, including solid waste decomposition products, determined by the director by rule to present a threat to human health or the environment if released into the environment.

The term hazardous substance does not include any of the following when contained in an underground storage tank from which there is not a release: Crude oil or any fraction thereof or petroleum, if the tank is in compliance with all applicable federal, state, and local law.

(6) "Owner or operator" means:

(a) Any person with any ownership interest in the facility or who exercises any control over the facility; or

(b) In the case of an abandoned facility, any person who had owned, or operated, or exercised control over the facility any time before its abandonment;

The term does not include:

(i) An agency of the state or unit of local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or circumstances in which the government involuntarily acquires title. This exclusion does not apply to an agency of the state or unit of local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility; or

transferred to the account by the legislature. Moneys in the account may be used only to carry out the purposes of this chapter, including but not limited to the following activities:

(i) The state's responsibility for hazardous waste planning, management, regulation, enforcement, technical assistance, and public education required under chapter 70.105 RCW;

(ii) The state's responsibility for solid waste planning, management, regulation, enforcement, technical assistance, and public education required under chapter 70.95 RCW;

(iii) The hazardous waste cleanup program required under this chapter;

(iv) State matching funds required under the federal cleanup law;

(v) Financial assistance for local programs in accordance with RCW 70.95.130, 70.95.140, 70.95.220, 70.95.230, 70.95.530, 70.105.220, 70.105.225, 70.105.235, and 70.105.260;

(vi) State government programs for the safe reduction, recycling, or disposal of hazardous wastes from households, small businesses, and agriculture;

(vii) Hazardous materials emergency response training;

(viii) Water and environmental health protection and monitoring programs;

(ix) Programs authorized under chapter 70.146 RCW;

(x) A public participation program, including regional citizen advisory committees;

(xi) Public funding to assist potentially liable persons to pay for the costs of remedial action in compliance with cleanup standards under section 3(2)(d) of this act but only when the amount and terms of such funding are established under a settlement agreement under section 4(4) of this act and when the director has found that the funding will achieve both (A) a substantially more expeditious or enhanced cleanup than would otherwise occur, and (B) the prevention or mitigation of unfair economic hardship; and

(xii) Development and demonstration of alternative management technologies designed to carry out the top two hazardous waste management priorities of RCW 70.105.150.

(3) The following moneys shall be deposited into the local toxics control account: Those revenues which are raised by the tax imposed under section 10 of this act and which are attributable to that portion of the rate equal to thirty-seven one-hundredths of one percent. Moneys deposited in the local toxics control account shall be used by the department for grants to local governments for the following purposes in descending order of priority: (a) Remedial actions; (b) hazardous waste plans and programs under RCW 70.105.220, 70.105.225, 70.105.235, and 70.105.260; and (c) solid waste plans and programs under RCW 70.95.130, 70.95.140, 70.95.220, and 70.95.230. Funds for plans and programs shall be allocated consistent with the priorities and matching requirements established in chapters 70.105 and 70.95 RCW.

(4) Except for unanticipated receipts under RCW 43.79.260 through 43.79.282, moneys in the state and local toxics control accounts may be spent only after appropriation by statute. All earnings from investment of balances in the accounts, except as provided in RCW 43.84.090, shall be credited to the accounts.

(5) One percent of the moneys deposited into the state and local toxics control accounts shall be allocated only for public participation grants to persons who may be adversely affected by a release or threatened release of a hazardous substance and to not-for-profit public interest organizations. The primary purpose of these grants is to facilitate the participation by persons and organizations in the investigation and remedying of releases or threatened releases of hazardous substances and to implement the state's solid and hazardous waste management priorities. No grant may exceed fifty thousand dollars though it may be renewed annually. Moneys appropriated for public participation from either account which are not expended at the close of any biennium shall revert to the state toxics control account.

(6) No moneys deposited into either the state or local toxics control account may be used for solid waste incinerator feasibility studies, construction, maintenance, or operation.

(7) The department shall adopt rules for grant issuance and performance.

NEW SECTION. Sec. 8. INTENT OF POLLUTION TAX. It is the intent of this chapter to impose a tax only once for each hazardous substance possessed in this state and to tax the first possession of all hazardous substances, including substances and products that the department of ecology determines to present a threat to human health or the environment. However, it is not intended to impose a tax on the first possession of small amounts of any hazardous substance (other than petroleum and pesticide products) that is first possessed by a retailer for the purpose of sale to ultimate consumers. This chapter is not intended to exempt any person from tax liability under any other law.

NEW SECTION. Sec. 9. DEFINITIONS. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Hazardous substance" means:

(a) Any substance that, on the effective date of this section, is a hazardous substance under section 101(14) of the federal comprehensive environmental response, compensation, and liability act of 1980, 42 U.S.C. Sec. 9601(14), as amended by Public Law 99-499;

(b) Petroleum products;

(c) Any pesticide product required to be registered under the federal insecticide, fungicide and rodenticide act; and

(d) Any other substance, category of substance, and any product or category of product determined by the director of ecology by rule to present a threat to human health or the environment if released into the environment. The director of ecology shall not add or delete substances from this definition more often than twice during each calendar year. For tax purposes, changes in this definition shall take effect on the first day of the next month that is at least thirty days after the effective date of the rule. The word "product" or "products" as used in this paragraph (d) means an item or items containing both: (i) One or more substances that are hazardous substances under (a), (b), or (c) of this subsection or that are substances or categories of substances determined under this paragraph (d) to present a threat to human health or the environment if released into the environment; and (ii) one or more substances that are not hazardous substances.

(2) "Petroleum product" means plant condensate, lubricating oil, gasoline, aviation fuel, kerosene, diesel motor fuel, benzol, fuel oil, residual oil, liquefied or liquefiable gases such as butane, ethane, and propane, and every other product derived from the refining of crude oil, but the term does not include crude oil.

(3) "Possession" means the control of a hazardous substance located within this state and includes both actual and constructive possession. "Actual possession" occurs when the person with control has physical possession. "Constructive possession" occurs when the person with control does not have physical possession. "Control" means the power to sell or use a hazardous substance or to authorize the sale or use by another.

(4) "Previously taxed hazardous substance" means a hazardous substance in respect to which a tax has been paid under this chapter and which has not been remanufactured or reprocessed in any manner (other than mere repackaging or recycling for beneficial reuse) since the tax was paid.

(5) "Wholesale value" means fair market wholesale value, determined as nearly as possible according to the wholesale selling price at the place of use of similar substances of like quality and character, in accordance with rules of the department.

(6) Except for terms defined in this section, the definitions in chapters 82.04, 82.08, and 82.12 RCW apply to this chapter.

NEW SECTION. Sec. 10. POLLUTION TAX. (1) A tax is imposed on the privilege of possession of hazardous substances in this state. The rate of the tax shall be seven-tenths of one percent multiplied by the wholesale value of the substance.

(2) Moneys collected under this chapter shall be deposited in the toxics control accounts under section 7 of this act.

(3) Chapter 82.32 RCW applies to the tax imposed in this chapter. The tax due dates, reporting periods, and return requirements applicable to chapter 82.04 RCW apply equally to the tax imposed in this chapter.

NEW SECTION. Sec. 11. EXEMPTIONS. The following are exempt from the tax imposed in this chapter:

(1) Any successive possession of a previously taxed hazardous sub-

stance. If tax due under this chapter has not been paid with respect to a hazardous substance, the department may collect the tax from any person who has had possession of the hazardous substance. If the tax is paid by any person other than the first person having taxable possession of hazardous substance, the amount of tax paid shall constitute a debt owed by the first person having taxable possession to the person who paid the tax.

(2) Any possession of a hazardous substance by a natural person under circumstances where the substance is used, or is to be used, for a personal or domestic purpose (and not for any business purpose) by that person or a relative of, or person residing in the same dwelling as, that person.

(3) Any possession of a hazardous substance amount which is determined as minimal by the department of ecology and which is possessed by a retailer for the purpose of making sales to ultimate consumers. This exemption does not apply to pesticide or petroleum products.

(4) Any possession of alumina or natural gas.

(5) Persons or activities which the state is prohibited from taxing under the United States Constitution.

(6) Any persons possessing a hazardous substance where such possession first occurred before the effective date of this section.

NEW SECTION. Sec. 12. CREDITS. (1) Credit shall be allowed in accordance with rules of the department of revenue for taxes paid under this chapter with respect to fuel carried from this state in the fuel tank of any airplane, ship, truck, or other vehicle.

(2) Credit shall be allowed, in accordance with rules of the department, against the taxes imposed in this chapter for any hazardous substance tax paid to another state with respect to the same hazardous substance. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to that hazardous substance. For the purpose of this subsection:

(a) "Hazardous substance tax" means a tax:

(i) Which is imposed on the act or privilege of possession hazardous substances, and which is not generally imposed on other activities or privileges; and

(ii) Which is measured by the value of the hazardous substance, in terms of wholesale value or other terms, and in the determination of which the deductions allowed would not constitute the tax an income tax or value added tax.

(b) "State" means (i) the state of Washington, (ii) a state of the United States other than Washington, or any political subdivision of such other state, (iii) the District of Columbia, and (iv) any foreign country or political subdivision thereof.

NEW SECTION. Sec. 13. WATER DISCHARGE FEES. A new section is added to chapter 90.48 RCW to read as follows:

(1) The department shall establish annual fees to collect expenses for issuing and administering each class of permits under RCW 90.48.160, 90.48.162, and 90.48.260. An initial fee schedule shall be established by rule within one year of the effective date of this section, and thereafter the fee schedule shall be adjusted no more often than once every two years. This fee schedule shall apply to all permits, regardless of date of issuance, and fees shall be assessed prospectively. All fees charged shall be based on factors relating to the complexity of permit issuance and compliance and may be based on pollutant loading and toxicity and be designed to encourage recycling and the reduction of the quantity of pollutants. Fees shall be established in amounts to fully recover and not to exceed expenses incurred by the department in processing permit applications and modifications, monitoring and evaluating compliance with permits, conducting inspections, securing laboratory analysis of samples taken during inspections, reviewing plans and documents directly related to operations of permittees, overseeing performance of delegated pretreatment programs, and supporting the overhead expenses that are directly related to these activities.

(2) The annual fee paid by a municipality, as defined in 33 U.S.C. Sec. 1362, for all domestic wastewater facility permits issued under RCW 90.48.162 and 90.48.260 shall not exceed the total of a maximum of five cents per month per residence or residential equivalent contributing to the municipality's wastewater system. The department shall adopt by rule a schedule of credits for any municipality engaging in a comprehensive monitoring program beyond the requirements imposed by the depart-

ment, with the credits available for five years from the effective date of this section and with the total amount of all credits not to exceed fifty thousand dollars in the five-year period.

(3) The department shall ensure that indirect dischargers do not pay twice for the administrative expense of a permit. Accordingly, administrative expenses for permits issued by a municipality under RCW 90.48.165 are not recoverable by the department.

(4) In establishing fees, the department shall consider the economic impact of fees on small dischargers and the economic impact of fees on public entities required to obtain permits for storm water runoff and shall provide appropriate adjustments.

(5) All fees collected under this section shall be deposited in the water quality permit account hereby created in the state treasury. Moneys in the account may be appropriated only for purposes of administering permits under RCW 90.48.160, 90.48.162, and 90.48.260.

(6) The department shall submit an annual report to the legislature showing detailed information on fees collected, actual expenses incurred, and anticipated expenses for the current and following fiscal years.

(7) The legislative budget committee in 1993 shall review the fees established under this section and report its findings to the legislature in January 1994.

Sec. 14. Section 6, chapter 109, Laws of 1987 and RCW 43.21B.— are each amended to read as follows:

(1) Any order issued by the department or authority pursuant to RCW 70.94.211, 70.94.332, 70.105.095, 43.27A.190, 86.16.020, or 90.48.120(2) or any provision enacted after July 26, 1987, or any permit, certificate, or license issued by the department may be appealed to the pollution control hearings board if the appeal is filed with the board and served on the department or authority within thirty days after receipt of the order. Except as provided under chapter 70.— RCW (sections 1 through 7 of this 1988 act.) this is the exclusive means of appeal of such an order.

(2) The department or the authority in its discretion may stay the effectiveness of an order during the pendency of such an appeal.

(3) At any time during the pendency of an appeal of such an order to the board, the appellant may apply pursuant to RCW 43.21B.— (section 7, chapter 109, Laws of 1987) to the hearings board for a stay of the order or for the removal thereof.

(4) Any appeal must contain the following in accordance with the rules of the hearings board:

(a) The appellant's name and address;

(b) The date and docket number of the order, permit, or license appealed;

(c) A description of the substance of the order, permit, or license that is the subject of the appeal;

(d) A clear, separate, and concise statement of every error alleged to have been committed;

(e) A clear and concise statement of facts upon which the requester relies to sustain his or her statements of error; and

(f) A statement setting forth the relief sought.

(5) Upon failure to comply with any final order of the department, the attorney general, on request of the department, may bring an action in the superior court of the county where the violation occurred or the potential violation is about to occur to obtain such relief as necessary, including injunctive relief, to insure compliance with the order. The air authorities may bring similar actions to enforce their orders.

(6) An appealable decision or order shall be identified as such and shall contain a conspicuous notice to the recipient that it may be appealed only by filing an appeal with the hearings board and serving it on the department within thirty days of receipt.

NEW SECTION. Sec. 15. A new section is added to chapter 70.105 RCW to read as follows:

Any person who knowingly transports, treats, stores, handles, disposes of, or exports a hazardous substance in violation of this chapter is guilty of: (1) A class B felony if the person knows at the time that the conduct constituting the violation places another person in imminent danger of death or serious bodily injury; or (2) a class C felony if the person knows that the conduct constituting the violation places any property of another person or any natural resources owned by the state of Washington or any of its local governments in imminent danger of harm. As used

Mastrodonato, George

From: Beulah Holman [beulahh@DOR.WA.GOV]
Sent: Tuesday, May 31, 2005 3:46 PM
To: DOR-EXCISE-TAX-
INFORMATION@listserv.wa.gov
Subject: Excise Tax Advisories (issued and cancelled)

The Department of Revenue cancelled ETA 540 Special Hazardous Substance Tax Applications.

A copy of the cancelled ETA is available at:

<http://dor.wa.gov/content/laws/eta/etatoc550.aspx>

A copy of the cancellation notice is available at:

<http://dor.wa.gov/docs/rules/eta/eta540cnotice.pdf>

The Department issued ETA 2009-3s BTA Nonacquiescence.

A copy of the ETA is available at:

<http://dor.wa.gov/docs/rules/eta/2009-3s.pdf>

A copy of the issuance statement is available at:

<http://dor.wa.gov/docs/rules/eta/2009-3sinot.pdf>



STATE OF WASHINGTON
DEPARTMENT OF REVENUE

CANCELLATION OF INTERPRETIVE STATEMENT

This announcement of the cancellation of this interpretive statement is being published in the Washington State Register pursuant to the requirements of RCW 34.05.230(4).

The Department of Revenue has cancelled the following excise tax advisory (ETA):

540.04.22.252 Special Hazardous Substance Tax Applications. This advisory is being cancelled because it provides out-of-date information that is no longer needed. The ETA was written to explain the Department's interpretation of law (chapter 82.22 RCW) that was repealed and replaced with new law (chapter 82.21 RCW) a number of years ago. The ETA refers to provisions of WAC 458-20-252 that do not exist in the current version of the rule. Issues addressed in this document that are pertinent under current law are addressed in the rule. There is also no need for the list of examples of products that result from a crude oil refinery process. This list is 17 years old, and such information could be found via internet research.

A copy of the cancelled document is available via the Internet at <http://www.dor.wa.gov/content/laws/eta/eta.aspx>, or a request for copies may be directed to:

Roseanna Hodson
Interpretations and Technical Advice Unit
P.O. Box 47453
Olympia, Washington 98504-7453
Phone: (360) 570-6119
FAX (360) 586-5543

Alan R. Lynn, Rules Coordinator

Filed: May 31, 2005
Time: 2:17 p.m.
WSR: 05-12-118



State of Washington
Department of Revenue

Excise Tax Advisory

Excise Tax Advisories (ETA) are interpretive statements issued by the Department of Revenue under authority of RCW 34.05.230. ETAs explain the Department's policy regarding how tax law applies to a specific issue or specific set of facts. They are advisory for taxpayers; however, the Department is bound by these advisories until superseded by Court action, Legislative action, rule adoption, or an amendment to or cancellation of the ETA.

NUMBER: 540.04.22.252

CONVERSION DATE: July 1, 1998

This ETA was cancelled effective May 31, 2005

SPECIAL HAZARDOUS SUBSTANCE TAX APPLICATIONS

Issued August 19, 1988

Pursuant to WAC 458-20-252 (Hazardous Substance Tax), Part (14), members of the petroleum industry have requested special rulings to, a) specify the kinds of refined petroleum products which may be exported for use as fuel; b) clarify that export exemption certificates may be taken by refiners and dealers even though all of the product covered by the certificate may not be exported by the buyer; c) explain the use of blanket certificates for tax exempt products; d) provide alternative tax reporting methods in lieu of calculating tax credits upon ingredients of end-petroleum products; e) explain any and all available cost deductions for measuring the tax, including other Washington state taxes; and f) provide the circumstances under which the Department will accept properly documented sales invoices as proofs of previously taxed hazardous substances in lieu of giving certifications.

While items a) and b) above pertain exclusively to the petroleum industry, the remaining items are generally pertinent for all possessors of any hazardous substances.

It is the position of the Department, under chapter 82.22 RCW and Rules 252, that:

a) RCW 82.22 provides that hazardous substance means petroleum products. Petroleum products include plant condensate, lubricating oil, gasoline, aviation fuel, kerosene, diesel motor fuel, benzol, fuel oil, asphalt base, residual oil, liquefied or liquefiable gases such as butane, ethane and propane and "every other product" derived from the refining of crude oil but does not include crude oil.

ETBS have been made Excise Tax Advisories, and have retained their old number. Advisories with a 2 (plus three digits) are new advisories, ETBs that have been revised and readopted after review under the Department's regulatory improvement program, or advisories that have been revised and/or readopted.

Please direct comments to:
Department of Revenue
Legislation & Policy Division
P O Box 47467
Olympia, Washington 98504-7467
(360) 753-4161 eta@DOR.wa.gov

To inquire about the availability of receiving this document in an alternate format for the visually impaired or language other than English, please call (360)705-6715. Teletype (TTY) users please call 1-800-451-7985.

Other products derived from refining crude oil, which are generally sold or used as fuel, include but are not limited to:

- A. Gasoline
 - 1. Regular Leaded Gasoline
 - 2. Regular Unleaded Gasoline
 - 3. Mid Grade Unleaded Gasoline
 - 4. Premium Unleaded Gasoline
 - 5. Premium Leaded Gasoline
 - 6. Aviation Gasoline
 - 7. Other Gasoline

- B. Blending Stocks
 - 1. Cat Cracked Gasoline
 - 2. Light Straight Run Gasoline
 - 3. Reformer Gasoline (Reformate)
 - 4. Alkylation Gasoline (Alkylate)
 - 5. Isomerization Gasoline

- C. Distillate Fuels
 - 1. Jet Fuel
 - 2. Kerosene
 - 3. Diesel Fuel
 - 4. Home Heating Oil
 - 5. Number 2 Fuel Oil

- D. Volatile Fuels
 - 1. Propane
 - 2. Butane
 - 3. Export Refinery Fuel Gas

- E. Residual Fuels
 - 1. Bunker Fuel Oil
 - 2. Number 6 Fuel Oil
 - 3. Marine Fuel Oil
 - 4. Industrial Fuel Oil
 - 5. Cracked Gas Oils
 - 6. Catalytic Cracked Clarified Oil

These listed "other products" used as fuel are entitled to the exemptions of hazardous substance tax when used by the refiner in further processing petroleum, i.e., burned in the refinery plant; and when they are exported for use or sale outside this state as fuel.

Conversely, some "other products" derived from refining crude oil which are unfinished substances, generally not sold or used as fuel, include but are not limited to:

A. Feedstocks

1. Distilling Light Naphtha
2. Distilling Heavy Naphtha
3. Catalytic Reformer Feeds
4. Distillate Hydrotreater Feeds
5. Hydrocracker Feed
6. Catalytic Cracker Feed
7. Vacuum Gas Oils
8. Propylene
9. Butylene
10. Isobutane

These feedstock products are not entitled to the exemptions for use as fuel instate or for export sale or use as fuel.

None of the products listed above, whether used as fuel or not, are taxable merely because they are possessed as intermediate substances during the oil refining process itself. Their possession is taxable only when they are removed from the refining process for some other, nonexempt, use or sale.

Products generally referred to as petroleum derivatives, which contain any of the above listed substances only as an ingredient or component of the further manufactured product are not taxable hazardous substances unless and until so designated by future ruling of the Department of Ecology. Such further manufactured derivative products include such things as WD-40, gasoline additives, automotive parts cleaning agents, and electrical appliance oils, etc.

b) The exemption certificate for export sale or use as fuel outside this state may be given by buyers to refiners and accepted by such refiners even though not all of the products distributed or sold in this state will be exported by the buyer. By giving this certification of export to their sellers, the buyers simply agree to report and directly pay to the state the hazardous substance tax upon any portion of the product which is not exported for use or sale as fuel outside this state. Thus, it is not necessary for the seller to file amended tax returns to account for fuel products upon which export exemption certificates are taken. However, persons who actually report and pay the tax upon fuel products which they actually export from this state may file amended returns to obtain credit for any fuel which has been overtaxed.

c) Certificates covering export fuel products, as well as certificates for any previously taxed hazardous substances, may be given and taken in blanket form rather than giving or taking a certificate to cover each sale or transaction. Example certifications are contained in Rule 252, Parts (4)(c)(iv) and (15). Blanket certificates must be renewed at intervals not to exceed four years.

If the registration number shown on these certificates is cancelled or revoked or a material change occurs in the ownership of a purchaser's business, the blanket certificate must be renewed. If the recipient of the certificate has no reason to know of such cancellation, revocation, or change of ownership, the recipient may continue to rely on the existing certificate until it is four years old.

d) Refiners and processors of petroleum products and manufacturers of other hazardous substances may blend a variety of ingredients and components together in order to produce an end product which is a taxable hazardous substance. Some of these ingredients and components are themselves hazardous substances.

Accounting for the tax paid on the ingredients and components in order to take credits against the tax due upon the possession of the end product sold in this state may be impracticable or burdensome. Thus, in lieu of using the credit mechanism, any manufacturer or refiner who possesses taxable ingredients and components as well as the taxable end product during the same tax reporting period may simply report and pay the tax upon the full value of the taxable end product. Rule 252 already provides that the tax upon hazardous ingredients and components need not be reported and paid until such substances are withdrawn from storage for use. See Part (8)(c).

e) The measure of the hazardous substance tax is the "wholesale value" as determined by the manufacturer's or refiner's selling price. There are no deductions from the tax base for any of the manufacturer's/refiner's costs of doing business whatsoever. Thus, all charges made to the buyer are to be included in the tax measure except for the amount of the hazardous substance tax itself or any other tax which is the direct burden of the buyer rather than the seller. Such other taxes include only the Federal and state taxes on gasoline and motor vehicle fuel, retail sales tax, and use tax collected as agent for the state.

The business and occupation tax, under any classification, may not be deducted from the measure of the hazardous substance tax.

f) Certificates for previously taxed hazardous substances (Part 15 of Rule 252) need not be taken by buyers in instances where their sellers' invoices reflect the pertinent information which will show that the tax has already been paid. Thus, billing invoices which reflect that the hazardous substance tax has been paid and which show the type and quantity of product sold and the name and address of the seller or other person who has previously paid the tax will suffice, instead of taking separate certifications for each hazardous substance transaction.

For related hazardous substance tax applications, refer to ETBs 538 and 539.

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DIVISION II

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STATE OF WASHINGTON

No. 33236-1-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

BY _____
DEPUTY

TESORO REFINING AND MARKETING COMPANY,

Plaintiff-Appellant

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Defendant-Respondent

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Richard D. Hicks)

DECLARATION OF SERVICE

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I, Kathryn Savaria, the undersigned, hereby certify and declare under penalty of perjury as follows:

I am a citizen of the United States and a resident of Snohomish County, Washington. I am over the age of 18 years and am not a party to the within cause. My business mailing address is 1420 Fifth Avenue, Suite 4100, Seattle, WA 98101-2338.

I caused true and correct copies of Appellant's Opening Brief to be served to the following counsel in the manner described below:

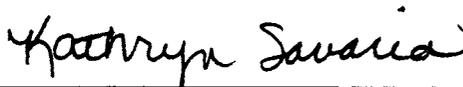
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DATED this 28th day of October, 2005.



Kathryn Savaria