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SUPREME COURT OF THE STATE OF WASHINGTON

SEIU HEALTHCARE 775NW,

Petitioner,

v.

GOVERNOR CHRISTINE GREGOIRE,

Respondent.

SEIU LOCAL 925,

Petitioner,

v.

GOVERNOR CHRISTINE GREGOIRE,

Respondent.

PETITIONERS' CONSOLIDATED REPLY BRIEF

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I. INTRODUCTION

Petitioner SEIU Healthcare 775NW (“SEIU 775NW”) and Petitioner SEIU Local 925 (“Local 925”) jointly submit this reply brief in support of their action in mandamus to compel the Governor to fulfill her nondiscretionary duty to submit to the Legislature “a request for funds necessary ... to implement the compensation and fringe benefits provisions of a collective bargaining agreement” that reflects the binding decision of an arbitration panel, pursuant to RCW 74.39A.300(2) and RCW 41.56.028(6).

As was noted by both Petitioners in their initial briefs in support of this action, the pertinent statutes identify only two preconditions for the mandatory submission by the Governor of a request for funds necessary to implement the compensation and fringe benefits provisions of the collective bargaining agreements that were entered into under RCW 74.39A.270 and RCW 41.56.028. First, the request must previously have been submitted to the director of the Office of Financial Management (“OFM”) by October 1st prior to the legislative session at which the request is to be considered. Second, the request must have either been certified by OFM as being feasible financially for the state or must reflect

the binding decision of an arbitration panel reached under RCW 74.39A.270(2)(c) or RCW 41.56.028.

In the instant cases, both of these prerequisites were met. A collective bargaining agreement (“the 2009-2011 IP contract”) was entered into between the State of Washington (“the State”) and SEIU 775NW via an interest arbitration decision issued by Arbitrator Timothy Williams on October 1, 2008. ASF775 ¶ 10. A request to fund the 2009-2011 IP contract, reflecting the interest arbitration award, was submitted to OFM by October 1, 2008. Yet the Governor failed to include funding for the parties’ agreement in her proposed budget for the 2009-2011 biennium. ASF775 ¶ 16.

Similarly, a collective bargaining agreement was reached between the State and Local 925 via an interest arbitration award issued by Arbitrator Cavanaugh on August 25, 2008. ASF925 ¶ 8. A request to fund this award was similarly submitted to OFM by the statutory deadline. Yet the Governor also failed to include funding for this agreement in her proposed budget for the 2009-2011 biennium. ASF925 ¶ 17

The State has attempted to justify these actions by reference to what it characterizes as “extraordinary economic conditions.” Brief of Respondent (“Resp. Br.”) at 18. There is nothing in the governing statutes which carves out an exception from the rule of law on that basis, however.

In the absence of such an exception, the Governor's action improperly derailed the statutory bargaining process and jeopardized the right of both the Petitioners, and their members, to receive the benefits of their duly bargained labor agreements. Equally importantly, by so acting, the Governor failed to perform an important non-discretionary duty, a failure which we respectfully ask this Court to rectify.

II. ARGUMENT

A. The State Has Conceded All But One of the Essential Elements of Petitioners' Argument.

Importantly, the State has not contested certain of the key assertions made by Petitioners with regard to their right to receive the relief sought herein. Specifically, the State has not disputed that Petitioners lack any plain, speedy or adequate remedy at law. Thus, this requirement of RCW 7.16.170 is met.

Nor has the State disputed that the Petitioners herein are beneficially interested, and therefore have standing to bring this action for mandamus, also in accordance with RCW 7.16.170.¹

Thus, the State's argument is based entirely on its contention that the Governor has no specific, existing, mandatory duty to act under the statutes involved in this dispute.

¹ See also *Eugster v. City of Spokane*, 118 Wn. App. 383, 402, 76 P.3d 741 (2003), *rev. denied*, 151 Wn.2d 1027, 94 P.3d 959 (2004).

B. The Governor Has A Specific, Mandatory Duty, Enforceable In Mandamus, To Submit As Part of Her Biennial Budget Request, A Request To Fund The Compensation And Fringe Benefit Provisions Of The 2009-2011 Arbitrated Contracts, So Long As the Two Prerequisites for Such a Submission Are Met.

- 1. The plain language of RCW 74.39A.300(1) and RCW 41.56.028(5), and the rules of statutory interpretation, dictate that the phrase “the governor must submit” creates a mandatory duty to act.**

When statutory language is clear and unequivocal, courts must assume that the legislature meant exactly what it said, apply the statute as written and decline to construe the statute otherwise. *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005); *Burton v. Lehman*, 153 Wn.2d 416, 424, 103 P.2d 1230 (2005). The Court cannot re-write or modify a mandatory statutory requirement created by the word “must” or “shall” under the guise of statutory interpretation or construction. *Graham Thrift Group, Inc. v. Pierce County*, 75 Wn. App. 267, 877 P.2d 228 (1994) (“must” is mandatory).

Respondent urges this Court to consider a number of factors to determine whether the phrase “the governor must submit” in RCW 74.39A.300(1) and RCW 41.56.028(5) imposes a mandatory duty on the Governor to request in her biennial budget funds necessary to implement the compensation and benefits provisions of the two collective bargaining

agreements here at issue (collectively, “the 2009-2011 contracts”). Resp. Br. at 41. Each of these considerations yields the same conclusion: must, unequivocally, means must.

Four factors guide the court in determining the plain meaning of a term: “the ordinary meaning of the language at issue, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole.” *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007).

The ordinary meaning of must is mandatory, rather than directive. Washington cases have explicitly construed the word “must,” like “shall,” to create a mandatory duty upon the party to whom the word applies. *See, Graham Thrift Group*, 75 Wn. App. at 267; *Buell v. City of Toppenish*, 174 Wn. 79, 80, 24 P.2d 431 (1933).²

The statutory budget scheme as a whole reflects the may/must dichotomy and sets forth numerous items the governor “may” submit (i.e., discretionary items) and those she “shall” submit (i.e., nondiscretionary items). *See, e.g.,* RCW 43.88.030 (twelve items identified as things that “shall” or “must” be done, and two items that “may” be done).³ The

² *See also* *Tranen v. Aziz*, 59 Md. App. 528, 534-35, 476 A.2d 1170 (1984) (finding that, unless the context indicates otherwise, “shall” and “must” will be construed synonymously to foreclose discretion and impose a positive absolute duty).

³ *See also* RCW 43.88.090(1) (providing discretion to direct the timing and content of estimates from agency officials, while requiring the Governor to communicate statewide

legislature's use of both "may" and "shall" indicates its intent for the words to have different meanings – "may" being directory and "shall" being mandatory. *See State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994); *State v. Bartholomew*, 104 Wn.2d 844, 848, 710 P.2d 196 (1985).

Respondent argues that RCW 43.88.030 "informs the meaning of the term 'must' in RCW 74.39A.300(1) and RCW 41.56.028(5)." Resp. Br. at 43. However nothing in RCW 43.88.030 supports Respondent's argument that "must" is non-mandatory.

For purposes of statutory construction, the legislature is presumed to have full knowledge of existing statutes affecting the matter upon which they are legislating. *Conte*, 159 Wn.2d 797, 808, 154 P.3d 194 (2007); *ATU Legislative Council of Wash. State v. State*, 145 Wn.2d 544, 552, 40 P.3d 656 (2002). In the collective bargaining statutes, the legislature included language requiring that the governor's submission of a request for funds be "part of the proposed biennial or supplemental operating budget submitted to the legislature under RCW 43.88.030." RCW 74.39A.300(1); RCW 41.56.028(5). The direct reference to RCW 43.88.030 shows contemplation by the legislature that the mandatory request for funds would be included in the governor's budget request.

priorities to those agencies and to seek public involvement and input); RCW 43.88.035 (providing discretion to propose budget-related legislative changes).

The older, more general budget statute, RCW 43.88.030, is informed, limited and constrained by the governor's obligations set forth in the newer, more specific interest arbitration statute.⁴ In other words, by enacting RCW 74.39A.300(1) and RCW 41.56.028(5), the legislature in essence grafted another mandatory duty on to RCW 43.88.030 that the Governor must follow.

With regard to employees listed in RCW 74.39A.270 and RCW 41.45.028, the interest arbitration panel is obligated to consider the financial ability of the State to pay for the compensation and benefit provisions of the arbitrated collective bargaining agreement (CBA). RCW 41.56.465(4)-(5). There is no need to require the OFM to certify the Governor's budget request as being financially feasible, because the State's ability to pay for the compensation and benefit provisions of the CBA has already been accounted for in the arbitration panel's decision. Thus, reading "the governor must" as mandatory fulfills the general object of both the general budget statutes and the more recent, more specific arbitration statutes.

In contrast, construing "must" as "may" leads to an inconsistent reading of the statutes (i.e. sometimes "must" and "shall" mean must, and

⁴ RCW 43.88.030 was enacted in 1959 and has been repeatedly amended. RCW 74.39A.300 was originally Initiative Measure No. 775, approved November 6, 2001. It was amended by the legislature in 2004. RCW 41.56.028 was originally enacted in 2006, but was amended in 2007.

sometimes “must” and “shall” mean may). In Washington, the rule is that courts interpret statutes as they are plainly written, unless a literal reading would contravene legislative intent by leading to a strained or absurd result. *State v. Keller*, 98 Wn.2d 725, 728, 657 P.2d 1384 (1983). Here, the State’s reading of the plain written language leads to an absurd and strained result, rendering the interest arbitration statutes without force and effect.

2. RCW 74.39A.300(1) and RCW 41.56.028(5) can be easily harmonized with the budget statutes without disturbing the Governor’s discretion.

Respondents contend that reading the word “must” to create a mandatory duty on the Governor to act would be inferring a legislative intent to “strip the Governor of her broad discretion to present to the Legislature a budget document that reflects the Governor’s honest judgment concerning the fiscal priorities of the State, and by necessary implication, the public policy priorities of the State.” Resp. Br. at 46. On the contrary, RCW 74.39A.300(1) and RCW 41.56.028(5) are in harmony with the budget statutes such that the Governor’s existing discretion is not disturbed.⁵

⁵ Because these statutes relate to the same subject matter, the court must harmonize them and maintain the integrity of the respective statutes. *Anderson v. Dept. of Corrections*, 159 Wn.2d 859, 861, 154 P.3d 220 (2007).

RCW 74.39A.300(1) and RCW 41.56.028(5) merely add another mandatory duty on to RCW 43.88.030, governing the submission of the Governor's budget. *See, e.g.*, RCW 43.88.030(2)(c) (impliedly referring to other statutes that mandate inclusions for the governor's budget).

As was noted above, the statutes that direct the Governor's actions for budget requests, recited at length by the State, Resp. Br. at 43-45, both impose mandatory duties in certain areas and allow her discretion in others. The State appears to argue that, because the Governor has some discretion regarding aspects of the proposed budget, and because her decisions may be based in part on fluid official economic projections, she has discretion over the entire budget document. Not so. The same budget statutes that indeed give the Governor discretion in some areas of the budget limit that discretion by specifying numerous items that the governor "shall" include in the budget documents. RCW 43.88.030(1)(a)-(h); RCW 43.88.030(2)(a)-(j). The statutes themselves foreclose the governor's discretion in many regards, and impose a positive absolute duty to include, for example, operational expenditures for each agency, revenues derived from agency operations and payments of all reliefs, judgments and claims. RCW 43.88.030(2)(b)-(e). The mandatory inclusions in the budget documents alone contravene the State's argument

that the discretion provided to the Governor relieves her of her statutory obligations regarding budget requests.

Additionally, the budget statute specifically requires the budget document or documents to include “other statutory expenditures.” RCW 43.88.030(2)(c). The language “other statutory expenditures” indicates that there may be expenditures required by other laws that are not explicitly named in RCW 43.88.030. This catch-all category of “other statutory expenditures” contemplates, impliedly refers to and encompasses the request for funds mandated by RCW 74.39A.300 and RCW 41.56.028.

Viewing the budget and labor statutes in harmony, as urged by Petitioners, maintains the integrity of the statutes, especially in light of the numerous other constraints the State admits foreclose the Governor’s judgment concerning fiscal priorities of the State. The State is quick to point out that almost 60 percent of the budget is nondiscretionary, “devoted to items we are required to provide, such as basic education, federally funded Medicaid, pensions and debt service. This forces us to balance the budget through cuts in the remaining 40 percent.” Resp. Br. at 18, 20 (quoting the Governor’s budget message, ASF775, Ex. 16, at 539-540). Respondent provides no authority to support why state statutory mandates concerning debt service, RCW 43.88.030(2)(a), and pension rates, RCW 43.88.030(2)(j) and RCW 41.45, bind the Governor in

submitting her budget document, but “other statutory expenditures” do not.

OFM Deputy Director Opitz clearly conceded that interest awards are binding expenditures like lawsuits and other mandates. Equally clearly, RCW 43.88.030(2)(c) provides that expenditures arising from other statutes, such as RCW 74.39A.300 and RCW 41.56.028, can mandate inclusions for the governor’s budget even if not specifically identified in RCW 43.88.030. For these reasons, the State’s argument that reading “must” as mandatory is at odds with RCW 43.88.030 and the Governor’s inherent discretionary authority is completely without merit.

3. Respondent contorts existing statutory language and adds nonexistent words to reach a strained, permissive interpretation of “must.”

As discussed above, meeting the statutory prerequisites of RCW 74.39A.300(2) and RCW 41.56.028(6) triggers the Governor’s non-discretionary duty to submit to the legislature a request for funds necessary to implement the 2009-2011 arbitrated contracts entered into under RCW 74.39A.270(2) and RCW 41.56.028. It is then up to the legislature to approve or reject the submission of the request for funds as a whole. RCW 74.39A.300(3); RCW 41.56.028(7).

Respondent strains to read “must” not as requiring the Governor to submit the funding request once the statutory prerequisites have been met,

but rather, as requiring her to do so only “*if she determines to seek funding for them.*” Thus, according to the State, the word “must” mandates “*the process by which –i.e., direct[s] how,* the Governor is to request funding,” once she has decided to request funding. Resp. Br. at 47-48 (italics in original).

The word “must” immediately precedes and modifies the word “submit,” however. While the phrase, “as part of the proposed biennial or supplemental operating budget...” describes one aspect of how this submission must take place, it in no way can be read as making the obligation to “submit” conditional on the Governor’s preference to so act, or any other unstated criteria. Consistent with well-established rules of statutory construction, therefore, no such unstated precondition or prerogative can be read into the statute.⁶

Without the modifying statutory phrase, the sentence simply reads “the governor must submit...a request for funds necessary to implement the compensation and benefit provisions of a collective bargaining agreement entered into under this section....” RCW 74.39A.300(1); RCW 41.56.028(5). The plain meaning of this sentence controls.

⁶ See, e.g., *Dep’t of Labor and Industries v. Cook*, 44 Wn.2d 671, 676, 269 P.2d 962 (1954) (a court cannot read into a statute anything which the court may conceive the legislature unintentionally left out); *Henley v. Henley*, 95 Wn. App. 91, 98, 974 P.2d 363 (1999) (“Courts cannot read into a statute words which are not there”) (quoting *Coughlin v. City of Seattle*, 18 Wn. App. 285, 289, 567 P.2d 262 (1977)).

Nor, finally, is a contrary interpretation of the statute required by the important legislative concerns for transparency, legislative oversight, control and honest and informed assessments regarding fiscal priorities. Resp. Br. at 48-49. That is because the collective bargaining statutes contain mandatory procedures that address those concerns. During the collective bargaining process between Petitioners and the State, the Governor is required to consult periodically with the legislature⁷ regarding appropriations necessary to implement the compensation and fringe benefits provisions of any CBA. RCW 74.39A.300(5); RCW 41.56.028(8). Upon completion of negotiations, the Governor must advise the legislature on the elements of the agreement and on any legislation necessary to implement it. *Id.* Read plainly, these provisions directly promote the legislature's goals of accountability, transparency and oversight.⁸

4. Interpreting the Governor's duty under RCW 74.39A.300(1) and RCW 41.56.028(5) as discretionary would render much of the statutes meaningless and superfluous.

Courts presume that the drafters of legislation do not use superfluous words. *Smith v. Whatcom County Dist. Court*, 147 Wn.2d 98,

⁷ Specifically, she "shall periodically consult with the joint committee on employment relations established by RCW 41.80.010."

⁸ Moreover, by adopting the statutes at issue, the legislature presumably thought they were accomplishing precisely these goals.

110, 52 P.3d 485 (2002). Statutes should not be interpreted in such a manner as to render any portion meaningless, superfluous or questionable. *Avlonitis v. Seattle Dist. Court*, 97 Wn.2d 131, 138, 641 P.2d 169 (1982); *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991).

The statutory schemes setting forth a collective bargaining and interest arbitration process function to bind both parties to the arbitrator's award, in the event the parties are unable to negotiate a CBA on their own. The Governor, or her designee, bargains the contract, and the legislature ultimately approves or disapproves the request to fund it. Thus, the statute would be undermined, and much of its language rendered superfluous, if the Governor could simply determine, after the interest arbitration process was complete, that in her judgment the CBA should not be funded. Such a result would be fundamentally at odds with the rules of statutory construction.

5. The state's contention that the word "shall" must be interpreted as "may" in order to avoid calling the constitutional validity of the relevant statutes into question is without merit.

The State contends that Petitioners' interpretation of the relevant statutory provisions "would call the validity of these statutes into question" in light of the language of Article II, Section 6, granting the Governor the authority to "recommend" certain measures to the

Legislature. The State then argues that the term “shall,” as used in the statutes, should therefore be “construed as permissive,” to avoid this constitutional problem.

The State’s argument has several fundamental flaws. First, the State has provided just one sentence of argument in support of its position that a plain reading of the statutes in question would render them unconstitutional. *See* Resp. Br. at 52. It has provided no analysis of either the textual language of the constitutional provision (quoting just a fragmentary ten words) or of preexisting state law, nor has it cited any caselaw construing or discussing this provision.

This Court has repeatedly stated that it will not consider constitutional issues unless the party so proposing “present[s] considered arguments” to the court. *See In re Rosier*, 105 Wash.2d 606, 616, 717 P.2d 1353 (1986) (“naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion”) (*quoting United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir.1970)).⁹ For this reason alone, this Court should decline to base its decision in the instant

⁹*See also Havens v. C & D Plastics, Inc.* 124 Wn.2d 158, 169, 876 P.2d 435 (1994) (appellate court will not address constitutional arguments that are not supported by adequate briefing); *Margola Assoc. v. City of Seattle*, 121 Wn.2d 625, 649-50, 854 P.2d 23 (1993) (substantive due process claim rejected, in part, on inadequate briefing); *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) (“Parties raising constitutional issues must present considered arguments to this court”).

case on the State's purported constitutional challenge to the statutes here at issue.

Were this Court to choose to examine the State's constitutional argument, moreover, it would find that the contention being made has no merit. That is because there is absolutely no legal authority suggesting that the Legislature lacks the power to direct the Governor to submit, for its consideration, a legislative proposal she may not support. The only caselaw cited for the contrary proposition, *Sutherland v. Governor*, 29 Mich. 320, 1874 WL 6372 * 5 (1874), is entirely inapposite, because it involves a determination from the Michigan Supreme Court more than a century-and-a-quarter ago that a writ of mandamus can *never* be issued by a court in that state against its governor.¹⁰

Finally, the State's suggestion that a mere fear of constitutional infirmity is a proper basis for construing the term "shall" as permissive, not mandatory, lacks merit. *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Coun. (EFSEC)*, 165 Wn.2d 275, 299, 197 P.3d 1153 (2008), the only case cited for this proposition, involved a statute that, if read literally, would have unconstitutionally

¹⁰ The doctrine of gubernatorial immunity from writs of mandamus has not been adopted in Washington. See *State ex rel. Lemon v. Langlie*, 45 Wn.2d 82, 92, 273 P.2d 464 (1954).

deprived this Court of its power to review a decision of the superior court.¹¹

Thus, while actual incompatibility with the state constitution might conceivably be a basis for interpreting the term “shall” to mean “may” under certain narrow circumstances, the mere fear of such incompatibility is not similarly a basis for deviating from the normal rules of statutory interpretation. Certainly the Respondent has offered no compelling reason for deviation in the instant case.

C. The Governor’s Duty Under RCW 74.39A.300(1) And RCW 41.56.028(5) Is A Ministerial, Not Discretionary, Act, Enforceable In Mandamus.

RCW 74.39A.300(1) and RCW 41.56.028(5), like the statutes concerning debt service and pensions, RCW 43.88.030(2)(a), RCW 43.88.030(2)(j), and RCW 41.45, afford the Governor no discretion as to whether to include a request for funding to the legislature in her budget document. The plain language of the specific statute directs that this is so. Respondent has not provided any authority why “other statutory expenditures” that the Governor “shall include” in her budget document and which contemplate mandatory requests for funding like the one in RCW 74.39A.300(1) and RCW 41.56.028(5) should be treated any

¹¹ *In re Elliott*, 74 Wn.2d 600, 610, 446 P.2d 347 (1968), relied on by *Residents Opposed*, similarly involved an apparent exercise of legislative power which, if upheld through a literal reading of the term “shall,” would have imposed “onerous and unconstitutional dictates” upon this Court.

differently from other nondiscretionary budget items. RCW 43.88.030(2)(c).

Because the two prerequisites have been satisfied, the Governor's duty to act is specific, existing and non-discretionary. She has no discretion to decide, based on an unexpected financial crisis or for any other reason, not to request funding for the 2009-2011 contracts in her budget document. The legislature retains the power to approve or reject the submission of the request for funds as a whole. RCW 74.39A.300(3); RCW 41.56.028(7). Thus it is in the *legislature's* purview, not the Governor's, to account for what would, at the time of the arbitrators' decisions, have been an unforeseeable event. The appropriation decision rests with the legislature.

Petitioners do not dispute the broad discretion that inheres in the executive. However, under the clear, unambiguous statutory scheme, once a CBA is entered into under RCW 41.56.028 or RCW 74.39A.270, the Governor must obey the instruction of the law, without discretion or judgment, and submit to the legislature a request for funds necessary to implement the CBA. Because she has not done so, and continues to refuse to do so, her clear duty is enforceable in mandamus, and the court should issue the writ forthwith.

D. The State's Argument That the Statutory Prerequisites Of RCW 74.39A.300(2) And RCW 41.56.028(6) Have Not Been Met Because the Decisions of Arbitrators Williams and Cavanaugh Are Not "The Binding Decision[s] of an Arbitration Panel" Has No Merit.

The State argues, in the alternative, that the prerequisites set forth in RCW 74.39A.300(2) and RCW 41.56.028(6) have not been fulfilled because the decisions of the interest arbitrators, having not yet been approved and funded by the legislature, are not "binding" as required in the statutes. Resp. Br. at 24-30.

The State's assertion misconstrues the statute, relies on a strained, circular and untenable reading of the language, and contradicts one of the central features of the statutes' bargaining scheme and purpose.

1. Interest arbitration, by its very nature, results in final and binding terms for the parties' contracts.

Interest arbitration results in final and binding terms for the parties' contracts. It is widely recognized as a binding process, distinct from bilateral negotiations or mediation where parties voluntarily agree to contract terms. The Public Employment Relations Commission (PERC), Washington's primary agency with jurisdiction over public sector collective bargaining, defines interest arbitration as:

A process whereby the issues not resolved in bargaining between and [sic] employer and organized employees may be presented to an impartial arbitrator for final resolution.

In Washington State, interest arbitration is a statutory process for certain employees as defined by statute.

(<http://www.perc.wa.gov/glossary.asp#i>)(viewed February 20, 2009). The United States Office of Personnel Management explains that when an arbitrator performs interest arbitration he or she “resolve[s] bargaining impasses by dictating the terms of the agreement.”¹²

Even the commentator cited by the State, Resp. Br at n. 28, recognized that, “[t]he arbitrator is vested with the authority to receive evidence and conduct hearings on the dispute, and to issue a binding award with respect to all issues in dispute, which must be incorporated into the parties’ new collective bargaining agreement.” Stuart S. Mukamal, *Unilateral Employer Action Under Public Sector Binding Interest Arbitration*, 6 J.L. & Com. 107, 109 (1986). “Binding interest arbitration is thus distinguished from ‘fact finding.’ A fact-finder merely issues recommendations for settlement of a dispute (often required to be made public) which the parties are generally free to accept or reject.” *Id.* at n.2.

Thus, interest arbitration is understood in the arena of collective bargaining and labor relations as a process that results in final and binding

¹²See <http://www.opm.gov/LMR/glossary/glossarya.asp#ARBITRATION> (viewed February 20, 2009).

contract terms. In that regard it is significantly and substantively different from other forms of dispute resolution. When parties opt for interest arbitration rather than a mediated or negotiated resolution of their contract they do so knowing that the result will determine the terms of their labor agreement. It is “binding” on both parties, absent an appeal by one party or the other to a higher court based (usually) on some claimed irregularity in the proceeding or irrationality of outcome.¹³

Contrary to the State’s assertion, nothing in RCW 74.39A.300(2) and RCW 41.56.028(6) changes this universally accepted definition of the meaning of a “binding” interest arbitration decision. The statutes establish a procedural framework and address the distinct functions of the Governor and the Legislature. The language cited by Respondents draws an important distinction between the bargaining processes, which can (as in this case) culminate in arbitrated contracts, and the appropriations process.

The bargaining process is the exclusive domain of the collective bargaining representatives and the Governor. The Legislature does not negotiate contracts. However, the Legislature holds exclusive authority over the appropriations process.¹⁴

¹³ See, e.g., *IAFF Local 1296 v. City of Kennewick*, 86 Wn.2d 156, 162, 542 P.2d 1252 (1975) (“arbitrary or capricious” standard applied to judicial review of arbitration decisions).

¹⁴ “The legislature must approve or reject the submission of the request for funds as a whole. If the legislature rejects or fails to act on the submission, any such agreement will

Recognizing the Legislature’s exclusive control over funding, the statute binds the Governor to the result of the interest arbitrators’ awards – to the extent of the Governor’s authority – by requiring her to seek funding for the collective bargaining agreements she arbitrated. RCW 41.56.028(5) and RCW 74.39A.300(1). The ultimate decision as to the funding of the contracts remains at all times with the Legislature. Reflecting this demarcation between the branches of government, the statute harmonizes the binding nature of interest arbitration with the separation of powers by clarifying in RCW 41.56.028(2)(d)(ii) and RCW 74.39A.270(2)(c)(ii) that the “decision of the arbitration panel is not binding on the legislature and, if the legislature does not approve the request for funds ... is not binding on the state.”¹⁵

2. The interpretation advanced by the State would lead to absurd results and frustrate the statutes’ purpose.

The interpretation advanced by the State would lead to absurd results and frustrate the statutes’ purpose.

be reopened solely for the purpose of renegotiating the funds necessary to implement the agreement.” RCW 41.56.028(7); RCW 74.39A.270

¹⁵ If the decisions of the interest arbitrators were not “binding” at all, of course, as the State contends, then there would have been no need for the statute to provide specifically, as it does here, that the decisions are not “binding” on the Legislature. As with so many of the State’s other arguments, this interpretation would be at odds with the rules of statutory construction, to wit, the presumption that the drafters of legislation do not use superfluous words. *Smith*, 147 Wn.2d 98 at 110; *Avlonitis*, 97 Wn.2d at 138.

First, the State's suggestion that the Governor's duty to submit the arbitrated contracts to the Legislature does not arise until the Legislature has funded those very contracts leads to a fundamentally circular interpretation of the statutory language. Once a collective bargaining agreement entered into via an interest arbitration decision has been funded by the Legislature, there is no longer any reason or basis for the Governor to submit a request for such funding in any budget request. Yet, under the State's analysis, the obligation to submit a request for funds necessary to fund an arbitrated agreement only arises *after* the Legislature funds it. There is no better term for this than "nonsensical."

Second, this interpretation would allow the Governor to ignore an interest arbitration award in its entirety. This would transform an interest arbitration process into an advisory "fact finding", which all parties could simply ignore. *See* Mukamal, *supra* at n. 2. These interest arbitration awards would never compel any branch of the state to ever take any action. While the Legislature could certainly have created a statutory scheme that involved only "advisory" arbitrations, the actual statutory scheme very clearly does not follow that approach.

Third, the State's suggestion that the Governor would only be required to request funding for labor agreements in a supplemental budget, Resp. Br. at 30, reads an entire provision right out of the statute. RCW

41.56.028(5)¹⁶ and RCW 74.39A(300)(1)¹⁷ both state that once the prerequisites are met the Governor must seek funding for the compensation and benefit provisions for the collective bargaining agreements she entered “as a part of the proposed biennial or supplemental operating budget submitted to the legislature.” (Emphasis added).

Finally, the approach advocated by the State would also contradict all parties’ historic understanding and practice. Deputy Director of OFM Wolfgang Opitz explained it bluntly when he described the outcome of the interest arbitration process as creating “a legal mandate.” *See* Brief of Petitioner SEIU Healthcare 775NW at 20; Brief of Petitioner SEIU Local 925 at 20; ASF Ex. 4 at page 626:2-8. The State’s December 18, 2008 announced plan to seek legislation that would subject interest arbitration awards to be certified as feasible financially reflects the State’s recognition that under current law, arbitration awards are binding in so far as they obligate the Governor to include them in her budget. ASF Ex. 15. Such legislation would be unnecessary if, as the State now argues, the

¹⁶ “Upon meeting the requirements of subsection (6) of this section, the governor must submit, as a part of the proposed biennial or supplemental operating budget submitted to the legislature under RCW 43.88.030, a request for funds necessary to implement the compensation and benefit provisions of a collective bargaining agreement entered into under this section or for legislation necessary to implement such agreement.”

¹⁷ “Upon meeting the requirements of subsection (2) of this section, the governor must submit, as a part of the proposed biennial or supplemental operating budget submitted to the legislature under RCW 43.88.030, a request for funds necessary to administer chapter 3, Laws of 2002 and to implement the compensation and fringe benefits provisions of a collective bargaining agreement entered into under RCW 74.39A.270 or for legislation necessary to implement such agreement.”

arbitration awards were not required to be included in the Governor's biennial budget until after the Legislature had already funded them.

E. Petitioners' Interpretation of the Statutes Does Not Lead to Results that Contravene the Legislature's Exclusive Role in Appropriating Funds.

The State emphasizes that no agency or state officer, including the Governor, may bind their office or agency "to spend money or incur any liability without an appropriation for the [sic] purpose, or to bind the Legislature to make appropriations." Resp. Br at 34. Petitioners have never asserted, nor do they now argue, that the arbitrated collective bargaining agreements bind the Legislature. Petitioners' mandamus action does not seek to compel the Legislature to appropriate funds. Petitioners seek only to compel the Governor to fulfill the mandatory non-discretionary duty of including the costs of the arbitrated contracts in her biennial budget request to the Legislature.

Situations like those arising in *Greenwood v. State Bd for Community College Ed.*, 82 Wn.2d 667, 672, 513 P.2d 57, 60 (1973) are completely inapposite. In that case employment contracts for academic employees exceeded the legislatively appropriated amounts and were therefore unenforceable, at least in part. *Id.* The statutes at issue here, which prevent such a thing from occurring, did not exist at that time.

Now, the collective bargaining agreements at issue are negotiated well in advance of their term.

The 2009 biennium, to illustrate the point, commences July 1, 2009. The arbitration awards were both concluded and presented to OFM on or before October 1, 2008.¹⁸ The contracts should have been presented to the Legislature for funding by December of 2008, substantially in advance of their effective date.

Under this procedure, there is simply no prospect of a labor agreement forcing the State to exceed the amount appropriated therefore.

F. The Statutory Scheme as Written Is Not So Plainly Irrational As To Justify Either Rewriting or Disregarding It in the Manner Sought by the State.

As written, the statutes at issue are quite simple. They create two parallel tracks leading to the mandatory submission by the Governor of a request for funds necessary to implement the compensation and fringe benefits provisions of collective bargaining agreements. First, the request could relate to a negotiated agreement that has been certified by OFM as being feasible financially; second, the request could relate to an agreement

¹⁸ On August 25, 2008, ASF ¶ 8 (SEIU Local 925), and on October 1, 2008 (SEIU Healthcare 775NW), ASF ¶ 8.

that arises out of (“reflects”) the binding decision of an arbitration panel. RCW 74.39A.300(2) and RCW 41.56.028(6).¹⁹

Respondent criticizes the policy choice reflected in these two parallel tracks. Assuming *arguendo* that respondent identifies valid policy shortcomings, which Petitioners in no way concede, the forum for redressing those concerns would clearly be the Legislature, not this Court.

It is important to note, however, that the policy choice about which the State implicitly complains is neither absurd nor irrational, and thus does not provide any basis for this Court to attempt to give the pertinent statutes any reading other than that which flows naturally from the language contained therein. That is because of a series of safeguards against unforeseeable post-arbitration decision revenue shortfalls are built into the overall process related to the funding of collectively bargained agreements.

¹⁹ The State suggests that the statutory scheme cannot be as simple as set forth herein because of the prospect that a contract could possibly contain both negotiated *and* arbitrated compensation and benefits provisions, as occurred in the instant situation with Local 925’s contract, while SEIU 775’s contract funding is entirely the product of interest arbitration. Br. Rsp. at 51. Yet these two non-mutually exclusive paths are precisely what the statutes call for. RCW 41.56.028(6); RCW 74.39A.300(2). Moreover, the pertinent statutory language underlying the State’s argument provides only that “[t]he legislature must approve or reject the submission of the request for funds as a whole,” *see* RCW 74.39A.300(3), RCW 41.56.028(7). The statute does not say that the Governor’s request for funds must necessarily include funding for the entirety of a collective bargaining agreement (as opposed to merely the portion that arises from or reflects an interest arbitration decision).

First, during negotiations and upon their completion, the Governor “shall periodically consult with the [Legislature’s] joint committee on employment relations... regarding appropriations necessary to implement the compensation and benefit provisions of any collective bargaining agreement.” RCW 41.56.028(8).

Second, the statutory deadline by which interest arbitrated contracts must be submitted to OFM is October 1 of the year preceeding the legislation session at which the request is to be considered. This provides the Governor and OFM more than two months to incorporate the award into the Governor’s balanced biennial budget request submitted to the Legislature.

Third, the statutes require the interest arbitrators to take into account the “ability of the state to pay for the compensation and benefit provisions of a collective bargaining agreement.” RCW 41.56.465(4)(a)(ii); RCW 41.56.465(5)(a)(ii). Thus, an interest arbitration decision, like a negotiated agreement, has to survive some level of scrutiny with regard to its overall impact on the State’s budget, prior to being something that the Governor must submit to the Legislature for funding.

Fourth, and perhaps most fundamentally, the Legislature has the power to “approve or reject the submission for the request for funds as a

whole.” RCW 41.56.028(7) and RCW 74.39A.300(3). This is a complete “fail-safe” mechanism, because presumably the Legislature will simply refuse to agree to the Governor’s funding request if “earth-shattering” economic developments arise.²⁰

It is vital to note, finally, that unintended consequences of the instant legislative scheme are equally likely to occur with regard to a “negotiated” agreement that has been certified by OFM, as they are with regard to an arbitrated agreement that has passed muster with the interest arbitrator. A severe financial downturn could occur subsequent to OFM certification, just as it could after the date of the interest arbitration award. Because the problems posed by such a downturn are not unique to the “arbitrated agreement” funding track, they cannot be a basis for concluding that this track does not actually exist, and that arbitrated agreements must still be submitted to OFM for approval.

III. CONCLUSION

For the foregoing reasons, Petitioners herein request that this Court issue a writ of mandamus directing the Governor to officially withdraw the "proposed biennial ... operating budget" she previously submitted to

²⁰ There is also a fifth safeguard, albeit one of uncertain and untested scope, in that the statutes provide that if a significant revenue shortfall occurs *after* the Legislature has approved the funding request, the Governor or the Legislature can so declare by proclamation or resolution, respectively, in which case the parties “shall immediately enter into collective bargaining for a mutually agreed upon modification of the agreement.” RCW 41.56.028(10) and RCW 74.39A.300(7).

the legislature under RCW 43.88.030, and instead submit a proper one, which contains "a request for funds necessary to implement the compensation and benefit provisions" of the two collective bargaining agreements entered into via interest arbitration, so as to bring her into compliance with the statutes.

RESPECTFULLY SUBMITTED this 24th day of February 2009.

s/Dmitri Iglitzin

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BY RONALD R. CARPENTER

I hereby certify that on this 24th day of February, 2009, I caused
Petitioner's Consolidated Reply Brief to be filed with the Washington
State Supreme Court via email to Supreme@courts.wa.gov. Per
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C

United States Court of Appeals,
Ninth Circuit.

BOISE CASCADE CORPORATION; Pope & Talbot, Inc.; James River II, Inc., Petitioners,
v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, Respondent.

NORTHWEST COALITION FOR
ALTERNATIVES TO PESTICIDES (NCAP), Petitioner,
v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, Respondent.

CITIZENS FOR A BETTER ENVIRONMENT, Petitioner,
v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, Respondent,
The Santa Clara Valley Nonpoint Source Dischargers, Respondent-Intervenor.

NORTHWEST COALITION FOR
ALTERNATIVES, et al., Petitioners,
v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, Respondent.

Nos. 89-70428, 89-70429, 89-70430, 90-70494, 90-70496, 90-70497, 90-70262, 91-70056 and 91-70426.

Argued and Submitted Aug. 2, 1991.

Decided Aug. 23, 1991.

As Amended Oct. 7, 1991.

California and Oregon submitted for administrative approval individual control strategies intended to address discharge of toxic pollutants into water segments in those states. The Environmental Protection Agency (EPA) approved individual control strategies, and challengers filed petitions for review. The Court of Appeals, Beezer, Circuit Judge, held that EPA's approval of individual control strategies was not subject to review in Court of Appeals.

Dismissed.

West Headnotes

[1] Statutes 361 ↪205

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic Aids to Construction

361k205 k. In General. Most Cited

Cases

Statutes 361 ↪206

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic Aids to Construction

361k206 k. Giving Effect to Entire Statute. Most Cited Cases

Statutes must be interpreted as a whole, giving effect to each word and making every effort not to interpret provision in manner that renders other provisions of same statute inconsistent, meaningless, or superfluous.

[2] Statutes 361 ↪212.6

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k212 Presumptions to Aid Construction

361k212.6 k. Words Used. Most Cited

Cases

Words used more than once in same statute must be presumed to have same meaning.

[3] Administrative Law and Procedure 15A ↪701

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(B) Decisions and Acts Reviewable

15Ak701 k. In General. Most Cited Cases

Environmental Law 149E ↪641

149E Environmental Law

149EXIII Judicial Review or Intervention

149Ek636 Administrative Decisions or Actions Reviewable in General

149Ek641 k. Water Pollution. Most Cited

Cases

(Formerly 199k25.15(3.2) Health and Environment)

Approval by Environmental Protection Agency (EPA) of individual control strategies submitted by California and Oregon to address discharge of toxic pollutants into water segments in those states was not EPA "promulgation" subject to judicial review in Court of Appeals, though states' failure to submit individual control strategies in timely manner conferred upon EPA duty of implementation, and despite potential for bifurcation of review proceedings between Court of Appeals and either federal district courts or state courts. Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), §§ 304(l)(1, 3), 509(b)(1)(G), as amended, 33 U.S.C.A. §§ 1314(l)(1, 3), 1369(b)(1)(G).

[4] Administrative Law and Procedure 15A ↪663

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(A) In General

15Ak663 k. Jurisdiction. Most Cited Cases

Environmental Law 149E ↪641

149E Environmental Law

149EXIII Judicial Review or Intervention

149Ek636 Administrative Decisions or Actions Reviewable in General

149Ek641 k. Water Pollution. Most Cited

Cases

(Formerly 199k25.15(3.2) Health and Environment)

Fact that Environmental Protection Agency (EPA) has final decision-making authority in issuance of individual control strategy submitted by state to address discharge of toxic pollutants into water segments within state did not mean that state judicial and administrative proceedings were inadequate for reviewing state-created individual control strategies,

such that there should be review in federal court. Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), §§ 304(l)(1, 3), 509(b)(1)(G), as amended, 33 U.S.C.A. §§ 1314(l)(1, 3), 1369(b)(1)(G).

*1428 Nora Chorover, Citizens for a Better Environment, San Francisco, Cal., Richard H. Williams, Lane, Powell, Spears, Lubersky, Jay T. Waldron and David F. Bartz, Jr., Schwabe, Williamson, Wyatt, Portland, Oregon; Victor Sher, Sierra Club Legal Defense Fund, Seattle, Wash. and John E. Bonine, Eugene, Or., for petitioners.

Marilyn Jacobsen and Martin F. McDermott, U.S. Dept. of Justice, and Diane Regas, E.P.A., Washington, D.C., for respondent.

Robert L. Falk, Morrison & Foerster, San Francisco, Cal., for intervenor.

Petition for Review of a Decision of the Environmental Protection Agency.

Before WRIGHT, BEEZER and WIGGINS, Circuit Judges.

BEEZER, Circuit Judge:

This is a consolidated disposition concerning two related petitions brought pursuant to the Clean Water Act (Act). California and Oregon each submitted to the United States Environmental Protection Agency (EPA) an individual control strategy (ICS) intended to address the discharge of toxic pollutants into water segments within its respective state. The EPA approved the ICSs and these petitions followed.

Citizens for a Better Environment (Citizens) petitions for review of the California ICS. The Santa Clara Valley Nonpoint Source Dischargers (Municipalities), a consortium of municipalities whose stormdrains were the identified cause of the discharge,*1429 petitioned to intervene.^{FN1} The Oregon ICS is being challenged by three pulp and paper mills affected by that ICS,^{FN2} and by the Northwest Coalition for Alternatives to Pesticides (the Coalition).^{FN3} We dismiss both petitions for lack of jurisdiction.

^{FN1}. The Santa Clara Valley Nonpoint Source Dischargers consists of the Santa

Clara Valley Water District, the County of Santa Clara, the City of Campbell, the City of Cupertino, the City of Los Altos, the Town of Los Altos Hills, the Town of Los Gatos, the City of Milpitas, the City of Monte Sereno, the City of Mountain View, the City of Palo Alto, the City of San Jose, the City of Santa Clara, the City of Saratoga, and the City of Sunnyvale.

FN2. The three mills are owned by the Boise Cascade Corporation, Pope & Talbot, Inc., and James River II, Inc. They will be referred to collectively as "the Mills."

FN3. The Coalition was joined in its petition by Columbia River United and Jay Sherrerd. The three petitioners will be jointly referred to as "the Coalition."

I

The Clean Water Act, 33 U.S.C. § 1251 et seq., is intended "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. One of the policies of the Act is to "recognize, preserve, and protect the primary responsibilities and rights of States" in the restoration and maintenance of their waters and in the application of the Act. See 33 U.S.C. § 1251(b).^{FN4} This policy is evident in the requirement, added by the Water Quality Act of 1987, that states identify navigable waters affected by toxic pollutants and develop strategies for cleaning them.

FN4. The Clean Water Act declares:

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use ... of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.

33 U.S.C. § 1251(b); *see also American Paper Institute*, 890 F.2d 869, 873 n. 6 (7th Cir.1989) (quoting numerous similar expressions of congressional intent found

in the legislative history of the Act).

Section 304(l) of the Act requires each state to list all navigable waters for which the state does not expect to be able to achieve applicable water quality standards (the "A list"). § 304(l)(1)(A), 33 U.S.C. § 1314(l)(1)(A). States are to submit another list (the "B list") of waters for which the anticipated failure to achieve the relevant standard is due to the discharge of certain toxic pollutants identified in section 1317(a). See id. § 1314(l)(1)(B). States must also identify the point sources responsible for the problem (the "C list"). Id. § 1314(l)(1)(C).^{FN5} For each point source listed, the state must devise an "individual control strategy" (ICS) calculated to bring about compliance with the water quality standards within three years of the adoption of the ICS. Id. § 1314(l)(1)(D).

FN5. A point source is "any discernible, confined and discrete conveyance ... from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

The EPA must approve or disapprove a state's ICS within a specified period of time. See 33 U.S.C. § 1314(l)(2). If a state fails to submit lists or ICSs, or if EPA disapproves an ICS, the EPA "in cooperation with such State ... shall implement the requirements of paragraph (1) in such States." Id. § 1314(l)(3). *See generally Westvaco Corp. v. EPA*, 899 F.2d 1383, 1385 (4th Cir.1990).

EPA regulations state that an ICS is to be submitted in the form of a final National Pollutant Discharge Elimination System (NPDES) permit. 40 C.F.R. § 123.46(c).^{FN6} Unlike an ICS, which is a plan to limit discharge of toxic pollutants, an NPDES permit allows what would otherwise be an illegal discharge of pollutants from a point source or point sources^{FN7} into navigable waters and ensures that such discharge will comply with the requirements of the Act. See 33 U.S.C. §§ 1311(a), 1342(a). The permits are issued pursuant to a system established*1430 in section 402 of the Act, 33 U.S.C. § 1342. Because of the relationship between ICSs and NPDES permits, analysis of ICSs requires references to NPDES permits and must rely in part on interpretation of NPDES statutes and regulations.

FN6. Where a state cannot submit a final

permit, the ICS may be in the form of a draft permit. 40 C.F.R. § 123.46(c).

FN7. 40 C.F.R. § 122.28 allows general NPDES permits to be issued to regulate categories of point sources that satisfy certain criteria.

The federal-state relationship established by the Act is also illustrated in Congress' goal of encouraging states to "assume the major role in the operation of the NPDES program." Shell Oil Co. v. Train, 585 F.2d 408, 410 (9th Cir.1978); see also American Paper Institute, Inc. v. EPA, 890 F.2d 869, 873 & n. 6 (7th Cir.1989). The Administrator of the EPA is authorized to delegate to individual states the authority to issue NPDES permits themselves, subject to EPA objection. See 33 U.S.C. § 1342(b), (d).

When a state has been granted such authority, the EPA must suspend its own authority to issue permits until the Administrator determines that the state is no longer capable of issuing permits and notifies the state that the state's authority to do so is being withdrawn. Id. § 1342(c). The result is "a system for mandatory approval of a conforming State program [which] creates a separate and independent State authority to administer the NPDES pollution control." Shell Oil, 585 F.2d at 410 (quoting Mianus River Preservation Committee v. EPA, 541 F.2d 899, 905 (2d Cir.1976)).

California and Oregon are two of 39 states that have been granted authority to administer NPDES programs themselves. See 39 Fed.Reg. 26,061 (1973) (cited in Shell Oil, 585 F.2d at 410). The California State Water Resources Control Board (State Board) and its various Regional Water Quality Control Boards are responsible for the enforcement of the Act in California and for issuing NPDES permits. Jurisdiction to review decisions of the California State Board is conferred on California state courts. Cal. Water Code § 13330. The state agency that issues NPDES permits in Oregon is the Oregon Department of Environmental Quality. Jurisdiction to review decisions of the Oregon Department of Environmental Quality is conferred on Oregon state courts. Or.Rev.Stat. § 183.484 (1991).

II

A. California Factual Background

California submitted the section 1314(l) lists to the EPA in February 1989. The South San Francisco Bay was included on the B-list of water segments impaired by the discharge of section 1317(a) toxic pollutants. Area storm drains were identified as point sources contributing to violations of water quality standards. EPA approved the listing decisions, but found that California had missed the February 1989 deadline for submitting an ICS for the storm drain discharges into the South San Francisco Bay. The EPA decision stated:

EPA is not able to approve the stormwater ICSs at this time because none have been submitted. However, EPA acknowledges that while the State is currently taking steps toward development of stormwater permits, it is not reasonable to expect a completed ICS at this time. Recent completion of field monitoring of the South Bay stormdrains and the scheduled completion of a report characterizing the storm discharges should enable the State to develop stormwater permits. If the State completes stormdrain ICSs by March 1990, EPA will consider those ICSs for approval as part of EPA's final 304(1) decisions. EPA is committed to working cooperatively with the State in developing the stormwater permits.

On June 20, 1990, the California Regional Water Quality Control Board, San Francisco Bay Region, issued a final NPDES permit to the Municipalities. The permit prohibited stormwater discharge that would "cause a violation of any applicable water quality objectives for receiving waters" and required the Municipalities to comply with a number of management practices designed to identify the sources of pollutants in stormwater discharge and to decrease their presence. California submitted the NPDES permit to the EPA as an ICS for the storm drains. On September 28, 1990, EPA's Region IX office approved the NPDES permit as an ICS.

*1431 Citizens objected to the permit on the ground that it did not contain numerical effluent limitations for stormdrain discharge. On July 23, 1990, Citizens filed an administrative petition for review with the California State Board challenging the NPDES permit on the ground that it lacked numerical water quality-based effluent limitations. On May 16, 1991, the State Board declined to require the NPDES permit to

include numerical water quality-based effluent limits. On January 25, 1991, Citizens petitioned this court for review of the EPA's approval of California's ICS.

B. Oregon Factual Background

In February 1989, Oregon submitted its lists of navigable waters requiring ICSs. EPA responded by informing the Oregon Department of Environmental Quality that detectable levels of 2,3,7,8 tetrachlorodibenzo-p-dioxin had been connected to the presence of chlorine bleaching pulp and paper mills, and that the lists submitted by Oregon should be modified to include the mills petitioning for review in this case.

In June 1989, Oregon submitted amended lists and ICSs for the three mills in the form of preliminary draft permit modifications. EPA conditionally approved the ICSs with final approval contingent upon issuance of final permits containing effluent limitations on the chlorine-based toxin. From December 1989 to November 1990, the Oregon Department of Environmental Quality held hearings and submitted a number of draft permits and proposed final permits with schedules and effluent limitations for EPA approval. During this period, the Mills and the Coalition petitioned to this court for review of the EPA's conditional approval of the ICSs.

In January 1991, this court granted EPA's motion for a voluntary remand to allow EPA to reconsider the question of approval of the ICSs and to consider whether there had been adequate opportunity for public comment at the state or federal level. On March 27, 1991, EPA approved the state-submitted permits as ICSs for the Boise Cascade and James River mills, and conditionally approved the ICS concerning Pope & Talbot.

The Boise Cascade and James River mills have filed administrative appeals with the Oregon Department of Environmental Quality contesting the final, November 1990, state-submitted permit renewals. The Coalition is a party to that consolidated appeal. The Coalition has also filed an action in Oregon circuit and appeals courts contesting the permit modification issued for the Pope & Talbot mill.

III

33 U.S.C. § 1369(b)(1) provides:

Review of the Administrator's action ... (G) in promulgating any individual control strategy under section 1314(1) of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person.

The EPA argues that this court does not have jurisdiction to review its approval of the California and Oregon ICSs because such approval does not constitute "promulgation."

[1][2][3] Section 1369(b)(1) specifically grants courts of appeals jurisdiction to review only certain EPA actions taken with respect to each of the requirements of the Act.^{FN8} The section distinguishes between EPA approvals, determinations and promulgations.*1432 Such specificity demonstrates that Congress did not intend court of appeals jurisdiction over all EPA actions taken pursuant to the Act. *See Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 517 (2d Cir.1976) ("[T]he complexity and specificity of section 1369(b)(1) in identifying what actions of EPA under the [Clean Water Act] would be reviewable in the courts of appeals suggests that not all such actions are so reviewable.").

FN8. Section 1369(b)(1) provides for review in the federal courts of appeals of

the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual con-

trol strategy under section 1314(1) of this title.

33 U.S.C. § 1369(b)(1).

Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous. See *Sutherland Stat. Const.* §§ 46.05, 46.06 (4th ed.1984); see also *Aluminum Co. of America v. Bonneville Power Admin.*, 891 F.2d 748, 755 (9th Cir.1989). We must presume that words used more than once in the same statute have the same meaning. See *Sutherland* § 46.06.

We hold that for the purposes of section 1369(b)(1), "promulgation" is not the same as "approval." The difference between subsection (G) and subsection (E), which provides for review of EPA decisions "approving or promulgating" effluent limitations, 33 U.S.C. § 1369(b)(1)(E), compels this conclusion. See *United Technologies Corp. v. OSHA*, 836 F.2d 52, 53 (2d Cir.1987) (The use of different words in the same sentence of a statute signals that Congress intended to distinguish between them.). To fail to distinguish between "promulgation" and "approval" would either result in a conflict between subsections (E) and (G) or would make superfluous the use of "approval" in subsection (E). We conclude, therefore, that Congress did not consider EPA approval of ICSs to be "promulgation" for the purpose of judicial review pursuant to subsection (G).

The Seventh Circuit reached the same conclusion in *Roll Coater, Inc. v. Reilly*, 932 F.2d 668 (7th Cir.1991), in which the court held that the EPA's approval of an ICS is not reviewable under section 1369(b)(1)(G).

Subsection (E) authorizes review of a decision "approving or promulgating any effluent limitation" under certain sections, the very distinction the EPA asks us to draw under subsection (G). Other subsections reinforce this reading. Subsections (B) and (D) create jurisdiction to review "any determination pursuant to" a named statute. Three more subsections—(A) and (C), in addition to (G)—limit review to the EPA's action in "promulgating" something. Subsection (A) refers to a "standard of performance" under § 306, 33

U.S.C. § 1316, and subsection (C) to an "effluent standard, prohibition, or pretreatment standard" under § 307, 33 U.S.C. § 1317. All of the items in (A) and (C) are things the Administrator does on his own. Subsections (B) and (D) treat "determinations" as something different from promulgation, implying that the EPA does not "promulgate" everything it issues or approves.

Id. at 670.

The petitioners argue that *Roll Coater* is different from the present cases because the ICS approved in *Roll Coater* was in the form of a draft NPDES permit, which the EPA could approve only conditionally. See 40 C.F.R. § 123.46(f). Because the state could modify the permit subsequent to the EPA's conditional approval, see *Roll Coater*, 932 F.2d at 669, the approval was not a final determination regarding the permit and for that reason review was not appropriate.

The *Roll Coater* court stated that "[u]ntil the state amends *Roll Coater's* permit to incorporate the terms of the ICS, there is no review anywhere." *Id.* at 671. The court did not, however, suggest that once the EPA approved the final permit, jurisdiction in the federal appellate courts existed pursuant to section 1369(b). To the contrary, the court stated that once the state amended the permit "a state court may review the action, including all of the antecedent decisions about the content of the B and C lists." *Id.* (emphasis added). Furthermore, the rationale underlying the Seventh Circuit's interpretation of section 1369 is not based on the finality of the EPA's *1433 decisions, but on the distinction the statute draws between approval and promulgation and the fact that in the case of ICSs, Congress intended federal courts to have jurisdiction only where the EPA itself promulgates the ICS.

In anticipation of such a conclusion, the petitioners argue that the EPA has effectively promulgated the ICS in question here. Section 1314(l)(3) states:

If a State fails to submit control strategies in accordance with paragraph (1) or the Administrator does not approve the control strategies submitted by such state in accordance with paragraph (1), then ... the Administrator, in cooperation with such State and after notice and opportunity for public comment,

shall implement the requirements of paragraph (1) in such State....

33 U.S.C. § 1314(l)(3). The petitioners contend that once the states failed to submit timely ICSs, the EPA's duty to "implement" the paragraph requiring ICSs transforms the EPA's role from oversight to intervention and that any resulting ICS was therefore promulgated by the EPA, no matter who was actually responsible for developing the ICS.

The regulations, however, suggest that even where the EPA is required to implement section 1314(l)(1), the state retains the authority to issue the ICS in most circumstances. 40 C.F.R. § 123.46(f) states:

At any time after the Regional Administrator disapproves an ICS (or conditionally approves a draft permit as an ICS), the Regional Office may submit a written notification to the State that the Regional Office intends to issue the ICS. Upon mailing the notification, and notwithstanding any other regulation, exclusive authority to issue the permit passes to EPA.

"[O]nly upon mailing of this notification does such permit issuing authority pass to the EPA." *P.H. Glatfelter Co. v. EPA*, 921 F.2d 516, 517 (4th Cir.1990).

Furthermore, the mere fact that the EPA cooperates with a state in developing an ICS does not make the ICS an EPA promulgation. In *Shell Oil*, we held that even if a state's decision to issue or deny an NPDES permit was made pursuant to EPA instructions, the court of appeals did not have jurisdiction to review the decision because it was not an EPA action issuing or denying the permit, as required by section 1369(b)(1)(F). 585 F.2d at 411.

Our interpretation of the EPA's duty to implement the Act is consistent with the purpose of the Act to afford states as much control as possible over implementation and enforcement of pollution controls. See 33 U.S.C. § 1251(b). Maximizing state control also suggests that federal courts should review ICS decisions only when the ICS was actually developed by the EPA, leaving review of state-developed ICSs to state courts. See *Roll Coater*, 932 F.2d at 671 (Once the state develops a final NPDES permit as an ICS, "a state court may review the action."). This is precisely the system formalized by Congress in allowing federal review of ICS decisions only where the ICS is

"promulgat[ed]" by the EPA. Cf. *American Paper Institute*, 890 F.2d at 874-75 (Under the Act, a final state-issued NPDES permit, although subject to EPA approval, is subject to judicial review in state court.).

In the present cases, the EPA satisfied its duty to implement section 1314(l) by requiring the states to modify and complete the ICSs. The EPA did not demonstrate any intention to issue the ICSs itself or to rescind the states' authority to issue NPDES permits. This was a reasonable manner of implementing section 1314(l) because the states had completed studies of their toxic problems and had already begun to develop permit requirements.

The petitioners further argue that if the EPA's approval of California's ICS is not reviewable in this court, there will be an irrational bifurcation of review between federal courts of appeals and district courts. This argument assumes that if federal courts of appeals do not have jurisdiction to review EPA action regarding ICSs under section 1369(b)(1), such action is reviewable in federal district court under the Administrative Procedure Act. See *14345 U.S.C. § 702.^{FN9}

FN9. "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

Whether petitioners could seek review in federal district court under the Administrative Procedure Act is not before us. It may be, however, that such review is foreclosed by the existence of adequate state fora for review of the states' actions in creating and granting NPDES permits. See *Shell Oil*, 585 F.2d at 414; see also 5 U.S.C. § 701 (APA provisions apply except to the extent that statutes preclude judicial review); *Roll Coater*, 932 F.2d at 671 (EPA approval of ICS not reviewable pursuant to the APA because the Water Quality Act divides review "between the courts of appeals and state courts, not between the courts of appeals and the district courts"); cf. *American Paper Institute*, 890 F.2d at 875 (Congressional intent to place the regulatory burden on the states shows clear intent to preclude federal review of state-issued NPDES permits). If this is the case, any bifurcation that results when there exists a state forum for review of an ICS is consistent with Congress' goal of leaving

with the states the primary responsibility for controlling water pollution: state courts will review state-promulgated ICSs and federal courts will review those promulgated by the EPA.

The bifurcation envisioned by the petitioners might occur if a state does not have any procedure for reviewing decisions regarding an ICS.^{FN10} It is unclear, however, whether such a situation exists. It is also unclear how this limited potential for bifurcation in federal court would require us to disregard Congress' intent to ensure that States retain the primary responsibility in the restoration and maintenance of their waters. Any bifurcation problem is simply the logical consequence of the interrelationship of sections 1369(b)(1)(G) and 1342(d).

FN10. It appears that even states not authorized to issue NPDES permits, must develop and submit ICSs themselves, even though ICSs are to be developed in the form of NPDES permits. See 33 U.S.C. § 1314(l)(1) (lists of impaired waters and ICSs to be submitted by "each state"); 40 C.F.R. § 123.46(a), (c). In such a case, federal court review of the substance of the ICS might be possible. In such states, once the ICS is approved, the permit itself must be issued by the EPA. Section 1369(b)(1)(F) grants the courts of appeals jurisdiction to review EPA actions "in issuing or denying" NPDES permits. 33 U.S.C. § 1369(b)(1)(F). A challenge to the issuance of a permit on the ground that the ICS on which it was based was not properly developed would essentially be a challenge of the ICS itself.

[4] Petitioners' final argument is that state court review is inadequate because a state court cannot set aside an ICS that has been approved by EPA. Although state courts do not have the direct power to invalidate or to enjoin EPA's approval of an ICS, state courts can interpret federal law, and thus can review and enjoin state authorities from issuing permits that violate the requirements of the Clean Water Act. Any modifications of the permits would have to be approved by EPA, but the fact that EPA has the final decision-making authority in the issuance of an ICS does not mean that state judicial and administrative proceedings are inadequate for reviewing state created ICSs.

IV

The petitions are DISMISSED for lack of jurisdiction. The EPA and the Santa Clara Valley Nonpoint Source Dischargers' request for attorney's fees in No. 91-70056 is DENIED. See 33 U.S.C. § 1369(b)(3) (fee awards to prevailing parties left to court's discretion).

C.A.9,1991.
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942 F.2d 1427, 33 ERC 1693, 60 USLW 2181, 22
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