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NO. 95885-8

SUPREME COURT OF THE STATE OF WASHINGTON

ASSOCIATION OF WASHINGTON BUSINESS, et al.,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Appellant,

and

WASHINGTON ENVIRONMENTAL COUNCIL, et al.,

Intervenor-Appellant.

AMICUS CURIAE BRIEF OF
THE PUGET SOUND CLEAN AIR AGENCY

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I. INTRODUCTION

The Puget Sound Clean Air Agency (“Agency”) is a local air authority with jurisdiction in King, Snohomish, Pierce, and Kitsap Counties. Agency Regulation (“Reg.”) I, § 1.01. The Agency was activated by the Washington Clean Air Act (“CAA”), chapter 70.94 RCW, in 1967 and its purpose is to “carry out the requirements and purposes of the Washington Clean Air Act and the Federal Clean Air Act” and provide administration and enforcement of Agency regulations. *Id.* The Agency adopts regulations pursuant to and consistent with the federal and state Clean Air Acts. The Washington State Department of Ecology (“Ecology”) and seven local clean air agencies have jurisdiction for air permitting and regulation in the state of Washington.¹ More than 4.1 million Washington residents reside within the Agency’s four-county jurisdiction.

The Agency works to protect public health, improve air quality, and reduce the region’s contribution to climate change. As the Agency’s jurisdiction includes the most densely populated area of Washington, a major strategic goal of the Agency is reducing greenhouse gas emissions related to transportation. The Clean Air Rule, adopted by Ecology, assists

¹ For a map of local air agencies and the counties they represent *see* <https://ecology.wa.gov/About-us/Our-role-in-the-community/Partnerships-committees/Clean-air-agencies> (last visited January 15, 2019).

in achieving the Agency's goal by reducing the greenhouse gas emissions associated with combustion of transportation and other fuels.

The Agency offers this brief in support of the Clean Air Rule ("Rule"), chapter 173-442 WAC. The Rule is within Ecology's statutory authority and is an important mechanism for reducing greenhouse gas emissions from within Washington State. The Agency also has a strong interest in the proper interpretation of the provisions of the CAA.

II. SUMMARY OF THE ARGUMENT

To invalidate the Rule, the Superior Court relied upon a false distinction between emitters, who the Court designated as "indirect emitters" and "direct emitters," and determined that only "direct emitters" could be regulated. But the Court's distinction was based on terms appearing nowhere in the CAA. Rather, the Rule is an "emission standard," consistent with the lawful authorities provided to Ecology in the CAA, that is applied to all parties subject to the Rule. The Rule should be reinstated because it is firmly within Ecology's authority and is consistent with the intent of the legislature to "preserve, protect, and enhance the air quality for current and future generations." RCW 70.94.011.

III. ARGUMENT

A. Ecology and Local Air Agencies Jointly Implement the Federal and State Clean Air Acts in Order to Protect Air Quality in Washington State.

The CAA makes it unlawful for any person to “**cause air pollution or permit it to be caused** in violation of this chapter, or of any ordinance, resolution, rule or regulation validly promulgated hereunder.” RCW 70.94.040, (Causing or permitting air pollution – Exception (emphasis supplied)). Ecology and local air agencies are responsible for implementing this and other provisions of the CAA and protecting air quality in Washington State. Ecology promulgates rules to implement the CAA and the Federal Clean Air Act. chapter 70.94 RCW; 42 U.S.C. § 7401 et seq. (1970). Local air agencies also promulgate regulations to implement both the federal and state Clean Air Acts. RCW 70.94.141(1). In some instances, the Agency adopts Ecology’s regulations by reference. *See e.g.*, Agency Reg. I, § 2.02 (State Environmental Policy Act “SEPA”), Agency Reg. I, § 6.01(a) (New Source Review). In some instances, Ecology’s rules apply statewide, such as the Clean Air Rule’s statewide emission standards. RCW 70.94.331(2)(c). Accordingly, rules adopted by Ecology are of particular importance to the Agency.

Under the CAA, the Agency has a wide range of responsibilities to protect air quality within its jurisdiction. These responsibilities include,

but are not limited to, comprehensive planning to prevent air pollution; issuance of permits, called Notice of Construction Orders of Approval, to regulate air contaminants from sources of air contaminants; conducting air quality monitoring; enforcing against violations of air quality laws and regulations including fugitive air contaminants such as dust and odors; requiring asbestos surveys and notifications during construction; and declaring and enforcing burn bans.² Thus, local air agencies, in addition to the Department of Ecology, are integral parts of the protection of Washington’s air quality.

B. Ecology has Authority to Set Emission Standards and Regulate Greenhouse Gas Emissions under the Clean Air Rule.

1. Greenhouse gases are air contaminants under the Clean Air Act.

Air contaminants are defined under the CAA as “dust, fumes, mist, smoke, other particulate matter, vapor, gas, odorous substance, or any combination thereof.” RCW 70.94.030(1); Agency Reg. I, § 1.07(b). Air pollution is the “presence in the outdoor atmosphere of one or more air contaminants in sufficient quantities and of such characteristics and duration as is, or is likely to be, injurious to human health, plant or animal

² See e.g.,: RCW 70.94.141(6) (preparation and development of comprehensive plans for the prevention, abatement, and control of air pollution.); RCW 70.94.152; RCW 70.94.153; Agency Reg. I, § 6.03 (Notice of Construction Orders of Approval); RCW 70.94.141(8) (air quality monitoring); Agency Reg. I, § 9.15 (fugitive dust); Agency Reg. I, § 9.11 (odors); Agency Reg. III, §§ 4.02-.03 (asbestos survey and notification requirements); and Agency Reg. I, § 13.05; (burn bans).

life, or property, or which unreasonably interfere with enjoyment of life and property.” RCW 70.94.030(2); Agency Reg. I, § 1.07(c). Greenhouse gases are considered air contaminants. *Massachusetts v. E.P.A.*, 549 U.S. 497, 528-529 (2007). *See also* Wash. Exec. Order 09-05, *Washington’s Leadership on Climate Change* (May 21, 2009) (finding greenhouse gases to be air contaminants under the CAA).

2. Ecology has authority to set emission standards under the Clean Air Act.

Emissions are the release of air contaminants into the ambient air. RCW 70.94.030(11); Agency Reg. I, § 1.07(i). The CAA further defines “emission standard” or “emission limitation” as:

a requirement established under the federal clean air act or this chapter that limits the quantity, rate, or concentration of emissions of air contaminants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice, or operational standard adopted under the federal clean air act or this chapter.

RCW 70.94.030(12); Agency Reg. I, § 1.07(j)³. The CAA directs Ecology to adopt by rule “air quality standards and emission standards for the control or prohibition of emissions to the outdoor atmosphere of radionuclides, dust, fumes, mist, smoke, other particulate matter, vapor,

³ The Agency’s definition of “emission standard” parallels that of the Federal Clean Air Act and the CAA.

gas, odorous substances, or any combination thereof.” RCW 70.94.331(2)(c). Regulations may be based on “a system of classification by types of emissions or types of sources of emissions, or combinations thereof, which it determines most feasible for the purposes of this chapter.” *Id.*⁴ Pursuant to the above authorities, Ecology has used different methods to regulate different air contaminants. For example, Ecology has set emission standards related to woodstoves (WAC 173-433-100); aluminum production (chapter 173-415 WAC); sulfite pulping mills (chapter 173-410 WAC); and greenhouse gas emissions from oil refineries (chapter 173-485 WAC, Petroleum Refinery Greenhouse Gas Emission Requirements, the Refinery RACT⁵). Depending on the circumstances, these regulations utilize different approaches to effectively regulate different air contaminants.

⁴ Appellants have already addressed arguments related to statutory construction and interpretation of the CAA, in particular RCW 70.94.331, and Ecology’s authority to promulgate the Rule. The Agency agrees with the positions expressed by Ecology and the Washington Environmental Council and will not repeat those arguments here. *See* Brief of Appellant Washington State Department of Ecology at pp. 15-18; Brief of Intervenor-Appellant Washington Environmental Council et al., at pp. 17-25.

⁵ Under the CAA, RACT means “the lowest emission limit that a particular source or source category is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility.” RCW 70.94.030(20). In 2014, Ecology promulgated chapter 173-485 WAC known as the “Refinery RACT”, pursuant to a court order. The rule reduces greenhouse gas emissions from five of the state’s oil refineries through improvements instituted by the refineries in technologies and control equipment used by the refineries. The rule requires annual reporting and where a refinery has achieved compliance with the energy efficiency standard, it submits proof of compliance with WAC 173-485-040(1) to Ecology. In essence, the rule requires each refinery to reach an energy efficiency benchmark, much like the regulation of energy-intensive trade-exposed industries under the Rule.

Similarly, in the Rule, Ecology considered different options, and adopted a combination of methods it determined in its experience and expertise would effectively limit the emission of greenhouse gases. The Rule is consistent with the purposes of the CAA and chapter 70.235 RCW (Limiting Greenhouse Gas Emissions) and falls within the type of emission standard the legislature allows Ecology to adopt by rule under RCW 70.94.331(2)(c).

C. The Superior Court Order Invalidating the Clean Air Rule Should Be Reversed Because it is Premised on Terms that do not Appear in the Clean Air Act.

The Superior Court's Order is based on an erroneous interpretation of RCW 70.94.030(12) and RCW 70.94.331, premised upon the notion that these provisions limit the application of emission standards to so-called "direct emitters". The Superior Court's Order correctly identifies Ecology's authority to establish emission standards, and then injects a distinction between so-called "direct emitters" and "indirect emitters" into RCW 70.94.331(2) and RCW 70.94.030(12). Superior Court Order at ¶¶ 6-8. But the legislature did not include these terms in the CAA. *See e.g.* RCW 70.94.030 (definitions) or elsewhere in the CAA. The Superior Court Order then reasons that the definition of emission standards is "the key issue with respect to whether Ecology has the authority to implement the Clean Air Rule as it applies to 'indirect emitters.'" Superior Court

Order at ¶ 9. However, nothing in RCW 70.94.331 prevents or limits the application of an emission standard to so-called “indirect emitters” (who the Court states are petroleum producers and importers and natural gas distributors). To the contrary, Ecology’s authority to adopt emission standards under the CAA is not so bound, and could include a variety of methods some of which could apply to the regulation of “indirect emitters”. Thus, the Superior Court’s Order is based on a misapplication and misinterpretation of the CAA, and should be reversed.

IV. CONCLUSION

For the reasons stated above, the Agency respectfully requests that the Superior Court Order be reversed.

RESPECTFULLY SUBMITTED this 1st day of February 2019.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the state of Washington that on February 1, 2019, I did cause to be served true and correct copies of **Puget Sound Clean Air Agency’s Motion for Leave to File Amicus Curiae Brief** and **Amicus Curiae Brief of the Puget Sound Clean Air Agency** in the above-captioned matter via electronic mail upon the following:

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