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**SUPREME COURT OF THE STATE OF WASHINGTON**

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ASSOCIATION OF WASHINGTON BUSINESS, et al.,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Appellant,

and

WASHINGTON ENVIRONMENTAL COUNCIL, et al.,

Intervenor-Appellants.

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**BRIEF OF INTERVENOR-APPELLANTS WASHINGTON  
ENVIRONMENTAL COUNCIL, ET AL**

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## INTRODUCTION

Climate change is already having devastating effects on Washington and its citizens and without substantial reductions in greenhouse gas emissions, these impacts will dramatically worsen. Threats to Washington and its citizens include sea level rise that would submerge coastal areas; increased frequency and magnitude of wildfires that destroy homes, agricultural lands, and wilderness areas; decreased summer flows in streams and aquifers that provide water for people and wildlife; and increased human illnesses and deaths, to list only a few. To prevent the worst effects of climate change, every country, state, and local jurisdiction must take action to reduce greenhouse gas emissions, and this action must come soon.

To address this significant threat, the Department of Ecology (“Ecology”) enacted the Clean Air Rule requiring the largest contributors to Washington’s greenhouse gas emissions to reduce or offset a fraction of their emissions over time. Ecology is obligated by Washington law to regulate greenhouse gas emissions under broad delegations of authority in the Clean Air Act, RCW Ch. 70.94, and the statute Limiting Greenhouse Gas Emissions, RCW Ch. 70.235. While the Clean Air Act commands Ecology to regulate air pollutants, the statute is largely silent as to the

structure and form of regulations that Ecology may adopt. Such silence leaves choices in regulatory design to the agency's discretion.

Here, however, the superior court read detailed constraints on Ecology's authority into a statutory text that nowhere contains them. Specifically, the superior court held that the Clean Air Act prohibits Ecology from regulating greenhouse gas emissions from the largest entities that sell fossil fuels for combustion, despite the fact that the Act does not contain this limitation. The superior court's narrow construction also cannot be reconciled with the broad purpose of the Clean Air Act and the statute Limiting Greenhouse Gas Emissions.

Ecology has both the authority and the obligation under Washington law to regulate greenhouse gas emissions, and this authority encompasses the details of the regulatory mechanism Ecology chose in the Clean Air Rule. This Court should reverse the superior court's decision and reinstate the Clean Air Rule.

#### ASSIGNMENT OF ERROR

The superior court erred in Conclusions of Law 8, 9, 10, and 12 of its Order Granting Petition for Judicial Review. Clerk's Papers ("CP") 838-39.

## ISSUES PRESENTED

1. Whether Ecology acted within its statutory authority in adopting greenhouse gas emission standards for Washington's largest polluters, including entities that sell fossil fuels for combustion.
2. Whether Ecology has statutory authority to give polluters flexibility in meeting the required emission reductions in the Clean Air Rule by allowing tradeable compliance instruments ("Emission Reduction Units").<sup>1</sup>

## STATEMENT OF THE CASE

### I. CLIMATE CHANGE DRIVEN BY ANTHROPOGENIC GREENHOUSE GAS EMISSIONS THREATENS DEVASTATING CONSEQUENCES FOR WASHINGTON.

Climate change is not a far-off risk—Washington is already experiencing adverse impacts from climate change that are worse than previously predicted and are projected to worsen in the future.

Administrative Record ("AR") 3235 (Dec. 2014 Washington Department of Ecology report). This is apparent on the landscape as climate events

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<sup>1</sup> The superior court did not reach this issue, but because this Court sits in the same position as the superior court and reviews the agency's action directly, this Court can reach issues that the superior court declined to reach. *See, e.g., Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

like floods, droughts, wildfires, and landslides have devastated local communities in recent years. AR 3235; AR 20619 (wildfires burned 400,000 acres in 2014 and more than 1,000,000 acres in 2015).<sup>2</sup> Sea level rise and ocean acidification are already occurring along the Washington coast, while glaciers and spring snow pack have decreased in the mountains. AR 3513 (Dec. 2013 University of Washington Climate Impacts Group report to Ecology).

Without prompt action to reduce greenhouse gas emissions, Washingtonians will face even greater health, environmental, and economic costs in the near future. *See, e.g.*, AR 3250, AR 3799 (Washington Department of Health Comments on Clean Air Rule), AR 20901 (Executive Order 14-04, Washington Carbon Pollution Reduction and Clean Energy Action). In monetary terms, the projected cost of climate change impacts in Washington will be nearly \$10 billion per year by 2020. AR 20901; *see also* AR 3250. More alarming is the toll that climate change will take on human health as instances of respiratory diseases, heart attacks, and cancer are expected to increase. AR 3250, AR 3799. Existing health inequalities are likely to be exacerbated by climate

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<sup>2</sup> *Citing* Washington Forest Protection Association, *Annual Report 2015* (2015), available at <http://www.wfpa.org/wp-content/uploads/2017/11/wfpa-2015-annual-report.pdf>.

change as well, with communities of color, low-income households, immigrants, indigenous peoples, and persons with disabilities amongst those at greatest risk. AR 3799.

The Washington State Department of Health, in its comments on the Clean Air Rule, described the gravity of the problem that Washington policymakers must grapple with: “climate change threatens the air we breathe, the water we drink, the food we eat, and the places we live.” AR 3799. Increased occurrences of wildfires, as well as the increased severity of these blazes, will threaten the lives and livelihoods of nearby communities and worsen air quality throughout the state. *Id.*, AR 3248. Drinking water supplies and water quality will be at risk from more frequent droughts, flooding, and sea level rise. *Id.* The agricultural food supply will be impacted by warmer temperatures and associated pests, AR 3250, while ocean acidification and algal blooms will threaten the availability of shellfish and other marine species that people depend on for food, AR 3249, AR 3799. While storm and flood events may devastate homes and families throughout the state, sea level rise will displace coastal communities, including Tribes who have occupied those lands since time immemorial. AR 3799.

In its December 2014 report to the Legislature, Ecology noted that “[t]o have a reasonable chance to avoid unprecedented risks to peoples’

lives and wellbeing, the Intergovernmental Panel on Climate Change has concluded that emissions reductions in excess of what have been pledged or committed by nations are required.” AR 3235. While the State of Washington endeavors to protect its citizens from the impacts of climate change by regulating greenhouse gas emissions under state law, efforts to do likewise at the federal level have come to a grinding halt with the change in administrations. Indeed, the current administration has worked at a dizzying pace to roll back climate protections at the federal level. *See, e.g.*, 82 Fed. Reg. 48,035 (Oct. 16, 2017) (EPA’s proposed rule to repeal the Clean Power Plan); 83 Fed. Reg. 16,077 (Apr. 13, 2018) (EPA withdrawing final determination on greenhouse gas emission standards for certain vehicles); Remarks Announcing United States Withdrawal From the United Nations Framework Convention on Climate Change Paris Agreement, 2017 Daily Comp. Pres. Doc. 373 (June 1, 2017) (withdrawal from the Paris climate accord). With federal protections and commitments scrapped one after the other, state actions to reduce greenhouse gas emissions are more important than ever.

II. WASHINGTON IS NOT MEETING ITS STATUTORY TARGETS, LET ALONE WHAT IS NEEDED TO AVOID THE WORST IMPACTS OF CLIMATE CHANGE.

In 2008, the legislature enacted statutory limits on greenhouse gas emissions, RCW 70.235.020(1)(a). Washington is not on track to meet those limits. AR 2828, 2857 (Oct. 2013 Leidos report to Climate Legislative and Executive Workgroup). A 2013 report to the legislature found that, while the state has made some progress in reducing its greenhouse gas emissions, existing state and federal policies do not require adequate emission reductions to put Washington on track to meet its statutory limits. *Id.* Highlighting the uniqueness and enormity of the challenge that climate change presents, the report concluded that Washington will need to pursue a variety of emissions reduction measures, as well as strengthen existing policies, to meet the goals set by the legislature. AR 2821, AR 2831-32.

A. Past Legislative Attempts to Comprehensively Regulate Greenhouse Gas Emissions Have Failed.

While it has been clear for many years that Washington must act to reduce its greenhouse gas emissions, the legislature has repeatedly failed to pass any comprehensive measures. In 2007, then-Governor Gregoire issued an Executive Order that, among other things, directed state agencies to work with a broad set of stakeholders to develop a climate change initiative for Washington. AR 3115 (Executive Order 07-02 Washington

Climate Change Challenge). Following the Executive Order, Ecology and the Department of Community, Trade and Economic Development convened the Washington Climate Advisory Team—a group that consisted of representatives from industry, environmental organizations, tribes, utilities, and state and local governments. AR 27507 (Feb. 2008 Recommendations of the Washington Climate Advisory Team). The Climate Advisory Team acknowledged the critical challenge Washington faces in addressing climate change and issued recommendations for reducing Washington’s greenhouse gas emissions, finding that

[b]y choosing to grow and expand our Clean Economy in order to embrace and meet the challenge of climate change, Washington can build a healthier and more prosperous future. Our forests, our farms, our fish, our power supply, our marine and terrestrial ecosystems, our heritage and culture, including our tribal cultures, and our communities—indeed, in a most profound way, our entire quality of life—depend on the choices we make today to do so.

AR 27515.

In addition to issuing an Executive Order, Governor Gregoire proposed legislation that would have committed Washington State to participate in a regional cap and trade program as part of the Western Climate Initiative. H.B. 1819, 61st Leg., Reg. Sess. (Wash. 2009); S.B. 5735, 61st Leg., Reg. Sess. (Wash. 2009). But the legislature failed to

pass the bill, leaving Washington without comprehensive greenhouse gas regulations.

In 2015, Governor Inslee put forth the Carbon Pollution Accountability Act, a cap-and-trade proposal that would have generated substantial revenue for the state through allowance auctions.<sup>3</sup> AR 3476 (Dec. 2014 Policy Brief for Carbon Pollution Accountability Act); H.B. 1314, 64th Leg., Reg. Sess. (Wash. 2015); S.B. 5283, 64th Leg., Reg. Sess. (Wash. 2015). Meeting the same fate as Governor Gregoire's regional cap-and-trade proposal, Governor Inslee's comprehensive, revenue-generating bill was rejected by the legislature. Shortly thereafter, citing the urgent need for Washington to reduce its emissions, Governor Inslee directed Ecology to use its existing authority to set emission standards for greenhouse gases. AR 20229-30 (Aug. 2015 Letter from Governor Inslee to Ecology Director).

B. The Clean Air Rule Is a Significant Step Towards Necessary Greenhouse Gas Reductions.

Ecology enacted the Clean Air Rule under its existing Clean Air Act authority to establish emission standards for Washington. Acting with the urgency that climate change mandates, Ecology began preparing the

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<sup>3</sup> Allowances are tradeable compliance instruments frequently used in cap and trade regulation that represent the authorization to emit a specified amount of pollution.

proposed rule in September 2015 and held dozens of stakeholder meetings throughout the state. AR 4965 (Concise Explanatory Statement). After making substantial revisions to the proposed rule based on the stakeholder input received during the extensive rulemaking process, AR 4965, Ecology adopted a final version of the Clean Air Rule in September 2016. AR 393-96 (Rule-making Order), AR 4954.

Even with the Clean Air Rule, which requires covered parties to reduce their greenhouse gas emissions by 1.7 percent per year, WAC 173-442-060, Washington will have to do more to meet its statutory limits. AR 4980, AR 5049. And, as Ecology's 2014 report to the legislature acknowledges, Washington must achieve reductions beyond these outdated statutory targets to do its part to limit the worst impacts of climate change. AR 3236.

The Clean Air Rule regulates the largest contributors to Washington's greenhouse gas emissions, which account for two-thirds of Washington's in-state emissions. AR 4980, AR 5049. Regulated entities fall into three categories: large stationary sources; producers and importers of petroleum products; and distributors of natural gas destined for combustion. WAC 173-442-010. Initially, only entities that are responsible for at least 100,000 metric tons of annual greenhouse gas emissions are required to comply with the Rule. WAC 173-442-030(3).

The Rule is designed to bring in other large emitters over time—the compliance threshold decreases every three years until, in 2035, the threshold for regulation will become and remain 70,000 metric tons per year. *Id.*

The Clean Air Rule allows polluters a great deal of flexibility in meeting the Rule’s emission reduction goals. AR 5066; WAC 173-442-200. During the rulemaking process, regulated entities argued for the kind of flexibility that the Rule provides. *See* 26970. The various compliance options available under the Rule allows polluters to directly reduce their emissions, or to offset their emissions by acquiring “emission reduction units” for emission reductions achieved through other projects or by other covered parties. *See* WAC 173-442-200. Polluters may use one of these options or a combination of several alternatives to meet their compliance obligations. AR 4977–78.

C. Washington Must Decrease Its Reliance On All Fossil Fuels to Have Any Chance of Decreasing Greenhouse Gas Emissions to Sustainable Levels

Emissions from combusted fossil fuels account for the majority of Washington’s greenhouse gas emissions—transportation fuels account for 45 percent of statewide emissions, AR 3223, while natural gas and oil account for 22 percent of statewide emissions, AR 3220. In 2011, natural

gas use for heat accounted for 11.9 million tons of Washington’s greenhouse gas emissions. AR 3220.

Additionally, the production and transport of natural gas results in substantial methane emissions, a greenhouse gas 25 times more potent than carbon dioxide. *See* AR 29582, 29597 (EPA emissions inventory). In 2014, natural gas systems were the largest anthropogenic source category of methane emissions in the United States. *Id.*

### III. WASHINGTON LAW REQUIRES GREENHOUSE GAS REDUCTIONS.

Washington has committed by law to reduce its greenhouse gas emissions. RCW Ch. 70.235 (Limiting Greenhouse Gas Emissions). In 2008, the Washington legislature directed that the state “shall” reduce its greenhouse gas emissions to 1990 levels by 2020; to 25 percent below 1990 levels by 2035; and to 50 percent below 1990 levels by 2050. RCW 70.235.020(1)(a). *See also* RCW 70.235.005(3) (“It is the intent of the legislature that the state will: (a) Limit and reduce emissions of greenhouse gas consistent with the emission reductions established in RCW 70.235.020”).

The legislature directed Ecology to “develop, in coordination with the western climate initiative, a design for a regional multisector market-based system” to meet established emission reduction limits. RCW

70.235.030(1)(a). The legislature further directed Ecology to present this plan to the legislature, identifying which actions under the plan would require additional legislative authority. RCW 70.235.020(1)(b). The legislature, however, specifically authorized Ecology to take action to reduce greenhouse gas emissions under existing statutory authority *before* receiving legislative approval of this plan. *Id.* (“Actions taken using existing statutory authority may proceed prior to approval of the greenhouse gas reduction plan.”). *See also* RCW 70.235.020(1)(c) (“Except where explicitly stated otherwise, nothing in [this law] limits any state agency authorities as they existed prior to June 12, 2008.”).

Washington’s Clean Air Act also requires Ecology to regulate greenhouse gas emissions by providing that Ecology “shall” regulate air contaminants. *See* RCW 70.94.331(2)(a)-(c). Greenhouse gases are unquestionably an air contaminant within the meaning of the Act. RCW 70.94.030(1).<sup>4</sup> Under the Clean Air Act, Ecology’s regulation of greenhouse gases must be adequate to “preserve, protect, and enhance the air quality for current and future generations” and to “secure and maintain

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<sup>4</sup> The U.S. Supreme Court has also held that the sweeping definition of “air pollutant” under the federal Clean Air Act encompasses greenhouse gases. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 528-29, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007). *See also* 74 Fed. Reg. 66,523 (Dec. 15, 2009) (EPA greenhouse gas endangerment finding). Washington Executive Order 09-05 likewise declared that “greenhouse gases are air contaminants.”

levels of air quality that protect human health and safety, . . . [and] to prevent injury to plant, animal life, and property.” RCW 70.94.011.

Moreover, the Clean Air Act specifically directs Ecology to adopt emission standards for Washington State. RCW 70.94.331(2)(b). An emission standard, in turn, is defined as “a requirement . . . that limits the quantity, rate, or concentration of emissions of air contaminants on a continuous basis.” RCW 70.94.030(12). These emission standards “may be based upon a system of classification by types of emissions or types of sources of emissions, or combinations thereof, which [Ecology] determines most feasible for the purposes of this chapter.” RCW 70.94.331(2)(c). Additionally, Ecology has discretion to decide whether to set emission standards for the state as a whole, from area to area, or from source to source. RCW 70.94.331(3).

#### IV. PROCEDURAL BACKGROUND

Immediately following Ecology’s issuance of the Clean Air Rule, the Association of Washington Business et al. (“AWB”) and several gas companies (“Avista”) filed petitions for review under the Administrative Procedure Act (“APA”) in Thurston County superior court. CP 1; *see* CP 363. Washington Environmental Council, Climate Solutions, and Natural Resources Defense Council (collectively, “WEC”) intervened to defend Ecology’s authority to adopt the Rule. CP 403.

Following briefing and a hearing on the merits, the superior court held that Ecology exceeded its statutory authority by adopting the Clean Air Rule. CP 839. The court reasoned that Ecology’s authority to establish emission standards under the Clean Air Act is limited to regulating sources, or entities that directly release contaminants into the air, and that Ecology may not establish emissions standards for entities that sell fossil fuels destined for combustion. *Id.* The superior court declined to reach the other issues raised by Petitioners. *Id.*

#### STANDARD OF REVIEW

Washington courts review agency rules under the Administrative Procedure Act. RCW 34.05.570(2). Appellate courts sit in the same position as the superior court and apply the APA standards of review to the administrative record. *Cornelius v. Dep’t of Ecology*, 182 Wn.2d 574, 585, 344 P.3d 199 (2015). A court may declare a rule invalid only if it finds that the rule “violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.” *Wash. State Hosp. Ass’n v. Dep’t of Health*, 183 Wn.2d 590, 595, 353 P.3d 1285 (2015) (citing RCW 34.05.570(2)(c), internal quotations omitted). Agency rules are presumed valid and will be upheld if consistent with the legislative scheme. *Id.*; *ASARCO, Inc. v. Puget*

*Sound Air Pollution Control Agency*, 112 Wn.2d 314, 321, 771 P.2d 335 (1989).

#### SUMMARY OF ARGUMENT

Climate change poses one of the most serious and urgent threats of our time. While countries, states, and cities delay, ever more pollutants enter our atmosphere, where they will stay and cause harm for decades. Each year that passes without meaningful limits on greenhouse gas emissions brings us one step closer to catastrophic levels of warming. Washington is obligated to do its part by reducing its greenhouse gas emissions to levels that will prevent the worst impacts of climate change.

The Washington Clean Air Act provides the authority and obligation for Ecology to set emission standards for the control of greenhouse gas emissions. RCW 70.94.331(2)(c); *supra* at 12-14. The Act delegates rulemaking authority to Ecology in broad terms, with few constraints on how Ecology may structure rules implementing this authority. *See id.* In the Clean Air Rule, Ecology established emission standards for Washington's largest climate polluters, including entities that sell fossil fuels for combustion – namely, petroleum product producers and importers, and natural gas distributors. These entities are responsible for 75 percent of the greenhouse gas emissions covered by the Rule, and Ecology reasonably determined that applying emission

standards to the largest entities that sell and profit from these fossil fuels is the most feasible way to regulate these emissions.

Nothing in the plain language of the Clean Air Act prohibits this approach, and the purpose of the Clean Air Act and the statute Limiting Greenhouse Gas Emissions strongly support a broad interpretation of Ecology’s authority to address the most pressing environmental problem of our time. Yet the superior court interpreted the Clean Air Act to permit only the regulation of sources, inserting limiting words into a statute that nowhere contains them.

The superior court confronted an issue of first impression in this state—the breadth of Ecology’s authority under the Clean Air Act to regulate greenhouse gas emissions from fossil fuels at the point of sale. The superior court erred in its narrow interpretation of the Clean Air Act and WEC asks that the superior court’s ruling be reversed and the Clean Air Rule reinstated.

## ARGUMENT

### I. THE PLAIN LANGUAGE OF THE CLEAN AIR ACT DOES NOT LIMIT EMISSION STANDARDS TO SOURCES

In interpreting a statute, the Court’s “fundamental purpose is to ascertain and carry out the intent of the legislature.” *Quinault Indian Nation v. Imperium Terminal Servs., LLC*, 187 Wn.2d 460, 468, 387 P.3d 670 (2017) (internal citations omitted). “If a statute’s meaning is plain on

its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *Id.* (internal citations and quotation marks omitted). The Court begins with the plain language of the statute, including “(1) the entirety of the statute in which the disputed provision is found, (2) related statutes, or (3) other provisions within the same act.” *Matter of Adoption of T.A.W.*, 186 Wn.2d 828, 840, 383 P.3d 492 (2016) (internal citations omitted). Additionally, “[i]f the statute at issue, or a related statute, incorporates a relevant statement of purpose, our reading of the statute should be consistent with that purpose.” *Id.* As the Washington Supreme Court has consistently held, “when passing laws that protect Washington’s environmental interests, the legislature intended those laws to be broadly construed to achieve the statute’s goals.” *Quinault Indian Nation*, 187 Wn.2d at 470.

The superior court held that Ecology lacks authority under the Act to establish emission standards for “indirect emitters” – namely, the petroleum product producers and importers and natural gas distributors. But while the Act specifies *what* Ecology may regulate – emissions, through emission standards – it is silent as to *whom* Ecology may regulate. The fossil fuels these covered parties sell are sold for combustion only, and their combustion emits 75 percent of the greenhouse gas emissions covered by the Rule. AR 5233. *See also* AR 5026-27. Nothing in the

Clean Air Act limits the entities that may be covered by emission standards, and the sweeping purpose of the Clean Air Act and the statute Limiting Greenhouse Gas Emissions compel a broad interpretation of Ecology's authority. The superior court erred in holding that the Clean Air Act prohibits Ecology from applying emission standards for these fossil fuels to the parties that sell them.

A. The Statutory Text Does Not Limit Emission Standards To Sources.

The Clean Air Act directs Ecology to adopt emission standards for Washington State. RCW 70.94.331(2)(b). An emission standard is defined 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). Emissions, in turn, are defined as “a release of air contaminants into the ambient air.” RCW 70.94.030(11). Because the Clean Air Act addresses “broad concerns surrounding the environmental dangers of [air pollution],” these terms “require[ ] a liberal construction.” *Quinault Indian Nation*, 187 Wn.2d at 470.

In the Clean Air Rule, Ecology set a baseline level of emissions for covered parties and then required annual reductions from this baseline, thereby limiting the “quantity . . . of emissions” of greenhouse gases as the Act directs. *See* RCW 70.94.030(12). Yet the superior court held these emission standards unlawful on the grounds that Ecology may only apply emission standards to “‘direct emitters,’ or sources that directly emit air contaminants.” CP 838 (Order at ¶ 7). *See also* CP 839 (Order at ¶ 10) (“Ecology’s authority under RCW 70.94.331(2) is limited to entities who directly introduce contaminants into air, not entities who sell commodities, the ‘indirect emitters.’”).

The superior court held that Ecology’s authority only extends to sources, but the plain language of the Act nowhere contains this limitation. The definition of “emission standard” specifies what Ecology may regulate – the “quantity, rate, or concentration of emissions of air contaminants.” RCW 70.94.030(12). But nothing in this definition limits which entities these standards may cover. In the absence of any explicit limitation in the text of the Act on which entities Ecology may regulate, that choice is left to Ecology. *See ASARCO*, 112 Wn.2d at 322 (“An agency may fill in the gaps of a statutory framework if necessary to effectuate a general statutory scheme.”) (internal citation omitted).

Interpreting the definition of “emission standard” to apply only to “sources” also requires altering portions of the statutory text. The definition of “emission standard” specifies that such standards may *include* requirements “relating to the operation or maintenance of a source.” RCW 70.94.030(12). As the Supreme Court has repeatedly held, use of the term “including” indicates the legislature’s intent that the subsequent examples are expansive, not exclusive. *See Pub. Util. Dist. No. 1 of Pend Oreille Cty. v. Dep’t of Ecology*, 146 Wn.2d 778, 807 n.7, 51 P.3d 744 (2002). *See also Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 359, 20 P.3d 921 (2001) (holding that “includes” is a term of enlargement); *Town of Ruston v. City of Tacoma*, 90 Wn. App. 75, 84, 951 P.2d 805 (1998) (“Generally, the statutory use of ‘including’ does not exclude entities that are not specifically enumerated thereafter.”). There is simply no way to read “including” as “limited to,” but that is precisely what the superior court did.

Nor is it permissible for the superior court to add the limitation to the Clean Air Act that Ecology may only regulate “direct emitters.” CP 838-39 (Order at 4, 10). The Clean Air Act never mentions direct emitters or indirect emitters; instead, it is silent as to which entities Ecology may regulate. *See RCW 70.94.331(2)(b); RCW 70.94.030(12)*. The superior court improperly inserted a limitation into the Clean Air Act—that

Ecology may only regulate “direct emitters” and not “indirect emitters”—despite the fact that the statute nowhere contains these words. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (“we ‘must not add words where the legislature has chosen not to include them.’”) (internal citation omitted).

Under a plain and literal reading of the Clean Air Act, any regulation that “limits the quantity, rate, or concentration of emissions of air contaminants on a continuous basis” is an emission standard. RCW 70.94.030(12). Nothing in this plain text prohibits Ecology from applying greenhouse gas emission standards to the entities that sell and profit from combustible fossil fuels, rather than applying emission standards to each and every homeowner with a gas stove. The superior court apparently believed that the legislature did not intend to allow Ecology to regulate at the point of sale. *See* CP 838-39. But “[t]his court will not add to or subtract from the clear language of a statute, rule, or regulation even if it believes the Legislature . . . intended something else but did not adequately express it unless the addition or subtraction of language is imperatively required to make the statute rational.” *Dep't of Licensing v. Cannon*, 147 Wn.2d 41, 57, 50 P.3d 627 (2002). It is entirely rational for the Clean Air Act to delegate authority to Ecology to establish standards that limit air contaminants without specifying what form those regulations

must take, and the superior court erred in adding to the clear language of the statute here.

The provision authorizing Ecology to establish emission standards likewise makes clear that emission standards need not be limited to sources. RCW 70.94.331(2)(c). The Clean Air Act explicitly gives Ecology the flexibility to establish emission standards based *either* on “types of sources of emissions” *or* on “types of emissions,” depending on which method Ecology “determines most feasible for the purposes of this chapter.” RCW 70.94.331(2)(c). For petroleum products and natural gas, Ecology chose to regulate “types of emissions” rather than “types of sources,” and this choice falls squarely within the discretion explicitly granted to the agency under the plain language of the Act. *Id.* Indeed, the provision allowing Ecology to regulate “types of emissions” in addition to “types of sources of emissions” would be redundant and superfluous if only regulation of “types of sources of emissions” were permitted. *See In re Estate of Mower*, 193 Wn. App. 706, 720, 374 P.3d 180 (2016) (courts are required to “avoid interpretations of a statute that would render superfluous a provision of the statute”).

The Act allows Ecology to choose to regulate either types of sources or types of emissions based on Ecology’s determination as to which approach is “most feasible.” RCW 70.94.331(2)(c). Ecology

reasonably determined that regulating emissions from distributors, producers, and importers is the most feasible way to regulate emissions from petroleum products and natural gas:

The [Clean Air Rule] was designed to cover the largest contributors of [greenhouse gas] emissions in Washington and capture a majority of Washington total [greenhouse gas] emissions, while also limiting the total number of covered facilities and companies. . . . This is a balance between getting as much emissions in the program as possible while limiting the regulatory burden on small sources and the administrative burden associated with regulating numerous small sources.

AR 5026-27. Indeed, it is hard to imagine how Ecology could effectively regulate emissions from petroleum products and distributed gas at the source level—an emission standard covering each individual trip to the gas pump would certainly not be the “most feasible” way to regulate these emissions. Luckily, the Clean Air Act explicitly grants Ecology authority to regulate types of emissions instead of sources if Ecology determines that approach “most feasible.” RCW 70.94.331(2)(c). Ecology so determined here, that determination is reasonable, and it falls squarely within the choices the Act explicitly authorizes Ecology to make.

Finally, this Court may also look to related statutes to discern the legislature’s intent. *See, e.g., State v. Bunker*, 169 Wn.2d 571, 578, 238 P.3d 487 (2010) (“The plain meaning of a statute may be discerned from all that the Legislature has said in the statute and related statutes which

disclose legislative intent about the provision in question.”) (internal quotation marks and citations omitted). Here the statute Limiting Greenhouse Gas Emissions, RCW Chapter 70.235, demonstrates the legislature’s intent that Ecology regulate greenhouse gas emissions. In addition to the purpose of the statute, which as discussed *infra* strongly supports upholding Ecology’s authority here, the statute Limiting Greenhouse Gas Emissions anticipates that Ecology may act under other statutory authority to regulate greenhouse gases. *See* RCW 70.235.020(1)(b) (“Actions taken using existing statutory authority may proceed prior to approval of the greenhouse gas reduction plan.”). The Clean Air Act, which allows Ecology to regulate “air contaminants” including greenhouse gases, is central to Ecology’s “existing statutory authority” to regulate greenhouse gas emissions. The fact that the legislature expressly indicated that Ecology is authorized to regulate greenhouse gases under existing statutory authority supports a holding that Ecology has authority under the Clean Air Act to address the urgent problem of greenhouse gas pollution.

B. The Purpose of the Clean Air Act and the Statute Limiting Greenhouse Gas Emissions Support A Broad Interpretation of Ecology’s Authority.

This Court must also interpret the Clean Air Act consistent with the relevant statement of purpose in that Act and the statute Limiting

Greenhouse Gas Emissions. *See Matter of Adoption of T.A.W.*, 186 Wn.2d at 840. Washington courts look to a statute’s declaration of purpose as “an important guide to understanding the breadth of authority the legislature has delegated to [an agency].” *See Armstrong v. State*, 91 Wn. App. 530, 537, 958 P.2d 1010 (1998).

Here, the stated purpose of the Clean Air Act could hardly be broader. In RCW 70.94.011, the legislature explained the critical pollution reduction goals it intended the Act to achieve:

It is declared to be the public policy to preserve, protect, and enhance the air quality for current and future generations. Air is an essential resource that must be protected from harmful levels of pollution. Improving air quality is a matter of statewide concern and is in the public interest. It is the intent of this chapter to secure and maintain levels of air quality that protect human health and safety, including the most sensitive members of the population, to comply with the requirements of the federal clean air act, to prevent injury to plant, animal life, and property, to foster the comfort and convenience of Washington's inhabitants, to promote the economic and social development of the state, and to facilitate the enjoyment of the natural attractions of the state.

This powerful legislative explanation of the importance of preserving and protecting air quality demands an expansive interpretation of the Clean Air Act that allows Ecology the flexibility to effectively regulate greenhouse gas emissions. *Armstrong*, 91 Wn. App. at 537. It is clear that if left unchecked, greenhouse gas emissions will reach untenable levels that will

not “protect human health and safety,” nor promote “economic and social development,” nor facilitate enjoyment of the state’s natural attractions. RCW 70.94.011. To the contrary, it is clear that climate change is already affecting Washington; wildfires, landslides, ocean acidification, drought, and flooding are already having devastating impacts throughout the state. *Supra* at 3-6. Human health impacts, including increased incidence of respiratory diseases, heart attacks, and cancer are expected to increase, and entire coastal communities will be displaced. *Id.* These effects will worsen if emissions are left unchecked. *Id.*

The legislature also expressly anticipated that Ecology would enact an “intensive” and “progressive” program, using “all known, available and reasonable methods” to curb dangerous pollution. RCW 70.94.011. That is precisely what Ecology has done here: when confronted with the massive problem of how to effectively regulate greenhouse gas emissions, Ecology developed a progressive program to regulate emissions from fossil fuels sold for combustion at the point of sale. This reasonable approach is also consistent with the legislature’s stated intent that Ecology find ways to regulate emissions from small individual sources in the aggregate. RCW 70.94.011. As Ecology explained, regulating at the point of sale limits the number of regulated entities but still achieves emission reductions from petroleum products and distributed gas, which in

the aggregate account for 75 percent of the emissions covered by the rule.  
AR 5233. *See also* AR 5026-27.

Moreover, in the statute Limiting Greenhouse Gas Emissions, the legislature has also specifically expressed its intent that greenhouse gas emissions be regulated. Not only did the legislature enact statutory targets requiring reductions in the state's greenhouse gas emissions, RCW 70.235.020, the legislature also stated that “[i]t is the intent of the legislature that the state will: (a) Limit and reduce emissions of greenhouse gas consistent with the emission reductions established [in this statute]”. RCW 70.235.005(3).

As this Court has held, “[s]tatutes should be interpreted to further, not frustrate, their intended purpose.” *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 712, 153 P.3d 846 (2007) (internal quotations and citation omitted). This Court has often looked to the plain language of the legislature's statement of policy and intent to support a liberal construction of environmental laws. *See Quinault Indian Nation*, 187 Wn.2d at 473 (interpreting the Ocean Resources Management Act in light of the Act's broad statement of policy and intent in RCW 43.143.010). Interpreting the Clean Air Act to prevent Ecology from regulating greenhouse gas emissions at the point of sale flies in the face of the legislature's expansive mandate in RCW 70.94.011. This Court should adopt an expansive

interpretation of Ecology's authority to enact emission standards to give full effect to the legislature's express and sweeping goals in the Clean Air Act.

II. A BROAD INTERPRETATION OF THE CLEAN AIR ACT IS CONSISTENT WITH LEGISLATIVE HISTORY AND ECOLOGY'S AUTHORITATIVE INTERPRETATION

If the plain language of a statute is unambiguous, then the court's inquiry is at an end. *State v. Armendariz*, 160 Wn.2d 106, 110–11, 156 P.3d 201 (2007). But where the plain language of the statute is subject to more than one reasonable interpretation, the statute is ambiguous. *Id.* “This court may attempt to discern the legislative intent underlying an ambiguous statute from its legislative history. Likewise, this court may look to authoritative agency interpretations of disputed statutory language.” *Id.* (internal citations omitted).

As discussed *supra*, the plain language of the Clean Air Act, including the statutory text and purpose of the Act and the statute Limiting Greenhouse Gas Emissions, grants Ecology the authority to set emission standards for petroleum product producers and importers and natural gas distributors. If this Court finds the plain language to be ambiguous, however, the legislative history of the Act and Ecology's authoritative interpretation likewise support the conclusion that Ecology acted within its statutory authority in the Clean Air Rule.

A. The Provisions Of The Clean Air Act Were Meant To Evolve With Time.

Washington's first Clean Air Act was enacted in 1967, and much of the language in the Act's statement of purpose (now codified at RCW 70.94.011) dates to that original enactment. Laws of 1967, ch. 238, § 1.<sup>5</sup> The Clean Air Act was significantly amended, and its statement of purpose expanded, in 1991. Laws of 1991, ch. 199, § 102.<sup>6</sup>

In support of the expansive statement of purpose included in the 1991 version of the Act, which is the version of RCW 70.94.011 in effect today, the legislature found that "ambient air pollution is the most serious environmental threat in Washington state" and considered "air pollution levels, costs, and damages to be unacceptable." Laws of 1991, ch. 199, § 101.<sup>7</sup> Similarly, both the Senate Bill Report and the House Bill Report noted that the expanded legislative findings and goals "generally reflect three principles: 1) all air polluters should pay for the costs of air pollution; 2) state laws should prevent deterioration of air quality; and 3)

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<sup>5</sup><http://leg.wa.gov/CodeReviser/documents/sessionlaw/1967c238.pdf?cite=1967%20c%20238%20%A7%201>.

<sup>6</sup> <http://lawfilesexternal.wa.gov/biennium/1991-92/Pdf/Bills/Session%20Laws/House/1028-S.SL.pdf?cite=1991%20c%20199%20%A7%20102>

<sup>7</sup> <http://lawfilesexternal.wa.gov/biennium/1991-92/Pdf/Bills/Session%20Laws/House/1028-S.SL.pdf?cite=1991%20c%20199%20%A7%20102>

state government should be a role model in reducing air pollution.” *See* H.B. Rep. 1028, 52nd Leg., Reg. Sess. (Wash. 1991);<sup>8</sup> S.B. Rep. 1028, 52nd Leg., Reg. Sess. (Wash. 1991).<sup>9</sup> The Clean Air Rule plainly furthers these legislative goals—it places the burden on polluters to reduce their pollution or pay the cost of reductions elsewhere, in keeping with the principle that “all air polluters should pay for the costs of air pollution.” *Id.* The greenhouse gas emission reduction requirements in the Clean Air Rule also help to “prevent deterioration of air quality.” *Id.*

Nothing in the legislative history of the 1967 Act nor the 1991 Amendments explicitly addresses how Ecology may establish emission standards for greenhouse gases, and certainly nothing addresses how Ecology may structure greenhouse gas emission limits for petroleum products and distributed gas. This is hardly surprising, given that in 1967 and even in 1991, most governments were not yet fully aware of the magnitude and urgency of the threat posed by climate change. But while neither the statutory text nor the legislative history directly speaks to our modern understanding of the scope of this problem, the legislature wrote

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<sup>8</sup> <http://lawfilesexternal.wa.gov/biennium/1991-92/Pdf/Bill%20Reports/House/1028.HBR.pdf>

<sup>9</sup> <http://lawfilesexternal.wa.gov/biennium/1991-92/Pdf/Bill%20Reports/House%20Historical/1028-S%20BRH%20APH.pdf>

the Clean Air Act in broad terms with few constraints on Ecology's authority to address air pollution.

Statutes written in broad terms are meant to evolve with time. The legislature may not have anticipated the threat posed by greenhouse gas emissions or the specific regulatory approach Ecology adopted in the Clean Air Rule when the Clean Air Act was adopted, but this does not mean that the Rule falls outside the purview of the statute. As the U.S. Supreme Court held when confronted with the question of whether broad authority to regulate air pollution in the federal Clean Air Act authorized regulation of greenhouse gases, "the fact that a statute can be applied in situations not expressly anticipated ... does not demonstrate ambiguity. It demonstrates breadth." *Massachusetts v. E.P.A.*, 549 U.S. 497, 528-29, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007). The Court went on to note:

While the Congresses that drafted [the federal Clean Air Act] might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. The broad language of [the federal Clean Air Act] reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence.

*Id.* at 532.

Here, the Clean Air Act does not speak to the regulatory approach Ecology adopted in the Clean Air Rule—but the language of the Act

should be read to evolve with time, to allow Ecology to adopt appropriate regulations to confront the most significant environmental threat of our time. *See Browder v. United States*, 312 U.S. 335, 339, 61 S. Ct. 599, 85 L. Ed. 862 (1941) (“Old laws apply to changed situations. The reach of a statute is not sustained or opposed by the fact that it is sought to bring new situations under its terms.”); *Consumer Electronics Ass’n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003) (“the Supreme Court has consistently instructed that statutes written in broad, sweeping language should be given broad, sweeping application”). The Washington legislature in 1967 and 1991 wrote a statute that was meant to endure and evolve, and this Court should interpret its expansive language to allow Ecology the flexibility to address new threats.

B. Failed Legislation Did Not Amend The Clean Air Act.

In briefing below, AWB made much of the fact that the legislature has twice considered, and twice failed to pass, comprehensive legislation regulating greenhouse gas emissions. But the fact that these earlier proposals failed does not undermine Ecology’s authority to enact a more limited rule using its existing Clean Air Act authority.

As an initial matter, there are significant differences between each of the two failed legislative measures and Ecology’s Clean Air Rule. *See supra* at 7-9. For example, Governor Inslee’s 2015 proposal would have

created allowance auctions that generate substantial revenue for the state.<sup>10</sup> *See* H.B.1314, 64th Leg., Reg. Sess. (Wash. 2015). Governor Gregoire’s 2009 proposal would have committed Washington State to participate in a regional cap and trade program as part of the Western Climate Initiative. H.B. 1819, 61st Leg., Reg. Sess. (Wash. 2009). The Clean Air Rule does not commit Washington to join the Western Climate Initiative regional cap-and-trade program, nor does it require an allowance auction or otherwise create a major new source of state revenue. These are important differences: entering into binding interstate agreements and creating a major new revenue stream are the types of actions that typically do require legislative action.

And while there are also some similarities between the Clean Air Rule and each of the failed legislative proposals, the legislature’s failure to adopt a statute that would have comprehensively regulated greenhouse gas emissions does not weigh against the validity of the Rule. *See State v. Conte*, 159 Wn.2d 797, 813, 154 P.3d 194 (2007) (“legislative intent cannot be gleaned from the failure to enact a measure, particularly where there are several different components of it, any one of which might be critical to the decision to reject.”). Likewise, the legislature’s rejection of

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<sup>10</sup> *See supra* n.3.

Governor Inslee’s 2015 Carbon Pollution Accountability Act does not suggest that Ecology now lacks authority to establish a statewide emission standard under the Clean Air Act. *City of Medina v. Primm*, 160 Wn.2d 268, 279-80, 157 P.3d 379 (2007) (unless a court decision holds that a statute does not confer a particular authority, “nothing can be inferred from the legislature’s inaction” on a bill that would have explicitly granted that authority). *See also Spokane Cnty. Health Dist. v. Brockett*, 120 Wn.2d 140, 153, 839 P.2d 324 (1992) (“courts will not speculate as to the reason for the rejection” of a proposed amendment); *Armstrong*, 91 Wn. App. at 541 n.9 (legislature’s failure to adopt a bill similar to disputed regulation does not bear on the validity of the agency’s authority, and may indicate “legislative acquiescence in the agency’s interpretation of the statute”).

Finally, the fact that a version of RCW 70.235.020 that did not pass would have given Ecology authority to “develop and implement a program to limit greenhouse gases emissions” does not limit Ecology’s authority under the Clean Air Act. *City of Medina*, 160 Wn.2d at 279-80. *See also* H.B. 2815, 60th Leg., Reg. Sess., § 3 (as introduced 2008).<sup>11</sup> The enacted version of RCW 70.235.020 directs Ecology to submit a plan to

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<sup>11</sup> <http://lawfilesext.leg.wa.gov/biennium/2007-08/Pdf/Bills/House%20Bills/2815.pdf>.

the legislature to achieve the greenhouse gas reductions mandated by that section, specifying which portions of the plan require additional legislative authority. That section also specifically authorizes Ecology to proceed with actions using its existing authority prior to approval of that plan. RCW 70.235.020(1)(b). The Clean Air Rule cannot be construed as Ecology's plan to meet the targets in RCW 70.235.020—by Ecology's own admission, the emission reductions the Clean Air Rule mandates will be not be enough to meet the targets. AR 4980, AR 5049. Instead, the Clean Air Rule is an initial step using Ecology's Clean Air Act authority—precisely the type of step that the legislature directed Ecology to proceed with prior to the approval of a comprehensive legislative plan. RCW 70.235.020(1)(b).

In arguments below, AWB attempted to paint the Clean Air Rule as a dramatic end-run around the legislature by the executive branch. CP 304. The facts paint a far simpler picture. The legislature failed to enact two different climate bills, and so Ecology enacted a greenhouse gas rule under its pre-existing Clean Air Act authority, as the legislature has explicitly authorized Ecology to do. *See* RCW 70.235.020(1)(b).

C. Ecology's Authoritative Interpretation Carries Significant Weight.

In addition to legislative history, “this court may look to authoritative agency interpretations of disputed statutory language.” *Armendariz*, 160 Wn.2d at 111. *See also Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004) (“[W]here a statute is within [an] agency's special expertise, the agency's interpretation is accorded great weight, provided that the statute is ambiguous.”) (internal quotation marks and citation omitted). Deference is accorded an agency's interpretation if: “(1) the particular agency is charged with the administration and enforcement of the statute, (2) the statute is ambiguous, and (3) the statute falls within the agency's special expertise.” *Bostain*, 159 Wn.2d at 716 (internal citations omitted). Each of these conditions is met here and Ecology's interpretation is entitled to deference.

The Clean Air Rule represents Ecology's authoritative interpretation of the Act: in it, Ecology interpreted its authority to establish emission standards for Washington's largest climate polluters, including entities that sell fossil fuels for combustion. If the Court finds the Act ambiguous, Ecology's interpretation is entitled to deference because Ecology is the state agency authorized to implement the Clean Air Act by

establishing emission standards for the state, among other duties. RCW 70.94.331. Emission standards under the Clean Air Act and regulation of greenhouse gases also fall within Ecology's special expertise. *See PT Air Watchers v. Dep't of Ecology*, 179 Wn.2d 919, 929, 319 P.3d 23 (2014) (recognizing Ecology's expertise in evaluating greenhouse gas emissions under the State Environmental Policy Act); *Weyerhaeuser Co. v. Dep't of Ecology*, 86 Wn.2d 310, 315, 545 P.2d 5 (1976) (the legislature has vested Ecology with broad authority and responsibility for managing the environment in the state).

In short, “[a] court must give great weight to the statute's interpretation by the agency which is charged with its administration, absent a compelling indication that such interpretation conflicts with the legislative intent.” *Marquis v. City of Spokane*, 130 Wn.2d 97, 111, 922 P.2d 43 (1996). There is no indication at all, let alone a compelling one, that Ecology's interpretation conflicts with legislative intent. Instead, the legislature's intent as reflected in the purpose of the Clean Air Act and statute Limiting Greenhouse Gas Emissions strongly supports Ecology's interpretation here. Ecology's interpretation of the Clean Air Act as allowing point of sale regulation of Washington's largest climate polluters is entitled to deference.

### III. THE CLEAN AIR ACT DOES NOT PROHIBIT THE USE OF EMISSION REDUCTION UNITS

Before the superior court, AWB and Avista argued that two elements of the Rule's structure are not authorized by the Clean Air Act: Ecology's decision to establish emission standards for petroleum product producers and importers and natural gas distributors, and Ecology's decision to allow covered parties to comply with the Rule by obtaining tradable compliance instruments, termed "emission reduction units." *See, e.g.,* CP 318-20. As discussed *supra*, the superior court erred in holding that the Clean Air Act limits Ecology's authority to set emission standards to sources. The superior court did not reach the question of whether the Clean Air Act limits Ecology's authority to allow tradeable emission reduction units. CP 839 (Order at ¶ 13). But in reviewing an agency's decision under the APA, this Court sits in the same position as the superior court, and so may reach issues even if the superior court did not. *See generally Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

Here, the question of Ecology's authority to regulate greenhouse gas emissions from Washington's largest polluters presents an urgent question of public importance. Every year that passes without comprehensive regulation brings us closer to catastrophic levels of

warming, and the emission reductions that will be lost due to the superior court's flawed decision will be that much harder to achieve later. This Court already must address Ecology's statutory authority under the Clean Air Act to regulate petroleum product producers and importers and natural gas distributors, and the Court should address the closely related issue regarding Ecology's statutory authority to allow tradeable compliance instruments at the same time.<sup>12</sup>

Ecology's decision to allow emission reduction units is within Ecology's authority under the Clean Air Act. Emission reduction units are tradeable compliance instruments: covered parties may reduce their emissions directly, or they may obtain emission reduction units to meet all or part of their compliance obligation. WAC 173-442-200. Use of such instruments gives covered parties significant flexibility to choose how to achieve the greenhouse gas reductions the Rule requires.

Emission reduction units can be generated in a number of ways: when covered parties decrease their emissions more than the Rule requires, WAC 173-442-140, through projects that reduce greenhouse gas emissions, WAC 173-442-160, and through purchased allowances from cap and trade programs in other jurisdictions, WAC 173-442-170.

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<sup>12</sup> This Court should also address the additional issues raised in Ecology's brief so that the start date of the Clean Air Rule is not further delayed.

Covered parties with an excess of emission reduction units may bank them for compliance in the future or sell them to other covered parties. WAC 173-442-130, -140.

Allowing covered parties to meet their emission limits through offsite reductions changes *where* the reductions occur, but nonetheless limits the “quantity” of emissions. RCW 70.94.030(12). Nothing in the Act specifies that trading is prohibited or that emission standards may only require reductions at the geographic site of a regulated party. To the contrary, the Act explicitly grants Ecology the authority to set emission standards at whatever geographic scale it chooses. *See* RCW 70.94.331(3).

Allowing polluters some flexibility to choose where emissions reductions take place, while still limiting the quantity of pollutants they emit, is well within Ecology’s authority under the plain language of the Clean Air Act. *See Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9–10, 43 P.3d 4 (2002) (where the language of a statute is plain on its face, courts must give effect to that plain meaning); *ASARCO*, 112 Wn.2d at 321 (agency regulations that are consistent with the legislative scheme will be upheld). Interpreting the Clean Air Act to grant Ecology authority to issue the Clean Air Rule is also consistent with legislative purpose and intent. *Supra* at 25-29.

The statute Limiting Greenhouse Gas Emissions further demonstrates that the baseline-credit approach in the Clean Air Rule falls within Ecology’s authority under the Clean Air Act. In that statute, the legislature clarified that Ecology may not enter into the Western Climate Initiative market-based greenhouse gas reduction program without explicit legislative approval. *See* RCW 70.235.030(1) (directing Ecology to “develop, in coordination with the western climate initiative, a design for a regional multisector market-based system” and to submit to the legislature “[p]roposed legislation, necessary funding, and the schedule necessary to implement the preferred design”); RCW 70.235.005(4) (“In the event the state elects to participate in a regional multisector market-based system, it is the intent of the legislature that the system will become effective by January 1, 2012, after authority is provided to the department for its implementation.”).

The legislature explicitly anticipated that Ecology might act under existing authority to regulate greenhouse gas emissions, RCW 70.235.020(1)(b), and provided that the Western Climate Initiative trading program was not within that existing authority and would require explicit legislative approval, RCW 70.235.030(1). “When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference ... is that Congress considered the

issue of exceptions and, in the end, limited the statute to the ones set forth.” *See United States v. Johnson*, 529 U.S. 53, 58, 120 S. Ct. 1114, 146 L. Ed. 2d 39 (2000). Here, the legislature created a clear exception to Ecology’s authority by limiting Ecology’s ability to enter the Western Climate Initiative, and this Court should not create additional exceptions that the legislature did not include.

Finally, interpreting Ecology’s authority to allow covered parties geographic flexibility in where emissions reductions occur is consistent with the interpretation of similar language in the federal Clean Air Act. Specifically, under the federal Clean Air Act, “emission limitations” include a nationwide cap and trade program to control emissions that contribute to acid rain. *See North Carolina v. EPA*, 531 F.3d 896, 902 (D.C. Cir. 2008), *modified on reh’g in part by North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008). *See also* 42 U.S.C. § 7651(g) (describing rule requiring polluters to hold tradable allowances as an “emission limitation”); *id.* § 7651(b) (“It is the intent of this subchapter to effectuate such reductions by requiring compliance by affected sources with prescribed emission limitations . . . , which limitations may be met through alternative methods of compliance provided by an emission allocation and transfer system.”). “Emission limitation” as it is defined under the federal Clean Air Act is broad enough to include trading of compliance

obligations, *see* 42 U.S.C. § 7602(k), and there is no reason to interpret the language in Washington’s Act more narrowly, *see* RCW 70.94.030(12).

#### CONCLUSION

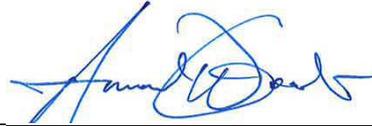
The superior court held that the Clean Air Act does not authorize the regulatory choices Ecology made in the Clean Air Rule. But the Act is largely silent as to the structure and form of regulations that Ecology may adopt, and simply does not speak to the specific choices necessary to implement the statute. This Court should interpret the Clean Air Act, consistent with its broad purpose, to allow Ecology to adopt feasible, reasonable, and urgently needed limits on greenhouse gas emissions from Washington’s largest polluters. The decision of the superior court should be reversed and the Clean Air Rule reinstated.

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Respectfully submitted this 9<sup>th</sup> day of August, 2018.



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**APPENDIX**

RCW 70.94.011.....A-2  
RCW 70.94.030.....A-4  
RCW 70.94.331.....A-7  
RCW 70.235.005.....A-9  
RCW 70.235.020.....A-10  
RCW 70.235.030.....A-11

**RCW 70.94.011****Declaration of public policies and purpose.**

It is declared to be the public policy to preserve, protect, and enhance the air quality for current and future generations. Air is an essential resource that must be protected from harmful levels of pollution. Improving air quality is a matter of statewide concern and is in the public interest. It is the intent of this chapter to secure and maintain levels of air quality that protect human health and safety, including the most sensitive members of the population, to comply with the requirements of the federal clean air act, to prevent injury to plant, animal life, and property, to foster the comfort and convenience of Washington's inhabitants, to promote the economic and social development of the state, and to facilitate the enjoyment of the natural attractions of the state.

It is further the intent of this chapter to protect the public welfare, to preserve visibility, to protect scenic, aesthetic, historic, and cultural values, and to prevent air pollution problems that interfere with the enjoyment of life, property, or natural attractions.

Because of the extent of the air pollution problem the legislature finds it necessary to return areas with poor air quality to levels adequate to protect health and the environment as expeditiously as possible but no later than December 31, 1995. Further, it is the intent of this chapter to prevent any areas of the state with acceptable air quality from reaching air contaminant levels that are not protective of human health and the environment.

The legislature recognizes that air pollution control projects may affect other environmental media. In selecting air pollution control strategies state and local agencies shall support those strategies that lessen the negative environmental impact of the project on all environmental media, including air, water, and land.

The legislature further recognizes that energy efficiency and energy conservation can help to reduce air pollution and shall therefore be considered when making decisions on air pollution control strategies and projects.

It is the policy of the state that the costs of protecting the air resource and operating state and local air pollution control programs shall be shared as equitably as possible among all sources whose emissions cause air pollution.

It is also declared as public policy that regional air pollution control programs are to be encouraged and supported to the extent practicable as essential instruments for the securing and maintenance of appropriate levels of air quality.

To these ends it is the purpose of this chapter to safeguard the public interest through an intensive, progressive, and coordinated statewide program of air pollution prevention and control, to provide for an appropriate distribution of responsibilities, and to encourage coordination and cooperation between the state, regional, and local units of government, to improve cooperation between state and federal government, public and private organizations, and the concerned individual, as well as to provide for the use of all known, available, and reasonable methods to reduce, prevent, and control air pollution.

The legislature recognizes that the problems and effects of air pollution cross political boundaries, are frequently regional or interjurisdictional in nature, and are dependent upon the existence of human activity in areas having common topography and weather conditions conducive to the buildup of air contaminants. In addition, the legislature recognizes that air pollution levels are aggravated and compounded by increased population, and its consequences. These changes often result in increasingly serious problems for the public and the environment.

The legislature further recognizes that air emissions from thousands of small individual sources are major contributors to air pollution in many regions of the state. As the population of a region grows, small sources may contribute an increasing proportion of that region's total air emissions. It is declared to be the policy of the state to achieve significant reductions in emissions from those small sources whose aggregate emissions constitute a significant contribution to air pollution in a particular region.

It is the intent of the legislature that air pollution goals be incorporated in the missions and actions of state agencies.

[ 1991 c 199 § 102; 1973 1st ex.s. c 193 § 1; 1969 ex.s. c 168 § 1; 1967 c 238 § 1.]

#### **NOTES:**

**Finding—1991 c 199:** "The legislature finds that ambient air pollution is the most serious environmental threat in Washington state. Air pollution causes significant harm to human health; damages the environment, including trees, crops, and animals; causes deterioration of equipment and materials; contributes to water pollution; and degrades the quality of life.

Over three million residents of Washington state live where air pollution levels are considered unhealthful. Of all toxic chemicals released into the environment more than half enter our breathing air. Citizens of Washington state spend hundreds of millions of dollars annually to offset health, environmental, and material damage caused by air pollution. The legislature considers such air pollution levels, costs, and damages to be unacceptable.

It is the intent of this act that the implementation of programs and regulations to control air pollution shall be the primary responsibility of the department of ecology and local air pollution control authorities." [ 1991 c 199 § 101.]

**Alternative fuel and solar powered vehicles—1991 c 199:** "The department of ecology shall contract with Western Washington University for the biennium ending June 30, 1993, for research and development of alternative fuel and solar powered vehicles. A report on the progress of such research shall be presented to the standing environmental committees and the department by January 1, 1994." [ 1991 c 199 § 230.]

**RCW 70.94.030****Definitions.**

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Air contaminant" means dust, fumes, mist, smoke, other particulate matter, vapor, gas, odorous substance, or any combination thereof.

(2) "Air pollution" is 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 life, or property, or which unreasonably interfere with enjoyment of life and property. For the purpose of this chapter, air pollution shall not include air contaminants emitted in compliance with chapter 17.21 RCW.

(3) "Air quality standard" means an established concentration, exposure time, and frequency of occurrence of an air contaminant or multiple contaminants in the ambient air which shall not be exceeded.

(4) "Ambient air" means the surrounding outside air.

(5) "Authority" means any air pollution control agency whose jurisdictional boundaries are coextensive with the boundaries of one or more counties.

(6) "Best available control technology" (BACT) means an emission limitation based on the maximum degree of reduction for each air pollutant subject to regulation under this chapter emitted from or that results from any new or modified stationary source, that the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such a source or modification through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such a pollutant. In no event shall application of "best available control technology" result in emissions of any pollutants that will exceed the emissions allowed by any applicable standard under 40 C.F.R. Part 60 and Part 61, as they exist on July 25, 1993, or their later enactments as adopted by reference by the director by rule. Emissions from any source utilizing clean fuels, or any other means, to comply with this subsection shall not be allowed to increase above levels that would have been required under the definition of BACT as it existed prior to enactment of the federal clean air act amendments of 1990.

(7) "Best available retrofit technology" (BART) means an emission limitation based on the degree of reduction achievable through the application of the best system of continuous emission reduction for each pollutant that is emitted by an existing stationary facility. The emission limitation must be established, on a case-by-case basis, taking into consideration the technology available, the costs of compliance, the energy and nonair quality environmental impacts of compliance, any pollution control equipment in use or in existence at the source, the remaining useful life of the source, and the degree of improvement in visibility that might reasonably be anticipated to result from the use of the technology.

(8) "Board" means the board of directors of an authority.

(9) "Control officer" means the air pollution control officer of any authority.

(10) "Department" or "ecology" means the department of ecology.

(11) "Emission" means a release of air contaminants into the ambient air.

(12) "Emission standard" and "emission limitation" mean 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.

(13) "Fine particulate" means particulates with a diameter of two and one-half microns and smaller.

(14) "Lowest achievable emission rate" (LAER) means for any source that rate of emissions that reflects:

(a) The most stringent emission limitation that is contained in the implementation plan of any state for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable; or

(b) The most stringent emission limitation that is achieved in practice by such class or category of source, whichever is more stringent.

In no event shall the application of this term permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under applicable new source performance standards.

(15) "Modification" means any physical change in, or change in the method of operation of, a stationary source that increases the amount of any air contaminant emitted by such source or that results in the emission of any air contaminant not previously emitted. The term modification shall be construed consistent with the definition of modification in Section 7411, Title 42, United States Code, and with rules implementing that section.

(16) "Multicounty authority" means an authority which consists of two or more counties.

(17) "New source" means (a) the construction or modification of a stationary source that increases the amount of any air contaminant emitted by such source or that results in the emission of any air contaminant not previously emitted, and (b) any other project that constitutes a new source under the federal clean air act.

(18) "Permit program source" means a source required to apply for or to maintain an operating permit under RCW 70.94.161.

(19) "Person" means an individual, firm, public or private corporation, association, partnership, political subdivision of the state, municipality, or governmental agency.

(20) "Reasonably available control technology" (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. RACT is determined on a case-by-case basis for an individual source or source category taking into account the impact of the source upon air quality, the availability of additional controls, the emission reduction to be achieved by additional controls, the impact of additional controls on air quality, and the capital and operating costs of the additional controls. RACT requirements for a source or source category shall be adopted only after notice and opportunity for comment are afforded.

(21) "Silvicultural burning" means burning of wood fiber on forestland consistent with the provisions of \*RCW 70.94.660.

(22) "Source" means all of the emissions units including quantifiable fugitive emissions, that are located on one or more contiguous or adjacent properties, and are under the control of the same person, or persons under common control, whose activities are ancillary to the production of a single product or functionally related group of products.

(23) "Stationary source" means any building, structure, facility, or installation that emits or may emit any air contaminant.

(24) "Trigger level" means the ambient level of fine particulates, measured in micrograms per cubic meter, that must be detected prior to initiating a first or second stage of impaired air quality under RCW 70.94.473.

[ 2005 c 197 § 2; 1993 c 252 § 2; 1991 c 199 § 103; 1987 c 109 § 33; 1979 c 141 § 119; 1969 ex.s. c 168 § 2; 1967 ex.s. c 61 § 1; 1967 c 238 § 2; 1957 c 232 § 3.]

#### NOTES:

\*Reviser's note: RCW 70.94.660 was recodified as RCW 70.94.6534 pursuant to 2009 c 118 § 802.

8/7/2018

RCW 70.94.030: Definitions.

**Finding—1991 c 199:** See note following RCW **70.94.011**.

**Purpose—Short title—Construction—Rules—Severability—Captions—1987 c 109:** See notes following RCW **43.21B.001**.

**RCW 70.94.331****Powers and duties of department.**

- (1) The department shall have all the powers as provided in RCW 70.94.141.
- (2) The department, in addition to any other powers vested in it by law after consideration at a public hearing held in accordance with chapters 42.30 and 34.05 RCW shall:
  - (a) Adopt rules establishing air quality objectives and air quality standards;
  - (b) Adopt emission standards which shall constitute minimum emission standards throughout the state. An authority may enact more stringent emission standards, except for emission performance standards for new woodstoves and opacity levels for residential solid fuel burning devices which shall be statewide, but in no event may less stringent standards be enacted by an authority without the prior approval of the department after public hearing and due notice to interested parties;
  - (c) 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, gas, odorous substances, or any combination thereof. Such requirements may be based upon 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. However, an industry, or the air pollution control authority having jurisdiction, can choose, subject to the submittal of appropriate data that the industry has quantified, to have any limit on the opacity of emissions from a source whose emission standard is stated in terms of a weight of particulate per unit volume of air (e.g., grains per dry standard cubic foot) be based on the applicable particulate emission standard for that source, such that any violation of the opacity limit accurately indicates a violation of the applicable particulate emission standard. Any alternative opacity limit provided by this section that would result in increasing air contaminants emissions in any nonattainment area shall only be granted if equal or greater emission reductions are provided for by the same source obtaining the revised opacity limit. A reasonable fee may be assessed to the industry to which the alternate opacity standard would apply. The fee shall cover only those costs to the air pollution control authority which are directly related to the determination on the acceptability of the alternate opacity standard, including testing, oversight and review of data.
- (3) The air quality standards and emission standards may be for the state as a whole or may vary from area to area or source to source, except that emission performance standards for new woodstoves and opacity levels for residential solid fuel burning devices shall be statewide, as may be appropriate to facilitate the accomplishment of the objectives of this chapter and to take necessary or desirable account of varying local conditions of population concentration, the existence of actual or reasonably foreseeable air pollution, topographic and meteorologic conditions and other pertinent variables.
- (4) The department is directed to cooperate with the appropriate agencies of the United States or other states or any interstate agencies or international agencies with respect to the control of air pollution and air contamination, or for the formulation for the submission to the legislature of interstate air pollution control compacts or agreements.
- (5) The department is directed to conduct or cause to be conducted a continuous surveillance program to monitor the quality of the ambient atmosphere as to concentrations and movements of air contaminants and conduct or cause to be conducted a program to determine the quantity of emissions to the atmosphere.
- (6) The department shall enforce the air quality standards and emission standards throughout the state except where a local authority is enforcing the state regulations or its own regulations which are more stringent than those of the state.
- (7) The department shall encourage local units of government to handle air pollution problems within their respective jurisdictions; and, on a cooperative basis provide technical and consultative assistance therefor.
- (8) The department shall have the power to require the addition to or deletion of a county or counties from an existing authority in order to carry out the purposes of this chapter. No such addition or

deletion shall be made without the concurrence of any existing authority involved. Such action shall only be taken after a public hearing held pursuant to the provisions of chapter **34.05** RCW.

(9) The department shall establish rules requiring sources or source categories to apply reasonable and available control methods. Such rules shall apply to those sources or source categories that individually or collectively contribute the majority of statewide air emissions of each regulated pollutant. The department shall review, and if necessary, update its rules every five years to ensure consistency with current reasonable and available control methods. The department shall have adopted rules required under this subsection for all sources by July 1, 1996.

For the purposes of this section, "reasonable and available control methods" shall include but not be limited to, changes in technology, processes, or other control strategies.

[ 1991 c 199 § 710; 1988 c 106 § 1. Prior: 1987 c 405 § 13; 1987 c 109 § 39; 1985 c 372 § 4; 1969 ex.s. c 168 § 34; 1967 c 238 § 46.]

#### **NOTES:**

**Finding—1991 c 199:** See note following RCW **70.94.011**.

**Severability—1987 c 405:** See note following RCW **70.94.450**.

**Purpose—Short title—Construction—Rules—Severability—Captions—1987 c 109:** See notes following RCW **43.21B.001**.

**Severability—1985 c 372:** See note following RCW **70.98.050**.

**RCW 70.235.005****Findings—Intent.**

(1) The legislature finds that Washington has long been a national and international leader on energy conservation and environmental stewardship, including air quality protection, renewable energy development and generation, emission standards for fossil-fuel based energy generation, energy efficiency programs, natural resource conservation, vehicle emission standards, and the use of biofuels. Washington is also unique among most states in that in addition to its commitment to reduce emissions of greenhouse gases, it has established goals to grow the clean energy sector and reduce the state's expenditures on imported fuels.

(2) The legislature further finds that Washington should continue its leadership on climate change policy by creating accountability for achieving the emission reductions established in RCW **70.235.020**, participating in the design of a regional multisector market-based system to help achieve those emission reductions, assessing other market strategies to reduce emissions of greenhouse gases, and ensuring the state has a well trained workforce for our clean energy future.

(3) It is the intent of the legislature that the state will: (a) Limit and reduce emissions of greenhouse gas consistent with the emission reductions established in RCW **70.235.020**; (b) minimize the potential to export pollution, jobs, and economic opportunities; and (c) reduce emissions at the lowest cost to Washington's economy, consumers, and businesses.

(4) In the event the state elects to participate in a regional multisector market-based system, it is the intent of the legislature that the system will become effective by January 1, 2012, after authority is provided to the department for its implementation. By acting now, Washington businesses and citizens will have adequate time and opportunities to be well positioned to take advantage of the low-carbon economy and to make necessary investments in low-carbon technology.

(5) It is also the intent of the legislature that the regional multisector market-based system recognize Washington's unique emissions portfolio, including the state's hydroelectric system, the opportunities presented by Washington's abundant forest resources and agriculture land, and the state's leadership in energy efficiency and the actions it has already taken that have reduced its generation of greenhouse gas emissions and that entities receive appropriate credit for early actions to reduce greenhouse gases.

(6) If any revenues that accrue to the state are created by a market system, they must be used to further the state's efforts to achieve the goals established in RCW **70.235.020**, address the impacts of global warming on affected habitats, species, and communities, and increase investment in the clean energy economy particularly for communities and workers that have suffered from heavy job losses and chronic unemployment and underemployment.

[ 2008 c 14 § 1.]

**RCW 70.235.020****Greenhouse gas emissions reductions—Reporting requirements.**

(1)(a) The state shall limit emissions of greenhouse gases to achieve the following emission reductions for Washington state:

- (i) By 2020, reduce overall emissions of greenhouse gases in the state to 1990 levels;
- (ii) By 2035, reduce overall emissions of greenhouse gases in the state to twenty-five percent below 1990 levels;
- (iii) By 2050, the state will do its part to reach global climate stabilization levels by reducing overall emissions to fifty percent below 1990 levels, or seventy percent below the state's expected emissions that year.

(b) By December 1, 2008, the department shall submit a greenhouse gas reduction plan for review and approval to the legislature, describing those actions necessary to achieve the emission reductions in (a) of this subsection by using existing statutory authority and any additional authority granted by the legislature. Actions taken using existing statutory authority may proceed prior to approval of the greenhouse gas reduction plan.

(c) Except where explicitly stated otherwise, nothing in chapter 14, Laws of 2008 limits any state agency authorities as they existed prior to June 12, 2008.

(d) Consistent with this directive, the department shall take the following actions:

- (i) Develop and implement a system for monitoring and reporting emissions of greenhouse gases as required under RCW **70.94.151**; and
- (ii) Track progress toward meeting the emission reductions established in this subsection, including the results from policies currently in effect that have been previously adopted by the state and policies adopted in the future, and report on that progress.

(2) By December 31st of each even-numbered year beginning in 2010, the department and the \*department of community, trade, and economic development shall report to the governor and the appropriate committees of the senate and house of representatives the total emissions of greenhouse gases for the preceding two years, and totals in each major source sector. The department shall ensure the reporting rules adopted under RCW **70.94.151** allow it to develop a comprehensive inventory of emissions of greenhouse gases from all significant sectors of the Washington economy.

(3) Except for purposes of reporting, emissions of carbon dioxide from industrial combustion of biomass in the form of fuel wood, wood waste, wood by-products, and wood residuals shall not be considered a greenhouse gas as long as the region's silvicultural sequestration capacity is maintained or increased.

[ 2008 c 14 § 3.]

**NOTES:**

\***Reviser's note:** The "department of community, trade, and economic development" was renamed the "department of commerce" by 2009 c 565.

**RCW 70.235.030****Development of a design for a regional multisector market-based system to limit and reduce emissions of greenhouse gas—Information required to be submitted to the legislature.**

(1)(a) The director shall develop, in coordination with the western climate initiative, a design for a regional multisector market-based system to limit and reduce emissions of greenhouse gas consistent with the emission reductions established in RCW **70.235.020**(1).

(b) By December 1, 2008, the director and the director of the \*department of community, trade, and economic development shall deliver to the legislature specific recommendations for approval and request for authority to implement the preferred design of a regional multisector market-based system in (a) of this subsection. These recommendations must include:

(i) Proposed legislation, necessary funding, and the schedule necessary to implement the preferred design by January 1, 2012;

(ii) Any changes determined necessary to the reporting requirements established under RCW **70.94.151**; and

(iii) Actions that the state should take to prevent manipulation of the multisector market-based system designed under this section.

(2) In developing the design for the regional multisector market-based system under subsection (1) of this section, the department shall consult with the affected state agencies, and provide opportunity for public review and comment.

(3) In addition to the information required under subsection (1)(b) of this section, the director and the director of the \*department of community, trade, and economic development shall submit the following to the legislature by December 1, 2008:

(a) Information on progress to date in achieving the requirements of chapter 14, Laws of 2008;

(b) The final recommendations of the climate advisory team, including recommended most promising actions to reduce emissions of greenhouse gases or otherwise respond to climate change. These recommendations must include strategies to reduce the quantity of emissions of greenhouse gases per distance traveled in the transportation sector;

(c) A request for additional resources and statutory authority needed to limit and reduce emissions of greenhouse gas consistent with chapter 14, Laws of 2008 including implementation of the most promising recommendations of the climate advisory team;

(d) Recommendations on how projects funded by the green energy incentive account in \*\*RCW **43.325.040** may be used to expand the electrical transmission infrastructure into urban and rural areas of the state for purposes of allowing the recharging of plug-in hybrid electric vehicles;

(e) Recommendations on how local governments could participate in the multisector market-based system designed under subsection (1) of this section;

(f) Recommendations regarding the circumstances under which generation of electricity or alternative fuel from landfill gas and gas from anaerobic digesters may receive an offset or credit in the regional multisector market-based system or other strategies developed by the department; and

(g) Recommendations developed in consultation with the department of natural resources and the department of agriculture with the climate advisory team, the college of forest resources at the University of Washington, and the Washington State University, and a nonprofit consortium involved in research on renewable industrial materials, regarding how forestry and agricultural lands and practices may participate voluntarily as an offset or other credit program in the regional multisector market-based system. The recommendations must ensure that the baseline for this offset or credit program does not disadvantage this state in relation to another state or states. These recommendations shall address:

(i) Commercial and other working forests, including accounting for site-class specific forest management practices;

- (ii) Agricultural and forest products, including accounting for substitution of wood for fossil intensive substitutes;
- (iii) Agricultural land and practices;
- (iv) Forest and agricultural lands set aside or managed for conservation as of, or after, June 12, 2008; and
- (v) Reforestation and afforestation projects.

[ 2008 c 14 § 4.]

**NOTES:**

**Reviser's note:** \*(1) The "department of community, trade, and economic development" was renamed the "department of commerce" by 2009 c 565.

\*\* (2) RCW **43.325.040** expired June 30, 2016.

## DECLARATION OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I caused to be served a true and correct copy of the foregoing document upon the parties using the Appellate Court Portal filing system, which will send electronic notification of such filing; as well as an email pursuant to the e-service agreement to the following:

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

Executed this 9<sup>th</sup> day of August 2018, at Seattle, Washington.



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Heather Murphy  
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**Appellate Court Case Title:** Association of Washington Business, et al. v. Washington State Department of Ecology, et al.  
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