



FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.

2018 APR 27 AM 11: 22

Linda Myhre Enlow
Thurston County Clerk

1	<input type="checkbox"/>	EXPEDITE
2	<input type="checkbox"/>	No Hearing Set
3	<input checked="" type="checkbox"/>	Hearing Is Set
4	Date:	<u>April 27, 2018</u>
5	Time:	<u>9:00 a.m.</u>
6	Judge/Calendar:	<u>James Dixon</u>
7		

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

ASSOCIATION OF WASHINGTON
BUSINESS, et al.,

Petitioners,

v.

WASHINGTON STATE DEPARTMENT
OF ECOLOGY,

Respondent.

AVISTA CORPORATION, et al.,

Petitioners,

v.

WASHINGTON STATE DEPARTMENT
OF ECOLOGY,

Respondent.

No. 16-2-03923-34
(consolidated with 16-2-03966-34)

~~PROPOSED~~ ORDER GRANTING
PETITION FOR JUDICIAL REVIEW

This matter came before the Court on December 15, 2017 for judicial review of Chapter 173-442 WAC and amendments to Chapter 173-441 WAC, adopted by the Department of Ecology on September 15, 2016 (together "the Clean Air Rule"). Petitioners Association of

1 Washington Business et al. (“AWB”) appeared by and through counsel Jason T. Morgan;
2 Petitioners Avista et al. (the “LDC Petitioners”) appeared by and through counsel Megan H.
3 Berge. AWB and the LDC Petitioners are referred to, collectively, as “Petitioners.” Respondent
4 Washington State Department of Ecology (“Ecology”) appeared by and through counsel Laura J.
5 Watson, Katharine Shirey, and Emily Nelson Assistant Attorneys General. Respondent-
6 Intervenors Washington Environmental Council et al. appeared by and through counsel Marisa
7 Ordonia and Jan Hasselman of Earthjustice. The Court considered each party’s briefing on the
8 merits, authorities, and relevant law. After hearing argument on December 15, 2017, the Court
9 made an oral ruling, supported by the following:
10

11 **BACKGROUND**

12 *Procedure*

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14 1. On September 27, 2016, AWB filed a Petition for Review with this Court and
15 moved to file an amended petition on December 5, 2016. The Court granted the motion on June
16 5, 2017, and AWB filed the Amended Petition on June 15, 2017. In its petition, AWB
17 challenged both the “new regulations promulgated by the Washington Department of Ecology at
18 WAC Ch. 173-442, generally referred to as the ‘Clean Air Rule’- and associated amendments to
19 WAC ch. 173-441.” AWB 1st Amended Pet. at 1-2. On September 30, 2016, LDC Petitioners
20 filed a separate Petition for Review with this Court and moved to file an amended petition on
21 December 5, 2016. The LDC Petitioners challenged the Clean Air Rule, Chapter 173-442 WAC.
22 LDC 1st Amended Pet. at 2, 20. The Court granted the motion to on June 5, 2017, and the LDC
23 Petitioners filed the Amended Petition on June 15, 2017. This Court consolidated the cases of
24 LDCs Petitioners and AWB on October 21, 2016.
25
26

1 5. In RCW 70.94.331(2)(b), Ecology is authorized to “adopt emissions standards
2 which shall constitute minimum emission standards throughout the state.”

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4 6. In RCW 70.94.030(12), the terms “emission standard” and “emission limitation”
5 are defined to mean, in part, “a requirement established under the Federal Clean Air Act or this
6 chapter that limits the quantity, rate, or concentration of emissions of air contaminants on a
7 continuous basis”

8 7. This Court finds that RCW 70.94.331(2) and RCW 70.94.030(12) allow Ecology
9 to regulate emission standards on “direct emitters,” or sources that directly emit air
10 contaminants.

11
12 8. In contrast, some entities regulated by the Clean Air Rule (natural gas distributors
13 and petroleum product producers and importers) do not directly emit air contaminants. Rather,
14 these “indirect emitters,” are entities that do not introduce contaminants into the air.

15
16 9. This Court finds that these “indirect emitters” cannot reduce emissions directly
17 and must buy emission reduction units (“ERUs”) to comply with the Clean Air Rule. AR 5049,
18 5083-84. For example, LDC Petitioners, as natural gas distributors, are legally required to
19 supply service sufficiently and affordably to meet customer demand. RCW 80.28.074. The only
20 way for “indirect emitters” to comply with the regulations at issue is to buy ERUs. The
21 definition of “emission standard” is the key issue with respect to whether Ecology has the
22 authority to implement the Clean Air Rule as it applies to “indirect emitters.”
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1 10. This Court finds that Ecology’s authority under RCW 70.94.331(2) is limited to
2 entities who directly introduce contaminants into air, not entities who sell commodities, the
3 “indirect emitters.”
4

5 11. This Court also finds that the regulation of “indirect emitters,” is fundamental to
6 the entire Clean Air Rule. AR 5083-84 (“[R]oughly 75-80 percent of the emission reductions
7 required in the program need to be acquired by entities that lack ability to reduce emissions
8 directly, instead relying on downstream users of their products to reduce those emissions.”).

9 12. This Court holds that, pursuant to RCW 34.05.570(2)(c), the Clean Air Rule
10 exceeds the statutory authority of the agency conferred by law. The Court therefore finds that
11 the Clean Air Rule is invalid.
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13 13. Because of this Court’s ruling with respect to lack of legislative approval, the
14 Court need not and does not address whether: the rules violate a statutory mandate regarding
15 collection of transportation emissions data; whether the ERU program is an unconstitutional tax;
16 whether Ecology failed to comply with the State Environmental Policy Act by dispensing with
17 an Environmental Impact Statement; or whether Ecology acted arbitrarily and capriciously when
18 it conducted its cost-benefit analysis, determined that the Clean Air Rule was the least-
19 burdensome alternative, or in regulating natural gas emissions.
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1 **ORDER**

2 Based on the foregoing, it is hereby ORDERED that the Clean Air Rule, as enacted at
3 WAC Chapter 173-442 and 2016 amendments to made to WAC chapter 173-441, published at
4 Washington State Register 16-19-047 (Sept. 15, 2016), is invalid.
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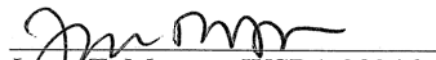
6 DATED this 27 day of April 2018.

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9
10 Judge James Dixon

11 Thurston County Superior Court

12
13 Presented by:

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15 
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