NO. 95885-8

**SUPREME COURT OF THE STATE OF WASHINGTON**

ASSOCIATION OF WASHINGTON BUSINESS, et al.,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Appellant,

and

WASHINGTON ENVIRONMENTAL COUNCIL, et al.,

Intervenor-Appellants.

# REPLY BRIEF OF INTERVENOR-APPELLANTS WASHINGTON ENVIRONMENTAL COUNCIL, ET AL

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## INTRODUCTION

Climate change and the harms it will cause are precisely the types of threats the Legislature directed Ecology to address through a broad delegation of authority in the Clean Air Act. The Association of Washington Business, *et al*., ("AWB") and Avista Corporation, *et al*. ("Gas Companies") (collectively, "Industry Petitioners") seek to avoid effective greenhouse gas regulation and urge this Court to narrowly interpret Ecology's authority to set emission standards. But courts must avoid narrow interpretations of broad language, especially when doing so will prevent an agency from tackling threats that are so squarely within its purview. The Clean Air Rule is a valid exercise of Ecology's authority to set emission standards, and this Court should reverse the superior court's decision and reinstate the Rule.

## BACKGROUND

Climate change is a significant threat to the lives and wellbeing of all Washingtonians. Without immediate and substantial reductions in greenhouse gas emissions, this threat will only grow worse. The urgent need to reduce greenhouse gas emissions was recently highlighted in an Intergovernmental Panel on Climate Change ("IPCC") report[1] that details

[1] Intergovernmental Panel on Climate Change, *Global Warming of 1.5ºC: an IPCC special report on the impacts of global warming of 1.5º C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the*

how anthropogenic carbon emissions must decline by greater amounts and more quickly than previously assumed to avoid warming beyond 1.5°C — a target lower than the 2°C target that countries were already failing to meet. *See* IPCC Report at 20.

The IPCC report highlights that if we fail to drastically reduce greenhouse gas emissions, the consequences will likely be much worse than initially anticipated. *Id.* at 11 ("Climate-related risks to health, livelihoods, food security, water supply, human security, and economic growth are projected to increase with global warming of 1.5°C and increase further with 2°C"). Consequences of only 1.5°C of warming would include negative impacts to human health and greater poverty in already disadvantaged areas. *Id*. at 11; *see also* AR 3799. Water and food shortages will increase with warming above 1.5°C, IPCC Report at 11, as

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*global response to the threat of climate change, sustainable development, and efforts to eradicate poverty, Summary for Policymakers*, October 2018, *available at* http://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf ("IPCC Report"). Pursuant to Rule ER 201, WEC requests judicial notice of the IPCC Report. ER 201(d) requires a court to take judicial note of adjudicative facts when requested by a party and supplied with the necessary information. Adjudicative facts are defined as those not subject to reasonable dispute because they are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ER 201(b). The IPCC is an intergovernmental body established by the United Nations Environment Programme and the World Meteorological Organization to assess climate change, and IPCC reports are readily available at its website (http://www.ipcc.ch/index.htm). This court should take judicial notice of the IPCC Report findings as adjudicative facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *See* ER 201(b); *see also State ex rel. Humiston v. Meyers*, 61 Wn.2d 772, 779, 380 P.2d 735 (1963).

will the extent of species loss and extinction, sea level rise, ocean acidification, and forest fires, *id*. at 9-10. Many of these consequences are already harming Washingtonians and these harms will only worsen if temperatures continue to rise. *See* WEC Opening Br. at 3-6. Action to reduce emissions as much as possible in the next decade are our best chance to avoid the worst of these consequences. IPCC Report at 20 (the "lower the emissions in 2030, the lower the challenge in limiting global warming to 1.5°C after 2030"); *id.* at 11 (limiting warming to 1.5°C could reduce the number of people both exposed to climate-related risks and susceptible to poverty by up to several hundred million by 2050).

Industry Petitioners acknowledge the seriousness of climate change while at the same time arguing against effective regulation of greenhouse gases in Washington. For example, the Gas Companies acknowledge that climate change is a "serious challenge to our global society" (at 1), but complain that there is no cost effective path for compliance with the Rule. These fears are based on their own inflated cost estimates, which are contradicted by Ecology's thorough calculations showing that the cost of compliance will be modest. *See, e.g.*, AR 5000, AR 461-92. Moreover, Gas Petitioners ignore the financial impact of uncontrolled climate change. The projected monetary cost of climate change impacts in Washington will be nearly $10 billion per year by 2020.

AR 20901. There certainly is no cost effective path for Washington to absorb $10 billion per year in climate change costs, and that number will only grow as warming continues and increases. The record demonstrates that the true cost of inaction is far higher than the modest cost of complying with the Rule.

The Gas Companies also try to "greenwash" the fossil fuels they sell by suggesting that gas is somehow good for the climate. *See* Avista Br. at 28 n.12. But Washington must reduce its reliance on all fossil fuels—including fracked gas—to achieve the deep emission reductions necessary to avoid the worst impacts of climate change. The Gas Companies' self-serving attempt to paint themselves as environmentally-friendly cannot be squared with the major emissions that result from the fracking, transport, and combustion of the fossil fuels they profit from. AR 29582 (in 2014, natural gas systems were the largest anthropogenic source category of methane emissions in the United States—methane is a greenhouse gas 25 times more potent than carbon dioxide); *see also* AR 29597.

Gas Petitioners next insist (at 34-36) that the Rule will actually increase greenhouse gas emissions because regulated industries will simply shift their pollution to other states where emissions are not regulated, a problem referred to as "leakage." But again, Gas Petitioners'

fears are belied by Ecology's analysis finding that leakage would be minimal. *See* AR 4985-86, AR 5012. More importantly, the fact that other states have not yet regulated greenhouse gas emissions is no excuse for Washington to fail to do so. Climate change is a global problem, but each jurisdiction must do its part to prevent it. *See* AR 3253; *see also* RCW 70.235.030(1)(a)(iii) (setting emission reduction targets for Washington to "do its part to reach global climate stabilization levels"). If each state or country waits until all the others have acted, no one will take the first step and we will all pay the price in increased wildfires, flooding, sea level rise, extinctions, and human death and suffering. *See, e.g.,* AR 3235, AR 3513, AR 3799.

AWB takes this argument even further, suggesting (at 3-5) that since climate change is a global issue, then its members—who are responsible for millions of tons of greenhouse gas emissions in Washington State each year, *see* CP 603-04—should not be held to account for their substantial contributions to this problem. If each state and country adopts the approach AWB advocates, then we stand no chance of averting the worst consequences of climate change. Because of the human, environmental, and financial costs that climate change poses to Washington, Ecology wisely followed the Legislature's directive to regulate to help prevent these major threats.

AWB also suggests (at 4-5) that Washington is already doing plenty to lower statewide emissions and that additional greenhouse gas reductions are not necessary. This is plainly absurd. The record shows that we are on a path that will radically reshape our planet and state at tremendous human and environmental cost, and that Washington is not doing its fair share to avoid these catastrophic consequences. AR 3235-36 (climate change impacts are worse than previously predicted and Washington's statutory limits for greenhouse gases should be more aggressive to reflect current science). *See also* AR 2828, 2857 (Washington is not on track to meet greenhouse gas emission limits set out in RCW 70.235.020(1)(a)). AWB advocates for a race to the bottom, suggesting Washington should do no more since there are others who have done even less. This suggestion runs counter to the Legislature's intent to "secure and maintain levels of air quality that protect human health and safety." RCW 70.94.011.

The Clean Air Rule is an important first step in reducing Washington's greenhouse gas emissions. Industry Petitioners offer faint assurances that they recognize the threat posed by climate change but in the same breath assert that regulation is too expensive, ineffective, and unnecessary. The record demonstrates, however, that the Rule will significantly reduce Washington's greenhouse gas emissions at a modest

cost. The record also plainly shows that these greenhouse gas emission reductions are sorely needed, and soon, to help prevent the worst consequences of climate change in Washington.

## ARGUMENT

### I. THE CLEAN AIR RULE IS AN EMISSION STANDARD AUTHORIZED BY THE CLEAN AIR ACT.

The Clean Air Act authorizes Ecology to establish emission standards to control air pollution, RCW 70.94.331, and the Clean Air Rule is a valid exercise of that authority. This Court looks to the plain language of the statute, as well as the Legislature's purpose and closely related statutes, in interpreting the plain meaning of the Clean Air Act. *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 645, 62 P.3d 462 (2003). All support a reading of the statute finding that Ecology acted within its statutory authority by regulating to address the most significant air pollution problem of our time.[2]

[2] It is well-settled that courts grant great weight to an agency's interpretation of a statute within the agency's expertise. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004). The Gas Companies attempt to escape this established standard by insisting (at 10) that agencies do not receive deference in determining the scope of their own authority. But this case is nothing like *Lenander v. Department of Retirement Services*, 186 Wn.2d 393, 409, 377 P.3d 199 (2016) ("An agency's rules or regulations cannot amend or alter legislative enactments."). Here, it is clear that Ecology has statutory authority to promulgate emission standards. RCW 70.94.331. The question for this Court is whether the Clean Air Rule is an emission standard, and on this question, Ecology's interpretation is due deference. *Port of Seattle*, 151 Wn.2d at 593.

### A. The Plain Language of the Clean Air Act Authorizes the Clean Air Rule.

The Clean Air Rule is an "emission standard" under the plain language of the Clean Air Act. *See* RCW 70.94.331; RCW 70.94.030. The Act includes a delegation of authority to Ecology to establish "emission standards," RCW 70.94.331, as well as definitions of "emission standard," "emission," and "air contaminant," RCW 70.94.030. A plain reading of each of these provisions makes clear that the Clean Air Rule is a valid exercise of Ecology's authority.

Starting with the relevant defined terms, the Act directs Ecology to regulate "air contaminants," which are defined as "dust, fumes, mist, smoke, other particulate matter, vapor, gas, odorous substance, or any combination thereof." RCW 70.94.030(1). No party disputes that greenhouse gases are air contaminants within the meaning of the Act, nor could they.

"Emission," also a defined term, "means a release of air contaminants into the ambient air." RCW 70.94.030(11). Under the Clean Air Rule, Ecology regulated emissions of greenhouse gases from stationary sources and emissions from the combustion of fossil fuels sold by petroleum and gas companies. WAC 173-442-020(k). There is no dispute that the stationary sources regulated under the Rule release

greenhouse gases. There is also no dispute that the fossil fuels sold by the petroleum and gas companies are sold for combustion only (other uses are explicitly exempt under the Rule, *see* WAC 173-442-020(j)(ii)-(iii)) and that the combustion of these fossil fuels releases substantial quantities of greenhouse gases into the ambient air.

An emission standard, in turn, is a requirement that "limits the quantity, rate, or concentration of emissions of air contaminants on a continuous basis…" RCW 70.94.030(12). The Clean Air Rule limits the "quantity" of greenhouse gas emissions by requiring regulated entities to achieve a 1.7% annual average reduction in emissions. WAC 173-442-060. Regulated entities may choose to meet this requirement through onsite or offsite reductions. WAC 173-442-200(4). Allowing entities to meet their emission limits with offsite reductions changes *where* the reductions occur, but nonetheless limits the "quantity" of emissions. RCW 70.94.030(12).

Finally, the Act delegates authority to Ecology to adopt "emission standards" and specifies that "[s]uch requirements 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). The Clean Air Rule limits the quantity of greenhouse gas emissions based on

types of sources of emissions (stationary sources) and types of emissions (greenhouse gases from combustion of fossil fuels). WAC 173-442-010. Ecology reasonably determined that for transportation fuels and gas, it was "most feasible" to regulate types of emissions (emissions from combustion of fossil fuels) because regulating every single trip to the pump would be impracticable. RCW 70.94.331(2)(c). *See also* AR 4977, AR 5027. Under a plain and straightforward reading of the Clean Air Act, the Clean Air Rule is a valid exercise of Ecology's authority.

*1. Ecology's Authority is Not Limited to Sources.*

The Gas Companies principally argue that emission standards apply only to "sources," Avista Br. at 12-20, but the statute itself contains no such limitation. *See* RCW 70.94.030(12). The Gas Companies delve into a lengthy explanation of the statute's grammar and syntax, but a simple, uninterrupted reading of the text reveals the contrary:

> Emission standard . . . mean[s] 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) (emphasis added). While this definition *includes* two types of emission standards that may only apply to sources, "including" cannot be read as "limited to," no matter how closely you scrutinize the

structure of this straightforward sentence. *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) (the term "including" indicates the Legislature's intent that the subsequent examples are expansive, not exclusive).[3]

The Gas Companies nonetheless insist (at 14-15) that because the two types of emission standards that follow the word "including" apply to sources, the first clause must be limited to sources as well. The Gas Companies would have the statute read that an emission standard is "a requirement . . . that limits the quantity, rate, or concentration of emissions of air contaminants **from a source** on a continuous basis." The problem for the Gas Companies is that the emphasized language is their own addition, not the Legislature's. Absent the clause they seek to add, nothing in the plain language limits emission standards to sources. RCW 70.94.030(12).

For similar reasons, the Gas Companies' reliance (at 18) on *Washington Natural Gas Co. v. Public Utility District No. 1 of Snohomish County* is misplaced. 77 Wn.2d 94, 98, 459 P.2d 633 (1969). In the

[3] The Gas Companies charge WEC with "insinuati[ng] that an agency may expand a statutory framework unless the Legislature specifically prohibits that expansion." Avista Br. at 19 n.9. This mischaracterizes WEC's simple assertion that the Clean Air Act specifically delegates authority to Ecology to promulgate emission standards with few limits on how Ecology may exercise that authority, RCW 70.94.331, and that no other authority prohibits the approach Ecology took with the Clean Air Rule.

statutory definition of "person" at issue in that case, the Legislature did not offer a general definition and instead defined the term only with a specific list of entities it includes. Because the list did not include municipal corporations, the Court held that "the legislature did not employ language designed to bring public utility districts within the operation of the statute nor leave room to include them within it by construction." *Id.* (discussing RCW 19.86.010). In contrast, in the statutory definition of emission standard at issue here, the Legislature offered a general definition of emission standard first, followed by two examples. The general definition easily encompasses Ecology's Rule.

The Gas Companies also ask this Court to rewrite RCW 70.94.331, which allows Ecology to regulate either "types of emissions or types of sources of emissions," depending on which approach Ecology finds most feasible. The Gas Companies explain that what the Legislature actually meant to say was that Ecology can regulate only "categories of sources, or [] categories of emissions from sources." Avista Br. at 19. If that was what the Legislature meant to say, it would have used those words—it did not. *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005) (courts must "assume the legislature meant exactly what it said and apply the statute as written") (internal citations and quotations omitted).

Lacking a textual hook for the limits they seek to add, the Gas Companies next turn to dicta to claim this Court has already ruled on an issue that was never even before it. Avista Br. at 15-16. In *Asarco, Inc. v. Puget Sound Air Pollution Control Agency*, 112 Wn.2d 314, 771 P.2d 335 (1989), the Court described the differences between air quality standards and emission standards as background, but the scope of Ecology's authority to set emission standards was not before the Court. It is well-established that dicta is not controlling in a future case where the issue is squarely presented. *Kovacs v. Dep't of Labor & Indus.*, 186 Wn.2d 95, 100, 375 P.3d 669 (2016) ("Dictum is not a holding of this court.").

The Gas Companies complain that Ecology may not consider practicalities in picking a regulatory approach. Avista Br. at 26-27. But the Clean Air Act explicitly grants Ecology the authority to regulate types of emissions instead of types of sources where that approach is "most feasible." RCW 70.94.331(2)(c). Ecology reasonably determined that regulating emissions from fossil fuels via distributors and producers is the most feasible way to regulate some of the largest polluters in the state. AR 5027.

The Gas Companies go so far as to claim (at 31-32) that this approach is an "absurd result" that this Court must avoid. But as this Court has held, the canon of interpretation of avoiding absurd results

should be applied sparingly, and any interpretation that is "conceivable" is not absurd. *State v. Ervin*, 169 Wn.2d 815, 824, 239 P.3d 354 (2010) ("Because it is conceivable, the result is not absurd."); *see also In Matter of Dependency of D.L.B.*, 186 Wn.2d 103, 119, 376 P.3d 1099 (2016) (courts apply the canon of avoiding absurd results "sparingly," and only to "prevent obviously inept wording from thwarting clear legislative intent"). It is certainly conceivable, and so not absurd, that the Legislature intended to allow Ecology to regulate the entities that are responsible for and profit from a major portion of the state's greenhouse gas pollution.

*2. The Broad Language of the Act Allows Regulatory Approaches to Evolve With Time.*

The Gas Companies contend (at 16-17) that Ecology's authority to enact emission standards must be limited to sources because Ecology's other emission standards have regulated only sources. It is undisputed that the regulatory approach Ecology took in the Clean Air Rule is different than the approach Ecology has used in the past to regulate other air pollutants. But that does not make it unlawful—greenhouse gas regulation presents unique challenges that require unique solutions. The Legislature's use of broad language in the Clean Air Act should be read as an intentional choice to allow regulatory flexibility over time.

It is well-established that the Legislature's choice of broad language confers the flexibility to adopt new regulatory approaches. In *Massachusetts v. EPA,* the U.S. Supreme Court addressed a similar dispute in the context of federal law and found that the federal Clean Air Act encompasses regulation of greenhouse gases. 549 U.S. 497, 528-29, 532, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007). The Court noted that the Congress that enacted the federal Clean Air Act might not have appreciated the threat posed by climate change, but held that Congress' choice of broad language "reflects an intentional effort to confer the flexibility necessary to forestall [] obsolescence." *Id.* at 532. Nor was this a new rule announced by the Court in that decision—cases dating back many decades stand for the same proposition. *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 the act is not sustained or opposed by the fact that it is sought to bring new situations under its terms."). Likewise, this Court has consistently held that "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 v. Imperium Terminal Servs., LLC*, 187 Wn.2d 460, 470, 387 P.3d 670 (2017).

Reading the Clean Air Act to encompass Ecology's regulatory approach in the Clean Air Rule does not require any change to the language the Legislature did enact. It only requires an understanding that this broad language confers broad discretion to adopt new regulatory approaches as the threats the agency must address evolve over time. *Massachusetts v. EPA*, 549 U.S. at 532.

*3. AWB's Arguments Do Not Justify Ignoring the Plain Language of the Clean Air Act.*

For its part, AWB does not bother to address the plain language of the Clean Air Act. Instead AWB advances a "slippery slope" policy argument that the Gas Companies relegate to a footnote (at 30 n.13)—that since nearly everything has "indirect" emissions, a plain reading of the Clean Air Act would mean that *everything* and *everyone* with even the smallest amount of emissions could be regulated. AWB Br. at 18. Of course, not everything and everyone is regulated by the Clean Air Rule, just the entities that are responsible for the largest shares of greenhouse gas emissions in the state. AR 4980, AR 5049 (Rule regulates the largest contributors to Washington's greenhouse gas emissions, which account for two-thirds of Washington's in-state emissions). Moreover, Ecology remains obligated to adopt regulations that are reasonable. *See* RCW

34.05.570(2)(c). An emission standard that regulates Washington's largest polluters is reasonable.

AWB also argues (at 13-14) that the Rule is invalid because Ecology lacks an "express grant of authority" to adopt the Clean Air Rule. This is plainly wrong—Washington law does not require an express grant of authority for agencies to carry out lawful rulemaking. *See Lenander v. Dep't of Ret. Sys.*, 186 Wn.2d 393, 404, 377 P.3d 199 (2016) ("Agencies have implied authority to carry out their legislatively mandated purposes.") (internal citations and quotations omitted). The Legislature granted broad authority to Ecology to set emission standards, and "[w]hen the legislature grants power to an agency, it also grants by implication everything lawful and necessary to the effectual execution of the power." *Id.* (internal citations and quotations omitted).

In short, neither the Gas Companies nor AWB offer any good reason for this Court to disregard the plain language of the Clean Air Act. The limits that Industry Petitioners seek to impose are nowhere to be found in the statutory text and instead are driven by their own preference to avoid regulation.

B. The Purpose of the Clean Air Act Supports the Rule.

Through the Clean Air Act, the Legislature sought to "preserve, protect, and enhance the air quality for current and future generations."

RCW 70.94.011. The Legislature's explicit intent was "to secure and maintain levels of air quality that protect human health and safety, including the most sensitive members of the population." *Id*. This legislative statement of purpose and intent guide this Court's interpretation of the Clean Air Act. *Ellensburg Cement Prod., Inc. v. Kittitas Cty*., 179 Wn.2d 737, 743, 317 P.3d 1037 (2014) (when engaging in statutory interpretation, courts' fundamental duty is to ascertain and implement the Legislature's intent).

The Legislature's stated purpose strongly supports finding the Clean Air Rule to be a valid exercise of Ecology's Clean Air Act authority. Washington must reduce its greenhouse gas emissions dramatically to have any chance of protecting our air quality for "current and future generations," and unchecked greenhouse gas emissions certainly will not "protect human health and safety." RCW 70.94.011. *See also* AR 3248-50, AR 3799 (describing current and projected climate change impacts in Washington, including increased occurrences of wildfires, droughts, and flooding; sea level rise and ocean acidification; threats to the agricultural food supply; increased instances of respiratory disease, heart attacks, and cancer).

The fact that the Rule furthers the Legislature's stated intent supports reading the plain language of the Act as it is written, without the

limitations the Gas Companies would add. In contrast, finding that Ecology may only regulate sources runs directly counter to the statute's purpose. While the emission reductions the Rule requires from stationary sources are an important step, omitting petroleum and gas companies would leave the companies responsible for nearly 75 percent of Washington's greenhouse gas pollution without any obligation to reduce emissions. AR 5027, AR 5233. It would be extremely difficult for Washington to achieve the deep emission reductions necessary to protect the health and safety of current and future generations while ignoring three-quarters of the problem.

The Gas Companies spend little time trying to reconcile the restrictions they seek to add to the Act with the Legislature's explicit statement of intent. Instead they insist that the statement of purpose does not allow Ecology to rewrite the rest of statutory text. Avista Br. at 22-23. But it is the Gas Companies who seek to add clauses limiting emission standards to sources, an interpretation that both rewrites the text and thwarts the Legislature's stated purpose.

For its part, AWB asks this Court to ignore the Legislature's statement of purpose and intent on the grounds that the 1995 Regulatory Reform Act barred Ecology from considering it. AWB Br. at 13-14, 23-24. This argument is easily dismissed. The Regulatory Reform Act

prohibits state agencies from relying solely on a statute's intent or purpose section as authority to adopt a rule. Laws of 1995, ch. 403, §§ 110-118. Here, Ecology expressly adopted the Clean Air Rule under its substantive authority to adopt emission standards in RCW 70.94.331.

It is indisputable that the purpose and intent section of the Clean Air Act supports the action that Ecology took here. *See* RCW 70.94.011. And it is well-established under Washington law that the purpose and intent section of a statute informs the interpretation of the text. *See, e.g., 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). The Regulatory Reform Act did not abrogate this longstanding and recently affirmed line of Washington cases.

### C. The Limiting Greenhouse Gas Emissions Statute Demonstrates the Legislature's Intent that Ecology Regulate Greenhouse Gases.

The Limiting Greenhouse Gas Emissions statute, RCW Chapter 70.235, demonstrates the Legislature's intent that Ecology regulate greenhouse gas emissions. 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"); RCW 70.235.020(1)(b) (authorizing Ecology to use its "existing statutory authority" to reduce greenhouse gas emissions).

The Legislature's stated intent in this closely related statute informs the Court's interpretation of the Clean Air Act. *Wash. Pub. Ports Ass'n*, 148 Wn.2d at 645 (court considers "not only the ordinary meaning of the words, but the underlying legislative purposes and closely related statutes to determine the proper meaning of the statute").

The Gas Companies note (at 21) that the Limiting Greenhouse Gas Emissions statute does not give Ecology new rulemaking authority. While true, that is beside the point. The Legislature's stated intent that Ecology regulate greenhouse gas emissions provides additional support for an interpretation of the Clean Air Act that allows Ecology to regulate greenhouse gas emissions effectively. *See Wash. Pub. Ports Ass'n*, 148 Wn.2d at 645 (court looks to closely related statutes in interpreting statutory text).

AWB, in contrast, argues that RCW Chapter 70.235 prohibits Ecology from enacting any kind of greenhouse gas regulation until a comprehensive greenhouse gas reduction plan has been approved by the Legislature. AWB Br. at 19-21. While the statute does require Ecology to submit such a plan for legislative approval, it also authorizes Ecology to regulate greenhouse gases under its existing statutory authority before that plan is approved. RCW 70.235.020(1)(b) ("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."). There is simply no way to read this explicit legislative authorization as a restriction on Ecology's authority.

Throughout its brief, AWB makes much of the Rule being "comprehensive," and argues that the Rule must be construed as the "plan" envisioned by the Legislature in RCW 70.235.020 because the Rule covers many different industries across the economy. The Rule is broad in scope because it addresses a wide-ranging threat to maintaining air quality in Washington. The Legislature authorized Ecology to regulate greenhouse gas emissions under its existing authority, without the caveat that Ecology could only take small or partial steps. RCW 70.235.020(1)(b). Additionally, while the Rule is a significant step, it cannot be the plan envisioned by the Legislature because it will not reduce Washington's emissions to the targets set out in RCW 70.235.020, as the plan must.

Finally, AWB's efforts (at 25-26) to infer limits on Ecology's authority from legislative proposals that were never enacted and a failed ballot initiative are at odds with governing law. *See, e.g., 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 Cty. 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). The plain language of RCW Chapter 70.235 authorizes Ecology to regulate greenhouse gases using existing authority, and that is what Ecology did in the Clean Air Rule.

### D. The Gas Companies Can Comply With the Clean Air Rule and Their Other Statutory Obligations.

The Gas Companies claim (at 28) that the Clean Air Rule "conflicts" with their obligation to supply gas service in a "safe, adequate, efficient, just, and reasonable manner" without explaining why this might possibly be the case. It is hard to imagine how requiring the Gas Companies to reduce or offset their emissions could make the gas they provide unsafe. Nor does the Rule require them to curtail customers' use or provide inadequate or inefficient service; like other regulated entities, the Gas Companies have many options to comply, including by purchasing emission reduction units that represent offsite emission reductions. *See* AR 5006. Moreover, Washington law explicitly encourages and requires the Gas Companies to implement efficiency and

conservation measures that help their customers use gas more efficiently, thereby reducing both the amount of gas their customers use and the Gas Companies' compliance obligation that is based on that use. *See* RCW 80.28.025; RCW 80.28.024; WAC 480-90-238; *see also* Avista Br. at 5 n.2 (acknowledging that Gas Companies can implement energy efficiency programs).

Finally, it is hard to see how reducing the environmental impact of the fossil fuels the Gas Companies sell would be unjust or unreasonable, and the Gas Companies cite nothing indicating that it would be. Complying with the Clean Air Rule is entirely consistent with the Gas Companies' other obligations under Washington law.

## II. THE CLEAN AIR ACT ALLOWS THE USE OF EMISSION REDUCTION UNITS.

Ecology's decision to allow regulated entities to comply with the Clean Air Rule by securing offsite emission reductions – termed "Emission Reduction Units" – is also within Ecology's authority under the Clean Air Act. The Act specifies that Ecology may set emission standards that limit the quantity of air pollutants without specifying where those reductions must occur. RCW 70.94.331; RCW 70.94.030. Accordingly, an emission standard that limits the quantity of emissions and allows

geographic flexibility as to where they occur falls squarely within the plain language of the Act.

AWB argues (at 27) that a rule allowing offsite emission reductions could not be within Ecology's authority to establish emission standards because other sections of the Act explicitly authorize very different trading programs. But the Legislature's express authorization of emission banking and carbon "credits" in RCW 70.94.850 and RCW 80.70.020, respectively, does not repeal by implication Ecology's authority to use different tradable units in other programs. *See U.S. Oil & Ref. Co. v. Dep't of Ecology*, 96 Wn.2d 85, 88, 633 P.2d 1329 (1981) ("Implied repeals are disfavored."). These limited programs neither duplicate nor render unnecessary Ecology's regulation of greenhouse gases in the Clean Air Rule.

## CONCLUSION

For the foregoing reasons, this Court should hold that the Clean Air Rule is a valid exercise of Ecology's authority under the Clean Air Act and reinstate the Rule.

Respectfully submitted this 20th day of November, 2018.

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**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 to the following:

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Executed this 20th day of November, 2018, at Seattle, Washington.

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**Comments:**

Reply Brief of Intervenor-Appellants Washington Environmental Council, et al.

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