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 APPELLANT WASHINGTON STATE DEPARMENT OF ECOLOGY

ROBERT W. FERGUSON
Attorney General

LAURA J. WATSON, WSBA 28452
Senior Assistant Attorney General
EMILY C. NELSON, WSBA 48440
Assistant Attorney General
P.O. Box 40117
Olympia, WA 98504-0117
360-586-6770
Office ID No. 91024

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I. INTRODUCTION

The Legislature directed the Department of Ecology to adopt 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." RCW 70.94.331(2)(c). Ecology did so by adopting the Clean Air Rule which sets greenhouse gas emission standards for fossil fuels and polluting facilities. The Clean Air Rule falls within the statutory definition of an "emission standard" and advances the Legislature's goal of using all known and reasonable methods to prevent and reduce air pollution.

The Industry Petitioners argue that Ecology lacks authority for the Clean Air Rule despite the plain and broad language of RCW 70.94.331(2)(c). The Natural Gas Local Distribution Companies (Gas Companies) acknowledge that Ecology has authority to set standards for greenhouse gases but they do not believe this authority extends to fossil fuels. Other Industry Petitioners, led by the Association of Washington Business (AWB), argue that Ecology lacks authority to regulate greenhouse gases because the Legislature previously failed to pass a cap-and-trade greenhouse gas reduction program. Both arguments fail. Ecology possesses authority to regulate greenhouse gases and did so

responsibly by setting standards for the entities that produce the most emissions in our state.

The Petitioners' other arguments also fail. The rule is capable of being severed and the superior court erred by failing to even conduct a severability analysis. The superior court further erred when it invalidated all of Ecology's amendments to its greenhouse gas reporting rules even though the AWB challenged only one of those amendments. As for the arguments that the superior court never reached: (1) the Clean Air Rule does not impose a tax and is not subject to article VII, section 5 of the Washington Constitution; (2) Ecology's SEPA determination for the rule is not clearly erroneous (assuming Petitioners even have standing to challenge that determination); and (3) Ecology's cost-benefit analysis and least-burdensome alternatives analysis are not arbitrary and capricious.

In sum, the Clean Air Rule is within Ecology's statutory authority, and the Petitioners fail to meet their burden of demonstrating the invalidity of the rule under any ground. If the Court disagrees and concludes that portions of the rule are invalid, the Court should consider whether invalid portions of the rule are severable from valid portions rather than invalidate the entire rule as the superior court did.

II. ARGUMENT

A. The Clean Air Act Authorizes Ecology to Adopt Greenhouse Gas Emission Standards for Fossil Fuels

In its opening brief, Ecology described how the Clean Air Rule falls within the statutory definition of "emission standard." Ecology Opening Br. (Opening Br.) 15 (citing RCW 70.94.030(12)). Specifically, Ecology noted that the rule "limits the quantity, rate, or concentration of emissions of air contaminants on a continuous basis" based on the "types of emissions" (i.e., greenhouse gases). *Id.* at 16. The alternative interpretation of "emission standard" urged by the Industry Petitioners reads language out of the definition and undermines the Clean Air Act's policy of providing "for the use of all known, available, and reasonable methods to reduce, prevent, and control air pollution." *Id.* at 14–17; RCW 70.94.011.

The Gas Companies argue that emission standards cannot apply to fossil fuels because "emission standard" is limited to the two examples contained within the definition. Avista Resp. Br. (Avista Br.) 14–15. To accept this, the Court would need to delete the first part of the definition in RCW 70.94.030(12), leaving only the clauses that provide examples of an emission standard:

> ~~[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.

(Strikethrough and emphasis added.) This cannot be the correct interpretation because it would render nearly half of the definition superfluous. *See Ralph v. Dep't of Nat. Res.*, 182 Wn.2d 242, 248, 343 P.3d 342 (2014); Opening Br. 16–17.

The Gas Companies then cite a stray statement in this Court's *ASARCO* decision to argue that emission standards apply only to "sources" of emissions as that term is statutorily defined. Avista Br. 15–16 (citing *ASARCO, Inc. v. Puget Sound Air Pollution Control Agency*, 112 Wn.2d 314, 320, 771 P.2d 335 (1989)). But the statement they cite is irrelevant because *ASARCO* did not address whether "emission standard" applies only to sources. Decisions that don't address a particular legal issue are not controlling on future cases where the issue is squarely raised. *See, e.g.*, *State ex rel. Gallwey v. Grimm*, 146 Wn.2d 445, 459, 48 P.3d 274 (2002).

The Gas Companies cite regulations that Ecology adopted specifically for "sources" as proof that emission standards apply only to sources. Avista Br. 16–17 (citing WAC 173-400). However, the cited

regulations do not set greenhouse gas emission standards and are not part of the Clean Air Rule. The fact that Ecology adopted separate regulations to deal with different air pollution problems does not affect whether Ecology has authority to adopt emission standards for fossil fuels.

The Gas Companies also argue that Ecology has never adopted emission standards for non-sources. Avista Br. 20; *see also* AWB Resp. Br. (AWB Br.) 21. This is true, but irrelevant. Most air pollutants can be effectively regulated at the smokestack. In contrast, greenhouse gases are unique due to their ubiquity, the threats they pose, and the range of solutions available to reduce them. The United States Supreme Court recognized as much when it rejected a similar argument under the federal Clean Air Act. *Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007). There, the Court noted that although Congress "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." *Id.* at 532. The federal Clean Air Act, like the Washington Act, was drafted broadly "to confer the flexibility necessary to forestall such obsolescence." *Id.*

The Gas Companies complain that it is not fair to apply emission standards to the fuels they sell because they have no control over what

consumers do with those fuels. Avista Br. 29–30; *see also* AWB Br. 24–25. Put another way, although Petitioners sell fossil fuels for the sole purpose of combustion, Petitioners believe they should not be accountable for the emissions that inevitably arise from the fuels' combustion. The notion is that Ecology cannot regulate the purveyors of fossil fuels and must instead regulate each individual who visits the gas pump or owns a natural gas furnace. This is both unworkable and contrary to the legislative directive to "safeguard the public interest through an intensive, progressive, and coordinated statewide program of air pollution prevention and control . . . as well as to provide for the use of all known, available, and *reasonable* methods to reduce, prevent, and control air pollution." RCW 70.94.011 (emphasis added).

The Gas Companies allege that the Clean Air Rule conflicts with their responsibility, under utility laws, to deliver affordable natural gas to state residents. Avista Br. 28. The Companies do not explain why they cannot comply with both utility laws and the Clean Air Rule. The rule merely imposes an operating expense that, like other prudently incurred costs (e.g., labor, insurance, taxes, and maintenance), will be absorbed by the Companies and passed through to customers in rates approved by the Washington Utilities and Transportation Commission. *See* RCW 80.28.020; *Willman v. Utils. & Transp. Comm'n*, 154 Wn.2d 801,

806, 117 P.3d 343 (2005); *People's Org. for Wash. Energy Res. v. Utils. & Transp. Comm'n*, 104 Wn.2d 798, 808–11, 711 P.2d 319 (1985). Further, utility regulations expressly direct the Companies to consider "the cost of risks associated with environmental effects including emissions of carbon dioxide" when planning to meet future demand. WAC 480-90-238(2)(b). Thus, the Companies must anticipate environmental compliance costs when evaluating future investments.

Finally, the Gas Companies argue that Ecology deserves no deference in its interpretation of the Clean Air Act. Avista Br. 25. To the contrary, 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).

Unlike the Gas Companies, the AWB does not attempt to grapple with the plain statutory language of "emission standard." Instead, the AWB argues that Ecology cannot set emission standards for greenhouse gases because the Legislature declined to pass a multisector market-based reduction program that Ecology proposed under RCW 70.235.020. AWB Br. 14–15, 20–22. The AWB is wrong.

RCW 70.235.020 directed Ecology to submit a plan to the Legislature to achieve statutory greenhouse gas reduction requirements. RCW 70.235.020(1)(b). The cornerstone of the plan was supposed to be a

regional multisector market-based system for which additional legislative authority was needed. RCW 70.235.030. However, the plan was not limited to this component. Rather, Ecology was directed to develop reduction measures using existing statutory authority plus any additional authority granted by the Legislature. RCW 70.235.020(1)(b). The Legislature specified that "[a]ctions taken using existing statutory authority may proceed prior to approval of the greenhouse gas reduction plan." *Id.* To make its point crystal clear, the Legislature specified that nothing in the statute was intended to limit "any state agency authorities as they existed prior to [the effective date of this statute]." RCW 70.235.020(1)(c). Since the Clean Air Rule derives from Ecology's existing authority to adopt emission standards, it is immaterial that the Legislature declined to enact Ecology's proposal for a regional multisector market-based reduction program.

The AWB argues that the Legislature further "limited Ecology's rulemaking authority" through the 1995 enactment of the Regulatory Reform Act. AWB Br. 13–14, 23–24. The Regulatory Reform Act prevents all state agencies (not just Ecology) from relying solely on a statute's intent or purpose section as authority to adopt a rule. Laws of 1995, vol. 2, ch. 403, §§ 110–118; *see also* RCW 34.05.322. Ecology adopted the Clean Air Rule under its substantive authority to adopt

emission standards in RCW 70.94.331, not under the policy and intent sections of the Clean Air Act. The Regulatory Reform Act is not implicated here.

The AWB argues that Ecology cannot allow regulated entities to meet their compliance obligations with emission reduction units because of RCW 70.94.850, which relates to creation of an emission credits banking program.[1] AWB Br. 27. RCW 70.94.850 is unrelated to the adoption of emission standards under RCW 70.94.331. Rather, it was enacted in 1984 to implement new federal requirements and concepts, including creation of an emissions credit banking program linked to Ecology's administration of the federal "prevention of significant deterioration" program. S.B. Rep., SSB 3616 (Wash. 1984). Nothing in the bill suggests that it was intended to eliminate Ecology's pre-existing authority to adopt emission standards—an authority that was amended to substantially its current form in 1969. Laws of 1969, vol. 1, ch. 168, § 34.

The AWB's "lack of legislative authority" arguments are further belied by the fact that the Legislature appropriated over $4.5 million to Ecology to implement the Clean Air Rule. Laws of 2017, vol. 2, ch. 1, § 302; *see also* CP 664, 665 (describing $4.5 million appropriation as

[1] One emission reduction unit is equal to one ton of greenhouse gases. Emission reduction units can be used by regulated entities to demonstrate compliance with the rule as an alternative or supplement to reducing on-site emissions. Opening Br. 7–8.

providing funding and staff for the Clean Air Rule). The Legislature can acquiesce in an agency's statutory interpretation by failing to amend a statute after the agency adopts a rule to implement the statute. *See Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit Cty.*, 135 Wn.2d 542, 566, 958 P.2d 962 (1998). Here, the Legislature did not amend the definition of "emission standard" after Ecology adopted the Clean Air Rule. Rather, the Legislature appropriated a large sum so that Ecology could implement the rule. These actions do not conform to the AWB's positon that Ecology lacks legislative authority for the rule.

In sum, the Clean Air Rule is an "emission standard" as defined in RCW 70.94.030(12). To accept the Gas Companies' contrary arguments, the Court would need to delete the first half of the statutory definition. To accept the AWB's position, the Court would need to conclude that RCW 70.235.020 repealed Ecology's existing authority to set emission standards for greenhouse gases, even though the Legislature explicitly stated the opposite and funded the rule. The Industry Petitioners' arguments fail. The Clean Air Rule should be upheld.

B. If Portions of the Rule Are Invalid, Those Portions Should Be Severed From the Valid Portions

The AWB alone argues that the superior court properly refused to sever invalid portions of the rule from valid portions. AWB Br. 28–32.

But as Ecology noted in its opening brief, portions deemed invalid by the superior court could have been severed without affecting the functionality or purpose of the remaining rule.[2] Opening Br. 21–24. The AWB refutes this by stating that a truncated rule would "narrowly single out only 48 sources." AWB Br. 30. But only five petroleum product producers, four natural gas distributors, and an unspecified number of petroleum importers would be excluded from coverage if fossil fuels were removed from regulatory coverage. AR 11793. In other words, many more sources would likely be covered than not.

The AWB also argues that, unlike federal rules, state rules can never be severed because of the required cost-benefit analysis and other mandatory aspects of state rulemaking. AWB Br. 30–31. But state rulemaking requirements are not so different from federal requirements. Both state and federal agencies are required to publish notice of proposed rules and provide for public comment. RCW 34.05.320, .325; 5 U.S.C. § 553. Both state and federal agencies can promulgate a final rule that differs from the proposed rule only if there is a substantial relationship between the proposed and final versions. RCW 34.05.340; *Allina Health*

[2] The AWB suggests that Ecology abandoned this argument because Ecology "failed to appear at the hearing" on severability. AWB Br. 29 n.11. The AWB neglects to mention that the superior court indicated that it wanted to resolve the issue *without* oral argument, and Ecology thus noted the matter without oral argument. CP 760, 904.

Servs. v. Sebelius, 746 F.3d 1102, 1107 (D.C. Cir. 2014) (final rule must be "logical outgrowth" of proposed rule). And both state and federal rules are subject to judicial review on the record under specified standards of review. RCW 34.05.570; 5 U.S.C. § 706.

Indeed, even the cost-benefit analysis is not unique under Washington law. Although the federal Administrative Procedure Act (APA) does not require a cost-benefit analysis for every rule, several federal statutes do require agencies to consider costs prior to rule adoption. For example, the emission standards at issue in the *Davis* case required the Environmental Protection Agency (EPA) to compare the costs of achieving emission reductions with the health and environmental impacts of the standards. *Davis Cty. Solid Waste Mgmt. v. U.S. EPA*, 101 F.3d 1395, 1398 (D.C. Cir. 1996) (*Davis I*). The court nevertheless allowed valid portions of the standards to remain in effect after severance of the invalid portions. *Davis Cty. Solid Waste Mgmt. v. U.S. EPA*, 108 F.3d 1454, 1455 (D.C. Cir. 1997) (*Davis II*). *See also Michigan v. EPA*, __ U.S. __, 135 S. Ct. 2699, 2707–12, 192 L. Ed. 2d 674 (2015) (EPA required to consider costs when determining whether to regulate a source for hazardous air pollutants under the Clean Air Act). Thus, state regulations

cannot be distinguished from federal regulations on the false premise that only Washington requires consideration of costs.[3]

The AWB also argues that the rule is not severable because Ecology declined to exclude natural gas and petroleum products from the rule. AWB Br. 30–31 (citing AR 326–327). Of course, Ecology wanted the broadest possible regulatory coverage to ensure the greatest emission reductions. But covering a smaller number of sources would still accomplish the rule's purpose of reducing greenhouse gases, and the rule would still function as intended. Ecology's inclusion of a severability clause further supports that Ecology would have adopted the rule even without the allegedly offending provisions. *See El Centro De La Raza v. State*, __ Wn.2d __, 428 P.3d 1143, 1157 (2018) (plurality opinion).

Although the entire rule should be upheld, to the extent that portions are deemed invalid, this Court should conduct a severability analysis and allow valid portions of the rule to remain in effect.

C. All of the Greenhouse Gas Reporting Rule Amendments Should Be Upheld

The superior court erred by invalidating all of Ecology's amendments to its greenhouse gas reporting rules when the AWB only

[3] Cost-benefit analyses are not required for all Washington rules. They are only required for "significant legislative rules" adopted by specified agencies, including the Department of Ecology. RCW 34.05.328(5)(a)(i).

challenged a single amendment. Opening Br. 26–27. The AWB alone argues that the superior court appropriately invalidated all of the reporting amendments. AWB Br. 32–34. But because many of the invalidated reporting provisions operate independently of the Clean Air Rule, there was no conceivable basis to invalidate them. *See* Opening Br. 27.

The AWB disputes that the reporting amendments have independent utility. AWB Br. 33–34. However, as Ecology explained in its rulemaking documents, the amendments serve multiple purposes. Specifically, newly amended WAC 173-441 "changes the emissions covered by the reporting program, modifies reporting requirements, *and* updates administrative procedures to align with Chapter 173-442 WAC—Clean Air Rule." AR 393 (emphasis added). For example, one amendment eliminates a fee that transportation suppliers would otherwise be required to pay (WAC 173-441-110) whereas another amendment incorporates federal reporting requirements by adding federally covered reporting categories (WAC 173-441-120). The AWB's suggestion that the amendments serve no function aside from implementing the Clean Air Rule is simply wrong.

The superior court further erred by failing to explain its reason for invalidating all of the amendments, as required by RCW 34.05.570(1)(c). Opening Br. 27. The AWB faults Ecology because Ecology "never asked"

for specific findings from the court. AWB Br. 34. But it was the AWB that proposed the order signed by the court. CP 797–802. Ecology cannot reasonably be faulted for flaws in the AWB's order.

The AWB also argues that the superior court did not need to reach the validity of the reporting amendments because the court found that the lack of authority for the Clean Air Rule was "dispositive" on this issue. AWB Br. 33. That is not what the court said. Rather, the court stated that it was not reaching the specific reporting issue raised by the AWB of "whether the rules invalidate legislative mandate regarding collection of transportation emissions data." CP 758. The court's oral ruling understandably does not mention the remainder of the reporting amendments because the AWB never challenged them.

As for the specific provision that *was* challenged by the AWB, that provision is within Ecology's statutory authority. As explained in Ecology's opening brief, Ecology established reporting requirements that require petroleum product producers and importers to report their emissions using the same methods currently used to report emissions to EPA.[4] Opening Br. 29–31. Ecology noted that "petroleum products

[4] The AWB erroneously argues that Ecology's reporting rules do not require the same methods as EPA reporting requirements because Ecology's rule creates different definitions of "importer" and "exporter." AWB Br. 36–37 (citing WAC 173-441-120(2)(h)(ii)). Although it is true that the Clean Air Rule uses definitions that are specific to import into or export from Washington, the methods of reporting emissions under the

producers and importers" are not synonymous with the "transportation fuel suppliers" required to report emissions under RCW 70.94.151(5)(a)(iii). *Id.* Ecology also noted that EPA reporting requirements (and the Clean Air Rule) require reporting of emissions from "petroleum products" which is broader than the "transportation fuels" covered by RCW 70.94.151(5)(a)(iii). *Id.* at 31–32. And EPA (and the Clean Air Rule) require reporting at a different point in the distribution chain than reporting under RCW 70.94.151(5)(a)(iii). *Id.* at 31.

The AWB does not dispute that the Clean Air Rule applies to "petroleum products" rather than the narrower category of "transportation fuels." Nor does the AWB dispute that reporting under the rule occurs at a different point in the fuel distribution chain. The AWB further acknowledges that there is only some definitional overlap between "petroleum product producers and importers" and "transportation fuel suppliers," and that the terms are not synonymous. AWB Br. 35–36.

Despite these undisputed differences, the AWB argues that *any* definitional overlap is fatal because RCW 70.94.151(5)(a)(iii) was a legislative compromise whereby the Legislature wanted to collect emissions data from transportation fuels in a cost-effective manner. AWB

Clean Air Rule are the same as EPA's methods (e.g., what products are covered, how they are measured, and emissions calculations).

Br. 35 (citing AR 20394). What the AWB does not mention is that proponents of the bill recognized that the raw data from sales could not be used for "future regulatory programs" because there was too much risk of misinterpreting the data. AR 20394. Future regulatory programs were thus contemplated when RCW 70.94.151(5)(a)(iii) passed and it was recognized at the time that the reporting required by that statute would be insufficient for regulatory purposes. Opening Br. 32–33 (Department of Licensing does not require detailed or consistent reporting which results in imprecise usage and combustion information).

Ecology's decision to adopt reporting requirements for the specific parties regulated by the rule (i.e. petroleum products producers and importers) does not exceed Ecology's statutory authority. All amendments to WAC 173-441 should be upheld.

D. The Clean Air Rule's Emission Reductions Reserve Does Not Impose a Tax or a "Tax-In-Kind"

The AWB alone argues that the reserve account created by the Clean Air Rule constitutes an impermissible tax under article VII, section 5 of the Washington Constitution. AWB Br. 38–40. However, a tax is an enforced contribution of money the purpose of which is to raise revenue. *City of Snoqualmie v. King Cty. Exec. Dow Constantine*, 187 Wn.2d 289, 299, 386 P.3d 279 (2016); *Covell v. City of Seattle*, 127

Wn.2d 874, 879, 905 P.2d 324 (1995). The reserve account is not a tax under this or any definition. Opening Br. 33–36.

The AWB tries to broaden the definition of "tax" by misconstruing the purpose of the rule's emission reductions reserve, relevant case law, and Ecology's arguments. The emission reductions allocated to the reserve[5] do not just support environmental justice projects as the AWB implies. AWB Br. 39. Rather, Ecology first prioritizes the allocation of emission reduction units for the re-startup of curtailed facilities, for new entrants in Washington's market, and to accommodate increased operations at an existing facility. WAC 173-442-240(4). Environmental justice projects and support for green power renewable programs can receive emission reduction units only if units remain after Ecology makes these prioritized allocations. *Id.*

The AWB then cites cases that do not stand for the AWB's proposition that the reserve is subject to article VII, section 5. AWB Br. 38–39. First, the AWB cites a one-justice concurring opinion to argue that taxes can be "in-kind" rather than cash payments. *Id.* (citing *Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 697, 49 P.3d 680 (2002) (Sanders, J., concurring)). The cited opinion interprets

[5] Two percent of a covered party's annual 1.7 percent reduction or 0.034 percent of a party's total annual emissions. WAC 173-442-240(1).

RCW 82.02.020, which expressly prohibits local governments from imposing on development "any tax, fee, or charge, *either direct or indirect* . . . ." *Benchmark*, 146 Wn.2d at 697–98 (emphasis added). RCW 82.02.020 is not at issue here. For that reason, *San Telmo Associates*, also cited by the AWB, is inapposite because it was also interpreting RCW 82.02.020. *San Telmo Assocs. v. City of Seattle,* 108 Wn.2d 20, 24, 735 P.2d 673 (1987).

Next, the AWB cites *Southwick, Inc. v. City of Lacey*, 58 Wn. App. 886, 890, 795 P.2d 712 (1990), to again argue that taxes can be "in-kind" rather than actual payments. Although the appellate court did make that statement, the court cited *San Telmo Associates,* 108 Wn.2d at 24, which, again, was interpreting RCW 82.02.020. *Southwick*, 58 Wn. App. at 890. Cutting against the AWB, the *Southwick* court held that "[w]hile fulfillment of the conditions [in the permit] will require the expenditure of money, cost alone does not make the requirements a tax." *Id.* The *Southwick* court ultimately concluded that the challenged permit condition was not a tax because its primary purpose was to regulate rather than raise revenue. *Id.*

Last, the AWB misstates the holding in *Hillis Homes, Inc. v. Snohomish County*, 97 Wn.2d 804, 809, 650 P.2d 193 (1982), to argue that "[a] regulation imposes a tax if its 'primary purpose . . . is to accomplish

desired public benefits which cost money.'" AWB Br. 39. What the court actually held is that a *monetary charge* is a tax rather than a regulatory fee if the purpose of the charge is to raise money. *Hillis Homes*, 97 Wn.2d at 809. Emission reductions are not monetary charges, so article VII is not implicated. *Constantine*, 187 Wn.2d at 302–03.

The AWB concludes by claiming that Ecology characterizes the reserve as a "fee." AWB Br. 40. To the contrary, the reserve allocations are not monetary payments and, thus, are neither taxes nor fees. *See* Opening Br. 34–35; CP 524–26. The reserve is a mechanism for Ecology to regulate greenhouse gas emissions permitted under the rule by ensuring that new, re-starting, or expanding facilities can integrate into Washington's regulatory landscape without derailing the overall emissions reductions mandated by the rule. *See* WAC 173-442-240. The reserve raises no revenue, and the only thing "banked" is a representative number of emission reduction units that Ecology may allocate or retire as needed to ensure ongoing reductions. *Id.* The reserve is not a tax and article VII, section 5 does not apply.

E. Ecology Was Not Required to Complete an EIS for the Rule

1. Industry Petitioners lack standing under SEPA

Below, Ecology moved to dismiss the Industry Petitioners' SEPA claims under CR 12(c). This Court reviews the denial of Ecology's

CR 12(c) motion de novo. *See P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 203, 289 P.3d 638 (2012). For purposes of the motion, any facts well-pled in the complaint are deemed true. *See Bailey v. Town of Forks*, 108 Wn.2d 262, 264, 737 P.2d 1257 (1987). However, "a motion for judgment on the pleadings admits only facts well pleaded. It does not admit mere conclusions nor the pleader's interpretation of statutes involved nor [the pleader's] construction of the subject matter." *Pearson v. Vandermay*, 67 Wn.2d 222, 230, 407 P.2d 143 (1965) (quoting *Hodgson v. Bicknell*, 49 Wn.2d 130, 136, 298 P.2d 844 (1956)).

The Petitioners lack standing under SEPA because their interests in challenging the rule are economic, not environmental. Opening Br. 38–39. The Gas Companies raise speculative allegations of harm to their property, but this is an economic rather than an environmental harm and is insufficient for standing under SEPA. CP 639; *Snohomish Cty. Prop. Rights All. v. Snohomish Cty.*, 76 Wn. App. 44, 53–54, 882 P.2d 807 (1994). The Gas Companies also allege injury to their customers and shareholders. Avista Br. 43. But a party cannot establish standing under SEPA by alleging injuries to third parties unless the party meets the test for associational standing. *See Des Moines Marina Ass'n v. City of Des Moines*, 124 Wn. App. 282, 291, 100 P.3d 310 (2004). Opening Br. 38–39. The Gas Companies do not claim to meet that test.

For its part, the AWB alleges generalized "environmental burdens" AWB Br. 46; CP 603–04 ("These large and small Washington businesses are directly, substantially, and prejudicially affected by the Rules through unlawful governmental regulation, increased costs, lost or foreclosed business and opportunities, and numerous other procedural, substantive, economic, and environmental burdens."). These conclusory allegations of harm are economic, not environmental, and are not well-pled. As such, they should not be deemed "admitted" under CR 12(c)'s standard of review.

The Gas Companies try to analogize their economic concerns to those at issue in *Kucera v. Department of Transportation*, 140 Wn.2d 200, 995 P.2d 63 (2000). Avista Br. 42–43. In *Kucera*, property owners on Rich Passage opposed a high-speed ferry on the grounds that the wake from the vessel had damaged the shoreline in front of their homes. *Kucera*, 140 Wn.2d at 205. An amicus contended the owners lacked standing under SEPA because their claimed economic and property damages did not fall within SEPA's zone of protected interests. *Id.* at 212. This Court found the property owners had met this first part of the standing test because they claimed specific harm to the shoreline environment. *Id.* at 206–07. In fact, Washington State Ferries had concluded several years prior that long-term

operation of high-speed ferries could cause damage to the Rich Passage shoreline. *Id.* at 204.

The facts in the present case do not line up with *Kucera*. The AWB admits that its professed desire for "sound environmental policy" rests on an underlying concern for its members' financial well-being. CP 604, 606. The Gas Companies likewise allege speculative impacts to property, wind farms, projects, and biomass generators, which affect their economic bottom line. CP 639. *Kucera* does not stand for the proposition that any party can achieve standing under SEPA by adding the word "environmental" to their claimed economic injuries. Petitioners' SEPA claims should be dismissed for lack of standing.

2. The Court should uphold Ecology's determination of nonsignificance

An agency's SEPA determination is reviewed under the clearly erroneous standard and should be upheld unless the Court is "left with the definite and firm conviction that a mistake has been committed." *Norway Hill Pres. & Prot. Ass'n v. King Cty. Coun.*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976). Opening Br. 37. The Industry Petitioners allege that Ecology disregarded their SEPA claims when drafting the rule, but that is not the case. Ecology addressed their claims in its response to comments, its SEPA determination of nonsignificance (DNS), and in other documents

that analyzed the rule's intended and unintended effects. Ecology correctly determined the rule would not result in significant adverse environmental impacts and, therefore, no environmental impact statement (EIS) was required.

a. The rule's DNS adequately addresses leakage

The Industry Petitioners allege that the Clean Air Rule will result in the "leakage" of greenhouse gas emissions from Washington to other jurisdictions. AWB Br. 41–42; Avista Br. 45–46. Ecology thoroughly considered this issue and concluded that greenhouse gas emissions would not increase as a result of the rule. Opening Br. 41–45. Energy-intensive trade-exposed industries raised leakage claims early in the rulemaking process, and Ecology significantly revised the rule based on their feedback. *See* AR 5012; AR 2846; WAC 173-442-070. After making these changes, Ecology received more comments from industries claiming additional leakage impacts. AR 4298–344 (Nucor Steel); AR 4167–84 (Ash Grove Cement). Ecology in turn consulted additional outside resources on the issue of leakage, which it noted in an addendum to the rule's DNS and SEPA bibliography. AR 494, 504. The record shows that Ecology understood the industry's claims, researched those claims, and ultimately concluded that the claims did not warrant the preparation of an

EIS. This reasoned analysis is sufficient to support Ecology's decision to issue a DNS.

The Petitioners do not address *PT Air Watchers v. Department of Ecology*, 179 Wn.2d 919, 319 P.3d 23 (2014), and with good reason—the decision undercuts their argument that Ecology must directly rebut all information provided by Petitioners in order to comply with SEPA. As Ecology explained in its opening brief, this Court has already determined that giving parties the opportunity to provide comments and competing scientific information, as Ecology did here, meets the requirement that the agency engage in a "reasoned analysis" before issuing a DNS. Opening Br. 37–38 (citing *PT Air Watchers*, 179 Wn.2d at 931).

b. The risk of power supply and generation shifting does not require Ecology to prepare an EIS

Ecology did not "summarily dismiss" the Gas Companies' claims about power supply and generation shifting.[6] Avista Br. 45. Rather, Ecology considered these claims, as well as other comments and studies, and properly determined that it did not need to prepare an EIS for the rule.

[6] The Gas Companies' citation to the Millennium Bulk Terminal-Longview coal export project EIS is improper. First, the Millennium EIS is not part of the administrative record for the Clean Air Rule. *See* RCW 34.05.558. Second, SEPA recognizes that different projects will merit different scopes of review—that is why the threshold determination process exists. *See* WAC 197-11-310 to -330. The Gas Companies' comparison of the Clean Air Rule, which is designed to reduce greenhouse gas emissions, with the largest proposed coal export terminal in the country, is not an apt comparison.

The Gas Companies contend it was unreasonable for Ecology to rely on the federal Clean Power Plan as a means of addressing power supply issues under the rule because the U.S. Supreme Court had stayed the Plan in February 2016. *Id.* at 46. However, the Gas Companies themselves commented on the rule that "[e]ven though the U.S. Supreme Court has stayed implementation of the [Clean Power Plan], Washington's electric power sector must continue to plan for compliance." AR 20174. They also lauded the Clean Power Plan as "superior to [the rule] for regulating the inherently interstate and international electric power sector." AR 20172. The Gas Companies' attempt to capitalize on the federal government's change in energy policy underscores why the APA assesses the validity of an agency's action at the time it was made, rather than in light of unpredictable political changes. *See* RCW 34.05.570(1)(b).

The Gas Companies' criticism of Ecology's reliance on the Seventh Northwest Conservation and Electric Power Plan is also misplaced. Avista Br. 46–47. It was reasonable to rely on a regional energy generation forecast, which takes into account the potential impact of state carbon regulations, in assessing the Gas Companies' claims of power generation shifting. *See* AR 29444. The Plan acknowledges that existing natural gas use will likely increase to "replace retiring coal plants and meet carbon-reduction goals in the near term," but also notes that

while carbon regulations like the Clean Air Rule can increase electricity costs for customers, "they also stimulate new sources of supply and efficiency and make more efficiency measures cost-effective." AR 29444, 29445.

Ecology recognized that the Clean Air Rule, like many regulations, could increase costs to business and could impact the price of fossil fuels regulated under the rule. For that reason, Ecology prepared a secondary economic impacts report that looked at price impacts. That report concluded that there would be only modest, incremental increases in the price of natural gas as a result of the rule. AR 9792–820. Thus, Ecology had sufficient information to determine that the rule was unlikely to induce the massive energy generation shifting claimed by the Gas Companies. If evidence of such shifting occurs in the future, Ecology committed to monitoring implementation of the rule to evaluate alternative approaches to regulating those emissions if needed. AR 5013.

c. Petitioners' conclusory assertions of fuel shifting and increased transportation emissions under the rule do not merit an EIS

Finally, the Gas Companies trot out the same arguments they made during the comment period that in response to an increase in the prices of natural gas, consumers will: (1) toss out their high efficiency natural gas furnaces and replace them with inefficient wood-fired stoves and electric

furnaces, and (2) be discouraged from reducing emissions in the transportation sector. Avista Br. 47–49. The Companies present only speculation in support of these claims.

First, there is no evidence in the record, aside from the Companies' own conclusory assertions, that residential customers will switch to wood and electricity for heating if the price of natural gas goes up. *See* Avista Br. 48 (citing PSE and Cascade Natural Gas comments at AR 20160, 20192, 21538; Avista comments at AR 21477). Coupled with Ecology's economic analyses showing a modest increase in the price of natural gas from the rule's implementation, threats of fuel shifting are the sort of remote and speculative consequence for which SEPA does not require an EIS. *See Cheney v. City of Mountlake Terrace*, 87 Wn.2d 338, 344, 552 P.2d 184 (1976).

The Companies' claim that the rule will increase emissions from the transportation sector fares no better. The Companies speculate that the rule will delay a transition from petroleum-fueled vehicles to natural gas-fueled vehicles. Avista Br. 49 n.28. The Companies present no evidence that sufficient infrastructure exists to enable a meaningful transition to natural gas-fueled vehicles, versus the significant infrastructure currently under development for electric vehicle use. Even assuming that natural gas-fueled vehicles become a more viable option for consumers, the

evidence in the record demonstrates that the rule will encourage transitions from gas to electric vehicles, thus maximizing greenhouse gas emission reductions. AR 2849; AR 2822. And, Ecology assessed the potential impacts of this shift in its SEPA addendum. AR 500.

The Petitioners have not shown that the DNS for the rule was clearly erroneous. The DNS thus should be upheld.

F. Ecology's Cost-Benefit Analysis Should Be Upheld

Ecology prepared a thorough, well-reasoned cost-benefit analysis in accordance with the APA. Opening Br. 45–49. The Petitioners maintain that Ecology's cost-benefit analysis is arbitrary and capricious because it "unfairly disregarded credible and important evidence related to the costs and benefits of the Rule." Avista Br. 33. They are mistaken.

Petitioners claim that Ecology arbitrarily inflated the rule's benefits by "considering only emission *reductions* that might result from the Rule, without also considering Rule-induced emission *increases*." *Id.* at 34; *see also* AWB Br. 47. This argument is predicated on the assertion that "[t]he Rule will force Washington utilities to draw from cheaper, out-of-state sources which largely are higher-emitting" in order for the utilities to "provide 'least-cost' electricity to their customers . . . ." Avista Br. 35.

Ecology has already addressed this claim above. *See* Section II.A, *supra*. However, it bears repeating that the rule would not prevent the Gas

Companies from recouping increased natural gas costs from their customers, nor would it prevent the Companies from meeting demand for natural gas. *See* Section II.A, *supra*. The same goes for electric utilities, which likewise must consider "the cost of risks associated with environmental effects including emissions of carbon dioxide" when planning to meet future demand. WAC 480-100-238(2)(b); RCW 19.280.020(11). Moreover, Washington utilities are required to meet most baseload electricity demand with electricity generation that meets Washington's greenhouse gas emissions performance standard, thereby decreasing the risk that the rule will encourage utilities to import more polluting power from out of state. WAC 480-100-405(1); RCW 80.80.060(1), .070(1). In sum, Ecology considered and reasonably rejected Petitioners' claims of widespread leakage. The fact that the agency did not accept their claims as absolute truth does not render the cost-benefit analysis arbitrary and capricious under the APA.

The Gas Companies also argue that Ecology "capriciously deflated the Rule's costs" by undervaluing the price and availability of emission reduction units and incorrectly calculating the cost to covered parties of complying with the rule. Avista Br. 36–40. Ecology addressed these arguments in its merits briefing before the superior court. *See* CP 495–509. There, Ecology explained that its own estimates of the Gas

Companies' projected compliance costs were about half those offered by the Companies. CP 497–99; *see also* AR 5002, 11793 (NG LDCs (not EITE) tab, cell F3), (All parties tab, col. DI, total of rows 42–46 plus row 49). Ecology also pointed out that it based its cost estimates of in-state renewable energy credits on a national analysis conducted by the U.S. Department of Energy, which Ecology then inflated in order to account for the fact that the credits must be generated in state. CP 499; AR 275 n.22, 29563–65. Ecology took the Gas Companies' concerns seriously, but ultimately determined that they were exaggerated. This is precisely the sort of evidence that could lead decision-makers to come to different conclusions, which shows that Ecology's determination here was neither arbitrary nor capricious. *See Rios v. Dep't of Labor & Indus.*, 145 Wn.2d 483, 501, 39 P.3d 961 (2002).

Finally, the AWB insists that Ecology erred in using the social cost of carbon as a measure of the rule's benefits. AWB Br. 47–48. The AWB ignores federal law, and the work of several federal agencies, and instead relies on uncodified legislative findings and two inapposite appellate decisions to argue that the APA limits agencies to looking at "state-only impacts" when conducting a cost-benefit analysis.[7] AWB Br. 48. Of

[7] This contradicts the AWB's earlier arguments regarding the scope of review Ecology was required to conduct for the rule under SEPA. *See* AWB Br. 42, 44.

course, legislative findings do not supplant the plain language of a statute. *See HJS Dev., Inc. v. Pierce Cty. ex rel. Dep't of Planning & Land Servs.*, 148 Wn.2d 451, 480 & n.126, 61 P.3d 1141 (2003). Moreover, the findings cited by the AWB do not suggest that agencies cannot consider the full costs and benefits of a rule, nor do the findings suggest that agencies should draw an artificial line around Washington when the costs and benefits of a rule extend beyond our borders. Simply put, nothing prevents an agency from looking at global benefits, using the social cost of carbon, in preparing its cost-benefit analysis. *See also Zero Zone, Inc. v. U.S. Dep't of Energy*, 832 F.3d 654 (7th Cir. 2016); Opening Br. 47–49.

The record here contains ample documentation to support Ecology's conclusion that the benefits of the rule outweigh its costs. The cost-benefit analysis is not arbitrary and capricious and is not a basis for invalidating the rule.

G. The Clean Air Rule Is the Least-Burdensome Alternative for Regulating Greenhouse Gas Emissions

Last, the AWB contends that Ecology's least-burdensome alternatives analysis does not comply with the APA. AWB Br. 49–50. In so arguing, the AWB conflates the phrase "hard look" from the intent section of the Regulatory Reform Act with the "hard look" required of environmental impact statements prepared in accordance with the National

Environmental Policy Act (NEPA). *See id.* at 49. But Washington's APA is not NEPA, and the NEPA standard does not apply here.

Under NEPA, alternatives analysis is "the heart of [an] environmental impact statement," (40 C.F.R. § 1502.14) and all reasonable alternatives must be rigorously explored and objectively evaluated. Federal agencies must provide reasons for eliminating alternatives. 40 C.F.R. § 1502.14(a). Courts have determined that this language requires agencies to take a "hard look" at alternatives when preparing an environmental impact statement.[8] *See, e.g.*, *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998). No such standard applies to the least-burdensome alternatives analysis required by the APA. Under the APA, the agency must provide sufficient documentation to "persuade a reasonable person that the determinations are justified." RCW 34.05.328(2). Here, Ecology included documentation in the rulemaking file that is more than sufficient to persuade a reasonable person that Ecology minimized the burden placed by the Clean Air Rule while still meeting the objectives of the rule and the statute it implements. Opening Br. 50.

[8] Even under the strict NEPA standard, an agency is not required to prepare a detailed discussion of every remote and speculative alternative put forward in comments. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Coun.*, 435 U.S. 519, 551, 98 S. Ct. 1197, 55 L. Ed. 2d 460 (1978).

The AWB also argues that Ecology's analysis is insufficient based on the length of the document. AWB Br. 49. But that is not what this Court considers when reviewing a least-burdensome alternative analysis. Again, a least-burdensome alternative analysis should be upheld where the rulemaking file contains sufficient documentation to persuade a reasonable person that the agency's determinations are justified. RCW 34.05.328(2).

Here, Ecology's rulemaking file is replete with documentation of the changes made to ensure that the rule was the least-burdensome alternative. *See* AR 5048–49 (1.7 percent annual emission reductions required rather than 3–10 percent advocated by stakeholders); AR 5012, 5042–43 (provisions added to make it easier for energy-intensive trade-exposed industries to achieve compliance while staying competitive in international markets); AR 5007–08 (aligning the rule with the Clean Power Plan at the request of power producers); AR 263–64 (excluding certain products and sources from the rule). This constitutes sufficient documentation to support Ecology's determination that the rule minimizes the burden it placed on regulated parties.

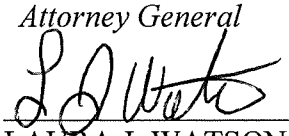
III. CONCLUSION

The Legislature granted Ecology broad authority to set emission standards and develop workable solutions to air pollution. The Clean Air Rule culminated from extensive stakeholder engagement and a thorough

balancing of the costs and benefits of the rule. The rule is well within Ecology's authority to set emission standards, and the Industry Petitioners fail to show that their speculative assertions of harm render the rule or the process arbitrary and capricious. The rule should be upheld in its entirety. Barring that, this Court should conduct the severability analysis that the superior court refused to conduct and determine which parts of the rule may remain in effect.

RESPECTFULLY SUBMITTED this 20th day of November 2018.

ROBERT W. FERGUSON
Attorney General



LAURA J. WATSON, WSBA 28452
Senior Assistant Attorney General
EMILY C. NELSON, WSBA 48440
Assistant Attorney General
Office ID No. 91024
P.O. Box 40117
Olympia, WA 98504-0117
360-586-6770
laura.watson@atg.wa.gov
emily.nelson@atg.wa.gov
Attorneys for Appellant Washington State Department of Ecology

CERTIFICATE 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:

Jason T. Morgan
Jeffrey W. Leppo
Matthew Cohen
Stoel Rives LLP
600 University St., Ste. 3600
Seattle, WA 98101

jason.morgan@stoel.com
jeffrey.leppo@stoel.com
matthew.cohen@stoel.com
judy.shore@stoel.com
sharman.loomis@stoel.com

Attorneys for Respondents Association of Washington Business, et al.

Gregory C. Hesler
Avista Corporation
P.O. Box 3727
Spokane, WA 99202

greg.hesler@avistacorp.com

William Bumpers
Megan H. Berge
Sterling A. Marchand
Emily Wilson
Baker Botts LLP
1299 Pennsylvania Ave. NW
Washington, D.C. 20004

william.bumpers@bakerbotts.com
megan.berge@bakerbotts.com
sterling.marchand@bakerbotts.com
emily.wilson@bakerbotts.com

Samia R. Broadaway
Baker Botts LLP
98 San Jacinto Blvd., Ste. 1500
Austin, TX 78701

samia.broadaway@bakerbotts.com

Attorneys for Respondents Avista Corporation, et al.

Amanda Goodin
Jan Hasselman
Marisa Ordonia
Earthjustice
705 Second Ave., Ste. 203
Seattle, WA 98104

agoodin@earthjustice.org
jhasselman@earthjustice.org
mordonia@earthjustice.org

Attorneys for Intervenor-Appellants Washington Environmental Council, et al.

DATED at Olympia, Washington, this 20th day of November 2018.

Danielle E. French

DANIELLE E. FRENCH
Legal Assistant

APPENDIX

S. B. Report, SSB 3616 (Wash. 1984)

SENATE BILL REPORT

SSB 3616

BY Senate Committee on Parks and Ecology (Originally sponsored by Senators Hughes, Hansen, Quigg, Rasmussen, Fuller, Peterson and Guess)

Modifying provisions governing air pollution emissions.

Senate Committee on Parks and Ecology

Senate Hearing Date(s): March 7, 1983; March 11, 1983

Majority Report: That Substitute Senate Bill No. 3616 be substituted therefor, and the substitute bill do pass.
Signed by Senators Hughes, Chairman; Talmadge, Vice Chairman; Hansen, Hurley, Kiskaddon, Lee, Rasmussen, Williams.

Senate Staff: Ed Thorpe (753-2247); Mike Reed (753-1969)

AS PASSED SENATE, JANUARY 12, 1984

BACKGROUND:

Recent federal legislation has introduced several new concepts of air pollution control. Legislation is needed that recognizes these concepts and authorizes compliance with the federal mandates.

SUMMARY:

Definitions of terms are eliminated. The Department of Ecology and local air pollution control authorities are authorized to implement an emissions credit banking program, as described. The Department is authorized to accept delegation of the prevention of significant deterioration program of the federal Clean Air Act.

The program shall cease to exist on June 30, 1986 unless continued by the Legislature.

Fiscal Note: none requested

ATTORNEY GENERAL'S OFFICE - ECOLOGY DIVISION

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- mordonia@earthjustice.org
- samia.broadaway@bakerbotts.com
- sharman.loomis@stoel.com
- sterling.marchand@bakerbotts.com
- william.bumpers@bakerbotts.com

Comments:

Sender Name: Danielle French - Email: danielle.french@atg.wa.gov
Filing on Behalf of: Laura J Watson - Email: laura.watson@atg.wa.gov (Alternate Email: ECYOlyEF@atg.wa.gov)

Address:
PO Box 40117
2425 Bristol Court SW
Olympia, WA, 98504-0117
Phone: (360) 586-6770

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