

FILED
SUPREME COURT
STATE OF WASHINGTON
4/14/2025 4:04 PM
BY SARAH R. PENDLETON
CLERK

No. 103413-0

SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON FARM BUREAU,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Respondent.

ON DIRECT REVIEW FROM THURSTON COUNTY
SUPERIOR COURT

OPENING BRIEF

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<https://www.tvw.org/watch/?clientID=9375922>
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House Environment and Energy Committee, Public Hearing: E2SSB 5126 - Concerning the Washington Climate Commitment Act, April 14, 2021, 8:00 am,
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Wholesale Purchases and Sales Tax Exemptions, Form 27-0036, Department of Revenue,
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I. INTRODUCTION

In 2021, Washington passed the Climate Commitment Act (“CCA”), which charged the Department of Ecology (“Ecology”) with administering a cap and invest program to put economic pressure on greenhouse gas intensive industries to reduce emissions in the state and encourage innovation and investment in renewable options. When it enacted this bill, the Legislature recognized that Washington farmers would face severe negative impacts from the CCA, and because they operate on such thin margins, they would be unable to compete and innovate as quickly as other businesses. The Legislature exempted from the CCA emissions from fuel used for agricultural purposes permanently, and exempted fuel used to transport agricultural goods for five years. The Legislature also directed Ecology to enact rules to implement this exemption.

However, Ecology recognized that it would require additional administrative work to implement this exemption. So, it adopted a regulatory framework that provides illusory relief to

farmers from CCA surcharges on agricultural fuel. Ecology's rules exceeds the statutory mandate of the exemption because only fuel suppliers may seek the exemption, and the rules disincentivize suppliers from actually seeking the exemption by not making reporting of exempt fuel mandatory and creating regulatory risk for suppliers who choose to report exempt fuel. Thus, suppliers continue to charge farmers CCA surcharges on fuel and farmers have no recourse to seek the exemption on their own if the fuel suppliers choose not to seek the exemption. Ecology knew of these problems when it adopted the rules, but arbitrarily and capriciously chose to move forward with the rules anyway.

In recognition of the fundamental problems with its rules, Ecology convened a workgroup of farmers and fuel suppliers to try to address the problem. However, ultimately Ecology rejected the workgroup's suggestions because the agency wrongly claimed that it does not have any power to collect information from or reimburse farm fuel users for improperly imposed

surcharges on exempt fuel. Ecology made no changes to the fundamental structure of the regulations.

Washington Farm Bureau (“WFB”) filed a Petition for Rulemaking asking Ecology to fix the structural problems with its farm fuel exemption rules. Ecology arbitrarily and capriciously denied the petition, pointing to its then ongoing workgroup. However, after denying the petition, Ecology declined to make any of the major changes proposed by the workgroup.

WFB challenged this denial and the underlying rule. The superior court denied WFB’s petition without any explanation or reasoning. WFB sought direct appeal to this Court due to the serious on going harm that farmers are suffering because of this rule. This Court granted review.

WFB respectfully asks this Court to declare WAC 173-441-122-(5)(d)(xi)(C) and WAC 173-446-040(2)(b)(iii)–(iv) invalid and direct Ecology to engage in revised rulemaking that accords with the requirements of the CCA.

II. ASSIGNMENTS OF ERROR

The superior court made the following errors:

1. The superior court erred in concluding that Ecology's farm fuel exemption rules, WAC 173-446-040(2)(b)(iii)–(iv) and WAC 173-441-122(5)(d)(xi)(C), were within Ecology's statutory authority under the CCA when the rules applied the exemption exclusively to fuel suppliers, despite the statute's clear purpose to exempt farm fuel users from the CCA. *See* RCW 70A.65.080(7)(e).

2. The superior court erred in the concluding, in the alternative, that the CCA allows the farm fuel exemption to be optional for suppliers, and thus within Ecology's statutory authority under the CCA, even though the optional nature of the regulation makes the exemption illusory for farm fuel users and unworkable for suppliers.

3. The superior court erred in concluding that Ecology's adoption of these rules was neither arbitrary nor capricious, even though Ecology recognized that tracking fuel

end use down the supply chain from the suppliers' perspective was virtually impossible, thus there was no effective way for suppliers to seek the exemption.

4. The superior court erred in concluding that Ecology's denial of WFB's petition for rulemaking was neither arbitrary nor capricious, and did not exceed the scope of the law, when Ecology knew that the farm fuel exemption rules were unworkable, it devoted resources to fix the problem, but then declined to make any substantive changes to the rules despite many workable suggestions from Ecology's working group.

III.ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the superior court err by affirming Ecology's farm fuel exemption rules when the rules apply the exemption exclusively to fuel suppliers and allow the mandatory exemption to be optional for suppliers? (Assignments of Error 1, 2, 3).

2. Did the superior court err when it affirmed Ecology's denial of WFB's petition for rulemaking when

Ecology knew that the farm fuel exemption rules were unworkable? (Assignment of Error 4).

IV. STATEMENT OF THE CASE

A. Washington Passed The Climate Commitment Act, Including The Farm Fuel Exemptions.

In 2021, the legislature passed the CCA to reduce greenhouse gas emissions in the state through a cap and invest program. *See* RCW 70A.65.005(2). The CCA directs Ecology to create “a cap on greenhouse gas emissions from covered entities and a program to track, verify, and enforce compliance” with the cap by selling or distributing carbon credits or offset credits, collectively called “compliance instruments.” RCW 70A.65.060(1). The CCA requires Ecology to create a complex and nuanced program that takes into account considerations and impacts on various businesses and groups in Washington. RCW 70A.65.220; *see also* RCW 70A.65.005(7) (findings and intent section noting the various interests for which the CCA must account).

Ecology must set limits, or caps, on greenhouse gas emissions by adopting “annual allowance budgets” based on data reported to the department by “covered entities” under the Washington Clean Air Act, RCW 70A.15.1005, et seq. or “provided as required by this chapter.” RCW 70A.65.070(2). “‘Allowance’ means an authorization to emit up to one metric ton of carbon dioxide equivalent.” RCW 70A.65.010(1). “The annual allowance budgets must be set to achieve the share of reductions by covered entities necessary to achieve the 2030, 2040, and 2050 statewide emissions limits established in RCW 70A.45.020.” RCW 70A.65.070(2). Ecology must lower the cap over time to meet Washington’s emissions reduction goals. *Id.*

Ecology must distribute the budgeted allowances to “covered entities” through auctions, RCW 70A.65.100, or via allocation of allowances to certain “emissions-intensive, trade-exposed industries,” RCW 70A.65.110. Ecology must also issue “offset credits” to “covered entities” for projects that “[p]rovide

direction environmental benefits,” “[r]esult in greenhouse gas reductions or removals,” and “[h]ave been certified by a recognized entity.” RCW 70A.65.170(1)–(2).

Under the CCA, “covered entities” must purchase allowances and transfer allowances to Ecology based on the amount of “covered emissions” that the “covered entity” reports during the compliance period. *See* RCW 70A.65.010(19), (22), .310(1)–(2). “[C]overed entities” include some end users of fossil and suppliers of fossil fuels. RCW 70A.65.080(1). Specifically, in deciding who should be required to purchase carbon credits under the CCA, the Legislature determined that some end users, such as facilities that have emissions of 25,000 metric tons of carbon dioxide equivalent, should be covered. RCW 70A.65.080(1)(a). However, to capture emissions from industries with lower emissions and other sources, fuel suppliers are also “covered entities” under the CCA. *See* RCW 70A.65.080(1)(d). Suppliers measure and report their emissions based how much “carbon dioxide equivalent emissions would

result from the full combustion or oxidation” of the fuel sold for use in the state. *Id.*; *see also* RCW 70A.65.080(8) (“The department shall not require multiple covered entities to have a compliance obligation for the same emissions. The department may by rule authorize . . . fuel suppliers . . . to provide by agreement for the assumption of the compliance obligation for fuel or natural gas supplied and combusted in the state.”).

The CCA directs Ecology to look to emissions reports under the Washington Clean Air Act, RCW 70A.15.2200, and also provides that Ecology should collect additional data “as required by this chapter” to administer the program. RCW 70A.65.070 (noting that Ecology must base its annual allowance budgets on “[d]ata reported to the department under RCW 70A.15.2200 or provided as required by this chapter”); *see also* RCW 70A.65.080 (noting that a person is a “covered entity” based on “reported emissions under RCW 70A.15.2200 . . . or [] additional data provided as required by this chapter”).

The CCA exempts certain uses of fossil fuel from coverage under the act. The statute provides:

(7) The following emissions are exempt from coverage in the program, regardless of the emissions reported under RCW 70A.15.2200 or provided as required by this chapter:

[. . .]

(e)(i) Motor vehicle fuel or special fuel that is used exclusively for agricultural purposes by a farm fuel user. This exemption is available only if a buyer of motor vehicle fuel or special fuel provides the seller with an exemption certificate in a form and manner prescribed by the department. For the purposes of this subsection, “agricultural purposes” and “farm fuel user” have the same meanings as provided in RCW 82.08.865.

(ii) The department must determine a method for expanding the exemption provided under (e)(i) of this subsection to include fuels used for the purpose of transporting agricultural products on public highways. The department must maintain this expanded exemption for a period of five years, in order to provide the agricultural sector with a feasible transition period.

RCW 70A.65.080(7). “[A]gricultural purposes” includes “the performance of activities directly related to the growing, raising, or producing of agricultural products.” RCW 82.08.865. “Farm fuel user” refers to “a farmer” or “a person who provides

horticultural services for farmers.” *Id.* Critically, while “covered entities” supply the fuels that are exempted, the exemption applies to farm fuel users. *Compare* RCW 70A.65.080(1)(d) *with* RCW 70A.65.080(7)(e).

When the Legislature first introduced the CCA without the farm fuel exemption, farmers and organizations representing farmers including WFB, expressed concerns about the negative impact that increased fuel prices would have on Washington farmers. *See* House Environment and Energy Committee, Public Hearing: E2SSB 5126 - Concerning the Washington Climate Commitment Act, April 14, 2021, 8:00 am, <https://www.tvw.org/watch/?clientID=9375922947&eventID=2021041204>, remarks beginning at 48:43. Farmers were specifically concerned that increased fuel costs would make it harder for Washington farmers to compete in a business that already operates on thin margins. *Id.* In response, the legislature adopted an amendment to the bill to add the farm fuel exemption. The sponsor of the amendment noted that farmers are critical

partners in addressing climate change and because farms operate on “thin margins . . . we’re giving farmers an on ramp. . . . we’ve created five years where they can get rebates for the carbon price on their farm transport fuels and we’ve exempted on-farm use of fuels.” House Environment and Energy Committee, Executive Session: E2SSB 5126 - Concerning the Washington Climate Commitment Act, April 16, 2021, 3:00 pm, <https://www.tvw.org/watch/?clientID=9375922947&eventID=2021041223>, remarks beginning at 1:05:18.

B. Ecology Expressed Concern About The Challenges In Promulgating Rules For The Farm Fuel Exemption.

The Legislature tasked Ecology with enacting regulations to implement the CCA. RCW 70A.65.220 (“The department shall adopt rules to implement the provisions of the program established in RCW 70A.65.060 through 70A.65.210.”); RCW 70A.65.080(7)(e)(ii).

Before and during the rulemaking process, Ecology recognized potential challenges with implementing the farm fuel exemptions. In 2021, Ecology observed that the exemption for

transporting agricultural products on public highways would be difficult to implement, noting that “[e]ven a simple attestation process could result in considerable paperwork.” CP 98-158 (ECY002958).¹ In the same planning document Ecology asked: “How will we implement this, and perhaps more importantly, how important is enforcement?” *Id.*²

Notes from a meeting on September 30, 2021, said that based on the “process used in the GHG Reporting Rule . . . [t]here is almost no way to create a paper-trail of receipts

¹ The agency’s administrative record consists of 7185 pages, plus five data files and 22 native files in excel, and is designated in two parts: CP 37-97 (“Notice of Filing of Agency Record”) and CP 98-158 (“Notice of Filing of Agency Record and Index 7,185 Page Record on CD”). Hereinafter, WFB cites only to the relevant pages of the agency record (“ECYXXX”).

² In its 2021 Legislative Implementation Plan for the CCA, Ecology noted that “the easiest way to comply with this program is not currently viable” because “it is currently illegal to drive on a highway using dyed fuel (i.e, for agricultural, use).” ECY002933. Ecology further noted that “Ecology *must* also develop a method for expanding the exemption to include fuels used for the purpose of transporting agricultural products on public highways, and must maintain this expanded exemption for five years.” *Id.* (emphasis added).

showing that fuel produced was end-used for Ag purposes.” ECY002959. Further, the notes observed that “[t]his will be a difficult process to hammer out, but will ultimately become an issue of compliance enforcement.” *Id.* Accordingly, Ecology knew that it would be functionally impossible for fuel suppliers to create a paper trail for exempt transactions if it chose to tie the exemption to the GHG Reporting Rule for “covered entities,” instead of to the buyers of the farm fuel as the CCA intended.

C. Ecology Promulgated Regulations Regarding The Farm Fuel Exemption.

In 2022, Ecology adopted regulations related to the calculation of “covered emissions,” WAC 173-446-040, and related to greenhouse gas reporting requirements for suppliers, WAC 173-441-122. WAC 173-446-040(2)(b)(iii)–(iv) addresses the farm fuel exemption, and ties the exemption to the greenhouse gas reporting rule for suppliers in WAC 173-441-122. The regulation provides that:

The following supplier emissions are not covered emissions if the *supplier* can demonstrate to ecology’s satisfaction as specified under WAC 173-

441-122 (5)(d)(xi) that the emissions originate from:

[. . .]

(iii) Motor vehicle fuel or special fuel used exclusively for agricultural purposes by a farm fuel user as described in WAC 173-441-122 (5)(d)(xi)(C).

(iv) Fuels used for transporting agricultural products on public highways if it meets the requirements in RCW 82.08.865 as described in WAC 173-441-122 (5)(d)(xi)(C). This exemption is in effect for emissions years 2023 through 2027 and is not available for emissions after 2027.

WAC 173-446-040(2)(b) (emphasis added).

WAC 173-441-122 in turn addresses the greenhouse gas reporting requirements under the Clean Air Act and the CCA. Ecology promulgated the rule in 2022 to “improve reporting requirements in order to align with the new requirements from the CCA.” WSR 22-05-050. The new reporting rule purports to include “requirements necessary to support the . . . overall objectives of the statute or chapter, or the goals or the CCA.” *Id.* The regulation provides that suppliers “*may* separately indicate the quantity of each fuel type if the fuel supplier can demonstrate

to ecology’s satisfaction that the fuel is used for one of the following purposes:”

(C) Motor vehicle fuel or special fuel that is used exclusively for agricultural purposes by a farm fuel user. The supplier must demonstrate to ecology's satisfaction that the buyer of the fuel provided the seller with an exemption certificate as described in RCW 82.08.865. Fuel used for the purpose of transporting agricultural products on public highways may be included if it is flagged separately and meets the requirements in RCW 82.08.865.

WAC 173-441-122(5)(d)(xi)(C) (emphasis added).

RCW 82.08.865 provides a sales tax exemption for sales of “diesel fuel, biodiesel fuel . . . to a farm fuel user for agricultural purposes . . . This exemption is available only if the buyer provides the seller with an exemption certificate in a form and manner prescribed by the department.”

In adopting this rule, Ecology affirmatively chose to tie the *mandatory* farm fuel exemption for *users* to the *optional* greenhouse gas reporting rules for *suppliers*.

D. After The Rules Went Into Effect, Ecology Failed To Address Complaints That Farmers Continued To Be Charged CCA Surcharges For Exempt Fuel.

The cap and invest program of the CCA went into effect on January 1, 2023, and Ecology reported that it immediately began to receive complaints that farmers were paying CCA surcharges despite the clear exemption for their emissions in the Act. ECY007156.

On January 21, 2023, the WFB emailed Ecology raising concerns that the regulations and guidance failed to protect agricultural businesses as required by the legislature. ECY005400–5402. WFB specifically noted that the regulatory framework provided no mechanism for reimbursement of wrongfully assessed CCA-related fees and costs, and that Washington state farmers were not receiving their authorized exemptions. *Id.* Ecology responded:

[I]t has come to our attention that some fuel suppliers are assessing surcharges against fuels that are exempt from regulation. Next week, the Department of Ecology will issue interim guidance that should provide greater clarity around how to document the emissions exemptions for maritime,

on-farm agricultural, and aviation fuels. After that guidance is issued, it is our hope that fuel suppliers will stop assessing surcharges on the sale of exempt fuels. *However, please be aware that fuel suppliers make their own pricing decisions, and Ecology plays no role in regulating those prices or regulating transparency around how those prices are set.*

ECY005401 (emphasis added). Essentially, Ecology acknowledged that the regulations were not actually providing the intended relief for farmers, but promised solutions in its upcoming guidance.

On January 25, 2023, Ecology published “Interim Guidance on Reporting and Documenting Emissions from Exempt Fuels under the Cap-and-Invest Program: Watercraft, Agricultural, Aviation, and Exported Fuels.” ECY005403–11, 5412. The guidance lays out documentation methods by which a fuel supplier/covered entity “*can* demonstrate fuels were ‘used exclusively for agricultural purposes.’” ECY005409 (emphasis added). But, there is no requirement that the suppliers *must* track emissions from agricultural uses to effectuate the exemption.

ECY005408 (“How a covered entity *may* establish this exemption is set forth in WAC 173-446 and WAC 173-441.” (emphasis added)). Further, Ecology’s guidance offers no incentive (either carrot or stick) for suppliers to actually track and report the exempt emissions, and instead provides additional obligations, and risk, for suppliers who do in fact track and report this data. *See* ECY005408. The guidance document provides that if suppliers choose to track and report the data for the exempt fuel, then the suppliers “must establish a data management system that tracks fuel deliveries to customer.” *Id.*

On February 3, 2023, Ecology issued additional interim guidance to address the exemption for “fuels used to transport ‘agricultural products on public highways.’” ECY005422–28, 5429. The document highlighted documentation necessary to establish that fuel was used to transport agricultural products on public highways. In noting the difficulties that suppliers face in obtaining such data, Ecology said, “[i]t may be helpful if fuel distributors share exemption documentation with the fuel

supplier/covered entity.” ECY005427. But Ecology declined to regulate this portion of the transaction, noting that “[t]his is a matter between the fuel supplier and the fuel distributor” and “obligations rest with the covered entity and it is therefore the responsibility of the covered fuel supplier to assemble and retain all necessary documentation.” ECY005427.

On February 6, 2023, Ecology internally circulated a draft letter to fuel suppliers about the issues with the treatment of exempt fuels in the state. ECY005452–53. The initial draft declared that “Ecology expects that fuel supplier will stop imposing surcharges on exempt fuels and will promptly provide refunds to customers who have paid these surcharges.” ECY005455. But that language was deleted and replaced with an indecisive statement that Ecology was “aware that many fuel suppliers are assessing surcharges.” ECY005452.

Ecology never sent the letter, and eventually converted the letter to a vague notice that there had been some problems with

the rulemaking and that Ecology planned to convene a workgroup to discuss the issues. *See* ECY005832–33.

On February 10, 2023, Ecology circulated an *optional* exemption certificate. ECY005446. The certificate itself provides that “[t]his form may be utilized to document fuel transactions that are exempt under these provisions, **but fuel users and covered entities are not required to use it.**” ECY-05447 (emphasis in original).

After issuing the guidance, Ecology continued to receive complaints that farmers were paying fuel surcharges that they ought to have been exempted from under the CCA. *See, e.g.* ECY005474–77 (email from Skagit Valley Farm on April 22, 2023); ECY005736–37 (email from Washington State Dairy Federation on May 11, 2023).

Ecology responded to the complaints by convening a workgroup to discuss changes to the regulatory framework and

to address the concerns with exempt users not receiving the benefits of their exemption.³ ECY005573.

The workgroup met eight times between June and September 2023. ECY007159. Throughout the meetings, workgroup members agreed that the most workable solution for the farm fuel exemption would be to have Ecology rebate CCA fees directly to end users. *See* ECY006116.

In coming to this conclusion the workgroup noted the specific reasons why the supplier focused rules rules do not work:

- Fuel suppliers had no line of sight into distribution or the actual use by the end user, resulting in

³ In communications about correspondence from the Washington State Dairy Federation, Ecology again acknowledged, at least internally, that there was a serious disconnect between the exemptions for fuel suppliers, and agricultural users seeing the trickle-down effects of such exemptions. ECY005735 (“[W]e know that some big suppliers have committed [to providing exemptions to farmers], but whether smaller distributors are following suit (or just pocketing potential profit) is a bigger question that has direct impacts on farmers.”).

potential liability for extending more effective exemptions. ECY006116.

- Suppliers further noted that they would be on the hook for mistakes or fraudulent attestations by fuel users. ECY007140. Ecology confirmed this, noting that it cannot regulate end users, so it cannot provide any oversight for their use of fuel.⁴ ECY006999.
- CCA fuel surcharges are often bundled into the fuel prices paid by distributors, preventing them from discounting the fuel at the point of sale without going below cost. ECY006590.
- Almost all retail fuel sales are done by entities that fuel suppliers have no right to manage or control, and so fuel suppliers could not certify fuel delivered as exempt without violating the law. ECY006777.

In response to the workgroup members position that Ecology needed to develop a reimbursement program, Ecology reiterated its stance that fuel suppliers were solely responsible for imposing and retaining the CCA fuel surcharges and were, thus, solely responsible for removing them for exempt users. *See* ECY006674; ECY006677-80. Ecology said that because the fuel was exempt there was no reason for fuel suppliers to assess CCA

⁴ As discussed below, this statement about an inability to regulate end users is not true.

surcharges.

The draft meeting summary for the workgroup's final meeting noted that the workgroup members disagreed with Ecology's assertions that the group made substantial progress towards resolving the problems with the farm fuel exemption rule. ECY006998–7004. For example, workgroup members continued to assert that Ecology should rebate fuel fees. ECY006998. Fuel suppliers strongly disagreed with Ecology's contention that the surcharges were retained by the suppliers, reasoning that they used the surcharges to purchase carbon credits from Ecology at auctions. ECY006998–99. A workgroup representative noted that their members were out more than a million dollars because the rules fundamentally did not work. ECY006999. Workgroup members said that Ecology's proposed solutions "aren't practical or implementable" and that "this felt like a forced solution." ECY007003.

At the same time Ecology continued to receive reports that even on bulk fuel deliveries, the farm fuel exemption was rarely

applied, resulting in weekly CCA fuel surcharges to farmers of \$6,000 or more and that farmers were not receiving reimbursements for the wrongful charges. *See* ECY006432; ECY006538; ECY006548. At the same time, fuel suppliers and distributors continued to tell Ecology that the rules for agricultural exemptions were too convoluted, and that Ecology had an obligation to ensure that the end users were exempt, because the revenues from the cap and trade fee that the CCA surcharges were intended to address ultimately flowed to Ecology.⁵ ECY006429; ECY006559.

In the concluding report from the workgroup, Ecology rejected the proposal for refunds or reimbursements to end users

⁵ In 2024, the Legislature recognized this problem persists and took steps toward rectifying the impact of the CCA-charges on agricultural fuel users and transporters in the state operating budget. Laws of 2024, ch. 376, § 410(10) (ESSB 5950).s Specifically, the Legislature appropriated \$30,000,000 of the climate investment account for payments to support farm fuel users and transporters who purchased fuel for agricultural purposes that is exempt from the requirements of the CCA. *Id.* at Sec. 401(10)(a). The appropriation was temporary relief because Ecology's rules remain in effect.

and accused workgroup members of misunderstanding the regulation.⁶ ECY007119, 007124-25, 007128. The final interim guidance document hued closely to Ecology’s earlier guidance, and failed to address the concerns raised during the workgroup, including the lack of incentives for suppliers and distributors to engage with the program, Ecology’s failure to create a mandatory process for exempting agricultural fuels, and its failure to create a reimbursement program. *See* ECY007145–48, ECY007151.

E. Ecology Declined To Engage In Additional Rulemaking And The Superior Court Wrongly Affirmed.

On June 16, 2023, the WFB and the Washington Trucking Associations⁷ petitioned Ecology for additional rulemaking under RCW 34.05.330, asking that the agency ensure that fuel

⁶ Notably, despite rejecting the workgroup’s proposed solutions, Ecology, drafted a response to the Petitioners’ petition for rulemaking that discusses the potential for the work group to solve the problems the Petitioners identified with Ecology’s regulations. ECY006687, ECY006690.

⁷ The Washington Trucking Associations subsequently withdrew as an Appellant.

used for agricultural purposes and fuels used for transporting agricultural products on public highways would be exempt under the CCA. ECY006001–05. Petitioners explained that, since the CCA had begun and despite the statutory exemption, the cost of fuel purchased for agricultural purposes and transportation had increased between \$0.45 and \$0.70 per gallon, resulting in an estimate of \$74 million⁸ added to the price of fuel that should be exempt. ECY006004; CP 1–7. Accordingly, Petitioners asked Ecology to put in place rules that provided (1) an adequate method for users to claim the exemptions set forth in RCW 70A.65.080(7)(e)(i)–(ii) on fuel *before* it is purchased, and (2) a process for the agricultural and transportation industries to be able to obtain refunds from the State for the overcharged amounts due to Ecology’s initial failure to put an adequate exemption system in place. *Id.*

⁸ This amount was calculated as of the time of the filing of the petition in September 2023. It is likely in the hundreds of millions by the date of this filing.

On August 11, 2023, Ecology denied the Petition. ECY006850-56. Ecology asserted that it had “adopted [the CCA] exemptions into our regulations implementing the CCA.” ECY006853. Ecology acknowledged that CCA surcharges were being assessed on exempt fuel sold to farm fuel users and transporters and referred Petitioners to its Interim Guidance and the “Washington Department of Ecology Exemption Certificate (Optional),” which Ecology explained gave fuel suppliers “*suggestions* for processes” to exempt the fuel. *Id.* (emphasis added). Ecology also referred Petitioners to its workgroup, *id.*— whose recommendations Ecology ultimately rejected after the workgroup concluded in October 2023, ECY007119, 007124-25, 007128.

Having exhausted all avenues with Ecology, the WFB and Washington Trucking Associations sought judicial review under the Administrative Procedure Act. The superior court dismissed the petition “for the reasons articulated by the Respondent in their briefing.” CP 912. WFB filed a petition for direct review

before the Washington Supreme Court, which this Court granted.

V. STANDARD OF REVIEW

The Administrative Procedure Act, chapter 34.05 RCW, governs judicial review of an administrative rule. The Court may declare an agency's rule invalid at adoption or as applied if (1) it violates constitutional provisions; (2) exceeds the agency's statutory authority; (3) was adopted without compliance to statutory rule-making procedures; or (4) is arbitrary and capricious. RCW 34.05.570(2)(c); *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 645, 62 P.3d 462 (2003).

Further, RCW 34.05.570(4)(a) provides that a court may review all agency action "not reviewable under (2) or (3) of [RCW 34.05.570]." Ecology's denial of the Petition for Rulemaking falls under this catch-all category of agency action. Relief may be granted if the court determines the action is unconstitutional, outside the statutory authority of the agency, arbitrary or capricious, or taken by persons not lawfully entitled to take such action. RCW 34.05.570(4)(c).

In either form of judicial review, the court may order an agency to take action required by law, order an agency to exercise discretion required by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order. RCW 34.05.774(b).

Determining the extent of Ecology's rule-making authority and the validity of its rules promulgated under the CCA are questions of law reviewed de novo. *Wash. State Hosp. Ass'n v. Wash. State Dep't of Health*, 183 Wn. 2d 590, 595, 353 P.3d 1286 (2015); *Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 437, 120 P.3d 46 (2005). This Court also reviews questions of statutory interpretation de novo. *Wash. State Hosp. Ass'n*, 183 Wn. 2d at 595; *W. Telepage, Inc. v. City of Tacoma Dep't of Fin.*, 140 Wn.2d 599, 607, 998 P.2d 884 (2000).

VI. ARGUMENT

Ecology's farm fuel exemption rules set forth in WAC 173-446-040 and the corresponding sections of WAC 173-441-

122 are invalid because they exceed Ecology's statutory authority and Ecology's adoption of the rules is arbitrary and capricious. The rules exceed Ecology's statutory authority because they fail to adhere to the plain meaning of the CCA exemption—the rules apply only fuel suppliers instead of agricultural farm fuel users. In addition, the rules as promulgated do not require suppliers to seek the exemption, and provide no incentives for them to do so, which makes the statutory exemption illusory. Ecology arbitrarily and capriciously adopted this unworkable exemption framework knowing that voluntary supplier compliance effectively made the mandatory statutory exemption a nullity.

Ecology's denial of WFB's petition for rulemaking was likewise both arbitrary and capricious and failed to adhere to the purpose of the CCA because Ecology knew and acknowledged that its agriculture fuel exemption regulatory scheme was unworkable, but failed to take action to fix the problem.

A. Ecology’s Regulations Exceed Its Statutory Authority Under The CCA.

When the legislature grants an agency the power to enact regulations, the regulations “must be written within the framework and policy of the applicable statutes.” *Ass’n of Washington Bus. v. Washington State Dep’t of Ecology*, 195 Wn.2d 1, 9, 455 P.3d 1126(2020) (quoting *Swinomish Indian Tribal Cmty. v. Dep’t of Ecology*, 178 Wn.2d 571, 580, 311 P.3d 6 (2013)). When an agency enacts a regulation that is not “reasonably consistent with the controlling statutes,” the agency exceeds its statutory authority and the regulation is invalid. *Id.*

“[A]dministrative rules or regulations cannot amend or change legislative enactments.” *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 19, 43 P.3d 4 (2002) (quoting *Dep’t of Ecology v. Theodoratus*, 135 Wn.2d 582, 600, 957 P.2d 1241 (1998)). “[J]ust as an agency cannot promulgate a rule that exceeds its statutory mandate, neither can it diminish statutory protections by failing to act.” *Kumar v. Gate Gourmet Inc.*, 180 Wn.2d 481, 495, 506, 325 P.3d 193 (2014) (concluding

Washington’s Law Against Discrimination includes a duty to reasonably accommodate an employee’s religious practices and reversing trial court’s dismissal of employees’ reasonable accommodation, disparate impact, battery and NIED claims); *cf. Wash. State Hosp. Ass’n v. Wash. State Dep’t of Health*, 183 Wn.2d 590, 595, 353 P.3d 1286 (2015) (concluding a rule was invalid “because it interprets terms in RCW 70.38.105(4)(b) in a manner that is too broad to be consistent with the statute”). Further, courts “do not defer to an agency the power to determine the scope of its own authority.” *Ass’n of Washington Bus.*, 195 Wn.2d at 10 (quoting *Lenander v. Dep’t of Ret. Sys.*, 186 Wn.2d 393, 409, 377 P.3d 199 (2016)).

To determine whether a regulation is consistent with a statute, courts engage in statutory interpretation. *Spokane County v. Dep’t of Fish & Wildlife*, 192 Wn.2d 453, 457, 430 P.3d 655 (2018). When interpreting a statute, the “court’s goal is to determine and effectuate legislature’s intent.” *Ctr. for Envtl. Law & Policy v. Dep’t of Ecology*, 196 Wn.2d 17, 29, 468 P.3d

1064(2020). “The court determines plain meaning from all that the legislature has said in the statute and related statutes that disclose legislative intent about the provision in question,” along with the “plain meaning of the language” in the statute. *Id.* Where the plain meaning is not clear from the words and context of the statute, or is susceptible to more than one reasonable meaning, the court may look to legislative history.” *Alaska Airlines, Inc. v. Dep’t of Labor & Indus.*, 1 Wn.3d 666, 675, 531 P.3d 252 (2023).

The CCA states that agricultural fuel users and transporters are exempt from the CCA and the corresponding burdens the program imposes. RCW 70A.65.080(7)(e)(i) (“[m]otor vehicle fuel or special fuel that is *used* exclusively for agricultural purposes by a *farm fuel user*” is “exempt from coverage in the program, regardless of the emissions reported under RCW 70A.15.2200” (emphasis added)). Further, the CCA directs Ecology to promulgate regulations to carry out this statutory purpose. RCW 70A.65.220; RCW 70A.65.080(7)(e)(ii).

Ecology’s regulations are inconsistent with the plain statutory meaning because they apply the exemption to the supplier, not the end farm fuel user. WAC 173-446-040(2)(b) (“The following supplier emissions are not covered emissions if the *supplier* can demonstrate” (emphasis added)). Further, without any incentives for suppliers to comply, the regulations as promulgated cover emissions that the legislature intended to exempt from the CCA. The brief examines each deficiency in turn.

1. The agricultural fuel exemption applies to end user of the fuel, not suppliers.

The plain meaning of the statute and the legislative history demonstrates that the agricultural fuel exemption is meant to exempt farm fuel users—farmers—from the burdens imposed by the CCA. RCW 70A.65.080(7)(e)(i)–(ii).

a. The plain language and structure demonstrates that the agricultural exemption is intended to benefit farmers.

The CCA expressly states that the agricultural use exemption is intended to benefit farmers. The statute provides

that Ecology “must maintain this expanded [agricultural] exemption for a period of five years, in order to provide the *agricultural sector* with a feasible transition period.” RCW 70A.65.080(7)(e)(ii) (emphasis added). Further, the statute expressly places the decision of whether to seek the exemption on agricultural users; the statute provides that the “exemption is available *only if a buyer* of motor vehicle fuel or special fuel provides the seller with an exemption certificate in a form and manner prescribed by” Ecology. RCW 70A.65.080(7)(e)(i) (emphasis added). This plain language demonstrates that the legislature intended to exempt farmers, the users of agricultural fuel, from increased fuel costs because of the CCA.

The user-focused purpose of the exemption is reinforced by the statute’s reference to RCW 82.08.865, which exempts “farm fuel users” from sales and business and operation taxes. RCW 70A.65.080(7)(e)(i) (“For the purposes of this subsection, ‘agricultural purposes’ and ‘farm fuel user’ have the same meanings as provided in RCW 82.08.865.”). Further, the two

statutes contain nearly identical language providing that “[t]his exemption is available only if the buyer provides the seller with an exemption certificate in a form and manner prescribed by the department.” RCW 82.08.865; RCW 70A.65.080(7)(e)(i) (“This exemption is available only if a buyer *of motor vehicle fuel or special fuel* provides the seller with an exemption certificate in a form and manner prescribed by the department.” (emphasis added to highlight difference)). In the tax context, this language means that “farm fuel users” seek the tax exemption and benefit from the exemption. *See Farmer’s Certificate for Wholesale Purchases and Sales Tax Exemptions*, Form 27-0036, Department of Revenue, <https://dor.wa.gov/sites/default/files/2022-02/27-0036.pdf>.

Not only is the end user certification method baked into the plain language of the statute, but it makes sense logically as “farm fuel users” are in the best position to know and track the purpose for which their fuel was used. Taken together, the clear

expressed Legislative intent is that qualified end users be spared the costs of the CCA's cap-and-invest framework.

b. The legislative history of the agricultural exemption shows that the purpose is to benefit farmers.

Even if the Court determines that the language and structure of the statute do not provide plain meaning of the legislative intent, the legislative history also gives illuminating insight into the legislative intent.

When the CCA bill was first introduced during the 2021–2022 Legislative Session, it did not include an exemption for farmers. *See* S.B. 5126, 67th Leg. § 7(6) (2021), <https://lawfilesexternal.wa.gov/biennium/2021-22/Pdf/Bills/Senate%20Bills/5126.pdf?q=20250409225425>.

WFB and others testified during the public hearings on the bill about the negative impact that increased fuel prices would have on Washington farmers. *See* House Environment and Energy Committee, Public Hearing: E2SSB 5126 - Concerning the Washington climate commitment act., April 14, 2021, 8:00 am,

<https://www.tvw.org/watch/?clientID=9375922947&eventID=2021041204>, remarks beginning at 48:43. In opposition to the bill Tom Davis, a lobbyist for WFB, said: “One of our major concerns remains the increase in gas prices. Fuel costs increases are very damaging to farm operations. . . . All farms rely on fossil fuels . . . higher fuel cost increases the cost to grow the crops, makes farmers less competitive with farmers in other states and in other countries. Sadly farmers will get nothing from this bill except for higher costs.” *Id.*

In response, the Environment and Energy Committee adopted an amendment to the bill to add the agricultural exemption. The sponsor of the amendment, Representative Shewmaker said:

Our farmers are price takers⁹ and they’re also on the frontlines of the effects of climate change. That

⁹ “A price taker is an individual or company that must accept prevailing prices in a market, lacking the market share to influence market price on its own.” *Price Taker: Definition, Perfect Competition, and Examples*, Investopedia, <https://www.investopedia.com/terms/p/pricetaker.asp> (last visited April 13, 2025).

means they have to be a part of the solution We've been doing this work together with things like the sustainable farm and fields work, other voluntary early conservation programs and we want to make sure that that next generation has the tools they need to get into farming and prosper, which is just so hard right now with these thin margins. So we're giving farmers an on ramp. . . . we've created five years where they can get *rebates for the carbon price on their farm transport fuels* and we've *exempted on-farm use* of fuels which we expect, given where the market's going, people are going to want to switch to [electric options].

House Environment and Energy Committee, Executive Session:

E2SSB 5126 - Concerning the Washington climate commitment

act., April 16, 2021, 3:00 pm,

<https://www.tvw.org/watch/?clientID=9375922947&eventID=2021041223>, remarks beginning at 1:05:18. These remarks

demonstrate legislative intention to create an exemption that

benefits farmers and protects them from increased fuel prices

because of the CCA cap and invest market. In fact,

Representative Shewmaker describes the statutory exemption as

allowing farmers to receive “rebates for the carbon price on their

farm transport fuels.” *Id.* The legislature adopted the proposed committee amendments whole.

c. Ecology’s regulations are inconsistent with the statute because they apply the agriculture exemption to fuel suppliers, not farmers.

Despite the Legislature’s clear intent that farmers be spared the increased costs associated with the CCA, Ecology adopted a supplier-focused framework that guaranteed that farmers would not be exempted from the costs of compliance and would pay more for fuel under the CCA. *See* WAC 173-446-040(2)(b); *see also* WAC 173-441-122(2)(d)(xi)(C).¹⁰ Ecology’s

¹⁰ At the Superior Court, Ecology claimed that WFB never challenged any part of WAC 173-441-122 and only challenged WAC 173-446. *See* CP 842. The Petition plainly explained the interoperation of WAC 173-441-122 and WAC 173-446-040. *See* CP 2–4. The operative portion of the exemption is found in WAC 173-446-040, but the exemption is tied into a process set out in WAC 173-144-122. *See* WAC 173-446-040(2)(b)(iii) (“Motor vehicle fuel or special fuel used exclusively for agricultural purposes by a farm fuel user as described in WAC 173-441-122 (5)(d)(xi)(C).”). Thus, WFB properly discusses and challenges both regulations.

rules are fundamentally inconsistent with the CCA on its plain face, as interpreted by Ecology, and as applied practically.

Ecology's rules apply the exemption to fuel suppliers, despite the clear statutory purpose to exempt farmers from coverage under the CCA. The regulations exempt "*supplier* emissions . . . if the *supplier* can demonstrate . . . that the emissions originate from: . . . Motor vehicle fuel or special fuel used exclusively for agricultural purposes by a farm fuel user . . . [or] Fuels used for transporting agricultural products on public highways." WAC 173-446-040 (2)(b)(i)–(ii) (emphasis added).

Ecology does not dispute that its regulations only apply to suppliers. *See* ECY005427, ECY006674; ECY006677–80. In fact, the administrative record demonstrates that Ecology knew that under its supplier-focused rule, farmers continue to pay CCA surcharges on exempt fuel. ECY006999 (workgroup member noted that farmers were out more than a million dollars).

In defense of this structure, Ecology argued that the benefits of this exemption for suppliers would trickle down to

farmers through “market forces.” CP 839. Ecology’s argument ignores that the CCA creates a highly regulated market, and the statutory exemption was specifically adopted to protect farmers from the “market forces” that would otherwise harm them and potentially run them out of business as the cost of farming in Washington becomes too high. *See* House Environment and Energy Committee, Executive Session: E2SSB 5126 - Concerning the Washington climate commitment act., April 16, 2021, 3:00 pm, <https://www.tvw.org/watch/?clientID=9375922947&eventID=2021041223>, remarks beginning at 1:05:18.

The CCA slowly increases the financial pressure on covered entities over time to encourage innovation and adaption. *See* 70A.65.070. But the short term reality of the CCA is that it has an extreme and detrimental impact on farmers, especially small farms where margins are very narrow. *See* House Environment and Energy Committee, Executive Session: E2SSB 5126 - Concerning the Washington climate commitment act.,

April 16, 2021, 3:00 pm,

<https://www.tvw.org/watch/?clientID=9375922947&eventID=2021041223>, remarks beginning at 1:05:18. As Representative Shewmaker noted when she introduced this exemption, farmers are “price takers” and have no control over the fuel prices they pay to run their farms. *Id.* Because of this market imbalance, suppliers have no economic incentive to engage with the program and to pass the savings from agricultural exemptions on to farmers. Further, farmers have no power to seek the exemption themselves if the fuel distributor declines to accept their certification or the ultimate supplier declines to engage seek the exemption.

Ecology and the working group even noted that some suppliers and distributors still charge farmers a CCA surcharge on fuel that should be exempt. *See* ECY006432; ECY006538; ECY006548 (even after it circulated its interpretive guidance, Ecology continued to receive reports that even on bulk fuel deliveries, the agricultural exemption was rarely applied,

resulting in weekly CCA fuel surcharges to farmers of \$6,000 or more and that farmers were not receiving reimbursements for the wrongful charges). This especially impacts small farms. *See* ECY004429, CP 5 (“These unlawful added costs are particularly harmful to small farmers across Washington who make up nearly 67 percent of operations in the state and that represent higher overall percentages of women and minority producers and principal operators.”). Ecology’s regulatory structure has already cost Washington farmers (and those consumers purchasing their goods) hundreds of millions of dollars and it continues to harm them.¹¹

The supplier focused aspect of Ecology’s rules cut the intended beneficiaries of the exemption, the farmers, out of the picture with no guarantee that farmers will see any saving on fuel

¹¹ Driving farmers out of business in Washington is not a solution to climate change. Food will merely be grown in other states that are not taking steps to address climate change, and other countries where there are even fewer protections for the environment and workers.

purchases. It is illogical to say that the Legislature intended to give fuel suppliers a windfall through this exemption. Further, while anecdotally some suppliers may have passed the savings on to farmers, *see* ECY005736, Ecology's regulations provide no requirement that they do so. The record demonstrates that farmers continue to pay higher prices for fuel that should be exempt because of this supplier focused structure.

d. Ecology has authority to enact rules that directly exempt farmers.

In its response brief below, which analysis the superior court adopted, Ecology argued that it does not have authority under the CCA to provide the exemption directly to farmers. CP at 852. Ecology advanced a similar argument in the working group, saying that it “can’t regulate end users.” ECY006999.

“When a power is granted to an agency, everything lawful and necessary to the *effectual execution* of the power is also granted by implication of law.” *Tuerk v. State, Dep’t of Licensing*, 123 Wn.2d 120, 125, 864 P.2d 1382 (1994) (internal

citations omitted and emphasis added). Further, “implied authority is found where an agency is charged with a *specific duty*, but the means of accomplishing that duty are not set forth by the Legislature.” *Id.* at 125; *accord Smith v. Spokane County*, 89 Wn. App. 340, 359, 948 P.2d 1301 (1997) (“Although the statute does not expressly grant the authority for administration and operation expenses, it is recognized that when a statute expressly grants the general authority to achieve a lawful objective, it implies the right to perform such acts as are reasonably necessary to achieve the objective.”); *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 74, 110 P.3d 812 (2005).

The CCA expressly gives Ecology power to promulgate regulations to exempt the use of agricultural fuel from the Act and the authority to adopt rules to implement the exemption process. RCW 70A.65.080(7)(e)(ii), .220. The plain meaning of the agricultural exemption is to benefit farmers. Further, the statute provides that farm fuel users are the parties that must document the fuel use and provide an “exemption certificate” to

sellers. *See* RCW 70A.65.080(7)(e)(i). Thus, Ecology has the power to regulate farm fuel users as that is the only way to “*effectual[y] execut[e]*” the exemption. *See Tuerk*, 123 Wn.2d at 125.

Further, the CCA grants Ecology “implied authority” over end users because the statute gives Ecology a “specific duty” to “determine a method for expanding the exemption provided under (e)(i) of this subsection to include fuels used for the purpose of transporting agricultural products on public highways.” 70A.65.080(7)(e)(ii). Ecology has the statutory authority to carry out this duty by regulating end users of fuel—in fact the record establishes that this is the only effective way to carry out this duty. *See* ECY006998–7004 (draft summary of final workgroup meeting in which members noted that there continue to be barriers for suppliers to seek the exemption, and end users continue to pay CCA surcharges).

In support of its argument that it has no power over end users of agricultural fuel, Ecology points to the provisions of the

CCA that define “covered entities,” saying that because the statute explicitly includes “covered entities” in the cap and invest and reporting requirements of the statute, Ecology may *only* regulate “covered entities” under the CCA. CP 852.

WFB does not dispute that “covered entities” such as suppliers must engage in the cap and invest market to purchase carbon credits and remit the credits to Ecology based on their reported emissions and may exclude exempt fuel sales from their reportable emissions. RCW 70A.65.080(7). But the analysis does not end there; the statute also provides that it is the *end users* that must provide proof of exemption and who should be spared the burden of the CCA. *See* RCW 70A.65.080(7)(e)(i).

The structure of the agricultural exemption itself distinguishes the agricultural use exemption for farmers from the supplier’s reporting requirements. Emissions from fuel used in agriculture are exempt from the CCA “regardless of the emissions reported under RCW 70A.15.2200.” RCW 70A.65.080(7)(e)(i). The CCA specifically ties the definition of

“covered entities” to emissions reported under RCW 70A.15.2200. RCW 70A.65.080(1). Thus, the exemption must be made available to farmers based on their own reported use, not based on the supplier’s report of that use. This distinction in the statute demonstrates that the agricultural use exemption was meant to apply to end users of the agricultural fuel, “regardless” of the emissions reported by the suppliers. Ecology’s narrow interpretation that the CCA can only regulate “covered entities” that participate in the cap and invest market is simply incorrect.

2. The agricultural fuel exemption is mandatory for suppliers, not optional.

Even if the Court accepts Ecology’s argument that Ecology does not have the authority to regulate farm fuel users, the rules improperly make the program entirely optional for fuel suppliers. The statute provides that the emissions “are exempt,” not that the emissions *may* be exempt. RCW 70A.65.080(7). Further, Ecology “*must* determine a method for expanding the

exemption . . . to include fuels used for the purpose of transporting agricultural products on public highways.”¹² *Id.* at (7)(e)(ii). The only caveat to this mandatory language provides that “[t]his exemption is available only if a buyer of motor vehicle fuel or special fuel provides the seller with an exemption certificate in a form and manner prescribed by the department.”¹³ *Id.* at (7)(e)(i). Thus, the only way suppliers do not have an

¹² Washington courts have long recognized “that the word ‘shall’ in a statute is presumptively imperative and operates to create a duty.” *Ctr. for Env’tl. Law & Policy v. Dep’t of Ecology*, 196 Wn.2d 17, 30–31, 468 P.3d 1064 (2020) (quoting *Erection Co. v. Dep’t of Labor & Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993)). Thus, “unless a contrary legislative intent is apparent,” the word “shall” imposes a mandatory requirement on an agency to follow the legislature’s directive. *Id.* (emphasis in original). Same too with the word “must” in a statute. See *Khmelnitskaya v. Wang*, No. 82823-1-I, 2022 WL 2229494, *2 (Wn. App. July 21, 2022) (unpub. op.) (determining the words “shall” and “must” both to denote a mandatory requirement in a statute) (cited per GR 14.1); see also *In re Ellis*, 118 Wash. 484, 489, 203 P. 957(1922) (analyzing whether “may” means “must” or “shall” in a statute); *W. Wis. R. Co. v. Foley*, 94 U.S. 100, 103, 24 L. Ed. 71 (1876) (“‘Shall’ ought undoubtedly to be construed as meaning ‘must.’”).

¹³ This language mirrors RCW 82.08.865, in which the word “buyer” refers to the end user, the farmer.

obligation to report these exempt fuel uses is if the end-user—buyer—fails to report the exempt use to the seller.¹⁴

Ecology's rules provides that emissions from agricultural fuels are exempt if the supplier can demonstrate that the emissions originated from fuel used in agriculture "as described in WAC 173-441-122 (5)(d)(xi)(C)." WAC 173-441-122 in turn provides that suppliers "*may* separately indicate the quantity of each fuel type if the fuel supplier can demonstrate to ecology's satisfaction that the fuel is used for" covered agricultural purposes. WAC 173-441-122 (5)(d)(xi)(C). In its guidance documents Ecology confirmed that under its regulations suppliers are not required to seek an exemption for agricultural

¹⁴ Below, Ecology argued that the statute does not provide mandatory reporting requirements for exempt emissions under WAC 173-441-122. CP 843. This argument misses the point—this case only turns on what suppliers are required to report *because* Ecology tied the farm fuel exemption to supplier's reporting obligations. Nothing in the statute noted that this link was required, but when Ecology chose to link these two sperate requirements, it could not abandon the requirements of the exemption by folding it into an optional reporting requirement.

fuel. ECY005427. Further, Ecology noted that because it imposes “emissions reporting and compliance obligations” on suppliers, “it is *therefore the responsibility of the covered fuel supplier to assemble and retain all necessary documentation,*” pertaining to exempt fuels. *Id.*

As Ecology’s own working group repeatedly pointed out, suppliers have a limited “line of sight” into the end users use of fuel, especially non-bulk fuel sold through one or more distributors, such as gas stations. ECY007122. Thus, under Ecology’s scheme, they take on a reporting obligation without a clear way to ensure that they are in compliance with their own obligation. *See* ECY006999 (workgroup members express concern about how to identify deal with “fraudulent” or non-compliant users). Beyond the risk, Ecology’s existing program creates no incentive for suppliers to actually exempt farm fuel users and transporters, because suppliers could just impose the CCA surcharge on all fuel sold and avoid the need to pay for additional compliance work.

This regulatory scheme goes against the statutory intent that the exemption be mandatory, not optional. The scheme also fails to comply with the statute's plain intent: to provide an exemption from the CCA surcharges for farmers. Thus, the regulations exceed Ecology's statutory authority because Ecology's rules implementing the exemption are illusory.

At the superior court, Ecology further reasoned that the cap and invest program is guided by market forces, thus Ecology need not make the exemption mandatory for suppliers to take advantage of it. CP at 841–42. However, the administrative record shows that many fuel suppliers do not report exempted fuel because of the logistical challenges of determining the use of the fuel sold and the corresponding regulatory risk that it poses for suppliers. *See* ECY006432; ECY006538; ECY006548. Ecology was well aware that the supposed market forces were not fulfilling Ecology's statutory duty to provide an exemption for farmers.

The fact that some suppliers are voluntarily complying with the exemption and offering rebates does not solve this problem. *See* ECY007140 (workgroup members continued to express concern about the issue of non-bulk fuel sales at the conclusion of the group). As Ecology noted, the suppliers applying the exemptions are bulk suppliers that typically sell to larger farms, while smaller farms and transporters purchase non-bulk fuel from third party distributors such as retail gas stations. *See* ECY005735. Ecology noted that “we know that some big suppliers have committed [to providing exemptions to farmers], but whether smaller distributors are following suit (or just pocketing potential profit) is a bigger question that has direct impacts on farmers.” *Id.* Further, farmers, especially small farmers, do not have the market power to demand suppliers accept the exemption certificates and pass along the cost savings to the farmers. Thus, the market based solution does not provide an actual exemption for farm fuel users.

Ecology's rules exceed the scope of its statutory authority by failing to make the exemption mandatory.

B. Ecology Acted In An Arbitrary And Capricious Manner When It Knowingly Adopted An Unworkable Exemption Framework.

“An agency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances.” *Puget Sound Harvesters Ass’n v. Wash. State Dep’t of Fish & Wildlife*, 157 Wn. App. 935, 945, 239 P.3d 1140 (2010). In making this determination, “the reviewing court must consider the relevant portions of the rule-making file and the agency’s explanations for adopting the rule as part of its review.” *Wash. Indep. Tel. Ass’n v. Wash. Utils. & Transp. Comm’n*, 148 Wn.2d 887, 906, 64 P.3d 606(2003). An agency must also explain its rulemaking, identifying the agency’s reasons for the rule and indicating how the final rule reflects agency consideration of any public comments. *See* RCW 34.05.325(6)(a).

Ecology's adoption of the agriculture fuel exemption rules under WAC 173-446-040(2)(b) and WAC 173-441-122-(5)(d) were arbitrary and capricious because Ecology recognized from the outset that its adopted regulatory framework created a substantial risk that exempt farm fuel users and transporters would be swept into the CCA. *See* ECY002904; ECY002933; ECY002959.

From the beginning, Ecology recognized that there were serious and significant problems with its approach to the farm fuel exemption. Ecology employees observed that complying with the Legislature's mandate might require a "completely new reporting for agric[ultural] on -road" and asked the question "How to handle exemptions?" *See* ECY002904. Ecology also knew that "the easiest way to comply with this program is not currently viable," ECY002933, despite acknowledging, at least initially, that it was incumbent on them to "devise a 'method' for making that [the farm fuel exemption] possible." ECY002958. But instead of focusing on developing a workable solution,

Ecology focused on the fact that creating such program “could result in considerable paperwork,” prompting the question “[h]ow will we implement this, and perhaps more importantly, *how important is enforcement?*”¹⁵ *Id.* (emphasis added). Indeed, Ecology observed that “[t]here is *almost no way to create a paper-trail of receipts* showing that fuel produced was end-used for Ag purposes.” ECY002959.

Despite identifying these challenges, Ecology never considered—even internally—alternative regulatory structures. *Compare* ECY002969 *with* ECY002973; WSR 22-20-056. Instead, Ecology threw up its proverbial hands and created an exemption program that exempts fuel only if suppliers *choose* to

¹⁵ Ecology defends its comments about avoiding paperwork as merely complying with RCW 34.05.328(1)(e). CP 845. But the comments about avoiding paperwork did not occur in the context of a stated desire to reduce the burden on the regulated community as required by that statute. But by adopting its chosen method, Ecology created more paperwork for suppliers who chose to implement exemption. This was a clear disregard of Ecology’s statutory duty to ensure effective exemptions for the intended purpose.

take on a task that Ecology noted would result in considerable paperwork and was nearly impossible—creating a paper trail for the end use of fuel. Further, Ecology offered no assistance to suppliers in the form of a mandate or safe harbor provision for acceptance of agricultural end user certificates. *See* ECY002959 (noting that the farm fuel exemption “will ultimately become an issue of compliance enforcement” for suppliers). Yet Ecology illogically expected suppliers to take on the cost and regulatory risk and still pass the savings on to consumers.

Ecology’s decision was “willful and unreasoning and taken without regard to the attending facts or circumstances” that Ecology itself highlighted when creating the regulatory framework. *Puget Sound Harvesters*, 157 Wn. App at 945.

C. Ecology’s Denial Of WFB’s Petition For Rulemaking Was Arbitrary And Capricious And Exceeded Its Statutory Authority.

While courts generally accord agencies “wide discretion in deciding to forgo rulemaking in an area . . . an agency’s allusion to fiscal considerations and prioritizing cannot be

regarded as an unbeatable trump in the agency's hand; on review, a plaintiff has the opportunity to show that the agency's failure to act was "[a]rbitrary or capricious" or beyond the agency's statutory authority. *Rios v. Wash. Dep't of Labor & Indus.*, 145 Wn.2d 483, 507, 39 P.3d 961 (2002).

In *Rios*, the court held that the Department of Labor and Industries' denial of Rios's petition for rulemaking to create a monitoring program for farm workers exposed to a specific pesticide was arbitrary. *Id.* At the time of the petition, "the Department had already invested its resources in studying cholinesterase-inhibiting pesticides and because the report of its own team of technical experts had, in light of the most current research, deemed a monitoring program both necessary and doable, the Department's 1997 denial of the pesticide handlers' request was 'unreasoning and taken without regard to the attending facts or circumstances.'" *Id.* at 508 (quoting *Hillis v. State, Dep't of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997)).

WFB sent a Petition for Rulemaking asking Ecology to put in place rules that provided (1) an adequate method for users to claim the exemptions on fuel *before* it is purchased and (2) a process for the agricultural and transportation industries to be able to obtain refunds from the State for the overcharged amounts due to Ecology's initial failure to put an adequate exemption system in place. ECY006004.

Ecology denied the petition, even though it knew that some agricultural fuel users were still paying CCA surcharges on exempt fuel. ECY006845. Ecology's denial was based on its flawed interpretation that the CCA only allowed it to regulate suppliers, as discussed above. Ecology reasoned that "[t]he fact that the guidance is being implemented successfully by many fuel suppliers suggests that there is no need for a change to our current rules." ECY006848. Ecology further explained that it was denying the petition because it was in the process of working towards solutions with the workgroup, which could include

“expanding Ecology’s guidance, initiating rulemaking, or pursuing other actions.” ECY006848.

However, Ecology did not take significant actions to address the problems raised in the workgroup. Multiple members of the workgroup expressed concerns about regulatory exposure for suppliers who have no way to verify the use of the fuel that they sell. One member noted we “can get all the documentation we want, but if the third party verifiers say they don’t believe the end user – then [we are] stuck and don’t have anything else to do; trusting customer with attestation.” ECY007002. Another member noted, in the context of non-bulk fuel for sold at gas stations, Ecology’s proposals “are not practical solutions. I don’t view these as implementable or practical. Tried to bring up these concerns last meeting, but we were shut down with last meeting,” further “felt like a forced solution; there is a high turnover for retail station owners.” ECY007002–03. Another member noted, “[m]y members are out over a million dollars. These don’t seem like solutions to me.” ECY006999. Ecology responded that it

“can’t regulate end users.” *Id.* Ecology recognized that “[d]uring the final meeting, workgroup members shared concerns relating to the 3rd party verification process and potential liability in the event of fraudulent attestations.” ECY007105.

Despite the issues with the farm fuel exemption rule, Ecology refused to consider changes to the fundamental structure of the regulations and never explained why it believes that it has no authority to collect compliance forms directly from end users of farm fuel. *See* ECY007125 (“The point of regulation cannot move, and compliance obligations are non-transferable.”). Thus, its denial of the petition for rulemaking was arbitrary and capricious.

Like the Department of Labor and Industries in *Rios*, Ecology specifically identified the problem with its regulations and devoted resources to finding a solution, including by forming the industry working group. The working group presented Ecology with multiple viable solutions, such as making the reporting requirement mandatory for fuel suppliers.

Yet, despite its recognition of the deficiency in its regulations, and its reliance on the existence of the workgroup as a basis for denying the petition, Ecology eventually rejected the recommendations of the working group and doubled down on its flawed approach to the farm fuel exemption instead. This is a textbook case of an arbitrary and capricious act taken without reason and “without regard to the attending facts or circumstances.” *Hillis*, 131 Wn.2d at 383.

VII. CONCLUSION

For these reasons, WFB respectfully asks the Court to declare Ecology’s rules on the farm fuel exemption invalid and order Ecology to engage in rulemaking that complies with the law.

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Respectfully submitted April 14, 2025,

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*This brief contains 10,437 words in
compliance with RAP 18.17(c)(2).*

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury of the laws of the State of Washington that on April 14, 2025, I caused to be served a copy of the attached document to the following person(s) in the manner indicated below at the following address(es):

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April 14, 2025 - 4:04 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 103,413-0
Appellate Court Case Title: Washington Farm Bureau et al. v. Washington Dept. of Ecology
Superior Court Case Number: 23-2-02916-7

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