NO. 1034130

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

RESPONDENT STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY'S RESPONSE TO OPENING BRIEF

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I. INTRODUCTION

In 2021, the Washington State Legislature enacted the Climate Commitment Act (CCA), Washington's landmark effort to confront the climate crisis and protect Washingtonians from its most harmful effects. See Laws of 2021, ch. 315–317. The CCA establishes an economy-wide, market-based program designed to reduce greenhouse gas emissions from the state's largest emitters. As relevant here, the CCA requires the largest fuel suppliers in Washington to purchase and retire compliance instruments equal to their annual greenhouse gas emissions.

At the same time, the CCA exempts certain kinds of emissions, including those arising from the use of agricultural fuels. Specifically, suppliers do not need compliance instruments where they can demonstrate that their emissions were associated with fuels used for agricultural purposes or to transport agricultural products. Recognizing the importance of these exemptions to Washington's farmers, the Department of Ecology worked diligently to effectuate them, adopting rules that allow

covered suppliers to subtract emissions from agricultural fuels from their total covered emissions and pass their compliance savings on to agricultural customers. These efforts have been successful, with dozens of fuel suppliers around the state working with farmers directly to supply lower-cost fuels.

Washington Farm Bureau (Farm Bureau) now challenges Ecology's rules as insufficient to control the retail price of fuels purchased for agricultural purposes. Dissatisfied with the Legislature's policy choices, the Farm Bureau asks the Court to contravene legislative intent by interpreting the CCA to not only grant but mandate Ecology's exercise of expansive, implied authority—authority that is conspicuously absent from the statute's structure and plain text. Farm Bureau's challenge fails for multiple reasons.

First, the true source of the Farm Bureau's dissatisfaction is not Ecology's rules, but instead the statutory exemption itself. The CCA places the point of regulation for facilitating the agricultural fuels exemptions on large fuel suppliers—it does not

grant Ecology sweeping authority to regulate the entire fuel supply chain as the Farm Bureau suggests, nor does it allow Ecology to redirect auction proceeds to provide rebates directly to end users. The Legislature confirmed this point when it endorsed Ecology's implementation of the exemptions during the 2025 Legislative session, refining Ecology's authority without rejecting the agency's incentive-based, supplier-focused approach.

Second, the Farm Bureau improperly challenges Ecology's rule allowing (without mandating) suppliers to claim the agricultural fuels exemptions, despite failing to identify that rule in their petition for review. Without the rulemaking file before the court, the Court need not consider the Farm Bureau's arguments as to the rule's validity. Even if the Farm Bureau has properly stated claims regarding Ecology's optional reporting rule, neither the CCA nor the Washington Clean Air Act mandate the relief the Farm Bureau requests.

Finally, the Farm Bureau's arguments that Ecology acted arbitrarily ignore the agency's thoughtful deliberations in developing its exemption rules and its considerable efforts to work with stakeholders and the regulated community to ensure those rules function as intended. Ecology's denial of the Farm Bureau's petition for rulemaking was entirely lawful here, where the Farm Bureau requested relief that was either unauthorized or not mandated under the CCA, and where the administrative record amply demonstrates Ecology's progress on improving implementation under its current rules. This Court should affirm.

II. ISSUES PRESENTED

1. Did the superior court properly conclude that Ecology's rules under Chapter 173-446 WAC were lawful where they are consistent with the CCA's plain language, which places the point of regulation on fuel suppliers, not end users, and does not mandate that fuel suppliers claim exemptions?

2. Did the superior court correctly conclude that Ecology properly denied the Farm Bureau's petition for

rulemaking where the Farm Bureau's requested relief exceeded Ecology's authority, Ecology was still exploring the nature of the issue and potential solutions through a stakeholder workgroup, and fuel suppliers were increasingly able to successfully access the exemption under Ecology's rules and associated guidance?

III. STATEMENT OF THE CASE

A. The Climate Commitment Act and the Agricultural Fuels Exemptions

The primary purpose of the CCA is to reduce statewide greenhouse gas emissions, consistent with the state's emissions limits for 2030, 2040, and 2050, respectively. *See* RCW 70A.65.060(1); RCW 70A.45.020(1)(a). The Legislature directed Ecology to implement this purpose by establishing a declining cap on the aggregate emissions from certain regulated parties—referred to as "covered entities"—and by administering a statewide program "to track, verify, and enforce compliance through the use of compliance instruments." RCW 70A.65.060(1). The CCA establishes which parties are subject to regulation as covered entities, including a subset of

"suppliers" of fuels like diesel and gasoline—namely, those that supply an amount of fuel to Washington customers that results in emissions of at least 25,000 metric tons of carbon dioxide equivalent (MT CO_2e) annually. *See* RCW 70A.65.080(1)(d).

The CCA requires each covered entity to obtain and surrender to Ecology a sufficient number of "compliance instruments" to cover its "compliance obligation"—the amount of greenhouse gas emissions for which it is responsible. *See* RCW 70A.65.010(19), .310. There are two types of compliance instruments, emission allowances and offset credits, each of which represents one MT CO_2e. RCW 70A.65.010(1), (18), (52). Each covered entity has flexibility in determining how to satisfy its compliance obligation by choosing the optimal mix of emissions reductions and compliance instruments. Each year, a certain number of allowances are offered for sale by Ecology at auctions (held at least quarterly) through a sealed bidding process administered by an independent contractor, forming the primary market for allowances. RCW 70A.65.100; WAC 173-

446-350(2). Allowances and offset credits may also be purchased and sold on the secondary market. RCW 70A.65.090(8); WAC 173-446-400(7).

The Legislature exempted certain categories of greenhouse gas emissions from coverage under the program, including emissions from "[m]otor vehicle fuel or special fuel that is used exclusively for agricultural purposes by a farm fuel user." RCW 70A.65.080(7), (7)(e)(i). The Legislature also directed Ecology to "determine a method for expanding" this exemption to include emissions from "fuels used for the purpose of transporting agricultural products on public highways." RCW 70A.65.080(7)(e)(ii). The CCA makes this exemption 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).

Accordingly, the statute lays out the framework for Ecology to regulate emissions from fossil fuels—large suppliers must purchase compliance instruments to account for emissions

from the fuels they sell, but they may claim exemptions as appropriate, including where an agricultural end-user of their fuel presents an exemption certificate in a manner specified by Ecology.

B. Cap-and-Invest Program Rulemaking

The CCA became effective on July 25, 2021, and required Ecology to adopt rules to implement the cap-and-invest program by October 1, 2022. *See* Laws of 2021, ch. 316; RCW 70A.65.070(1)(a), .220. This compressed rulemaking timeline required rapid and complex efforts to recruit new staff, consult with other agencies and experts in the field of carbon markets, and conduct extensive public engagement. CP 98–158 (ECY002919–2921, ECY002926–2930).[1]

[1] The agency's administrative record consists of 7,185 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, and consistent with the Farm Bureau's briefing, Ecology cites only to the relevant pages of the agency record ("ECYXXX").

On May 16, 2022, Ecology filed a notice of proposed rulemaking, ECY003764–3773, and published its proposed rule language for public review and comment. ECY003626–3763. Consistent with the CCA, Ecology's rule exempted emissions resulting from motor vehicle fuel or special fuel used exclusively for agricultural purposes by a farm fuel user and from fuels used to transport agricultural products on public highways. ECY003637–3638 (proposed WAC 173-446-040(2)(b)(i)–(iv)).

Ecology held four public hearings on the proposed rule in June 2022. *See* ECY003764. Ecology also extended the public comment period to stay open through July 15, 2022. ECY004288. Ecology ultimately received 1,401 comment submissions and made more than 100 changes to the rule language in response. *See* ECY005050–5104. Ecology received no feedback, however, on the agricultural fuels exemptions

during the public comment period. *See* ECY005041–5356 (showing Ecology's responses to all comments received).[2]

As a result, Ecology adopted the proposed rule language for these exemptions without change:

> (b) 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).

ECY004883 (adopted WAC 173-446-040(2)(b)(iii)–(iv)).

Ecology's final rule, adopted September 29, 2022, took effect on October 30, 2022. *See* ECY005357–5358.

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[2] The Washington Trucking Association submitted a comment about the potential for the rules to increase fuel costs in general, but its letter did not reference or criticize the proposed exemption mechanisms. *See* ECY004429–4431. Washington Farm Bureau did not submit any comments on the proposed rule.

C. Cap-and-Invest Program Implementation

The cap-and-invest program's first four-year compliance period began on January 1, 2023. RCW 70A.65.070(1)(a), .310(1). Shortly thereafter, Ecology began receiving complaints from the agriculture industry that fuel suppliers were imposing new surcharges on fuels whose emissions are eligible for exemptions under the CCA. *See* ECY007160.

Ecology quickly issued interpretive guidance concerning the exemption for emissions from fuels used for agricultural purposes by a farm fuel user, ECY005413–5421, and on the exemption for emissions from fuels used to transport agricultural products on public highways. ECY005422–5428. The agency also published an exemption certificate for "fuel users" to complete and present to a fuel supplier to avoid a surcharge. ECY005440–5443.

In May 2023, Ecology announced the creation of a stakeholder workgroup "to search for solutions to ensure that the exemptions were properly applied under the law and, critically,

to ensure end users did not continue to pay unfair surcharges on exempt fuels." ECY007161. Ecology invited a broad range of interested parties to participate, including fuel suppliers and distributors, as well as agriculture industry representatives. *See* ECY007166. Of the 37 workgroup members, 13 represented agricultural interests. *Id*. The Farm Bureau was invited and participated as a member of the workgroup. ECY005522–5523, ECY005631.

In June 2023, after accepting its invitation to participate in the workgroup but before the first meeting was held, the Farm Bureau and Washington Trucking Associations (WTA) submitted a rulemaking petition to Ecology pursuant to RCW 34.05.330. ECY006002–6005. The petition requested that Ecology initiate rulemaking to accomplish two specific outcomes:

> [Petitioners] request that the Department open rulemaking to put in place (1) an adequate method 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 in place.

ECY006004 (emphasis in original). Ecology was required to respond within 60 days. RCW 34.05.330(1).

In preparation for the workgroup meetings, Ecology contracted with a third-party facilitator "to assist in fostering an open and robust discussion in which everyone could be heard." ECY007161. Ecology's Director attended the first meeting on June 22 and shared that she intended for the workgroup "to be a collaborative and solutions-focused way for parties to share ideas and have the detailed and honest conversations necessary to end the imposition of surcharges" on exemption-eligible fuels. *Id.* Over the course of the first two meetings, the workgroup members collectively developed a list of issues and challenges to focus on during the following sessions. *Id.* The discussion amongst workgroup members was "often robust" and revealed "there were profound disagreements as to some issues." ECY007162.

In August 2023, Ecology denied the petition for rulemaking. ECY006845. Ecology's response noted that the petition did not identify "any mandatory duty" for Ecology to adopt the specific rule provisions the petitioners requested. ECY006848–6849. In doing so, Ecology highlighted that the CCA places the responsibility on regulated parties—i.e., fuel suppliers—to claim the exemptions for emissions from certain agricultural fuels. ECY006845–6847. Ecology further explained that a refund program was infeasible and would exceed the agency's authority. ECY006848–6849.

Ecology also summarized concrete actions the agency was taking in response to recent complaints about surcharges being added to the price of exemption-eligible fuels, including: (1) the issuance of two interpretive guidance documents and an exemption form that could be used to document eligibility for the exemptions; and (2) the creation of a stakeholder workgroup to develop "best practices that can be applied, under existing law,

to ensure that all fuel suppliers, distributors, and customers are aware of these exemptions and that end-users are not paying surcharges . . . .” ECY006847. Ecology described how suppliers were beginning to implement the interpretive guidance, which was helping them separately track exempt emissions and stop assessing surcharges. ECY006848. Finally, Ecology emphasized the collaborative nature of the stakeholder workgroup and its ongoing work to develop recommendations to address the petitioners’ concerns in a way that would “work for a wide range of fuel suppliers and fuel users.” *Id.*

In September 2023, as the stakeholder workgroup continued to convene, the Farm Bureau and Washington Trucking Association filed a Petition for Declaratory Judgment and for Review of Agency Action challenging Ecology’s denial of the rulemaking petition and seeking to invalidate provisions of Chapter 173-446 WAC. CP 1–7. The Thurston County Superior Court dismissed that suit with prejudice in July 2024, concluding the petitioners had standing but that their claims

failed based on the analysis articulated in Ecology's briefing. *See* CP 908. The Farm Bureau appeals that decision here.[3]

D. Subsequent Legislative Action

In its 2023–2025 supplemental operating budget, the Legislature appropriated $30 million from the Climate Investment Account, RCW 70A.65.250, and directed the Department of Licensing (DOL) to administer "payments to support farm fuel users and transporters," who purchased fuel for exemption-eligible uses under RCW 70A.65.080(7)(e). *See* Laws of 2024, ch. 376, § 401(10). The Legislature directed DOL to make these remittance payments available in flat-rate tiers, based on the farm fuel user's or transporter's attestation as to annual gallons consumed. *Id.* at § 401(10)(b)(i)–(iv).

Then, during the 2025 Legislative Session, the Legislature considered and adopted amendments to the CCA's agricultural

[3] The Washington Trucking Association withdrew as an Appellant on December 6, 2024.

fuels exemptions. Enacted May 15, 2025, Engrossed Second Substitute House Bill 1912 (E2SHB 1912) made four relevant changes to the exemption framework. Laws of 2025, ch. 282. First, it provides that retail fuel sellers, including "exempt fuel purchase aggregator[s] or cardholder or membership-based payment option[s]" (commonly referred to as "cardlock" fuel sellers) may voluntarily notify Ecology of locations where exemption-eligible fuel is available for purchase. *Id.* at § 1(3). Second, it directs Ecology to "post and periodically update" a "directory tool" listing the name and location of each retail fuel seller that has notified Ecology that it sells exemption-eligible fuel. *Id.* at § 1(1). Ecology may only include fuel sellers in this directory that "make available" exemption-eligible fuel "at a price that is different than the price of fuel" that is not exemption-eligible. *Id.* Third, E2SHB 1912 requires Ecology to publish by October 1, 2025, a guide for users of exemption-eligible agricultural fuel that describes the process for obtaining remittance payments from DOL, as well as the "mechanisms by

which" end-users may purchase exemption-eligible fuel, "including, but not limited to, exempt fuel purchase aggregators and cardholder or membership-based payment options offered by private parties." *Id.* at § 1(2)(a). It specifically provides that the information on these "mechanisms" is "limited to information that is voluntarily disclosed by retail fuel sellers or exempt fuel purchase aggregators." *Id.* at § 1(2)(a)(ii). Finally, the bill indicated the Legislature's intent to "pair" the above activities with a continuation of the DOL remittance payment program in the 2025–2027 biennium budget. *Id.* at § 1(5). Importantly, the bill did not change the supplier-focused nature of the agricultural fuels exemptions.

IV. STANDARD OF REVIEW

Both Ecology's rule and its denial of the Farm Bureau's rulemaking petition in this case are subject to the judicial review provisions of the Administrative Procedure Act (APA), Chapter 34.05 RCW. The Farm Bureau bears the burden of proof to demonstrate the invalidity of Ecology's actions.

RCW 34.05.570(1)(a). For each claim, the validity of Ecology's action must be determined in accordance with the applicable standard of review set forth in RCW 34.05.570, "as applied to the agency action at the time it was taken." RCW 34.05.570(1)(b).

In reviewing administrative action, an appellate court "sits in the same position as the superior court and applies the standards of the [APA] directly to the record before the agency." *Bond v. Dep't of Soc. & Health Servs.*, 111 Wn. App. 566, 571, 45 P.3d 1087 (2002) (citing *Tapper v. State Emp. Sec. Dep't,* 122 Wn.2d 397, 402, 858 P.2d 494 (1993)).

A challenge to the denial of a rulemaking petition is subject to the standards for judicial review of "other agency action," set forth in RCW 34.05.570(4). The Farm Bureau must show that Ecology's denial was:

> (i) Unconstitutional;
> (ii) Outside the statutory authority of the agency or the authority conferred by a provision of law;
> (iii) Arbitrary or capricious; or

(iv) Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action.

RCW 34.05.570(4)(c)(i)-(iv).

A challenge to the validity of a rule is subject to the standards for judicial review set forth in RCW 34.05.570(2). The court may invalidate the challenged rule provisions only if the Farm Bureau demonstrates that "the rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious." RCW 34.05.570(2)(c).

Here, the Farm Bureau argues that Ecology's rules and denial of the petition for rulemaking are inconsistent with statute and arbitrary and capricious, but it does not argue that Ecology's rules are procedurally improper or unconstitutional, nor that Ecology's denial of the rulemaking petition was unconstitutional

or performed by an unauthorized official. *See* Appellant's Opening Brief (Appellant's Br.) at 4–5.

Where the Legislature expressly delegates authority to an agency to promulgate rules, those rules are presumed to be valid, and the scope of judicial review "should normally go no further than to ascertain whether the rule is reasonably consistent with the statute it purports to implement." *Weyerhaeuser Co. v. Dep't of Ecology*, 86 Wn.2d 310, 314, 545 P.2d 5 (1976). Indeed, if the challenged rule provisions are "reasonably consistent" with the authorizing statute, they should be upheld as valid even if the court believes them to be "unwise." *Id.* To invalidate the challenged rule provisions as exceeding Ecology's statutory authority, the Farm Bureau must present "compelling reasons . . . sufficient to show the scheme is in conflict with the intent and purpose of the legislation." *Wash. Fed'n of State Emps. v. State Pers. Bd.*, 29 Wn. App. 818, 821, 630 P.2d 951 (1981). The Farm Bureau has the burden of proving the challenged rule provisions are "patently inconsistent with either

the legislative intent as [the courts] divine it or the statutes as written." *Id.*

The burden of proving an agency action is arbitrary and capricious is even higher. The Farm Bureau must demonstrate that Ecology's adoption of the cap-and-invest rule was "willful, unreasoning, and taken without regard to the attending facts or circumstances." *Ass'n of Wash. Spirits & Wine Distribs. v. Liquor Control Bd.*, 182 Wn.2d 342, 358, 340 P.3d 849 (2015). This is a "heavy burden," and the scope of review "is very narrow." *Id.* at 359. Provided that the rule was adopted "after due consideration" and there is "room for two opinions" regarding its validity, it must be upheld even if the court believes it to be "erroneous." *Id.* at 358 (quoting *Rios v. Dep't of Labor & Indus.*, 145 Wn.2d 483, 501, 39 P.3d 961 (2002)).

V. ARGUMENT

A. Ecology's Rule is Consistent with the Plain Language and Statutory Framework of the CCA

The Farm Bureau's primary challenge to Ecology's rules implementing the CCA is that the rules "apply only [to] fuel

suppliers instead of agricultural farm fuel users." Appellant's Br. at 31. True enough. But because that is entirely a product of the statutory framework Ecology is required to implement, the Farm Bureau's challenge must be rejected.

1. The CCA places the point of regulation on fuel suppliers, not end users

The CCA is clear: large fuel suppliers are the entities that incur compliance obligations for emissions resulting from fuels supplied to Washington customers, and they are therefore the only entities that can claim the agricultural fuels exemptions. *See* RCW 70A.65.080(1)(d), (7). The statute does predicate a supplier's eligibility to claim these exemptions on the ultimate end-use of the fuel, RCW 70A.65.080(7)(e)(i)–(ii), but the exemptions expressly apply to "*emissions* [that] are exempt from coverage in the program," not end users. RCW 70A.65.080(7) (emphasis added). Instead, a "buyer of motor vehicle fuel or special fuel" that is "used exclusively for agricultural purposes by a farm fuel user" may make that exemption "available" to the upstream covered supplier if they "provide[] the seller with an

exemption certificate in a form and manner prescribed by [Ecology]."[4] RCW 70A.65.080(7)(e)(i).

Reflecting this statutory scheme, Ecology's rule allows covered suppliers to subtract emissions from agricultural fuel from their total covered emissions if they can demonstrate that the end-user provided a proper exemption certificate when purchasing the fuel. WAC 173-441-122(5)(d)(xi)(C). Ecology facilitates that process as the Legislature intended: Ecology regulates and imposes compliance costs on the largest fuel suppliers in Washington, allowing them to claim exemptions for emissions from fuel they sell for specific end uses; Ecology's guidance and rule provide that certificates for these exemptions are to be tracked—incentivized by market forces—throughout the supply chain. If suppliers fail to claim exemptions, their fuel will be more expensive than that of competitors who do; if

[4] Tellingly, the Legislature chose not to alter this system when implementing the 2025 changes to the agricultural use exemption set out above.

suppliers want end-users to present certificates, they must offer a method of doing so, as well as discounts sufficient to encourage participation. As the number of allowances available at auction declines each year, the incentives to access exemptions will become even greater. *See* RCW 70A.65.070(2); WAC 173-446-210(1)–(2).

The Farm Bureau's claims about the meaning of the agricultural fuels exemptions rest on an inaccurate depiction of this statutory scheme. Notwithstanding the fact that the exemptions plainly apply to the emissions for which suppliers bear a compliance obligation, the Farm Bureau variously asserts that the exemptions apply to "agricultural fuel users and transporters," (Appellant's Br. at 34), to the "use of agricultural fuel" (*Id.* at 47), to the fuel itself (*Id.* at 34), *and* to the emissions *Id*. at 35). Appellant's Br. at 34–35, 47. The Farm Bureau argues that Ecology's rules implementing the agricultural fuels exemption are inconsistent with statute because they "apply the exemption to the supplier, not the end farm fuel user."

Appellant's Br. at 35. The Farm Bureau further argues that Ecology has "the power to regulate farm fuel users," *Id.* at 48, to effectuate the Legislature's intent, and that "the exemption must be made available to farmers based on their own reported use." *Id.* at 50.

But these arguments confuse the compliance scheme under the CCA and the scope of Ecology's authority, as well as the practical features of the market for fuel.

The CCA distinguishes between "covered entities" and "covered emissions." *Compare* RCW 70A.65.010(23) *with* RCW 70A.65.010(22). A covered entity is a party that is responsible for large volumes of greenhouse gas emissions in the state (for fuel suppliers, at least 25,000 MT CO_2e) and that incurs a "compliance obligation" for those emissions. RCW 70A.65.080(1)–(6). The amount of a covered entity's compliance obligation depends on its "covered emissions"—calculated by determining an entity's total actual emissions and then subtracting any emissions exempt under

RCW 70A.65.080(7). *See* RCW 70A.65.010(19), (22); RCW 70A.65.080(7); RCW 70A.65.310(1). The effect of the agricultural exemptions is to reduce the amount of "covered emissions" attributable to *suppliers* that are subject to the CCA—and therefore to decrease their compliance obligations and ultimately their costs of compliance. A covered entity's compliance costs are a product of how they choose to satisfy their compliance obligation, whether by purchasing allowances at auction, buying compliance instruments on the open market, or by reducing their emissions. *See* RCW 70A.65.310(1)–(3).

By comparison, unless they cross the 25,000 MT CO_2e coverage thresholds contained in RCW 70A.65.080, the CCA does not apply to small fuel suppliers and end users down the supply chain. *See* RCW 70A.65.080(1)(d). Because small fuel users are not subject to regulation under the CCA, they have no compliance costs under the Act from which they could be "exempt." Instead, recognizing that compliance costs might be

passed down to customers, the Legislature provided exemptions for certain supplier emissions as a mechanism to reduce their overall compliance obligation. RCW 70A.65.080(7).

Costs paid "at the pump" by end users—including those costs labeled "CCA" surcharges—are not set by Ecology; instead, they are set by the final seller of fuel, and they incorporate prices paid all the way up the supply chain to covered fuel suppliers, including intermediary wholesalers and distributors. *See* ECY006150 ("Obligated parties are not always the party that sells fuel directly to Ag exempt parties. Fuel is sold to distributors who track sales with no obligation"); ECY006355 (depicting fuel supply chain and CCA point of regulation). Under Ecology's current rule, a growing number of retail fuel sellers (such as individual gas stations) voluntarily offer "at the pump" discounts to end users who present exemption certificates. *See, e.g.,* ECY006579, ECY006581, ECY006584, ECY006669–6670. Those discounts are decided

and set by the upstream fuel supplier claiming the exemption. ECY006573 ("distributors have this price included in the fuel price").

The Farm Bureau argues that the CCA requires Ecology to make the agricultural fuel exemptions "available to farmers." Appellant's Br. at 50. But aside from being contradicted by statute, the Farm Bureau fails to explain how that might work. Doing so would require Ecology to seize implied, expansive authority to regulate the entire fuel supply chain, including stepping in to fix the price of fuel at the point of sale. This would contravene statute and saddle Ecology with a monumental lift the Legislature never intended. To do so accurately, Ecology would have to monitor fuel sales throughout the whole supply chain, then subsequently mandate that every fuel seller in the state—including every individual gas station—offer prescribed discounts to end users of agricultural fuels. *See* ECY006355 (highlighting complexity of supply chain upstream from retail fuel sellers). Contrary to the Farm Bureau's assertions, this

would require not only authority to "regulate farm fuel users," Appellant's Br. at 48, but the authority to regulate the prices charged by all retail fuel sellers in Washington. Such an expansive and invasive undertaking would be invalid without clear, express direction from the Legislature.

The CCA simply does not provide that direction. Nowhere does the CCA allow Ecology to regulate the prices charged by covered suppliers for their fuel, much less the prices charged by fuel sellers entirely outside the program. And it is not Ecology but the Legislature who dictated which parties are subject to regulation as "covered entities" under the CCA. *See* RCW 70A.65.080. It specifically established the point of regulation: fuel *suppliers* are subject to regulation, not small fuel *users*, and they become covered entities under the CCA only

when they supply an amount of fuel that results in at least 25,000 MT CO_2e of in-state emissions.[5] *Id.*

For similar reasons, the CCA does not imply the authority to require discounts "at the pump," much less a mandate to do so.

Administrative agencies have only "those powers expressly granted to them and those necessarily implied from their statutory delegation of authority." *Tuerk v. Dep't of Licensing*, 123 Wn.2d 120, 124–25, 864 P.2d 1382 (1994). "[I]mplied 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.

[5] By comparison, the state Clean Air Act requires a broader category of fuel suppliers to report their greenhouse gas emissions to Ecology: those responsible for emissions of at least 10,000 MT CO_2e. *See* RCW 70A.15.2200(5)(a). The use of a substantially higher emissions threshold for CCA program coverage further demonstrates legislative intent to impose compliance obligations and other regulatory requirements only on large fuel suppliers—not smaller-scale suppliers, distributors, or retailer sellers.

The Legislature directed Ecology to treat as "exempt from coverage in the program" emissions from fuels used exclusively for agricultural purposes by a farm fuel user, and to "determine a method for expanding" that exemption to include emissions from "fuels used for the purpose of transporting agricultural products on public highways." RCW 70A.65.080(7), (7)(e)(i)-(ii). Ecology's specific duty is to exempt these categories of emissions from coverage under the CCA. It did just that. Where suppliers demonstrate that their emissions are associated with agricultural fuels, those emissions are exempt from coverage, WAC 173-446-040(2)(b)(iii); Ecology also provides an equivalent exemption process for emissions from fuels used for transporting agricultural products. WAC 173-446-040(2)(b)(iv). Regulating the prices of fuel charged by retail sellers is not necessary to exempt these emissions from the compliance obligations of covered entities in the program. Therefore, Ecology is neither impliedly authorized nor required to do so. That is especially true here, where the authority that is

purportedly implied would involve regulatory mechanisms that fundamentally differ from Ecology's express authority under the CCA–to require covered entities to acquire compliance instruments commensurate with their covered emissions.

Even if the Court finds the language of RCW 70A.65.080(7) to be ambiguous, all the foregoing reasons provide an adequate basis to conclude that Ecology's interpretation is reasonable. That is particularly true here, where the CCA is squarely within Ecology's expertise as the state agency tasked with administering many of Washington's climate policies. *See, e.g.,* RCW 70A.65.060; RCW 70A.15.2200(5); RCW 70A.45.020(1)(b), (d), (2). Its interpretation is therefore due significant deference. *See Port of Seattle v. Pollution Control Hearings Bd*., 151 Wn.2d 568, 593, 90 P.3d 659 (2004).

In short, the CCA does not exempt agricultural users, because they are not covered in the first instance—in plain language, the Act exempts the emissions from certain

agricultural fuels, which are attributable to specifically delineated covered entities. Nor does the market- and incentive-based CCA give Ecology authority to fix prices across the fuel supply chain. Ecology's rule is entirely consistent with this statutory framework, and the Farm Bureau fails to carry its burden of proving the rule is "patently inconsistent" with the statute or legislative intent. *Wash. Fed'n of State Empls.*, 29 Wn. App. at 821.

2. The CCA does not require mandatory reporting of exempt emissions

The Farm Bureau also argues that, even if Ecology does not have implied authority to regulate the entire fuel supply chain, Ecology erred by not mandating that suppliers claim the exemptions under RCW 70A.65.080(7)(e)(i)–(ii). Appellant's Br. at 50. This argument attacks a provision of Ecology's rules located in Chapter 173-441 WAC, which is not properly before the Court. And again, the incentive structure that Farm Bureau criticizes is entirely consistent with the CCA's statutory

framework, and the Farm Bureau fails to identify any mandatory provision to the contrary. Because the provisions of Chapter 173-446 WAC regarding emissions reporting and emissions exemptions are consistent with the authorizing statute, the Farm Bureau fails to overcome the rule's presumed validity. *Weyerhaeuser*, 86 Wn.2d at 314.

a. Farm Bureau's Petition for Review does not seek to invalidate Ecology's emissions reporting rule

As a threshold matter, the specific rule provision that the Farm Bureau criticizes for its optional features appears in an entirely different chapter of the administrative code than the one challenged in this action. Specifically, the rule at issue appears in WAC 173-441-122. Appellant's Br. at 3.

In its Petition for Review, however, the Farm Bureau did not request any declaratory relief related to Chapter 173-441 WAC. Instead, it only challenged the validity of rule provisions found in Chapter 173-446 WAC. *See* CP 6 at ¶¶ 27, 30. Similarly, in the Prayer for Relief, the Farm Bureau only requested

invalidation of rules found in Chapter 173-446 WAC. *See id.* at 7. Accordingly, with respect to any allegations regarding the emissions reporting rule, Chapter 173-441 WAC, the Farm Bureau has not properly identified "the agency action at issue" or made "a request for relief, specifying the type and extent of relief requested." RCW 34.05.546(4), (8).

Moreover, because the Petition did not request invalidation of any provision found in Chapter 173-441 WAC, the rulemaking file for that rule is not included in the agency record. Accordingly, any arguments regarding the validity of WAC 173-441-122 are not properly before this Court. *See St. Joseph Hosp. & Health Care Ctr. v. Dep't of Health*, 125 Wn.2d 733, 745, 887 P.2d 891 (1995) (declining to consider the validity of a rule where the rulemaking file was not in the record). This alone justifies affirming dismissal of the challenge to Chapter 173-441 WAC.

b. The cap-and-invest rule is entirely consistent with the CCA's requirements regarding covered emissions

Even if the Farm Bureau had properly raised its attack on the validity of Ecology's emissions reporting rules by challenging Ecology's actual cap-and-invest program rule, Chapter 173-446 WAC, it has failed to demonstrate that any of those rule provisions are "patently inconsistent" with the plain language of the statute or evidence of legislative intent. *Wash. Fed'n of State Empls.*, 29 Wn. App. at 821.

The cap-and-invest program rule states, in relevant part, that "supplier emissions are not covered emissions" where the "*supplier* can demonstrate . . . the emissions originate from . . . fuel used exclusively for agricultural purposes . . . [or] [f]uels used for transporting agricultural products on public highways." WAC 173-446-040(2)(b) (emphasis added). This provision further establishes that exempt emissions are reported separately under Ecology's greenhouse gas emissions reporting rule, Chapter 173-441 WAC. *Id.* In turn, the reporting rule requires

fuel suppliers to report all emissions resulting from the combustion or oxidation of fuel they supply to Washington customers, while allowing them to separately report the emissions from exempt fuels and subtract them from the supplier's covered emissions. *See* WAC 173-441-122(5)(a)(ii), (5)(d)(xi).

Nowhere does the CCA expressly mandate reporting of exempt emissions. Nor does RCW 70A.15.2200, the portion of the Washington Clean Air Act which directs Ecology to require reporting of greenhouse gas emissions. Under RCW 70A.15.2200(5), the Legislature provided a detailed set of requirements for the reporting program and gave Ecology wide latitude to craft rules to "support implementation of the [CCA]." RCW 70A.15.2200(5)(a). The Legislature also explained ways in which requirements under the cap-and-invest program would have bearing on Ecology's reporting program. *See, e.g.*, RCW 70A.15.2200(5)(d) ("When a person that holds a compliance obligation under RCW 70A.65.080 fails to submit an

emissions data report . . . [Ecology] may assign an emissions level"). Yet, despite this specificity elsewhere, the Legislature provided no express requirement to report exempt emissions.

Nonetheless, the Farm Bureau argues suppliers must report exempt emissions because RCW 70A.65.080(7)(e)(ii) states that Ecology "must determine a method for expanding the [agricultural fuels exemption] to include fuels used for the purpose of transporting agricultural products on public highways." Notwithstanding that this logic would only apply to emissions from fuels used in agricultural transport—not fuels purchased by a farm fuel user—the use of "must" in that provision does not require Ecology to impose mandatory reporting of exempt emissions. It only requires Ecology to expand the exemption to a separate subset of emissions.

The rule does just that, defining a method for exempting emissions from fuels used to transport agricultural products on public highways. *See* WAC 173-446-040(2)(b)(iv) (specifying that emissions "are not covered emissions" if the supplier can

demonstrate that the fuel "meets the requirements in RCW 82.08.865.").[6] The "must" in RCW 70A.65.080(7)(e)(ii) requires nothing further.

The Farm Bureau also argues that reporting of exempt emissions is mandatory because RCW 70A.65.080(7)(e) states that emissions from agricultural fuels "are exempt," which it alleges implies that exempt emissions must be reported. But that is simply not enough to create a mandatory duty. For one, RCW 70A.65.080(7)(e)(i) itself provides that the emissions are exempt "only if" an end user provides an exemption certificate to the seller, indicating that the Legislature understood a

[6] The rule's cross-reference to RCW 82.08.865 is consistent with the CCA, which expressly incorporates its definitions of "agricultural purposes" and "farm fuel user." *See* RCW 70A.65.080(7)(e)(i). In addition to defining those key terms, RCW 82.08.865 incorporates by reference the definitions set forth in RCW 82.04.213. *See* RCW 82.08.865(2). In turn, RCW 82.04.213(1) defines "agricultural product." As a result, the rule establishes a method for determining what qualifies for an exemption under RCW 70A.65.080(7)(e)(ii)—only those emissions from the combustion of fuels used to transport "agricultural products," as defined in RCW 82.04.213(1), on public highways.

voluntary system of communication between the seller and end-user would be required. And when the Legislature wanted to mandate reporting of certain categories of emissions, it did so. *See, e.g.*, RCW 70A.15.2200(5)(a)(i) (providing rules *must* require that "[e]missions of greenhouse gases resulting from the combustion of fossil fuels be reported separately from emissions . . . resulting from the combustion of biomass").

The Farm Bureau further argues that Ecology's rule exceeds its statutory authority because Ecology "was well aware that the supposed market forces were not fulfilling Ecology's statutory duty to provide an exemption for farmers." Appellant's Br. at 54 (citing ECY006432; ECY006538; ECY006548). But that argument improperly relies on citing to portions of the administrative record from well *after* Ecology adopted the rules. This evidence has no bearing on the meaning of the statute, nor on the validity of Ecology's rule, which must be "determined as of the time the agency took the action adopting the rule." *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 148 Wn.2d

887, 906, 64 P.3d 606 (2003)). The Court may disregard this line of argument.

Finally, even if Ecology had required separate reporting of all exempt emissions, the end result would not guarantee the Farm Bureau's goals here. Because the CCA does not grant Ecology authority to fix the price of fuel at the pump or regulate every point of sale along the supply chain, Ecology cannot require fuel suppliers to pass on to their customers the cost savings realized by claiming exemptions and reducing their overall compliance obligation.[7] As a result, the Farm Bureau has not demonstrated that a favorable judgment would redress its only alleged injury—the increased cost of purchasing exemption-eligible fuel—as required to obtain relief under the APA. *See* RCW 34.05.530(3).

[7] Though, again, fuel suppliers have an incentive to pass the resulting cost savings on to qualifying end users in the form of lower fuel prices in order to remain competitive. *See, e.g.,* ECY006501-6502.

B. The Rule is Not Arbitrary and Capricious Because Ecology Adopted the Rule After Thoughtful Consideration and Deliberation

The administrative record demonstrates that Ecology duly considered the difficulties of implementing the agricultural fuels exemptions as directed by the Legislature and adopted a rule that hewed closely to the statutory framework it provided. The Farm Bureau's arguments otherwise fail to overcome this record.

The Farm Bureau asserts that Ecology "recognized from the outset" that its rule "created a substantial risk that exempt farm fuel users and transporters would be swept into the CCA." Appellant's Br. at 57. Again, as discussed above, farm fuel users and transporters are not covered under the CCA and cannot be "swept in." *See* RCW 70A.65.080. Moreover, the Farm Bureau does not meaningfully explain how Ecology's choice to adopt a rule that closely mirrors the Legislature's statutory exemption demonstrates that Ecology knowingly contradicted the intent of the CCA.

The Farm Bureau next points to evidence in the agency record indicating that Ecology staff were engaged in discussion on the statutory exemptions and how to incorporate them into the rule. Appellant's Br. at 57–58 (citing ECY002904, ECY002933, ECY002958, and ECY002959). These citations, however, show not that Ecology ignored the challenge of the agricultural exemptions, but instead that it engaged in thoughtful consideration and deliberation regarding their implementation within the confines of the statute—the very opposite of arbitrary and capricious behavior. *See, e.g.*, ECY002933.

For example, Ecology's draft implementation plan reflects Ecology's discussion of the "easiest way" to implement the exemptions, which would be to limit their applicability to emissions from "dyed fuel"—a category of fuel with dye added to indicate its tax-exempt status. ECY002933; *see also* RCW 82.38.065; 26 U.S.C. §§ 4041(f), 4082(a)(1). However, the Department of Licensing's rules prohibit the "on-road use"

of dyed diesel. WAC 308-77-114(1). Because this approach would only capture a subset of the statutory emissions exemptions, Ecology determined it was "not currently viable." ECY002933.

The Farm Bureau also criticizes Ecology's consideration of the drawbacks of an approach that would "result in considerable paperwork." Appellant's Br. at 58. This argument falls flat. In crafting the rule, it was entirely reasonable and appropriate for Ecology to evaluate how "considerable paperwork" requirements would impact the regulated community. Indeed, Ecology is required by law to adopt rule provisions that represent "the least burdensome alternative for those required to comply with it[,] that will achieve the general goals and specific objectives" of the authorizing statute. RCW 34.05.328(1)(e).

The Farm Bureau further argues that Ecology failed to consider alternative regulatory structures, Appellant's Br. at 58, and should have "offered [] assistance to suppliers" in the form

of mandated reporting of exempt fuels or a "safe harbor provision" for acceptance of agricultural end user certificates.[8] *Id.* at 59. But because the Farm Bureau did not request relief from any portion of Chapter 173-441 WAC, the record of Ecology's decision on the optional reporting provision under WAC 173-441-122(5) is not before the court. And during the rulemaking on Chapter 173-446 WAC, Ecology received zero comments from the many stakeholders involved in its rulemaking either suggesting Ecology's approach was unworkable or presenting alternative regulatory approaches. ECY005041–5356.

Moreover, the Farm Bureau's argument about a "safe harbor"—raised for the first time here on appeal—overlooks that the CCA counsels against a blanket safe harbor, making the farm fuel exemption 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."

[8] The Farm Bureau does not explain how a reporting mandate would "assist" suppliers.

RCW 70A.65.080(7)(e)(i). Ecology, through its rules and guidance, makes clear how suppliers may avoid liability for mis-reporting: by adequately demonstrating that emissions from their fuels were associated with exempt end-uses, in accordance with WAC 173-441-122(5)(d)(xi)(C). *See* WAC 173-446-040(2)(b)(iii)–(iv).

Finally, and critically, the fact that the Farm Bureau believes Ecology should have adopted a different rule—or considered alternatives not proposed during the comment period—is simply not enough to show Ecology's adoption of the rule is arbitrary and capricious. If there is "room for two opinions" as to the methods Ecology chose to implement the exemption, the court should uphold the rule even if it believes the rule to be "erroneous." *Wash. Spirits & Wine Distribs.*, 182 Wn.2d at 358 (quoting *Rios*, 145 Wn.2d at 501).

Ecology understood that the Legislature's statutory scheme for the agricultural fuel exemptions might be difficult to implement but, receiving no criticism or feedback on Ecology's

proposed rule on those exemptions, it reasonably adopted that rule after due consideration.

C. Ecology's Denial of the Farm Bureau's Rulemaking Petition Was Well-Reasoned and Within Its Legal Authority

Ecology's denial of the rulemaking petition was entirely appropriate here, where the Farm Bureau requested relief that was either not mandated or entirely unauthorized under the CCA, and where the administrative record demonstrates that Ecology's denial was informed by increasingly successful implementation of the rule and by the robust discussions of its ongoing workgroup. As set out below, the Farm Bureau's allegations are insufficient to satisfy its burden to establish that Ecology's denial was legally deficient.

1. The record shows Ecology's interpretive guidance is helping fuel suppliers track and report exempt emissions

The Farm Bureau's petition for rulemaking first asked Ecology to establish a "method to claim the exemptions set forth in RCW 70A.65.080(7)(e)(i)–(ii) on fuel *before* it is purchased."

ECY006004 (emphasis in original). Ecology denied this element of the petition for three reasons. First, Ecology noted the Farm Bureau did not identify "any mandatory duty" for Ecology to establish such a method by rule. ECY006848. Second, Ecology explained that the interpretive guidance issued earlier in the year provided such a method and that suppliers were beginning to implement the guidance successfully. *Id.* And third, Ecology pointed to the ongoing workgroup as the best way to "adequately identify the scope of the issues and develop workable solutions." *Id.* Ecology noted that initiating rulemaking at that point in time "would significantly undercut the Workgroup's mission of developing consensus-based recommendations for options that will work for a wide range of fuel suppliers and fuel users." *Id.* These conclusions were immanently reasonable.

The record demonstrates the considerable time and effort Ecology had devoted to developing workable guidance, and that the guidance was increasingly effective. Shortly after adoption

of the rule, Ecology issued interpretive guidance to assist covered fuel suppliers in identifying the documentation needed to claim exemptions from their covered emissions, consistent with the statute and the rule. *See* ECY005415, ECY005424–5425. Ecology's January 2023 guidance identified three types of documentation that a supplier could use to claim the exemption for emissions from fuels used for agricultural purposes, including the Department of Revenue's Form 27 0036. *See* ECY005419. Similarly, Ecology's February 2023 guidance identified two types of documentation that Ecology "will accept" for purposes of documenting the exemption for emissions from fuels used to transport agricultural products. ECY005427. This guidance also specifically noted that these examples were "not intended to be exhaustive." *Id.*

In both guidance documents, Ecology committed to continuing its work with fuel suppliers to identify additional methods to establish eligibility for the exemptions. Ecology committed to develop a form that could be used by farmers to

demonstrate to a supplier that their use of the fuel qualifies for the exemption. ECY005419, ECY005427. And Ecology indicated the agency would remain open to working with fuel suppliers and others to identify "other potential sources of information and documentation that might be used to demonstrate eligibility" for the exemptions. ECY005419, ECY005427.

Despite this, the Farm Bureau asserts that Ecology wrongly denied the petition when it knew that some fuel suppliers were still attaching CCA "surcharges" to the price of fuel used for agricultural purposes. Appellant's Br. at 61 (citing ECY006845). But Ecology did not ignore this fact in denying the petition. Instead, as it expressly identified as a basis for denial, at the time Ecology denied the rulemaking petition there was ample evidence that fuel suppliers were increasingly—and voluntarily—using the guidance documents to separately track exempt emissions, which enabled them to stop assessing surcharges. *See* ECY006848. For example, on April 3, 2023, a

representative of BP America, Inc. informed Ecology that it was ready to implement a tracking system for exemption-eligible fuels and that it would work "as expeditiously as is possible" to help eligible end users understand how to provide supporting documentation. ECY005457. Later that month, Christensen Inc. publicly announced that it was selling fuel and propane without a surcharge to "all eligible agricultural customers." ECY006715. In July 2023, U.S. Oil, HF Sinclair, and Christensen all reported they were issuing reimbursements to customers who had paid a surcharge for exemption-eligible fuel. *See* ECY006581, ECY006584. And as of August 3, 2023—a week before Ecology denied Farm Bureau's petition—Ecology was aware of at least 25 fuel suppliers who were not assessing a surcharge on agricultural fuels. *See* ECY006669–6670.

Notably, end users also reported that exemption-eligible fuels were being made available to farmers without a surcharge. For example, in July 2023, the Washington State Dairy Federation reported to the workgroup that they now "have

suppliers" who do not assess a surcharge for agricultural fuels. ECY006579. The group's representative also shared a resource with several workgroup members representing agricultural interests—including the Farm Bureau representative—to help them identify companies selling surcharge-free fuel to farmers. *See* ECY006563, ECY006723–6726. In light of this progress, it was entirely reasonable for Ecology to deny the petition, even if some increasingly isolated fuel suppliers continued to assess surcharges.

Next, the Farm Bureau claims that it was arbitrary for Ecology to rely on the ongoing workgroup as a basis for denying the petition, alleging that Ecology ultimately "rejected the recommendations" of that workgroup. Appellant's Br. at 64. This too misses the mark. It is well settled that "the validity of agency action is to be determined *as of the time it was taken*." *Neah Bay Chamber of Com. v. Dep't of Fisheries*, 119 Wn.2d 464, 474, 832 P.2d 1310 (1992) (citing RCW 34.05.562(1); RCW 34.05.570(1)(b)) (emphasis in original). Whether Ecology

ultimately adopted the recommendations of its workgroup is not determinative of whether it was arbitrary for Ecology to cite the workgroup when denying the Farm Bureau's petition. And Ecology reasonably believed not only that the workgroup would reach workable solutions, but also that initiating rulemaking would "undercut" the workgroup's mission—that view was reasonable, independent of the workgroup's final recommendations.

The Farm Bureau's citation to *Rios* for the proposition that Ecology contradicted its own workgroup findings is inapposite. Appellant's Br. at 60 (citing *Rios,* 145 Wn.2d at 507).[9] In *Rios*, this Court found the Department of Labor and Industries had arbitrarily and capriciously failed to act by not adopting a

[9] The Farm Bureau incorrectly states that, in *Rios*, the Department of Labor and Industries had denied the petitioners' petition for rulemaking. Appellant's Br. at 60. In *Rios*, the petitioners had not filed a petition for rulemaking, but the court allowed them to proceed on the theory that the agency's failure to take the complained of action was arbitrary and capricious, per RCW 34.05.570(4)(c)(iii). *Rios*, 145 Wn.2d at 507, 511.

program that its own group of technical experts had previously concluded was "necessary and doable." 145 Wn.2d at 508. Here, not only was Ecology's workgroup report published *after* Ecology denied the Farm Bureau's petition, but the conclusions of the workgroup offered no consensus that Ecology's rules and guidance were unworkable. *See, e.g.,* ECY007165 (discussing workgroup's progress on having surcharges removed from retail fuel); ECY007170-7171 (discussing workgroup feedback on how to refine exemption guidance). This is fundamentally distinguishable from the circumstances in *Rios*, where the agency's own report indicated the necessity and feasibility of rulemaking.

For all the above reasons, Ecology's denial of the Farm Bureau's request to initiate rulemaking on the agricultural fuels exemptions was neither beyond the agency's legal authority nor arbitrary and capricious.

2. The CCA does not authorize Ecology to provide rebates as requested

The Farm Bureau's petition also asked Ecology to adopt an amended rule establishing a process for agricultural fuel users to obtain "refunds from the State" as reimbursement for the increased cost of fuel those users may have paid when purchasing exemption-eligible fuel. ECY006004. Ecology denied this element of the rulemaking petition for four reasons. First, Ecology noted that, as a practical matter, a state agency could not issue refunds of money that the state never received.[10] ECY006848. Second, Ecology reiterated the importance of the "collaborative efforts of the Workgroup" in developing "durable solutions" to this particular concern. *Id.* Third, Ecology

[10] Ecology specifically disputed the petitioners' assertion that the State of Washington "reap[s] the revenue from" the increased price of exempt fuels: "These surcharges have been assessed and collected by fuel suppliers that are either not claiming allowable exemptions from the CCA or are not passing on the cost savings of those exemptions to fuel distributors and end users. The State of Washington has not received any revenue from the actions of these fuel suppliers." ECY006848.

explained that the state constitution prohibits agencies from allocating money from the state treasury without express legislative authorization, which did not exist for such a rebate program. ECY006849 (citing Wash. Const., Art. VIII, Sec. 4). Finally, Ecology noted that the petitioners did not identify "any mandatory duty for Ecology to establish a process to provide public funds to the end users of exempt fuels." *Id.* Again, Farm Bureau fails to show these were unreasoned responses.

With respect to the first, second, and fourth reasons, the Farm Bureau does not meaningfully explain why Ecology's denial of its request for a refund program was arbitrary and capricious. Nor could it, as the CCA plainly does not provide Ecology with authority to do so. The CCA requires an independent financial services administrator to collect all bid guarantees, hold them until the auction results are verified, and then directly "transfer the auction proceeds to the state treasurer for deposit." RCW 70A.65.100(3), (7). As a result, Ecology never receives or holds any of the auction proceeds. In fact, any

diversion of those proceeds would constitute a misappropriation of public funds, in violation of the state Constitution. *See* Wash. Const., Art. VIII, Sec. 4; *see also* RCW 43.88.130. Ecology's refusal to take an action that would violate the law is neither outside the agency's legal authority, nor arbitrary and capricious.

And, as with the first element of the petition, the Farm Bureau attempts to argue that Ecology ignored the recommendations of its workgroup, alleging that the workgroup reached consensus on the need for an Ecology-facilitated refund program as "the most workable solution for the farm fuel exemption." Appellant's Br. at 22–23. But no such consensus existed. At the time Ecology denied the rulemaking petition, a number of workgroup members had already expressed opinions in direct conflict. For example:

- "Companies who are inappropriately imposing the surcharges should reimburse their customers who shouldn't have gotten charged in the first place." ECY006590.
- "Reimbursement program funds need to come from fuel suppliers. If the funds are reimbursed

by the state, then fuel suppliers can charge higher prices, and make greater profits." ECY006590.

- "The state is not responsible for fuel costs or surcharges. So public dollars should not be used to pay for reimbursements." ECY006590.

Even among the subset of members who represented agricultural interests, the desire for Ecology-administered refunds was not unanimous. For example, the Washington State Dairy Federation expressed a firm belief that suppliers are responsible for removing the surcharges, and that failure to do so puts them at a competitive disadvantage with those who do. *See* ECY006501-6502. The Washington State Potato Commission also consistently disagreed with Petitioners' position that Ecology has an obligation to provide or even facilitate reimbursements. *See, e.g.*, ECY006581 ("I think each link in the supply chain is responsible for handling the surcharge for exempt fuel so that it passes down or up the supply line."); ECY006585

("Get the reimbursement back from who supplied you . . . . Whatever program is developed, it should be handled primarily between the private parties.").

In short, the Farm Bureau fails to provide any legal basis that would authorize, much less mandate, Ecology to create a rebate program for agricultural fuel users. It therefore cannot show that Ecology's refusal to do so was arbitrary and capricious or otherwise unlawful, especially where the administrative record demonstrates that many stakeholders disagreed on the appropriateness of such a program.

D. The Legislature Implicitly Affirmed Ecology's Framework for Administering the Agriculture Fuels Exemptions

While not expressly part of the administrative record, this Court is permitted to take judicial notice of the Legislature's actions to amend the agricultural fuels exemptions under E2SHB

1912, enacted this session, which affirm Ecology's voluntary, incentive-based approach to implementation.[11]

Far from repudiating Ecology's interpretation of the statute, E2SHB 1912 essentially mirrors Ecology's rule. It imposes no mandatory reporting of exempt emissions, nor does it direct Ecology to "make available" exemptions to end users. *See* Laws of 2025, ch. 282. Instead, it endorses Ecology's interpretation that discounts on fuel used for exemption-eligible end uses are intended to be handled primarily between private parties on a voluntary basis.

E2SHB 1912 requires Ecology to publish guidance on where and how end users may find surcharge-free fuel, *Id.* at § 1(2), and to create a directory of sellers making exemption-

[11] The Court may take judicial notice of facts outside the record if they meet the standard under ER 201 for "adjudicative facts." *Cameron v. Murray*, 151 Wn. App. 646, 658–59, 214 P.3d 150 (2009). Under this standard, judicial notice is proper if the fact is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ER 201(b).

eligible fuel available at lower prices. *Id.* at § 1. Whether a retail fuel seller identifies itself as a seller of exemption-eligible fuels is entirely voluntary, *Id.* at §§ 1(2)(a)(ii); 1(3), and Ecology is required to publish only that information which is provided voluntarily. *Id.* at § 1(1), (2)(a)(ii). The bill supports Ecology's voluntary approach by creating a strong incentive for retail fuel sellers: By offering exemption-eligible fuel at a different price and voluntarily reporting the locations where they do so, sellers will have a distinct competitive advantage in attracting agricultural customers, facilitated by Ecology's directory. *Id.* at § 1(1). Nowhere does E2SHB 1912 *require* fuel sellers to offer exemption-eligible fuels at a lower price. It therefore implicitly confirms that the Legislature did not intend for Ecology to dictate prices at the pump, nor for Ecology to force retail sellers to track sales of exemption-eligible fuels.

In fact, in its testimony in opposition to the bill, the Farm Bureau seemed to agree, stating its view that the bill would "just codify" Ecology's ongoing implementation of the agricultural

fuels exemptions.[12] The Farm Bureau then repeatedly opposed the bill, asserting that it would not "resolve" its outstanding issues with the agricultural fuels exemptions.[13]

These latest Legislative actions drive home that the Farm Bureau's true issue with the exemptions is not Ecology's faithful implementation of the statute, but instead the statutory scheme crafted by the Legislature. If it believed that Ecology's voluntary, incentive-based approach to implementing the agricultural fuels exemptions was contrary to statute, the Legislature had every opportunity to clarify Ecology's duties. Instead, the Legislature

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[12] Senate Environment, Energy, and Technology Committee, Public Hearing: E2SHB 1912 – Concerning the exemption for fuels used for agricultural purposes in the climate commitment act, March 25, 2025, 1:30 pm, https://tvw.org/video/senate-environment-energy-technology-2025031419/?eventID=2025031419, remarks beginning at 57:47.

[13] Senate Ways and Means Committee, E2SHB 1912 – Concerning the exemption for fuels used for agricultural purposes in the climate commitment act, April 5, 2025, 12:00 pm, https://tvw.org/video/senate-ways-means-2025041086/?eventID=2025041086, remarks beginning at 1:11:54.

endorsed and refined Ecology's approach, providing the agency with new directions and authority to help private parties voluntarily claim the exemptions and offer discounts on fuels they sell. It did so nearly unanimously.[14]

The Legislature's policy choices on the operation of the agricultural fuels exemptions are plain on the face of the CCA, made even plainer with passage of E2SHB 1912. Farm Bureau asks this Court to override those policy choices, to accomplish by judicial order what it could not through legislative lobbying. That request should be denied.

VI. CONCLUSION

For the foregoing reasons, the Court should affirm Ecology's denial of the rulemaking petition, uphold the cap-and-invest rules in their entirety, and dismiss the case with prejudice.

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[14] *See* https://app.leg.wa.gov/billsummary/?BillNumber=1912&Year=2025&Initiative=false (indicating E2SHB passed 94-2 in the House of Representatives, and 49-0 in the Senate).

This document contains 9,327 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 18th day of June 2025.

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I certify under penalty of perjury under the laws of the state of Washington that on June 18, 2025, I caused to be served the foregoing document in the above-captioned matter upon the parties hereto via the Appellate Court Filing Portal, which will send electronic notification of such filing to all parties of record.

DATED this 18th day of June 2025, in Olympia, Washington.

s/ *Zachary Packer*
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