

GREENHOUSE GAS REGULATION IN WASHINGTON — CLEAN AIR RULE PARTIALLY INVALIDATED

Date: 5 February 2020

U.S. Environment, Land and Natural Resources Alert

By: Ankur K. Tohan, Alyssa A. Moir, Natalie J. Reid

On January 16, 2020, the Washington Supreme Court invalidated those portions of the Washington Clean Air Rule ("Rule") that sought to regulate "indirect" emissions of greenhouse gases from businesses and utilities that produce or distribute fossil fuels.[1] The basis for the court's ruling was that the Department of Ecology ("Ecology") exceeded its statutory authority granted under the Clean Air Act ("Act"). In addition, the court noted that the Washington Legislature should determine the scope of Ecology's authority to regulate greenhouse gases. In reaction to the ruling, Governor Inslee asked the Washington Legislature to introduce two bills in the Washington House and Senate that each seek to grant Ecology the authority to regulate the so-called "indirect emissions" of greenhouse gases from fossil fuels under the federal and state clean air acts.

Ecology issued the Rule in late 2016, relying on the rulemaking authority granted to it by the Act. The Rule created emission standards for three types of businesses: (1) certain stationary sources, (2) petroleum producers and importers, and (3) natural gas distributors.[2] In previous alerts, we described the Rule in more detail, discussing the [first draft](#) of the Rule, the [revised draft](#), and the [initial law suits](#) against the Rule.

The Rule required most of these businesses to reduce their greenhouse gas ("GHG") emissions by 1.7 percent each year, using two nonexclusive methods: modify their operations to reduce their actual emissions and/or obtain "emission reduction units." Businesses may obtain emission reduction units by (1) reducing their actual GHG emissions, (2) undertaking projects that reduce GHG emissions, or (3) purchasing emission reduction units in markets outside Washington.

Shortly after the Rule was promulgated, several trade industries filed suit against Ecology, alleging that the agency lacked statutory authority under the Act to issue the Rule. In 2017, a trial court invalidated the entire Rule, finding that Ecology lacked statutory authority to regulate entities that sold commodities that released contaminants into the air when used. Ecology filed for direct review by the Washington Supreme Court.

One focus of the state supreme court was whether Ecology has the authority to impose emission standards on businesses that do not themselves directly emit GHGs, but whose products ultimately do, namely, petroleum producers and exporters and natural gas distributors. The Washington Supreme Court ruled against Ecology because under the Act, "emission standards" apply only to those entities that directly emit air pollutants and do not include those emissions related to downstream use or consumption of the products those entities produce.

The court severed the unauthorized portion of the Rule relating to natural gas distributors and petroleum producers and importers, but allowed the remaining portions of the Rule to stand. However, the court invited a legislative response to its ruling, noting in conclusion that "[I]f the State of Washington wishes to expand the definition of emission standards to encompass 'indirect emitters,' the legislature will say so."

On January 28, the Washington Legislature responded by introducing Senate Bill 6628, which grants Ecology the authority to regulate persons who produce or distribute fossil fuels or other products that emit GHGs in Washington. On January 29, the House introduced a companion bill, House Bill 2892, that mirrors Senate Bill 6628.

Notably, the two bills introduced in the Legislature include the provision that "The department may require persons who produce or distribute fossil fuels *or other products that emit greenhouse gases* in Washington to comply with air quality standards, emission standards, or emission limits on emissions of greenhouse gases."^[3] (Emphasis added). This provision indicates that, as currently drafted, the bills are not limited to regulating fossil fuels. The bills do not define what "other products" may be regulated by Ecology. Potentially, many additional products that emit greenhouse gases could be regulated. For example, "products" may include wood and cardboard that release CO₂ when decomposing, manure and other products sold as fertilizer, methane emitted by cows, and so on. The Legislature has not addressed whether the bills seeks to regulate entities that produce these "other products."

We will continue to track the efforts in the Washington Legislature to modify the Act and grant Ecology the authority to regulate indirect emissions.

NOTES

[1] Ass'n of Wash. Bus. v. Dep't of Ecology, No. 95885-8 (Wash. Sup. Ct. Jan. 16, 2020).

[2] WAC 173-442-010, -020(1)(k).

[3] S.B. 6628, 66th Leg., 2020 Reg. Sess. (Wash. 2020), available at <http://lawfilesexxt.leg.wa.gov/biennium/2019-20/Pdf/Bills/Senate%20Bills/6628.pdf?q=20200131101120>;

H.B. 2892, 66th Leg., 2020 Reg. Sess. (Wash. 2020), available at <http://lawfilesexxt.leg.wa.gov/biennium/2019-20/Pdf/Bills/House%20Bills/2892.pdf?q=20200131101352>

KEY CONTACTS



ANKUR K. TOHAN
PARTNER

SEATTLE
+1.206.370.7658
ANKUR.TOHAN@KLGATES.COM



ALYSSA A. MOIR
PARTNER

SEATTLE
+1.206.370.7965
ALYSSA.MOIR@KLGATES.COM



NATALIE J. REID
ASSOCIATE

SEATTLE
+1.206.370.6557
NATALIE.REID@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.