

MEMORANDUM

TO: Joni Bosh

FROM: Amanda Goodin

DATE: November 9, 2020

RE: Legal interpretation of the Clean Energy Transformation Act requirement to use the social cost of greenhouse gas emissions

This memorandum contains our legal analysis of the requirement in the Clean Energy Transformation Act (“CETA”) that utilities incorporate the social cost of greenhouse gas emissions in their planning decisions. Specifically, this memorandum concludes that the Utilities and Transportation Commission and Department of Commerce (the “Agencies”) can and should include in the social cost of carbon all emissions that occur because of generation, including emissions from the extraction, production, and transportation of a fuel used to generate electricity.¹ Nothing in the Washington Supreme Court’s decision in *Association of Washington Business v. Department of Ecology*, 195 Wn.2d 1 (2020), precludes this approach.

Under CETA, the social cost of greenhouse gas emissions functions as a cost adder in resource decisions. RCW 19.280.030(3). This cost adder reflects the true societal cost of incremental emission increases, represented by the monetized damages associated with increased flood risk, harm to human health, loss of agricultural productivity, and other harms caused by increased warming.² This cost adder is designed to “allow agencies to incorporate

¹ A separate memorandum dated September 11, 2020 concludes that the requirement to incorporate the social cost of carbon applies to small utility resource plans.

² As explained by the technical support document that forms the basis for the value of the social cost of carbon in CETA, “The purpose of the social cost of carbon (SC-CO₂) estimates presented here is to allow agencies to incorporate the social benefits of reducing carbon dioxide (CO₂) emissions into cost-benefit analyses of regulatory actions. The SC-CO₂ is the monetized damages associated with an incremental increase in carbon emissions in a given year. It is intended to include (but is not limited to) changes in net agricultural productivity, human health, property damages from increased flood risk, and the value of ecosystem services due to climate change.” Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 at 3 (August 2016),

the social benefits of reducing carbon dioxide (CO₂) emissions into cost-benefit analyses of regulatory actions.”³

CETA requires all electric utilities to use the social cost of greenhouse gas emissions in their resource planning decisions. RCW 19.280.030(3). Utilities must “consider the social cost of greenhouse gas emissions” and incorporate it “as a cost adder when: (i) Evaluating and selecting conservation policies, programs, and targets; (ii) Developing integrated resource plans and clean energy action plans; and (iii) Evaluating and selecting intermediate term and long-term resource options.” RCW 19.280.030.

CETA’s plain language does not specify whether the emissions associated with a resource for purposes of the cost adder include the upstream emissions that occur because of generation, such as the emissions from the extraction, production, and transportation of a fuel used to generate electricity. However, the statutory context and purpose support including these emissions in the social cost of greenhouse gas emissions.

In the context of CETA’s planning requirements, it makes sense to include upstream emissions in the social cost of greenhouse gas emissions cost adder. When choosing between resources, utilities generally must select the least cost resource to serve their customers. Incorporating the full societal cost of fossil fuel resources allows utilities to more accurately assess which resources are truly least cost from a societal perspective. Excluding some or all of the emissions associated with a resource does not prevent these emissions or the associated harms. It only skews the cost comparison between resources. A cost adder that excludes a resource’s upstream emissions masks some of the harm and makes that resource appear artificially inexpensive compared to resources that do not impose such significant societal costs.

Including upstream emissions in the social cost of greenhouse gas emissions cost adder is also consistent with the legislature’s stated findings and intent in CETA. RCW 19.405.010. The legislature recognized the significant threat climate change poses to Washington and intended to mandate a transition from fossil fuels to one hundred percent clean energy. *Id.* The legislature also intended to empower utilities, through regulatory tools and incentives, to achieve this transition. *Id.* Including upstream emissions in the social cost of greenhouse gas emissions cost adder furthers this stated legislative purpose. It provides a “regulatory tool” that allows utilities to more accurately compare the true societal costs of their resource choices. RCW 19.405.010(5). And it accelerates the transition to one hundred percent clean energy by requiring utilities to base their cost comparisons on the full societal cost of fossil fuel resources. RCW 19.405.010(2), (3).

epa.gov/sites/production/files/2016-12/documents/sc_co2_tsd_august_2016.pdf (cited in RCW 80.28.405).

³ *Supra* n.2.

Nothing in the Court's decision in *Association of Washington Business v. Department of Ecology*, 195 Wn.2d 1 (2020), precludes the agencies from requiring utilities to include upstream emissions in the social cost of greenhouse gas emissions cost adder.

In that case, petitioners challenged the Department of Ecology's decision to establish emission standards under the Washington Clean Air Act. The Court held that Ecology could only issue emission standards for entities that directly emitted air pollution, not entities that caused upstream or downstream emissions. The Court based this holding on the plain language of the Act's definition of "emission standard":

An emission standard is "a requirement... that limits the quantity, rate, or concentration of emissions of air contaminants on a continuous basis." RCW 70.94.030(12). The Act defines "emission" as "a release of air contaminants into the ambient air." RCW 70.94.030(11). Taking these definitions together, an emission standard is best understood as a limit on how and when regulated entities can release air contaminants into the ambient air. If an emission standard regulates the release of air contaminants, it naturally follows that emission standards are intended to regulate those entities that directly cause such releases.

195 Wn.2d at 12.

The Court also noted that the structure of the Clean Air Act supported its holding. Specifically, the Court noted that the Act also grants Ecology authority to set air quality standards, and unlike emission standards, these air quality standards need not apply solely to entities that directly cause releases. *Id.* at 16-17. The Court found that the breadth of this alternative tool in the same Act counseled against a more expansive reading of Ecology's authority to establish emission standards. *Id.*

It would be inappropriate to read the Court's holding in *Association of Washington Business* as a broad prohibition on considering upstream emissions in other statutes. The Court's holding turned on the statutory definition of "emission standard" and the structure of the Clean Air Act. 195 Wn.2d at 11-17. Because these questions of statutory interpretation are tied to a specific statute's language and purpose, the Court's holding on the definition of "emission standard" does not constitute a sweeping prohibition on agencies' authority to consider upstream emissions. Instead, CETA's different statutory language, structure, and context compel a different analysis and result.⁴

⁴ As the Court noted in *Association of Washington Business*, an agency has broad authority to issue rules within the framework of a governing statute, and "so long as the rule is 'reasonably consistent with the controlling statute[s],' an agency does not exceed its statutory authority." *Ass'n of Wash. Bus.*, 195 Wn.2d at 9 (quoting *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wash.2d 571, 580, 311 P.3d 6 (2013)). Whether an agency's rule is consistent with the statute

CETA's statutory language, context, and purpose are very different than the Clean Air Act. To start, CETA does not authorize or even mention "emission standards." Nor does CETA create any other regulatory authority that hinges on the time and place that emissions are "released." The Court's discussion of the Clean Air Act's plain language does not apply to CETA's different language.

The context and purpose of CETA's planning requirement, discussed above, are likewise distinct from the regulatory authority at issue in the Clean Air Act. The legislature's stated purpose to transition to one hundred percent clean energy and the use of the cost adder as a planning tool to allow for a more accurate comparison between resources support including upstream emissions.

Finally, it would be particularly inappropriate to read the Court's decision in *Association of Washington Business* as a sweeping bar to considering upstream emissions in other statutes, given that the Court did not even hold that all provisions of the Clean Air Act would bar such an approach. 195 Wn.2d at 16-17. While the Court held that Ecology lacked authority to regulate indirect emitters through an "emission standard," the Court explicitly noted that Ecology might have such authority in establishing air quality standards under the Clean Air Act. *Id.* If the Court's holding does not extend to other provisions of the same Act, it certainly does not extend to a different statute with different language, context, and purpose.

In short, the agencies can and should include upstream emissions in the social cost of greenhouse gas cost adder in CETA. The context of this planning requirement and the legislature's stated purpose support this interpretation, and nothing in *Association of Washington Business v. Department of Ecology*, 195 Wn.2d 1, undermines it.

CETA also specifies how the agencies must establish the social cost per metric ton of emissions. RCW 80.28.405.

turns on the plain meaning of the statute, including its language, structure, context, and statements of legislative intent. *Id.*

