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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

ZOE & STELLA FOSTER, minor children by)
 and through their guardians MICHAEL FOSTER)
 and MALINDA BAILEY; AJI & ADONIS PIPER,)
 minor children by and through their)
 guardian HELAINA PIPER; WREN WAGENBACH, a)
 minor child by and through her guardian)
 MIKE WAGENBACH; LARA FAIN, a minor child)
 by and through her guardian MONIQUE DINH;)
 GABRIEL MANDELL, a minor child by and)
 through his guardians VALERIE and RANDY)
 MANDELL; JENNY ZU, a minor child by and)
 through her guardians YAN ZHANG &)
 WENFENG XU,)
 Plaintiffs,) No. 14-2-25295-1 SEA
 vs.)
 WASHINGTON DEPARTMENT OF ECOLOGY,)
 Defendant.)

HEARING

The Honorable Judge Hollis R. Hill Presiding
April 29, 2016

TRANSCRIBED BY: Bonnie Reed, CET
 Reed Jackson Watkins
 206.624.3005

A P P E A R A N C E S

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4 On Behalf of Plaintiffs:

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2 April 29, 2016

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4 THE COURT: Please be seated. Good morning. All right.
5 We're here on Petitioners' motion for relief from judgment
6 on Foster v. Washington Department of Ecology, Cause No.
7 14-2-25295-1.

8 Could the parties please make their appearances for the
9 record starting over on my left with Ms. Rodgers?

10 MS. RODGERS: Yes, good morning. Andrea Rodgers on behalf
11 of Petitioners. And I have Petitioner Gabe Mandell and Lara
12 Fain with me this morning.

13 THE COURT: Good morning.

14 MS. SHIREY: Kay Shirey for the Washington State
15 Department of Ecology.

16 THE COURT: All right. Oral argument was requested and
17 granted by Petitioners. Let me tell you first of all and
18 put on record what I've reviewed. I've reviewed the motion
19 and declaration and exhibits attached, the response,
20 declaration and exhibits attached, and Petitioners' reply.
21 I also reread my own order of November 19th, 2015 and
22 reviewed some of the other files.

23 So, Ms. Rodgers, would you like to stand up at the bar and
24 address the Court?

25 MS. RODGERS: Yes, Your Honor.

1 Good morning, Your Honor, and may it please the Court.
2 We're here today on -- we filed a Rule 60(b) motion looking
3 for an order for relief from judgment. And I just wanted to
4 start out to be very clear about what we are asking the
5 Court do. Essentially, Your Honor, we're asking the Court
6 to make findings that Ecology has made two
7 misrepresentations to this Court during the earlier
8 proceedings, and that justifies an order of relief under
9 Rule 60(b)(4), or in the alternative that there are
10 extraordinary circumstances that we're dealing with in this
11 case that justifies relief under Rule 60(b)(11).

12 Upon making those findings, Your Honor, we're asking that
13 you vacate those parts of the final order that deny our
14 petition for review. That, in turn, leaves the petitioners
15 essentially without a remedy in this case in light of the
16 legal violations that were found in the final order, and we
17 believe that you would then have the authority to enter a
18 remedy under the APA, which we are asking for, would be an
19 order directing Ecology to promulgate a rule as well as
20 direct them to do the updates to RCW 72.35.

21 First, I'll start with the misrepresentations to the
22 Court, Your Honor. As you know, we heard a lot both in the
23 briefs and in oral argument about the December 2014 report
24 that Ecology prepared. And in that report Ecology concluded
25 that the emissions standard -- the emissions limits and the

1 emissions reduction trajectory in that statute were not
2 based on science and need to be more aggressive and needed
3 to be updated. But at that time they recommended -- they
4 stated in their report that no recommendation was going to
5 be made because they were going to wait until Paris.

6 Ecology and during the proceedings in this case provided
7 testimony that they were going to provide those updates to
8 the legislature in 2016, and at this point the legislative
9 session has come and gone and those legislative
10 recommendations were never made. Your Honor, so -- and it's
11 undisputed that that has not happened here.

12 The request that Ecology make those recommendations was
13 originally included in our petition for rule making and it's
14 an extremely important part of this case, Your Honor. Not
15 only is it mandated by law, it's required by statute in RCW
16 72.35.040. It's also required by executive order and -- but
17 it also affects and informs how Ecology will implement their
18 statutory authority going forward; whether it's adopting a
19 clean air rule or whatever they do in regards to reducing
20 climate emissions -- or carbon dioxide emissions, it's very
21 important that they make those recommendations because that
22 will guide their actions in the future. It was an important
23 part of our case to begin with, it hasn't vanished or
24 disappeared. And we believe that the misrepresentation to
25 the Court saying that they would do it and have not done it

1 entitles us to relief under Rule 60(b)(4).

2 The second issue, Your Honor, is the rule making. As you
3 know, after this Court issued its first the order in the
4 case regarding the motion to strike, after the youth met
5 with the governor, that he directed Ecology to promulgate a
6 rule. And that process was started -- officially was
7 started in September of last year, and on February 26th of
8 this year, they withdrew that rule. Now, Ecology -- we
9 believe that Ecology's promise to reissue the rule, isn't
10 really worth very much, Your Honor, given their historic
11 track record of inability to deal with this problem. The
12 record in our case shows that it's been at least 26 years
13 since Ecology recognized that climate change was a problem
14 and that urgent action needed to be taken to draw down
15 carbon dioxide emissions.

16 Administrative Record 14 is from 2008 when that's the
17 first time in our record where Ecology was considering using
18 their Clean Air Act authority to regulate carbon dioxide
19 emissions. Here we are six years later, Your Honor, they
20 promised the Court that they will promulgate a rule, they
21 ended up withdrawing that rule, and we're left today without
22 a rule. And so I believe that Ecology's long history of
23 inability to deal with this problem justifies relief in this
24 case.

25 And Your Honor, I want to point out that it wasn't until

1 these youth brought this litigation that the governor
2 directed them to do this rule. And it wasn't until the day
3 after the motion was filed that Ecology scheduled the
4 webinar that was held just two days ago to present some new
5 ideas about a new proposal for a rule. So it's very, very
6 important that the Court exercise its authority to provide
7 these youth with a remedy; otherwise, they don't have any
8 other remedy available to them at law.

9 And the circumstances in this case, I believe, are unlike
10 any other, Your Honor. I think the findings that you made
11 in this case very clearly recognized the current state of
12 the science, the urgent need for action, and Ecology's
13 inability and unwillingness to do what needs to be done to
14 protect the rights of these kids, enables them -- entitles
15 them to relief from this Court.

16 I did want to ask, Your Honor, two days ago Ecology
17 submitted supplemental declaration that had text of the
18 webinar that wasn't included in your list of documents that
19 you had reviewed. If it was, I would like to address it,
20 but could I ask if that --

21 THE COURT: Actually, I neglected to note to myself that
22 when that was provided to the Court. I did review it
23 yesterday.

24 MS. RODGERS: Okay. Your Honor. Well, I'd like to
25 briefly address that. You know, I think it provides further

1 support for why we're here today. Just to go through it, I
2 think one of our bases for arguing that Rule 60 relief is
3 appropriate in this case is Ecology's inability to do what
4 is required by both the findings by this Court in the
5 November order as well as the clear statutory directive to
6 protect and preserve air quality for current and future
7 generations.

8 I think as just going through that document, which was a
9 webinar and it appears to be a PowerPoint presentation that
10 takes you through what they're planning to do in the new
11 rule -- now, I want to be clear, we're not asking you to
12 dictate the content of any future rule. We recognize the
13 Court's limitation in that regard. We are asking for an
14 order directing them to do a rule in accordance with the
15 time line that Ecology itself has proposed. And the time
16 line that they proposed is on page 32 of that supplemental
17 declaration.

18 But also, Your Honor, just going through that document,
19 it's quite clear that Ecology is not taking into account the
20 rights of these kids when it's regulating carbon dioxide
21 emissions. I'll just note, they discuss the clean air rule
22 concept; they still will not reveal what Washington's part
23 is to draw down carbon dioxide emissions, even though that's
24 required by RCW 72.35.040, even though it's been required by
25 Governor Inslee, they still will not tell us where we need

1 to go in order to fulfill their constitutional and statutory
2 mandates.

3 In addition, Your Honor, it shows in the "who's in, who's
4 out" slide, nearly half of emission sources are not covered
5 by this rule. Additionally, it allows delayed
6 implementation, up to three years for certain sources to get
7 regulated. It uses a baseline and credit system that has
8 failed in other places, most notably Alberta. And Your
9 Honor, it just does not show that this agency is committed
10 to implementing the rule of law as has been interpreted by
11 this Court in the November order, Your Honor.

12 And finally, I wanted to address the second part of the
13 supplementary documents that were provided was an op-ed by
14 Climate Solutions and NRDC. I'm not quite clear on the
15 relevance of that document, but since it was provided to the
16 Court, I just wanted to say, Your Honor, we're pleased to
17 see that others are advocating for greenhouse gas emission
18 reductions, but we don't believe that, again, it displaces
19 or replaces Ecology's obligation to do scientifically-based
20 reductions.

21 And I think, you know, a more relevant op-ed was in the
22 paper on the 23rd, written by Fawn Sharp who is a Quinault
23 tribal leader. And in that op-ed, she talks about the 1,000
24 tribal members that are currently being relocated off of
25 their reservation lands and moved to higher ground due to

1 sea level rise. She talks about the Mount Anderson Glacier
2 that feeds the Quinault River and Lake Quinault that has
3 disappeared entirely. And she talks about the need for
4 urgent action to protect her people.

5 So Your Honor, we respectfully request that you vacate --
6 make those findings regarding misrepresentations and/or
7 extraordinary circumstances, vacate those portions of the
8 final order that affirm Ecology's denial of the petition for
9 rule making and then order a remedy in this case. And I
10 believe that remedy should be an order directing Ecology to
11 promulgate a rule that complies with the November 19th order
12 as well as direct them to make their updates to the
13 legislature that is required by law.

14 Thank you, Your Honor.

15 THE COURT: Thank you, Ms. Rodgers.

16 Ms. Shirey, good morning.

17 MS. SHIREY: Good morning and may it please the Court, my
18 name is Kay Shirey. I represent the Washington State
19 Department of Ecology in this case.

20 As you know, we are here to address Petitioners' motion
21 for post-judgment relief under Civil Rule 60(b). This Court
22 must deny that motion unless Petitioners prove by clear and
23 convincing evidence that Ecology either made
24 misrepresentations or committed fraud or Petitioners prove
25 that extraordinary circumstances exist here that are not

1 covered by any other provision of Civil Rule 60(b).

2 We ask the Court to deny Petitioners' motion for two
3 reasons: First, Petitioners' claim that Ecology has
4 abandoned the effort to adopt a rule limiting greenhouse gas
5 emissions in Washington is false. Ecology is working
6 vigorously on the rule and is on a path to complete the rule
7 before the end of 2016, as they told this Court they would.

8 Second, this Court's November 19th, 2015 ruling did not
9 rely on Ecology making a recommendation to the 2016
10 legislature; therefore, the fact that Ecology did not make a
11 recommendation to the legislature does not provide a basis
12 for relief under Civil Rule 60(b).

13 So on the first point, Petitioners claim that Ecology has
14 failed to meet its commitment to adopt a final rule by the
15 end of 2016. That rule has no merit because Ecology is on
16 track to adopt a final rule by the end of 2016. As
17 explained in our briefing, Ecology withdrew the earlier
18 proposed rule because the Administrative Procedure Act
19 required them to because they needed to make substantial
20 changes to the rule.

21 At the April 27, 26 webinar -- and you say you've got that
22 document.

23 THE COURT: I do.

24 MS. SHIREY: And I have one here.

25 THE COURT: I did review it.

1 MS. SHIREY: Okay. So that explains what Ecology has been
2 thinking and the feedback Ecology has gotten on the proposed
3 language back -- this was proposed back in January and the
4 changes they are proposing to make as a result of that
5 feedback. Some of those changes address concerns raised by
6 the environmental community and some of those changes
7 address concerns raised by the regulating committee.

8 So there is no fraud or misrepresentation here. Fraud is
9 making a false statement. There is no false statement here.
10 Ecology said they would adopt a rule by the end of 2016, and
11 Ecology is on track to adopt a rule by the end of 2016, if
12 not earlier. There are also no extraordinary circumstances
13 here because Ecology is doing exactly what Ecology said it
14 would do.

15 So Petitioners' second claim is that they are entitled to
16 relief under 60(b) because Ecology did not make a
17 recommendation on greenhouse gas emissions to the 2016
18 legislature. This claim is without merit because a
19 recommendation to the legislature was not part of this
20 Court's decision in this case. The decision in this case
21 was based on the commitment that Ecology made to engage in
22 rule making as directed by the governor. This Court's
23 decision makes very clear that it was based on the ruling,
24 and I think at the end of the decision, the Court said: The
25 petition for review is denied due to the Department of

1 Ecology having commenced the aforementioned rule making
2 process as directed by the governor.

3 None of the statements -- there's no statement in the
4 decision that requires Ecology to make a recommendation to
5 the legislature. There's nothing in the Court's ruling that
6 would lead one to believe that it was based -- there was any
7 reliance on Ecology making a recommendation to the
8 legislature; therefore, there's no basis for relief under
9 60(b).

10 So to elaborate, there is no fraud or misrepresentation
11 here. Ecology's determination not to make a recommendation
12 to the legislature was not fraud because there was no false
13 statement. The statement originally made was by Hedia
14 Adelsman. Ms. Adelsman's statement was true at the time it
15 was made. Ecology made a decision later not to make the
16 recommendation to the legislature because Ecology was
17 devoting its resources to rule making to actually reduce
18 greenhouse gases when a recommendation to the legislature
19 would do nothing. Since there's no false statement, there's
20 no fraud, there's no relief available under 60(b)(4).

21 And there are also no extraordinary circumstances here.
22 Extraordinary circumstances must be extraneous to the
23 actions of the Court or go to questions of regularity of the
24 proceedings, and there is no claim here that meets those
25 requirements. Petitioners' claim that climate change is

1 itself the extraordinary circumstance that justifies relief
2 under 60(b)(11), but in making this claim, Petitioners are
3 reiterating arguments they made in the earlier proceedings,
4 and such claims are not sufficient to reopen a case. If you
5 look at *Sollenberger v. Cranwell*, 26 Wn. App 783, a 1980
6 case, it says that merely repeating arguments made at trial
7 does not provide a basis for reopening the case.

8 There's another case in *Nordstrom v. Campbell* (phonetic),
9 26 Wn. App 449, 1980. It says the power to vacate a
10 judgment on motion is not intended to be used as a means for
11 the court to review or revise its own final judgments. If
12 the petitioners wish to challenge this Court's ruling, they
13 could have filed an appeal, which they have not.

14 So another element to this is that non-performance of a
15 material condition of a judgment has been deemed to be an
16 extraordinary circumstance justifying modification of a
17 judgment. But that is not available here because the
18 recommendations to the legislature was not material to this
19 Court's decision in this case. And, indeed, if the Court
20 had meant for that recommendation to be a material part of
21 the determination, it did not do so, and cannot now hold
22 Ecology accountable for not knowing that.

23 So in closing, I would like to say that this Court's
24 November 19th, 2015 ruling was based on Ecology's statement
25 that the agency would adopt the rule to limit greenhouse gas

1 emissions in Washington by the end of 2016. Ecology is
2 doing exactly what it told the Court it would do. It's
3 working diligently to adopt a rule by the end of 2016.
4 Under these circumstances, there is no basis for vacating or
5 modifying the judgment in this case.

6 THE COURT: I do have one question. What about your
7 representation that 2016 hasn't run, and therefore, a
8 recommendation could still be made to the legislature.
9 Hasn't the 2016 legislature recessed?

10 MS. SHIREY: The legislature has recessed, but certainly
11 Ecology could make a recommendation in 2016 to the 2017
12 legislature.

13 THE COURT: All right. Thank you, Ms. Shirey.

14 MS. RODGERS: To clear the record, Your Honor, we are not
15 alleging fraud. We do not yet have a record in this case to
16 allege a case of fraud. We're alleging misrepresentations
17 that were done by Ecology here.

18 Your Honor, Ecology promises yet again that they're going
19 to issue the rule by the end of 2016. There's nothing
20 stopping Ecology from either not issuing a new rule or
21 withdrawing a rule that comes out again. We would be placed
22 in the same situation we are again, we would be forced to
23 come back to this court yet again months later, and it puts
24 the petitioners in an even more difficult situation than
25 they are already. A schedule for compliance with the rule

1 making is imperative to ensure that Ecology fulfills their
2 statutory and constitutional responsibilities. They have
3 committed to a time line, we have it, if we could put it in
4 a proposed order and they can fulfill their
5 responsibilities.

6 I wanted to talk about, Your Honor, that they were
7 required to withdraw the rule. That's not what the APA
8 says. That section says Ecology has a choice when
9 there's -- they want to revise portions of a proposed rule,
10 they can either withdraw the rule or they can issue a
11 supplemental notice. There's two ways to approach that
12 situation. They didn't have to follow this path five months
13 into the process.

14 Again, it's nice that the environmentalists and others are
15 participating in the rule making process, but there's
16 nothing to indicate that Ecology is addressing the concerns
17 of these youth and concerns that will address the future
18 habitability of this planet, Your Honor.

19 The recommendation to the legislature was an integral part
20 of our petition for rule making. And for some reason it
21 seems to have just disappeared; it is not on Ecology's
22 radar. But I'll point the Court to the final order page,
23 it's quoted in our reply brief at 8. What the Court says,
24 the Court finds specifically the Department of Ecology is
25 the agency authorized both to recommend changes in statutory

1 emission standards and to establish limits that are
2 responsible. The current rule making is toward that end.

3 It's an important part of this, and if those
4 recommendations are not met -- or are not made, Your Honor,
5 there is no way for Ecology to put this state on a path
6 towards where it needs to go to deal with climate recovery,
7 Your Honor.

8 And again, the record in the case shows -- and there's
9 testimony in the cases from the order to show cause hearing
10 that Ecology was targeting its clean air rule towards
11 complying with the emission limits set in RCW 72.35. You
12 know, we have always taken the position, Your Honor, that
13 that's a floor, it's not a ceiling; but that's not the
14 position Ecology has taken. Ecology has always interpreted
15 that statute as constraining their ability to do
16 scientifically-based emission reduction standard. So the
17 recommendation is a very important part of all of this, Your
18 Honor.

19 And finally extraordinary circumstances isn't climate
20 change, unfortunately, that's our reality. The
21 extraordinary circumstance is 26 years of inaction by this
22 agency in spite of clear legislative authority and directive
23 to act. They did not do the recommendation that they said
24 they would do. They promulgated a rule which they later
25 withdraw and can withdraw at any time or simply not

1 promulgate.

2 And to respond to Ecology's accusation that we could have
3 appealed; well, Your Honor, when the appeal deadline ran in
4 December, they were doing a proposed rule and we were
5 expecting them to -- the legislative session was about to
6 start in January and we would assume that they were going to
7 do what they had told the Court that they would do. So
8 there was no basis for us to appeal the judgment. But since
9 that appeal deadline has run, they have not fulfilled their
10 assurances to this Court and that is what justifies relief
11 under Rule 60, Your Honor.

12 Thank you.

13 THE COURT: Thank you.

14 All right. I am going to vacate portions of the November
15 19th, 2015 order. And I'm going to do so from the bench, so
16 bear with me. I'm looking at that order right now, and
17 it's -- I'm going to quote from it. On page 1: The
18 Washington State Department of Ecology is required by law to
19 periodically report to the legislature summarizing human
20 caused climate change and to make recommendations regarding
21 whether greenhouse gas emissions reductions required by
22 Washington statute need to be updated.

23 To quote Ecology: The effect of climate change on water
24 supplies, public health, coastal and storm damage, wildfires
25 and other impacts will be costly unless additional actions

1 are taken to reduce greenhouse gases. That was in the
2 Department of Ecology's report to the legislature dated
3 almost two years ago -- well, one and a half years ago,
4 December 2014.

5 Ecology does have the duty to engage in rule making. They
6 were directed to do so by Governor Inslee in July of this
7 year. Ecology doesn't dispute that current science
8 establishes that rapidly increasing global warming causes an
9 unprecedented risk to the earth including land, sea and
10 atmosphere and all living plants and creatures.
11 Washington -- this is Ecology being quoted: Washington
12 faces serious economic and environment disruptions from the
13 effects of climate change.

14 The reason I quote Ecology, which I was doing, in
15 reiterating my order is that this is -- this is a matter --
16 this is an extraordinary circumstance that we're facing
17 here. I'm not finding that Ecology made any
18 misrepresentations to the Court or committed any fraud.
19 Ecology did start a rule making procedure.

20 But I am finding under Rule 60(b) 11 that extraordinary
21 circumstances exist which require vacation of the portion of
22 the order that denied -- that put the matter back in the
23 hands of Ecology with the understanding of this Court that
24 Ecology was going to pursue a rule making procedure and was
25 going to make a recommendation to the legislature during the

1 2016 session, which is now concluded.

2 I'm not confident at this point that the rule making
3 procedure will be completed by the end of 2016 without a
4 court order, and I think it's necessary that that be in a
5 court order, and so I will issue an order to that effect.
6 That the rule making procedure proceed and that a rule be
7 issued by the end of calendar year 2016 and that a
8 recommendation to the legislature be made during the 2017
9 session. And I'm going to ask the parties to confer as to
10 when during that session such a rule should be presented for
11 it to have any possibility of affecting the legislature's
12 decision on these matters.

13 The reason I'm doing this is because this is an urgent
14 situation. This is not a situation that these children can
15 wait on. Polar bears can't wait, the people of Bangladesh
16 can't wait. I don't have jurisdiction over their needs in
17 this matter, but I do have jurisdiction in this court, and
18 for that reason I'm taking this action.

19 So I would like the parties to confer and propose written
20 findings and an order to the Court. If you can do that now,
21 that would be great. If not, you can submit it during the
22 week next week. I'm out of town all week, so I wouldn't be
23 able to review it until Monday, the 9th of May. Thank you.
24 The Court is in recess.

25 THE CLERK: Please rise.

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STATE OF WASHINGTON)
) ss
COUNTY OF KING)

I, the undersigned, do hereby certify under penalty of perjury that the foregoing court proceedings were transcribed under my direction as a certified transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability, including any changes made by the trial judge reviewing the transcript; that I received the audio and/or video files in the court format; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand
this 3rd day of May, 2016.

Bonnie Reed, CET