



STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

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August 14, 2014

Andrea Rogers Harris  
Law Offices of Andrea K. Rogers Harris  
2907 S. Adams Street  
Seattle, WA 98108

Subject: Petition for Rule Making

Dear Andrea Rodgers Harris (on behalf of Youth Petitioners):

This letter responds to your petition for rule making received by Washington State Department of Ecology (Ecology) on June 17, 2014, as corrected on June 18, 2014. Youth petitioners ask Ecology to adopt a rule<sup>1</sup> that would recommend to the Governor new carbon dioxide (CO<sub>2</sub>) emission reductions in Washington, and require Ecology to ensure that the new reductions occur.

**Decision**

After careful consideration, Ecology is denying your petition. Ecology's reasons for the denial are:

- (1) Under RCW 70.235.020(1)(a) the Legislature established specific statewide greenhouse gas (GHG) emission reductions limits that can be updated upon Ecology's recommendation to the Legislature based on current science. The Legislature required Ecology to adopt a plan to achieve the reductions, and required Ecology to monitor progress toward achieving the reductions. RCW 70.235.020(1)(b), (d), (2). Nothing in RCW 70.235 requires Ecology to adopt different emissions reductions, develop a plan to ensure those reductions, or implement the monitoring requirements in the proposed rule.
- (2) Washington is working to achieve the reductions in RCW 70.235.020(1)(a), and the measures it is taking are an alternative approach to your proposed rule.
- (3) None of the additional cited sources in the petition's proposed rule requires Ecology to adopt the proposed rule.

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<sup>1</sup> A summary of the Petition and proposed rule is attached in Appendix A.



**Under RCW 70.235.020(1)(a) the Legislature established specific statewide greenhouse gas emission reduction limits that can be updated upon Ecology's recommendation to the Legislature based on current science. The Legislature required Ecology to adopt a plan to achieve the reductions, and required Ecology to monitor progress toward achieving the reductions. RCW 70.235.020(1)(b), (d), (2). Nothing in RCW 70.235 requires Ecology to adopt different emissions reductions, develop a plan to ensure those reductions, or implement the monitoring requirements in the proposed rule.**

In 2008, the Legislature established greenhouse gas emissions reductions limits for the state of Washington under RCW 70.235.020(1)(a). Under RCW 70.235.020(1)(a), specific reductions are to occur by specified dates.<sup>2</sup> Under RCW 70.235.040, Ecology is required to provide a report and recommend to the Legislature whether the reductions should be updated based upon current science.<sup>3</sup> To make recommendations to the Legislature on any updates, and better understand the latest research on climate change impacts in Washington State, Ecology requested that the University of Washington Climate Impacts Group prepare a summary report synthesizing current knowledge about observed trends and projected climate change impacts in Washington State and the Pacific Northwest. The Climate Impacts Group recently released its December 2013, report, entitled *Climate Change Impacts and Adaptation in Washington State: Technical Summaries for Decision Makers*.<sup>4</sup> The report was based on recent global, national, and regional assessments as well as peer-reviewed publications and other reports consistent with RCW 70.235.040.<sup>5</sup> Ecology is currently reviewing the state's greenhouse gas emission reductions in consultation with the Climate Impacts Group to formulate recommendations on whether those reductions should be updated.

To achieve the reductions in RCW 70.235.020(1)(a), Ecology was required to:

- submit a GHG reduction plan to the Legislature describing necessary actions,
- develop and implement a system for monitoring and reporting emissions of GHGs,
- track progress toward meeting the reductions and report on that progress, and
- report to the Governor and Legislature the total emissions of GHGs in 2010, and each even-numbered year thereafter, including totals in each major source sector. RCW 70.235.020(1)(b), (d)(i)-(ii), (2).

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<sup>2</sup> Under RCW 70.235.020(1)(a): the state shall limit its emissions of greenhouse gases to achieve the following emission reductions for Washington state: (i) by 2020, reduce overall emissions of greenhouse gases in the state to 1990 levels; (ii) by 2035, reduce overall emissions of greenhouse gases in the state to 25% below 1990 levels; (iii) by 2050, the state will do its part to reach global climate stabilization levels by reducing overall emissions to fifty percent below 1990 levels, or seventy percent below the state's expected emission that year.

<sup>3</sup> Under RCW 70.235.040: Within eighteen months of the next and each successive global or national assessment of climate change science, the department shall consult with the climate impacts group at the University of Washington regarding the science on human-caused climate change and provide a report to the Legislature summarizing that science and make recommendations regarding whether the greenhouse gas emissions reductions required under RCW 70.235.020 need to be updated.

<sup>4</sup> See <http://cses.washington.edu/cig/reports.shtml#sok>.

<sup>5</sup> This report followed an earlier assessment by the Climate Impacts Group in 2009. See [The Washington Climate Change Impacts Assessment \(2009\)](http://cses.washington.edu/db/pdf/wacciareport681.pdf). Available at <http://cses.washington.edu/db/pdf/wacciareport681.pdf>.

In 2008, Ecology recommended to the Legislature proposed policies and a plan to meet the reductions in RCW 70.235.020(1)(a) including the first reductions to be achieved by 2020.<sup>6</sup> In 2010, Ecology updated the 2008 report, described the reductions from existing policies and those expected from future policies, and the progress that was being made toward meeting the reductions. See *Path to a Low-Carbon Economy*.<sup>7</sup> Ecology issued greenhouse gas emissions inventories in December 2010<sup>8</sup>, and December 2012<sup>9</sup>. The 2012 report shows emissions from Washington's economic sectors decreased from 2007 to 2010.

There is nothing in RCW 70.235.020(1)(a) or RCW 70.235.040 that requires Ecology to make recommendations, by rule, to the Governor and Legislature to take any of the following steps in the proposed rule:

- change the amounts of the GHG emission reductions established in RCW 70.235.020(1)(a),
- add GHG emissions reductions of 4% per year, and
- reduce CO<sub>2</sub> emissions as a subset of GHG emissions.

Furthermore, there is nothing in RCW 70.235.020(1)(a) or RCW 70.235.040 that would require Ecology to develop a plan to ensure emissions reductions of CO<sub>2</sub> and other greenhouse gases described in the proposed rule are achieved including reductions of CO<sub>2</sub> and GHGs by 4% per year across all sectors. In fact, in a case challenging Puget Sound Regional Council's Transportation plan, the Washington Court of Appeals held that RCW 70.235.020(1)(a) does not require pro-rata reductions in GHG emissions, but rather it requires GHG emission reductions across the state as a whole. *Cascade Bicycle Club v. Puget Sound Regional Council*, 175 Wash. App. 494 (2013) (the state can achieve the mandated greenhouse gas reductions by eliminating some emission sources or, alternatively, by reducing some sources by more than the required amount and others by less).

There is nothing in RCW 70.235.020(1)-(2) that requires Ecology to assist other agencies and entities with authority to reduce carbon dioxide emissions to achieve the reductions in the proposed rule.

Finally, there is nothing in RCW 70.235.020(1)-(2) requiring Ecology to prepare a biennial accounting and inventory of CO<sub>2</sub> emissions specifically (the requirement is for GHG emissions reporting that includes CO<sub>2</sub>), or to obtain third party verification of its emissions reports.

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<sup>6</sup> See Ecology and Community, Trade and Economic Development, 2008, *Growing Washington's Economy in a Carbon-Constrained World: A Comprehensive Plan to Address the Challenges and Opportunities of Climate Change*, Publication No. 08-01-025. Available at [www.ecy.wa.gov/climatechange/2008CompPlan.htm](http://www.ecy.wa.gov/climatechange/2008CompPlan.htm).

<sup>7</sup> Ecology, 2010, *Path to a Low-Carbon Economy: An Interim Plan to Address Washington's Greenhouse Gas Emissions*, Publication No. 10-01-011. Available at [www.ecy.wa.gov/biblio/1001011.html](http://www.ecy.wa.gov/biblio/1001011.html).

<sup>8</sup> Ecology, 2010 (revised September 2013), *Washington State Greenhouse Gas Emissions Inventory 2007-2008*, Publication No. 10-02-046. Available at [www.ecy.wa.gov/biblio/1002046.html](http://www.ecy.wa.gov/biblio/1002046.html).

<sup>9</sup> Ecology, 2012 (revised September 2013), *Washington State Greenhouse Gas Emissions Inventory 2009-2010*, Publication No. 12-02-034. Available at [www.ecy.wa.gov/biblio/1002046.html](http://www.ecy.wa.gov/biblio/1002046.html).

**Washington is working to achieve the reductions in RCW 70.235.020(1)(a) and the measures it is taking are an alternative approach to your proposed rule.**

Ecology and other governmental entities are implementing the reductions in RCW 70.235.020(1)(a) under the following statutory and regulatory measures, including but not limited to:

- Greenhouse gas emission performance standards for baseload power plants. RCW 80.80.040.
- TransAlta (Centralia) coal plant emission reduction requirements. RCW 80.80.040(3)(c)(i)(2011) (amending RCW 80.80 to require the state's only coal-fired power plant and largest single source of greenhouse gas emissions in the state to shut down one of its two coal units by 2020 and the second unit by 2025.)
- Renewable energy portfolio standards. RCW 19.285.
- Ecology's GHG emission standards for petroleum refineries. WAC 173-485.
- Greenhouse gas emission standards for motor vehicles (RCW 70.120A), and renewable fuel standards (RCW 19.112).
- Statewide goals to reduce annual per capita vehicle miles traveled by 2050, RCW 47.01.440; authority for Washington State Department of Transportation to work to achieve those reductions to address greenhouse gas emissions through efforts such as encouraging alternative modes of transportation and developing an alternative fuels corridor pilot project. RCW 47.01.078(4), .440; RCW 47.80.023(1); RCW 47.38.070.

In 2013, Governor Inslee on behalf of Washington, together with British Columbia, Oregon, and California through the Pacific Coast Collaborative, called for additional West Coast actions on climate leadership, clean transportation, and clean energy and infrastructure.<sup>10</sup>

To address CO<sub>2</sub> emissions that cause ocean acidification, former Governor Gregoire created the Washington State Blue Ribbon Panel on Ocean Acidification to develop recommendations to respond to ocean acidification and reduce its harmful causes and effects. The Panel convened in February 2012, and in November 2012, released a report and technical document of findings and recommendations for action.<sup>11</sup> On November 27, 2012, in response to the panel's recommendations, Governor Gregoire issued Executive Order 12-07 (November 27, 2012): Washington's Response to Ocean Acidification<sup>12</sup> directing the Department of Ecology and other cabinet agencies to implement the Panel's key early actions.<sup>13</sup>

In 2013, the Washington Legislature established the Climate Legislative and Executive Workgroup and required it to recommend a state program of actions and policies to reduce

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<sup>10</sup> See <http://www.pacificcoastcollaborative.org/Pages/Welcome.aspx>.

<sup>11</sup> See Washington State Blue Ribbon Panel on Ocean Acidification, 2012, Ocean Acidification: From Knowledge to Action. Available at <https://fortress.wa.gov/ecy/publications/publications/1201015.pdf>.

<sup>12</sup> Executive Order 12-07 available at <http://www.governor.wa.gov/office/execorders/eoarchive/#gregoire>.

<sup>13</sup> In 2013, the Legislature also created the Washington Marine Resources Advisory Council within the Office of the Governor to advise and work with the Washington Ocean Acidification Center on the effects and sources of ocean acidification, deliver recommendations to the Governor and Legislature on ocean acidification, and seek funding sources to support the Council's recommendations. RCW 43.143.050, 060.

greenhouse gas emissions that if implemented would ensure achievement of the state's emissions limits outlined in RCW 70.235.020. Second Substitute Senate Bill 5802 (2013 Session). The Workgroup secured an independent review of existing state and federal policies, and the progress made towards the carbon pollution limits and concluded that, despite significant progress, Washington needs to do more to meet our statutory reductions in RCW 70.235.<sup>14</sup>

Building on the work of the Climate Legislative and Executive Workgroup, Ecology, together with other state agencies, and organizations, is focused on reducing emissions under the direction of Governor Inslee's Executive Order 14-04 from sectors that will produce the most significant reductions.<sup>15</sup> Under Executive Order 14-04, the Governor's Carbon Emissions Reduction Taskforce will recommend, by November 2014, a carbon emission limits and market mechanisms program for Washington that will inform legislation to be requested by the Governor for consideration during the 2015 legislative session. The program will establish a cap on carbon pollution emissions, with binding requirements to meet our statutory GHG emissions reductions, and include the market mechanisms needed to meet the reductions in the most effective and efficient manner possible. In addition, under Executive Order 14-04 the governor's office, state agencies, public entities and other organizations are working to develop and implement additional programs to reduce emissions in the following sectors and categories:

- Electricity – reduce imported coal-fired electricity consumed in the state
- Transportation – efficiency, planning, investment, and clean fuels and vehicles
- Clean technology – investment for new renewable energy and energy efficiency
- Energy efficiency – buildings, agriculture, and industries
- State government operations – clean cars and fuels, buildings and other activities to reduce emissions

All of these actions, including Ecology's work to report and make recommendations to the Legislature on updates to the GHG emissions reduction in RCW 70.235.020(1)(a) constitute an alternative approach to your proposed rule.

**None of the additional cited sources in the petition's proposed rule requires Ecology to adopt the proposed rule.**

There is nothing in the general introductory section of Ecology's organic act, RCW 43.21A.010 (Legislative declaration of state policy on environment and utilization of natural resources), that authorizes specific regulatory actions. The fact that RCW 43.21A.010 does not authorize specific regulatory action is further demonstrated by RCW 43.21A.080 that prohibits Ecology from adopting rules "that are based solely on a section of law stating a statute's intent or purpose, on the enabling provisions of the statute establishing the agency, or on any combination of such provisions...."

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<sup>14</sup> Leidos, 2013, Evaluation of Approaches to reduce Greenhouse Gas Emissions in Washington State – Final Report, prepared for State of Washington Climate Legislative and Executive Workgroup. Available at <http://www.governor.wa.gov/issues/economy/climateWorkgroup/>.

<sup>15</sup> Executive Order 14-04 available at <http://www.governor.wa.gov/office/execorders/>.

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In the absence of a statute directing Ecology to take the specific actions you are proposing in your petition, Ecology declines to adopt a rule based solely on an alleged constitutional doctrine. Washington's public trust doctrine applies to navigable waters and lands beneath them, not the atmosphere. Where it applies, it operates only to restrict alienation of the resource where alienation impairs the public's traditional interest in using the resource. It does not create an affirmative duty for the State to act. It does not impose obligations to ensure a particular quality of the resource and it does not provide authority for Ecology to act in reliance on the doctrine absent express statutory authority. *Caminiti v. Boyle*, 107 Wn.2d 662 (1987).

In closing, I appreciate the concern and desire of the youth petitioners to reduce GHG emissions for improving the environment for themselves and future generations. However, Ecology denies your petition for rule making in favor of its current approach to reducing GHG emissions. Ecology is committed to continuing its leadership to address the impacts of climate change under this approach.

Sincerely,



Maia D. Bellon  
Director

Enclosures (1)

cc: Hedia Adelsman, Department of Ecology  
Stuart A. Clark, Department of Ecology  
Bari Schreiner, Department of Ecology  
Nancy Pritchett, Department of Ecology  
Leslie Seffern, Office of the Attorney General

## Appendix A

### Rule Making Petition

Your petition states:

- Science shows anthropogenic climate change is occurring.
- State government has recognized that climate change is already occurring.
- Ocean acidification is causing harm worldwide and already harming Washington.
- Best available science dictates that safe concentrations of atmospheric carbon dioxide are 350 ppm or lower.
- Washington's current greenhouse gas emission reductions are not based on best available science.
- Ecology has statutory authority and obligation to initiate rulemaking under RCW 70.235 and RCW 43.21A.010 to adopt the rule proposed in the petition.
- The Washington Constitution, the Public Trust Doctrine, and RCW 70.235 require that the Department make recommendations and promulgate a rule according to the best available science.

### Proposed Rule

Your petition asks Ecology to "promulgate a rule that fulfills the Department's legal obligation to both provide recommendations to the legislature to update the State's statutory greenhouse gas emissions limits and implement science-based emissions limits to put Washington on the global climate stabilization trajectory." Under the rule proposed in your petition Ecology would:

- (1) Recommend to the Governor and the Legislature that Washington reduce its:
  - (a) carbon dioxide (CO<sub>2</sub>) emissions:
    - to aim for a return of atmospheric carbon dioxide levels of 350 ppm by 2100; and
    - to 80% below 1990 levels by 2050.
  - (b) greenhouse gas emissions by 4% per year to achieve:
    - thirty-one (31) percent below 1990 levels by 2020;
    - to sixty-two (62) percent below 1990 levels by 2035; and
    - to eighty (80) percent below 1990 levels by 2050.
- (2) Independent of and prior to any legislative action, ensure that:
  - (a) starting in 2015, statewide CO<sub>2</sub> emissions are reduced by an aggregate 4 percent per year through 2050 across all sectors over which Ecology has control;
  - (b) an emission reduction plan is developed and implemented to achieve the reductions in (1)(b) across all sectors over which Ecology has control; and other agencies and entities with authority to reduce carbon dioxide emissions receive assistance; and
  - (c) other greenhouse gases are reduced consistent with the requirements of RCW 70.235.020.

(3) Beginning no later than January 31, 2015:

- (a) prepare and make publicly available a biennial accounting and inventory, verified by a third party, of state carbon dioxide and carbon dioxide equivalent emissions including every substantial source of those emissions;
- (b) estimate CO<sub>2</sub> emission reductions that proposed policies will achieve within a specific timeframe; and
- (c) prepare a budget to address specified tasks.