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The Honorable Hollis R. Hill

**STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT**

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 MITCHELL; JENNY XU, a minor child by and through her guardians YAN ZHANG & WENFENG XU,

Petitioners,

v.

WASHINGTON DEPARTMENT OF ECOLOGY,

Respondent.

NO. 14-2-25295-1

DEPARTMENT OF ECOLOGY
RESPONSE TO JUNE 23, 2015
COURT ORDER

I. INTRODUCTION

On June 23, 2015, the Court issued an order requiring the Washington State Department of Ecology (Ecology) to reconsider its denial of Petitioners' June 17, 2014 Petition for Rulemaking, taking into account two documents provided by Petitioners with their opening

1 brief in this case: Ecology's December 2014 report to the Legislature titled, *Washington*
2 *Greenhouse Gas Emission Reduction Limits* (December 2014 Report), and the Declaration of
3 Dr. Kharecha. The order asked Ecology to determine by July 8, 2015, whether to affirm or to
4 amend its denial. On July 6, 2015, the Court granted Ecology's request to extend the response
5 deadline to August 7, 2015. Ecology has reconsidered the Petition for Rulemaking and the two
6 documents listed above. For the reasons discussed below, Ecology is not granting the Petition
7 insofar as Ecology is not adopting the specific rule Petitioners are seeking. However, Ecology
8 is initiating a rulemaking to adopt a rule under a directive issued by Governor Inslee on
9 July 28, 2015. Governor Inslee's directive requires Ecology to initiate a rulemaking to set a
10 regulatory cap on carbon dioxide emissions and to develop reductions in carbon dioxide
11 emissions using its existing authority. Ecology has begun that rulemaking effort.

12 The first section of this response provides Ecology's review of the December 2014
13 Report and Dr. Kharecha's declaration. The second section provides Ecology's decision on
14 reconsideration, including consideration of Governor Inslee's July 28, 2015, directive.

15 **II. REVIEW OF ECOLOGY'S DECEMBER 2014 REPORT TO THE** 16 **LEGISLATURE AND DR. KHARECHA'S DECLARATION**

17 **A. Review of Ecology's December 2014 Report**

18 State law requires Ecology to consult with the climate impacts group at the University
19 of Washington and, within 18 months of each successive global or national assessment of
20 climate change science, provide a report to the Legislature summarizing the science and
21 making recommendations regarding whether the greenhouse gas emission reductions required
22 under RCW 70.235.020 need to be updated. RCW 70.235.040. Ecology's December 2014
23 Report was prepared and submitted to the Legislature to meet this requirement. Declaration of
24 Andrea K. Rodgers Harris (Rodgers Harris Decl.), Ex. 1 at 1-2.

25 In September 2013 and March 2014, the Intergovernmental Panel on Climate Change
26 (IPCC) published the Fifth Assessment Report on Global Climate Change. Rodgers Harris

1 Decl., Ex. 1 at 11. In May 2014, the Third U.S. National Climate Assessment was released,
2 with a chapter focusing on the Northwest. *Id.* In response, Ecology produced the December
3 2014 Report to the Legislature. *Id.* at 1–2.

4 As required, Ecology’s December 2014 Report provides an overview of the national
5 and international assessments of the science, including reports from the IPCC, the National
6 Academy of Sciences, and the European Union, among others. Rodgers Harris Decl., Ex. 1,
7 *see esp.*, at 7–17. Ecology’s December 2014 Report notes the internationally agreed upon need
8 to keep the global surface temperature increase to no more than 2°C. *Id.*; *see also* at 15 (To
9 prevent the most severe impacts of climate change, more than 140 members of the United
10 Nations Framework Convention on Climate Change (UNFCCC) (including the United States)
11 agreed to keep the rise in average global surface temperature to less than 2°C above the
12 preindustrial period average.). Ecology’s report also provides the IPCC’s 2013 analysis of the
13 global increase in temperature under four greenhouse gas concentration pathways, noting that
14 “Global surface temperature increases and keep [sic] rising beyond 2100 in all scenarios except
15 the lowest concentration pathway (RCP #2.6), which would require stringent emissions
16 reductions policies to keep warming below 3.6°F (2°C).” *Id.* at 10. In addition, Ecology’s
17 report describes a July 2014 White House report addressing the costs of allowing the global
18 temperature to increase by 3°C rather than 2°C. *Id.* at 14.

19 The December 2014 Report explains that the international community has coalesced
20 around commitments to “keep the rise in average global surface temperature at less than 3.6°F
21 or 2°C above the preindustrial period average.” Rodgers Harris Decl., Ex. 1 at 5, 15;
22 Declaration of Hedia Adelsman (Adelsman Decl.) ¶¶ 6, 7. Hedia Adelsman, Ecology Special
23 Assistant to the Director for Climate Change and author of Ecology’s report, notes that about
24 190 countries who are members of the United Nations Framework Convention on Climate
25 Change are working towards securing a legally binding global climate agreement to curb
26 carbon emissions, which will be signed by the 21st Conference of Parties in Paris in December

1 2015. Adelsman Decl. ¶ 7. It is expected that this agreement will be based on commitments
2 by UNFCCC members to keep within the 2°C target. *Id.* However, the 2015 Paris Conference
3 will include scientific debates on whether the 2°C temperature increase is an appropriate
4 threshold to avoid dangerous climate change. *Id.* at ¶ 11.

5 The December 2014 Report also explains that the current emission reduction
6 requirements in RCW 70.235.020 reflect the fact that Washington State’s “greenhouse gas
7 emissions are relatively lower than other states and economies of a similar size, in part due to
8 its heavy reliance on electricity derived from the state’s hydropower system.” Rodgers Harris
9 Decl., Ex. 1 at 6. The report notes that the Washington State emission reductions currently
10 required by RCW 70.235.020 are not sufficient to keep the rise in surface temperature below
11 2°C. *Id.* at 17–18; Adelsman Decl. ¶ 10.

12 Finally, Ecology’s December 2014 Report concludes that, although the science
13 supports stricter emission reductions than provided in RCW 70.235.020, Ecology would not
14 recommend changing the statutory reduction requirements until after the December 2015
15 climate talks in Paris. Rodgers Harris Decl., Ex. 1 at 18. The author of that report, Special
16 Assistant to the Director Hedia Adelsman, explains why. Adelsman Decl. ¶¶ 11–12.

17 Washington State’s existing statute (RCW 70.235.020(1)(a)(iii)) requires the state “to
18 do its part to reach global climate stabilization levels.” Adelsman Decl. ¶ 12. In December
19 2014, when Ecology’s report to the Legislature was written, it was impossible to determine
20 what Washington’s part should be. *Id.* At this time, it is recognized as appropriate that
21 different nations, sub-nations, and states set different greenhouse gas emissions reductions.
22 Adelsman Decl. ¶ 11. That is, there is no longer one uniform set of emission reductions that all
23 nations are agreeing to meet. Instead, each nation is submitting its assessment of what its
24 target should be to the United Nations (U.N.) Secretariat in advance of the Paris Conference.
25 *Id.* United States’ targets were submitted to the U.N. Secretariat in the spring of
26 2015. *Id.* at ¶ 12. Thus, in December 2014, when Ecology’s report was written, the United

1 States had not yet submitted its proposed greenhouse gas emission targets to the U.N.
2 Secretariat. *Id.*

3 In November 2015, U.N. scientists will evaluate the greenhouse gas emission targets
4 submitted by all parties to determine whether they are sufficient to achieve the goal of limiting
5 the increase in global temperature to below 2°C. *Id.* at ¶ 11. In addition, the 2015 Paris
6 Conference will include scientific debates on whether the 2°C temperature increase is an
7 appropriate threshold to avoid dangerous climate change. *Id.* It is not known if members of
8 the UNFCCC will pledge to keep the temperature to 2°C or to a lower level, such as the 1°C
9 target proposed by the Petitioners. *Id.*

10 Ecology believes any changes to Washington's greenhouse gas emission reduction
11 requirements should be informed by the determinations made during the December 2015 Paris
12 Conference of the Parties concerning (1) how emissions reductions are respectively allocated
13 to developed and developing nations, (2) the United States' final greenhouse gas reduction
14 commitments, (3) the debate on the appropriate temperature target to meet, and (4) the
15 determinations made by U.N. scientists concerning the sufficiency of the submitted targets to
16 achieve the 2°C goal. Adelsman Decl. ¶ 12. For these reasons, Ecology decided it was better
17 to wait until after the December 2015 Paris Conference to determine what Washington's part in
18 reaching global stabilization levels should be and to make the appropriate recommendations to
19 the Legislature. *Id.*

20 **B. Review of Dr. Kharecha's Declaration**

21 Dr. Kharecha claims Ecology's December 2014 Report is defective because it does not
22 specify the amount of temperature rise that will stabilize the climate. Declaration of Pushker
23 Kharecha (Kharecha Decl.) ¶ 15. Dr. Kharecha is mistaken. Consistent with the requirement
24 that Ecology report on global or national assessments of climate change science, Ecology's
25 report provides the UNFCCC assessment that the rise in average global surface temperature
26

1 must be kept to less than 2°C above the preindustrial average. Rodgers Harris Decl., Ex. 1
2 at 15.

3 Dr. Kharecha also claims Ecology's report does not present the current science on
4 climate stabilization. Kharecha Decl. ¶ 14. Again, Dr. Kharecha is mistaken. Consistent with
5 the requirement that Ecology report on global or national assessments of climate change
6 science, Ecology's report presents the IPCC science on different climate scenarios that are
7 predicted to occur at different levels of carbon dioxide emissions. Rodgers Harris Decl., Ex. 1
8 at 10. This analysis concludes, "Global surface temperature increases and keep [sic] rising
9 beyond 2100 in all scenarios except the lowest concentration pathway . . . which would . . .
10 keep warming below 3.6°F (2°C)." *Id.* This presentation reflects the current global assessment
11 of climate stabilization.

12 Dr. Kharecha next faults the December 2014 Report for not providing the science
13 supporting the internationally accepted view that global temperatures should be allowed to rise
14 no more than 2°C. Kharecha Decl. ¶ 14. In fact, the December 2014 Report provides a history
15 of the international consensus that global surface temperature must be kept from rising more
16 than 2°C above the preindustrial average, starting with the European Union determinations in
17 1996 and 2005, and moving through the IPCC determination in 2007 and the 2009 acceptance
18 in the Copenhagen Accord. Rodgers Harris Decl., Ex. 1 at 5.

19 The bulk of Dr. Kharecha's declaration provides Dr. Kharecha's opinions concerning
20 climate change, reiterating his research, and reiterating his conclusion that climate stabilization
21 requires global concentrations of carbon dioxide to remain below 350 ppm (corresponding to a
22 temperature increase of about 1°C above preindustrial levels).¹ Dr. Kharecha makes it clear
23 that what he really objects to is the fact that Ecology's report does not present *his* research and
24 conclusions. Kharecha Decl. ¶¶ 12–13, 15–19. However, the requirement in RCW 70.235.040

25 ¹ Petitioners translate the 350 ppm limit described by Dr. Kharecha into a 1°C increase in global
26 temperature. Pet. for Rulemaking at 44.

1 is to provide a report on global or national assessments of climate change science.
2 RCW 70.235.040. Dr. Kharecha's opinions concerning the need to keep global temperatures
3 from rising more than 1°C are based on work that he and his colleague Dr. James Hansen
4 published in one article attached to his declaration: James Hansen et al., *Assessing*
5 *"Dangerous Climate Change": Required Reduction of Carbon Emissions to Protect Young*
6 *People, Future Generations and Nature*, PLOS ONE 8:12, e81628 (2013). This work and this
7 one article do not constitute a "global or national assessment of climate change science."
8 Therefore, Ecology had no duty to present that science to the Legislature.²

9 III. ECOLOGY'S DECISION ON RECONSIDERATION

10 A. Ecology Is Not Required to Adopt Recommendations to the Legislature by Rule

11 In addition to the discussion on this issue in Ecology's Response Brief in this case,
12 Ecology adds the following: (1) Ecology does not have the authority to adopt its
13 recommendations to the Legislature required by RCW 70.235.040 by rule, and (2) as discussed
14 above, the information provided by Petitioners to support their proposed recommendations to
15 the Legislature do not meet the statutory criteria for such recommendations.

16 1. Ecology Does Not Have the Authority to Adopt Recommendations to the 17 Legislature by Rule

18 As an administrative agency, Ecology has only those powers expressly conferred upon
19 it by the Legislature and any powers necessarily implied from that grant of power. *Mun. of*
20 *Metro. Seattle v. Pub. Emp't Relations Comm'n*, 118 Wn.2d 621, 633, 826 P.2d 158 (1992).
21 Here, the power expressly conferred on Ecology is to issue a report to the Legislature, after
22 consulting with the climate impacts group. RCW 70.235.040. Nowhere in RCW 70.235 or in
23 RCW 70.94 is Ecology given the authority to adopt rules to make recommendations to the
24

25 ² Ecology's December 2014 Report does acknowledge that "[s]cientists are urging countries to rethink
26 the CO2 concentration level of 450 and the maximum temperature rise by considering CO2 stabilization at
350 ppm and lowering maximum temperature change to 2.7°F/1.5°C." Rodgers Harris Decl. Ex. 1 at 17.

1 Legislature. Nor is it necessary to imply such authority in order for Ecology to carry out the
2 duty to provide a recommendation to the Legislature.

3 **B. Ecology Will Be Adopting a Rule to Reduce Carbon Dioxide Emissions in**
4 **Washington**

5 As discussed above, neither Ecology's December 2014 Report nor Dr. Kharecha's
6 declaration provides a basis for Ecology to grant the Petition for Rulemaking by adopting the
7 specific rule proposed by Petitioners. However, Ecology will begin a rulemaking to set a cap
8 on carbon dioxide emissions in Washington that will result in substantive reductions in carbon
9 dioxide emissions. On July 28, 2015, Governor Inslee issued a directive to Ecology to use its
10 existing authority under the state Clean Air Act to develop a rule setting a cap on carbon
11 emissions in Washington to achieve substantive reductions in carbon emissions. Declaration
12 of Stuart Clark (Clark Decl.) ¶ 7; Ex. B.

13 Prior to issuing his directive, the Governor, in consultation with Ecology and other
14 agencies, took a comprehensive suite of bills to the Legislature addressing climate change.
15 Adelsman Decl. ¶ 9. The central bill proposed was the 2015 Carbon Pollution Accountability
16 Act, which proposed a cap-and-trade mechanism to reduce greenhouse gas emissions in
17 Washington. *Id.* In advance of the 2015 legislative session, Ecology worked extensively with
18 the Governor to develop the Carbon Pollution Accountability Act. Clark Decl. ¶ 4. During the
19 2015 legislative session, Ecology supported these bills at the Legislature, testifying numerous
20 times in their support. *Id.* The 2015 Legislature failed to adopt these bills. *Id.*

21 In coordination with the Governor's office, Ecology has also taken other steps to
22 address climate change. For example, during 2014, in keeping with the Governor's Executive
23 Order 14-04 (AR 22), Ecology began work on a clean fuel standard to address carbon dioxide
24 emissions from the transportation sector, Washington's largest source of carbon dioxide
25 emissions. Clark Decl. ¶ 5. Ecology's efforts included analysis of design elements of a clean
26 fuel standard, drafting potential regulatory language for the standard, and holding public

1 meetings throughout the state to take input from stakeholders and to educate the public about
2 how a clean fuel standard would work. Clark Decl. ¶ 5. Ecology was forced to discontinue
3 these efforts when the 2015 Legislature adopted a bill providing that funding for public transit
4 will be jeopardized if Ecology initiates rulemaking to adopt a clean fuel standard before 2023.
5 Clark Decl. ¶ 6; Ex. A.

6 After the legislative session ended without any comprehensive legislative approach to
7 address greenhouse gas emissions, the Governor issued his directive for Ecology to use its
8 existing authority to reduce emissions. Clark Decl. ¶ 7; Ex. B. The directive further requires
9 Ecology to use a transparent and open process and provide all stakeholders ample opportunity
10 to participate in developing a rule that would result in substantive reductions in carbon dioxide
11 emissions. Clark Decl., Ex. B. Ecology has begun taking the necessary steps to comply with
12 the Governor's directive and initiate the rulemaking process. Clark Decl. ¶ 8. Ecology has
13 committed to initiating the formal Administrative Procedure Act rulemaking process in 2015,
14 and adopting a final rule by the end of 2016. *Id.* The Petitioners are important stakeholders
15 who are expected to participate fully in the rulemaking process.

16 IV. CONCLUSION

17 As directed by the Court, Ecology has reconsidered its denial of Petitioners' Petition for
18 Rulemaking in light of Ecology's December 2014 Report to the Legislature and
19 Dr. Kharecha's declaration. As discussed above, the documents do not provide a basis for
20 Ecology to grant the Petition for Rulemaking by adopting the specific rule proposed by
21 Petitioners. However, Ecology will begin rulemaking to set a cap on carbon dioxide emissions
22 to achieve substantive reductions in carbon dioxide emissions. Ecology's decisions in this case
23 neither violate the Washington State Constitution, are outside Ecology's statutory authority, or

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1 are arbitrary and capricious. Ecology therefore asks this Court to uphold Ecology's decisions
2 and dismiss this case.

3 DATED this 7th day of August 2015.

4 ROBERT W. FERGUSON
5 Attorney General

6 

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1 **CERTIFICATE OF SERVICE**

2 I certify that I electronically filed the foregoing document with the King County
3 Superior Court Clerk's e-filing system and e-served such filing to the following parties of
4 record:

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