

The Honorable Hollis R. Hill
Hearing: April 15, 2016

**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 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 SEA

PETITIONERS' RULE 60(B)
MOTION FOR RELIEF FROM
JUDGMENT

ORAL ARGUMENT REQUESTED

1 **I. INTRODUCTION & RELIEF REQUESTED**

2 Petitioners respectfully move this Court for an Order granting them relief from
3 judgment pursuant to Superior Court Civil Rule (CR) 60(b)(4) and (11). On November 19,
4 2015, this Court entered an Order Affirming the Denial by the Washington Department of
5 Ecology (“Ecology”) of Petitioners’ Petition for Rulemaking “due to the Department of
6 Ecology having commenced the aforementioned rulemaking process as directed by the
7 Governor.” Order Affirming the Department of Ecology’s Denial of Petition for Rule Making
8 (Nov. 19, 2015) (hereinafter “Final Order”). After finding Ecology’s current emission
9 standards insufficient, this Court declined to grant Petitioners’ requested relief based upon
10 Ecology’s assurances that it would timely promulgate a rule regulating carbon dioxide
11 emissions. Final Order at 7.
12

13 Ecology did not do what it assured this Court it would do. Instead, on February 26,
14 2016, Ecology withdrew its proposed Clean Air Rule. By withdrawing the proposed rule,
15 Ecology has once again demonstrated that it is unable or unwilling to fulfill its legal
16 responsibilities absent a Court order directing it to do so in a timely manner. Therefore,
17 because the legal violations found by this Court are ongoing, and indeed getting worse, relief
18 under Rule 60(b) is appropriate.
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20 **II. STATEMENT OF FACTS**

21 Despite having knowledge about the perils of climate change for at least twenty-six
22 years, and the legal authority to act, Ecology has yet to develop a rule designed to protect the
23 fundamental rights of Petitioners. In 1990, Ecology wrote “[t]he potential impacts of global
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1 warming dwarf those of other environmental threats.” Administrative Record (AR) 14¹ at 5.
2 In December 2008, Ecology wrote “[e]ven then [in 1990], it was clear the societal threat that
3 climate change presents is of a nature and magnitude unlike any other we have faced.” *Id.*
4 Ecology recognized “[t]he science is clear that we must move forward quickly to reduce
5 greenhouse gas (GHG) emissions in order to mitigate its effects. Without action, climate
6 change will negatively affect nearly every part of Washington’s economy through changes in
7 temperature, sea level, and water availability.” AR 14 at 1.

9 In 2009, the University of Washington Climate Impacts Group warned, “[t]he
10 significance of these regional consequences of climate change underscore the fact that
11 historical resource management strategies will not be sufficient to meet the challenges of future
12 changes in climate. Rather, these changes demand new strategies.” AR 13² at ES-2. In
13 December 2010, Ecology reiterated its mantra, “[t]he science is clear that we must move
14 forward quickly to reduce greenhouse gas (GHG) emissions” AR 15³ at 1. In this 2010
15 plan, Ecology projected “the policies the state has already implemented to reduce GHG
16 emissions will result in relatively constant emissions between now and 2020. Unfortunately,
17 this means the state is not on track to meet its statutory reduction limit for 2020 and beyond.”
18 *Id.* In 2013, another report warned, “the State will not meet its statutory reductions for 2020,
19 2035 and 2050 with current state and federal policies.” AR 21⁴ at 1. The same year, the UW
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22 ¹ Ecology & Community Trade & Economic Development, *Growing Washington’s Economy in a Carbon-
23 Constrained World: A Comprehensive Plan to Address the Challenges and Opportunities of Climate Change*,
Ecology Publication No. 08-01-025 (Dec. 2008).

24 ² University of Washington Climate Impacts Group, *The Washington Climate Change Impacts Assessment:
Evaluating Washington’s Future in a Changing Climate* (June 2009).

25 ³ Ecology, *Path to a Low-Carbon Economy: An Interim Plan to Address Washington’s Greenhouse Gas
Emissions*, Ecology Publication No. 10-01-011 (Dec. 2010).

26 ⁴ Leidos, *Evaluation of Approaches to Reduce Greenhouse Gas Emissions in Washington State – Final Report*
(Oct. 14, 2013).

1 Climate Impacts Group concluded that “[a]ll scenarios indicate continued warming” and that
2 “current and future choices about greenhouse gas emissions will have a significant effect on
3 the amount of warming that occurs after about the 2050s.” AR 12⁵ at ES-2.

4 In April 2014, Governor Inslee declared, “Washington needs to take additional actions
5 now, to meet our statutory commitment, to do our part in preventing further climate change, to
6 capture the job growth opportunities of a clean energy economy, and to meet our obligation to
7 our children and future generations.” AR 22⁶ at 2. In December 2014, Ecology found: “If we
8 delay action by even a few years, the rate of reduction needed to achieve these goals would
9 have to be beyond anything achieved historically and could be very costly.”⁷ Ecology stated,
10 “Climate change is not a far off risk. Globally, it is happening now and is worse than
11 previously expected, and it is forecasted to get worse. We are imposing risks on future
12 generations (causing intergenerational inequities) and liability for the harm that will be caused
13 by climate change that we are unable or unwilling to avoid.” *Id.* at 18. Ecology concluded,
14 “Washington State’s existing statutory limits should be adjusted to better reflect the current
15 science. The limits need to be more aggressive in order for Washington to do its part to address
16 climate risks and to align our limits with other jurisdictions that are taking responsibility to
17 address these risks,” but advised “that no changes be made to the state’s statutory emission
18 limits at this time. International negotiations are under way regarding new emissions
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23 ⁵ University of Washington Climate Impacts Group, *State of Knowledge Report, Climate Change Impacts &*
24 *Adaptation in Washington State: Technical Summaries for Decision Makers* (Dec. 2013).

25 ⁶ Executive Order 14-04, Washington Carbon Pollution Reduction & Clean Energy Action (Apr. 29, 2014).

26 ⁷ Declaration of Andrea K. Rodgers Harris filed in support of Petitioners’ Opening Brief (Rodgers Harris Decl.)
(Mar. 15, 2015), Exhibit 1 (Ecology, Washington Greenhouse Gas Emission Reduction Limits, Report Prepared
Under RCW 70.235.040, Ecology Publication No. 14-01-006 (Dec. 2014)) at vi (hereinafter “December 2014
Report”).

1 reductions targets, in preparation for the UN climate conference in December 2015, to be held
2 in Paris.” *Id.* at vi.

3 Ecology submitted testimony in this case that it “is following the discussions and the
4 path to Paris closely and will be ready to decide what changes to Washington’s limits are
5 appropriate and recommend these changes to the Legislature in 2016, shortly after the
6 negotiations by the UNFCCC members are concluded and the commitments by the various
7 nations, including the United States, are finalized.”⁸ As of the date of this filing, the Paris talks
8 and the 2016 Washington legislative session have ended, but Ecology has made no
9 recommendations to the legislature on how RCW 70.235 should be updated “to better reflect
10 the current science.” Declaration of Andrea K. Rodgers (“Rodgers Decl.”) at ¶ 7.

11
12 On November 19, 2015, the Final Order acknowledged that Ecology’s actions to date
13 were insufficient:

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15 the emission standards currently adopted by Ecology do not fulfill the
16 mandate to ‘[p]reserve, protect and enhance the air quality for current and
17 future generations.’ The regulations currently in place specify technological
18 controls of a small number of air pollution sources while not even addressing
19 transportation which as of 2010 was responsible for 44% of annual total GHG
20 emissions in Washington State. *One need only go back to Ecology’s
21 pronouncement in the December 2014 report to appreciate the inadequacy of
22 its current efforts to preserve, protect and enhance the air quality for current
23 and future generations.*

24
25 Final Order at 6 (emphasis added). In spite of this finding, this Court affirmed Ecology’s
26 denial of the petition for rulemaking “given that [Ecology] is engaging in rulemaking under the
directive to establish standards for greenhouse gas emissions.” *Id.* at 7.

⁸ Declaration of Hedia Adelsman filed in support of Ecology’s Response to June 23, 2015 Court Order (Aug. 7, 2015) (“Adelsman Decl.”) at ¶ 12.

1 Specifically, on August 7, 2015, Ecology informed this Court that it was “initiating a
2 rulemaking to adopt a rule under a directive issued by Governor Inslee on July 28, 2015” using
3 its authority under the Washington Clean Air Act. Ecology Response to June 23, 2015 Court
4 Order (Aug. 7, 2015) at 2. Ecology informed this Court it had “begun that rulemaking effort”
5 and was “committed to initiating the formal Administrative Procedure Act rulemaking process
6 in 2015, and adopting a final rule by the end of 2016.” *Id.* at 9. Based on these
7 representations, this Court issued the Final Order.
8

9 After holding stakeholder meetings, Ecology released a proposed rule on January 5,
10 2016 and stated it was accepting comments through April 8, 2016. Rodgers Decl. at ¶ 3.
11 However, on February 26, 2016, Ecology announced that it was withdrawing the proposed rule
12 to “continue working with stakeholders” and “allow more time to integrate suggestions.” *Id.* at
13 ¶ 4. All that remains is Ecology’s rulemaking announcement (CR-101), which reflects what
14 was first proposed eight years ago (AR 14 at 70):⁹ “Consistent with the Legislature’s intent to
15 reduce greenhouse gas emissions, Ecology is using its existing authority under the State Clean
16 Air Act to adopt a rule that limits emissions of greenhouse gases.” *Id.* at ¶ 6 (CR-101 Form at
17 2).
18

19 III. STATEMENT OF THE ISSUE

20 Whether the Court should grant Youth Petitioners’ Motion for Order of Relief from
21 Judgment.
22

23 ⁹ Specifically, in 2008 Ecology recognized it could use its authority under the Washington Clean Air Act to
24 “[a]dopt air quality standards to control amounts of GHG emissions in the outdoor air;” “[a]dopt rules that limit
25 the amount of GHG emissions from specific sources or categories;” “[a]dopt rules or require permits to impose
26 certain kinds of emission standards on existing sources;” and “[a]dopt rules under the New Source Review (NSR)
program to set an emissions threshold for requiring a source to obtain a permit.” AR 14 at 70. Ecology found that
“though not ideal, the state’s Clean Air Act would provide a way for the state to reduce GHG emissions in some
parts of the economy.” *Id.*

1 IV. AUTHORITY

2 A. Petitioners Are Entitled to Relief Under Rule 60(b)(4).

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4 “On motion and upon such terms as are just, the court may relieve a party . . . from a
5 final judgment, order, or proceeding for the following reasons: . . . (4) Fraud (whether
6 heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an
7 adverse judgment.” CR 60(b)(4). A Rule 60(b)(4) motion must be made “within a reasonable
8 time.” *Id.*; *In re: Marriage of Thurston*, 92 Wn.App. 494, 499-500, 963 P.2d 947 (1998).
9 “Motions for vacation or relief of a judgment under CR 60(b) are within the discretion of the
10 trial court” *Flannagan v. Flannagan*, 42 Wn.App. 214, 222, 709 P.2d 1247 (1985).
11 ““Courts should and do give a liberal construction to 60(b).”” *Gustafson v. Gustafson*, 54
12 Wn.App. 66, 70, 772 P.2d 1031 (1989) (quoting 7 Moore’s Federal Practice ¶ 60.18[8] (2d ed.
13 1987)).
14

15 Any party seeking relief under Rule 60(b)(4) must establish the alleged fraud or
16 misrepresentation by clear and convincing evidence. *Lindgren v. Lindgren*, 58 Wn.App. 538,
17 596, 794 P.2d 526 (1990). “[T]he fact that the [fraudulent] acts complained of occurred after
18 the entry of judgment does not bar relief.” *Suburban Janitorial Servs. v. Clarke American*, 72
19 Wn.App. 302, 309, 863 P.2d 1377 (1993). According to one Washington court:
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21 The finality of judgments is an important value of the legal system.
22 However, in both civil and criminal cases, circumstances arise where
23 finality must give way to the even more important value that justice be done
24 between the parties. CR 60 is the mechanism to guide the balancing of
25 finality and fairness.

26 *Id.* at 313.

In this litigation, Ecology made two factual misrepresentations to the Court that
thwarted Petitioners’ ability to obtain their requested relief in spite of demonstrated legal

1 violations.¹⁰ **First**, Ecology informed the Court that it was “committed to initiating the formal
2 Administrative Procedure Act rulemaking process in 2015, and adopting a final rule by the end
3 of 2016.” Ecology Response to June 23, 2015 Court Order (Aug. 7, 2015). However, on
4 February 26, 2016, Ecology withdrew the proposed Clean Air Rule with no alternative
5 currently in place to remedy the legal violations found by this Court in the Final Order.
6 **Second**, Ecology represented to the Court that, in light of the recommendations contained in
7 the December 2014 Report, it “will be ready to decide what changes to Washington’s limits are
8 appropriate and recommend these changes to the Legislature in 2016, shortly after the
9 negotiations by the UNFCCC members are concluded and the commitments by the various
10 nations, including the United States, are finalized.” Adelsman Decl. at ¶ 12. The Paris
11 negotiations have concluded, the 2016 legislative session has come and gone, and in the face of
12 this urgent climate crisis where delay locks in more heating and more harm to these Petitioners,
13 Ecology failed to make **any** recommendations to the legislature as to how the GHG emissions
14 limits in RCW 70.235 should be updated in violation of RCW 70.235.040.¹¹ Rodgers Decl. ¶
15 7. Ecology must be held accountable for not following through on its assurances to the Court
16 that it would fulfill its legal responsibilities to protect the fundamental rights of Petitioners that
17 are protected by law.
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21 ¹⁰ In this proceeding brought under the Administrative Procedure Act, RCW 34.05, Petitioners sought an order:
22 (1) vacating and setting aside Ecology’s decision denying the Petition for Rulemaking; (2) directing Ecology to
23 initiate rulemaking on scientifically-based carbon dioxide emission limits for the state of Washington; and (3)
24 requiring Ecology to meet a timeline within which the rule must be promulgated. Petitioners’ Response to Court’s
25 August 12, 2015 Order to Show Cause (Aug. 25, 2015).

26 ¹¹ RCW 70.235.040 provides: 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.*” (Emphasis added).

1 Petitioners recognize that they do not yet have a record that Ecology purposefully made
2 these unfulfilled promises to the Court. However, for purposes of this motion, “[i]t is
3 immaterial whether the misrepresentation was innocent or willful. The effect is the same
4 whether the misrepresentation was innocent, the result of carelessness, or deliberate.” *Peoples*
5 *State Bank v. Hickey*, 55 Wn.App. 367, 371, 777 P.2d 1056 (1989). The fact of the matter is
6 that this Court found Ecology was not complying with its legal responsibilities to protect the
7 fundamental rights of the Petitioners from harm caused by climate change:
8

9 The regulations currently in place specify technological controls of a small
10 number of air pollution sources while not even addressing transportation
11 which as of 2010 was responsible for 44% of annual total GHG emissions in
12 Washington State. ***One need only go back to Ecology’s pronouncement in***
13 ***the December 2014 report to appreciate the inadequacy of its current efforts***
14 ***to preserve, protect and enhance the air quality for current and future***
15 ***generations.***

16 Final Order at 6-7 (emphasis added). In spite of this finding, the Court did not issue
17 Petitioners’ requested relief “given that [Ecology] is engaging in rulemaking under the
18 directive to establish standards for greenhouse gas emissions.” Final Order at 7; *see also id.* at
19 8 (“Therefore, the Public Trust Doctrine mandates that the State act through its designated
20 agency to protect what it holds in trust. The Department of Ecology is the agency authorized
21 both to recommend changes in statutory emission standards and to establish limits that are
22 responsible. The current rulemaking is toward that end.”); *id.* at 9 (“Now that Ecology has
23 commenced rulemaking to establish greenhouse [gas] emission standards taking into account
24 science [as] well as economic, social and political considerations, it cannot be found to be
25 acting arbitrarily or capriciously.”); *id.* at 10 (“For the foregoing reasons, the petition for
26 review is DENIED due to the Department of Ecology having commenced the aforementioned
rulemaking process as directed by the Governor.”).

1 Ecology represented to this Court that it would timely promulgate a Clean Air Rule and
2 recommend legislative updates to RCW 70.235 in 2016. These representations resulted in the
3 issuance of the Final Order. Whether “innocent or willful,” Ecology has not followed through
4 on its promises. Because the Court’s decision denying Petitioners’ requested relief was
5 predicated upon Ecology’s unfulfilled promises to the Court that it would promulgate a Clean
6 Air Rule and recommend legislative updates to RCW 70.235 in 2016, relief under Rule
7 60(b)(4) is not only justified, but essential to protecting the Petitioners’ declared legal rights.
8 *See Lindgren v. Lindgren*, 58 Wn.App. 588, 596, 794 P.2d 526 (1990) (stating that the
9 fraudulent conduct or misrepresentation “must *cause* the entry of the judgment”).
10

11 **B. In the Alternative, Petitioners Are Entitled to Relief Under Rule 60(b)(11).**

12 In the alternative, Petitioners seek relief pursuant to Rule 60(b)(11) because this case
13 presents extraordinary circumstances that warrant judicial intervention. The urgent need to
14 decrease carbon dioxide emissions to protect the legal rights of these Petitioners has been
15 extensively briefed in this case, undisputed by Ecology, documented in the Administrative
16 Record, and determined by the Court:
17

18 In fact, as Petitioners assert and this court finds, their very survival depends
19 upon the will of their elders to act now, decisively and unequivocally, to
20 stem the tide of global warming by accelerating the reduction of emission
21 of GHG’s before doing so becomes first too costly and then too late. The
22 scientific evidence is clear that the current rates of reduction mandated by
23 Washington law cannot achieve the GHG reductions necessary to protect
24 our environment to ensure the survival of an environment in which
25 Petitioners can grow to adulthood safely.

26 Final Order at 5. In spite of this finding, Ecology withdrew the proposed Clean Air Rule.
Never before has the judicial branch been faced with an issue of this magnitude, where absent
“concerted, effective, and rapid climate action” by the executive branch of government to

1 reduce carbon dioxide emissions, our children and their progeny will be consigned “to a very
2 different, far less habitable, planet.” See Declaration of Dr. James E. Hansen in Support of
3 Petitioners’ Response to Court’s Show Cause Order (Aug. 25, 2015) at ¶¶ 21, 27.

4 “Relief under Civil Rule 60(b)(11) is confined to situations involving extraordinary
5 circumstances not covered by any other section of the rule.” *Summers v. Dep’t of Revenue for*
6 *State of WA*, 104 Wn.App. 87, 93, 14 P.3d 902 (2001). “The United States Supreme Court has
7 held that this rule ‘vests power in courts adequate to enable them to vacate judgments
8 whenever such action is appropriate to accomplish justice.’” *Flannagan*, 42 Wn.App. at 221
9 (quoting *Klapprott v. United States*, 335 U.S. 601, 615 (1949)). Here, justice demands a court
10 order directing Ecology to initiate a rulemaking process, including a specific, enforceable
11 schedule, to cap and reduce carbon dioxide emissions in a manner that complies with the
12 Court’s November 19, 2015 Final Order. Anything less will reward and perpetuate Ecology’s
13 undisputed history of inaction.
14
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16 It has been twenty-six years since Ecology first recognized “[t]he potential impacts of
17 global warming dwarf those of other environmental threats.” AR 14 at 5.¹² Eighteen years
18 later, Ecology found “[t]he science is clear that we must move forward quickly to reduce
19 greenhouse gas (GHG) emissions in order to mitigate its effects. Without action, climate
20 change will negatively affect nearly every part of Washington’s economy through changes in
21 temperature, sea level, and water availability.” AR 14 at 1. Ecology has failed to “move
22 forward” at all “to reduce greenhouse gas (GHG) emissions in order to mitigate its effects.” *Id.*
23

24 _____
25 ¹² Ecology described the origin of this quotation: “So began the chapter on global warming in the Department of
26 Ecology’s report, *Washington Environment 2010*, issued in 1990 under then-director and now Governor Chris
Gregoire. Even then, it was clear the societal threat that climate change presents is of a nature and magnitude
unlike any other we have faced.” AR 14 at 5.

1 No rules have been put in place to put the state on a path towards compliance with RCW
2 70.235.020, let alone scientifically based reductions of GHG emissions. The consequences of
3 Ecology’s inaction are dire and rise to the level of “extraordinary circumstances”:

4 In brief, we now find that *any* additional warming above present risks
5 melting some of Greenland and much of Antarctica. The physical processes
6 giving rise to these risks are described most fully in our most recent work.
7 These developments – unless soon arrested through concerted, effective, and
8 rapid climate action – may implicate the continuing viability of cities along
9 the eastern seaboard, as well as much of coastal Washington and low-lying
10 areas across the globe. These may be submerged, perhaps in as little as
several decades from now – and thus lost irretrievably, at least for millennia,
absent serious action to phase out fossil fuel emissions. The ensuing risk of
economic and social breakdown is manifest.

11 Declaration of Dr. James E. Hansen in Support of Petitioners’ Response to Court’s Show
12 Cause Order (Aug. 25, 2015) at ¶¶ 21. Absent an order from this Court, Ecology will continue
13 to lead this state down the path towards climate destabilization, causing the permanent and
14 irreversible infringement of the fundamental and inalienable rights of these Petitioners and
15 future generations. The protection of these fundamental rights requires judicial intervention by
16 this Court to hold Ecology accountable for complying with the law as decreed in this case. *See*
17 *In re: Marriage of Thurston*, 92 Wn.App. at 496 (“Because a material condition of the parties’
18 1989 decree did not occur and the nonoccurrence of that condition constituted an extraordinary
19 circumstance, the court did not abuse its discretion by granting the CR 60(b)(11) motion.”).

21 V. CONCLUSION & REQUEST FOR RELIEF

22 For the reasons set forth above, Petitioners respectfully request that the Court grant its
23 Rule 60(b) motion and issue an order directing Ecology to initiate rulemaking proceedings to
24 promulgate a rule with an enforceable schedule to comply with the legal obligations outlined in
25 the November 19, 2015 Final Order.
26

1 Respectfully submitted this 6th day of April, 2016.

2
3 s/ Andrea K. Rodgers

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the 6th day of April, 2016 I served one true and correct copy of
3 the foregoing Petitioners’ Motion for Relief from Judgment on the following individuals via e-
4 mail service in accordance with the parties’ electronic service agreement.
5

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7
8 s/ Andrea K. Rodgers
9 Andrea K. Rodgers
10 Western Environmental Law Center
11 Attorney for Youth Petitioners
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