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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 ORDER TO SHOW
CAUSE RE: CONTEMPT

I. INTRODUCTION

On November 19, 2015, this Court issued a decision determining that, although the Washington State Department of Ecology (Ecology) has a mandatory duty to adopt limits on emissions of carbon dioxide in Washington, Ecology was fulfilling that duty by acting on

1 Governor Inslee’s directive to Ecology to adopt a rule to reduce carbon dioxide emissions in
2 Washington. On May 16, 2016, in response to a motion for postjudgment relief, this Court
3 issued an order requiring Ecology to continue its rulemaking effort, and to adopt the final rule
4 by the end of 2016. Ecology adopted the rule, known as the Clean Air Rule, on September 15,
5 2016. Petitioners now ask the Court to find Ecology in contempt of court because, although
6 Ecology adopted the rule well before the December 31, 2016 deadline, Ecology adopted a rule
7 Petitioners do not like.

8 Ecology asks this Court to dismiss Petitioners’ claims for two reasons. First,
9 Petitioners’ claims that Ecology’s rule does not meet legal requirements must be brought in
10 Thurston County Superior Court. Second, there is no basis for a finding of contempt because
11 Ecology complied with this Court’s orders.

12 II. ARGUMENT

13 A. Petitioners Must Bring Their Challenge to Ecology’s Rule in Thurston County 14 Superior Court

15 Petitioners ask this Court to determine that Ecology’s rule does not meet the
16 requirements of law. Ecology strongly disputes the merits of the Petitioners’ claims and
17 believes the Clean Air Rule complies with the law. However, Ecology will not make its
18 arguments on that question here, because, as explained below, Petitioners’ challenge to
19 Ecology’s rule may be heard only in Thurston County Superior Court.

20 1. Petitioners’ motion is a challenge to Ecology’s rule

21 The refrain throughout Petitioners’ brief is that Ecology’s Clean Air Rule fails to meet
22 the requirements of state law. From start to finish—from Introduction to Conclusion—
23 Petitioners claim the Clean Air Rule does not “fulfill” state “statutory and constitutional
24 responsibilities.” Petitioners’ Motion for Order to Show Cause Re: Contempt (Motion) at 5, 7,
25 8, 9, 10, 11, 12, 13, 14, 15, 16. In their Introduction, Petitioners ask this Court to issue an order
26 requiring Ecology to “ensure . . . reduction of greenhouse gas (“GHG”) emissions . . . in a

1 manner that fulfills its statutory and constitutional responsibilities.” Motion at 5. They repeat
2 this claim in their Conclusion, adding the request that the Court retain jurisdiction to “ensure
3 that Ecology makes progress towards reducing GHG emissions in a manner that fulfills its
4 statutory and constitutional responsibilities.” Motion at 16. On page 7, Petitioners lay out in
5 three bullet points what they believe Ecology’s duty under the law is. Section B then discusses
6 “Ecology’s Refusal To Fulfill Its ‘Duty Required by Law.’” Motion at 8. On page 9,
7 Petitioners get to the heart of their claim: that the 1.7% per year reductions in greenhouse gas
8 emissions required by Ecology’s rule are not sufficient to fulfill Ecology’s duty under the law.
9 These statements make it clear that Petitioners are challenging the validity of Ecology’s rule.

10 Petitioners claim they are not asking the Court to review the parameters of the Clean
11 Air Rule or dictate what those parameters should be. Motion at 10, 17. However, that is exactly
12 what they are asking. Specifically, they are asking the Court to find that the provisions of
13 WAC 173-442-060(1)(b), requiring covered parties to reduce emissions by 1.7% per year, are
14 insufficient under the law and should be revised to require reductions of 8% per year. Motion
15 at 9, 16. This claim constitutes a challenge to the validity of the Clean Air Rule.

16 Petitioners, of course, have the right to raise their claims and make their arguments that
17 the Clean Air Rule does not meet legal requirements. However, because their claims challenge
18 the validity of a state agency rule, they can only be considered by Thurston County Superior
19 Court. RCW 34.05.570(2)(b)(i).

20 **2. Rule challenges can only be considered by Thurston County Superior**
21 **Court**

22 As outlined in previous briefing in this case, the state Administrative Procedure Act
23 (APA) dictates the procedures that must be used for state agency rulemaking. RCW 34.05.310–
24 .395. Similarly, the APA dictates the procedures that must be used for challenging state agency
25 rules. Those procedures require, for example, that the review of a rule be based on the agency’s
26 record. RCW 34.05.558. The record for a rulemaking must include a rulemaking file with “[a]ll

1 written petitions, requests, submissions, and comments received by the agency and all other
2 written material regarded by the agency as important to adoption of the rule or the proceeding
3 on which the rule is based.” RCW 34.05.370(2)(c). The rulemaking file must also include
4 “[c]itations to data, factual information, studies, or reports on which the agency relies in the
5 adoption of the rule” (RCW 34.05.370(2)(f)), as well as a concise explanatory statement
6 responding to comments on the draft rule and indicating how the final rule reflects agency
7 consideration of the comments. RCW 34.05.370(2)(g); RCW 34.05.325. The record in the
8 adoption of a significant legislative rule such as Ecology’s Clean Air Rule must also include a
9 cost-benefit analysis and a small business economic statement. RCW 34.05.328. The
10 rulemaking file in this case includes several thousand pages of analysis explaining the agency’s
11 decision-making processes in adopting the Clean Air Rule, responses to stakeholder comments,
12 and the other documentation required by the APA.

13 The APA also dictates the standard of review: The court may declare a rule invalid “if
14 it finds that: The rule violates constitutional provisions; the rule exceeds statutory authority of
15 the agency; the rule was adopted without compliance with statutory rule-making procedures; or
16 the rule is arbitrary and capricious.” RCW 34.05.570(2)(c). Petitioners’ claims fall squarely
17 within this standard of review, as Petitioners claim the Clean Air Rule violates their
18 constitutional rights and exceeds statutory authority. *See, e.g.*, Motion at 5, 8, 16.

19 Finally, the APA dictates that challenges to rules may only be considered by the
20 Thurston County Superior Court:

21 The validity of any rule may be determined upon petition for a declaratory
22 judgment addressed to the superior court of Thurston county, when it appears
23 that the rule, or its threatened application, interferes with or impairs or
immediately threatens to interfere with or impair the legal rights or privileges of
the petitioner.

24 RCW 34.05.570(2)(b)(i) (emphasis added).

1 Because Petitioners seek relief for their claim that the rule and its application interfere
2 with or impair their legal rights, this provision of the APA applies and Petitioners may only
3 seek relief in the Superior Court of Thurston County.

4 The Washington Supreme Court decided this question in *Sim v. WA State Parks &*
5 *Recreation Comm'n*, 90 Wn.2d 378, 583 P.2d 1193 (1978). There the plaintiff sought
6 invalidation of a state agency rule by filing an appeal in Pacific County Superior Court. *Id.* at
7 379. The State moved for a change of venue to Thurston County, which was denied. *Id.* at 380.
8 The supreme court remanded the case with directions to transfer the case to Thurston County
9 Superior Court. *Id.* at 384. The court held:

10 If a party chooses to bring a declaratory judgment petition challenging the
11 validity of a state agency rule, the statute provides only one place in which to
file it: Thurston County.

12 *Id.* at 381.¹

13 Mr. Sim argued that his claim was not bound by the APA limitation on venue because
14 it was a request for injunctive relief, not an action for declaratory judgment. *Id.* at 380. The *Sim*
15 court noted, however, that Mr. Sim “specifically requested relief in the form of a judgment
16 declaring the questioned regulation void,” and determined that Mr. Sim’s action was “primarily
17 a petition for a declaratory judgment seeking a determination regarding the validity of an
18 agency rule.” *Id.* at 380–381. Here, Petitioners style their claim as a motion for contempt.
19 However, they are asking this Court to find that Ecology’s rule does not meet legal statutory
20 and constitutional requirements. Therefore, as in *Sim*, Petitioners’ claim, is “primarily a
21 petition for a declaratory judgment seeking a determination regarding the validity of an agency
22 rule.”

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25 ¹ *Sim* was decided under the former APA, RCW 34.04, but was decided based on a provision identical to
26 our current APA rule challenge provision, RCW 34.05.570(2)(b)(i), which requires rule challenges to be lodged in
Thurston County Superior Court.

1 The court in *Sim* noted that the Legislature designated Thurston County as the
2 appropriate venue because it was the principal forum of convenience for evaluating agency
3 rules. *Sim*, 90 Wn.2d at 383. (“The legislature, among other considerations, no doubt
4 recognized that, in most instances where the validity of state agency rules is the primary issue,
5 the files, records, and the agencies affected by the challenge are centralized in Thurston
6 County.”) Here, the agency is already in Thurston County Superior Court because a number of
7 parties have already filed challenges to Ecology’s rule in that court. Declaration of Laura J.
8 Watson in Opposition to Petitioners’ Show Cause Motion for Contempt (Watson Decl.) ¶¶ 2, 3.
9 In accordance with the schedule for those challenges, the files and records for Ecology’s Clean
10 Air Rule will be provided to Thurston County Superior Court on November 28, 2016. Watson
11 Decl. Ex. C at 2. The briefing schedule for those challenges has also been set, and oral
12 argument is scheduled for March 31, 2017. *Id.*

13 Because Petitioners’ claims constitute a challenge to Ecology’s Clean Air Rule, they
14 must be filed in Thurston County Superior Court.

15 **3. Allowing this challenge to go forward in King County could subject**
16 **Ecology to contradictory rulings by different courts on the same questions**

17 A further reason for requiring venue in Thurston County Superior Court is that
18 allowing different courts to rule on challenges to the same rule at the same time could subject
19 Ecology to contradictory rulings that the agency could not then comply with. The parties
20 challenging Ecology’s Clean Air Rule in Thurston County Superior Court are asking that court
21 to rule on the legal standards Ecology was required to meet in adopting the Clean Air Rule.²
22 Similarly, Petitioners are asking King County Superior Court to rule on the legal standards
23 Ecology was required to meet in adopting the Clean Air Rule. Motion at 9, 16. If the two

24 ² Parties challenging the Clean Air Rule in Thurston County Superior Court include the Association of
25 Washington Business, Industrial Customers of Northwest Utilities, Northwest Food Processors Association,
26 Northwest Industrial Gas Users, Northwest Pulp and Paper Association, Washington Farm Bureau, Washington
Trucking Associations, Western States Petroleum Association, Avista Corporation, Cascade Natural Gas
Corporation, Northwest Natural Gas Company, and Puget Sound Energy. Watson Decl. Exs. A and B.

1 courts should reach conclusions at odds with one another, Ecology would be in the untenable
2 position of being required to comply with both contradictory rulings at the same time.

3 For all the reasons provided above, Ecology asks this Court to find that, because
4 Petitioners' action challenges the validity of a state agency rule, Petitioners must file their
5 claims in Thurston County Superior Court. Ecology asks this Court to therefore dismiss
6 Petitioners' challenge and advise Petitioners that they may file their challenge in Thurston
7 County Superior Court, where a number of other parties are already challenging the Clean Air
8 Rule.

9 **B. Ecology Cannot Be Held in Contempt Because Ecology Complied with the Court's**
10 **Orders**

11 Petitioners claim that Ecology, by adopting a rule Petitioners do not like, is in contempt
12 of this court's November 19, 2015 and May 16, 2016 rulings in this case. Motion at 8.
13 However, nothing in either of these orders can be construed as requiring Ecology to adopt the
14 specific rule Petitioners seek. To the contrary, the November 19, 2015 ruling specifically
15 rejected this argument. Declaration of Katharine G. Shirey in Support of Ecology's Response
16 to Order to Show Cause Re: Contempt (Shirey Decl.) Ex. A at 4 ("this Court must now rule on
17 Petitioner's appeal which specifically seeks a rule on GHG that is based on 'current science'
18 which the ongoing rulemaking does not guarantee. Because this Court does not have the
19 authority to exclude non-science related considerations from this ongoing rulemaking, for the
20 reasons cited below, the appeal is DENIED.").

21 Petitioners try to expand the requirements of the Court's orders to infer such a
22 requirement. However, when determining whether a party is in contempt of court for violating
23 a court order, the order must be strictly construed in favor of the contemnor (in this case,
24 Ecology). Therefore, Petitioners' attempts to broaden the meaning of this Court's rulings
25 cannot stand, and Ecology cannot be held in contempt of court.
26

1 **1. Ecology complied with this Court’s November 19, 2015 order**

2 The Court’s November 19, 2015 order affirms Ecology’s denial of Petitioners’ petition
3 for rulemaking. The order states, “Now that Ecology has commenced rulemaking to establish
4 greenhouse [sic] emission standards taking into account science and [sic] well as economic,
5 social and political considerations, it cannot be found to be acting arbitrarily or capriciously.
6 For the foregoing reasons, the petition for review is DENIED due to the Department of
7 Ecology having commenced the aforementioned rulemaking process as directed by the
8 Governor.” Shirey Decl. Ex. A at 9–10. In that order, the Court acknowledges that it “does not
9 have the authority to exclude non-science related considerations from [Ecology’s] ongoing
10 rulemaking” (*Id.* at 4) and that it “cannot dictate the parameters of that procedure.” *Id.* at 7.

11 Congruent with the November 19, 2015 ruling, Ecology completed its rulemaking
12 effort, adopting a rule “taking into account science [as] well as economic, social and political
13 considerations.” Declaration of Sarah Louise Rees (Rees Decl.) ¶ 5. Petitioners claim Ecology
14 is in contempt of court because Petitioners believe that certain science-based considerations
15 should have resulted in a different rule. Motion at 9. However, the November 19, 2015 order
16 explicitly acknowledges that Ecology can take into account more than science. Shirey Decl.
17 Ex. A at 4. This Ecology did. Under these circumstances, there is no basis for holding Ecology
18 in contempt of court for violation of the November 19, 2015 order.

19 **2. Ecology complied with this Court’s May 16, 2016 order**

20 The May 16, 2016 order, issued in response to Petitioners’ motion for relief under Civil
21 Rule 60(b) (CR 60(b)), states,

22 THE COURT HEREBY ORDERS AS FOLLOWS:

- 23 1. Ecology shall proceed with the rulemaking procedure to adopt a rule to
24 limit greenhouse gas emissions in Washington state as directed by
25 Governor Inslee in July 2015, and shall issue the rule by the end of
26 calendar year 2016.

1 2. Ecology shall provide a recommendation to the 2017 legislature on
2 greenhouse gas limits for the state of Washington as provided in
3 RCW 70.235.040.

4 3. The Parties shall confer within the next sixty (60) days to determine
5 when such a recommendation should be presented to have the best
6 possibility of affecting the legislators on these matters.

7 Shirey Decl. Ex. B at 3.

8 Petitioners challenge Ecology's compliance with the first of these provisions. Motion at
9 8 n.2. However, as that provision requires, Ecology proceeded with the rulemaking procedure
10 to adopt a rule to limit greenhouse gases in Washington State as directed by Governor Inslee in
11 July 2015. Rees Decl. ¶¶ 3, 4. Ecology issued the rule on September 15, 2016, well before the
12 end of calendar year 2016. Rees Decl. Ex. A. Therefore, Ecology complied with the Court's
13 May 16, 2016 order.

14 Petitioners claim Ecology's rule does not comply with the May 16, 2016 order because
15 the May 16, 2016 order vacated portions of the November 19, 2015 order. Motion at 8, 12.
16 Petitioners do not articulate which provisions of the November 19, 2015 order they believe the
17 Court meant to vacate. However, they appear to claim that the Court meant to vacate the
18 provisions in the November 19, 2015 order acknowledging that Ecology could take into
19 account factors other than science. Motion at 8, 12.

20 Petitioners' interpretation of the May 2016 order assumes the Court, without saying so,
21 with no analysis, in direct contradiction to what it explicitly stated to be the law in the
22 November 19, 2015 order, and contrary to the requirements of the APA, suddenly determined
23 that it could place requirements on the substance of Ecology's as yet unadopted rule.
24 Petitioners' interpretation goes too far.

25 It is instructive to go back to what the Court actually said in ruling on Petitioners'
26 CR 60(b) motion. The Court stated:

1 But I am finding under 60(b) 11 that extraordinary circumstances exist which
2 require vacation of the portion of the order that denied – that put the matter back
3 in the hands of Ecology with the understanding of this Court that Ecology was
4 going to pursue a rule making procedure and was going to make a
5 recommendation to the legislature during the 2016 session which is now
6 concluded. I’m not confident at this point that the rule making procedure will be
7 completed by the end of 2016 without a court order, and I think it’s necessary
8 that that be in a court order, and so I will issue an order to that effect. That the
9 rule making procedure proceed and that a rule be issued by the end of calendar
10 year 2016 and that a recommendation to the legislature be made during the 2017
11 session.

12 Shirey Decl. Ex. C at 19–20.

13 This statement makes clear that the Court’s concern was about the *timing* of Ecology’s
14 rule. The Court made no statement concerning the substance of Ecology’s rule. Moreover, the
15 portion of the Court’s statement articulating what the Court was ordering Ecology to do is
16 directed solely at ensuring Ecology adopt its rule by the end of 2016. The Court did not direct
17 Ecology to adopt any particular rule. Nor did the Court make any statement about what should
18 or should not be in the rule. To the contrary, the Court made it clear that Ecology should
19 continue with the rulemaking process it had started, stating, “I will issue an order to that effect.
20 *That the rule making procedure proceed* and that a rule be issued by the end of calendar year
21 2016 . . .” *Id.* (emphasis added). In accordance with these remarks, and in compliance with
22 Court’s May 16, 2016 order, Ecology proceeded with its rulemaking effort and adopted the
23 rule before the end of 2016. Therefore, Ecology complied with the Court’s May 16, 2016
24 order.

25 **3. The Court’s orders must be construed narrowly in the light most favorable**
26 **to Ecology**

Even if the Court intended its April 29, 2016 remarks and the May 16, 2016 order to
place substantive requirements on Ecology’s rule, the Court may not hold Ecology in contempt
for not having done so because the Court’s order does not make that intent clear. Neither the
Court’s April 29, 2016 remarks nor the May 16, 2016 order addresses the substantive

1 requirements for Ecology’s rule, or places any requirements on Ecology with regard to the
2 substance of the rule.

3 When a superior court bases a contempt finding on a court order, “the order must be
4 strictly construed in favor of the contemnor.” *Stella Sales Inc. v. Johnson*, 97 Wn. App. 11, 20,
5 985 P.2d 391 (1999); *Johnston v. Beneficial Mgmt. Corp. of Am.*, 96 Wn.2d 708, 713, 638 P.2d
6 1201 (1982); *Ecology v. Tiger Oil*, 166 Wn. App. 720, 767, 271 P.3d 331 (2012). The purpose
7 for this “strict construction” rule is to protect persons from contempt proceedings based on
8 violation of judicial decrees that are unclear or ambiguous, or that fail to explain precisely what
9 must be done. *Graves v. Duerden*, 51 Wn. App. 642, 647–8, 754 P.2d 1027 (1988) (citing *Int’l*
10 *Longshoremen’s Ass’n v. Philadelphia Marine Trade Ass’n*, 389 U.S. 64, 88 S. Ct. 201, 19 L.
11 Ed. 2d 236 (1967) (“unintelligible” decree “defie[d] comprehension”); *State v. Int’l*
12 *Typographical Union*, 57 Wn.2d 151, 356 P.2d 6 (1960) (act complained of not specifically
13 prohibited by decree)); *see also Trummel v. Mitchell*, 156 Wn.2d 653, 671–72, 131 P.3d 305
14 (2006) (vacating a contempt finding after noting that nothing in the order specifically
15 prohibited the conduct that occurred). In contempt proceedings, an order will not be expanded
16 by implication beyond the meaning of its terms when read in light of the issues and the
17 purposes for which the suit was brought. *Johnston*, 96 Wn.2d at 712–13 (cited by *Graves*, 51
18 Wn. App. at 647–8).

19 In compliance with these rulings, the Court’s May 16, 2016 order must be strictly
20 construed in favor of Ecology and may not be expanded beyond the meaning of its terms.
21 Moreover, Ecology cannot be held in contempt for failing to take an action that the order failed
22 to explain precisely needed to be taken. The Court’s May 16, 2016 order clearly required
23 Ecology to adopt a rule by the end of 2016, which Ecology has done. Nothing in the May 16,
24 2016 order placed any requirements on the substance of Ecology’s rule. Therefore, no such
25 requirements can be implied, and Ecology may not be held in contempt based on the substance
26 of the rule it adopted.

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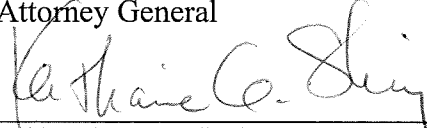
III. CONCLUSION

Petitioners' claims amount to a challenge to Ecology's Clean Air Rule, which can only be heard in Thurston County Superior Court. Moreover, Ecology complied with the Court's November 19, 2015 decision and with the Court's May 16, 2016 order. Therefore, there is no basis for finding Ecology in contempt of court. Ecology therefore asks this Court to deny Petitioners' Motion and dismiss their claims.

DATED this 18th day of November 2016.

I certify that this memorandum contains 3609 words, in compliance with the Local Civil Rules.

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