

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

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ZOE & STELLA FOSTER, minor )  
 children by and through their )  
 guardians MICHAEL FOSTER and )  
 MALINDA BAILEY; AJI & ADONIS )  
 PIPER, minor children by and )  
 through guardian HELAINA ) No. 14-2-25295-1 SEA  
 PIPER; WREN WAGENBACH, a minor )  
 child by and through her ) Appeal No. 75374-6-I  
 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. )

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HEARING ON MOTION FOR ORDER TO SHOW CAUSE

The Honorable Hollis Hill Presiding

November 22, 2016

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TRANSCRIBED BY: Katherine VanGrinsven, CA CSR #11985  
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## A P P E A R A N C E S

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On Behalf of the Petitioners:

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2 November 22, 2016

3  
4 THE COURT: Please be seated. Good afternoon, everyone.  
5 Well, here we are back again on Foster vs. Washington  
6 Department of Ecology, Cause No. 14-2-25295-1. I'd first  
7 like the attorneys to put their names on the record and for  
8 them to introduce their clients who are in court.

9 MS. RODGERS: Thank you, Your Honor. Andrea Rodgers on  
10 behalf of the plaintiffs. And with me today is Gabriel  
11 Mandell, Adonis Piper, my colleague Julia Olson, Aji Piper,  
12 and Athena Fain -- Lara Fain, I'm sorry.

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

14 MS. SHIREY: Kay Shirey on behalf of Washington State  
15 Department of Ecology. From the Department of Ecology we  
16 have Camille St. Onge.

17 THE COURT: All right. Welcome everybody.

18 All right. This is petitioners' motion for an order to  
19 show cause whether the Department should be held in contempt  
20 based on the Court's prior orders. So let me hear -- I've  
21 read the motion, the response and the reply. There are a  
22 few of the documents that were referred to that I haven't  
23 had the opportunity yet to read, so I do need to tell you  
24 that. So I won't be ruling from the bench, but I think I  
25 understand the issues pretty well based on the extensive

1 amount of reading that I have done to date.

2 So let me start with you, Ms. Rodgers.

3 MS. RODGERS: Thank you, Your Honor.

4 Good afternoon. Andrea Rodgers on behalf of the  
5 plaintiffs -- or the petitioners in this case, Your Honor.  
6 We are here today because my clients find themselves in the  
7 same position that they were back in 2014 when the  
8 Department of Ecology denied their petition for rulemaking,  
9 and that is in spite of the fact that this Court has issued  
10 two orders finding largely legally in favor of the  
11 petitioners and in spite of the fact that the case -- in  
12 this case we are dealing with a situation of extreme  
13 urgency.

14 And I believe the Court has recognized what is at stake  
15 here: A climate system capable of sustaining human life. I  
16 want to be very clear though, Your Honor. We are not here  
17 to appeal the legality of the Clean Air Rule. That is not  
18 what this motion is all about. Our petition for rulemaking  
19 did not ask for a particular policy, and rather we're  
20 seeking an order directing Ecology to develop a regulatory  
21 plan to ensure science-based numeric reductions of  
22 greenhouse gas emissions in Washington State.

23 In order to grant our requested relief, there is no need  
24 for this Court to make any findings regarding the legality  
25 of the Clean Air Act. And I realize that there are

1 currently challenges of the Clean Air Rule -- excuse me --  
2 that are currently ongoing in Thurston County Superior  
3 Court, and we are not asking this Court to make a finding  
4 regarding the substance of that rule.

5 Ecology has publicly admitted that the policies in  
6 existence today, including the Clean Air Rule, will not  
7 reduce emissions in line to comply with the existing  
8 greenhouse gas emissions contained in RCW 70.235.020, the  
9 very limits that this Court previously found to be out of  
10 date, not based on science, and insufficient, I quote, to  
11 protect our environment and to ensure the survival of an  
12 environment in which petitioners can grow to adulthood  
13 safely.

14 And to my right, Your Honor, we have a demonstrative  
15 exhibit. And this is a graph that the Department of  
16 Ecology -- the colored lines were prepared by the Department  
17 of Ecology, and it shows that -- the blue line -- the red  
18 line is state emissions without any actions taken. The blue  
19 line, expected emissions under the Clean Air Rule. And the  
20 green line are the existing greenhouse gas emission limits  
21 that have been found to be not supported in science and  
22 outdated and not protective of the rights of young people.

23 You will see that the blue line does not get us to comply  
24 with those statutory reductions. The final two lines at the  
25 bottom are those lines that are required. They're emission

1 reductions that are required by best available science in  
2 accordance with the scientific prescription and scientific  
3 information that is contained in the record and has been  
4 supplied by the petitioner in this case. And I will note,  
5 it has not been disputed by Ecology. There's no alternative  
6 scientific prescription that's been presented as part of  
7 this case, even with the Clean Air Rule on the books.

8 And again, we are not asking you to set it aside or vacate  
9 that rule. That is not what we are here to do. These young  
10 people's rights are continuing to be violated, and Ecology  
11 remains out of compliance with the law as it was defined by  
12 this Court in both the November and the May court orders.

13 We are asking you to enter an order that gives meaning to  
14 the two previous court orders issued by this Court. We are  
15 asking for a regulatory plan that insures science-based  
16 numeric reductions in greenhouse gas emissions in  
17 Washington.

18 And because Ecology has never in this case before disputed  
19 the science that has been offered by the petitioner, we  
20 believe that you do have the authority to order them to base  
21 their emission reduction plan based upon the scientific  
22 prescription that has been offered by petitioners.

23 And again, if Ecology can come up with science that is an  
24 alternative prescription that will protect the rights of  
25 young people and that will fulfill their legal

1 responsibilities, that certainly should be made available.  
2 And that is another reason why we're asking you to exercise  
3 continuing jurisdiction over this matter.

4 The Court clearly has the inherent and statutory authority  
5 to enforce its prior orders. Ecology does not dispute that  
6 fact in its response brief. And also, Your Honor, Ecology  
7 has the legal authority and responsibility to remedy the  
8 ongoing legal violations of these young people's fundamental  
9 rights.

10 In its response brief, Ecology does not argue that it  
11 lacks authority to develop the regulatory plan that is  
12 sought by petitioners. In fact, Ecology has done something  
13 similar before, Your Honor. And I would point your  
14 attention to the Administrative Record at 14 and 15, the  
15 first being a plan that Ecology developed along with another  
16 state agency, which is called "A Comprehensive Plan to  
17 Address the Challenges and Opportunities of Climate Change."

18 And Administrative Record 15 is another interim plan to  
19 address Washington's greenhouse gas emissions. And they  
20 clearly have the authority to develop those plans based on  
21 RCW 70.235.020. And what is missing from those plans that  
22 have been developed, Your Honor, are emissions reductions  
23 that align with what is required by best available science.

24 Both of those two documents will show and they admit that  
25 the state is not on track to meet the existing statutory

1 greenhouse gas reductions. So something more needs to be  
2 done, and that is what we're asking you to order the agency  
3 to do today.

4 THE COURT: Let me ask you --

5 MS. RODGERS: We are not here to tell you --

6 THE COURT: Let me ask you a question, and --

7 MS. RODGERS: Yes.

8 THE COURT: -- I'll let you go on. Do you acknowledge  
9 that this Court doesn't -- that this is not the proper venue  
10 to challenge the rule that has been issued? That the proper  
11 venue would be Thurston County for that to be done?

12 MS. RODGERS: Yes. We don't dispute with that. I believe  
13 that the language in the Administrative Procedures Act is  
14 clear on that.

15 THE COURT: Okay. So then my next question is what is it  
16 that -- what did you bring before this Court initially,  
17 other than a request that -- for an order to require the  
18 rulemaking procedure to take place?

19 MS. RODGERS: Yes. In our petition for rulemaking, Your  
20 Honor, we asked that Ecology promulgate a rule that did two  
21 things. The first was that they make recommendations to the  
22 legislature to revise the emission reductions that are  
23 currently in state law based on best available science.

24 The second thing that we asked them to do was to use their  
25 existing statutory authority to promulgate a rule ensuring

1 the reduction of carbon dioxide emissions based upon best  
2 available science. That was the two-part rule.

3 We were not seeking a rule based solely on the Clean Air  
4 Act. Our -- the entire -- our entire legal case is based  
5 upon their constitutional obligations, their public trust  
6 obligations, and the full panoply of their statutory  
7 authority, which is quite broad.

8 I'd like to note for the Court that Ecology was -- is  
9 charged with, and I quote, to plan, coordinate, restore and  
10 regulate the utilization of our natural resources in a  
11 manner that will protect and conserve our clean air, our  
12 pure and abundant waters, and the natural beauty of the  
13 state.

14 And to carry out those purposes, the Department of Ecology  
15 has a number of other statutory authorities that were cited  
16 in our petition for rulemaking that gives them authority and  
17 the responsibility, frankly, to do this kind of plan that we  
18 have been -- that we were seeking in our original petition  
19 for rulemaking.

20 THE COURT: Okay.

21 MS. RODGERS: And we recognize, Your Honor, that Ecology  
22 is not the only agency that needs to take action to reduce  
23 greenhouse gas emissions in the state. We understand that  
24 there are a variety of different agencies that play a role  
25 in this process. But it is Ecology who has the

1 responsibility and the legal duty to develop the plan and to  
2 adopt -- tell us what is -- what are safe levels of carbon  
3 dioxide emissions so that all actions targeting greenhouse  
4 gas reductions are aimed toward that scientific standard.

5 And I just would like to note, Your Honor, as the  
6 Washington Supreme Court recently recognized in a decision  
7 that was issued a couple of months ago, agencies have  
8 implied authority to carry out their legislatively mandated  
9 purposes. When the legislature grants power to an agency,  
10 it also grants by implication everything lawful and  
11 necessary to the effectual execution of the power.

12 That case is Lenander vs. Washington State Department of  
13 Retirement Systems at 186 Wn.2d 393 at page 404, and that's  
14 a 2016 case, Your Honor. Ecology has clear statutory  
15 authority to do what we are asking -- what we are asking you  
16 to order them to do.

17 And finally, Your Honor, the Public Trust Doctrine, I  
18 would like to briefly mention that, because that really is  
19 the heart and soul of this case. And I wanted to reference  
20 a recent decision out of the District of Oregon, which we  
21 attached along with our reply brief that was the --

22 THE COURT: Right. I did read the Juliana decision with  
23 great interest.

24 MS. RODGERS: Yes. Yes. And as you know, this Court's  
25 November decision was cited in that case. And as Judge

1 Aiken in that case said, "The Government, as trustee, has a  
2 fiduciary duty to protect the trust assets from damage so  
3 that current and future trust beneficiaries will be able to  
4 enjoy the benefits of the trust."

5 Now, the Washington State legislature has delegated the  
6 authority to protect the natural resources of this state.  
7 They have delegated that responsibility to the Washington  
8 State Department of Ecology, and that is why, Your Honor, we  
9 are asking that you enter an order finding them in contempt  
10 of the two prior orders and directing them to issue a  
11 regulatory plan as set forth in the proposed order that we  
12 have provided.

13 And if there's not any further questions, I will...

14 THE COURT: All right. I don't think so at this time.

15 MS. RODGERS: Thank you, Your Honor.

16 THE COURT: Thank you.

17 Ms. Shirey.

18 MS. SHIREY: Your Honor, may it please the Court, my name  
19 is Kay Shirey. I represent the Washington State Department  
20 of Ecology in this matter. And we are here, as Ms. Rodgers  
21 explained, on petitioners' claim that Ecology is in contempt  
22 of court for failing to follow the requirements of this  
23 Court's orders dated November 19th, 2015, and May 15th,  
24 2016.

25 We ask the Court to deny the relief, deny petitioners'

1 claim for two reasons. First, their claims constitute,  
2 despite what they say, they constitute a challenge to  
3 Ecology's rule that must be brought in Thurston County  
4 Superior Court; and second, that Ecology complied with this  
5 Court's rulings and, therefore, there is no basis for  
6 contempt of court.

7 THE COURT: Let me -- let me ask you something about the  
8 first basis. Were Ecology to have come up with a rule that  
9 basically said: We don't think there needs to be any cap on  
10 carbon emissions or, you know, we've issued a rule that  
11 basically had no significance, no power, no meaning, would  
12 that be in violation of the Court's order?

13 MS. SHIREY: I believe, Your Honor, that this Court's  
14 order was tied to Ecology's commitment to rulemaking  
15 according to the Governor -- Governor Inslee's directives.  
16 And Governor Inslee's directives, which I have copies of  
17 here -- it's in the record, but I have copies here if you  
18 would like one.

19 THE COURT: Um-hum. Well, I do have one in the record,  
20 but I'll take one to put with this particular --

21 MS. SHIREY: Okay.

22 THE COURT: -- stack of documents that's growing.

23 MS. SHIREY: All right.

24 THE COURT: Thank you.

25 MS. SHIREY: Do you need another one? Okay.

1           This is a letter from Governor Inslee to Maia Bellon, the  
2           Director of the Department of Ecology, dated August 13th,  
3           2015, in which he directs Ecology to adopt a rule.

4           And the letter says, "In order to help meet the state's  
5           statutory greenhouse gas emission limits, RCW 70.235.020,  
6           the cap must decline over time. I ask that you carefully  
7           assess what sectors and facilities should be governed by the  
8           rule in order to regulate the state's largest contributors  
9           of carbon pollution to achieve the greatest emissions  
10          reductions in an efficient and effective manner."

11          So your order, the Court's order from November 19th, 2015,  
12          recognized that Ecology had begun a rulemaking to meet the  
13          requirements of this directive and that Ecology's efforts  
14          fulfilled Ecology's duties that you had found under the  
15          constitution of the Public Trust Doctrine.

16          So what Ecology has done is exactly what this directive  
17          states. Ecology has determined reductions and a cap that  
18          goes down over time and the sources that should be included,  
19          the major sources of greenhouse gases in Washington. And if  
20          I can refer to this exhibit that petitioners has put up  
21          here.

22          THE COURT: Um-hum.

23          MS. SHIREY: The red line is (inaudible) no action taken.  
24          The blue line is the reductions under the rule. And as they  
25          pointed out, the green line is the levels that should be

1 reached under 70.235.020. And there is a difference between  
2 the blue line and the green line, but as Ecology explains in  
3 its concise explanatory statement in the -- it's part of the  
4 rulemaking record in this case, and I believe this is  
5 provided in Petitioners' Exhibit A -- Exhibit 5 to --

6 THE COURT: Um-hum.

7 MS. SHIREY: -- in Ms. Rodgers' declaration in their  
8 opening brief, that they -- that these reductions are about  
9 two-thirds of the reductions that would be needed to meet  
10 the 70.235.020 requirements. And the reason they're  
11 two-thirds is because Ecology can only reach two-thirds of  
12 the sources that emit greenhouse gases in Washington.

13 So the idea is that the sources that are covered under the  
14 rule have reductions that bring them to levels that meet the  
15 70.235.020 reduction requirements, but the -- but Ecology  
16 can't reach all the sources and, therefore, this doesn't  
17 reach the entire goal.

18 THE COURT: But ecology acknowledges that the limits  
19 required by the statute are no longer -- they're no longer  
20 enough to curb the tide of global warming; is that correct?  
21 Am I correct on that, that --

22 MS. SHIREY: You are.

23 THE COURT: -- Ecology has already acknowledged that?

24 MS. SHIREY: Yes.

25 THE COURT: So we're talking about probably -- well, let

1 me ask you. Would you agree that the dotted lines are more  
2 significant than the green line, which is already  
3 acknowledged as being not sufficient to stem the tide?

4 MS. SHIREY: I'm not in a position to evaluate those  
5 dotted lines at all.

6 THE COURT: Okay. Okay. But you do agree that Ecology  
7 has publicly acknowledged that the current limit in the  
8 statute is not enough to stem the tide of global warming?

9 MS. SHIREY: Yes, I do acknowledge that.

10 THE COURT: So let me ask you the same question that the  
11 judge in Oregon asked. Wouldn't Ecology appreciate the  
12 participation of the public, such as the petitioners in this  
13 case, to move beyond the political morass that exists around  
14 addressing global warming?

15 MS. SHIREY: Ecology absolutely appreciates the  
16 participation of the public and of these folks here in the  
17 process; but the process is what it is, and it's bound as it  
18 is. And Ecology has a 29,000-page ruling in the record that  
19 shows how Ecology balanced all the various interests  
20 involved here and came up with the rule that they came up  
21 with.

22 THE COURT: Um-hum.

23 MS. SHIREY: And I would note that at the time of the  
24 November 19th, 2015, ruling in this case, this Court found  
25 that Ecology was meeting its requirements, doing its duty by

1 working to promulgate a rule that met the Governor's  
2 directives. And that is what Ecology has done.

3 THE COURT: And where in my ruling did I point  
4 specifically to the Governor's directive? You're talking  
5 about the May order, correct?

6 MS. SHIREY: No. I'm talking about the November 2015  
7 order. In the November 2015 order, you said the petition is  
8 denied because the Department of Ecology has commenced the  
9 aforementioned rulemaking process as directed by the  
10 Governor.

11 And in the -- in the remarks that you made in this court  
12 on April 29th that provided the basis for the May 15th  
13 order, you said that Ecology -- let's see -- I'm not --  
14 let's see. I think it's necessary that I will issue an  
15 order to that effect, that the rulemaking procedure proceed  
16 and that a rule be issued by the end of calendar year 2016.

17 So the rulemaking issue the Court was referring to here is  
18 the rulemaking that Ecology had undertaken in order to meet  
19 the Governor's directive, which was found to be -- meet  
20 Ecology's duty under the November 19th, 2015, ruling.

21 THE COURT: So is this Court restricted to the vague  
22 language of the Governor's directive which doesn't actually  
23 direct Ecology to do anything in particular except issue a  
24 rule?

25 MS. SHIREY: It does though. First, the Court is not

1 limited to that, but the Court's limited to the orders that  
2 have been issued so far. And the orders that have been  
3 issued so far are tied to the rulemaking as per the  
4 Governor's directive. The Governor's directive says: In  
5 order to help meet the state's statutory greenhouse gas  
6 emission limits in RCW 70.235.020, the cap must decline over  
7 time, et cetera.

8 So Ecology looked at various different possibilities and  
9 determined that at this time it was -- it is appropriate to  
10 adopt a rule balancing all of the various different  
11 interests that are involved here, the scientific, the  
12 technical, the social and economic interests that this Court  
13 recognized Ecology has to look at and to develop the rule  
14 they developed.

15 If petitioners want to challenge that, they can challenge  
16 that, absolutely, in Thurston County Superior Court and  
17 where the 29,000 pages of the rulemaking record are now  
18 being delivered to the Court in the context of the other  
19 cases that have been brought in that court.

20 All of those cases -- all of those plaintiffs or  
21 appellants in that case believe that Ecology's role has gone  
22 too far. These folks believe that Ecology's role has not  
23 gone far enough. Their claims need to be heard in Thurston  
24 County.

25 THE COURT: So where does the Public Trust Doctrine fit in

1 into the scenario of challenging a rule of the Department of  
2 Ecology? Or does it? Or is there another forum or cause of  
3 action that would -- that would be more appropriate than  
4 this one or a challenge in Thurston County against the rule?

5 MS. SHIREY: A challenge to the rule in Thurston County  
6 Superior Court would provide a forum for petitioners to make  
7 their arguments that the Public Health Doctrine required  
8 Ecology to do more than Ecology did. That forum would give  
9 them absolutely the ability to make those claims.

10 And one thing that petitioners say in their reply brief is  
11 that the only relief they would be able to get in Thurston  
12 County would be a finding that the rule is invalid, and  
13 that's not correct. Under the ATA, the Thurston County  
14 Superior Court would be able to find -- would be able to  
15 remand the rule back to Ecology to make changes if the Court  
16 found it insufficient in some way, which is very similar to  
17 what they're asking for here.

18 THE COURT: And what are the restrictions on the  
19 Department of Ecology in terms of its decision on issuing a  
20 rule taking into consideration the economic interests of the  
21 petitioners who are challenging the rule currently in  
22 Thurston County?

23 MS. SHIREY: The -- a rule must be accompanied by a cost  
24 benefit analysis, and the cost benefit analysis must find  
25 that the benefits accorded by the rule outweigh the costs of

1 the rule, of complying with the rule. And the -- I'm sorry,  
2 now --

3 THE COURT: Yeah. So has Ecology to date found in issuing  
4 the rule that it's issued, has Ecology found that the  
5 interests of citizens of the state to be protected from the  
6 results of global warming is less important than some of the  
7 economic interests that are at stake?

8 MS. SHIREY: No, Ecology has not made that finding.  
9 Ecology has made the finding that the costs of the rule --  
10 that the benefits for the rule outweigh the costs. But the  
11 petitioners in Thurston County Superior Court, some of them  
12 are challenging that finding.

13 THE COURT: Of course. I understand.

14 MS. SHIREY: And claim that the costs outweigh the  
15 benefits.

16 THE COURT: Right. Right.

17 MS. SHIREY: So petitioners have stated here and stated in  
18 their reply brief that they are not asking this Court to  
19 rule on the validity of any of Ecology's Clean Air Rule.  
20 But indeed, that's exactly what they are asking for.

21 They claim that the provision in the rule that mandates  
22 emissions reductions at 1.7 percent per year is unlawful  
23 because (inaudible) their rights they need a reduction  
24 closer to 8 percent per year. So that's a direct challenge  
25 to WAC 173-442-060(1)(b).

1           The relief they're seeking is an order from this Court  
2           directing Ecology to regulate greenhouse gas emissions in a  
3           manner that fulfills its statutory and constitutional  
4           responsibility. That's a direct challenge to this rule.  
5           That -- those are claims that they need to bring in Thurston  
6           County Superior Court.

7           And their -- so petitioners claim that this is not about  
8           the rule, but they can't have it both ways. It's either  
9           about the rule or it's not about the rule. And if it's not  
10          about the rule, there is no basis for a finding of contempt  
11          because the orders that this Court has issued were all tied  
12          to Ecology rulemaking and their petition for rulemaking. If  
13          their claim is about the rule, then it needs to be brought  
14          in Thurston County Superior Court.

15          So the second point I want to make is that Ecology  
16          complied with the Court's orders. In May of 2015, you  
17          issued an order telling Ecology to continue the rulemaking  
18          process and to adopt a rule by the end of 2016. Ecology  
19          continued the rulemaking process, which was tied to the  
20          Governor's directives, and completed the rule by September  
21          2016, so before the deadline in the order.

22          Petitioners claim that the order placed substantive  
23          requirements on Ecology's rule beyond those that are in  
24          Governor Inslee's directives. And if you look at the order,  
25          it does not. The order says adopt a rule by the end of

1 2016.

2 If -- for this Court to have placed the kinds of  
3 requirements on the rulemaking that petitioners would like  
4 to believe that were in this order, the Court would have had  
5 to have acted without saying so with no analysis, in direct  
6 contradiction to what this Court stated to be the law in the  
7 November 19th, 2015, order and contrary to the  
8 administrative procedures and -- and if you look at the  
9 remarks that were made on April 29th, it -- well, I'll just  
10 quote.

11 This is from a transcript of the remarks that were made on  
12 April 29th. "But I am finding under Rule 60(b)(11) that  
13 extraordinary circumstances exist that require the portion  
14 of the order that put the matter back in the hands of  
15 Ecology with the understanding of this Court that Ecology  
16 was going to pursue a rulemaking procedure and was going to  
17 make a recommendation to the legislature during the 2016  
18 session, which is now concluded.

19 "I'm not confident at this point that the rulemaking  
20 procedure will be completed by the end of 2016 without a  
21 court order, and I think it's necessary that that be in a  
22 court order. And so I will issue an order to that effect,  
23 that the rulemaking procedure proceed and that a rule be  
24 issued by the end of calendar year 2016." And that  
25 recommendation be made to the legislature, but we are not

1 here on that particular claim.

2 This language states that the concern was about the  
3 timing, that the Court was not confident that Ecology would  
4 complete the rulemaking that it had started and would not  
5 complete it by the end of 2016. There's no mention there of  
6 what content of the rule would be.

7 And I want to point out one -- a couple of other things,  
8 but one of them is that, as I pointed out here, the  
9 declining trajectory of greenhouse gas emissions in  
10 Washington caused by these -- that will occur because of  
11 this rule, the blue line and the difference between that and  
12 the green line are because Ecology didn't cover all the  
13 sources, couldn't cover all the sources.

14 And the plaintiff -- the petitioners in their original  
15 petition recognized that Ecology could not require  
16 reductions in greenhouse gas emissions from all sectors.  
17 And their original petition, they proposed that Ecology  
18 adopt a rule requiring reductions across, I'm quoting,  
19 across all sectors over which it has control.

20 So petitioners recognized that Ecology by itself could not  
21 mandate the kinds of reductions, all of the reductions that  
22 are required being met through an Ecology rule through the  
23 Ecology regulated sources.

24 THE COURT: And what are the sectors that ecology cannot  
25 regulate under a rule?

1 MS. SHIREY: There are several of them, including jet  
2 fuel, ships, railroads, those are preempted by the federal  
3 government. But the largest one is imported energy. So the  
4 Washington State gets a certain amount of its electrical  
5 energy from the coal strip coal mining plant in Montana.  
6 And Ecology did not go out -- could not go out and regulate  
7 emissions from the out-of-state coal plant.

8 THE COURT: All right. Thank you.

9 MS. SHIREY: So even if this Court meant to place specific  
10 requirements on the rule beyond those in Governor Inslee's  
11 directive, the case law is clear that Ecology cannot be held  
12 in contempt of court for not meeting those requirements  
13 because those requirements are not clearly stated in the  
14 order.

15 The Court does not -- in ruling on a court order -- I'm  
16 sorry, in ruling on a complaint of contempt for violation of  
17 a court order, the courts must narrowly construe the court's  
18 order in favor of Ecology, and the Court cannot expand a  
19 court order by implication.

20 And I would like to distinguish the case that petitioners  
21 cited in their reply brief, R/L Associates vs. City of  
22 Seattle. The order in that case clearly stated that a law  
23 was invalid and the City of Seattle continued to enforce it.  
24 Here, the Court did not clearly state that Ecology -- what  
25 the rule was supposed to consist of. Ecology -- the only

1 thing that was clearly stated was that Ecology was required  
2 to adopt the rule by the end of 2016, which is what Ecology  
3 did.

4 So in closing, as petitioners state in their reply brief,  
5 this case is about Ecology's denial of petitioners' petition  
6 for rulemaking. This Court upheld Ecology's denial based on  
7 the fact that Ecology had begun the process of adopting the  
8 rule limiting greenhouse gas emissions in Washington in  
9 accordance with Governor Inslee's directive.

10 Ecology has adopted a rule limiting greenhouse gas  
11 emissions in Washington in accordance with Governor Inslee's  
12 directive. Ecology did so within the time limits that this  
13 Court placed in its May 15th, 2016, order. Therefore,  
14 Ecology is not in contempt of court. If petitioners believe  
15 Ecology's rule does not go far enough, petitioners are free  
16 to bring their objections to the (inaudible) to the Thurston  
17 County Superior Court. Thank you.

18 THE COURT: All right. Thank you.

19 Ms. Rodgers? Can you speak to the notice issue that  
20 Ms. Shirey has argued, that the Department essentially  
21 wasn't notified to do anything but issue a rule of some  
22 sort?

23 MS. RODGERS: Yes, Your Honor. I believe the plain  
24 language of the November court order was very clear in terms  
25 of what is the agency's legal authority and responsibility

1 to address the claims raised in the petition for rulemaking  
2 in regards to their legal responsibilities under the Clean  
3 Air Act, under the Public Trust Doctrine, and under the to  
4 comply with the constitution.

5 And in the May order, Your Honor, it was very clear that  
6 this Court vacated those portions of the rule -- of the  
7 decision that put the matter back into the hands of Ecology,  
8 but all other portions of that order remain in full force  
9 and effect.

10 And I don't think it was unclear from in the November 19th  
11 order when this Court said these youth have a fundamental  
12 right to a healthful and pleasant environment. It should  
13 come as no surprise to Ecology that they have an obligation  
14 to take action to ensure that they are not violating that  
15 right.

16 It should come as no surprise to the Department of Ecology  
17 that they cannot stand idly by while the public trust  
18 resources of this state are slipping away through our hands.

19 It should come as no surprise to the Department of Ecology  
20 that they have an obligation to protect air quality for  
21 present and future generations.

22 THE COURT: Well --

23 MS. RODGERS: And, Your Honor, we do not -- go ahead.

24 THE COURT: My question is -- it's sort of two-part. One,  
25 do you find yourself in between a rock and a hard place in

1 terms of not being able to challenge the rule in King County  
2 but asking for a finding of contempt or an order to show  
3 cause resulting in a finding of contempt for failure to  
4 adopt a rule that I think everybody agrees does not satisfy  
5 the requirements of the current science of climate control?  
6 Don't you find yourself in between a rock and a hard place?

7 And the other part of that question is, is there another  
8 avenue that the Court could take to continue jurisdiction  
9 over this matter other than through a hearing on an order to  
10 show cause?

11 MS. RODGERS: Your Honor, I believe, as an alternative  
12 approach in order to get around the fact that there is this  
13 rule and it's being -- being litigated in Thurston County  
14 Superior Court, if this Court were to order Ecology to  
15 develop a plan based on best available science setting the  
16 general outlines -- we're not asking Your Honor to tell  
17 Ecology to promulgate particular policies or to stop  
18 pursuing the Clean Air Rule. If Ecology believes the Clean  
19 Air Rule is an integral component of a strategy to reduce  
20 greenhouse gas emissions in line with best available  
21 science, keep it on the books.

22 THE COURT: Okay. So --

23 MS. RODGERS: That's fine, Your Honor. But --

24 THE COURT: So in order to -- in order to do that, where  
25 does -- how is that a part of your original petition in this

1 case? And I know you've explained it somewhat in your  
2 briefing, but I'm still trying to understand: Would there  
3 be a need to amend the petition? Would there be a need  
4 somehow to broaden the scope of what this Court is doing?

5 Because my understanding had been from the beginning that  
6 the petitioners were asking me to make sure that there was a  
7 rule by the Department of Ecology that addressed their  
8 concerns. And I will say out front that the rule as it  
9 exists, from the information that I have before me right  
10 now, doesn't address the concerns of the Court.  
11 Nonetheless, there's a rule, and that's what I ordered  
12 Ecology to do before the end of 2016.

13 MS. RODGERS: Yeah. And that is -- that can be a part of  
14 the strategy, Your Honor. But there's a whole panoply of  
15 things -- and they're using their existing authority -- that  
16 they are not doing. Ecology has yet to tell this Court how  
17 it is protecting the public trust resources, how it is  
18 protecting the constitutional rights of these young people.

19 And the reason that hasn't been done, Your Honor, is  
20 because Ecology will not take a position on what the science  
21 requires. Even today in this courtroom after litigating  
22 this case for over two years, Ecology has not taken a  
23 position on what science is -- what best available science  
24 says is needed to reduce greenhouse gas emissions to protect  
25 the rights of young people.

1           And why that's important, Your Honor, is that is the only  
2           standard that we have to ascertain whether Ecology has acted  
3           in compliance with their full statutory and constitutional  
4           responsibilities. And I believe this Court would have the  
5           authority to order them to develop the regulatory plan as  
6           proposed in our petition -- in our petition for rulemaking.

7           Whether it's called a rulemaking, whether it's called a  
8           plan, I think that that terminology is not what's  
9           significant, Your Honor. I believe what's significant is  
10          that Ecology is directed to develop a plan to protect the  
11          rights of these young people. And, frankly, it will not  
12          happen unless this Court orders them to do that. I believe  
13          that's clear.

14          THE COURT: No, I understand what it is that you want me  
15          to do, which is quite similar to the claim that -- the case  
16          that's being brought in Oregon is to make the federal  
17          government have a plan, as I understood that case.

18          Do I look to your petition for rulemaking to find -- to  
19          find the request that Ecology develop a plan as opposed to a  
20          rule, just a rule, an all-encompassing plan?

21          MS. RODGERS: That's certainly an option. And I think  
22          that other --

23          THE COURT: Is the language in the -- is the language in  
24          your petition for rulemaking?

25          MS. RODGERS: There's language in the petition for

1 rulemaking that's clear that what we're talking about are --  
2 is Ecology implementing their full authority to come up with  
3 a plan to reduce greenhouse gas emissions statewide.

4 So, yes, I believe that information is in there. But we  
5 certainly could file a supplemental petition or a  
6 supplemental complaint if the Court does not feel that it  
7 has sufficient information before it in order to order  
8 Ecology to develop the plan that needs to be done.

9 THE COURT: Um-hum.

10 MS. RODGERS: And, you know, we could certainly see the  
11 need to do that. But again, I believe in the record that  
12 you have before you in this case, you certainly could order  
13 them to do that because of the language in both the November  
14 and the May court orders I believe put them on notice that  
15 there was substantive expectations in terms of what they  
16 were going to do.

17 They took a path that they went down with the Clean Air  
18 Rule. They admit that it doesn't get to where we need to  
19 go, so there's still more work to be done. And I believe  
20 that can be done without disturbing or interfering in the  
21 Thurston County Superior Court matter.

22 THE COURT: Um-hum. I don't -- yeah, I don't think the --  
23 I don't think the argument from Ecology is that it would  
24 disturb the pending case. Although, you could intervene in  
25 that case. I would assume you could make a motion to

1           intervene. But more that you could file your own -- your  
2           own challenge to the rule in Thurston County, which -- you  
3           may find yourself in the Court of Appeals making the  
4           argument that -- or having to face the argument that the  
5           case belongs in Thurston County if the -- if I issue an  
6           order to show cause.

7           MS. RODGERS: Your Honor, I don't believe that's the case.  
8           I think if this Court takes action to -- you have plain  
9           authority to implement and enforce the prior orders of this  
10          case. And if Ecology pursues the rule, there's certainly a  
11          way for this Court to order them to take other action that  
12          protects the rights of young people.

13          And it's up to Ecology if they want to keep the Clean Air  
14          Rule on the books and make that a cornerstone and a key part  
15          of their plan to get them into full compliance with the law.  
16          Or if there's other -- but it's clear what's needed are  
17          other plans and other policies as well.

18          THE COURT: Um-hum.

19          MS. RODGERS: And, Your Honor, we certainly could provide  
20          supplemental briefing to the Court, if that is of interest,  
21          in regards to the Court's authority to order Ecology to come  
22          into compliance, if that would be appropriate.

23          THE COURT: All right. Thank you.

24          MS. RODGERS: Thank you.

25          THE COURT: All right. As I said, I'm not going to rule

1 from the bench. There was a voluminous amount of material  
2 here. Unfortunately, I'm not a Federal District Court judge  
3 with a chambers full of interns, and so I need more time to  
4 digest some of the information that I have.

5 So what I will commit to do is getting that done as  
6 quickly as possible and letting the parties know whether I  
7 need further briefing or issuing an order without further  
8 briefing and argument.

9 All right. Thank you very much, Counsel. And court is in  
10 recess.

11 (Conclusion of hearing.)

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C E R T I F I C A T E

STATE OF WASHINGTON )  
 )  
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 30th day of November, 2016.

Katherine VanGrinsven, CA CSR No. 11985