

**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' REPLY BRIEF IN
SUPPORT OF MOTION FOR ORDER
TO SHOW CAUSE RE: CONTEMPT

I. INTRODUCTION

In its response brief, Ecology does not present any evidence that it has complied with the legal findings of this Court. Instead, Ecology claims there was no "substance" to the Court's earlier orders. The agency continues to ignore the existence of its constitutional and

1 statutory duties to protect the fundamental rights of young people from the perils of climate
2 change. Petitioners respectfully request that this Court enter an order finding Ecology in
3 contempt and directing Ecology to come into compliance with their constitutional and statutory
4 responsibilities to protect the rights of Petitioners.

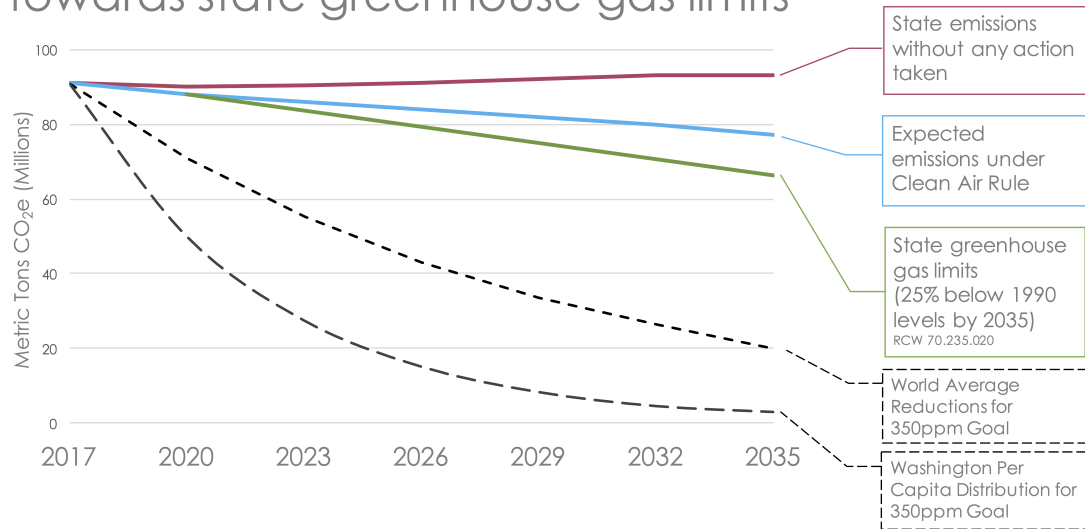
5 6 **II. ARGUMENT**

7 **A. Petitioners Are Not Asking The Court To Review The Content Of The Clean Air Rule.**

8 Ecology devotes nearly its entire response brief to arguing that Petitioners are
9 challenging the legality of the Clean Air Rule and that legal challenges to the Rule can only be
10 heard in Thurston County Superior Court. Ecy. Resp. Br. at 2-7. This is not an action to
11 challenge the Clean Air Rule. Petitioners filed this motion because even with the Clean Air
12 Rule on the books, Ecology still has not taken administrative action that protects the rights of
13 Petitioners. Ecology readily admits that adoption of the Clean Air Rule does not put
14 Washington on a track to meet the existing greenhouse gas (“GHG”) emission limits contained
15 in RCW 70.235.020, limits Ecology has previously found will “impos[e] risks on future
16 generations (causing intergenerational inequities)” Rodgers Dec., Exh. 5 at 20; Exh. 6 at
17 18. Indeed, Ecology has made this admission in graphic form:¹
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25 ¹ Ecology, Climate Change, at <http://www.ecy.wa.gov/climatechange/CAROverview.html> (last visited November
26 19, 2016). Plaintiffs added science-based emission reduction lines (previously provided to Ecology and based upon the scientific prescription Petitioners provided to the Court in earlier stages of this case) to the same chart.

Clean Air Rule makes progress towards state greenhouse gas limits



Therefore, there is no need for this Court to evaluate the content of the Rule itself to determine whether or not Ecology has fulfilled its legal obligations as described by this Court; it has already admitted it has not.²

Petitioners are not seeking an order vacating or setting aside the Rule, which is the relief that would be obtained upon a successful challenge to the Rule in Thurston County Superior Court. RCW 34.05.574. If Ecology believes the Rule is an integral component of its plan to fulfill its constitutional and statutory duties to address climate change, it can keep it on the books. However, the Rule cannot serve as compliance with this Court’s prior orders when Ecology admits it does not remedy the legal violations found by the Court.

This case is not about the Clean Air Rule. This case is a review of Ecology’s denial of youths’ petition for rulemaking. Nothing Ecology has done to date has cured the constitutional

² This type of public admission has previously been found to be evidence of contempt. See, e.g., *R/L Assoc. v. City of Seattle*, 113 Wn.2d 402, 410, 780 P.2d 838 (1989) (finding as sufficient evidence of intentional contempt a news release reporting that the City attorney advised a City department to continue to enforcing tenant assistance provisions in City code, in spite of court order preventing enforcement and stating that “[t]he courts need not tolerate this intentional violation of a valid judgment that prohibited the City from enforcing those provisions.”).

1 and public trust violations this Court recognized in its prior orders. Petitioners should not now
2 have to go to a different venue to challenge a Rule Ecology already admits does not protect the
3 rights of these Petitioners. This Court already has jurisdiction over the fundamental matter of
4 Ecology’s legal obligations under the constitution, the Public Trust Doctrine and its statutory
5 authority to ensure “responsible” emission reductions in the state of Washington. November
6 19, 2015 Order at 8. Petitioners brought their case to this Court, which has ongoing
7 jurisdiction and has issued two rulings and ordered a remedy to correct the violations of law it
8 found. That remedy has not been realized, even though Ecology has issued the Clean Air Rule.
9 This Court retains jurisdiction to enforce its prior orders until justice is done.³

11 **B. The Court’s November 19, 2015 Order Means What It Says.**

12 Petitioners are not trying to “expand the requirements of the Court’s orders,” but are
13 simply asking Ecology to comply with the Court’s plain language. Ecy. Resp. Br. at 7. “In a
14 contempt proceeding, an order will be enforced according to the plain meaning of its terms
15 when read in light of the issues and purposes surrounding its entry.” *R/L Assoc.*, 113 Wn.2d at
16 410. Ecology takes the untenable position that the Court’s legal findings regarding its
17 statutory, constitutional and Public Trust responsibilities to address climate change and to
18 protect the legal rights of these petitioners are meaningless and without “substance.” Ecy
19 Resp. Br. at 10. The Court was clear with respect to what portions of the November 19, 2015
20 order were vacated: “the portions of the November 19, 2015 order that denied petitioners’
21 requested relief and put the matter back in the hands of Ecology.” May 16, 2016 Order at 2-3.

24 ³ Contrary to Ecology’s claims, there is no risk that it would be subject to “contradictory rulings” should this
25 Court grant Petitioners’ requested relief. No party challenging the Clean Air Rule in Thurston County Superior
26 Court has alleged that the Rule violations this Court’s prior orders, the Public Trust Doctrine or that Ecology’s
failure to reduce GHG emissions jeopardizes the fundamental rights of young people preserved by the
Washington Constitution.

1 What Ecology neglects to acknowledge is that the Court also stated that “[a]ll other portions of
2 the November 19, 2015 Order remain in full force and effect.” *Id.* at 3. The Court would not
3 have included this language in the order had it intended its prior legal findings to be ignored by
4 Ecology.⁴

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6 What is notable about Ecology’s response brief is not what it contains, but what is
7 missing. Nowhere does Ecology demonstrate to the Court how its administrative action
8 “[p]reserves, protect[s] and enhances the air quality for the current and future generations,”
9 fulfills its fiduciary responsibilities to protect public trust resources, or protects the
10 “fundamental and inalienable right of the people of the State of Washington to live in a
11 healthful and pleasant environment.” *Id.* at 6 (quoting RCW 70.94.331(2)(a)(b), RCW
12 70.94.011), 8, 9 (quoting RCW 43.21A.010). As the party alleged to be in contempt at a show
13 cause hearing, it is Ecology that has the burden “of production and the burden of persuasion
14 regarding [its] claimed inability to comply with the court's order.” *Moreman v. Butcher*, 126
15 Wn.2d 36, 40 n.4, 891 P.2d 725 (1995) (“That the burden of persuasion lies with the
16 contemnor is of ancient lineage in Washington law”). It has failed to meet this burden.⁵

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18 **C. The Court Did Not Authorize Ecology To Ignore Science.**

19 Petitioners are not asking Ecology or the Court to ignore “factors other than science.”
20 Ecy. Resp. Br. at 9. The Court plainly recognized that when exercising its authority “to
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22 ⁴ Ecology is correct insofar as “[t]his Court made no statement concerning the substance of Ecology’s *rule*.” Ecy.
23 Resp. Br. at 10 (emphasis added). There was no need to do that in light of the fact that “[a]ll other portions of the
24 November 19, 2015 Order,” including the parameters by which Ecology must act to come into compliance with its
25 legal obligations, “remain in full force and effect.” May 16, 2016 Order at 3.

26 ⁵ Ecology’s argument that the orders should be strictly construed in their favor is a red herring because the plain
language of the court orders identifies clearly Ecology’s legal obligations with respect to reducing GHG
emissions. It is hard to fathom that Ecology does not know what action “precisely needed to be taken” when all
of the evidence in the record says the same thing: massive reductions in GHG emissions, on top of what is
currently required, are urgently needed to protect the rights of young people. Ecy. Resp. Br. at 11.

1 establish greenhouse [gas] emission standards,” it should take into account “*science* as well as
2 economic, social and political considerations.” November 19, 2015 Order at 9 (emphasis
3 added). Ecology illegally interprets this phrase as allowing politics to trump the science.⁶

4 This case is unique. Not only does the science call for significant GHG emission
5 reductions above and beyond what is currently required, but economic and social
6 considerations do too.⁷ The only barrier to Ecology’s compliance with its constitutional and
7 statutory obligations is political. As Judge Aiken of the District of Oregon recently recognized
8 in a constitutional climate rights case brought on behalf of youth,⁸ the Public Trust Doctrine
9 “prevent[s]” the political branches of government from “depriving a future legislature of the
10 natural resources necessary to provide for the well-being and survival of its citizens.” *Juliana*
11 *et al. v. United States*, No. 6:15-cv-01517-TC, 2016 WL 6661146, at *18 (D. Or. Nov. 10,
12 2016) (Appendix A) (quoting Br. of Amici Curiae Global Catholic Climate Movement
13 and Leadership Council of Women Religious at 3 (footnote omitted)). But that is exactly
14 what Ecology has done. No generation of policy makers will ever have the same opportunity
15 to address the climate crisis. Ecology’s failure to break through the political barriers to address
16 climate change in a manner called for by science, as well as social and economic
17 considerations, is precisely why it is incumbent upon this Court, as the third equal branch of
18 government, to enter an order coercing Ecology into compliance with its constitutional and
19 statutory responsibilities to protect the rights of these Petitioners. As Judge Aiken said, state
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24 ⁶ Ecology summarily asserts that it took “into account science, [as] well as economic, social, and political
25 considerations.” Ecy. Resp. Br. at 8 (quoting Rees Decl.). That contention is dubious since Ecology has once
26 again presented no scientific information to the Court.

⁷ See, e.g., November 19, 2015 Order at 2 (quoting Ecology report acknowledging the “costly” economic and
social impacts of climate change “unless additional actions are taken to reduce greenhouse gases.”).

⁸ One of the petitioners in this case, Aji Piper, is also a plaintiff in the federal case.

1 courts, like “Federal courts too often have been cautious and overly deferential in the arena of
2 environmental law, and the world has suffered for it.” *Id.* at *26.

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4 **V. CONCLUSION & REQUEST FOR RELIEF**

5 Petitioners respectfully request that the Court enter an order granting Petitioners’
6 motion for order to show cause re: contempt and grant the relief requested in the motion.

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8 I certify that this memorandum contains 1744 words, in compliance with the Local
9 Civil Rules. Respectfully submitted this 21st day of November, 2016.

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11
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the 21st day of November, 2016 I served one true and correct
3 copy of the foregoing Youth Petitioners' Reply Brief on the following individuals via e-mail
4 service in accordance with the parties electronic service agreement:
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8 _____
9 Andrea K. Rodgers
10 Western Environmental Law Center
11 Attorney for Youth Petitioners
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