

JUDGE HOLLIS R. HILL
FILED
KING COUNTY, WASHINGTON
NOV 19 2015
SUPERIOR COURT CLERK
BY Geylar Greer
DEPUTY

**SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY**

ZOE and STELLA FOSTER, minor children
by and through their guardians MICHAEL
FOSTER and MALINDA BAILEY; AJI and
ADONIS PIPER, minor children by and
through their guardian, HELAINA PIPER;
WREN WAGENBACH, a minor child by and
through her guardian MIKE WAGENBACK;
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 and
WENFENG XU,

Petitioners,

v.

WASHINGTON DEPARTMENT OF
ECOLOGY,

Respondent.

NO. 14-2-25295-1 SEA

ORDER AFFIRMING THE
DEPARTMENT OF ECOLOGY'S
DENIAL OF PETITION FOR RULE
MAKING

I. The Imminent Threat of Global Warning

The Washington State Department of Ecology (Ecology; the Department) is required
by law to periodically report to the legislature summarizing human-caused climate change and

1 to make recommendations regarding whether the greenhouse gas (GHG) emissions reductions
2 required by Washington statute need to be updated. In December 2014 Ecology issued the
3 required report which states,

4 Climate change is not a far off risk. It is happening now globally and the impacts
5 are worse than previously predicted, and are forecast to worsen... If we delay
6 action by even a few years, the rate of reduction needed to stabilize the global
7 climate would be beyond anything achieved historically and would be more
costly.

8 Dep't of Ecology, Washington Greenhouse Gas Emission Reduction Limits, Prepared Under
9 RCW 70.235.040 (Dec. 2014). This report also states,

10 The sea level is rising on most of Washington's coast, ocean acidification has
11 increased, and there's long-term warming. Glaciers and spring snowpack have
12 declined and the timing of stream flows has changed many rivers. And, climate
13 extremes like floods, droughts, fires and landslides are already affecting
Washington's economy and environment.

14 The effects of climate change on water supplies, public health, coastal and storm
15 damage, wildfires, and other impacts will be costly unless additional actions are
taken to reduce greenhouse gases.

16 *Id* at 5.

17 Despite this urgent call to action, Ecology's recommendation was, "that no changes be made to
18 the state's statutory emission limits at this time."^{1 2}

20 ¹ The Department initially moved to strike its most recent report to the legislature dated
21 December 2014 containing this recommendation because the report was not a part of the record
22 at the time of denial of the petition. The Court denied that motion in view of the fact that
23 before issuing its denial of this petition the Department had the information contained in this
report and therefore, the report "relate[s] to the validity of the agency action at the time it was
taken." RCW 34.05.562(1).

24 ² Ecology suggested delay until after the 2015 UN Climate Change Conference to begin
25 November 30th in Paris. Petitioners assert that issuance of the December 2014 report itself
was delayed for at least five months.

1 Meanwhile, three months before issuance of this report, frustrated by a historical lack of
2 political will to respond adequately to the increasingly urgent and dire acceleration of global
3 warming, eight youth petitioners (the Petitioners) had submitted a petition for rulemaking to
4 Ecology requesting that the Department adopt a proposed rule that, among other things, would
5 mandate limitation of GHG emissions consistent with current scientific assessments of
6 requirements to stem the tide of global warming. Petitioners assert, consistent with the
7 December 2014 report, that prompt decisive action by Ecology is necessary to protect from
8 climate change and ocean acidification the state's natural resources and the children who depend
9 on them.
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11 On August 14, 2014, the Department denied this petition without challenging the
12 underlying scientific bases for Petitioner's plea, by citing the following reasons: 1) nothing in
13 the Revised Code of Washington requires the Department to utilize the rulemaking process for
14 this purpose; 2) none of the non-statutory bases upon which Petitioners rely require the
15 Department to utilize the rulemaking process for this purpose; and 3) the Department and the
16 State of Washington have implemented various statutory and regulatory measures to satisfy the
17 emission reductions mandated by RCW 70.235.020 (which indisputably cannot achieve results
18 protecting the state's environment from catastrophic global warming). Ecology does not dispute
19 that it has the authority to set stricter emission standards; it maintains that Petitioners cannot
20 require it to do so by invoking the rulemaking procedure which would require public hearings
21 and input. In this appeal, Petitioners ask this court to overrule the Department's denial of their
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1 petition and to order the Department to commence a rulemaking process establishing greenhouse
2 gas emission standards consistent with current science.

3 This court heard Petitioners' appeal and on June 23, 2015, ordered the Department to
4 reconsider its denial of the petition after considering its own December 2014 report and the
5 declaration of Dr. Pushker Kharecha, a research scientist at Columbia University's Earth Institute
6 whose declaration was submitted by Petitioners in support of their appeal.
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8 On August 7, 2015, the Department notified the court that it had affirmed its denial of
9 the petition but indicated that it was initiating a rulemaking to adopt a greenhouse gas emissions
10 rule under a directive issued by Governor Inslee on July 28, 2015. Governor Inslee's directive
11 requires Ecology to initiate a rulemaking to set a regulatory cap on carbon dioxide emissions and
12 to develop reductions in carbon dioxide emissions using its existing authority. This rulemaking
13 effort (ongoing rulemaking) has begun and indications are that a rule will be enacted no later
14 than the end of 2016.
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16 In view of these developments this Court must now rule on Petitioner's appeal which
17 specifically seeks a rule on GHG that is based on "current science" which the ongoing
18 rulemaking does not guarantee. Because this Court does not have the authority to exclude non-
19 science related considerations from this ongoing rulemaking, for the reasons cited below, the
20 appeal is DENIED.
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22 II. Applicable Science

23 Petitioners assert, the Department does not dispute and this court finds, that current
24 scientific evidence establishes that rapidly increasing global warming causes an unprecedented
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1 risk to the earth, including land, sea, the atmosphere and all living plants and creatures. The
2 Department's Preproposal Statement of Inquiry regarding the ongoing rulemaking states as
3 reasons why rules on this subject are needed that "Washington faces serious economic and
4 environmental disruptions from the effects of climate change."
5

6 In fact, as Petitioners assert and this court finds, their very survival depends upon the will
7 of their elders to act now, decisively and unequivocally, to stem the tide of global warming by
8 accelerating the reduction of emission of GHG's before doing so becomes first too costly and
9 then too late. The scientific evidence is clear that the current rates of reduction mandated by
10 Washington law cannot achieve the GHG reductions necessary to protect our environment and
11 to ensure the survival of an environment in which Petitioners can grow to adulthood safely. In
12 fact, in its 2014 report to the legislature the Department stated, "Washington's existing statutory
13 limits should be adjusted to better reflect the current science. The limits need to be more
14 aggressive in order for Washington to do its part to address climate risks..."
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16 Petitioners' assert, consistent with Ecology's report that the current science dictates that
17 in order to stem the tide of climate change and protect future generations, the limits of greenhouse
18 gas emissions must be more stringent than those currently required by RCW 70.235.020.
19 Petitioners find the ongoing rulemaking inadequate because the governor's correspondence with
20 the Director of the Department of Ecology regarding the directive refers to the creation of a
21 binding cap on emissions in order to help meet the state's statutory greenhouse gas emission
22 limits contained in that statute rather than requiring a cap based on current science.
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24 III. Parameters of Judicial Review 25

1 Judicial review of the Department's decision to deny this petition for rulemaking is
2 limited by RCW 34.05.570(4) to the agency's failure to perform a duty required by law to be
3 performed. If the agency has failed to perform a duty required by law, the court can grant relief
4 only upon a determination that the action [inaction] is: 1) unconstitutional; 2) outside the
5 statutory authority of the agency or the authority conferred by a provision of law; or 3) arbitrary
6 and capricious. RCW 34.05.570(4)(i-iii).
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8 A. Duty required by law

9 Ecology recognizes that it has, "the authority to adopt additional greenhouse gas
10 standard[s] if it chooses to do so," but it initially argued that it is not required to act through
11 rulemaking. However, now, pursuant to the Governor's directive the Department is engaged in
12 rulemaking to develop a cap on greenhouse gas emissions.
13

14 In fact, it does have the mandatory duty under the Clean Air Act to "[a]dopt rules
15 establishing air quality standards" for GHG emissions, including carbon dioxide that "shall
16 constitute minimum emissions standards throughout the state." RCW 70.94.331(2)(a)(b). This
17 obligation must be implemented in a manner that "[p]reserves, protect[s] and enhance[s] the air
18 quality for the current and future generations." RCW 70.94.011.
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20 This mandatory duty must be understood in the context not just of the Clean Air Act itself
21 but in recognition of the Washington State Constitution and the Public Trust Doctrine. (See
22 below). In this context, the emission standards currently adopted by Ecology do not fulfill the
23 mandate to "[p]reserve, protect and enhance the air quality for current and future generations."
24 The regulations currently in place specify technological controls of a small number of air
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1 pollution sources while not even addressing transportation which as of 2010 was responsible for
2 44% of annual total GHG emissions in Washington State. One need only go back to Ecology's
3 pronouncement in the December 2014 report to appreciate the inadequacy of its current efforts
4 to preserve, protect and enhance the air quality for current and future generations.
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6 But, Ecology is not failing to fulfill this obligation given that it is engaging in rulemaking
7 under the directive to establish standards for greenhouse gas emissions. Again, this court cannot
8 dictate the parameters of that procedure.

9 B. Ecology's responsibility under the Public Trust Doctrine embodied in Article
10 XVII, Section 1 of the State Constitution

11 Article XVII, Section 1 of the Washington State Constitution asserts state ownership of,
12 "the beds and shores of all navigable waters in the state up to and including the line of ordinary
13 high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary
14 high tide within the banks of all navigable rivers and lakes..."
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16 Washington courts have found that this provision requires the State through its various
17 administrative agencies, to protect trust resources under their administrative jurisdiction. In
18 *Washington State Geoduck Harvest Assn. v. Washington State Dept. of Natural Resources*, 124
19 Wn. App. 441, 447-48 (2004), the court determined that "the public trust doctrine ensures state
20 management of public lands, in part, through the Constitution's express reservation of "the
21 beds and shores of all navigable waters in the state" for state ownership. This means "that the
22 sovereignty and dominion over this state's tidelands and shore lands, as distinguished from
23 title, always remains in the state and the state holds such dominion in trust for the public."
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1 *Caminiti v. Boyle*, 107 Wn.2d 662, 669 (1987). Therefore, the State has a constitutional
2 obligation to protect the public's interest in natural resources held in trust for the common
3 benefit of the people of the State.

4 Ecology argues that since the Public Trust Doctrine has not been expanded by the
5 courts beyond protection of navigable waters it cannot be applied to protection of the
6 "atmosphere." But this misses the point since current science makes clear that global warming
7 is impacting the acidification of the oceans to alarming and dangerous levels, thus endangering
8 the bounty of our navigable waters. Ecology's own Preproposal Statement of Inquiry identifies
9 as reasons for the ongoing rulemaking "loss of coastal lands due to sea level rise" and "an
10 increase in diseases and mortality in freshwater fish (salmon, steelhead and trout) because of
11 warmer water temperatures in the summer and more fluctuation of water levels." Governor
12 Inslee's communication office quotes the governor as saying, "Carbon pollution and the
13 climate change it causes pose a very real and existential threat to our state... Shellfish growers
14 on the coast know this." The navigable waters and the atmosphere are intertwined and to argue
15 a separation of the two, or to argue that GHG emissions do not affect navigable waters is
16 nonsensical. Therefore, the Public Trust Doctrine mandates that the State act through its
17 designated agency to protect what it holds in trust. The Department of Ecology is the agency
18 authorized both to recommend changes in statutory emission standards and to establish limits
19 that are responsible. The current rulemaking is toward that end.

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23 C. Ecology's responsibility to protect fundamental and inalienable rights protected
24 by the Washington State Constitution
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1 Article I, Section 30 of the Washington State Constitution states, “[t]he enumeration
2 of certain rights shall not be construed to deny others retained by the people.” Ecology’s
3 enabling statute states, “[I]t is a fundamental and alienable right of the people of the State of
4 Washington to live in a healthful and pleasant environment.” RCW 43.21A.010. Although, a
5 statutory duty cannot be created from the words of the enabling statute, this language does
6 evidence the legislature’s view as to rights retained under Article I, Section 30. If ever there were
7 a time to recognize through action this right to preservation of a healthful and pleasant
8 atmosphere, the time is now as:

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11 Climate change is not a far off risk. It is happening now globally and the impacts
12 are worse than previously predicted, and are forecast to worsen... If we delay
13 action by even a few years, the rate of reduction needed to stabilize the global
14 climate would be beyond anything achieved historically and would be more
15 costly.

16 Dep’t of Ecology, Washington Greenhouse Gas Emissions Reduction Limits, Prepared
17 under RCW 70.235.040 (Dec. 2014).

18 Washington must do more to meet its obligation to reduce emissions of carbon
19 pollution. We need to act purposefully and swiftly to reduce the threats posed by
20 climate change to the health, safety and economic prosperity of Washingtonians.

21 Letter from Governor Jay Inslee to Maia Bellon, Dir. Wash. Dep’t of Ecology (August
22 13, 2015).

23 D. Ecology’s actions are neither arbitrary nor capricious

24 Now that Ecology has commenced rulemaking to establish greenhouse emission
25 standards taking into account science and well as economic, social and political considerations,
it cannot be found to be acting arbitrarily or capriciously.

1 For the foregoing reasons, the petition for review is DENIED due to the Department of
2 Ecology having commenced the aforementioned rulemaking process as directed by the
3 Governor.
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5 DATED this 19th day of November, 2015.

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7 HONORABLE HOLLIS R. HILL
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