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

350 Seattle

vs

Puget Sound Clean Air Agency

No. 21-2-09958-7 SEA

**CASE INFORMATION COVER SHEET AND
AREA DESIGNATION**

(CICS)

CAUSE OF ACTION

INJ - Injunction

AREA OF DESIGNATION

SEA

Defined as all King County north of Interstate 90 and including all of Interstate 90 right of way, all of the cities of Seattle, Mercer Island, Issaquah, and North Bend, and all of Vashon and Maury Islands.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

350 Seattle, 350 Wenatchee, 350 Everett, 350)
Bellingham, Olympic Climate Action, 350)
Tacoma, Kitsap Environmental Coalition, 350)
Yakima, 350 Eastside, and 350 West Sound)
Climate Action)
Plaintiffs,)
vs.)
Puget Sound Clean Air Agency, Northwest)
Clean Air Agency, Olympic Region Clean Air)
Agency, Southwest Clean Air Agency, Benton)
Clean Air Agency, Spokane Regional Clean)
Air Agency, and Yakima Regional Clean Air)
Agency)
Defendants.

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

I. INTRODUCTION

Under the Washington State Clean Air Act (“Act”), the construction and establishment of new sources of air pollution must be approved under RCW 70A.15.2210, often referred to as notice of construction (“NOC”) approval.

The NOC approval process is governed by RCW 70A.15.2210, which provides that NOC approval is a decision that must be made by the *board of directors* of local clean air agencies. This

1 express statutory delegation ensures that these critical permitting decisions are made by a regionally
2 balanced and politically accountable governing board.

3 Rather than complying with the statutory process for new source approval, *all of the local*
4 *clean air agencies in the State are violating the Act* by: (1) illegally shifting decision-making
5 authority for new source approval and mitigation from their governing boards to technical staff and
6 (2) treating new source approval as a ministerial rather than a discretionary decision.

7 This concerted illegal action of the local air agencies is undermining the Act’s ability to
8 protect the public health of Washington residents and the State’s ability to achieve greenhouse gas
9 (GHG) emissions reduction targets.

10 II. PARTIES

11 2.1 Plaintiffs are organizations whose mission includes fighting climate change. They are
12 350 Seattle, 350 Wenatchee, 350 Everett, 350 Bellingham, Olympic Climate Action, 350 Tacoma,
13 Kitsap Environmental Coalition, 350 Yakima, 350 Eastside, and 350 West Sound Climate Action.
14 Their members include individuals who use and enjoy the environment in, and are affected by
15 pollution from, each of the Defendants’ jurisdictions. Moreover, as the Act recognizes, pollution
16 does not stop at jurisdictional boundaries, and that is especially true of greenhouse gases
17 (“GHGs”), whose impacts extend throughout the state and beyond.

18 2.2 Defendants’ illegal actions are supported by taxes. Plaintiffs’ members are taxpayers
19 who gave notice of Defendants’ illegal actions to the Attorney General, who declined to take action
20 on this matter. A copy of the notice is attached hereto as Exhibit A.

21 2.3 One of the goals of each Plaintiff organization is to fight climate change, and to
22 reduce the emissions of GHGs. In *Ass’n of Wash. Bus. v. Dept of Ecology*, 195 Wn.2d 1, 21 (2020),
23 the State Supreme Court determined that the Act regulates GHG emissions. The NOC approval

1 process, as designed, would assist Plaintiffs and their members in meeting their climate change goals,
2 since under the Act, the boards of directors of local air agencies are empowered to deny or mitigate
3 NOC approval to meet the standards of the Act. The Act requires the boards of local air agencies to
4 represent local governments, which often have adopted climate change goals. Local agencies
5 typically appoint their elected officials to the air agency board. The Act's intentional result is to put
6 critical decisions in the hands of a geographically representative and politically accountable board of
7 decision makers, who are subject to statutory conflict of interest procedures. Compliance with this
8 statutory structure is necessary to achieve the goals of the Act and to allow Plaintiffs to employ the
9 NOC approval process to fight climate change.

10 2.4 The local air agencies prevent Plaintiffs and their members from employing the NOC
11 approval process to address climate change in the manner provided for by the Act because the local
12 agencies have illegally eliminated board members, including local officials, from the NOC approval
13 process.

14 2.5 For example, but not by way of limitation, the Puget Sound Clean Air Agency board
15 includes King County Executive Dow Constantine, who represents a government that has adopted
16 climate change goals and has himself spoken out on climate change. Plaintiffs and Plaintiffs'
17 members claim a procedural right to have Executive Constantine be a decision-maker on NOC
18 approval and mitigation decisions, as the Act requires. His role as King County Executive gives him
19 a crucial background on the science and politics of climate change that cannot be substituted for by
20 technical staff. Similar examples could be found in other of Defendants' board members who were
21 wrongfully excluded from NOC decision-making.

22 2.6 Defendants have defended their illegal delegation of authority by taking the position
23 that NOC approval is a ministerial rather than a discretionary decision, directly contrary to State

1 Supreme Court precedent. By treating the NOC approval process as ministerial, Defendants have
2 illegally blunted the effectiveness of the NOC approval process.

3 2.7 Plaintiffs’ members are politically active in environmental organizations, and seek to
4 protect the environment and their own health by enforcing the rigorous procedures provided for by
5 the Act, including having the final decision on NOC approval made by a geographically balanced
6 and politically accountable board. Defendants’ failure to follow these procedures harms Plaintiffs
7 and their members by depriving them of procedural rights and facilitates the more rapid approval of
8 new sources of air pollution than would be allowed under the Act’s procedures. As recognized by
9 the Act, the air pollution released by new sources knows no jurisdictional boundaries and harms
10 Plaintiffs’ members.

11 2.8 Plaintiffs’ members’ aesthetic, economic, health, and recreational interests are being
12 harmed by climate change and NOCs that have been improperly granted by agency staff and/or that
13 will be granted by agency staff.

14 2.9 Plaintiffs and their members have ongoing aesthetic, economic, health, and
15 recreational interests in reducing greenhouse gases and other pollution by having the agencies’
16 governing boards deny NOCs or add mitigation to NOC approvals.

17 2.10 Climate change poses an existential crisis to our planet. State and local governments
18 have recognized they need to meet ambitious carbon reduction targets. Plaintiffs have an interest in
19 ensuring that democratically elected officials, as opposed to unaccountable staff, are properly making
20 decisions to authorize or deny permits for more GHG emissions is an issue of great public moment.

21 2.11 Defendants are the seven local clean air agencies operating in the State of
22 Washington, which are organized as municipal corporations.

23

1 **III. JURISDICTION AND VENUE**

2 3.1 This Court has subject matter jurisdiction over this action under chapter 7.24 RCW
3 and chapter 7.40 RCW.

4 3.2 Venue is proper in King County, Washington under RCW 4.12.025.

5 **IV. FACTUAL BACKGROUND**

6 **A. The Clean Air Act delegates new source approval to the governing bodies of local clean
7 air agencies.**

8 4.1 RCW 70A.15.2210 establishes a process requiring approval before the construction of
9 new sources of air pollution, with certain exceptions for residential and de minimis new sources.

10 4.2 The approval process set forth in RCW 70A.15.2210 is generally referred to as
11 “notice of construction approval” or “NOC approval.”

12 4.3 RCW 70A.15.2210 comprehensively regulates the NOC approval process, including
13 the following:

14 (a) establishing which new sources requires NOC approval;

15 (b) authorizing the collection of a fee for NOC applications;

16 (c) authorizing rulemaking on the NOC application and review process;

17 (d) authorizing the collection of “plans, specifications, and such other information” as
18 deemed necessary to determine whether the proposed new source will be in accord with applicable
19 rules and regulations in force under this chapter.

20 (e) establishing the substantive standards for NOC approval;

21 (f) identifying the “department of ecology or board” as the decision-maker on NOC
22 applications;

23 (g) authorizing the imposition of mitigation requirements with NOC approval;

(h) requiring engineering review prior to NOC approval;

- 1 (i) establishing timelines for processing NOC applications;
- 2 (j) requiring that NOC approval orders include certain determination; and
- 3 (k) exempting de minimis new sources from the NOC approval requirement.

4 4.4 RCW 70A.15.2210 explicitly delegates new source approval decision to either “the
5 department of ecology or the board of any authority”:

6 (1) The department of ecology or board of any authority may require notice of the
7 establishment of any proposed new sources

8
9 (3) Within thirty days of receipt of a notice of construction application, the department
10 of ecology or board may require, as a condition precedent to the establishment of the
11 new source or sources covered thereby, the submission of plans, specifications, and
12 such other information as it deems necessary to determine whether the proposed new
13 source will be in accord with applicable rules and regulations in force under this
14 chapter. If on the basis of plans, specifications, or other information required under this
15 section the department of ecology or board determines that the proposed new source
16 will not be in accord with this chapter or the applicable ordinances, resolutions, rules,
17 and regulations adopted under this chapter, it shall issue an order denying permission
18 to establish the new source. *If on the basis of plans, specifications, or other information
19 required under this section, the department of ecology or board determines that the
20 proposed new source will be in accord with this chapter, and the applicable rules and
21 regulations adopted under this chapter, it shall issue an order of approval for the
22 establishment of the new source or sources, which order may provide such conditions
23 as are reasonably necessary to assure the maintenance of compliance with this chapter
and the applicable rules and regulations adopted under this chapter.* Every order of
approval under this chapter must be reviewed prior to issuance by a professional
engineer or staff under the supervision of a professional engineer in the employ of the
department of ecology or board.

24
25 (6) Nothing in this section shall be construed to authorize the department of ecology or
26 board to require the use of emission control equipment or other equipment, machinery,
27 or devices of any particular type, from any particular supplier, or produced by any
28 particular manufacturer.

29
30 (9) Within thirty days of receipt of a notice of construction application the department
31 of ecology or board shall either notify the applicant in writing that the application is
32 complete or notify the applicant in writing of all additional information necessary to
33 complete the application. *Within sixty days of receipt of a complete application the
department or board shall either (a) issue a final decision on the application, or (b) for
those projects subject to public notice, initiate notice and comment on a proposed
decision, followed as promptly as possible by a final decision.* A person seeking
approval to construct or modify a source that requires an operating permit may elect to

1 integrate review of the operating permit application or amendment required by
2 RCW 70A.15.2260 and the notice of construction application required by this section.
3 A notice of construction application designated for integrated review shall be processed
4 in accordance with operating permit program procedures and deadlines.

5 4.5 The Act defines “board” as “the board of directors of an authority.” RCW
6 70A.15.1030(8).

7 4.6 The Act authorizes the board’s NOC approval order to “provide such conditions as are
8 reasonably necessary to assure the maintenance of compliance with this chapter and the applicable
9 rules and regulations adopted under this chapter.” RCW 70A.15.2210 (3).

10 4.7 The Act includes detailed rules to ensure that the boards of local air agencies are
11 regionally balanced, politically accountable, and subject to conflict of interest procedures. *See e.g.*,
12 RCW 70A.15.2000 (1), (2)(c) (“The governing body . . . shall be comprised of one appointee from
13 each county, who shall represent the city having the most population in such county, . . . and one
14 representative from each county to be designated by the board of county commissioners . . .”),¹ (6)
15 (subjecting board members to conflict of interest policies). Being so selected and disinterested, the
16 law deems that “[a] majority of the members of any ecology or authority board shall represent the
17 public interest” and “[a]n elected public official and the board shall be presumed to represent the
18 public interest.” WAC 173-400-220.

19 4.8. In the leading case concerning the NOC approval process, the State Supreme Court
20 held that the new source approval process involves a discretionary decision that requires balancing
21 current and future economic and environmental interests to achieve the purposes of the Act.

22 ¹ The Act sets up an entire process for selecting the board, including creating a “distinct city selection committee for each
23 county,” consisting of each city and town’s mayor. RCW 70A.15.2010, .2020. That committee exists “for the purpose of
making its initial appointments to the board of such authority and thereafter whenever necessary for the purpose of
making succeeding appointment.” RCW 70A.15.2020.

1 *Weyerhaeuser Co. v. Sw Air Pollution Control Auth.*, 91 Wn.2d 77, 85 (1978). *See also* RCW
2 70A.15.2210(3) (board’s “order may provide such conditions as are reasonably necessary to assure
3 the maintenance of compliance with this chapter . . .”).

4 4.9 The Act’s delegation of permitting authority to the governing board is critical to
5 fulfilling the Act’s purposes “to safeguard the public interest.” RCW 70A.15.1005.

6 4.10 The Act regulates GHGs. *Ass’n of Wash. Bus.*, 195 Wn.2d at 21.

7 4.11 Local air agencies’ failure to comply with the procedures of RCW 70A.15.2210
8 undermines new source approval as a tool for achieving GHG emissions reduction standards.

9 **B. Defendants refuse to comply with the Act’s decision-making process.**

10 4.12 All of the Defendants are violating the Act’s decision-making process by allowing
11 staff—rather than their governing boards—to make final approval and mitigation decisions under
12 RCW 70A.15.2210.

13 4.13 All of the Defendants are violating the Act by treating new source approvals under
14 RCW 70A.15.2210(3) as a ministerial rather than a discretionary decision.

15 **Factual allegations regarding Puget Sound Clean Air Agency:**

16 4.14 Puget Sound Clean Air Agency staff—rather than governing board—makes the final
17 decisions on NOC approval under RCW 70A.15.2210.

18 4.15 Puget Sound Clean Air Agency is taking illegal action by having its staff to make
19 final decisions on NOC approval under RCW 70A.15.2210.

20 4.16 Puget Sound Clean Air Agency takes the position that staff are authorized to make
21 final decisions on NOC approval under RCW 70A.15.2210.

22 4.17 Puget Sound Clean Air Agency takes the position that new source approval under
23 RCW 70A.15.2210 is a ministerial rather than a discretionary decision.

1 4.18 Puget Sound Clean Air Agency's board makes final decisions on variances issued
2 under RCW 70A.15.2310.

3 4.19 Puget Sound Clean Air Agency has promulgated regulations giving its board final
4 decision-making authority on variances issued under RCW 70A.15.2310.

5 **Factual allegations regarding Northwest Clean Air Agency:**

6 4.20 Northwest Clean Air Agency staff—rather than governing board—makes the final
7 decisions on NOC approval under RCW 70A.15.2210.

8 4.21 Northwest Clean Air Agency is taking illegal action by having its staff to make final
9 decisions on NOC approval under RCW 70A.15.2210.

10 4.22 Northwest Clean Air Agency takes the position that staff are authorized to make final
11 decisions on NOC approval under RCW 70A.15.2210.

12 4.23 Northwest Clean Air Agency takes the position that new source approval under RCW
13 70A.15.2210 is a ministerial rather than a discretionary decision.

14 4.24 Northwest Clean Air Agency's board makes final decisions on variances issued under
15 RCW 70A.15.2310.

16 4.25 Northwest Clean Air Agency has promulgated regulations giving its board final
17 decision-making authority on variances issued under RCW 70A.15.2310.

18 **Factual allegations regarding Olympic Region Clean Air Agency:**

19 4.26 Olympic region Clean Air Agency staff—rather than governing board—makes the
20 final decisions on NOC approval under RCW 70A.15.2210.

21 4.27 Olympic Region Clean Air Agency is taking illegal action by having its staff to make
22 final decisions on NOC approval under RCW 70A.15.2210.

23

1 4.28 Olympic Region Clean Air Agency takes the position that staff are authorized to make
2 final decisions on NOC approval under RCW 70A.15.2210.

3 4.29 Olympic Region Clean Air Agency takes the position that new source approval under
4 RCW 70A.15.2210 is a ministerial rather than a discretionary decision.

5 4.30 Olympic Region Clean Air Agency’s board makes final decisions on variances issued
6 under RCW 70A.15.2310.

7 4.31 Olympic Region Clean Air Agency has promulgated regulations giving its board final
8 decision-making authority on variances issued under RCW 70A.15.2310.

9 **Factual allegations regarding Southwest Clean Air Agency:**

10 4.32 Southwest Clean Air Agency staff—rather than governing board—makes the final
11 decisions on NOC approval under RCW 70A.15.2210.

12 4.33 Southwest Clean Air Agency is taking illegal action by having its staff to make final
13 decisions on NOC approval under RCW 70A.15.2210.

14 4.34 Southwest Clean Air Agency takes the position that staff are authorized to make final
15 decisions on NOC approval under RCW 70A.15.2210.

16 4.35 Southwest Clean Air Agency takes the position that new source approval under RCW
17 70A.15.2210 is a ministerial rather than a discretionary decision.

18 4.36 Southwest Clean Air Agency’s board makes final decisions on variances issued under
19 RCW 70A.15.2310.

20 4.37 Southwest Clean Air Agency has promulgated regulations giving its board final
21 decision-making authority on variances issued under RCW 70A.15.2310.

22 **Factual allegations regarding Benton Clean Air Agency:**

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1 4.38 Benton Clean Air Agency staff—rather than governing board—makes the final
2 decisions on NOC approval under RCW 70A.15.2210.

3 4.39 Benton Clean Air Agency is taking illegal action by having its staff to make final
4 decisions on NOC approval under RCW 70A.15.2210.

5 4.40 Benton Clean Air Agency takes the position that staff are authorized to make final
6 decisions on NOC approval under RCW 70A.15.2210.

7 4.41 Benton Clean Air Agency takes the position that new source approval under RCW
8 70A.15.2210 is a ministerial rather than a discretionary decision.

9 4.42 Benton Clean Air Agency's board makes final decisions on variances issued under
10 RCW 70A.15.2310.

11 4.43 Benton Clean Air Agency has promulgated regulations giving its board final decision-
12 making authority on variances issued under RCW 70A.15.2310.

13 **Factual allegations regarding Spokane Clean Air Agency:**

14 4.44 Spokane Clean Air Agency staff—rather than governing board—makes the final
15 decisions on NOC approval under RCW 70A.15.2210.

16 4.45 Spokane Clean Air Agency is taking illegal action by having its staff to make final
17 decisions on NOC approval under RCW 70A.15.2210.

18 4.46 Spokane Clean Air Agency takes the position that staff are authorized to make final
19 decisions on NOC approval under RCW 70A.15.2210.

20 4.47 Spokane Clean Air Agency takes the position that new source approval under RCW
21 70A.15.2210 is a ministerial rather than a discretionary decision.

22 4.48 Spokane Clean Air Agency's board makes final decisions on variances issued under
23 RCW 70A.15.2310.

1 4.49 Spokane Clean Air Agency has promulgated regulations giving its board final
2 decision-making authority on variances issued under RCW 70A.15.2310.

3 **Factual allegations regarding Yakima Clean Air Agency (4.50 through 4.55):**

4 4.50 Yakima Clean Air Agency staff – rather than governing board – makes the final
5 decisions on NOC approval under RCW 70A.15.2210.

6 4.51 Yakima Clean Air Agency is taking illegal action by having its staff to make final
7 decisions on NOC approval under RCW 70A.15.2210.

8 4.52 Yakima Clean Air Agency takes the position that staff are authorized to make final
9 decisions on NOC approval under RCW 70A.15.2210.

10 4.53 Yakima Clean Air Agency takes the position that new source approval under RCW
11 70A.15.2210 is a ministerial rather than a discretionary decision.

12 4.54 Yakima Clean Air Agency’s board makes final decisions on variances issued under
13 RCW 70A.15.2310.

14 4.55 Yakima Clean Air Agency has promulgated regulations giving its board final
15 decision-making authority on variances issued under RCW 70A.15.2310.

16 4.56 Collectively, Defendants issue over 100 NOC approvals annually.

17 4.57 Defendants illegal actions are supported by taxes.

18 **V. FIRST CAUSE OF ACTION – DECLARATORY RELIEF**

19 5.1 The preceding paragraphs are incorporated by reference as if set forth fully herein.

20 5.2 A controversy exists between Plaintiffs and Defendants regarding the following
21 issues:

22
23

1 a. Are Defendants violating the Act and taking illegal action by having their
2 staff—rather than their governing boards—make final NOC approval and mitigation
3 decisions under RCW 70A.15.2210?

4 b. Is the approval and mitigation of new sources under RCW 70A.15.2210 a non-
5 ministerial decision, such that the board may not delegate its authority without express
6 statutory authority?

7 5.3 “Where a statute, which is the source of a municipal or quasi municipal corporation’s
8 power, confers specific functions to particular officers or boards, such functions may not be
9 delegated to others unless the statute expressly authorizes such delegation to some other officer or
10 body.” *Noe v. Edmonds Sch. Dist.*, 83 Wn.2d 97, 103 (1973) (internal citations omitted). When
11 addressing a similar situation, the State Supreme Court said, “The resolution of this case turns on a
12 fundamental rule of administrative law – an agency may only do that which it is authorized to do by
13 the Legislature.” *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 226, (1993).

14 **VI. SECOND CAUSE OF ACTION – INJUCTIVE RELIEF**

15 6.1 The preceding paragraphs are incorporated by reference as if set forth fully herein.

16 6.2 Plaintiff seeks an injunction against Defendants: (1) requiring them to adhere to the
17 process outlined in RCW 70A.15.2210 in issuing future approvals under that section, including the
18 requirement that the board of directors make final decisions on NOC approval and (2) prohibiting
19 delegation of final decision-making authority under RCW 70A.15.2210 from board to staff.

20 **VII. RELIEF REQUESTED**

21 WHEREFORE, Plaintiffs seek the following relief:

22 7.1 Grant declaratory judgment establishing the following:
23

1 a. Defendants are in ongoing violation of the Act by allowing their staff—rather
2 than their board of directors—to make final decisions on NOC applications under RCW
3 70A.15.2210.

4 b. New source approval decisions under RCW 70A.15.2210 are not ministerial
5 decisions.

6 c. New source approval decisions under RCW 70A.15.2210 cannot be delegated
7 from the board to staff.

8 7.2 Grant permanent injunction against Defendants: (1) requiring them to adhere to the
9 process outlined in RCW 70A.15.2210 in issuing future approvals under that section, including the
10 requirement that the board of directors make final decisions on NOC approval and (2) prohibiting
11 delegation of final decision-making authority under RCW 70A.15.2210 from board to staff.

12 7.3 Grant such other relief as the Court deems just and equitable.

13 DATED this 28th day of July, 2021.

14 **SMITH & LOWNEY, PLLC**

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