The Honorable Hollis R. Hill
Oral Argument Date: October 30, 2015

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

ZOE & STELLA FOSTER, minor children by and through their guardians MICHAEL FOSTER and MALINDA BAILEY; AJI & ADONIS PIPER, minor children by and through their guardian HELAINA PIPER; WREN WAGENBACH, a minor child by and through her guardian MIKE WAGENBACH; LARA FAIN, a minor child by and through her guardian MONIQUE DINH; GABRIEL MANDELL, a minor child by and through his guardians VALERIE and RANDY MITCHELL; JENNY XU, a minor child by and through her guardians YAN ZHANG & WENFENG XU,

Petitioners,

v.

WASHINGTON DEPARTMENT OF ECOLOGY,

Respondent.

NO. 14-2-25295-1

DEPARTMENT OF ECOLOGY RESPONSE TO PETITIONERS' RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE AND MOTION TO STRIKE NEW EVIDENCE



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## I. INTRODUCTION

On June 23, 2015, this Court remanded this case to the Washington State Department of Ecology (Ecology) to reconsider Petitioners' June 17, 2014 Petition for Rulemaking in light of Ecology's December 2014 report to the Legislature and the Declaration of Dr. Kharecha. Ecology's August 7, 2015 response informed the Court that Ecology was starting rulemaking at the behest of Governor Inslee to adopt a regulatory cap on greenhouse gas emissions for the purpose of reducing Washington's greenhouse gas emissions. This is not enough for Petitioners. Petitioners claim the particular emission reduction scheme they advocate is the only scheme that Ecology can legally adopt. They ask this court to order Ecology to adopt their proposed rule. In doing so, they ask this Court to make law rather than apply existing law. Such an order would interfere with both the Legislature's emission reduction requirements and the Governor's rulemaking directive. Because neither state statutes nor the state constitution require Ecology to adopt Petitioners' proposed rule, such interference is not called for.

Petitioners, in essence, prematurely challenge Ecology's rule because they predict that they will not like the content of that rule. But Petitioners, like all other stakeholders and members of the public, will have a full opportunity to participate in and influence the rulemaking process. At the end of that process, if they get a rule they do not like, they can challenge it under the Administrative Procedure Act (APA). What they cannot do is ask this Court to order Ecology to adopt a particular rule. Such an extraordinary order would exceed this Court's authority to review Ecology's denial of the petition for rulemaking under the limited standards contained in the APA.

Petitioners also argue that the declarations of Hedia Adelsman and Stuart Clark included in Ecology's August 7 response constitute grounds for them to submit new evidence to the Court. Neither Ms. Adelsman, who is the Ecology staff person who wrote the December 2014 report, nor Mr. Clark, the manager of Ecology's Air Quality Program, provided any



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testimony questioning the scientific basis for Petitioners' Petition for Rulemaking. Nor did they provide any new science. Therefore, their declarations do not warrant the submission of new evidence by the Petitioners.

The new evidence Petitioners try to introduce consists of declarations from climate scientists mainly arguing that global surface temperatures should not be allowed to increase more than 1°C. In this APA judicial review proceeding, Petitioners are improperly urging the Court to rule on what constitutes the "correct" science of climate change. For good reason, courts have consistently refused to be caught up in the scientific fray. *See, e.g.*, *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2533 n.2, 180 L. Ed. 2d 435 (2011); *Washington Envtl. Coun. v. Bellon*, 732 F.3d 1131, 1136 n.3 (9th Cir. 2013). So too should this Court avoid the fray. Petitioners' new evidence is irrelevant in this APA proceeding, and Ecology therefore asks this Court to strike the portions of these documents addressing the 1°C limit.

## II. ARGUMENT

### A. Neither the Constitution nor State Statutes Require Ecology to Reach Beyond the Legislature and the Governor to Single-Handedly Resolve the Complex Social, Economic, and Environmental Issues Raised by Climate Change

Climate change raises complex social, economic, and environmental issues. No reading of the state constitution, RCW 70.94.331, or RCW 70.235 requires Ecology to reach beyond legislative and gubernatorial mandates to single-handedly resolve these complex social, economic, and environmental issues. Nor was Ecology's decision arbitrary or capricious.

#### 1. Ecology's denial of the Petition for Rulemaking was not outside the agency's statutory authority

Petitioners claim Ecology's enabling statute and the state Clean Air Act give them an inherent, inalienable right to a healthful environment. *See, e.g.,* Petitioners' Opening Br. at 13. They claim this right compels Ecology to adopt their rule. *Id.* Petitioners fail to acknowledge that the language they are relying on is located in the intent sections of the cited statutes. *See*

Ecology's Apr. 6 Resp. Br. at 7–10. It is well established that statements made in intent sections of statutes create no binding duties. *Id.* Nonetheless, Petitioners claim language in a recent court decision invoking the intent section of the State Environmental Policy Act (SEPA) supports their argument. Petitioners' Aug. 25 Resp. at 28–29 (citing *Puget Soundkeeper Alliance v. Pollution Control Hearings Bd. & Ecology*, No. 45609-5-II, 2015 WL 4540664 (Wash. Ct. App. July 28, 2015)). The case is inapposite. The *Puget Soundkeeper Alliance* court invalidated a permit condition that directly conflicted with state regulations. Here, neither Ecology's denial of the Petition for Rulemaking nor Ecology's current proposed rulemaking directly conflicts with state regulations. In addition, the language Petitioners rely on is dicta.

*Puget Soundkeeper Alliance* involved a condition in a National Pollutant Discharge Elimination System (NPDES) permit authorizing BP to discharge treated wastewater from the BP Cherry Point Refinery into the Strait of Georgia. *Puget Soundkeeper Alliance*, 2015 WL 4540664, at *1. The permit specified that the effluent limit for acute toxicity was "[n]o acute toxicity" using the whole effluent toxicity (WET) test. *Id.* A condition in the permit provided that one failed whole effluent toxicity test would not constitute a violation of the permit if BP took certain actions to determine the causes of the toxicity and remedy them. *Id.* at *2. The court invalidated that permit condition, finding that it directly conflicted with WAC 173-205-070(1)(c), an Ecology regulation specifying that a failed whole effluent toxicity test means failure to comply with the whole effluent toxicity limit. *Id.* at *7.[1]

The court did discuss language from the intent section of SEPA, but that discussion was not necessary for the court's decision and was therefore dicta. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 8–9, 977 P.2d 570 (1999) (a statement is dicta when it is not necessary to

[1] The court also pointed to Ecology regulations prohibiting the introduction of toxic substances above background levels in waters of the state (WAC 173-201A-240(1)) and requiring " 'acute and chronic toxicity testing . . . to evaluate compliance' with the standard. WAC 173-201A-240(2)." *Puget Soundkeeper Alliance* at *7.

the court's decision in a case.). Dicta is not binding authority. *See Hildahl v. Bringolf*, 101 Wn. App. 634, 650–51, 5 P.3d 38 (2000).

In addition, as noted above, the law is well settled that statements made in intent sections of statutes create no binding duties.[2] *Int'l Union of Operating Eng'rs Local 286 v. Sand Point Country Club*, 83 Wn.2d 498, 505, 519 P.2d 985 (1974) (citing *Whatcom Cty. v. Langlie*, 40 Wn.2d 855, 246 P.2d 836 (1952); *State ex rel. Berry v. Superior Court In & For Thurston Cty.*, 92 Wash. 16, 159 P. 92 (1916)). *See also In re Bale*, 63 Wn.2d 83, 87, 385 P.2d 545 (1963); *Huntworth v. Tanner*, 87 Wash. 670, 676–77, 152 P. 523 (1915). Thus, the intent sections that Petitioners rely on do not impose any binding duty on Ecology, nor do they require Ecology to adopt the rule Petitioners are seeking.

Indeed, the Legislature has expressly prohibited Ecology from relying on statements of intent or enabling statutes as authority for adopting a rule. *See* RCW 43.21A.080 ("[Ecology] may not adopt rules after July 23, 1995, that are based solely on a section of law stating a statute's intent or purpose, on the enabling provisions of the statute establishing the agency, or on any combination of such provisions, for statutory authority to adopt the rule.").

**2. Ecology's determination not to adopt Petitioners' carbon dioxide emission limits was not unconstitutional**

Petitioners claim Ecology's failure to adopt their proposed limits on carbon dioxide emissions is unconstitutional. *See, e.g.*, Petitioners' Aug. 25 Resp. at 4, 15. They argue that the public trust doctrine is part of Washington's constitution, and the public trust doctrine compels Ecology to adopt their rule. Petitioners' Opening Br. at 12. However, the constitutional provisions embodying the public trust doctrine apply only to navigable waters and to the land under them. Const. art. XV, § 1; *see also Caminiti v. Boyle*, 107 Wn.2d 662, 670, 732 P.2d 989 (1987) (citing *Portage Bay-Roanoke Park Comm'ty Coun. v. Shorelines Hearings Bd.*, 92 Wn.2d 1, 4, 593 P.2d 151 (1979)). The Washington State Supreme Court has

[2] *See also* Ecology's Apr. 6 Resp. Br. at 7–8.

refused to extend the public trust doctrine beyond these limits. *Rettkowski v. Ecology*, 122 Wn.2d 219, 232–33, 858 P.2d 232 (1993); *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 133–34, 969 P.2d 458 (1999). Even if the public trust doctrine applied in this case, that doctrine would not provide a basis for Petitioners' rule. *Rettkowski*, 122 Wn.2d at 232–33; *R.D. Merrill Co.*, 137 Wn.2d at 133–34; *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 99, 11 P.3d 726 (2000). Therefore, Ecology's decision was not unconstitutional.[3]

**3. Ecology's determination was not arbitrary or capricious**

An act is arbitrary or capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances. *Wash. Indep. Tel. Ass'n. v. Wash. Utils. & Transp. Comm'n*, 149 Wn.2d 17, 26, 65 P.3d 319 (2003). "[N]either the existence of contradictory evidence nor the possibility of deriving conflicting conclusions from the evidence renders an agency decision arbitrary and capricious." *Rios v. Dep't of Labor & Indus.*, 145 Wn.2d 483, 504, 39 P.3d 961 (2002). The court examines the record to determine whether the agency reached its decision through a process of reason, not whether the result was itself reasonable in the judgment of the court. *Rios*, 145 Wn.2d at 501. Agencies are accorded "wide discretion" when deciding to forgo rulemaking. *Nw Sportfishing Indus. Ass'n v. Ecology*, 172 Wn. App. 72, 91, 288 P.3d 677 (Div. II 2012) (citing *Rios*, 145 Wn.2d at 507).

In this case, Ecology looked at the attending fact that the Legislature[4] has acted in precisely the area Petitioners would have Ecology act. RCW 70.235.020. The Legislature has set emission reductions for greenhouse gas emissions in Washington and has provided Ecology with a role—that does not include rulemaking—in adjusting those reductions. RCW 70.235.020, .040. Ecology's decision to defer to the Legislature under these circumstances was not arbitrary or capricious. Petitioners argue that, notwithstanding the

[3] *See also* Ecology's Apr. 6 Resp. Br. at 11–14.

[4] Since that time, the Governor has also acted in this area.



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Legislature and the Governor, Ecology's current rulemaking is arbitrary and capricious under the standard articulated in *Rios*, because the rule is in direct contravention to the recommendations of Ecology's own experts. Petitioners' Aug. 25 Resp. at 14, 15. Petitioners point out that in the December 2014 report, Ecology stated that the reductions in RCW 70.235.020 are not stringent enough, and they argue that, under the standard articulated in *Rios*, a rule to meet those reductions is therefore arbitrary and capricious.

*Rios* is distinguishable: In *Rios*, the agency involved had an express and specific regulatory duty to take the actions it failed to take. *Rios*, 145 Wn.2d at 494. Here, Ecology has no such express or specific duty.[5] In addition, in *Rios*, the agency had found that the monitoring program requested by the pesticide handlers was both necessary and doable. *Id.* at 508 ("Because the Department had . . . deemed a monitoring program both *necessary and doable*, the Department's 1997 denial of the pesticide handlers' request was 'unreasoning and taken without regard to the attending facts or circumstances.' ") (emphasis added). Here Ecology has not determined that Petitioners' rule is necessary, or that it is doable. Indeed, although Ecology determined that the reductions in RCW 70.235.020 are inadequate, Ecology has not determined what a safe level of carbon dioxide in the atmosphere would be. See discussion in section II.C below. Therefore, the analysis in *Rios* does not apply and Ecology's denial was not arbitrary or capricious under the standard articulated in that case.

Next Petitioners claim that the standard in *Puget Soundkeeper Alliance* requires Ecology to provide a rational basis for moving forward with the rule the agency is proposing rather than the rule Petitioners would like to see. Petitioners' Aug. 25 Resp. at 15 (citing *Puget Soundkeeper Alliance* at *10). The argument fails for three reasons. First, in *Puget Soundkeeper Alliance*, the court found that RCW 34.05.570(3)(h) required reversal of a permit condition that directly conflicted with requirements in Ecology regulations unless the agency

[5] *See* Ecology's Apr. 6 Resp. Br. at 16–18.

provided a rational basis for the inconsistency. *Puget Soundkeeper Alliance* at *7, *9, *10. Here, Ecology's proposed rulemaking does not violate any rules or statutes.[6] Second, the standard relied on by *Puget Soundkeeper Alliance*, RCW 34.05.570(3)(h), does not apply in this case. The standard in RCW 34.05.570(3)(h) applies only to judicial review of agency orders. This case involves judicial review of a denial of a petition for rulemaking. A denial of a petition for rulemaking is reviewed as "other agency action," and is subject to the standards in RCW 34.05.570(4), not RCW 34.05.570(3). *Rios*, 145 Wn.2d at 491–92 (a denial of a petition for rulemaking is subject to judicial review as other agency action under RCW 34.05.570(4)).[7] Therefore, the requirement that Ecology provide a rational basis for its determination does not apply in this case. Finally, Ecology has, in fact, provided a rational basis for its actions: the agency has chosen to act consistently with the reductions currently in statute and with the governor's directive.

In their August 25, 2015 brief, Petitioners add one more new claim that Ecology's actions are illegal. They claim that Ecology has illegally deferred to the International Panel on Climate Change (IPCC) to determine what Washington's part in reaching global stabilization levels should be. Petitioners' Aug. 25 Resp. at 26 (citing Ecology's Aug. 7 Resp. at 5). Petitioners mischaracterize Ecology's actions. Ecology is not deferring to the IPCC to determine what Washington's emissions should be. Rather, Ecology is looking to the December 2015 Conference of the Parties to help *inform* Ecology's determination of the appropriate greenhouse gas reductions to recommend to the Legislature. Ecology's Aug. 7 Resp. at 5 ("Ecology believes any changes to Washington's greenhouse gas emission reduction

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[6] *See* Ecology's Apr. 6 Resp. Br. at 14–18. *See also* Declaration of Sarah Louise Rees (Rees Decl.) Ex. E (informal opinion of the Attorney General's Office concluding that RCW 70.235.020 does not create an express or implied cause of action for obtaining a court order to enforce the greenhouse gas emission reductions identified in that statute, and there is no state official who is under a duty to act to enforce the emission reductions).

[7] The standard in RCW 34.05.570(3)(h) applying the rational basis standard to judicial review of orders is in addition to the arbitrary and capricious standard, which is also applicable to judicial review of orders. RCW 34.05.570(3)(i).



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requirements should be *informed by* determinations made during the December 2015 Conference of the Parties.") (emphasis added). Once the Conference of the Parties has concluded, Ecology will weigh the results, and use them to make recommendations to the Legislature. March 16, 2015 Declaration of Andrea K. Rodgers Harris (Rodgers Harris Decl.) Ex. 1 at 18. There is nothing illegal in this.[8]

### B. Ecology Is in the Process of Adopting a Rule to Set a Binding Regulatory Cap on Greenhouse Gas Emissions in Washington

Ecology has begun the formal rulemaking process to adopt rules setting binding statewide greenhouse gas emission limits as directed by Governor Inslee. Rees Decl. Ex. C. The rulemaking process will provide for robust public participation, and Ecology expects to receive input from a wide variety of stakeholders, including tribes, environmental groups, regulated parties, other advocacy groups, and the public.[9] Rees Decl. ¶ 5. Like these numerous other interested parties, Petitioners will have the opportunity to fully engage in this rulemaking process and influence the final rule.

As it must when adopting any rule, Ecology will be required to balance a number of factors, including costs, benefits, regulatory fairness, and the concerns presented by all stakeholders. RCW 34.05.320, .325, .328. Before adopting the rule, Ecology will need to provide a Concise Explanatory Statement that includes responses to all comments received indicating "how the final rule reflects agency consideration of the comments, or why it fails to

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[8] Petitioners also claim Ecology is mistaken in believing that the outcome of the December 2015 United Nations Framework Convention on Climate Change (UNFCCC) conference in Paris will prescribe or even help determine specific reduction targets for individual nations, let alone individual states within the United States. Petitioners' Aug. 25 Resp. at 20 (quoting Declaration of Dr. Richard H. Gammon (Gammon Decl.) ¶ 6). In fact, Ecology never expressed the belief that the UNFCCC conference would determine specific reduction targets for individual nations or states within the United States. Ecology actually stated, "Many countries have submitted their greenhouse gas emissions targets to the UN Secretariat. The commitments will be evaluated by the UN scientists prior to the December Conference of Parties to determine whether they are sufficient to achieve the goal of limiting the increase in global temperature to below 2 degrees Celsius. It is recognized that different nations, sub-nations, and states may set different greenhouse gas emissions reductions . . . ." Declaration of Hedia Adelsman (Adelsman Decl.) ¶ 11.

[9] Several environmental groups have expressed support for Ecology's rulemaking effort and expressed their intention to engage in the rulemaking process. Rees Decl. Ex. D.

do so." RCW 34.05.325(6)(a)(iii). Ecology will also need to prepare a cost-benefit analysis (RCW 34.05.328), and a small business economic impact statement (RCW 34.05.320(1)(j)). Because the rulemaking process must take all these factors into account, Ecology cannot say at the outset of this rulemaking process exactly what the final rule will be. If Petitioners are not happy with the final rule, they are of course free to challenge it under the APA. Petitioners try to make an end-run around the rulemaking process by asking this Court to rule *now* that Ecology's rule will be unsatisfactory because the Governor's directive ties the rule to the emission reductions in RCW 70.235.020 rather than to the Petitioner's preferred emission reductions. Petitioners' Aug. 25 Resp. at 14. But this Court's role is to determine whether Ecology exceeded its statutory authority or was arbitrary or capricious when it denied the petition for rulemaking, not to dictate the content of Ecology's future rule. The Legislature delegated to Ecology the authority to promulgate rules under the Clean Air Act. Although courts play a critical role in determining the validity of agency rules after they are adopted, a court order requiring Ecology to adopt a particular rule would violate the separation of powers doctrine. *See State v. G.A.H.*, 133 Wn. App. 567, 580, 137 P.3d 66 (Div. I 2006) (invalidating a court order that violated the separation of powers doctrine). Petitioners, thus, cannot get the relief they seek.

**C. There Is No Basis for Striking Hedia Adelsman's Testimony**

Petitioners argue that Ms. Adelsman's testimony regarding the 2°C target should be excluded because Ecology has not demonstrated that Ms. Adelsman is a climate scientist. Petitioners' Aug. 25 Resp. at 17–18. Ms. Adelsman, however, provided her declaration as the policy maker who prepared the December 2014 report, not as a climate scientist. Ms. Adelsman did not comment on the merits or validity of any science. Instead, she repeated science presented in IPCC and other reports. *See, e.g.*, Rodgers Harris Decl. Ex. 1 at 10 (providing IPCC graph on Representative Concentration Pathways). Nor did Ms. Adelsman make any statements about what Ecology's, Washington's, or anyone else's emission target



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should be. Rather, she presented what others have said about emission targets. For example, she stated, "More than 100 countries (including the United States) signing the Copenhagen Accord in 2009, have agreed to keep temperature increases resulting from heat-trapping emissions to less than 2°C, a target aimed at limiting dangerously disruptive climate impacts." Adelsman Decl. ¶ 5. Finally, contrary to Petitioners' claims, Ms. Adelsman did not claim that 2°C is "safe." She actually said, "It is widely recognized by the scientific community and many countries that to avoid the worst impacts of climate change, the average rise in the surface temperature needs to be kept at less than 2 degrees Celsius . . . above the pre-industrial levels." Adelsman Decl. ¶ 5.

Petitioners acknowledge the role of policy makers in the climate debate. For example, like Ecology, Petitioners describe the 2°C target as a political commitment informed by science, not as a scientific assessment of absolutely "safe" levels of global warming. Gammon Decl. ¶ 7 (the 2°C target is a level that policy makers felt was politically achievable); Adelsman Decl. ¶ 5 (describing the 2°C target as policy target informed by science); Ecology's Aug. 7 Resp. at 3 (citing Ecology's December 2014 report at 15) (describing the 2°C target as a measure to prevent *the most severe impacts* of climate change). Petitioners also agree that while science informs the debate, policy makers determine acceptable emission targets. Gammon Decl. ¶ 7 ("Readers should note that each major IPCC assessment has examined the impacts of multiplicity of temperature changes but *has left political processes to make decisions on which threshold may be appropriate.*") (emphasis added); Hansen Decl. ¶ 15 (acknowledging that while the IPCC provides the science, the UNFCCC, *a political body*, is debating proposed national carbon reduction commitments). Consistent with Petitioner' description of the roles of science and policy, Ecology looks to the IPCC for scientific assessments (Rodgers Harris Decl. Ex. 1 at 5, 10, 15; Adelsman Decl. ¶ 6), but turns to political instruments such as the Copenhagen Accord to describe the greenhouse gas levels nations have agreed to try to meet (Rodgers Harris Decl. Ex. 1 at 5, 15; Adelsman Decl. ¶ 5).



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As Petitioners acknowledge, Ms. Adelsman has ample credentials as a policy maker. Adelsman Decl. ¶¶ 2, 3; Petitioners' Aug. 25 Resp. at 17. Because Ms. Adelsman was speaking as a policy maker rather than as a scientist, there is no basis for striking her testimony.

### D. The Science and Other Information Supporting the 1°C Limit in the Declarations of Dr. James E. Hansen, Ove Hoegh-Guldburg, Ph.D., Dr. Richard H. Gammon, and Matthew McRae Should Be Stricken[10]

Petitioners' August 25 response includes declarations from Dr. James E. Hansen, Dr. Ove Hoegh-Guldburg, Dr. Richard H. Gammon, and Matthew McRae, along with various attachments. These declarations and attachments consist for the most part of discussions and attachments supporting Petitioners' claim that the global surface temperature of the Earth should not be allowed to increase more than 1°C above pre-industrial levels. These declarations and attachments are not part of the record that was before Ecology when Ecology made the decision being appealed in this case.[11] Petitioners claim Ecology's submittal of additional testimony questioning the scientific basis for the petition for rulemaking justifies the submission of these declarations. Petitioners' Aug. 25 Resp. at 11.

Contrary to Petitioners' claim, Ecology's response on reconsideration did not include additional testimony questioning the scientific basis for the petition for rulemaking. Ecology's response included two declarations, one from Hedia Adelsman, explaining Ecology's policy

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[10] Specifically, Ecology is asking the Court to strike all of the declaration of Dr. James E. Hansen except paragraphs 3, 7, 8, 15, and 16; all of Dr. Guldburg's declaration; all of Matthew McRae's declaration; and paragraphs 11–13 of Dr. Gammon's declaration. Ecology is also asking the Court to strike all the attachments included with these declarations.

[11] Judicial review of an agency action must be confined to the record that was before the agency. RCW 34.05.558. New evidence may be allowed only in very limited circumstances. RCW 34.05.562. The court may accept new evidence only if it relates to the validity of the agency action at the time it was taken and is necessary to resolve disputes concerning (a) improper constitution of the decision-making body, (b) unlawfulness of procedure in Ecology's decision-making process, or (c) material facts in proceedings not required to be determined on the record. RCW 34.05.562(1). The court may remand to Ecology with directions for fact-finding if (a) Ecology failed to prepare or preserve an accurate record, (b) new evidence has become available that the party did not know and was under no duty to discover and the interests of justice would be served by remand, (c) Ecology improperly excluded or omitted evidence from the record, or (d) a relevant provision of law changed after the Ecology decision that may control the outcome. RCW 34.05.562(2).



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decision to refrain from making recommendations to the Legislature in the December 2014 report, and one from Stuart Clark, discussing developments in the 2015 Legislature and providing Governor Inslee's July 28, 2015 directive to Ecology to begin rulemaking. Adelsman Decl.; Declaration of Stuart Clark (Clark Decl.). Mr. Clark's declaration does not mention science. Clark Decl. To the extent Ms. Adelsman's declaration alludes to science, it summarizes information from Ecology's December 2014 report. *Compare* Adelsman Decl. ¶¶ 5, 6, *with* Rodgers Harris Decl. Ex. 1 at 15–17. Therefore, neither of these declarations provides any additional testimony questioning science and Petitioners are wrong in arguing they provide a basis for new evidence concerning the 1°C limit.

Petitioners next claim their new declarations should be admitted in the interests of justice. Petitioners' Aug. 25 Resp. at 11. Under the Administrative Procedure Act, a court may remand to serve the interests of justice only if new evidence has become available that the party did not know and was under no duty to discover. RCW 34.05.562(2)(b). The science and other information supporting the 1°C limit in Petitioners' declarations is not new evidence that the party did not know and was under no duty to discover. Petitioners' new declarations simply repeat their argument that global temperatures should not increase by more than 1°C. If Petitioners believe the information in these declarations was needed to support their petition for rulemaking, they should have provided the information with their petition.

Finally, as the record shows, Ecology did not evaluate science or the 1°C limit as part of its denial of the petition for rulemaking. Rather, Ecology based its decision on its evaluation of the agency's duty under the law. Therefore, the information in the four new declarations concerning the 1°C limit is irrelevant. Petitioners claim that Ecology's August 7 response on reconsideration makes it clear that now science is the issue in this case. Petitioners' Aug. 25 Resp. at 16. But Petitioners mischaracterize Ecology's response. This Court asked Ecology to reconsider its denial in light of Ecology's December 2014 report and Dr. Kharecha's declaration. June 23, 2015 Court Order. Ecology did as the Court ordered, and provided a

response evaluating both the December 2014 report and Dr. Kharecha's declaration, and the effects of those documents on Ecology's decision to deny the Petition for Rulemaking. Ecology determined that neither document changed Ecology's decision, and explained why. Ecology also provided a rational basis for its decision in the December 2014 report to refrain from recommending changes in the emission reduction requirements in RCW 70.235.020 until after the 2015 Paris climate talks. None of the discussions in Ecology's August 7 response made science "the issue in this case."

Petitioners' four new declarations were not part of the record before Ecology when the agency made the initial determination on the petition for rulemaking or when Ecology reconsidered its determination at the behest of this Court. Nor does the science and other information they present concerning the 1°C limit meet any of the requirements for the introduction of new evidence in judicial review of an administrative decision. Therefore, the portions of these four declarations and their attachments supporting Petitioners' claim that the global surface temperature of the Earth not be allowed to increase more than 1°C above pre-industrial levels are not properly before this Court and should be stricken.

### E. Petitioners Have Asked for a New Remedy That Goes Beyond Their Original Request for Relief

Petitioners' August 25 response asks for a new remedy: a court order with a timeline within which Ecology must act to promulgate its rule. Petitioners' Aug. 25 Resp. at 5.[12] Ecology has already been directed by the Governor to begin the rulemaking process in

[12] Petitioners make another new request for relief early in their brief, but fail to carry it through to the ultimate statement of relief requested at the end of their brief. That request asks this Court to issue an order directing Ecology to implement its legal authority in a manner that protects Petitioners' rights and the rights of future generations. Petitioners' Aug. 25 Resp. at 5. Petitioners claim the only way to protect their rights and the rights of future generations is to keep global temperatures from rising more than 1°C. Petitioners' Aug. 25 Resp. at 15–29. However, Petitioners have not shown that the adoption of their proposed rule will keep global temperatures from rising more than 1°C. Indeed, they have failed to demonstrate that there is any action Ecology can take that will keep global temperatures from rising more than 1°C. Therefore, they are without a viable remedy on this issue. The absence of a viable remedy raises serious questions concerning Petitioners' standing to raise this issue. RCW 34.05.530(3).

September 2015, provide a proposed rule by December 2015, and adopt the final rule by summer 2016. Rees Decl. Ex. B. Ecology is working hard to meet this aggressive timeline. Rees Decl. ¶ 7. This schedule gives Ecology approximately 11 weeks to draft the rule proposal. *Id.* This timeframe is extremely tight, especially given the controversial and highly technical nature of this rulemaking. *Id.* Although it will be exceptionally challenging to meet this timeframe, Ecology is fully committed to doing so while still allowing for a robust and transparent public process. *Id.* If the Court were to order Ecology to instead embark on a different rulemaking than the one that is currently underway, the entire rulemaking process could be derailed. This would delay adoption of the final rule and would delay implementation of the greenhouse gas reductions. Such a result is counterproductive and unwarranted.

## III. CONCLUSION

As demonstrated above, Ecology's denial of Petitioners' Petition for Rulemaking was neither unconstitutional, outside Ecology's statutory authority, nor arbitrary or capricious. In addition, Ecology has started the process to adopt a rule to set regulatory limits on greenhouse gas emissions in Washington by the summer of 2016. Ecology therefore respectfully asks this Court to affirm Ecology's denial of the petition. Ecology also asks this Court to deny Petitioners' brand-new request for a court order imposing deadlines on Ecology's current rulemaking process, and to strike the impermissible new evidence Petitioners have included with their August 25 response.

DATED this 2nd day of October 2015.

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