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CASE NUMBER 14-2-25295-1 SEA
The Honorable Holly Hill
Hearing: May 4, 2015

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' OPENING BRIEF.

ORAL ARGUMENT REQUESTED.

TABLE OF CONTENTS

I.	INTRODUCTION	6
II.	FACTS & PROCEDURAL BACKGROUND	7
	A. The Undisputed Facts: Climate Change Is Occurring In Washington	7
	B. Neither The Legislature Nor Any State Agency Has Acted To Put The State On A Path To Climate Stability	9
	C. Youth Petitioners’ Petition For Rulemaking Sought to Protect Their Future And Inalienable Rights Based On Current Climate Science	10
	D. Ecology’s Decision Denying Youth Petitioners’ Petition for Rulemaking.	11
III.	STANDARD OF REVIEW	11
IV.	ARGUMENT	12
	A. Ecology Violated Its Legal Duty To Protect Youth Petitioners’ Fundamental Inalienable Rights To A Healthful And Pleasant Environment & To Adopt Rules Establishing Air Quality Objectives & Standards & Air Emission Standards.	12
	B. Ecology Acted Arbitrarily And Capriciously By Failing To Address the Climate Science Presented In The Petition And Concluding Its “Alternative Approach” Addresses Concerns Raised by Youth Petitioners.	21
	C. Ecology Acted Arbitrarily And Capriciously By Failing To Address The Climate Science Presented In The Petition And Ignoring Its Admission That Urgent Action Is Required.	23
	D. Ecology Violated Its Legal Duty To Grant Youth Petitioners’ Petition and Initiate Rulemaking Using Current Climate Science	27
V.	CONCLUSION & REQUEST FOR RELIEF	29

TABLE OF AUTHORITIES

Cases

<i>ASARCO, Inc. v. Air Quality Coal.</i> , 92 Wn.2d 685, 601 P.2d 501 (1979)	14
<i>Budget Rent A Car Corp. v. State Dep't of Licensing</i> , 100 Wn.App. 381, 997 P.2d 420 (2000)	28, 29
<i>Caminiti v. Boyle</i> , 107 Wn.2d 662, 732 P.2d 989 (1987)	19, 20
<i>City of Bellevue v. King Cnty. Boundary Review Bd.</i> , 90 Wn.2d 856, 586 P.2d 740 (1978) ..	18
<i>Dep't of Ecology v. Theodoratus</i> , 135 Wn.2d 582, 957 P.2d 1241 (1998)	12
<i>Hillis v. State Dep't of Ecology</i> , 131 Wn.2d 373, 932 P.2d 139 (1997)	23, 25
<i>Ill. Cent. R.R. v. Illinois</i> , 146 U.S. 387 (1892)	19
<i>Kucera v. State</i> , 140 Wn.2d 200, 995 P.2d 63 (2000)	13
<i>Leschi Improvement Council v. State Highway Comm'n.</i> , 84 Wn.2d 271, 525 P.2d 774 (1974)	13
<i>Mahoney v. Shinpoch</i> , 107 Wn.2d 679, 732 P.2d 510 (1987)	28
<i>NW Sportfishing Indus. Ass'n v. Dep't of Ecology</i> , 172 Wn.App. 72, 288 P.3d 677 (2012)	21, 23, 25
<i>Postema v. Pollution Control Hearings Bd.</i> , 142 Wn.2d 68, 11 P.3d 726 (2000)	20, 29
<i>Public Citizen v. Steed</i> , 733 F.2d 93, 104 (D.C. Cir. 1984)	22
<i>Rettkowski v. Ecology</i> , 122 Wn.2d 219, 858 P.2d 232 (1993)	19, 20, 28
<i>Rios v. Dep't of Labor & Indus.</i> , 145 Wn.2d 483, 39 P.3d 961 (2002)	25, 26
<i>Robinson Twp. et al. v. Commonwealth of Pa.</i> , 83 A.3d 901 (Pa. 2013)	16
<i>Save a Valuable Env't (SAVE) v. City of Bothell</i> , 89 Wn.2d 862, 576 P.2d 401 (1978)	14
<i>Skokomish Indian Tribe v. Fitzsimmons</i> , 97 Wn.App. 84, 982 P.2d 1179 (1999)	12
<i>State Coal. for the Homeless v. DSHS</i> , 133 Wn.2d 894, 949 P.2d 1291 (1997)	18
<i>State v. Buchanan</i> , 29 Wash. 602, 70 P.52 (1902)	15

1.	<i>State v. Clark</i> , 30 Wn. 439, 71 P. 20 (1902)	16
2.		
3.	<i>State v. Rivers</i> , 129 Wn.2d 697, 921 P.2d 495 (1996)	15
4.	<i>Squaxin Island Tribe v. State Dep't of Ecology</i> , 177 Wn.App. 734, 312 P.3d 766 .	
5.	(2013)	22, 25
6.	<u>Constitutional Provisions</u>	
7.	Wash. Const. art. I, § 1	16
8.	Wash. Const. art. I, § 30.	16
9.	Wash. Const. art. XVII, § 1	16, 19
10.	<u>State Statutes</u>	
11.	RCW 4.84.350.	30
12.	RCW 34.05.330(1)	21, 22
13.	RCW 34.05.330(1)(a)(ii)	21, 22
14.	RCW 34.05.510.	11
15.	RCW 34.05.514(1)	11
16.	RCW 34.05.562	6
17.	RCW 34.05.570(4)(c)	6, 11, 13, 16
18.	RCW 34.05.574.	29
19.	RCW 43.21A.	12
20.	RCW 43.21A.010.	13, 16
21.	RCW 43.21A.080.	15
22.	RCW 43.21C.020(3)	13
23.	RCW 43.211.010.	15
24.	RCW 77.04.012.	19
25.	RCW 70.105D.010(1)	13
26.		

1.	RCW 70.105E.020(3)	13.
2.		
3.	RCW 70.235.....	9, 11, 12, 22, 26, 27, 28
4.	RCW 70.235.020	9, 21, 26, 27.
5.	RCW 70.235.040.....	9, 27, 28
6.	RCW 70.94.....	12, 14.
7.	RCW 70.94.011.....	17.
8.		
9.	RCW 70.94.141.....	17.
10.	RCW 70.94.331(2)	17.
11.	RCW 80.70.010(11)	18.
12.	RCW 80.70.070.....	18
13.	RCW 90.03.010	19
14.	RCW 90.54.020(3)(a)	19
15.	<u>State Regulations</u>	
16.	WAC 173-490-010 (1991)	14
17.	<u>Other Authorities</u>	
18.	Dep't of Ecology, <i>Washington Greenhouse Gas Emission Reduction Limits: Report</i> <i>Prepared Under RCW 70.235.040</i> (Dec. 2014)	6, 7, 9, 14, 26, 28
19.	James Hansen <i>et al.</i> , <i>Assessing "Dangerous Climate Change": Required Reduction of...</i> <i>Carbon Emissions to Protect Young People, Future Generations & Nature</i> ,.....	
20.	8 PLOS ONE (2013)	10, 23, 24.
21.		
22.	Charles K. Wiggins, <i>Francis Henry and the Declaration of Rights</i> , Washington State Bar News, May 1989.....	15.
23.		
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1. **I. INTRODUCTION**

2. ZOE & STELLA FOSTER, AJI & ADONIS PIPER, WREN WAGENBACH, LARA
3. FAIN, GABRIEL MANDELL, and JENNY XU (collectively “Youth Petitioners”) hereby
4. submit their opening brief in their appeal of the Washington Department of Ecology’s
5. (“Ecology’s”) denial of their Petition for Rulemaking (“Petition”) asking the agency to (1)
6. promulgate a rule mandating reductions of greenhouse gases (“GHGs”) based upon the most
7. current climate science; and (2) and make its statutorily-required recommendation to the
8. legislature on adjusting GHG emission limits based on current science through rulemaking.¹
9. This brief is supported by the attached declarations of Andrea K. Rodgers Harris and Pushker
10. Kharecha...

11. This case presents critical questions regarding the scope of Ecology’s legal authority
12. and obligation to protect essential natural resources under their jurisdiction, and the present
13. and future generations who depend upon them, from harm due to climate change and ocean
14. acidification.² Ecology recognizes:

15. Climate change is not a far-off risk. It is happening now globally and the impacts
16. are worse than previously predicted, and are forecast to worsen. . . . If we delay
17. action by even a few years, the rate of reduction needed to stabilize the global
18. climate would be beyond anything achieved historically and would be more
19. costly.³

20.
21.
22.
23. ¹ Agency Record (“AR”) at 11...

24. ² Climate change and ocean acidification are the direct result of carbon dioxide emissions, which have reached
25. unsafe levels in the atmosphere, thereby impairing the atmosphere’s function of regulating the energy (heat)
26. balance of earth and the chemistry of the oceans, which absorb 30 percent of the carbon dioxide pollution. For
27. brevity, Youth Petitioners hereinafter refer to this collective impairment as “climate change.”

³ Declaration of Andrea K. Rodgers Harris (“Rodgers Harris Decl.”) at ¶ 3, Ex. 1 at vi. This report, while not in
the Agency Record, is admissible pursuant to RCW 34.05.570(4)(b) (“The court may hear evidence, pursuant to
RCW 34.05.562, on material issues of fact raised by the petition and answer.”).

1 But delay is exactly what Ecology has sanctioned in this case. Ecology has acted in violation
2 of the law and has no right to deny Youth Petitioners and future generations their inalienable
3 right to a healthful environment and livable future.

4 **II. FACTS & PROCEDURAL BACKGROUND**

5 **A. The Undisputed Facts: Climate Change Is Occurring In Washington.**

6 Most of the salient facts at issue in this case are not in dispute. Ecology admits that
7 global warming is occurring and adversely impacting Earth's climate.⁴ At the same time,
8 ocean acidification "has been observed," due to the ocean absorbing approximately "30 percent
9 of the emitted anthropogenic carbon dioxide," thereby threatening Earth's ocean life.⁵ The
10 present rate of global heating is occurring as a result of human activities that release heat-
11 trapping GHGs at a rate and to levels unprecedented over the past 800,000 years.⁶ Increased
12 atmospheric levels of GHGs, primarily carbon dioxide ("CO₂") emissions from human
13 activities, intensify Earth's natural greenhouse effect at an accelerated rate, thereby changing
14 Earth's climate.⁷ "Carbon dioxide concentrations [in the atmosphere] have increased by 40
15 percent since pre-industrial times, primarily from fossil fuel emissions and secondarily from
16 net land use change emissions."⁸ Ecology admits that "[c]ontinued emissions of GHGs will
17 cause further warming and changes in all components of the climate system."⁹
18
19
20
21
22

23 ⁴ Ecology's Answer at 3:3-5.

24 ⁵ *Id.* at 3:4, 14-16.

25 ⁶ *Id.* at 3:5-7. Ecology does not dispute the fact that "[s]cientists have determined that it is extremely likely that
human influence has been the dominant cause of the observed warming since the mid-20th century." *Id.* at 3-4:23-
1...

26 ⁷ *Id.* at 3:12-14, 16-18.

⁸ *Id.* at 4:5-7...

⁹ *Id.* at 3:18-19.

Ecology recently recognized that “[s]ignificant changes in the Pacific Northwest and Washington’s climate are projected for the 21st century and beyond as a result of rising greenhouse gas emissions. . . *All scenarios indicate continued warming.*”¹⁰

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

The effects of climate change on water supplies, public health, coastal and storm damage, wildfires, and other impacts will be costly unless additional actions are taken to reduce greenhouse gases.¹¹

If immediate action is not taken, the costs of climate change and ocean acidification impacts to Washington are projected at \$10 billion per year by 2020.¹² Governor Inslee instructed that “Washington needs to take additional actions now” to address GHG emissions and their adverse impacts because “[d]ecisions made today about greenhouse gas emissions will have a significant effect on the amount of warming that will occur after mid-century,” when the children of today, including Youth Petitioners, will be the adults burdened with the crisis this generation and prior generations created.¹³

Ecology recognizes that climate science has significantly evolved and “admits that some aspects of the earth’s climate and natural systems have been observed to be changing faster than projected by the Intergovernmental Panel on Climate Change (“IPCC”) in 2007, including reductions in summer Arctic sea ice, and increases in Greenland margin melt rates

¹⁰ Declaration of Andrea K. Rodgers Harris (“Rodgers Harris Decl.”) at ¶ 3, Ex. 1 at 11. (emphasis added).

¹¹ *Id.* at v; AR 22 at 1. . .

¹² *Id.* . . .

¹³ *Id.*

1 and atmospheric CO₂ increases.”¹⁴ Importantly, Ecology recognizes that “IPCC 2007
2 projections were for an increase of 2 to 11.5 degrees Fahrenheit in global average surface air
3 temperatures for 2090-2099 . . . which would have impacts that could include increased
4 mortality of vulnerable human populations and alterations to natural systems.”¹⁵

5
6 **B. Neither The Legislature Nor Any State Agency Has Acted To Put The State On A
Path To Climate Stability**

7 Ecology says that the existing GHG reduction requirements in RCW 70.235 were
8 based, in part, on the IPCC’s 2007 compilation of science.¹⁶ RCW 70.235.020 sets the
9 following floor for GHG emission limits:
10

- 11 (i) By 2020, reduce overall emissions of greenhouse gases in the state
to 1990 levels.
- 12 (ii) By 2035, reduce overall emissions of greenhouse gases in the state
to twenty-five percent below 1990 levels;
- 13 (iii) By 2050, the state will do its part to reach global climate
14 stabilization levels by reducing overall emissions to fifty percent
below 1990 levels, or seventy percent below the state’s expected
15 emissions that year.

16 Under this existing law, Ecology is required to “consult with the climate impacts group
17 at the University of Washington regarding the science on human-caused climate change and
18 provide a report to the legislature summarizing that science and make recommendations
19 regarding whether the greenhouse gas emissions reductions required under RCW 70.235.020
20 need to be updated.”¹⁷ In December 2014, Ecology issued a report admitting that the current
21 GHG emissions limits in RCW 70.235 are not based upon current climate science:
22

23
24 ¹⁴ Ecology’s Answer at 5:1-4.

25 ¹⁵ *Id.* at 4-8. In 2090, Youth Petitioners will be 90 (Aji), 89 (Wren), 88 (Zoe, Lara, and Gabriel), 86 (Stella) and
26 85 (Adonis). At these ages, it is fair to say that the Youth Petitioners would qualify as “vulnerable human
populations.”

¹⁶ Rodgers Harris Decl. at ¶ 3, Ex. 1 at 3.

¹⁷ RCW 70.235.040; *see also* AR 22 at 7.

1 Washington State's existing statutory limits should be adjusted to better
2 reflect the current science. The limits need to be more aggressive in order
3 for Washington to do its part to address climate risks¹⁸

4 In spite of this finding, Ecology advised the Legislature to kick the can down the road:

5 Ecology recommends that no changes be made to the state's statutory
6 emission limits at this time. International negotiations are under way
7 regarding new emissions reductions targets, in preparation for the UN
8 climate conference in December 2015, to be held in Paris. Ecology
9 recommends waiting until the negotiations are concluded, as the result
10 could better inform how Washington's limits should be adjusted.¹⁹

11 **C. Youth Petitioners' Petition For Rulemaking Sought to Protect Their Future And**
12 **Inalienable Rights Based On Current Climate Science.**

13 Youth Petitioners filed a Petition for Rulemaking seeking an Ecology rule requiring and
14 recommending CO₂ emission reduction targets that are calibrated to restore global atmospheric
15 CO₂ levels to 350 ppm by the end of the century.²⁰ The current climate science Youth
16 Petitioners submitted in support of their Petition concludes that the previous IPCC goal of
17 limiting the temperature increase to 2°C is a "fallacy of logic."²¹ Current science establishes
18 that many climate impacts are manifesting much faster than most models predicted and the old
19 modeling used to determine the 2°C goal had significant deficiencies.²² The current climate
20 science shows that global warming must actually be limited to 1°C, meaning a global CO₂
21 atmospheric concentration of 350 ppm or lower by the end of the century.²³ In fulfilling their
22 statutory duties, Youth Petitioners asked Ecology to set CO₂ emission reductions on a global
23 trajectory to return carbon dioxide concentrations to 350 ppm by 2100 and achieve at least an

24 ¹⁸ Rodgers Harris Decl. ¶ 3, Ex. 1 at vi.

25 ¹⁹ *Id.* at 18.

26 ²⁰ AR 6 at 44.

²¹ AR 6 at 45; Rodgers Harris Decl. ¶ 4, Ex. 2; *see also* Declaration of Pushker Kharecha, Ph.D. ("Kharecha Decl.") at ¶¶ 16-17.

²² AR 6 at 46; Kharecha Decl. at ¶¶ 16-17.

²³ AR 6 at 46; Kharecha Decl. at ¶¶ 9, 10, 15, 17, 18.

1. eighty percent (80%) reduction from Washington’s 1990 CO₂ emissions by 2050.²⁴ The
2. proposed GHG emission limits require Washington to achieve a four percent (4%) annual
3. reduction in overall CO₂ emissions to achieve the 2050 target.²⁵

4. **D. Ecology’s Decision Denying Youth Petitioners’ Petition for Rulemaking.**

5. On August 14, 2014, Ecology denied Youth Petitioners’ Petition for Rulemaking.²⁶
6. Without addressing the scientific basis for the proposed rule, or its legal responsibility to
7. manage essential natural resources such as air and water, the agency denied the petition for
8. three reasons: (1) nothing in RCW 70.235 requires Ecology to adopt different emissions
9. reductions, develop a plan to ensure those reductions, or implement the monitoring
10. requirements in the proposed rule; (2) Washington “is working to achieve the reductions” set
11. forth in RCW 70.235 and “the measures it is taking are an alternative approach to your
12. proposed rule;” and (3) none of the additional cited sources in the petition require Ecology to
13. adopt the proposed rule.²⁷

16. **III. STANDARD OF REVIEW**

17. This Court has jurisdiction over this matter pursuant to RCW 34.05.510. Venue is
18. proper in this Court pursuant to RCW 34.05.514(1). This appeal is governed by the
19. Washington Administrative Procedure Act (“APA”), which authorizes relief if the agency has
20. acted in violation of the constitution, its statutory authority or the authority conferred by a
21. provision of law, or is arbitrary and capricious.²⁸ Deference to an administrative agency “does
22.

23. ²⁴ AR 6 at 59.

24. ²⁵ *Id.* The Petition also asked Ecology to take action to provide a biennial accounting of state CO₂ emissions,
25. separate from its CO₂ equivalent reporting, and assist other state agencies and entities with CO₂ reductions. *Id.* at
26. 60.

26. ²⁶ AR 11.

27. AR 11 at 1.

28. RCW 34.05.570(4)(c).

1 not extend to agency actions that are arbitrary, capricious, and contrary to law.”²⁹

2 Administrative action is arbitrary and capricious if it is willful, unreasoned, and taken without
3 regard to the attending facts and circumstances.³⁰

4 IV. ARGUMENT

5 A. Ecology Violated Its Legal Duty To Protect Youth Petitioners’ 6 Fundamental Inalienable Rights To A Healthful And Pleasant 7 Environment & To Adopt Rules Establishing Air Quality Objectives & 8 Standards & Air Emission Standards.

9 Ecology has statutory and constitutional responsibilities to protect Youth Petitioners’
10 fundamental inalienable rights to a healthful and pleasant environment and essential natural
11 resources including air and water. Youth Petitioners asked Ecology to promulgate the
12 proposed rule pursuant to RCW 43.21A (Creating Department of Ecology), RCW 70.94 (WA
13 Clean Air Act), RCW 70.235 (Limiting GHG Emissions), and the Public Trust Doctrine
14 embodied in the Washington Constitution. These laws impose upon Ecology the duty to act to
15 reduce GHG emissions to protect Youth Petitioners fundamental rights. Ecology erroneously
16 claims that no cited sources of legal authority in the Petition require Ecology to take the
17 requested action.³¹ Alarming, Ecology urges that it has no legal duty to protect Youth
18 Petitioners’ inherent and inalienable rights to a healthful environment. Ecology has acted
19 unconstitutionally, outside of its statutory authority, and in an arbitrary and capricious manner.
20 It is up to this Court to define Ecology’s legal obligation to Youth Petitioners and present and
21 future Washingtonians and ensure that Ecology implements its authority in full compliance
22 with the law.
23
24

25 ²⁹ *Skokomish Indian Tribe v. Fitzsimmons*, 97 Wn.App. 84, 94, 982 P.2d 1179 (1999).

26 ³⁰ *Dep’t of Ecology v. Theodoratus*, 135 Wn.2d 582, 598, 957 P.2d 1241 (1998).

³¹ AR 11 at 1.

1 Upon statehood and joining the union, the citizens of Washington retained certain
2 inherent and fundamental rights, including the right to a healthful and pleasant natural
3 environment. The Legislature recognized this right in creating the Department of Ecology:

4 *[I]t is a fundamental and inalienable right of the people of the state of*
5 *Washington to live in a healthful and pleasant environment and to benefit*
6 *from the proper development and use of its natural resources. The*
7 *legislature further recognizes that as the population of our state grows, the*
8 *need to provide for our increasing industrial, agricultural, residential,*
9 *social, recreational, economic and other needs will place an increasing*
10 *responsibility on all segments of our society to plan, coordinate, restore*
11 *and regulate the utilization of our natural resources in a manner that will*
12 *protect and conserve our clean air, our pure and abundant waters, and the*
13 *natural beauty of the state.*³²

14 The people's fundamental and inalienable right to a healthful environment is not *created* by
15 Ecology's organic act, but is an inalienable right of constitutional origin *recognized* in
16 Ecology's organic act, as well as other Washington statutes.³³ Ecology is the only state agency
17 with the delegated legal authority and obligation to protect Washington's citizens, and the
18 essential air and water resources they depend upon, from the undisputed catastrophic climate
19 change and ocean acidification resulting from excessive CO₂ emissions. And the agency must
20 do so by implementing its delegated legislative authority.³⁴

21 ³² RCW 43.21A.010 (1970) (emphasis added); *Kucera v. State*, 140 Wn.2d 200, 228, 995 P.2d 63 (2000)
22 (Johnson, J. concurring) (stating that this statutory language "displays a clear intent to protect *public* as well as
23 private interests."); *Leschi Improvement Council v. State Highway Comm'n.*, 84 Wn.2d 271, 279-80, 525 P.2d 774
24 (1974) ("The choice of this language . . . indicates in the strongest possible terms the basic importance of
25 environmental concerns to the people of this state.").

26 ³³ See, e.g., RCW 70.105D.010(1) (Model Toxics Control Act states that "[e]ach person has a fundamental and
inalienable right to a healthful environment, and each person has a responsibility to preserve and enhance that
right. The beneficial stewardship of the land, air, and waters of the state is a solemn obligation of the present
generation for the benefit of future generations."); RCW 70.105E.020(3) ("The fundamental and inalienable right
of each person residing in Washington state to a healthy environment has been jeopardized by pollution of air and
water spreading from Hanford.").

³⁴ RCW 43.21A.010 (1970); RCW 43.21C.020(2) ("[I]t is the continuing responsibility of . . . all agencies of the
state to use all practical means . . . to improve and coordinate plans, functions, programs, and resources to the end
that the state and its citizens may: (a) Fulfill the responsibilities of each generation as trustee of the environment
for succeeding generations; (b) Assure for all people of Washington safe, healthful, productive, and aesthetically

1 Youth Petitioners' inherent and fundamental rights to a healthful and pleasant
2 environment are inalienable constitutionally reserved rights that must be protected, and not
3 abridged, by Ecology.³⁵ Relying in part on RCW 43.21C.020(3), the Washington Supreme
4 Court has recognized this fundamental right demands protection in holding that a
5 municipality's statutory "duty to serve regional welfare when considering the problem of
6 adequate housing . . . exist[s] when the interest at stake is the quality of the environment."³⁶

7 Ecology's duty "to secure and maintain beneficial levels of air quality" by
8 promulgating rules to regulate air emissions pursuant to the Washington Clean Air Act, RCW
9 70.94, is invoked and violated when Ecology fails to act to protect fundamental rights to a
10 healthful environment.³⁷ The Washington Supreme Court has found a municipality's zoning
11 decision "arbitrary and capricious in that it failed to serve the welfare of the community as a
12 whole. Specifically, adverse environmental effects and potentially severe financial burdens on
13 the affected community have been completely disregarded."³⁸ Here, Ecology admits that
14 "[w]ithout action, climate change will negatively affect nearly every part of Washington's
15 economy through changes in temperature, sea level, and water availability."³⁹ The agency
16 record in this case is full of information detailing how Youth Petitioners' rights to a healthful
17
18
19
20
21

22 and culturally pleasing surroundings; (c) Attain the widest range of beneficial uses of the environment without
23 degradation, risk to health or safety, or other undesirable and unintended consequences . . .").

24 ³⁵ RCW 34.05.570(4)(c).

25 ³⁶ See *Save a Valuable Env't (SAVE) v. City of Bothell*, 89 Wn.2d 862, 871, 576 P.2d 401 (1978).

26 ³⁷ See Rodgers Harris Decl. ¶ 3, Ex. 1 at v, vi, 12; *ASARCO, Inc. v. Air Quality Coal.*, 92 Wn.2d 685, 709, 601
P.2d 501 (1979); WAC 173-490-010 (1991) (recognizing Ecology's authority "to provide for the systematic
control of air pollution from air contaminant sources and for the proper development of the state's natural
resources").

³⁸ *SAVE*, 89 Wn.2d at 870.

³⁹ AR 14 at 1; AR 15 at 1.

1 and pleasant environment will be and are being harmed by climate change.⁴⁰ Yet Ecology
2 declined to fulfill its mandatory duty to promulgate rules to protect air quality even though it
3 admits “[t]he science is clear that we must move forward quickly to reduce greenhouse gas
4 (GHG) emissions in order to mitigate its effects.”⁴¹ Ecology’s decision implicates and violates
5 Youth Petitioners’ fundamental rights to a healthful and pleasant environment preserved by the
6 Washington Constitution.
7

8 In its decision, Ecology stated that Youth Petitioners’ fundamental rights to a healthful
9 and pleasant environment acknowledged in RCW 43.211.010 “does not authorize specific
10 regulatory action” because RCW 43.21A.080 prohibits the adoption of rules “that are based
11 solely on a section of law stating a statute’s intent or purpose, on the enabling provisions of the
12 statute establishing the agency, or any combination of such provisions”⁴² Ecology’s
13 contention not only distorts, but subverts the law. As the statutorily authorized agent of the
14 Legislature to protect the natural environment, Ecology must protect the inalienable rights of
15 the people of Washington, present and future, using the authority and tools granted it.
16

17 First, the fundamental right implicated here is not a creature of statute. Rather, the
18 Legislature has recognized that the public’s right to a healthful environment is an inherent,
19 natural right that is preserved, and not extinguished, by the State Constitution.⁴³ Other courts
20

21 ⁴⁰ See, e.g., AR 12 at Section 5 (describing how the Pacific Northwest will be harmed by climate change and
22 noting that “[t]he Pacific Northwest is projected to warm rapidly during the 21st century,” *id.* at 5-1); *Id.* at 12-1.
23 (“Climate change is expected to affect both the physical and mental health of Washington’s residents by altering
the frequency, duration, or intensity of climate-related hazards to which individuals and communities [including
Youth Petitioners] are exposed.”).

24 ⁴¹ AR 15 at 1.

⁴² AR 11 at 5.

25 ⁴³ *State v. Buchanan*, 29 Wash. 602, 606, 70 P.52 (1902) (defining the term “inalienable right” as “the right that
every man had to do what he would with his own which would not interfere with the reciprocal rights of others.”);
26 *State v. Rivers*, 129 Wn.2d 697, 727 n.14, 921 P.2d 495 (1996) (Sanders, J., dissenting) (quoting Charles K.
Wiggens, *Francis Henry and the Declaration of Rights*, Washington State Bar News, May 1989, at 51, 54).

1 have similarly acknowledged and enforced inalienable rights to a healthy environment.⁴⁴ ...

2 The Washington State Constitution expressly recognizes that “[a]ll political power is
3 inherent in the people, and governments derive their just powers from the consent of the
4 governed, and are established to protect and maintain individual rights” and that “[t]he
5 enumeration in this Constitution of certain rights shall not be construed to deny others retained
6 by the people.”⁴⁵ Citing these constitutional provisions, the Washington Supreme Court has
7 stated:
8

9 The latter (section 1) is evidently the statement of a fundamental principle
10 inhering in the formation of the state and federal governments. It has no
11 application to the distribution of the sovereign powers of the government by the
12 people. The legislature represents this sovereignty of the people, except as limited
13 by the constitution. The first (section 30) is apparently the expression that the
14 declaration of certain fundamental rights belonging to all individuals and made in
15 the bill of rights shall not be construed to mean the abandonment of others not
16 expressed, which inherently exist in all civilized and free states. Those expressly
17 declared were evidently such as the history and experience of our people had
shown were most frequently invaded by arbitrary power, and they were defined
and asserted affirmatively. Consistently with the affirmative declaration of such
rights, it has been universally recognized by the profoundest jurists and statesmen
that certain fundamental, inalienable rights under the laws of God and nature are
immutable, and cannot be violated by any authority founded in right.⁴⁶

18 The Legislature has recognized that the right to a healthful and pleasant environment is one of
19 those “fundamental, inalienable rights” that “cannot be violated.”⁴⁷ Therefore, Youth
20 Petitioners are not asking Ecology to promulgate the proposed rule “based solely on” RCW
21 43.21A.010, but rather to fulfill the agency’s duty to protect and not abridge Youth Petitioners’

22
23 (“‘Under contemporary constitutional jurisprudence, the basic civil liberties were natural and inalienable rights
independent of any state constitution.’”).

24 ⁴⁴ See *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 947 n.35, 957 (Pa. 2013) (plurality opinion) (recognizing
that citizens’ rights to essential natural resources reflect “‘inherent and independent rights’ of mankind relative to
the environment” and inferring such rights are not created solely by virtue of an express environmental rights
25 constitutional provision).

⁴⁵ Wash. Const. art. I, §§ 1, 30; see also art. XVII, § 1...

26 ⁴⁶ *State v. Clark*, 30 Wn. 439, 443-44, 71 P. 20 (1902)...

⁴⁷ *Id.*; RCW 43.21A.010...

1 inherent fundamental rights preserved by the Washington Constitution. Agency rulemaking
2 must be done in accordance with the Washington Constitution.⁴⁸ Given the undisputed
3 evidence in the record that climate change is occurring, immediate action is needed, and the
4 effects of a changed climate will infringe upon Youth Petitioners' fundamental inalienable
5 rights to a healthful and pleasant environment preserved by the Washington Constitution,
6 Ecology had a legal duty to grant the Petition for Rulemaking.

7
8 Ecology has a specific statutory duty to adopt emission standards and "rules
9 establishing air quality objectives and air quality standards" pursuant to the Washington Clean
10 Air Act.⁴⁹ As one means to ensure that Youth Petitioners' inherent and fundamental rights to a
11 healthful and pleasant environment are maintained, the Washington Legislature has directed
12 Ecology to:

13
14 Preserve, protect and enhance the air quality for current and future generations.
15 Air is an essential resource that must be protected from harmful levels of
16 pollution. Improving air quality is a matter of statewide concern and is in the
17 public interest. It is the intent of this chapter to secure and maintain levels of air
18 quality that protect human health and safety, including the most sensitive
19 members of the population, to comply with the requirements of the federal clean
20 air act, to prevent injury to plant, animal life, and property, to foster the comfort
21 and convenience of Washington's inhabitants, to promote the economic and social
22 development of the state, and to facilitate the enjoyment of the natural attractions
23 of the state.

24 * * *

25 In selecting air pollution control strategies state and local agencies shall support
26 those strategies that lessen the negative environmental impact of the project on all
environmental media, including air, water, and land.

* * *

It is the intent of the legislature that air pollution goals be incorporated in the

⁴⁸ RCW 34.05.570(4)(c)(i) (stating that an agency's failure to perform a legal duty rule can be invalidated if it violates the constitution)...

⁴⁹ RCW 70.94.331(2)(a), (b).

missions and actions of state agencies.⁵⁰

To carry out this legislative directive, Ecology is given the statutory authority to “[a]dopt, amend and repeal its own rules and regulations, implementing” the Washington Clean Air Act, and the statutory mandate to “(a) Adopt rules establishing air quality objectives and air quality standards; (b) Adopt emission standards which shall constitute minimum emission standards throughout the state.”⁵¹ Therefore, the Washington Clean Air Act imposes a mandatory duty upon Ecology to promulgate a rule requiring mandatory GHG emissions limits.⁵² In fulfilling this mandatory statutory duty, Ecology must act in a manner that is consistent with, and protective of, Youth Petitioners’ fundamental and inalienable rights to a healthful and pleasant environment. The case law is clear that the fundamental right to a healthful environment “overlays” other statutory provisions, including the Washington Clean Air Act.⁵³

Finally, Ecology had a legal duty to promulgate the proposed rule pursuant to the Public Trust Doctrine. The Public Trust Doctrine secures for future generations of citizen beneficiaries a healthful and pleasant environment, and thereby imposes an affirmative and mandatory duty on the State to prevent substantial impairment to the state’s essential natural

⁵⁰ RCW 70.94.011; *See ASARCO, Inc. v. Puget Sound Air Pollution Control Agency*, 112 Wn.2d 314, 317, 771 P.2d 335 (1989) (accepting party’s admission that agencies have constitutional authority to regulate air emissions)...

⁵¹ RCW 70.94.141; 70.94.331(2)(a), (b) (using the term “shall”); *see also ASARCO, Inc.*, 112 Wn.2d at 320 (“RCW 70.94.331(2) specifically gives [Ecology] power to adopt rules relating to air quality and emission standards *in addition to* the powers granted by RCW 70.94.141.”)...

⁵² *State Coal. for the Homeless v. DSHS*, 133 Wn.2d 894, 907-08, 949 P.2d 1291 (1997) (“the word ‘shall’ . . . imposes a mandatory duty. . . .”) (citations omitted). Ecology also has additional statutory responsibility to adopt rules regarding CO₂ mitigation plans, which include “the process or means to achieve carbon dioxide mitigation through use of mitigation projects or carbon credits.” RCW 80.70.010(11); RCW 80.70.070 (directing Ecology to adopt rules to implement this chapter). This section demonstrates that Ecology has the authority to regulate carbon dioxide emissions as well as to take action to protect Youth Petitioners from excessive CO₂ emissions.

⁵³ *City of Bellevue v. King Cnty. Boundary Review Bd.*, 90 Wn.2d 856, 865, 586 P.2d 740 (1978).

resources.⁵⁴ The Public Trust Doctrine is also an expression of fundamental constitutional rights and sovereign obligations.⁵⁵

The State has repeatedly reiterated its role as trustee of the state's essential natural resources. Under the Constitution, "[t]he state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes."⁵⁶ The Washington Supreme Court has interpreted this declaration of ownership as having "partially encapsulated"⁵⁷ the Public Trust Doctrine.⁵⁸ In Washington's seminal public trust case, the court held "that the sovereignty and dominion over this state's tidelands and shorelands, as distinguished from title, always remains in the state and the state holds such dominion *in trust* for the public."⁵⁹ The state has exerted sovereign dominion and control over other natural resources, rendering those resources subject to the Public Trust Doctrine as well.

For example, "all waters within the state belong to the public"⁶⁰ The Legislature has also declared that "[w]ildlife, fish, and shellfish are the property of the state" and state

⁵⁴ See *Caminiti v. Boyle*, 107 Wn.2d 662, 670, 732 P.2d 989 (1987); *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 453 (1892) (prohibiting government management of trust resource in a way that results in "substantial impairment of the public interest in" the resource).

⁵⁵ *Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wn.App. 566, 577, 103 P.3d 203 (2004) (Quinn-Brintall, C.J., concurring) ("But the sovereign's duty to manage its natural resources recognized in the public trust doctrine is not time limited, and the primary beneficiaries of the sovereign's exercise of its public trust are those who have not yet been born or who are too young to vote. Thus, the sovereign authority to regulate natural resources is circumscribed by its duty to manage natural resources well for the benefit of *future* generations. And when the sovereign exercises this authority, by executive order, legislative enactment or public initiative, the tenets of the public trust doctrine must be satisfied.").

⁵⁶ Wash. Const. art. XVII, § 1.

⁵⁷ Use of the term "partially encapsulated" infers that the public trust doctrine exists in other parts of Washington law as well.

⁵⁸ *Rettkowski v. Ecology*, 122 Wn.2d 219, 232, 858 P.2d 232 (1993).

⁵⁹ *Caminiti v. Boyle*, 107 Wn.2d 662, 669, 732 P.2d 989 (1987) (emphasis added).

⁶⁰ RCW 90.03.010.

1 agencies “shall preserve, protect, perpetuate, and manage the wildlife and food fish, game fish,
2 and shellfish in state waters and offshore waters . . . in a manner that does not impair the
3 resource.”⁶¹ Finally, under the Washington Clean Air Act, “[a]ir is an essential resource that
4 must be protected from harmful levels of pollution. Improving air quality is a matter of
5 statewide concern and is in the public interest.”⁶² The Public Trust duty includes not only the
6 prevention of substantial impairment to the resource, but the duty to affirmatively protect the
7 resource as well.⁶³

9 The Washington Supreme Court has made it clear that “the duty imposed by the public
10 trust doctrine devolves upon the State, not any particular agency thereof.”⁶⁴ While the duty lies
11 with the State, because it is constitutionally-grounded, state agencies must comply with the
12 Public Trust Doctrine when exercising their delegated statutory authority.⁶⁵ The statutory
13 provisions cited above demonstrate that the Legislature has delegated significant authority to
14 Ecology to manage and protect the state’s air and water resources as a means to fulfill the
15 state’s public trust responsibilities.⁶⁶ The Supreme Court has yet to decide whether the Public
16 Trust Doctrine can serve as a sole legal basis for Ecology to act. *Id.* at 233. But in a case such
17 as this, where inherent fundamental rights are being abrogated, Ecology has a clear legal duty
18 to act. Because Ecology admitted that continued inaction will substantially impair nearly all
19
20

21 ⁶¹ RCW 77.04.012.

22 ⁶² RCW 70.94.11.

23 ⁶³ See, e.g., *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 94-95, 11 P.3d 726 (2000) (quoting RCW
24 90.54.020(3)(a)) (“Ecology is required to protect surface waters in order to preserve the natural environment, in
25 particular ‘base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other
26 environmental values, and navigational values.’”);

⁶⁴ *Rettkowski*, 122 Wn.2d at 232.

⁶⁵ RCW 34.05.570(4).

⁶⁶ See, e.g., *Caminiti*, 107 Wn.2d at 672 (recognizing that the Legislature retained control over public trust
resource, and thus complied with the Public Trust Doctrine because “[t]he statute also specifically authorizes an
agency of the state, the Department of Natural Resources, to regulate the docks through its powers of revocation
to protect waterward access and ingress rights of other landowners and the public health and safety.”).

1 public trust resources in the state, Ecology’s failure to act on Youth Petitioners’ Petition for
2 Rulemaking is a violation of the Public Trust Doctrine...

3 **B. Ecology Acted Arbitrarily And Capriciously By Failing To Address the Climate**
4 **Science Presented In The Petition And Concluding Its “Alternative Approach”**
5 **Addresses Concerns Raised by Youth Petitioners.**

6 In denying a petition for rulemaking under the APA, Ecology must comply with certain
7 mandatory requirements:

8 Within sixty days after the submission of a petition [for rulemaking], the agency
9 shall either (a) deny the petition in writing, stating (i) its reasons for the denial,
10 specifically addressing the concerns raised by the petitioner, and where
11 appropriate (ii) the alternative means by which it will address the concerns raised
12 by the petitioner, or (b) initiate rule-making proceedings.⁶⁷

13 Ecology’s conclusion that it is taking an “alternative approach” to Youth Petitioners’
14 proposed rule is arbitrary and capricious for two reasons. First, there is no “reasoned process”
15 that the “alternative approach” will achieve the scientifically-required CO₂ emission limits in
16 the proposed rule, let alone achieve compliance with the admittedly inadequate existing
17 statutory emission limits set forth in RCW 70.235.020.⁶⁸ Second, Ecology’s factual
18 determination that the “alternative approach” “will address the concerns raised by the
19 petitioner[s]” is not supported, and indeed is contradicted, by evidence in the record.⁶⁹

20 In issuing its decision denying the Petition, Ecology chose to identify “the alternative
21 means by which *it will address the concerns* raised by the petitioner”⁷⁰ In so doing,
22 Ecology must provide a reasoned basis for how Ecology’s alternative approach “will address”
23 the concerns raised in the Petition for Rulemaking. Otherwise, it would “frustrate judicial

24
25 ⁶⁷ RCW 34.05.330(1)...

⁶⁸ *NW Sportfishing Indus. Ass’n v. Dep’t of Ecology*, 172 Wn.App. 72, 91, 288 P.3d 677 (2012).

⁶⁹ See AR 11 at 4-5; RCW 34.05.330(1)(a)(ii)...

26 ⁷⁰ RCW 34.05.330(1)(a)(ii) (emphasis added).

review of the agency decision” because a court would have no means to gauge how and whether the “alternative approach” is a reasoned basis for rejecting a petition for rulemaking.⁷¹ Ecology’s decision is arbitrary and capricious because the agency fails to explain how its “alternative approach” will put the state on a path towards climate stability and protect the fundamental and inalienable rights of Youth Petitioners.⁷² Ecology simply includes a laundry list of existing statutes and workgroups that it claims, without analysis, will achieve the objectives of the proposed rule.⁷³ Ecology gives no indication of how these statutes will achieve GHG emission reductions comparable to what Youth Petitioners have asked for: a rule that sets a CO₂ emission reductions trajectory calibrated to return CO₂ concentrations to 350 ppm by the end of the century, the maximum atmospheric CO₂ level necessary for climate stability and ocean protection.⁷⁴

The undisputed evidence in the record shows that *none* of the alternative approaches identified by Ecology, even taken together, constitutes measures that will put Washington on a path towards achieving the GHG emission reductions set forth in RCW 70.235, let alone 350 ppm by the end of the century. Ecology itself admits that its “alternative approach” is not a viable means to address Youth Petitioners’ concerns:

Ecology projects that the policies the state has already implemented to reduce GHG emissions will result in negatively constant emissions between now and

⁷¹ *Squaxin Island Tribe v. State Dep’t of Ecology*, 177 Wn.App. 734, 741, 312 P.3d 766 (2013).

⁷² *Public Citizen v. Steed*, 733 F.2d 93, 104 (D.C. Cir. 1984)⁷² (finding that “NHTSA’s action was also arbitrary and capricious because the agency failed to pursue available alternatives that might have corrected the deficiencies in the program which the agency relied upon to justify the suspension. At the very least, NHTSA was required to explain why those alternatives would *not* correct the variability problems it had identified.”); *see also* RCW 70.235.020(iii) (requiring state to “do its part to reach global climate stabilization levels”).

⁷³ AR 11 at 4-5; RCW 34.05.330(1)(a)(ii).

⁷⁴ AR 6 at 59. Washington would need to reduce emissions by 4 percent per year, and achieve at least an 80% reduction in CO₂ emissions from 1990 levels by 2050 in order to be on the 350 ppm trajectory. AR 6 at 59-63; *see* Kharecha Decl., ¶¶ 11, 13.

2020. Unfortunately, this means that the state is not on track to meet its statutory reduction limit for 2020 and beyond.⁷⁵

Moreover, many of the components of the “alternative approach” are workgroups or declarations of policy or science that contain no statutory or regulatory requirements that will reduce GHG emissions in any way.⁷⁶ As recently as October 14, 2013, one of the “alternative approaches” recognized “despite significant progress, Washington needs to do more to meet our statutory requirements in RCW 70.235.”⁷⁷ However, in its decision at issue in this case, Ecology arbitrarily contends, “without regard to the attending facts or circumstances” and in contradiction to the agency record, that its current policies constitute an “alternative approach” to the proposed rule that seeks a CO₂ emission trajectory of 4 percent per year and to achieve at least an 80% reduction in CO₂ emissions from 1990 levels by 2050.⁷⁸

C. Ecology Acted Arbitrarily And Capriciously By Failing To Address The Climate Science Presented In The Petition And Ignoring Its Admission That Urgent Action Is Required.

This is not a case like *NW Sportfishing Indus. Ass’n*, where there were “contradictory field studies” and Ecology engaged in “a reasoned process after considering hundreds of studies in its own literature review, along with the results of two other literature reviews and input from

⁷⁵ AR 15 at 1.

⁷⁶ See, e.g., AR 18 (press release announcing creation of Pacific Coast Action Plan on Climate and Energy); AR 19 (Washington State Blue Ribbon Panel on Ocean Acidification Report); AR 20 (Executive Order 12-07).

⁷⁷ AR 11 at 5 (citing AR 21 at 1 (“The results of this project indicate that the State will not meet its statutory reductions for 2020, 2035 and 2050 with current state and federal policies.”)); AR 13 at 2 (“The significance of these regional consequences of climate change underscore the fact that historical resource management strategies will not be sufficient to meet the challenges of future changes in climate. Rather, these changes demand new strategies.”).

⁷⁸ *Hillis v. State Dep’t of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997). Ecology’s Update provides additional evidence of the capriciousness of Ecology’s decision that its “alternative approach” would protect Petitioners’ rights and interests. Rodgers Harris Decl., ¶ 3, Exh.1 at 11 (emphasis added) (“More than 20 years of research on Pacific Northwest climate change consistently finds that these impacts will grow substantially in the coming decades if we continue on our current path.”).

1 the parties.”⁷⁹ Here, the science is not generally in dispute. However, Ecology does not even
2 cite, let alone analyze, the primary scientific support for Youth Petitioners’ proposed rule.⁸⁰
3 Moreover, Ecology actively disregards the fact that the science calls for urgent action to draw
4 down GHG emissions...

5
6 Current climate science demonstrates that in order to avoid catastrophic and permanent
7 change, it is imperative that global CO₂ emission reduction targets are calibrated to restore
8 atmospheric CO₂ concentration to 350 ppm by the end of the century.⁸¹ In order to meet this
9 target, CO₂ emissions must be reduced by an adequate margin each year, depending upon the
10 year in which emissions peaked.⁸² For example, “if emissions reduction had begun in 2005,
11 reduction at 3.5% per year would have achieved 350 ppm at 2100.”⁸³ A peak in 2012 or 2020
12 would require annual reductions of 6% and 15%, respectively, making it that much more difficult
13 to put the state on a path towards climate stability.⁸⁴ This is one of the reasons why urgent action
14 to mandate scientifically-supported GHG emission reductions is required. In its decision,
15 Ecology never considered the scientific prescription for climate stability recommended by Dr.
16 Hansen and other top climate and ocean scientists from around the world and presented in the
17 Petition for Rulemaking.⁸⁵ Ecology’s failure to consider, let alone reference, the science
18 supporting Youth Petitioners’ proposed rule confirms that Ecology’s decision was arbitrary and
19
20
21
22

23 ⁷⁹ 172 Wn.App. at 99....

24 ⁸⁰ AR 6 at 44-51; Rodgers Harris Decl. ¶ 4, Ex. 2....

⁸¹ AR 6 at 44 (citing Rodgers Harris Decl. Ex. 2; Kharecha Decl. at ¶¶ 9, 10, 15, 18.

25 ⁸² AR 6 at 61(citing Rodgers Harris Decl. Ex. 2).

⁸³ *Id.*...

26 ⁸⁴ *Id.*...

⁸⁵ AR 11....

1 capricious.⁸⁶ This case presents the same situation that the Washington Supreme Court addressed
2 in *Rios v. Dep't of Labor & Indus.*, 145 Wn.2d 483, 508, 39 P.3d 961 (2002):

3 Because the Department had already invested its resources in studying
4 cholinesterase-inhibiting pesticides and because the report of its own team of
5 technical experts had, in light of the most current research, deemed a
6 monitoring program both necessary and doable, the Department's 1997
7 denial [request for rulemaking] was 'unreasoning and taken without regard to
8 the attending facts or circumstances.'⁸⁷

9 Therefore, in failing to grant the Petition for Rulemaking in the face of all of the uncontested
10 science, Ecology acted arbitrarily and capriciously in violation of the APA...

11 This case presents a very different situation than the case in *Squaxin Island Tribe*, where
12 "[t]he rulemaking petition record shows that Ecology weighed the pros and cons for each option"
13 presented in the petition process.⁸⁸ In that case:

14 Before issuing its decision, Ecology held a meeting with representatives
15 from the Tribe and met with Mason County commissioners. Ecology also
16 held a stakeholder and public meeting to discuss the Tribe's petition and
17 concerns and the decision Ecology faced. Ecology devised six options,
18 including closing or withdrawing the basin, limiting new uses, and seeking
19 funding for a study. Ecology's regional director specifically noted that the
20 agency should closely consider how the basin closure request relates to
21 other water resource issues in the state, particularly in Kittitas County.⁸⁹

22 Here, on the other hand, there is nothing similar in the agency record. Indeed, the only internal
23 agency communications about the Petition for Rulemaking are one email between agency staff
24 regarding the filing of the petition and the deadline for response (AR 3), a Director's Briefing
25 Form summarizing the denial and acknowledging that the petition "provides scientific support
26

⁸⁶ See *NW Sportfishing Indus. Ass'n*, 172 Wn.App. at 100 n.51 (upholding Ecology's denial of a petition for rulemaking in part because "Ecology considered each of the studies in its literature review for the AMT report [which served as a basis for Ecology's decision]. In denying Northwest Sportfishing's petition for rulemaking, Ecology restated that it had reviewed the studies Northwest Sportfishing identified in its petition.").

⁸⁷ *Id.* (quoting *Hillis*, 131 Wn.2d at 383).

⁸⁸ 177 Wn.App. at 743...

⁸⁹ *Id.* at 742-43...

1 for the[] assertion that a more stringent carbon dioxide standard is necessary” (AR 9), and an
2 alert to the Governor about the proposed denial (AR 10). There was no outreach to Youth
3 Petitioners or other potentially affected parties about the proposed rule. There were no
4 stakeholder or public meetings to discuss the Youth Petitioners’ petition. There were no internal
5 agency discussions regarding the viability of the scientific information set forth in the petition.
6 Simply put, Ecology failed to address, let alone consider, the countless scientific sources relied
7 upon in the Youth Petitioners’ petition. This failure renders Ecology’s decision arbitrary and
8 capricious.⁹⁰

10 Ecology’s decision is also arbitrary and capricious in light of the agency’s disregard of its
11 admission that urgent action is required to reduce GHG emissions:

12 If we delay action by even a few years, the rate of reduction needed to
13 achieve these goals would have to be beyond anything achieved
14 historically and could be very costly.

15 * * *

16 We are imposing risks on future generations (causing intergenerational
17 inequities) and liability for the harm that will be caused by climate
change that we are unable or unwilling to avoid.⁹¹

18 In spite of this recognition, Ecology alarmingly concludes that it is under no duty to act now to
19 protect Youth Petitioners’ fundamental and inalienable rights to a healthful environment. Not
20 only that, Ecology has affirmatively advised the state legislature *not* to act to update the existing
21 GHG emission limits even though the current science clearly demonstrates that RCW 70.235.020

24 ⁹⁰ *Rios*, 145 Wn.2d at 508.

25 ⁹¹ Rodgers Harris Decl. ¶ 3, Ex. 1 at 17, 18; AR 15 at 1. (“The science is clear that we must move forward quickly
26 to reduce greenhouse gas (GHG) emissions in order to mitigate its effects. Without action, climate change will
negatively affect nearly every part of Washington’s economy through changes in temperature, sea level, and water
availability.”)...

1. “needs to be updated.”⁹² Ecology cites to no credible science in the record, nor can they, to
2. suggest that continued delay on putting the state on a path towards climate stability is a legal
3. option. In light of this, Ecology’s decision denying Youth Petitioners’ Petition for Rulemaking
4. is arbitrary and capricious.

5. **D. Ecology Violated Its Legal Duty To Grant Youth Petitioners’ Petition and Initiate**
6. **Rulemaking Using Current Climate Science.**

7. Ecology claims “nothing in RCW 70.235 requires Ecology to adopt different emissions
8. reductions, develop a plan to ensure those reductions, or implement the monitoring
9. requirements in the proposed rule.”⁹³ Ecology grossly misapprehends its statutory obligations
10. pursuant to RCW 70.235. In essence, Ecology’s reading renders this statute not worth the
11. paper it was written on. The State’s GHG reduction statute imposes the following mandatory
12. duty on Ecology:
13.

14. Within eighteen months of the next and each successive global or national
15. assessment of climate change science, the department shall consult with the
16. climate impacts group at the University of Washington regarding the science on
17. human-caused climate change and provide a report to the legislature summarizing
18. that science and make recommendations regarding whether the greenhouse gas
19. emissions reductions required under RCW 70.235.020 need to be updated.⁹⁴

20. In its Petition for Rulemaking, Youth Petitioners asked Ecology to make its
21. recommendations to the Legislature through the rulemaking process because “Ecology’s
22. legislative recommendations implicate youth petitioners’ and future generations’ rights to
23. essential public trust resources”⁹⁵ Ecology’s decision to adopt a “wait and see” approach
24. that directly contradicts the agency’s own scientific findings violates the law and denies the

25. ⁹² Rodgers Harris Decl. ¶ 3, Ex. 1 at 18.

26. ⁹³ AR 11 at 1.

⁹⁴ RCW 70.235.040.

⁹⁵ AR 6 at 53.

1. public their right to inform this process.⁹⁶

2. Even though Ecology has concluded that “Washington State’s existing statutory limits
3. should be adjusted to better reflect the current science” and that “[t]he limits need to be more
4. aggressive in order for Washington to do its part to address climate risks and to align our limits
5. with other jurisdictions that are taking responsibility to address these risks,” the agency abdicated
6. its duty (and the reason for the agency’s very existence) and violated the law by telling the
7. Legislature not to take action to revise the emission limits set forth in RCW 70.235.020 and
8. instead wait to see what will result from international negotiations in Paris.⁹⁷ Ecology’s
9. “recommendation” serves to exacerbate, prolong, and potentially ensure perpetually the
10. impairment of Youth Petitioners’ fundamental and inherent rights to a healthful and pleasant
11. environment.⁹⁸ Not only is Ecology failing to take legally required action (as described above),
12. but the agency is expressly recommending that the Washington Legislature “impos[e] risks on
13. future generations (causing intergenerational inequities) and liability for the harm that will be
14. caused by climate change that we are unable or unwilling to avoid.”⁹⁹ In light of the clear threats
15. to Youth Petitioners’ inalienable rights to a healthful and pleasant environment, Ecology’s
16. decision not to use its authority to initiate rulemaking to recommend updates to RCW 70.235 is
17. unconstitutional, in excess of their statutory authority, and arbitrary and capricious.

20. ⁹⁶ See *Budget Rent A Car Corp. v. State Dep’t of Licensing*, 100 Wn.App. 381, 387, 997 P.2d 420 (2000) (finding
21. that it was unlawful for agency to act “without the benefit of rulemaking formalities such as notice and comment
22. from interested parties.”); *Mahoney v. Shinpoch*, 107 Wn.2d 679, 691, 732 P.2d 510 (1987) (“Full consideration
of public comment prior to agency action is both a statutory and constitutional imperative.”).

23. ⁹⁷ Rodgers Harris Decl. ¶ 3, Ex. 1 at 18. Ecology’s action essentially asks the Legislature to violate the Public
Trust Doctrine which “prohibits the State from disposing of its interest in the waters of the state in such a way that
24. the public’s right of access is substantially impaired, unless the action promotes the overall interests of the
public.” *Rettkowski*, 122 Wn.2d at 232.

25. ⁹⁸ Rodgers Harris Decl. Ex. 1 at 15 (“Globally, 2013 was the fourth warmest year on record.. Globally averaged
temperature has increased by 1.5° or 0.85°C between 1880 and 2012.. The [IPCC] confirmed continuing the
current pattern of greenhouse gas emissions would likely lead to a rise in temperature which will pose
26. unprecedented risks to people’s lives and wellbeing.”).

⁹⁹ Rodgers Harris Decl. ¶ 3, Ex. 1 at 18.

1. RCW 70.235 does not in any way limit Ecology's authority to promulgate the rule;
2. indeed, the statute only sets a floor for GHG emission limits and does not preclude Ecology from
3. recommending more stringent limits pursuant to its statutory authority and constitutional
4. obligations. While RCW 70.235 does not explicitly direct Ecology to promulgate the proposed
5. rule (other sources of law do that, as discussed above), it does direct the agency to consult with
6. the UW Climate Impacts Group regarding the current climate science as to what GHG emission
7. limitations are appropriate. Therefore, when implementing its legal duty to promulgate the
8. proposed rule, RCW 70.235.040 makes it clear that Ecology is to gather, implement, and apply
9. the current climate science.¹⁰⁰ The current climate science, which Ecology failed to acknowledge
10. or analyze in its decision, requires CO₂ emission reduction targets that are calibrated to restore
11. atmospheric CO₂ levels to 350 ppm by the end of the century.¹⁰¹ Ecology's failure to initiate
12. rulemaking to evaluate the current science and present their recommendations to the Legislature
13. violates the law.¹⁰²

16. V. CONCLUSION & REQUEST FOR RELIEF

17. For the reasons set forth herein, the Youth Petitioners respectfully request that the
18. Court rule on these critical legal issues of the inalienable rights of Youth Petitioners, vacate
19. and set aside Ecology's decision denying the petition for rulemaking, and direct Ecology to
20. initiate rulemaking on scientifically-based GHG emission limits for the state of Washington.
21. Youth have no other remedy at law for the irreversible threats to their inalienable rights as

23. ¹⁰⁰ See *Postema*, 142 Wn.2d at 92 (recognizing that Ecology has a duty to use the "best available science" in the
24. water rights context and that "Ecology should not be able to rely on use of out-dated methodology which would
25. allow impairment of surface water rights. Using a method fraught with error potential where more scientifically
26. acceptable methods exist would be inconsistent with the statutes prohibiting the grant of applications where
impairment would occur.").

¹⁰¹ AR 6 at 44-51; see *Kharecha Decl.* at ¶¶ 9, 10, 15, 18...

¹⁰² *Budget Rent A Car Corp.*, 100 Wn.App. at 387.

1. young citizens. In addition, Youth Petitioners respectfully request that the Court grant such
2. other relief as this Court deems appropriate. RCW 34.05.574. Finally, Youth Petitioners
3. request that fees and costs be awarded pursuant to RCW 4.84.350 and other applicable law.

4. Respectfully submitted this 16th day of March, 2015.
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