The Honorable Hollis R. Hill
Hearing Date: May 4, 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'S AMENDED RESPONSE BRIEF

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TABLE OF CONTENTS

I. RELIEF REQUESTED 1

II. STATEMENT OF FACTS 1

III. STATEMENT OF ISSUES 2

IV. ARGUMENT 2

A. Burden of Proof and Standard of Review 2

B. Ecology's Denial of Rulemaking Should Be Upheld 3

1. Ecology was not required to adopt a rule to make recommendations to the Legislature. 4

2. Ecology is not required to adopt Petitioners' proposed emission standards. 6

a. The policy statement in Ecology's enabling statute does not require Ecology to adopt Petitioners' emission standards. 7

b. The public trust doctrine does not require Ecology to adopt Petitioners' emission standards. 10

(1) The public trust doctrine in Washington applies only to navigable surface waters and the lands under them. 11

(2) Regardless of the scope of the public trust doctrine in Washington, the public trust doctrine does not provide independent authority for Ecology action. 12

c. RCW 70.94.331 does not require Ecology to adopt Petitioners' rule. 14

3. The court's decision in *Rios* does not govern the outcome of this case. 16

4. Ecology's decision to deny Petitioners' Petition for Rulemaking was not unconstitutional. 17

5. Ecology's decision to deny Petitioners' Petition for Rulemaking was not arbitrary or capricious. 20

6. Ecology's statement of alternatives does not violate APA requirements for responding to a petition for rulemaking. 21

C. Ecology's December 2014 Report to the Legislature is Not Properly Before This Court 22

V. CONCLUSION 23

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
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(360) 586-6770

TABLE OF AUTHORITIES

Cases

Aviation W. Corp. v. Dep't of Labor & Indus.,
138 Wn.2d 413, 980 P.2d 701 (1999) 3

Budget Rent A Car Corp. v. Dep't of Licensing,
100 Wn. App. 381, 997 P.2d 420 (2000) 5

Budget Rent A Car v. Dep't of Licensing,
144 Wn.2d 889, 31 P.3d 1174 (2001) 6

Caminiti v. Boyle,
107 Wn.2d 662, 732 P.2d 989 (1987) 10, 11

Cathcart-Maltby-Clearview Cmty. Coun. v. Snohomish Cnty.,
96 Wn.2d 201, 634 P.2d 853 (1981) 9-10

City of Bellevue v. King County Boundary Review Board,
90 Wn.2d 856, 586 P.2d 740 (1978) 19

City of L.A. v. L.A. City Water Co.,
177 U.S. 558, 20 S. Ct. 736, 44 L. Ed. 2d 886 (1990) 18

Human Rights Comm'n ex rel. Spangenberg v. Cheney Sch. Dist. 30,
97 Wn.2d 118, 641 P.2d 163 (1982) 18

Huntworth v. Tanner,
87 Wash. 670, 152 P. 523 (1915) 7

Ill. Cent. R.R. v. Illinois,
146 U.S. 387, 13 S. Ct. 110 (1892) 10

In re Bale,
63 Wn.2d 83, 385 P.2d 545 (1963) 7

In re Impoundment of Chevrolet Truck, WA License #A00125A v. Wash. State Patrol,
148 Wn.2d 145, 60 P.3d 53 (2002) 18

Int'l Union of Operating Eng'rs Local 286 v. Sand Point Country Club,
83 Wn.2d 498, 519 P.2d 985 (1974) 7

Kucera v. Department of Transportation,
140 Wn.2d 200, 995 P.2d 63 (2000) 8

Leschi Improvement Council v. State Highway Commission,
84 Wn.2d 271, 525 P.2d 774 (1974) 9

Mahoney v. Shinpoch,
107 Wn.2d 679, 732 P.2d 510 (1987) 6

ATTORNEY GENERAL OF WASHINGTON
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PO Box 40117
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Mun. of Metro. Seattle v. Pub. Emp't Relations Comm'n,
118 Wn.2d 621, 826 P.2d 158 (1992) 17-18

Nw. Sportfishing Indus. v. Ecology,
172 Wn. App. 72, 288 P.3d 677 (Div. II 2012) 2, 20, 21

Port of Seattle v. Pollution Control Hearings Bd.,
151 Wn.2d 568, 90 P.3d 659 (2004) 3, 6, 20

Portage Bay-Roanoke Park Cmty. Coun. v. Shorelines Hearings Bd.,
92 Wn.2d 1 (1979) 11

Postema v. Pollution Control Hearings Board,
142 Wn.2d 68 (2000) 13

PPL Mont., LLC v. Montana,
132 S. Ct. 1215 (2012) 10

R.D. Merrill Co. v. Pollution Control Hearings Board,
137 Wn.2d 118 (1999) 12, 13

Rettkowski v. Ecology,
122 Wn.2d 219 (1993) 11, 12, 13, 19

Rios v. Dep't of Labor & Indus.,
145 Wn.2d 483, 39 P.3d 961 (2002) 2, 3, 16

Save a Valuable Environment (SAVE) v. City of Bothell,
89 Wn.2d 862, 576 P. 2d 401(1978) 9

Squaxin Island Tribe v. Ecology,
177 Wn. App. 734, 312 P.3d 766 (Div. II 2013) 21

State ex rel. Berry v. Superior Court In & For Thurston Cnty.,
92 Wash. 16, 159 P. 92 (1916) 7, 15

State v. Buchanan,
29 Wash. 602, 70 P. 52 (1902) 18

State v. Rivers,
129 Wn.2d 697, 921 P.2d 495 (1996) 18, 19

United States v. 32.42 Acres of Land, More or Less, located in San Diego Cnty., Cal.,
683 F.3d 1030 (9th Cir. 2012) 10

Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n,
149 Wn.2d 17, 65 P.3d 319 (2003) 2

WEC v. Bellon,
732 F.3d 1131 (2013) 22

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
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(360) 586-6770

Whatcom Cnty. v. Langlie,
40 Wn.2d 855, 246 P.2d 836 (1952) 7

Constitutional Provisions

Const. art I, § 30 17

Const. art. XV, § 1 11

Const. art. XVII, § 1 11

Statutes

RCW 34.05.010(16) 4

RCW 34.05.310 5

RCW 34.05.310–.395 4

RCW 34.05.320 5

RCW 34.05.322 8

RCW 34.05.325 5

RCW 34.05.328 5

RCW 34.05.330(1) 21, 22

RCW 34.05.558 22

RCW 34.05.570(1)(a) 2

RCW 34.05.570(4) 2

RCW 34.05.570(4)(c) 2

RCW 43.21A 7

RCW 43.21A.010 7

RCW 43.21A.080 8

RCW 43.21C.020(3) 8, 9

RCW 49.17.050(4) 16

RCW 70.94 15

RCW 70.94.011 15

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
(360) 586-6770

RCW 70.94.030(6) 15
RCW 70.94.030(12) 14
RCW 70.94.331 ..... 7, 14, 15, 17
RCW 70.94.331(1)(b) 17
RCW 70.94.331(2) 14, 15
RCW 70.94.331(2)(b) 14
RCW 70.94.331(2)(c) 14, 15
RCW 70.94.331(3) 17
RCW 70.235 21
RCW 70.235.010(6) 1
RCW 70.235.020 ..... 1, 3, 5, 15, 17, 20, 21
RCW 70.235.040 ..... 1, 3, 4, 5, 6, 20, 22
RCW 90.58 11

Regulations

WAC 173-400-040(1) 15
WAC 173-400-110(5)(b) 14, 17
WAC 173-400-720(1) 14
WAC 173-400-720(4)(a)(vi) 14
WAC 173-485 ..... 15, 17
40 C.F.R. § 52.21(b) 14
40 C.F.R. § 52.21(j)(2) 14
40 C.F.R. § 131.11 20

Other Authorities

Engrossed Second Substitute H.B. 2815, 60th Leg., Reg. Sess. (Wash. 2008) 1
Lebbeus J. Knapp, *The Origin of the Constitution of the State of Washington*, 4 Wash. Historical Q. 227 (Oct. 1913) 19

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I. RELIEF REQUESTED

The Washington State Department of Ecology (Ecology) asks this court to affirm Ecology's August 14, 2014, denial of the Petition for Rulemaking (Petition) filed by Zoe and Stella Foster, Aji and Adonis Piper, Wren Wagenbach, Lara Fain, Gabriel Mandell, and Jenny Xu (Petitioners) on June 18, 2014. The Petition asked Ecology to adopt a rule mandating reductions in emissions of carbon dioxide, a greenhouse gas, and recommending to the state Legislature and state governor specific limits on emissions of carbon dioxide in Washington State. There is no requirement that Ecology adopt Petitioners' proposed emission standards, make the recommendations Petitioners seek, or that Ecology's recommendations to the Legislature be adopted by rule. In fact, the state Legislature has adopted statutory requirements for reductions in greenhouse gas emissions, as well as a process by which Ecology is required to recommend changes in those statutory emission reductions to the Legislature, and that process does not involve formal rulemaking. RCW 70.235.020, .040. Under these circumstances, it was neither unconstitutional, outside Ecology's authority, nor arbitrary or capricious for Ecology to defer to the current statutory scheme and deny the Petition for Rulemaking.

II. STATEMENT OF FACTS

Carbon dioxide is a greenhouse gas. RCW 70.235.010(6). In 2008, the Washington State Legislature adopted Engrossed Second Substitute House Bill (ESSHB) 2815, setting requirements for the reduction of greenhouse gas emissions in Washington State. RCW 70.235.020. ESSHB 2815 also requires Ecology to provide periodic reports to the Legislature summarizing the science on human-caused climate change and making recommendations regarding whether the greenhouse gas emissions reductions adopted by the Legislature should be updated. RCW 70.235.040. On June 17, 2014, Petitioners submitted a

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petition for rulemaking to Ecology.[1] Agency Record (AR) 2. Their petition asked Ecology to adopt a rule mandating reductions in emissions of carbon dioxide and recommending to the Legislature certain limits on carbon dioxide emissions. AR 2 at 2. On August 14, 2014, Ecology denied the Foster petition. AR 11. Petitioners then appealed Ecology's denial to this court.

III. STATEMENT OF ISSUES

There is one question before this court:

1. Did Ecology lawfully deny Petitioners' Petition for Rulemaking?

IV. ARGUMENT

A. Burden of Proof and Standard of Review

The party challenging the agency action bears the burden of demonstrating the invalidity of the action. RCW 34.05.570(1)(a). Therefore, Petitioners have the burden of proving that Ecology's denial of the rulemaking petition was invalid.

The denial of a petition for rulemaking is subject to judicial review as other agency action under RCW 34.05.570(4). *Rios v. Dep't of Labor & Indus.*, 145 Wn.2d 483, 491–92, 39 P.3d 961 (2002). An agency is accorded "wide discretion" when deciding to forgo rulemaking. *Nw. Sportfishing Indus. v. Ecology*, 172 Wn. App. 72, 91, 288 P.3d 677 (Div. II 2012) *citing Rios*, 145 Wn.2d at 507. A court will grant relief only if it determines that the agency's failure to adopt the rule was unconstitutional, outside the agency's authority, arbitrary or capricious, or taken by unauthorized persons. RCW 34.05.570(4)(c).

Arbitrary or capricious agency action is willful and unreasoning action 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

[1] On June 18, 2014, Petitioners submitted a Corrected Petition for Rulemaking, correcting typographical errors. AR 5, 6.

ATTORNEY GENERAL OF WASHINGTON
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evidence renders an agency decision arbitrary and capricious." *Rios*, 145 Wn.2d at 504. The court should give due deference to the specialized knowledge and expertise of an administrative agency. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 595, 90 P.3d 659 (2004). The court should also avoid exercising discretion that the Legislature entrusted to the agency. *Port of Seattle*, 151 Wn.2d at 568. The court reviews 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 (internal quotation marks omitted) (quoting *Aviation W. Corp. v. Dep't of Labor & Indus.*, 138 Wn.2d 413, 432, 980 P.2d 701 (1999)).

B. Ecology's Denial of Rulemaking Should Be Upheld

Petitioners asked Ecology to adopt a rule mandating certain emission standards for emissions of carbon dioxide and recommending to the Legislature and the governor certain standards for emissions of the greenhouse gas carbon dioxide in Washington State. Ecology's denial of this petition should be upheld. First, no law requires Ecology to adopt a rule to make recommendations to the Legislature. Second, no law requires Ecology to adopt Petitioners' proposed emission standards. On the contrary, the Washington State Legislature has already adopted reduction requirements for greenhouse gas emissions in Washington State and has, furthermore, also put in place a mechanism for Ecology to recommend changes to those standards. RCW 70.235.020, .040. In addition, the Department of Ecology has already adopted greenhouse gas emission standards under its Clean Air Act Authority. Under these circumstances, Ecology's decision not to adopt a rule changing the Legislature's requirements and the process put in place by the Legislature to change those requirements was not outside the agency's authority, unconstitutional, or arbitrary or capricious.

ATTORNEY GENERAL OF WASHINGTON
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1. Ecology was not required to adopt a rule to make recommendations to the Legislature.

As a threshold matter, Petitioners assert that Ecology must adopt a rule to make the recommendations to the Legislature required by RCW 70.235.040. Petitioners' Opening Brief (Opening Br.) at 6. Petitioners are mistaken. The Administrative Procedure Act (APA) does not require Ecology's recommendations to be adopted by rule because the recommendations do not meet the definition of "rule." Nor does any other statute require Ecology to adopt the recommendations by rule. Finally, Ecology's decision not to use rulemaking in this case was not arbitrary or capricious.

The state APA outlines specific rulemaking procedures that must be followed when adopting rules. RCW 34.05.310–.395. The APA defines a rule as:

> any agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction; (b) which establishes, alters, or revokes any procedure, practice, or requirement relating to agency hearings; (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law; (d) which establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession; or (e) which establishes, alters, or revokes any mandatory standards for any product or material which must be met before distribution or sale.

RCW 34.05.010(16).

The recommendations Ecology is required to provide to the Legislature under RCW 70.235.040 do not meet this definition of a rule. First, the recommendations are not an agency order, directive, or regulation of *general applicability*. They are directed solely at the Legislature. Second, the required recommendations make *recommendations* to the Legislature—they do not create any duties the violation of which could lead to a penalty or administrative sanction. For the same reason, they do not establish, alter, or revoke any qualification or requirement relating to the enjoyment of benefits or privileges conferred by

law.[2] Because the recommendations do not meet its definition of a rule, the APA does not require Ecology to adopt them using rulemaking procedures.

Nor does any other statute require Ecology to adopt a rule for its recommendations to the Legislature. The requirement in statute is for Ecology to "consult with the climate impacts group at the University of Washington," provide a report to the Legislature, and "make recommendations regarding whether the greenhouse gas emissions reductions required under RCW 70.235.020 need to be updated." RCW 70.235.040. The statute makes no mention of making those recommendations through rulemaking. Indeed, far from requiring Ecology to undertake the broad public processes required for rulemaking (RCW 34.05.310, .320, .325, .328), the Legislature requires Ecology to consult only with the climate impacts group at the University of Washington (RCW 70.235.040).

Petitioners claim that Ecology "denie[d] the public their right to inform this process" by making recommendations to the Legislature without going through rulemaking. Opening Br. at 27–28. They cite two cases to support their claim. Opening Br. at 28. Neither case applies here.

In the first case, *Budget Rent A Car Corp. v. Dep't of Licensing*, 100 Wn. App. 381, 997 P.2d 420 (2000), Budget sought to invalidate an order issued by the Department of Licensing (DOL) based on DOL's interpretation of an interstate registration agreement and adding to the fees Budget had paid for the previous year. *Budget Rent A Car*, 100 Wn. App. at 382–83. The court noted that DOL's generally applicable interpretation met the APA definition of a rule, but could be adopted either by rule or by adjudication, unless adoption by adjudication was an abuse of agency discretion. *Id.* at 386. The court determined that DOL abused its discretion, and should have adopted its interpretation by rule. *Id.* at 390. That

[2] Nor does the recommendation establish, alter, or revoke any procedure, practice, or requirement relating to agency hearings; or establish, alter, or revoke any qualifications or standards for the issuance, suspension, or revocation of licenses, or for any product or material.

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ruling does not apply here. Here, Ecology's recommendations to the Legislature are not generally applicable—they are addressed to the Legislature. Therefore neither rulemaking nor adjudication is required. Moreover, on appeal, the Supreme Court determined that Budget's interpretation of the interstate registration agreement did not require rulemaking. *Budget Rent A Car v. Dep't of Licensing*, 144 Wn.2d 889, 892, 31 P.3d 1174 (2001).

In the second case, *Mahoney v. Shinpoch*, 107 Wn.2d 679, 691, 732 P.2d 510 (1987), the Department of Social and Health Services (DSHS) initiated rulemaking to change State Supplemental Payment (SSP) benefits paid to recipients of federal Supplemental Security Income. *Mahoney*, 107 Wn.2d at 682. The agency, believing the specific changes it was implementing were mandated by state law, expedited the rulemaking process. *Id.* at 682–85. The court found that the specific changes were not mandated by state law, so full public comment was required for the rulemaking. *Id.* at 687. There was no question in *Mahoney* that the proposed changes to SSP benefits needed to be made by rule. Rather, the case concerned the APA procedures that must be followed when rulemaking is required. Here, rulemaking is not required. Therefore, *Mahoney* does not apply.

Finally, Ecology's decision not to make the required recommendations through rulemaking was not arbitrary or capricious. Arbitrary or capricious action is action that is willful, unreasoned, and taken without regard to the attending facts or circumstances. *Port of Seattle*, 151 Wn.2d at 589. The attending facts and circumstances in this case include the fact that the Legislature has determined the process Ecology is to use for making the required recommendations, and that process does not speak of rulemaking. RCW 70.235.040. Ecology's deferral to this legislatively-determined process was not "willful, unreasoned, or taken without regard to the attending facts or circumstances."

2. Ecology is not required to adopt Petitioners' proposed emission standards.

Petitioners claim (1) the policy statement in Ecology's enabling statute stating that people have a fundamental right to a healthful environment, (2) the public trust doctrine, and

ATTORNEY GENERAL OF WASHINGTON
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(3) RCW 70.94.331 require Ecology to adopt their proposed emission standards. As discussed below, none of these claims has any merit. Therefore, Ecology's denial of the Petition for Rulemaking was not outside Ecology's authority.

a. The policy statement in Ecology's enabling statute does not require Ecology to adopt Petitioners' emission standards.

Petitioners argue that the policy statement in Ecology's enabling statute that all persons have a fundamental right to live in a healthful and pleasant environment requires Ecology to adopt the emission limits in their proposed rule. Opening Br. at 13. Petitioners misunderstand the nature of RCW 43.21A.010. RCW 43.21A.010 is a declaration of policy and purpose that states the general intent of the Legislature in enacting RCW 43.21A. RCW 43.21A.010 (titled, "Legislative Declaration of State Policy on Environment and Utilization of Natural Resources"). Policy statements in legislation are not intended to and do not in fact create legal obligations. *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 Cnty. v. Langlie*, 40 Wn.2d 855, 246 P.2d 836 (1952); *State ex rel. Berry v. Superior Court In & For Thurston Cnty.*, 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). Legislative policy statements explain the motive and inducement to the making of a law, but are not essential. *State ex rel. Berry*, 92 Wash. at 32. Such statements are "without force in a legislative sense, being but a guide to the intentions of the framer." *Id.* A policy statement does not enlarge the enacting part, as it is no part of the law. *Id.* As a declaration of policy, RCW 43.21A.010 does not place an affirmative duty upon Ecology independent of and in addition to the duties placed on Ecology through the more specific provisions of RCW 43.21A.[3]

[3] When enacting RCW 43.21A, the Legislature expressly said as much. The note section accompanying RCW 43.21A.010 states: "The provisions of this act shall not impair or supersede the powers or rights of any person, committee, association, public, municipal or private corporation, state or local governmental agency, federal agency, or political subdivision of the state of Washington under any other law except as specifically provided herein."

ATTORNEY GENERAL OF WASHINGTON
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In addition, the Legislature has expressly forbidden agencies in general, and Ecology in particular, from relying on statements of intent or enabling statutes as authority for adopting a rule. *See* RCW 34.05.322; 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.").

Petitioners cite three cases to support their claim that Ecology must adopt their rule in order to support the fundamental right of people in Washington to live in a healthful and pleasant environment. Opening Br. at 13–14. All three cases cite to the intent section of the State Environmental Policy Act (SEPA), not Ecology's enabling statute. In none of these cases did the court rule that the fundamental right to a clean environment required agency action.

In *Kucera v. Department of Transportation*, 140 Wn.2d 200, 205–06, 995 P.2d 63 (2000), landowners claimed large wakes from a ferry constituted a trespass and nuisance, and caused damage to their properties in violation of SEPA and the Shoreline Management Act. The Superior Court entered a preliminary injunction limiting the speed of the ferry along a portion of its run pending compliance with SEPA, and the Department of Transportation appealed. *Kucera*, 140 Wn.2d at 206. The Supreme Court dissolved the preliminary injunction and held that before issuing the injunction, the trial court should have considered whether the property owners had an adequate remedy at law. *Id.* at 224. In a concurrence, Justice Johnson opined that the determination that there was not an adequate remedy at law should not be difficult because money damages have generally been found inadequate compensation for environmental damage. *Id.* at 227, 228. Justice Johnson then noted SEPA's statement that "each person has a fundamental and inalienable right to a healthful environment . . . ." *Id.* at 228 (citing RCW 43.21C.020(3)). Thus, in *Kucera*, the fundamental right to a healthful environment was invoked in a concurrence, discussing why money damages

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would likely not provide an adequate remedy at law. Justice Johnson's concurrence in no way uses SEPA's statement of fundamental rights to place a duty on an agency.

Leschi Improvement Council v. State Highway Commission, 84 Wn.2d 271, 525 P.2d 774 (1974), concerned a challenge to an environmental impact statement (EIS) issued under SEPA. *Leschi Imprv. Coun.*, 84 Wn.2d at 273. The court found that the petitioners had standing to bring the challenge under SEPA, and then upheld the environmental impact statement. *Id.* at 275, 287, respectively. In analyzing the standing issue, the court noted "The right of petitioners affected to a 'healthful environment' is expressly recognized as a 'fundamental and inalienable' right by the language of SEPA." *Id.* at 279–80. Thus, in *Leschi Improvement Council*, the court used SEPA's statement of the fundamental right to a clean environment to help justify its finding that the petitioners had standing to bring their case. The court did not impose any duty on anyone based on the fundamental right to a clean environment.

In *Save a Valuable Environment (SAVE) v. City of Bothell*, 89 Wn.2d 862, 576 P. 2d 401 (1978), an EIS was found deficient and a zoning approval invalidated because the EIS failed to address the consequences outside Bothell resulting from a proposed shopping center. *SAVE*, 89 Wn.2d at 868. The decision notes that "It is the policy of this state, expressed in the State Environmental Policy Act 'that each person has a fundamental and inalienable right to a healthful environment. . . .' RCW 43.21C.020(3)." *Id.* at 871. However, the decision was based not on the policy, but on the deficiency of the EIS.[4] *See also*, *Cathcart-Maltby-*

[4] Petitioners mischaracterize the court's finding. Petitioners state, "Relying in part on RCW 43.21C.020(3) [intent section of SEPA's enabling statute], the Washington Supreme Court [in *SAVE*] has recognized this fundamental right demands protection in holding that a municipality's statutory 'duty to serve regional welfare when considering the problem of adequate housing . . . exist[s] when the interest at stake is the quality of the environment.' " Opening Br. at 14. What the Supreme Court said was actually quite different. In determining that Bothell had a duty to look beyond the city boundaries in evaluating the environmental effects of its actions, the court examined cases outside the state of Washington. The court stated, "Other states also have imposed a duty to serve regional welfare when considering the problem of adequate housing. We find such a duty to exist when the interest at stake is the quality of the environment." *SAVE*, 89 Wn.2d at 871 (citations omitted).

ATTORNEY GENERAL OF WASHINGTON
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Clearview Cmty. Coun. v. Snohomish Cnty., 96 Wn.2d 201, 209, 634 P.2d 853 (1981) (in *SAVE*, "an EIS was considered deficient, and the zoning approval invalidated, because the EIS failed to address the extra-jurisdictional consequences of a proposed shopping center.").

None of these three cases required agency action based on the fundamental right to a clean environment. Therefore, none of these cases supports Petitioners' claim that the state's policy articulating a fundamental right to a clean environment requires Ecology to adopt their proposed emission standards.

b. The public trust doctrine does not require Ecology to adopt Petitioners' emission standards.

The public trust doctrine, as developed through English common law and brought into the common law of the various colonies and states, concerns the right of the public to navigation and the fishery. *Caminiti v. Boyle*, 107 Wn.2d 662, 667–70, 732 P.2d 989 (1987); *see also Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 453, 456–59, 13 S. Ct. 110 (1892). The public trust doctrine is a matter of state law rather than federal law. *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215, 1235 (2012). Nor do the contours of the public trust doctrine depend upon the United States Constitution. *PPL Mont.*, 132 S. Ct. 1215; *see also United States v. 32.42 Acres of Land, More or Less, located in San Diego Cnty., Cal.*, 683 F.3d 1030, 1037–38 (9th Cir. 2012).

Petitioners claim the public trust doctrine requires Ecology to adopt their proposed emission standards. Opening Br. at 18–20. Petitioners are mistaken. As discussed below, the public trust doctrine in Washington has historically applied to navigable surface waters and the lands under them. The state Supreme Court has refused to broaden its applicability even so far as to include groundwater in this state, much less the air or the atmosphere. Therefore, the public trust doctrine does not apply to carbon dioxide emissions into the air. Even assuming the public trust doctrine does apply to air emissions, it would not require Ecology to adopt Petitioners' emission standards. The state Supreme Court has determined that the public trust

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doctrine does not serve as an independent source of authority for Ecology to use in its decision-making apart from the provisions in statute.

(1) The public trust doctrine in Washington applies only to navigable surface waters and the lands under them.

Both the Washington State Supreme Court and the Washington State Constitution recognize the existence of the public trust doctrine in Washington. The state Supreme Court has stated, "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. It is this principle which is referred to as the 'public trust doctrine.' " *Caminiti*, 107 Wn.2d at 669.

Article XV section 1 and Article XVII section 1 of the Washington State Constitution assert the state's rights in navigable waters and ownership of the beds and shores of all navigable waters in the state. Article XV section 1 prohibits the state from giving up its rights in navigable waters, stating that "such area shall be forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce." Const. art. XV, § 1.

As illustrated above, recognition of the public trust doctrine in Washington extends only to navigable surface waters in the state and the lands beneath them. The state Supreme Court has stated, "The requirements of the 'public trust doctrine' are fully met by the legislatively drawn controls imposed by the Shoreline Management Act of 1971, RCW 90.58." *Caminiti*, 107 Wn.2d at 670 (citing *Portage Bay-Roanoke Park Cmty. Coun. v. Shorelines Hearings Bd.*, 92 Wn.2d 1, 4 (1979)). Nothing in case law or the constitution applies the public trust doctrine beyond navigable surface waters.

Twice the Washington State Supreme Court has been asked to extend the public trust doctrine beyond navigable waters. Both times, the court refused to do so. In *Rettkowski v. Ecology*, 122 Wn.2d 219, 232–33 (1993), a number of appellants including Ecology argued that the public trust doctrine justified Ecology's determination of who had senior rights in

ATTORNEY GENERAL OF WASHINGTON
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groundwater. *Rettkowski*, 122 Wn.2d at 231, 232; *see also id.* at 232 n.4. The court rejected this argument, stating "[W]e have never previously interpreted the [pubic trust] doctrine to extend to non-navigable waters or groundwater." *Id.* at 232.

In *R.D. Merrill Co. v. Pollution Control Hearings Board*, 137 Wn.2d 118, 133–34 (1999), the court was asked to apply the public trust doctrine to changes in water rights needed to support a proposed cross-country ski resort. The plaintiff in that case, Okanogan Wilderness League, argued that Ecology's approval of these changes violated the public trust doctrine. The court refused to apply the public trust doctrine, adhering to its decision in *Rettkowski* that the public trust doctrine did not apply to groundwater and refusing Okanogan Wilderness League's invitation to use the public trust doctrine as a canon of construction in interpreting the state water code provisions. *R.D. Merrill*, 137 Wn.2d at 133–34.

These two decisions affirm that the public trust doctrine in Washington applies only to surface waters and the lands underlying them, and does not extend even to other waters of the state, much less the air.

(2) Regardless of the scope of the public trust doctrine in Washington, the public trust doctrine does not provide independent authority for Ecology action.

Even if the public trust doctrine could somehow be found to apply to Washington's air, it still would not require Ecology to adopt Petitioners' emission standards. Contrary to Petitioners' assertion (Opening Br. at 20), the Supreme Court has determined that the public trust doctrine does not serve as an independent source of authority for the Department to use in decision-making apart from the provisions in statute. Three times, the Washington State Supreme Court has evaluated the argument that the public trust doctrine either required or justified Ecology action. All three times, the court found that it does not.

First, in *Rettkowski*, the Supreme Court stated,

> The appellants argue that, since the water in question is being squandered, the public trust doctrine allows Ecology to regulate to preserve this precious and limited resource. However, the issue in this case has never been Ecology's

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
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Olympia, WA 98504-0117
(360) 586-6770

> ability to regulate generally, which is admitted. Rather, at issue is Ecology's specific ability to establish and prioritize water rights unilaterally, without a general adjudication, to the detriment of other water users. Even assuming for the sake of argument that the public trust doctrine places on Ecology some affirmative duty to protect and preserve the waters of this state, the doctrine could provide no guidance as to *how* Ecology is to protect those waters. That guidance, which is crucial to the decision we reach today, is found only in the Water Code.

Rettkowski, 122 Wn.2d at 232–33.

In 1999, the court was urged to find certain Ecology actions approving the transferals of water rights violated the public trust doctrine. *R.D. Merrill*, 137 Wn.2d at 133–34. The court refused to do so, reiterating its ruling in *Rettkowski*: "the duty [under the public trust doctrine] devolves upon the State, not any particular agency." The issue before the court in *Rettkowski* "involved the Department's regulatory authority and the public trust doctrine could provide no guidance as to the Department's authority because 'that guidance . . . is found only in the water code.' " *R.D. Merrill*, 137 Wn.2d at 133–34. The court went on to state: "Without question, the state water codes contain numerous provisions intended to protect public interests. However, the public trust doctrine does not serve as an independent source of authority for the Department to use in its decision-making apart from the provisions in the water code." *Id.*

In 2000, the court addressed the question for the third time. In *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 99 (2000), the Pollution Control Hearings Board had found that the public trust doctrine applied to Ecology's decisions on the appropriation of water. The Supreme Court disagreed, stating, "Ecology's enabling statute does not permit it to assume the public trust duties of the state; the doctrine does not serve as an independent source of authority for Ecology to use in its decision-making apart from code provisions intended to protect the public interest." *Postema*, 142 Wn.2d at 99.

These decisions confirm that the public trust doctrine applies only to navigable surface waters in the state of Washington, and that the public trust doctrine does not serve as an

ATTORNEY GENERAL OF WASHINGTON
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Olympia, WA 98504-0117
(360) 586-6770

independent source of authority for Ecology to use in its decision-making. Therefore, the public trust doctrine does not require Ecology to adopt Petitioners' proposed standards for emissions of carbon dioxide into the air.

c. RCW 70.94.331 does not require Ecology to adopt Petitioners' rule.

Petitioners correctly point out that RCW 70.94.331 authorizes Ecology to adopt emission standards, air quality standards, and air quality objectives. Opening Br. at 17. Petitioners claim this provision requires Ecology to adopt the emission standards they propose. Opening Br. at 17. Petitioners are mistaken.

RCW 70.94.331 requires Ecology to "[a]dopt emission standards which shall constitute minimum emission standards throughout the state." RCW 70.94.331(2)(b). The statute requires Ecology to "[a]dopt by rule air quality standards and emission standards for the control or prohibition of emissions to the outdoor atmosphere of radionuclides, dust, fumes, mist, smoke, other particulate matter, vapor, gas, odorous substances, or any combination thereof." RCW 70.94.331(2)(c). Assuming for the sake of argument that RCW 70.94.331(2) requires Ecology to adopt standards for all possible substances covered in the statutory list, Ecology already *has* adopted emission standards for carbon dioxide. Ecology requires all new major air pollution sources and all major modifications to air pollution sources to employ "best available control technology" to control emissions of greenhouse gases, including carbon dioxide. WAC 173-400-110(5)(b); WAC 173-400-720(1); WAC 173-400-720(4)(a)(vi).[5] "Best available control technology" is defined as "an *emission limitation*[6] based on the

[5] WAC 173-400-110(5)(b) provides that new and modified sources subject to the requirements of prevention of significant deterioration permits are subject to restrictions on greenhouse gas emissions. WAC 173-400-720(1) states that prevention of significant deterioration permitting requirements apply to new major sources and major modifications. WAC 173-400-720(4)(a)(vi) lists the federal regulations governing prevention of significant deterioration permits that Ecology has adopted by reference, including 40 C.F.R. § 52.21(b), definitions, and 40 C.F.R. § 52.21(j)(2), control technology. 40 C.F.R. § 52.21(j)(2) requires all PSD sources to employ best available control technology for "each regulated NSR pollutant that it would have the potential to emit in significant amounts." 40 C.F.R. § 52.21(j)(2).

[6] Note that the terms "emission limitation" and "emission standard" are identical under state law. RCW 70.94.030(12).

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
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(360) 586-6770

maximum degree of reduction for each air pollutant" subject to the requirement to be subjected to best available control technology. RCW 70.94.030(6). In addition existing sources must use reasonably available control technology to limit greenhouse gas emissions. WAC 173-400-040(1); *see also* WAC 173-485 (establishing reasonably available control technology for greenhouse gas emissions from petroleum refineries). Finally, the state Legislature has adopted emission reduction requirements for carbon dioxide. RCW 70.235.020.

The statutory requirements of RCW 70.94.331 do not place any limits or restrictions on what the emission standards adopted by Ecology must look like. In fact, the statute gives Ecology considerable flexibility in adopting those standards, stating that the standards "may be based upon a system of classification by types of emissions or types of sources of emissions, or combinations thereof, which it determines most feasible for the purposes of this chapter." RCW 70.94.331(2)(c). Given that Ecology and the Legislature have adopted emission requirements for carbon dioxide, any requirement in RCW 70.94.331(2) has been met. Nothing in RCW 70.94.331(2) requires Ecology to additionally adopt the emission standards Petitioners propose[7].

Petitioners point to policy language in the intent section of Washington's Clean Air Act, RCW 70.94.011, to place restrictions on Ecology's duty to adopt emission standards. Opening Br. at 17–18. As discussed in section IV.B.2.b above, policy statements in legislation do not create legal obligations. Legislative policy statements do not enlarge the enacting part, as they are no part of the law. *State ex rel. Berry*, 92 Wash. at 32. The cited statute, RCW 70.94.011, is the "declaration of public policies and purpose" for the state Clean Air Act. RCW 70.94.011. As a declaration of policy, RCW 70.94.011 does not place an affirmative duty upon Ecology independent of and in addition to the duties placed on Ecology through the more specific provisions of RCW 70.94.

[7] Ecology does not argue that it lacks the authority to adopt additional greenhouse gas emission standard if it chooses to do so. Rather, the argument is that Ecology is not *required* to adopt additional standards.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
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Olympia, WA 98504-0117
(360) 586-6770

As discussed above, Ecology was not required to adopt Petitioners' proposed rule. Therefore, Ecology's denial of their Petition for Rulemaking was not outside Ecology's authority.

3. The court's decision in *Rios* does not govern the outcome of this case.

Petitioners claim this case presents the same situation that the Washington Supreme Court addressed in *Rios v. Department of Labor & Industries*, 145 Wn.2d at 508. Opening Br. at 25. Petitioners are mistaken.

In *Rios*, the Department of Labor and Industries had adopted rules recommending cholinesterase testing for pesticide handlers in the agricultural industry, but had not made such testing mandatory. The agency duty had a very specific and elaborate duty laid out expressly in statute:

> The Director shall (4) Provide for the promulgation of health and safety standards and the control of conditions in all work places concerning gases, vapors, dust, or other airborne particles, toxic materials, or harmful physical agents which shall set a standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life; any such standard shall require where appropriate the use of protective devices or equipment, and for monitoring or measuring any such gases, vapors, dust, or other airborne particles, toxic materials, or harmful physical agents.

RCW 49.17.050(4) (as quoted by *Rios*, 145 Wn.2d at 494).

The requirement clearly states the agency's duty to use the best available evidence to assure that, to the extent feasible, no employee will suffer "material impairment of health or functional capacity" due to a work hazard, even if the employee is exposed to the hazard for his or her entire working life. *Id.* To ensure the accomplishment of this duty, the agency must require monitoring or measuring of harmful physical agents. *Id.* The analysis in the *Rios* case concerned whether or not the agency's refusal to make cholinesterase monitoring mandatory met the requirement to protect pesticide handlers "to the extent feasible." *Rios*, 145 Wn.2d at 496–500. The court decided it did not.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
(360) 586-6770

Here, Ecology's statutory duty is a very general one—to "[a]dopt emission standards which shall constitute minimum emission standards throughout the state." RCW 70.94.331(1)(b). By contrast with *Rios*, there is no requirement concerning what those standards should be or what they should be based on. Also in contrast to *Rios*, here, the Legislature has given Ecology considerable flexibility in adopting emission standards. For example, such standards may be for the state as a whole or may vary from area to area or source to source. RCW 70.94.331(3). In addition, here, Ecology has adopted emission standards for carbon dioxide. WAC 173-485; WAC 173-400-110(5)(b), as discussed in n.4, above. These emission standards meet the requirements of RCW 70.94.331.[8] This situation is different from the situation in *Rios.* Here the statutory duty is general and has been met. In *Rios*, the statutory duty was specific and had not been met.

4. Ecology's decision to deny Petitioners' Petition for Rulemaking was not unconstitutional.

Petitioners claim Ecology's failure to adopt the emission limits in their proposed rule violates the Washington State Constitution. Opening Br. at 15–17. Petitioners point to no provision of the constitution requiring their rule. Opening Br. at 15–17. Rather, Petitioners claim the fundamental right to a healthful environment is "an inherent, natural right that is preserved, and not extinguished, by the State Constitution." Opening Br. at 15. They claim article I, section 30 of the constitution preserves that fundamental right, and that fundamental right demands their rule be adopted. Opening Br. at 16. Petitioners' logic fails. Whether or not the constitution preserves the fundamental right to a clean environment, Ecology's denial of their Petition for Rulemaking was not unconstitutional because the fundamental right does not provide an independent source of authority for Ecology to adopt their rule.

As an administrative agency, Ecology has only those powers expressly conferred upon it by the Legislature and any powers necessarily implied from that grant of power. *Mun. of*

[8] The Legislature has adopted emission reduction requirements for carbon dioxide. RCW 70.235.020.

ATTORNEY GENERAL OF WASHINGTON
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(360) 586-6770

Metro. Seattle v. Pub. Emp't Relations Comm'n, 118 Wn.2d 621, 633, 826 P.2d 158 (1992). With respect to the concept of "necessary implication," the Washington Supreme Court has indicated that such powers include "only those powers that are essential to the declared purpose of the legislation, 'not simply convenient, but indispensable' to carrying out the legislative purpose." *In re Impoundment of Chevrolet Truck, WA License #A00125A v. Wash. State Patrol*, 148 Wn.2d 145, 156 n.10, 60 P.3d 53 (2002) (quoting *City of L.A. v. L.A. City Water Co.*, 177 U.S. 558, 570–71, 20 S. Ct. 736, 44 L. Ed. 2d 886 (1990)). Moreover, administrative agencies have no inherent or common law powers. *In re Impoundment of Chevrolet Truck*, 148 Wn.2d at 156; *Human Rights Comm'n ex rel. Spangenberg v. Cheney Sch. Dist. 30*, 97 Wn.2d 118, 125, 641 P.2d 163 (1982). Therefore, even if the constitution does preserve Petitioners' fundamental right to a clean environment, that fundamental right does not require Ecology to adopt their proposed emission standards. Petitioners cite three cases to support their claim. These cases do not serve Petitioners well. The first two recognize the role of the Legislature in balancing fundamental rights. The third does not address fundamental rights at all.

State v. Buchanan, 29 Wash. 602, 70 P. 52 (1902), validated a law limiting the amount of time a woman could be employed in certain business establishments to 10 hours per day against the claim that the act was an arbitrary restriction on the fundamental right of a citizen to contract her labor. *Buchanan*, 29 Wash. at 604. In reaching its decision, the court noted that the *Legislature* has the job of balancing an individual's fundamental rights against the interests of society. *Id.* at 604–06.

State v. Rivers, 129 Wn.2d 697, 921 P.2d 495 (1996), found the law imposing life in prison after conviction for three felonies not unconstitutional cruel and unusual punishment as applied to Mr. Rivers. *Rivers*, 129 Wn.2d at 715. A footnote in Justice Sanders' dissent provides the quotation Petitioners cite: "under contemporary constitutional jurisprudence, the basic civil liberties were natural and inalienable rights independent of any state constitution."

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
(360) 586-6770

Id. at 727, n.14. Petitioners fail to note that Justice Sanders' footnote goes on to acknowledge that, "A necessary incident to the security of the state is the lodgment of power somewhere to determine under what circumstances these natural rights may be abridged or denied" quoting Lebbeus J. Knapp, *The Origin of the Constitution of the State of Washington*, 4 Wash. Historical Q. 227, 234 (Oct. 1913).

Petitioners claim *City of Bellevue v. King County Boundary Review Board*, 90 Wn.2d 856, 865, 586 P.2d 740 (1978), stands for the conclusion that "the fundamental right to a healthful environment 'overlays' other statutory provisions, including the Washington Clean Air Act." Opening Br. at 18. Petitioners overstate their claim. *City of Bellevue* concerns the applicability of statutory requirements under SEPA. *City of Bellevue*, 90 Wn.2d at 860, 865. The court did not say that the fundamental right to a healthful environment 'overlays' other statutory provisions; the court said, "the requirements of SEPA 'overlay' other statutory schemes." *Id.* at 865.

Both *State v. Buchanan* and Justice Sanders' dissent in *State v. Rivers* invoke the role of the Legislature in mediating fundamental rights. Here, as in *State v. Buchanan* and *State v. Rivers*, the Legislature has mediated Petitioners' fundamental right to a healthful environment by enacting the myriad provisions of the many environmental laws in effect in Washington. Ecology's role is to act within the authorities delineated in those statutes.

The court's reasoning in *Rettkowski* is more in line with the role of the agency here. In that case, the court determined that, even if the public trust doctrine did require Ecology to protect certain water rights, it did not impose any duty on Ecology beyond that contained in the Water Code, because the public trust doctrine "could provide no guidance as to *how* Ecology is to protect those water [right]s." *Rettkowski*, 122 Wn.2d at 232–33. Here, as in *Rettkowski*, the fundamental right to a clean environment provides no guidance as to how Ecology must protect the environment. That guidance must come from the Legislature.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
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(360) 586-6770

Thus, even if the state constitution does preserve Petitioners' fundamental right to a healthful environment, that fundamental right does not require Ecology to adopt Petitioners' rule. Because the constitution imposes no duty on Ecology to adopt Petitioners' proposed rule, Ecology's denial of their Petition for Rulemaking was not unconstitutional.

5. Ecology's decision to deny Petitioners' Petition for Rulemaking was not arbitrary or capricious.

An arbitrary or capricious agency action is one that is "willful, unreasoning, and taken without regard to the attending facts or circumstances." *Port of Seattle*, 151 Wn.2d at 589. Ecology's denial was not arbitrary or capricious. Ecology's denial was a reasoned decision taking into account the attending facts and circumstances, including the following:

- the Legislature has laid down a process for Ecology to follow in making its recommendations to the Legislature, and that process does not include rulemaking. RCW 70.235.040.
- the Legislature has established emission reductions for greenhouse gases, including carbon dioxide. RCW 70.235.020.
- Ecology has adopted emission standards for greenhouse gases under its Clean Air Act authority.
- Ecology has been coordinating with the Governor's efforts to develop the most effective strategies for reducing greenhouse gas emissions in this state. AR 21, 22.

Petitioners claim Ecology's denial was arbitrary and capricious because Ecology did not address the science they presented. Opening Br. at 23. However, science is not the issue in this case. Indeed, as discussed in Ecology's Answer (and quoted in Petitioners' Opening Brief), Ecology generally agrees with Petitioners' science. Petitioners rely on *Northwest Sportfishing Industry Association v. Ecology*, 172 Wn. App. 72. That case, which reviewed Ecology's denial of a petition for rulemaking to modify water quality standards, is inapposite here. In that case, Ecology was required to adopt water quality standards "based on sound scientific rationale" and containing "sufficient parameters or constituents to protect the designated use." 40 C.F.R. § 131.11. In that case, the controversy concerned whether Ecology's denial was consistent with the legal requirement that water quality standards be

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
(360) 586-6770

"based on sound scientific rationale" and protect the designated water use. *Nw. Sportfishing Indus. Ass'n*, 172 Wn. App. at 88–89. Here, the controversy does not involve similar legal standards, but rather, revolves around whether Ecology had a mandate to adopt Petitioners' proposed rules. In essence, the question is whether, under the facts and circumstances of this case, Ecology's decision was arbitrary and capricious. As discussed above, it was not.

6. Ecology's statement of alternatives does not violate APA requirements for responding to a petition for rulemaking.

When responding to a petition for rulemaking, an agency may, where appropriate, state the alternative means by which the agency will address the concerns raised by the petitioner. RCW 34.05.330(1). Ecology included such a statement in its denial of Petitioners' Petition. AR 11 at 4–5. Ecology's statement described measures the agency is taking to address climate change. Petitioners claim this statement does not adequately address their concerns because the measures listed by Ecology, even taken together, will not achieve the greenhouse gas emission reductions set in RCW 70.235, let alone the emission standards Petitioners advocate. Opening Br. at 21–22.

Petitioners are correct that the evidence in the record indicates that the measures currently in place will not achieve the emission reductions in RCW 70.235.020. However, Petitioners misconstrue the duty imposed by RCW 34.05.330(1). While a response to a petition for rulemaking must address the petitioner's concerns, it is not required to redress or remedy the substance of those concerns. *Squaxin Island Tribe v. Ecology*, 177 Wn. App. 734, 740–41, 312 P.3d 766 (Div. II 2013).[9] Ecology's description of the actions that have been

[9] Indeed, Petitioners' proposal will not achieve those emission standards, either. First, there is no guarantee that, after going through the public processes required under the APA, the adopted rule would be exactly as proposed. Next, even if the adopted rule embodied Petitioners' recommendations to the Legislature, there is no guarantee the Legislature would adopt those recommendations. Next, even if the Legislature adopted Petitioners' recommendations, without more, they would have very little effect. At this time, the law does not place on any agency any mandatory duty to ensure that the emission standards in RCW 70.235.020 be met. *See* RCW 70.235.

ATTORNEY GENERAL OF WASHINGTON
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taken and are being taken to address climate change in Washington satisfies the requirements of RCW 34.05.330(1).

Petitioners claim Ecology's decision to delay recommending changes to greenhouse gas emission standards until after the December 2015 Paris climate change meeting unbearably delays action on climate change. Opening Br. at 28. However, had Ecology accepted Petitioners' invitation to adopt recommendations by rulemaking, the resulting rule would likely have been adopted no sooner. *See, e.g.*, *WEC v. Bellon*, 732 F.3d 1131, 1138 (2013) (citing order giving Ecology 26 months to complete a rule).

C. Ecology's December 2014 Report to the Legislature is Not Properly Before This Court

In December 2014, Ecology produced a report making recommendations to the Legislature as required under RCW 70.235.040. Petitioners seek to have that report, *Washington Greenhouse Gas Emission Reduction Limits* (Report), admitted as evidence in this case. Opening Br. at 6.[10] Petitioners also claim that in making the recommendations in that Report, Ecology "abdicated its duty . . . and violated the law . . . ." Opening Br. at 28. Ecology's December 2014 Report is not on appeal before this court. The Report was produced four months after Ecology denied Petitioners' Petition for Rulemaking and three months after this appeal was filed. Petitioners did not, and indeed could not, challenge that Report as part of this appeal. Moreover, there is no record before the court explaining the decisions Ecology made in making the recommendations in that Report. Ecology therefore asks this Court to dismiss Petitioners' claims concerning that Report.

This appeal concerns Ecology's denial of Petitioners' Petition for Rulemaking, based on the record that was before Ecology at the time it issued that denial. RCW 34.05.558. Ecology's December 2014 Report is not part of the record of Ecology's decision to deny

[10] Ecology is filing an accompanying Motion to Strike, asking this court to strike this report.

ATTORNEY GENERAL OF WASHINGTON
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Petitioners' Petition for Rulemaking. Ecology has therefore filed an accompanying motion asking the court to strike the Report from this case.

Finally, the contents of the December 2014 Report have no bearing on this case. Ecology had not issued the Report at the time the agency denied Petitioner's Petition for Rulemaking. Ecology's legal duty in developing that report was different from that in denying a petition for rulemaking. Moreover, while there is no record available elaborating on the basis for Ecology's recommendations in the December 2014 Report, that basis was certainly not that Ecology had no duty to adopt a rule.

V. CONCLUSION

As shown by the arguments discussed above, Petitioners have failed to meet their burden of proving that Ecology's denial of their Petition for Rulemaking violates the Washington State Constitution, was outside Ecology's statutory authority, or was arbitrary and capricious. Ecology therefore asks this court to uphold Ecology's denial and dismiss this case.

DATED this 8th day of April 2015.

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