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CASE NUMBER: 14-2-25295-1 SEA
The Honorable Hollis R. Hill
Hearing: May 15, 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' OPPOSITION TO
RESPONDENT'S MOTION TO
STRIKE

1 **I. INTRODUCTION & RELIEF REQUESTED**

2 ZOE & STELLA FOSTER, AJI & ADONIS PIPER, WREN WAGENBACH, LARA
3 FAIN, GABRIEL MANDELL, and JENNY XU (collectively “Youth Petitioners”) respectfully
4 submit this Opposition to Respondent Washington Department of Ecology’s (“Ecology’s”) motion to strike “new evidence.” In support of its Opening Brief, Youth Petitioners submitted
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6 motion to strike “new evidence.” In support of its Opening Brief, Youth Petitioners submitted
7 the following information that was not contained in the Agency Record (“AR”) in this case: (1)
8 Ecology’s Washington Greenhouse Gas Emission Reduction Limits, Report Prepared Under
9 RCW 70.235.040 (December 2014) (“December 2014 Report”¹); and (2) Declaration of Dr.
10 Pushker Kharecha (“Kharecha Decl.”) explaining Ecology’s December 2014 Report. Because
11 both documents qualify under the Administrative Procedure Act’s (“APA’s”) requirements for
12 the court “to receive evidence in addition to that contained in the agency record for judicial
13 review,” Ecology’s motion to strike should be denied. RCW 34.05.562. In addition, the Court
14 can take judicial notice of the documents because they contain legislative facts. It is contrary
15 to the search for justice to create artificial barriers to the truth. Ecology seeks to strike its own
16 report in which it admits several key allegations of the Youth Petitioners, and is based
17 primarily on scientific information that is contained in the administrative record (AR 12) and
18 was available to Ecology at the time it denied Youth Petitioners’ Petition for Rulemaking.
19 This Report, and Youth Petitioners’ analysis thereof, should not be withheld from the Court.
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22 **II. STATEMENT OF FACTS**

23 On April 29, 2014, Governor Inslee directed Ecology to exercise its authority pursuant
24 to RCW 70.235.040 and “review the State’s enacted greenhouse gas emissions limits and
25 recommend any updates to the limits by July 15, 2014.” AR 20 at 7; *see also* RCW 70.235.040

26 ¹ A copy of this report is attached as Exhibit 1 to the Declaration of Andrea K. Rodgers Harris filed in support of

1 (“Within eighteen months of the next and each successive global or national assessment of
2 climate change science,² [Ecology] shall consult with the climate impacts group at the
3 University of Washington regarding the science on human-caused climate change and provide
4 a report to the legislature summarizing that science and make recommendations regarding
5 whether the greenhouse gas emissions reductions required under RCW 70.235.020 need to be
6 updated.”). In advance of the July deadline, on June 17, 2014, Youth Petitioners submitted
7 their Petition for Rulemaking to Ecology, asking in part, that the agency make its
8 recommendations to the Legislature through rulemaking because Ecology’s action
9 “implicate[s] youth petitioners’ and future generations’ rights to essential public trust
10 resources.” AR 6 at 53. Ecology failed to meet its July 15, 2014 deadline,³ and did not issue
11 its recommendations to the Legislature until December 2014, four months after it issued its
12 decision denying Youth Petitioners’ Petition for Rulemaking. AR 11. Ecology missed this
13 deadline even though the UW Climate Impacts Group’s report, which served as the basis for
14 Ecology’s recommendations, was issued in December 2013. December 2014 Report at 11; AR
15 12. Because Ecology’s December 2014 Report squarely addresses the legal and factual issues
16 raised in this case, Youth Petitioners submitted this Report, and their expert’s analysis of the
17 Report, to the Court in support of its Opening Brief. Ecology has moved to strike both the
18 Report and the Kharecha Declaration.⁴

22 ² Ecology identifies the most recent “global or national assessment of climate change science” in its December
23 2014 Report at p. 11.

24 ³ There is nothing in the record explaining why Ecology failed to meet the deadline imposed by Governor Inslee.

25 ⁴ It is important to clarify that one of the documents submitted as an exhibit to the Declaration of Andrea Rodgers
26 Harris (“Rodgers Harris Decl.”), James Hansen et al, *Assessing “Dangerous Climate Change”: Required
Reduction of Carbon Emissions to Protect Young People, Future Generations & Nature*, 8 PLOS ONE (2013), is
the scientific study that Youth Petitioners cited and relied upon extensively in their original Petition for
Rulemaking submitted to Ecology. AR 6 at 45-47, 52, 60, 63. Youth Petitioners submitted a copy of this
scientific study, co-authored by Dr. Kharecha, to the Court because Ecology failed to include a copy in the AR.

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Judicial review of agency decisions under the APA is typically limited to the administrative record before the agency at the time its decision is made. RCW 34.05.558; *Samson v. City of Bainbridge Island*, 149 Wn.App. 33, 64, 202 P.3d 334 (2009) (citing RCW 34.05.566(1)). However, there are exceptions to this general rule that apply to the case at bar. RCW 34.05.562 provides, in relevant part:

A. Ecology's December 2014 Report & The Kharecha Declaration Are Admissible Pursuant to RCW 34.05.562.

(1) The court may receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:

- (a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;
- (b) Unlawfulness of procedure or of decision-making process; or
- (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

Ecology admits Dr. Hansen's study is properly before the Court because Ecology has not moved to strike this study. Ecology's failure to include this study in the AR provides further support for Youth Petitioners' argument that the denial of the Petition for Rulemaking was arbitrary and capricious. *Puget Sound Harvester's Ass'n v. Wash. Dep't of Fish & Wildlife*, 157 Wn.App. 935, 950, 239 P.3d 1140 (2010) (finding agency action to be arbitrary and capricious when agency "ignore[s] the considerable information that it does have . . .").

1 Ecology's December 2014 Report "relates to the validity of the agency action at the
2 time it was taken" because it responds to one of the requests for relief in Youth Petitioners'
3 Petition for Rulemaking, specifically that Ecology's recommendations to the legislature be
4 based on current science and made through the rulemaking process. In its decision denying
5 Youth Petitioners' Petition for Rulemaking, Ecology stated that it is "currently reviewing the
6 state's greenhouse gas emission reductions in consultation with the Climate Impacts Group to
7 formulate recommendations on whether those reductions should be updated." AR 11 at 2.
8 However, it was not until Ecology issued the December 2014 Report that the agency actually
9 made its recommendations outside of the rulemaking process. Furthermore, the scientific basis
10 for Ecology's December 2014 Report is the UW Climate Impact Group's Report that was
11 issued in December 2013, which is a part of the agency record in this case (AR 12) and was
12 completed well in advance of Ecology's decision denying Youth Petitioners' Petition for
13 Rulemaking.
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16 For the first time, in the December 2014 Report, Ecology addresses the content of
17 primary scientific basis for Youth Petitioners' proposed rule, James Hansen et al, *Assessing*
18 *"Dangerous Climate Change": Required Reduction of Carbon Emissions to Protect Young*
19 *People, Future Generations & Nature*, 8 PLOS ONE (2013) ("Dr. Hansen Study"). In this
20 study, Dr. Hansen and his team characterized the goal of limiting global temperature increase
21 to 2°C as a "fallacy of logic."⁵ Instead, current climate science demands that governments
22 should aim for a global carbon dioxide concentration of 350 ppm or lower by the end of the
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26 ⁵ AR 6 at 46 n. 341 (citing James Hansen et al., *Assessing "Dangerous Climate Change": Required Reduction of Carbon Emissions to Protect Young People, Future Generations and Nature*, 8 PLOS ONE 1, 4 (2013).

1 century, in order to avoid catastrophic impacts.⁶ Ecology did not reference this scientific
2 prescription for preventing dangerous anthropogenic climate change and stabilizing the climate
3 system in its decision denying Youth Petitioners' Petition for Rulemaking. AR 11. Now, for
4 the first time, the agency acknowledges:

5 Many researchers are arguing that 3.6°F/2°C no longer constitutes
6 the threshold of dangerous climate change, given the changes
7 already seen in the climate system with the 1.5°F (0.8°C) of
8 warming that occurred between 1880 and 2012.
9 Scientists are urging countries to rethink the CO₂ concentration
10 level of 450 and the maximum temperature rise by considering
CO₂ stabilization at 350 ppm and lowering maximum temperature
change to 2.7°F/1.5°C.

11 December 2014 Report at 17 (citing a commentary that references, among other sources, Dr.
12 Hansen's scientific prescription for 350 ppm by the end of the century and stating that "[s]ince
13 Copenhagen, the foundation on which the 2 °C target was built has steadily eroded."). This
14 acknowledgment squarely calls into question the validity of Ecology's decision at the time it
15 was taken because Dr. Hansen's report (as well as the other sources cited in the December
16 2014 Report) was available to Ecology while it considered the Petition for Rulemaking, but the
17 agency failed to address the report or the need to get to 350 ppm by the end of the century in
18 any way in their decision denying the Petition for Rulemaking.

19 The December 2014 Report also contains admissions that relate to the validity of the
20 agency's decision at issue in this case, including but not limited to:

21 (1) Ecology's failure to act to address climate change violates Youth Petitioners'
22 fundamental and inalienable rights to a healthful and pleasant environment: ("We
23 are imposing risks on future generations (causing intergenerational inequities) and
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26 ⁶ *Id.* at 46 n. 342.

1 liability for the harm that will be caused by climate change that we are unable or
2 unwilling to avoid”);⁷

3 (2) Ecology’s “alternative approach” to addressing climate change violates the
4 mandates of RCW 70.235.005 and is insufficient to protect the state’s essential
5 natural resources and Youth Petitioners’ fundamental and inalienable rights to a
6 healthful and pleasant environment: (“The effects of climate change on water
7 supplies, public health, coastal and storm damage, wildfire and other impacts will
8 be costly unless additional actions are taken to reduce greenhouse gases.”);⁸ (“To
9 have a reasonable chance to avoid unprecedented risks to peoples’ lives and
10 wellbeing, the Intergovernmental Panel on Climate Change has concluded that
11 emissions reductions in excess of what have been pledged or committed by
12 nations are required.”);⁹

13 (3) Urgent, not delayed, action is required to drawdown GHG emissions: (“If we
14 delay action by even a few years the rate of reduction needed to stabilize the
15 global climate would be beyond anything achieved historically and would be
16 more costly.”);¹⁰

17 (4) The GHG emissions reductions established in RCW 70.235 are not based on
18 current climate science and are insufficient to protect the state’s public trust
19 resources and Youth Petitioners’ fundamental and inalienable rights to a healthful
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25 ⁷ December 2014 Report at 18.

26 ⁸ *Id.* at iv.

⁹ *Id.* at v.

¹⁰ *Id.* at vi.

1 and pleasant environment: (“Washington State’s existing statutory limits should
2 be adjusted to better reflect the current science.”).¹¹

3 Therefore, Ecology’s December 2014 Report “relates to the validity of the agency action at the
4 time it was taken” for purposes of RCW 34.05.562(1) and demonstrates the type of analysis
5 that Ecology should have performed in response to the Youth Petitioners’ Petition for
6 Rulemaking, but failed to undertake.

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8 In addition, the December 2014 Report “is needed to decide disputed issues regarding .
9 . . (b) Unlawfulness of procedure or of decision-making process; or (c) Material facts in rule
10 making, brief adjudications, or other proceedings not required to be determined on the agency
11 record.” RCW 34.05.562(1). In its Motion to Strike, Ecology contends that “[t]here are no
12 material facts in dispute in this case.” Ecy. Mtn. to Strike at 4. That admission provides
13 further support for Youth Petitioners’ claim that Ecology’s affirmative failure to exercise its
14 admitted legal authority to regulate CO₂ emissions pursuant to the Washington Clean Air Act
15 is arbitrary and capricious. Youth Petitioners’ Opening Brief at 23-27. But Ecology’s
16 concession contradicts their final decision denying Youth Petitioners’ Petition for Rulemaking
17 on the grounds that “Washington is working to achieve the reductions in RCW
18 70.235.020(1)(a), and the measures it is taking are an alternative approach to your proposed
19 rule.” AR 11 at 1. This statement raises factual issues as to the propriety of whether or not the
20 measures Ecology is taking do in fact constitute an “alternative approach.” Therefore,
21 Ecology’s December 2014 Report is admissible pursuant to RCW 34.05.562(1).
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24 The Kharecha Declaration is similarly admissible for the reasons set forth above.
25 Ecology mischaracterizes Dr. Kharecha’s Declaration by claiming it only discusses the

26 ¹¹ *Id.*

1 December 2013 report he co-authored with Dr. Hansen, *Assessing “Dangerous Climate*
2 *Change”: Required Reduction of Carbon Emissions to Protect Young People, Future*
3 *Generations and Nature*” as a means to argue that Youth Petitioners should have submitted this
4 declaration in support of their Petition for Rulemaking. However, the primary purpose of Dr.
5 Kharecha’s declaration is to analyze and explain Ecology’s December 2014 Report, which was
6 not available to Youth Petitioners when the Petition for Rulemaking was submitted. Kharecha
7 Decl. at ¶¶ 12-19. While the scientific basis for Ecology’s December 2014 Report (the UW
8 Climate Impacts Group December 2013 Report, AR 12) was available when the Petition for
9 Rulemaking was submitted, Ecology’s application of this science as a means to inform their
10 recommendations to the Legislature was not. Furthermore, the December 2014 Report is the
11 first and only time Ecology has commented on the scientific basis for Youth Petitioners’
12 proposed rule. Therefore, Dr. Kharecha’s declaration is admissible and properly before the
13 Court. RCW 34.05.562.

16 **B. The Court Can Take Judicial Notice of Both Documents**

17 The Court also has the authority to take judicial notice of both the December 2014
18 Report and Dr. Kharecha’s Declaration. “Legislative facts” are those that serve “as
19 background information a court may take into account ‘when determining the constitutionality
20 or proper interpretation of a statute, or when extending or restricting a common law rule.’”
21 *Cameron v. Murray*, 151 Wn.App. 646, 658-59, 214 P.3d 150 (2009) (quoting 5D
22 WASH.PRAC., HANDBOOK WASH. EVID.D. ER 201 Comment(1) (2008-09 ed.). “Under
23 this doctrine, a court can take judicial notice of scholarly works, scientific studies, and social
24 facts.” *Wyman v. Wallace*, 94 Wn.2d 99, 102-03, 615 P.2d 452 (1980). Here, Youth
25 Petitioners are asking the Court to interpret several statutes and submitted both documents to
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1 aid the court in making that determination. Therefore, The December 2014 Report and Dr.
2 Kharecha's declaration contain "legislative facts" of the type that are proper for the court to
3 take judicial notice.

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5 **V. CONCLUSION & REQUEST FOR RELIEF**

6 For the reasons set forth above, Youth Petitioners respectfully request that the Court
7 deny Ecology's Motion to Strike.

8 Respectfully submitted this 13th day of May, 2015.

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