The Honorable Hollis R. Hill
Hearing: April 29, 2016

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' REPLY BRIEF IN SUPPORT OF RULE 60(B) MOTION

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I. INTRODUCTION

In its response brief, Ecology admits it misrepresented to the Court that it would make recommendations to the legislature to update the existing GHG emission limits, and once again claims it intends to issue a new Clean Air Rule at some undisclosed date in the future. After at least twenty-six years of unfulfilled promises to take action on climate change, the time has come for the judicial branch to order Ecology to promulgate a rule regulating and adequately reducing carbon dioxide emissions, to remedy the legal violations previously found by this Court "before doing so becomes first too costly and then too late."[1]

II. ARGUMENT

A. The Court Has The Authority To Order Petitioners' Requested Relief.

Ecology questions the Court's ability to provide relief on the grounds that the relief sought would constitute "affirmative relief" not properly granted pursuant to Civil Rule (CR) 60(b). Ecy. Resp. Br. at 2, 8 n.4 (citing *Geonerco, Inc. v. Grand Ridge Properties IV, LLC*, 159 Wn. App. 536, 248 P.3d 1047 (2011)). The "affirmative relief" awarded by the trial court in *Geonerco* went well beyond the relief that could have been awarded in the original order resolving that case, and is vastly different than the relief requested here.[2] In *Geonerco*, the trial court modified the final judgment to award additional remedies (including monetary damages) not previously requested by the parties or litigated in the original case. 159 Wn. App. at 541. In essence, the trial court issued a remedy that could only have been sought through a separate cause of action, which is not a permissible use of CR 60(b). *Delay v. Gordon*, 475 F.3d 1039,

[1] Order Affirming Department of Ecology's Denial of Petition for Rulemaking ("Final Order") at 5.
[2] Notably in that case, the Court of Appeals in *Geonerco* did not deny relief pursuant to CR 60(b), but rather remanded the case back to the trial court "to determine whether to grant such relief under CR 60(b)." 159 Wn. App. 545.

1046 (9th Cir. 2007).

Here, petitioners ask that the Court find (consistent with *Geonerco*) that Ecology made misrepresentations regarding its commitment to develop the Clean Air Rule in a timely manner and to recommend updates to RCW 70.235, and those misrepresentations (and extraordinary circumstances) justify the Court vacating that portion of its prior order affirming Ecology's denial of the petition for rulemaking. CR 60(b)(4), (11). Once that part of the order is vacated, petitioners are left without a remedy to the ongoing legal violations found by the Court. Final Order at 6-7, 8. Petitioners submit that the appropriate remedy is petitioners' original request for relief; i.e., an order directing Ecology to recommend updates to RCW 70.235.020 and to promulgate a rule regulating carbon dioxide emissions in accordance with the legal findings set forth in the Final Order.

B. Ecology's Admission That It Did Not Recommend Updates To RCW 70.235.020 Justifies Relief Under CR 60(b)(4).

Ecology admits that it "did not make a recommendation to the 2016 Legislature to change the limits in RCW 70.235," even though it assured the Court it would do so and this recommendation is a legal mandate.[3] Ecy. Resp. Br. at 5. Ecology contends that this misrepresentation is of little import because "the Court's decision was based on Ecology's commitment to adopt a rule limiting carbon dioxide emissions in Washington." *Id.* However, the original petition for rulemaking sought a recommendation to the legislature to update RCW 70.235.020. AR 6 at 2. In its Final Order, the Court found that "[t]he Department of Ecology is the agency authorized both *to recommend changes in statutory emission standards* and to establish limits that are responsible. The current rulemaking is toward that end." Final Order

[3] Ecology's duty to recommend updates is required by the legislature (RCW 70.235.040) and by Executive Order 14-04 (AR 22) at 7.

at 8 (emphasis added). Therefore, the Court did rely upon Ecology's assurance that it would recommend updates to RCW 70.235.020 as it is legally obligated to do. Petitioners' claim that Ecology was legally obligated to make updates to RCW 70.235 has not vanished, nor has Ecology's legal duty.

Ecology's failure to fulfill its RCW 70.235.040 duties is of great significance in this case because it implicates how Ecology will implement its statutory authority. Present and future actions to reduce GHG emissions (including the Clean Air Rule) will be calibrated to achieve only the minimal reductions in RCW 70.235.020.[4] *See* Stu Clark Decl. at ¶ 7, Exh. B (Governor Inslee directed that the Clean Air Rule be designed "to make sure the state meets its statutory emission limits set by the Legislature in 2008."). With new recommendations based on current science (as deemed necessary in the December 2014 Report), Governor Inslee could, and would be within his authority to, direct Ecology to promulgate a rule consistent therewith, even absent legislative action on the recommendations.

Ecology's excuse that it "believes any attempt to persuade the 2016 Legislature to change the limits in RCW 70.235 would have been futile" not only misstates the law, but is untimely. Ecy. Resp. Br. at 6. Ecology would have believed such efforts to be futile at the time it made the representation to the Court. In other words, there was no intervening event making such efforts futile. Further, Ecology's belief that it is futile to comply with legislative and executive mandates well illustrates its continuing refusal to abide by the law. Difficulties in the political arena do not obviate Ecology's statutory duty to make a recommendation.[5]

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[4] Petitioners disagree that this should be so given that RCW 70.235.020 sets a floor, not a ceiling, for emissions targets. *See* Petitioners' Opening Br. (filed March 16, 2014) at 9, 29.

[5] The cases cited by Ecology in support of its futility argument are plainly inapposite. The case of *State v. Smith* stands for the proposition that the state has an obligation to make a good faith effort to obtain a witness' presence

C. A Court-Ordered Remedy Is Needed To Protect Petitioners' Rights.

Ecology contends that it is "on track to adopt a rule by the end of 2016." Ecy. Resp. Br. at 2. Given what is at stake, petitioners' fundamental rights to a livable future, the Court cannot assume Ecology will do what needs to be done in a timely manner. First, absent an order from this Court, nothing prevents Ecology from either refusing to issue a revised rule or withdrawing the next version of the rule. Second, all indications from Ecology suggest that the agency is not committed to promulgating a rule that complies with the legal findings in the Court's Final Order.[6] Third, some stakeholders are pressuring Ecology to delay implementation of the Clean Air Rule until implementation of the EPA's Clean Power Plan. Just as Ecology waited for the Paris Climate Agreement, it is foreseeable that Ecology will use the Clean Power Plan as an additional excuse for further delay, putting petitioners right back where they began two years ago.[7]

As Magistrate Judge Coffin, in the U.S. District Court for the District of Oregon, wrote three weeks ago, in an order recommending denial of motions to dismiss filed by the United

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at trial and need not undertake futile efforts to obtain the witness' attendance. 148 Wn.2d 122, 132, 59 P.3d 74 (2002). Ecology incorrectly claims (and erroneously cites) the case of *Music v. United Ins. Co. of America*, 59 Wn.2d 765, 768-69, 370 P.2d 603 (1962), in support of its futility argument. In that case, the Washington Supreme Court quoted an Oklahoma case that stated that futility is one reason why certain language in an insurance policy "does not apply in cases of permanent disability." *Id*. at 768-69. Neither case cited by Ecology justifies their admitted misrepresentation to the Court or noncompliance with a statutory and executive mandate to make recommendations to update RCW 70.235.020.

[6] *Compare* Declaration of Andrea K. Rodgers ("Rodgers Decl."), Exh. 1 (Withdrawn List of Entities with GHG Emissions Above 100,000 Metric Tons of Carbon Dioxide Equivalent Per Year) (Ecology's "best estimate of covered parties based on currently available data" identifies entities that emit 10,000 metric tons of carbon dioxide equivalent, none of which include transportation sources) *with* Final Order at 6-7 (finding that Ecology's current emission standards do not fulfill Ecology's statutory mandate under the Clean Air Act and recognizing that existing standards do "not even address[] transportation which as of 2010 was responsible for 44% of annual total GHG emissions in Washington State.").

[7] Rodgers Decl. Exh. 2 (Letter from PSE to Governor Inslee sharing "perspective on the Clean Air Rule (CAR) concepts proposed by the Department of Ecology" and stating that "[d]ue to the uncertainty around implementation of the Clean Power Plan (CPP), the concurrent need to maintain reliability, and the close nexus between the electric and natural gas industries, we propose a three-year stay of CAR rulemaking application for the power and LDC sectors until implementation of the Clean Power Plan is complete.").

States and the fossil fuel industry in a constitutional climate change case brought on behalf of youth:

> But the intractability of the debates before Congress and state legislatures and the alleged valuing of short term economic interest despite the cost to human life, necessitates a need for the courts to evaluate the constitutional parameters of the action or inaction taken by the government. This is especially true when such harms have an alleged disparate impact on a discrete class of society.

Juliana v. United States, Case 6:15-cv-01517-TC Dkt. 68 at 8 (D.Or. April 8, 2016) (Rodgers Decl. Exh. 3); at 14 ("The court need not dictate any regulations, only direct the EPA to adopt standards that prevent the alleged constitutional harm to the youth and future generation plaintiffs, should plaintiffs prevail in demonstrating such is possible."). Similarly, a Dutch court, on June 24, 2015, ordered a nationwide reduction of greenhouse gas emissions by a date certain. *See Urgenda Found. v. The State of The Netherlands*, The Hague District Court, Chamber for Commercial Affairs, Case No. C/09/456689/HA ZA 13-1396 (June 24, 2015) (Rodgers Decl. Exh. 4). Given the extraordinary circumstances presented in this case, petitioners ask this Court to use its full authority to uphold their constitutional rights.

Solving the climate crisis will require the full attention and authority of all three branches of government. For decades, the legislative and executive branches have failed to adequately curb GHG emissions. Now, with constitutional rights at stake and clear violations of law, this Court must exercise its clear democratic role and hold accountable the law-making and law-executing branches to address this crisis. Those branches, these petitioners, and all future generations urgently need this Court's order and watchful oversight.

V. CONCLUSION & REQUEST FOR RELIEF

For the reasons set forth herein, petitioners respectfully request that the Court grant its CR 60(b) motion, find that Ecology made misrepresentations to the Court regarding its

development of the Clean Air Rule and recommendations to update RCW 70.235.020, vacate that portion of the Final Order affirming Ecology's denial of their petition for rulemaking, and enter an order directing Ecology to promulgate a rule that complies with the law of this case, and to do so in a meaningful timeline. In addition, petitioners respectfully request that the Court grant such other relief as this Court deems appropriate. Finally, Youth Petitioners request that fees and costs be awarded pursuant to RCW 4.84.350 and other applicable law.

Respectfully submitted this 27th day of April, 2015.

s/ Andrea K. Rodgers

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