

KING COUNTY  
The Honorable Thomas R. Hill  
Hearing. December 15, 2016  
SUPERIOR COURT CLERK  
E-FILED

CASE NUMBER: 14-2-25295-1 SEA

**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' MOTION FOR  
LEAVE TO FILE SUPPLEMENTAL  
BRIEF AND AN AMENDED AND  
SUPPLEMENTAL PETITION FOR  
REVIEW IN RESPONSE TO  
COURT'S QUESTIONS AT SHOW  
CAUSE HEARING

1                                   **I.      INTRODUCTION & RELIEF REQUESTED**

2            Petitioners respectfully seek leave of this Court to file a supplemental brief in support  
3 of their Motion for Order to Show Cause re: Contempt and to file an amended and  
4 supplemental petition for review pursuant to CR 15(a) and (d). At the show cause hearing on  
5 November 22, 2016, this Court questioned its authority to grant Petitioners' requested relief  
6 due to Ecology's issuance of the Clean Air Rule. In light of those questions, to update the  
7 pending petition for review to reflect the current state of this litigation, and to add new  
8 allegations and causes of action that have arisen since this case was commenced, Petitioners  
9 request permission to submit a supplemental brief directly responding to the Court's questions,  
10 and to file an amended and supplemental petition for review. A copy of the proposed  
11 supplemental brief is attached as Appendix A to this motion. A copy of the proposed amended  
12 and supplemental petition for review is attached as Appendix B to this motion.  
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14

15                                   **II.     STATEMENT OF FACTS**

16            The factual background of this case is set forth in the earlier filings and pleadings  
17 submitted by the parties in this matter, and in this Court's prior orders. In addition, since this  
18 action was commenced in Fall 2014, a number of events have occurred that are relevant to this  
19 motion. The events include:

- 20            • In December 2014 Ecology issued a report entitled *Washington Greenhouse Gas*  
21            *Emission Reduction Limits: Report Prepared Under RCW 70.235.040*, that summarized  
22            the climate science and found that climate change "is worse than previously predicted."  
23            • In early 2015, Governor Inslee introduced the Carbon Pollution Accountability Act,  
24            which failed to be enacted into law by the 2015 Washington legislature.  
25  
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- In June 2015, Governor Inslee directed Ecology to abandon its efforts to develop a Clean Fuel Standard designed to reduce the overall carbon intensity of transportation fuels in light of the legislature's efforts to condition promulgation of the Clean Fuel Standard on loss of significant amounts of funding for transit.
- On July 28, 2015, after meeting with the Youth Petitioners in this case, Governor Inslee directed Ecology to use its existing statutory authority under RCW 70.94 and 70.235 to develop a Clean Air Rule that would cap carbon emissions in Washington.
- On August 7, 2015, Ecology issued a second denial to the petition for rulemaking, this time adding that it would begin a rulemaking process to cap Washington's CO<sub>2</sub> emissions, after which the Court entered a show cause order directing Youth Petitioners to explain to the Court why its petition should not be denied.
- On January 5, 2016, Ecology released its first proposed its Clean Air Rule. On February 26, 2016, Ecology withdrew its proposed Clean Air Rule.
- A modified Clean Air Rule was proposed on June 1, 2016. After soliciting both written and oral comments, the final version of the Clean Air rule was released on September 16, 2016.
- Ecology continues to issue permits and authorizations to private parties to emit dangerous levels of GHG emissions into the atmosphere.
- The aggregate acts and omissions of the State of Washington, Governor Inslee and Ecology have legalized dangerous levels of GHG emissions and failed to put Washington on a path to climate stability.

1 **III. STATEMENT OF THE ISSUE**

2 Whether the Court should grant Petitioners motion to file a supplemental brief and an  
3 amended and supplemental petition for review pursuant to CR 15(a) and (d).

4 **IV. EVIDENCE RELIED UPON**

5 Petitioners rely upon the balance of the pleadings and other documents on file in this  
6 action. Petitioners also rely upon the declaration of Andrea K. Rodgers filed in support of this  
7 motion.  
8

9 **V. ARGUMENT**

10 **1. A Supplemental Brief Is Warranted In The Interests of Justice.**

11 Petitioners submit that a short, supplemental brief on the issue of the Court's authority  
12 to remedy Petitioners' claims in spite of Ecology's issuance of the Clean Air Rule will assist  
13 the Court in the proper resolution of this case. At the show cause hearing, the Court asked a  
14 number of questions regarding its ability to grant Petitioners' requested relief given the  
15 pending appeals of the Clean Air Rule by other parties in Thurston County Superior Court.  
16 Allowing Petitioners to submit a supplemental brief would be in the interests of justice and  
17 would not be prejudicial to Ecology, as they would have the ability to respond to Petitioners'  
18 supplemental brief as contemplated by the court rules.  
19

20 **2. Amendment And Supplementation Of Petitioners' Petition For Review Is**  
21 **Warranted Under CR 15(a) And (d).**

22 Petitioners also seek to amend and supplement their petition for review in this case  
23 under CR 15(a) and (d) to enforce the fundamental constitutional rights of young people to a  
24 healthful and pleasant atmosphere and continued use of public trust resources. Petitioners  
25 allege, and this Court has found, that the aggregate actions taken by Ecology to address climate  
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1 change fall short of the agency’s constitutional and statutory responsibilities to protect the  
2 public trust resources in the state of Washington. Petitioners’ motion to amend and supplement  
3 their petition for review should be granted because the inclusion of the new allegations and  
4 causes of action will avoid piecemeal litigation, allow a prompt and efficient resolution of the  
5 entire controversy between the parties, will not prejudice Ecology, and the new facts and  
6 claims alleged are consistent with those contained in the original petition for review. Most  
7 importantly, this Court should grant Petitioners’ motion to amend and supplement their petition  
8 for review given the urgency of the climate crisis and to vindicate the fundamental rights of  
9 Petitioners that are being infringed upon by Ecology’s systemic and ongoing inability or  
10 unwillingness to facilitate the reduction of GHG emissions in a lawful manner.  
11

12 **A. Purpose of Amendment and Supplement.**  
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14 The purpose of the amendment and supplement is to update the pending petition for  
15 review to reflect the current status of this litigation as well as the current status of the State’s,  
16 Governor Inslee’s and Ecology’s (collectively, “Respondents”) actions and inactions taken in  
17 response to climate change. The proposed amended and supplemented petition for review is  
18 designed to address and include the prior orders entered in this case, and events that have  
19 occurred after the filing of the original petition for review in this case. The primary focus of  
20 the amended and supplemental petition for review is to add allegations and legal claims for  
21 violations of Petitioners’ constitutional rights of substantive due process arising out of  
22 Respondents’ failure to take meaningful action to address climate change and in light of  
23 Respondents’ aggregate actions that have legalized dangerous levels of GHG emissions.  
24

25 It is obvious that the infringement of the constitutional rights of the Petitioners and the  
26 violations of the constitutional Public Trust Doctrine cannot be remedied without systemic

1 change, much like desegregation or prison reform could not be redressed without systemic  
2 claims and judicial remedies, where political majorities maintained systems that perpetuated  
3 constitutional violations. *See, e.g., Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Swann v.*  
4 *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Brown v. Plata*, 563 U.S. 493 (2011).  
5 Thus, Petitioners’ amendments address the systemic actions Respondents are collectively  
6 taking that are violating their legal rights.  
7

8 The proposed amendment adds one Petitioner, Athena Fain, and adds the State of  
9 Washington and Governor Inslee as Respondents in the case. The addition of these two  
10 entities as Respondents is needed in light of Petitioners’ new factual allegations and causes of  
11 action. Ultimately, the proposed amendment and supplement clarify the scope of Petitioners’  
12 legal claims and simplify the case with regard to the ultimate relief sought and to be awarded to  
13 Petitioners.  
14

15 **B. Standard of Review.**

16 “The purposes of Rule 15 are to ‘facilitate a proper decision on the merits’ . . . and to  
17 provide each party with adequate notice of the basis of the claims or defenses asserted against  
18 him.” *Herron v. Tribune Pub. Co. Inc.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987) (quoting  
19 *Caruso v. Local Union 690 of Int’l Band of Teamsters*, 100 Wn.2d 343, 349, 670 P.2d 240  
20 (1983) (internal citation omitted). “Leave to amend [pursuant to CR 15(a)] should be freely  
21 given ‘except where prejudice to the opposing party would result.’” *Herron*, 108 Wn.2d at 164  
22 (quoting *Caruso*, 100 Wn.2d at 349); *Foman v. Davis*, 371 U.S. 178, 182 (1962). “In  
23 determining whether permitting amendment would cause prejudice, the trial court may  
24 consider factors including undue delay and unfair surprise” and whether the amendment would  
25 be futile or untimely. *In re Estate of Lowe*, 191 Wn. App. 216, 227, 361 P.3d 789 (2015).  
26

Civil Rule 15(d) provides, “[u]pon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.” “The purpose of Rule 15(d) is to promote as complete an adjudication of the dispute between the parties as possible by allowing the addition of claims which arise after the initial pleadings are filed.” *William Inglis & Sons Baking Co. v. ITT Cont’l Baking Co.*, 668 F.2d 1014, 1057 (9th Cir. 1981)<sup>1</sup> (citing *Case-Swayne Co. v. Sunkist Growers, Inc.*, 369 F.2d 449, 462 (9th Cir. 1966)). Supplementation of pleadings should be permitted, absent prejudice to a party. *Herron*, 108 Wn.2d at 169.

**C. Amendment & Supplementation Will Allow A Comprehensive Resolution Of The Controversy Between The Parties And Ensure Judicial Economy.**

Petitioners’ filing of an amended and supplemental petition for review will ensure a prompt, fair, comprehensive and efficient resolution of all of the legal claims alleged in this proceeding and will serve to clarify the scope of Petitioners’ claims alleged in this case. If the Court believes it does not have the authority to hold Ecology in contempt or to enter another show cause order, the only alternative available to the Petitioners would be to go back to where they were in 2014 and re-file their original petition for rulemaking or commence entirely new litigation, which would involve needless expense, delay and judicial inefficiency. Moreover, such delay would be highly prejudicial to Petitioners given the urgency of the climate crisis; an urgency this Court has previously acknowledged. Granting Petitioners leave to file an amended and supplemental petition for review will avoid endless litigation between the parties on the issues raised in this case.

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<sup>1</sup> Federal Rule of Civil Procedure (“FRCP”) 15(a) and (d) contain language substantially similar to the state rule, and thus federal case law interpreting FRCP 15(a) and (d) should be considered persuasive authority.



1 As of the date of this filing, there is no date set for a future trial or hearing in this  
2 matter, the existence of which would shorten Respondents' ability to defend the new  
3 allegations contained in the supplemental petition for review, thus there is no prejudice to  
4 Respondents. Upon the filing of the amended and supplemental petition for review, the Court  
5 will have an opportunity to set an appropriate case schedule that is convenient for the parties.  
6 In addition, the Court has the authority to order Respondents to respond to the supplemental  
7 pleading, "[i]f the court deems it advisable." CR 15(d). Accordingly, an amendment and  
8 supplementation of the petition for review at this stage in the proceedings is justified and  
9 needed to avoid piecemeal litigation and ensure a prompt and efficient resolution of the entire  
10 controversy between the parties.  
11

12 **D. Amendment And Supplementation Will Not Prejudice Ecology.**

13 Ecology cannot show that it will be prejudiced because it has received ample notice  
14 and knowledge of the orders previously issued in this case as well as the transactions,  
15 occurrences and events that have transpired after the filing of the original petition for review.  
16 Ecology has known since at least 2011 that young people in the state of Washington could  
17 bring legal claims against the state and its agencies for its illegal actions related to climate  
18 change, including claims brought under the Public Trust Doctrine. *Svitak, et al. v. State*, 2013  
19 WL 6632124 (WA Ct. App.) (Dec. 16, 2013) (original complaint filed in May 2011). Indeed,  
20 Ecology, as the agency given "the authority to manage and develop our air and water resources  
21 in an orderly, efficient, and effective manner and to carry out a coordinated program of  
22 pollution control involving these and related land resources," is best situated to know whether  
23 its actions related to climate change, and the State's aggregate actions to address climate  
24 change, protect the fundamental rights of young people. RCW 43.21A.020.  
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1           Petitioners have devoted a significant amount of time and resources litigating their  
2 claims set forth in the original petition for review filed in 2014. Outside of the litigation and as  
3 documented in previous court filings, Petitioners have made several attempts to resolve their  
4 claims both with the Governor’s office, and with Ecology. The State legislature has also been  
5 presented with opportunities to address the climate crisis. Governor Inslee and Ecology  
6 responded to the original litigation by pursuing administrative action in the form of the Clean  
7 Air Rule, which Ecology admits will not put the state on a path to compliance with the  
8 outdated GHG emission limits contained in RCW 70.235, limits this Court has previously  
9 found to be insufficient to protect the rights of Petitioners. All attempts to work with the  
10 executive and legislative branches on these issues have been unsuccessful. Therefore, Ecology  
11 has had ample notice and will not be prejudiced by Petitioners’ amendment and  
12 supplementation of their petition for review.  
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15       **E.           The Facts Alleged In The Amended & Supplemental Petition For Review Are**  
16       **Consistent With Those Alleged In The Original Petition For Review.**

17           It is appropriate for Petitioners to amend and supplement their petition for review in  
18 order to ensure full, appropriate and comprehensive relief for the Petitioners, other young  
19 people and future generations of this state. Petitioners seek to amend and supplement their  
20 petition for review to include new events and occurrences that have transpired since the filing  
21 of the original petition for review. The new facts and claims alleged are substantially similar  
22 to the facts alleged in the original petition for review and many come from documents  
23 produced by Ecology or relate to activities in which Ecology was involved. “[W]here facts set  
24 forth in the original complaint relate to and support the new cause of action in the amended  
25 complaint, the amended cause of action ‘is not so different as to cause prejudice to the  
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1 defendant.” *Belle v. Ross Prods. Div.*, No. 2:01-CV-677, 2003 WL 133242, at \*3 (S.D. Ohio  
2 Jan. 2, 2003) (quoting *Tefft v. Seward*, 689 F.2d 637, 639 (6th Cir. 1982)).

3         The new facts alleged in the amended and supplemental petition for review relate to the  
4 persistent violation of the fundamental, constitutional rights of Petitioners, caused and  
5 facilitated by Respondents’ conduct. All new allegations are substantially similar and closely  
6 related to the allegations in the original petition for review. Most significantly, the amended  
7 and supplemental petition for review is necessitated by Ecology’s failure to provide  
8 comprehensive relief in a manner that fulfills the agency’s constitutional, public trust and  
9 statutory responsibilities. Therefore, because the new facts and claims alleged in the amended  
10 and supplemental petition for review closely parallel the original allegations, supplementation  
11 and amendment of the petition for review is justified.  
12

## 13                                 **VI. CONCLUSION & REQUEST FOR RELIEF**

14         For the reasons set forth above, Petitioners respectfully request that the Court grant  
15 Petitioners’ leave to file the attached supplemental brief in support of its Motion for Order to  
16 Show Cause re: contempt, and to grant Petitioners leave to file the attached amended and  
17 supplemental petition for review.  
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19  
20 I certify that this memorandum contains 2588 words, in compliance with the Local  
21 Civil Rules. Respectfully submitted this 6<sup>th</sup> day of December, 2016.  
22

23  
24   s/ Andrea K. Rodgers  
25   Andrea K. Rodgers, WSBA #38683  
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  Seattle, WA 98117