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I. INTRODUCTION

In May 2010, after three years of extensive public involvement and inter-agency cooperation, the Puget Sound Regional Council (“PSRC”) adopted a Transportation Plan known as *Transportation 2040* (“*T2040*”). *T2040* reflects an analytically rigorous analysis of greenhouse gas emissions and includes specific strategies to reduce those emissions.

Plaintiffs’ entire challenge to *T2040* depends on two strained interpretations of RCW 70.235.020, which is part of the state’s greenhouse gas statute. First, even though RCW 70.235.020 includes no language assigning a “proportional share” of the state’s greenhouse gas emissions limits to certain sectors or geographic areas, Plaintiffs read into the statute a “proportional share” requirement in order to argue that PSRC violated that “requirement.” Plaintiffs may wish the law provided for this, but it does not.

Second, Plaintiffs claim that the language in RCW 70.235.020 that “the state shall limit emissions” is actually a mandate applicable to regional planning entities such as PSRC. However, not only is that an unsustainable interpretation of the statute, but as a factual matter, PSRC is a collection of local government representatives engaged in regional planning, and is not “the state.”

Resolution of these issues could have far-ranging consequences for all fourteen of the regional planning entities in Washington like PSRC, as well as the hundreds of counties and cities that make up those entities. If RCW 70.235.020 is a mandate to each of them, as would be the case under Plaintiffs’ creative interpretation of “the state,” and according to Plaintiffs, each one must somehow meet an unspecified “proportional share” of a state-wide limit, then this would result in sweeping new requirements well beyond a reasonable interpretation of the law.

1 Transportation Policy Board.² PSRC receives approximately 72 percent of its revenue from
2 federal grants, six percent from state grants, and the remaining 22 percent from dues paid by
3 PSRC members and from other local sources. PSRC at 00029206.
4

5 PSRC was not “created” by the state of Washington. Rather, PSRC was created by a
6 voluntary association of local governments in the region, as memorialized in an Interlocal
7 Agreement (the “Interlocal Agreement”). PSRC at 00028701. The Interlocal Agreement
8 establishes internal membership requirements, and procedures for governance of the agency.
9 PSRC at 00028705-11. Additionally, the Interlocal Agreement distinguishes between PSRC
10 and local and state governments, and sets out the relationship of PSRC to other levels of
11 government. PSRC at 00028711 (“In a collaborative process with citizens of the region,
12 interested groups and organizations, and local, regional and state government, the regional
13 agency prepares the [Regional Transportation Plan] and a regional growth management
14 strategy.”).
15
16

17 Local elected officials in the central Puget Sound region have participated in regional
18 planning since 1956, when the Puget Sound Regional Planning Conference was first formed
19 by the region’s county commissioners. The group reorganized several times since, including
20 the reorganization as PSRC in 1991, after enactment of the Growth Management Act and
21 concurrent with enactment of the federal Intermodal Surface Transportation Efficiency Act.
22 PSRC at 00028889-90.
23
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27 ² The Administrative Record contains documents that chart consideration of T2040 and the EIS throughout
28 the various PSRC Boards and working groups, including agendas and presentation materials from various
meetings of the Transportation Policy Board and Executive Board, among others.

1 As the regional transportation planning entity for the Puget Sound region, PSRC also
2 serves as the designated Metropolitan Planning Organization (“MPO”) under federal law and
3 as the designated Regional Transportation Planning Organization (“RTPO”) under state law.
4

5 On the federal level, the 1962 Federal-Aid Highway Act established that, as a
6 condition of federal funding, transportation projects in urbanized areas of 50,000 or more
7 persons must result from a continuing, comprehensive planning process undertaken
8 cooperatively by state and local governments. A key component of this collaborative process,
9 authorized in the Act, was the formation of MPOs, made up of representatives of local
10 government and governmental transportation authorities. 49 U.S.C. § 5303. PSRC’s
11 predecessor entity, then known as the Puget Sound Governmental Conference, was first
12 designated as an MPO in 1973. PSRC at 00028889.
13

14 On the state level, the legislature in 1990 authorized the creation of RTPOs that mirror
15 the metropolitan area planning performed by MPOs. RCW 47.80; *see also* PSRC
16 at 00028719. An RTPO is “the body designated by neighboring local jurisdictions within one
17 or more counties, through voluntary association, to achieve transportation coordination for the
18 region.” PSRC at 00028777. Where MPOs exist, they also function as the RTPO for the
19 region. Since 1991, PSRC has served as the RTPO for the central Puget Sound region. There
20 are 14 RTPOs in the state. PSRC at 00029215.
21

22 As the MPO and the RTPO for the central Puget Sound region, PSRC is required by
23 state and federal law to develop a long range transportation plan. 23 U.S.C § 134;
24 RCW 47.80.023(2), .030. *T2040* fulfills that requirement.
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1 **B. OVERVIEW OF *T2040*.**

2 *T2040* is a transportation plan for the four-county Puget Sound area to address
3 transportation needs over the next 30 years. Our region is expected to continue its pattern of
4 dramatic growth, by adding 1.5 million people and 1.2 million jobs by 2040. PSRC
5 at 00001209. Due to that growth, the demand for travel within and through the region is
6 expected to increase by about 40 percent by 2040. PSRC at 00003309.

7
8 *T2040* was developed to implement the regional growth strategy, VISION 2040, by
9 responding to three basic challenges: reducing congestion and improving regional mobility
10 while accommodating forecasted growth in population and employment; reconciling the need
11 for transportation facilities with their environmental impacts, including greenhouse gas
12 emissions linked to climate change; and developing a sustainable method of transportation
13 funding. PSRC at 00001212. Throughout the process of developing *T2040*, climate change
14 was identified as one of the key issues to be addressed. PSRC at 00003349.

15
16 Based on regional analysis, *T2040* identifies projects that can remedy unsafe
17 conditions, relieve roadway bottlenecks, expand transit options and facilities, advance High
18 Occupancy Vehicle use, expand bicycle and pedestrian modes of travel, and improve ferry
19 service. PSRC at 00001213. *T2040* does not itself implement or operate any particular
20 project or program; that is the responsibility of cities, counties, the state, federal agencies,
21 transit agencies, ports, tribal nations, and others. PSRC at 00001211.

22
23 After three years of public review, technical input, inter-agency consultation, and
24 evaluation of environmental impacts in a lengthy EIS, the PSRC General Assembly adopted
25 *T2040* in May 2010. *T2040* was based on the Preferred Alternative identified through the EIS
26 process, which included more transit service than any other alternative, miles of biking and
27
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1 walking facilities focused on access to transit stations and completing regional trail links,
2 replacement of several vulnerable roadways (Alaskan Way Viaduct and SR 520 floating
3 bridge), completion of missing links in the highway network, and expansion of some
4 roadways to support the regional growth strategy of concentrating growth in urban centers.
5 PSRC at 00001300-01. Over the 30-year life of *T2040*, new freeway and arterial lane miles
6 are proposed to increase by only 7 percent. PSRC at 00001361. The *T2040* financial strategy
7 relies on moving away from the unsustainable gas tax as the means of transportation funding,
8 and transitioning toward a new funding structure based on tolls and other charges. PSRC
9 at 00003313, 3320. A “central part” of *T2040* is a four-part strategy for reducing greenhouse
10 gas emissions. PSRC at 00003349-51.

13 **C. HOW WERE THE EIS AND *T2040* DEVELOPED?**

14 The first step in the process of developing a new regional transportation plan began in
15 June 2007. Once a public outreach effort was developed, a year-long EIS “scoping” process
16 was undertaken to determine the range of alternatives and environmental impacts to be
17 evaluated in the EIS on a new plan. PSRC at 00003769. PSRC held six public meetings in
18 2007 and early 2008 to receive public and agency comment on the scope of the EIS. *Id.* Over
19 950 comments were received from agencies and the public on a variety of topics, including
20 greenhouse gas emissions. PSRC at 00003770. *See also* PSRC at 00002332-42.

23 Before and throughout the scoping process, PSRC sought the input of environmental
24 and resource agencies, and advocacy groups. PSRC at 00003758. PSRC also convened a
25 variety of subject matter experts, and technical and working groups, to assist with various
26 aspects of the issue identification and analysis. *See* PSRC at 00003761. One such advisory
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1 group was the Climate Change/Air Quality Technical Working Group that met many times
2 throughout development of the EIS and plan, and provided input to PSRC.³

3
4 The next phase, between January 2008 and May 2009, was an intensely analytical one
5 to develop the alternatives for study in a Draft EIS. PSRC at 00003770. Over an 18-month
6 period, PSRC staff worked with other jurisdictions, interest groups, and the public to define
7 the alternatives and also completed detailed modeling and analysis. *Id.* PSRC employs an
8 integrated suite of computer models that incorporate population, employment and travel data
9 for the entire region, to produce estimates of vehicle speeds and volumes for the entire
10 transportation network for five time periods throughout the day.⁴ The travel component of the
11 modeling suite is built on a regional household survey of travel behavior and is calibrated to
12 observed traffic counts and highway speeds. Among other things, the model computes data to
13 help policy makers analyze pricing strategies and more accurately estimate trip choice for a
14 variety of modes including transit, ferry, and nonmotorized as well as motorized travel. The
15 next step is to identify emission factors at different speeds using the Environmental Protection
16 Agency's ("EPA") Motor Vehicle Emission Simulator ("MOVES"), which provides state-of-
17 the-art estimates of emissions from motor vehicles based on extensive research and data.
18 Applying MOVES emission analysis to regional vehicle miles traveled and speed data results
19 in estimates of total emissions.
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26 ³ For examples of the work of this group in particular, *see* PSRC at 00007042, 7235, 7262, 7531, 7811,
8286, 9349, and 10108.

27 ⁴ This modeling is highly technical, and only a brief summary is provided above. A 19-page description of
28 the modeling framework is provided at PSRC at 00002301-19, and a 14-page description entitled "Data Analysis
and Forecasting at the PSRC, New Tools within an Integrated Modeling Framework" is provided at PSRC
at 00003740-54.

1 As part of this analytical phase, PSRC staff made presentations on the draft
2 alternatives to 147 jurisdictions and interest groups. PSRC at 00003770. This phase
3 culminated with issuance of a Draft EIS in May 2009 that described the environmental
4 impacts (including greenhouse gas emissions) for a “Baseline” alternative (No Action or
5 Existing Conditions), and five alternatives with varying transportation improvements and
6 programs.

7
8 The public and agency comment period on the Draft EIS occurred from May to July,
9 2009. In addition to general public notice of the availability of the Draft EIS and opportunity
10 to comment, five workshops were conducted throughout the region specifically to reach low
11 income and minority populations, and those with special transportation needs. PSRC
12 at 00003771, 1307. Over 2,000 comments were provided on the Draft EIS, and were
13 reviewed by PSRC. PSRC at 00001307. Based on public and agency comment, technical
14 input, and additional modeling, staff then added a Preferred Alternative to the Final EIS, to be
15 evaluated alongside the Baseline and five alternatives from the Draft EIS. *Id.* A draft of
16 *T2040* itself was released for public comment, and the Final EIS was issued in March 2010.
17 PSRC at 00003755-73. The Final EIS includes a main volume and appendices totaling over
18 1,600 pages. PSRC at 00001185-2809. Based on comments received, changes were made to
19 the draft of *T2040*, and in May 2010, PSRC adopted it in final form. PSRC at 00003773. The
20 100-page Plan is in the Record at PSRC 00003295-4293.

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24 **D. WHAT KEY INFORMATION WAS LEARNED FROM DEVELOPMENT OF THE EIS
25 AND *T2040*?**

26 In analyzing greenhouse gas emissions, PSRC consulted a wide variety of technical
27 materials, studies, and policy papers from international, national, regional, and local sources.
28

1 The materials from the Administrative Agency Record listed as Category 4 documents reflect
2 many of the background documents considered by PSRC in developing T2040 and its EIS.
3 See Index to Record at 2 and 48-53. A report by the name of “*Moving Cooler*,” prepared by
4 the Urban Land Institute with thirteen co-sponsors, provided an important source of
5 information and check for locally modeled results. The *Moving Cooler* report is PSRC
6 at 00022275-374. The Appendices to *Moving Cooler* are PSRC at S00029331, 29355.
7

8 The purpose of the *Moving Cooler* study was to quantify the effectiveness of various
9 transportation strategies to reduce greenhouse gases, focusing on strategies to reduce miles
10 traveled, shift travel to more efficient modes of transportation, and to improve the efficiency
11 of the transportation network. PSRC at 00022287. The technical appendix to the *Moving*
12 *Cooler* study, entitled “*An Analysis of Transportation Strategies for Reducing Greenhouse*
13 *Gas Emissions*” identified bundles of strategies that were grouped into three scenarios:
14 expanded current practice, aggressive, and maximum effort. PSRC at S00029341-54.
15

16 The conclusion from the *Moving Cooler* study was that even under the maximum
17 effort scenario, only a 24 percent reduction in greenhouse gases from surface transportation
18 could be achieved by 2050, as compared to the Year 2005 study baseline. PSRC at 00022291.
19 This level of reduction resulted in greenhouse gas emissions from surface transportation *that*
20 *were still above 1990 emission levels*. PSRC at 00022292 (emphasis added). PSRC took note
21 of this conclusion. PSRC at 00004265. Just to achieve even this level of reduction in
22 greenhouse gas emissions from surface transportation, the maximum effort scenario assumed
23 all the following measures had been implemented:
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- 27 • Higher parking costs, including a minimum fee of \$200.00 per year for residential
28 on- street parking and a Federal tax on all commercial parking of \$5.00 per day,
per space;

- 1 • An increased gas tax of \$2.71 per gallon;
- 2 • A vehicle toll for entering all downtowns, employment centers, and retail centers;
- 3 • A peak hour toll in urban and rural areas of 65 cents per mile;
- 4 • A 5 cents per mile toll on all rural interstates regardless of congestion;
- 5 • A 12 cents per mile Vehicle Miles Traveled (“VMT”) fee;
- 6 • Increased land use densities;
- 7 • Increased traffic calming and bike and walkway improvements;
- 8 • Converting highway lanes to High Occupancy Vehicle lanes; and
- 9 • Expanded transit and reduced transit fares.

10 PSRC at S00029341-54.

11
12
13 *Moving Cooler* demonstrates that it is possible to reduce greenhouse gas emissions
14 from on-road vehicles through a variety of strategies, but even with extraordinary measures,
15 the reductions are still not enough to reduce transportation emissions to 1990 levels. PSRC
16 at 00022292. *Moving Cooler* also demonstrates the large cost to the individual for a
17 significant reduction in greenhouse gases through transportation approaches. The *Moving*
18 *Cooler* analysis was informative to PSRC as to the level of greenhouse gas reduction that
19 could be achieved through transportation planning alone, without also making changes in
20 vehicle fuel (less carbon in the fuel) or changes in vehicle fleet (more electric or low-emission
21 vehicles).

22
23
24 In addition to *Moving Cooler*, PSRC considered a report by the Washington State’s
25 2008 Climate Advisory Team, called “*Leading the Way: Implementing Practical Solutions to*
26 *the Climate Change Challenge.*” PSRC at 00004265. “*Leading the Way*” is in the Record at
27 PSRC 00023286. *Leading the Way* concluded that: “The sector-specific ‘most promising’
28

1 policies recommended here can ‘complement, but cannot supplant’ this centerpiece [market-
2 based] policy, but they alone cannot (and are not intended to) achieve the longer-term goals in
3 the absence of this market signal.” PSRC at 00023299.
4

5 Consistent with the *Moving Cooler* study, and consistent with the emphasis in *Leading*
6 *the Way* on the critical importance of a market-based strategy to reduce greenhouse gas
7 emissions, PSRC research and analysis reached the same conclusions. As early as
8 January 2008, PSRC staff briefed the Transportation Policy Board to advise that even with
9 aggressive land use changes, complete bicycle/pedestrian networks, and substantial transit
10 improvements, emissions from surface transportation would still continue to rise, and thus be
11 above baseline levels. PSRC at 00005931.
12

13 **E. WHAT DOES THE EIS SAY ABOUT GREENHOUSE GAS EMISSIONS?**

14 The state emissions limits in RCW 70.235.020 are specifically discussed in the
15 Executive Summary, Chapter 6, and in Appendix L to the EIS. PSRC at 00001221, 1456,
16 2459. The EIS lists one of the objectives of *T2040* as: “find creative ways to address climate
17 change.” PSRC at 00001210. In listing the “challenges” addressed by the *T2040* alternatives,
18 the EIS called out “Environmental Concerns: Reduce greenhouse gas emissions linked to
19 climate change and the water quality impacts on Puget Sound.” PSRC at 00001212. In
20 describing “areas of controversy and uncertainty,” the EIS noted that “the state has not yet
21 assigned [greenhouse gas emissions] targets for the regions of the state, or for individual
22 sectors (transportation, energy, housing, etc.).” This section also stated: “Notwithstanding the
23 absence of specific requirements and guidance, the PSRC Transportation Policy Board has
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1 taken a proactive stance to address the state’s climate change goals in the Transportation 2040
2 Update process.”⁵ PSRC at 00001221.

3 The Base Year for the entire *T2040* analysis was 2006 because the travel forecasts that
4 are an important part of the overall modeling were based on extensive 2006 Household
5 Activity Survey data for the entire region, which is the most recent data available. PSRC
6 at 00002444-48, 3334. The 2006 Survey was of 4,700 households in the region and consisted
7 of household and person demographics, a 2-day travel and activity diary, attitude
8 questionnaires, and a stated preference/choice experiment survey.⁶ PSRC at S00030583-93.
9
10 In determining how various alternative projects and programs can affect the number of cars
11 and trucks on the road in the future, the comparison in *T2040* is to the fully documented 2006
12 Base Year for all elements of the analysis. PSRC did not have complete data, or the same
13 quality of data, for 1990 when discussing RCW 70.235.020, and so used 2006 as its Base
14 Year. *T2040* referred to 2006 as a “surrogate” for 1990, as 2006 is the closest year to 1990
15 for which PSRC had complete data. *See, e.g.*, PSRC at 00003351.

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17
18 The EIS Executive Summary included a chart showing the annual tons of carbon
19 dioxide and other emissions under the 2006 Base Year and all other *T2040* alternatives, and a
20 summary of the differences between the alternatives. PSRC at 00001236. The carbon
21 dioxide emission levels for all of the alternatives are higher than the 2006 Base Year. *Id.*
22
23 This same information is included in the main body of the EIS, in Chapter 6 Air Quality and
24 Climate Change, with additional detail. PSRC at 00001445-73. The EIS noted that a variety
25 of strategies are needed to effectively reduce emissions from the transportation sector, and
26

27 ⁵ PSRC referred to the emission reduction limits as goals, rather than requirements, since the statute neither
28 states nor implies that the emission reduction limits are a mandate to PSRC.

⁶ A more detailed explanation of the 2006 Household Survey is provided at PSRC at S00030583-93.

1 that the types of strategies within PSRC's long-range planning function (land use, user fee,
2 and transportation choice strategies) are not by themselves able to reduce emissions below
3 2006 levels. PSRC at 00001221-22, 1467-73. In fact, PSRC's analysis showed that emission
4 levels will continue to rise over the years due to population growth, and the reductions are to
5 the degree of increase. PSRC at 00003349. Only with technological improvements to
6 vehicles and fuels, including changes to the vehicle fleet (significantly more energy-efficient
7 cars) would emission levels fall below 2006 levels. PSRC at 00001222. The EIS notes that
8 PSRC "does not have a direct role in determining the region's future approach to vehicle and
9 fuel technologies." *Id.* However, the EIS went on to note: "Nonetheless, in response to
10 comments and in an effort to encourage greenhouse gas reduction efforts, PSRC has tested
11 additional strategies to reduce greenhouse gas emissions." *Id.*

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13
14 The Executive Summary detailed the practical and methodological difficulties with
15 determining whether any alternative could reduce emissions below 2006 levels. *Id.* For
16 example, the EIS notes that the limits in RCW 70.235.020 are state-wide in nature and there
17 has been no determination of how that state-wide limit would translate into limits for
18 particular sectors or geographic areas. *Id.* The Executive Summary Conclusion on the
19 greenhouse gas topic is as follows:
20
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22 PSRC has taken a proactive stance at addressing the reduction of greenhouse
23 gas emissions, beginning with the multicounty planning policies and the
24 Regional Growth Strategy contained in VISION 2040 and continuing with the
25 analysis work and investment strategies contained in Transportation 2040.
26 This is an emerging area, with research and legislation continuing to evolve at
27 both the state and national levels. PSRC's boards have directed that
28 Transportation 2040 should be flexible and adaptable in order to respond to
new guidance and directions on a variety of issues, including climate change.

PSRC at 00001223.

1 In addition, many comment letters on the Draft EIS discussed greenhouse gas issues,
2 urging that *T2040* be aggressive in advancing state emission limits.⁷ For example, EPA
3 commented that a preferred alternative should be developed that was “fully responsive” to
4 “State reduction goals for greenhouse gases.” PSRC at 00002523. Also, the Puget Sound
5 Clean Air Agency urged that the preferred alternative should “build on the most aggressive
6 option” and “clearly show how we can achieve our air quality and climate goals.” PSRC
7 at 00002585. All of the agency and public comments on the Draft EIS were considered in
8 preparing the Final EIS and *T2040*. PSRC at 00003771.
9

10
11 In the Department of Ecology’s December 2010 Report to the Governor and the
12 Washington legislature (“Ecology 2010 Report”), Ecology provided this comment on the
13 *T2040* EIS:

14
15 PSRC took a proactive stance to address the state’s GHG limits and VMT
16 reduction benchmarks in the Transportation 2040 process. Their
17 Environmental Impact Statement created as part of the SEPA process
18 evaluated each planning scenario for GHG emissions as well as VMT. The
19 data produced an evaluation process that helped inform the region and state on
20 potential benefits of a combination of strategies in reducing emissions and
21 VMT.

22 PSRC at S00029511.

23 ⁷ See, e.g., letters from EPA (PSRC at 00002523), Department of Ecology (PSRC at 00002534), Puget
24 Sound Clean Air Agency (PSRC at 00002586), and City of Seattle (PSRC at 00002763). An unsigned letter
25 from Ecology urged PSRC to develop a plan that “ensures GHG emissions consistent with the region’s
26 proportional share of the transportation sectors GHG emissions reductions.” PSRC at 00002534. PSRC had a
27 follow up discussion with Ms. Janice Adair, Special Assistant on Climate Change to the Director of Ecology,
28 regarding the reference to “proportional share.” That discussion was by telephone and so there is not a document
in the record memorializing it. The Declaration of Janice Adair (“Adair Decl.”) is filed herewith to document
Ecology’s follow up comments on “proportional share.”

This Declaration is allowed by Stipulation B.2 in the November 5, 2010 Stipulation and Agreed Order
Amending Case Schedule which allows the parties to include declarations as part of their briefing in order to
raise and respond to affirmative defenses. PSRC’s Answer raised the affirmative defense of failure to state a
claim upon which relief can be granted. Answer at 5. The Adair Declaration is part of PSRC’s response to
Plaintiffs’ claim that the statute requires “proportional share” reductions.

1 **F. WHAT DOES T2040’S FOUR-PART GREENHOUSE GAS STRATEGY INCLUDE?**

2 In drafting T2040, PSRC decision makers had the benefit of the EIS and input from a
3 variety of agencies and technical working groups, received multiple briefings, and heard
4 many public comments on climate change, greenhouse gas emission limits, greenhouse gas
5 reductions possible through T2040 planning, and the types of non-PSRC, federal and state
6 legislative measures that would be required to achieve even greater reductions in emissions.
7 T2040 discusses the emissions limits in RCW 70.235.020 in three places. PSRC
8 at 00003349-50, 3459, 4265. Climate change is noted as a “key issue.” PSRC at 00003349.
9 The state’s emissions limits, and the relationship of the EIS alternatives to them, was
10 specifically discussed at no fewer than eight separate Transportation Policy Board and
11 Executive Board meetings. PSRC at 00005931, 5934, 10746, 10752, 11212-16, 11491,
12 11493, 15852, 15388, 15407, 15409, 15910, 15952, 16183-85.
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16 The culmination of the process was adoption of a four-part greenhouse gas strategy as
17 part of T2040. T2040 states: “An evaluation of greenhouse gas emissions and vehicle miles
18 traveled per capita was conducted in the process to develop Transportation 2040. The results
19 of this analysis and additional research have produced a four-part greenhouse gas strategy that
20 is a central part of Transportation 2040.” *Id.*
21

22 The four-part greenhouse gas reduction strategy centers on Land Use (implementing
23 regional planning policies favoring compact and concentrated growth to achieve a better jobs-
24 to-housing ratio), User Fees (phasing in of tolls and other roadway user fees), Choices
25 (increasing investments in transit, regional light rail, and walking and bicycle facilities), and
26 Technology. PSRC at 00003349-51. The first three components are directly related to the
27 adopted provisions in T2040. However, the Technology component goes beyond PSRC’s
28

1 transportation planning role and recognizes that PSRC can assist others in evaluating
2 improvements to fuels and the vehicle fleet, which “will play a crucial role in reducing
3 emissions.” PSRC at 00003350. PSRC’s research and analysis was conducted in
4 consultation with the EPA, WSDOT, Ecology, and the Puget Sound Clean Air Agency. *Id.*
5 The PSRC-led research has shown how much additional emissions reductions can be achieved
6 through increased use of electric and other alternative fuel vehicles, less carbon-intensive
7 fuels, and improved fuel efficiency of passenger and freight fleets. PSRC at 00003351.
8 *T2040* commits PSRC to continue to work with agencies to identify strategies to reduce
9 greenhouse gas emissions. *Id.* In addition, *T2040* commits PSRC to revisiting elements of
10 the adopted plan as new information is developed, and in response to federal and state
11 legislative actions. PSRC at 00003317, 3351, 3425.
12
13

14 The Ecology 2010 Report provided this comment on the PSRC four-part greenhouse
15 gas (“GHG”) strategy:
16

17 Transportation 2040’s four-part greenhouse gas reduction strategy is flexible,
18 and is designed to incorporate anticipated specific guidance to the region and
19 the transportation sector. Analysis shows that with compact land use patterns,
20 aggressive implementation of pricing and technology, along with increased
21 transportation choices, the strategy has the potential to reduce regional GHGs
22 from transportation by up to 28 percent below 2006 levels. These results show
23 that Transportation 2040 is on the right track toward reducing GHG emissions
24 associated with transportation in the Puget Sound region.

25 PSRC at S00029511.

26 **III. STATEMENT OF THE ISSUES**

27 **A. GREENHOUSE GAS EMISSIONS.**

28 Plaintiffs challenge compliance with RCW 70.235.020 under a constitutional writ of
review, raising the following issues:

1 **V. STANDARD OF REVIEW AND BURDEN OF PROOF**

2 **A. CONSTITUTIONAL WRIT OF REVIEW.**

3 Plaintiffs cite *City of Des Moines v. Puget Sound Regional Council*, 97 Wn. App. 920,
4 988 P.2d 993 (1999), *review denied*, 140 Wn.2d 1022 (2000), for the standard of review:
5 whether the action of a local legislative body was either illegal or arbitrary and capricious,
6 depending on the issue presented. Plaintiffs' Hearing Memorandum at 21. Plaintiffs'
7 constitutional writ claim asserts that PSRC's adoption of *T2040* violated RCW 70.235.020.
8 Because this claim hinges on the interpretation of that statute, it is to be reviewed under an
9 error of law standard.
10

11 It is unclear whether Plaintiffs also contend that PSRC's adoption of *T2040* was
12 arbitrary and capricious. If they do, the arbitrary and capricious standard of review must be
13 applied:
14

15 An action is arbitrary or capricious when the legislative body reaches its decision
16 willfully and unreasonably, without consideration and in disregard of facts or
17 circumstances. A decision reached after due consideration on a matter upon which
18 there is room for differing opinions is not arbitrary or capricious. This is so even
19 though a reviewing court may believe the decision is erroneous.

20 *Sparks v. Douglas County*, 127 Wn.2d 901, 908, 904 P.2d 738 (1995). This standard of
21 review is very deferential to PSRC.

22 Finally, the party asserting the invalidity of agency action has the burden of proof,
23 *Torrance v. King County*, 136 Wn.2d 783, 790, 966 P.2d 891 (1998), a point that Plaintiffs
24 never acknowledge. In particular, our Supreme Court has noted that "one who seeks to
25 demonstrate that action is arbitrary and capricious must carry a heavy burden." *Pierce County*
26 *Sheriff v. Civil Serv. Comm'n of Pierce County*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983).
27
28

1 **B. SEPA.**

2 Plaintiffs challenge the adequacy of the T2040 EIS under the SEPA. The adequacy of
3 an EIS is a question of law, reviewed *de novo*. See *Klickitat County Citizens Against*
4 *Imported Waste v. Klickitat County*, 122 Wn.2d 619, 633, 860 P.2d 390 (1993). However,
5 Washington courts have clarified that the *de novo* review must still give “substantial weight”
6 to the agency’s determination of EIS adequacy. See, e.g., *Klickitat County Citizens*,
7 122 Wn.2d at 633; see also *Solid Waste Alternative Proponents (SWAP) v. Okanogan County*,
8 66 Wn. App. 439, 442, 832 P.2d 503 (1992) (“Appellate review, however, is not totally
9 unfettered. Decisions of an agency regarding the adequacy of an EIS are ‘accorded
10 substantial weight.’”). This is in accord with the statutory requirement set forth in SEPA.
11 RCW 43.21C.090 (“In any action involving . . . the adequacy of a ‘detailed statement’, the
12 decision of the governmental agency shall be accorded substantial weight.”).

13 Plaintiffs attempt to turn the language of the courts around, stating that although
14 substantial weight must be given to the agency’s determination under SEPA, the decision is
15 “ultimately a question of law for the court to determine *de novo*.” Plaintiffs’ Hearing
16 Memorandum at 21. By reversing the order in which courts customarily present this standard
17 of review, Plaintiffs diminish the clear importance that courts place on the “substantial
18 weight” requirement. Contrary to Plaintiffs’ characterization, the accurate standard for this
19 type of SEPA challenge is as follows: “*Although the review is de novo, the court must give*
20 ‘substantial weight’ to the agency’s determination that an EIS is adequate under SEPA.”
21 *Glasser v. City of Seattle*, 139 Wn. App. 728, 740, 162 P.3d 1134 (2007) (emphasis added).
22 Accordingly, while this Court will review *de novo* the issue of EIS adequacy, the Court must
23 give substantial weight to the determinations made by PSRC. Plaintiffs bear the burden of
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1 demonstrating that the EIS is inadequate even despite the substantial weight to be accorded to
2 PSRC.

3
4 **VI. ARGUMENT ON RCW 70.235.020**

5 The crux of Plaintiffs' argument is that RCW 70.235.020 requires greenhouse gas
6 emissions reductions in *each* sector of Washington's economy and *each* geographic region of
7 the state in an amount proportionate to that sector's or region's share of total emissions. In
8 addition, Plaintiffs argue that the statutory emissions limits apply to individual entities that
9 they contend make up "the state." Neither argument is supported by the statute, and Plaintiffs
10 cannot support their claim that adoption of *T2040* was illegal.
11

12 **A. ADOPTION OF *T2040* WAS NOT ILLEGAL BECAUSE RCW 70.235.020 SETS
13 GREENHOUSE GAS EMISSIONS LIMITS FOR THE STATE AS A WHOLE.**

14 **1. RCW 70.235.020 Sets "Overall" Emissions Limits for the State.**

15 Plaintiffs claim that PSRC violated RCW 70.235.020 when it adopted *T2040*. To
16 evaluate Plaintiffs' claim, the Court must determine what RCW 70.235.020 means. Where
17 the meaning of the statute is "plain on its face, then the court must give effect to that plain
18 meaning as an expression of legislative intent." *City of Olympia v. Drebeck*, 156 Wn.2d 289,
19 295, 126 P.3d 802 (2006) (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d
20 1, 9-10, 43 P.3d 4 (2002)). Here, the plain meaning of the statute can be derived from the
21 language that the legislature used in the statute.
22

23 RCW 70.235.020 states in relevant part:

24 (1)(a) The state shall limit emissions of greenhouse gases to achieve the
25 following emission reductions for Washington state:

26 (i) By 2020, reduce *overall emissions* of greenhouse gases in the state to
27 1990 levels;

28 (ii) By 2035, reduce *overall emissions* of greenhouse gases in the state to

1 twenty-five percent below 1990 levels;

2 (iii) By 2050, the state will do its part to reach global climate stabilization
3 levels by reducing *overall emissions* to fifty percent below 1990 levels, or
4 seventy percent below the state's expected emissions that year.

5 *See* RCW 70.235.020(1)(a) (emphasis added).

6 Each of the three greenhouse gas emissions reduction limits in the statute applies to
7 “overall” emissions in the state. Based on the plain meaning of this language, when the
8 legislature required reductions in “overall” greenhouse gas emissions, it required reductions
9 across the state as a whole, without regard to the geographic region or to the sector in which
10 they occur. Those reductions could come from many sources, or from just one. They could
11 come from a single sector or geographic area, or from many. The legislature required only
12 that state-wide reductions as a whole add up to the specified levels.
13

14 The statutory interpretation that Plaintiffs argue for – that the legislature required
15 proportionate reductions for each sector and geographic area – flatly ignores the legislature’s
16 consistent use of the word “overall” when referring to greenhouse gas emissions reductions.
17 But ignoring “overall” violates one of the central principles of statutory construction: that
18 each word in a statute is there for a reason. “Statutes must be construed so that all the
19 language is given effect and no portion is rendered meaningless or superfluous.” *See Kilian v.*
20 *Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002). Because Plaintiffs’ interpretation of
21 RCW 70.235.020 gives no meaning to the word “overall,” their interpretation cannot be
22 correct.
23
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1 **2. Nothing in RCW 70.235.020 Sets Limits on Greenhouse Gas**
2 **Emissions that Apply Proportionately to Specific Sectors or**
3 **Geographic Areas.**

4 Not only do Plaintiffs disregard the legislature’s use of “overall” when referring to
5 greenhouse gas emissions reductions, but they also fail to point out any provision of the
6 statute that could be read to set proportionate limits applicable to specific sectors, geographic
7 areas, or government entities. In fact, there is no such provision. Plaintiffs’ reading of
8 RCW 70.235.020 reflects their own policy preferences, not the law as written. Nothing in
9 RCW 70.235 requires that the state meet the greenhouse gas emissions limits by reducing
10 emissions from particular sources or regions, or that reductions be made proportionately.
11

12 To the contrary, the legislature made clear that reductions should *not* be made
13 proportionately. It stated in the findings section of RCW 70.235 that the state will, among
14 other things, “reduce emissions at the lowest cost to Washington’s economy, consumers, and
15 businesses.” *See* RCW 70.235.005(3)(c). The legislature also expressed its intent that the
16 state will “minimize the potential to export pollution, jobs, and economic opportunities.” *Id.*
17

18 To reduce emissions at the “lowest cost” necessarily requires that the state consider
19 various options, and eliminate those that are more expensive in favor of those that are less
20 expensive. Similarly, if the state must ensure that its greenhouse gas emissions reduction
21 efforts do not send pollution, jobs, and economic opportunities to other states, it must be able
22 to discriminate among alternatives on that basis. There are many sectors causing greenhouse
23 gas emissions that must be considered: electricity, residential/commercial/industrial,
24 transportation, the fossil fuel industry, industrial processes, waste management, agriculture,
25 and forestry. PSRC at 00021413.
26
27
28

1 There would be no way to further this legislative intent if Plaintiffs’ reading of the
2 statute were correct. If the state must make proportionate reductions in each sector and
3 geographic area, then it must do so regardless of cost and regardless of whether pollution,
4 jobs, and economic opportunities were sent elsewhere. Under Plaintiffs’ interpretation, the
5 state would have to reduce greenhouse gas emissions proportionately in each sector and each
6 geographic area of the state even if it could reduce overall emissions at a lower cost by
7 focusing on certain sectors or geographic areas. That interpretation is contrary to legislative
8 intent.
9
10

11 PSRC is not alone in rejecting Plaintiffs’ interpretation of the statute. Ecology agrees
12 that reductions cannot be both proportionate *and* made at the “lowest cost.” In the Ecology
13 2010 Report to the legislature, Ecology wrote that:

14 Ecology does not believe each sector should be required to reduce emissions
15 consistent with its proportionate share of emissions. Instead, we must work to
16 identify the lowest-cost and most easily implemented reduction strategies.

17 PSRC at S00029466. This statement is consistent with the greenhouse gas emissions
18 reduction plan that Ecology developed in 2008 (“Ecology 2008 Plan”), which does not call for
19 proportionate reductions by sector or geographic region. Instead, it calls for adoption of an
20 emissions trading program that will allow the marketplace to determine which reductions can
21 be made at the lowest cost. As the agency that the legislature charged with implementing the
22 greenhouse gas emission reduction statute, Ecology’s interpretation of RCW 70.235.020 is
23 entitled to “great weight.” *See Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d
24 568, 593, 90 P.3d 659 (2004) (agency’s interpretation of a statute is accorded great weight
25 when the statute is within the agency’s special expertise).
26
27
28

1 In sum, this Court should not construe RCW 70.235.020 in a vacuum, but should
2 consider the entire statute when ascertaining the subsection’s meaning. *See Campbell &*
3 *Gwinn*, 146 Wn.2d at 11. Among other provisions, the Court should consider the legislature’s
4 statement of intent, which “can be crucial” to interpreting the statute. *See Towle v. Dep’t of*
5 *Fish & Wildlife*, 94 Wn. App. 196, 207, 971 P.2d 591 (1999). Plaintiffs’ interpretation of the
6 statute directly conflicts with the legislature’s statement of intent in RCW 70.235.005(3) that
7 greenhouse gas emission reductions should be made at the “lowest cost” and while
8 minimizing the potential to export pollution, jobs, and economic opportunities.
9
10

11 **3. PSRC’s Planning Does Not Include All Aspects of the**
12 **Transportation Sector.**

13 Plaintiffs also read RCW 70.235.020 as holding each entity of “the state” responsible
14 for reducing emissions in the sector and geographic area over which it exercises jurisdiction,
15 and further assert that PSRC’s jurisdiction is “transportation in the Puget Sound area.”
16 Plaintiffs’ Hearing Memorandum at 48. Once again, there is no support for Plaintiffs’
17 construction of the statute. PSRC is not “the state” – a point discussed at length below – and
18 even if it were, it would be absurd to require PSRC to reduce greenhouse gas emissions
19 throughout the transportation sector in the Puget Sound region.
20

21 Ecology has identified three ways to reduce greenhouse gas emissions from on-road
22 vehicles: reducing vehicle miles traveled (“VMT”); increasing the use of clean fuels, such as
23 biodiesel; and increasing the use of clean vehicles, such as electric cars. PSRC at S00029506-
24 11. However, PSRC’s jurisdiction does not extend to the fuel supply or to the development,
25 sale, or use of clean vehicles. PSRC at 00001222. If PSRC were required to reduce
26 greenhouse gas emissions from on-road vehicles in the Puget Sound region in an amount
27
28

1 proportionate to those vehicles' share of current emissions, PSRC would have to do so relying
2 exclusively on just one of the three recognized methods for such reductions.

3
4 Moreover, the percentage of state-wide greenhouse gas emissions attributable to
5 transportation in the Puget Sound region identified by Plaintiffs includes emissions from all
6 modes of transportation – cars, buses, trucks, ships and other vessels, aircraft, and trains.

7 However, PSRC does not have jurisdiction over truck movements at industrial facilities, cargo
8 handling equipment, ocean going vessels, commercial or military aircraft, or freight rail. To
9 hold PSRC responsible for the proportionate reduction of greenhouse gas emissions from the
10 transportation sector in the Puget Sound region would mean that all reductions would have to
11 come from the on-road transportation modes that PSRC planning does address: cars, buses,
12 and trucks. This would be an absurd result, one that the legislature could not have intended
13 when it enacted RCW 70.235.020. *See Kilian*, 147 Wn.2d at 21 (“The court must also avoid
14 constructions that yield unlikely, absurd or strained consequences”). Since statutes must be
15 interpreted so as to avoid absurd results, this Court must reject Plaintiffs’ interpretation of
16 RCW 70.235.020.
17
18

19
20 **4. RCW 70.235.020 Is Not Self-Implementing.**

21 In arguing that RCW 70.235.020 requires PSRC to reduce transportation-related
22 greenhouse gas emissions in the Puget Sound region by a proportionate share, Plaintiffs
23 implicitly argue that the statute is self-implementing – that is, that passage of the statute alone
24 required PSRC to make the mandated greenhouse gas emission reductions. But, as explained
25 below, Plaintiffs’ argument overlooks other provisions of the statute demonstrating that when
26 the legislature adopted the limits in RCW 70.235.020, it envisioned further work to determine
27 how, and by whom, the statutory emission reduction limits would be met.
28

1 cannot be read to require individual entities of “the state” to “take those actions necessary to
2 achieve the emission reductions.”⁸

3 ***b. The legislature intended that an emissions trading program be***
4 ***the centerpiece of the greenhouse gas emissions reduction***
5 ***plan.***

6 Although it required Ecology to develop a plan describing those actions necessary to
7 meet the greenhouse gas emission reductions limits in RCW 70.235.020, the legislature
8 intended that the central feature of that plan be a “regional multisector market-based system,”
9 or an emissions trading program. RCW 70.235.030(1)(a) provides that:

11 The director [of ecology] shall develop, in coordination with the western
12 climate initiative, a design for a regional multisector market-based system to
13 limit and reduce emissions of greenhouse gas consistent with the emission
reductions established in RCW 70.235.020(1).

14 The Ecology 2008 Plan relied heavily on an emissions trading program to meet the statutory
15 reduction limits. PSRC 00023908 (recommending that a cap-and-trade program be
16 implemented as “a centerpiece policy to address emissions throughout the economy”).⁹ In
17 2009, the legislature considered but failed to adopt a bill that would have created an emissions
18 trading program.¹⁰ PSRC at S00029466.

21 ⁸ Plaintiffs point out that the statute allows the state to proceed with actions to reduce greenhouse gas
22 emissions even before the legislature approves Ecology’s plan, as long as the actions can be taken using existing
23 statutory authority. *See* Plaintiffs’ Hearing Memorandum at 46. However, the statute says only that such actions
24 “may” proceed. *See* RCW 70.235.020(1)(b). Furthermore, since this authorization appears in a section that
assigns responsibility to Ecology, it appears that the only actions that “may” proceed are those of Ecology. Yet
Plaintiffs argue that PSRC was *required* to proceed with such actions. *See* Plaintiffs’ Hearing Memorandum
at 46-47. The statute does not support Plaintiffs’ position.

25 ⁹ The Ecology 2008 Plan also proposed backup options in case the legislature chose not to implement the
emissions trading program. Those options include a carbon tax and stricter regulation of greenhouse gas
26 emissions under the Clean Air Act. PSRC at 00023956-60.

27 ¹⁰ The emissions trading program may yet be authorized. After the emissions trading bill failed, Governor
Gregoire issued an executive order requiring Ecology to continue participating in the Western Climate Initiative
“to develop a regional greenhouse gas emission reduction program.” *See* Executive Order 09-05 at 2. The
28 Executive Order also required Ecology to pursue other strategies to help meet the greenhouse gas emission
reduction limits in RCW 70.235.020, such as negotiating with the single largest source of greenhouse gas

1 While the emissions trading program does not yet exist, the fact that RCW 70.235
2 required Ecology to develop a proposal for such a program tells us what the legislature had in
3 mind when it enacted the statute. The legislature intended that an emissions trading program
4 would “limit and reduce emissions” as required by RCW 70.235.020(1). *See*
5 RCW 70.235.030(1)(a). That means that some portion of the overall reductions required by
6 statute would come from the emissions trading program. Until the size of that portion is
7 known, the size of the portion to be addressed through other reduction efforts is also not
8 known. For example, if an emissions trading program was expected to reduce emissions by,
9 say, 85 percent of the total specified in the statute, then other efforts would need to address
10 only the remaining 15 percent of the reduction. Plaintiffs’ argument erroneously assumes that
11 PSRC is responsible for 100 percent of the reductions specified in the statute.
12
13

14
15 ***c. Actions already taken will reduce greenhouse gas emissions
16 by 45 percent of the amount required by 2020.***

17 Plaintiffs’ argument that RCW 70.235.020(1)(a) requires each state agency to make
18 proportionate greenhouse gas emissions reductions also ignores the steps that have already
19 been taken to reduce emissions. Just as the legislature expected that some of the mandated
20 greenhouse gas emission reductions would come from an emissions trading program, it also
21 understood that other efforts to reduce emissions were already underway. The legislature
22 made the following finding:
23

24 It is also the intent of the legislature that the regional multisector market-based
25 system recognize Washington’s unique emissions portfolio, including the
26 state’s hydroelectric system, the opportunities presented by Washington’s
abundant forest resources and agriculture land, and the state’s leadership in

27 emissions in the state, TransAlta Centralia Generation LLC, for an agreed order that would impose greenhouse
28 gas emission reductions at the coal-fired power plant. *Id.* at 3. An agreement has recently been reached with
TransAlta which will result in a sizeable decrease in the state’s total emissions. *See* Adair Decl. at ¶ 12.

1 energy efficiency and *the actions it has already taken that have reduced its*
2 *generation of greenhouse gas emissions* and that entities receive appropriate
3 credit for early actions to reduce greenhouse gases.

4 *See* RCW 70.235.005(5) (emphasis added). Ecology's 2008 Plan describes the actions that
5 had already been taken to reduce greenhouse gas emissions. They include the following:

- 6 1. Transportation
 - 7 a. Washington has already adopted stronger tailpipe emissions standards.
 - 8 b. In 2007, Congress raised the Corporate Average Fuel Economy ("CAFÉ")
9 standard for passenger cars and light trucks.
 - 10 c. In 2007, Congress enacted a law requiring increased production and sale of
11 biofuels.
 - 12 d. To encourage the sale of vehicles powered by a clean alternative fuel,
13 Washington has exempted their sale from state sales and use taxes.
- 14 2. Energy efficiency
 - 15 a. Under an initiative passed in 2006, utilities must adopt all cost-effective
16 measures to promote energy efficiency in their service areas.
 - 17 b. Laws enacted at the state and federal level set higher energy efficiency
18 standards for appliances and light bulbs.
 - 19 c. Washington amended the state energy code to improve energy efficiency in
20 residential and commercial buildings.
- 21 3. Renewable energy
 - 22 a. The 2006 initiative mentioned above also requires utilities with at least
23 25,000 customers to obtain 15 percent of their electricity from renewable
24 sources, such as wind and solar, by 2020.
 - 25 b. The legislature has set a GHG emissions performance standard for all new
26 electricity generation.
- 27 4. Government operations
 - 28 a. The legislature adopted a law requiring that by 2015, all state and local
government-owned vessels, vehicles, and construction equipment must
operate to the maximum extent practicable on electricity or biofuels.
 - b. Green building practices must be used for certain new buildings
constructed with state funds.

PSRC at 00023913-22. All told, these existing measures are expected to account for nearly
half – approximately 45 percent – of the emissions reductions specified for 2020. PSRC
at 00023903.

1 In the Ecology 2010 Report, Ecology provided an update regarding the status of
2 existing greenhouse gas emission reduction efforts. It concluded that some measures would
3 reduce emissions less than first thought, while additional measures had been taken since 2008
4 that would lead to additional reductions. For example, sales of biodiesel have declined, but
5 electric vehicles have become available, both contrary to Ecology's expectations in 2008.
6 PSRC at S00029508. Despite these changes in the specific reductions being made, Ecology
7 still projects that the measures now in place will produce about 45 percent of the reductions
8 required by 2020.¹¹ PSRC at S00029506.
9

10
11 The legislature clearly understood that actions already taken would help meet the
12 statutory limits, and left it to Ecology to evaluate the extent of the contribution they would
13 make. Only after Ecology wrote its plan could the legislature determine the additional efforts
14 needed to meet the 2020 and later limits. That lack of information when the legislature
15 adopted RCW 70.235.020 is further evidence that the statute is not self-implementing.
16

17 **B. ADOPTION OF T2040 WAS NOT ILLEGAL BECAUSE PSRC IS NOT**
18 **"THE STATE."**

19 Plaintiffs' entire case is based on expanding the term "state" in RCW 70.235.020 to
20 include entities such as PSRC, arguing that PSRC equals "the state" because PSRC is an
21 "agent of the state," an "arm of the state," or an "instrumentality of the state." Plaintiffs'
22 Hearing Memorandum at 30, 33, 34, respectively. As discussed above, Plaintiffs' argument
23 relies on a fundamental mischaracterization of RCW 70.235.020. However, even if a
24 determination of PSRC's classification is necessary, Plaintiffs' interpretation is contrary to the
25
26

27
28 ¹¹ The projections in the Ecology 2010 Report do not account for the recent agreement and pending
legislation related to TransAlta.

1 plain meaning of the statute as well as the clear intent of the legislature and, if accepted,
2 would result in absurd consequences.

3
4 **1. The Plain Meaning of “the state” Does Not Include PSRC.**

5 In interpreting a statute, a court’s “fundamental objective is to ascertain and carry out
6 the legislature’s intent, and if the statute’s meaning is plain on its face, then the court must
7 give effect to that plain meaning as an expression of legislative intent.” *Campbell & Gwinn*,
8 146 Wn.2d at 9-10; *see also State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002). The
9 language of RCW 70.235.020(1)(a) is clear: it applies to “the state.” PSRC, a regional
10 planning agency, is not “the state.”

11
12 **a. The plain meaning (including dictionary definitions) confirms**
13 **“the state” means the state of Washington.**

14 RCW 70.235.020(1)(a) unambiguously demonstrates the legislature’s intent to apply
15 reduction limits to “the state” as a whole. It reads: “[t]he state shall limit emissions of
16 greenhouse gases to achieve the following emission reductions for Washington state” and sets
17 “overall” greenhouse gas reduction limits, state-wide, for 2020, 2035, and 2050.

18 RCW 70.235.020(1)(a) (emphasis added). The unambiguous plain meaning of “the state” in
19 this context is the state of Washington,¹² as a whole, with the legislature instructing that
20 overall emissions for “the state” shall be reduced. *See* discussion *supra* at Section VI.A.

21 Citing a carefully excerpted dictionary definition of “state,” which they assert defines
22 “state” as all “operations, activities, or affairs of the government,” Plaintiffs claim that this
23

24
25
26 ¹² In seeking to detach the term “the state” from “Washington state,” Plaintiffs use quotation marks to give
27 the appearance that “Washington State” (capitalized) is distinct from the term “the state” (uncapitalized).
28 Plaintiffs’ Hearing Memorandum at 26. The *Office of the Code Reviser’s* style guide for bill drafting provides
that while the particular names of nations, states, cities, towns, and counties are to be capitalized, the words
“state,” “county,” and “city,” even when referring to specific states, cities, or counties, are never capitalized.
OFFICE OF THE CODE REVISER, STATUTE LAW COMM., BILL DRAFTING GUIDE, Part IV, § 3 (2011).

1 broad definition necessarily includes the “activities of PSRC.” Plaintiffs’ Hearing
2 Memorandum at 25 n.65, 26. A brief examination of the unexcerpted definition on which
3 Plaintiffs rely reveals its inapplicability. It provides, in whole:

4
5 6 : the operations, activities, or affairs of the government or ruling power of a
6 country : the sphere of administration and supreme political power of a
7 government (matters of ~) (secrets of ~) (ministers of ~) (Department of ~).

8 WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2228 (2002). Not only does this
9 definition not include PSRC, it is not even intended to refer to one of the United States.
10 Instead, it describes an abstract use of the term “state” relating to the affairs of a national
11 government. The definition is not applicable in this context.

12 When our legislature uses the term “the state,” it is referring to the state of
13 Washington, consistent with the applicable dictionary definitions:

14
15 7 : *often cap* : one of the bodies politic or component units in a federal system
16 that is more or less independent and sovereign over internal affairs but forms
17 with the other units a sovereign nation (the United *States* of America) (the
18 Indian ~s) (the ~s of Switzerland are called cantons). . . .

19 8 b : a territorial unit in which the general body of law is separate and distinct
20 from the law of any other territorial unit.

21 *Id.* Consistent with these traditional definitions, RCW 70.235.020 uses the term “the state” to
22 refer to the state of Washington. It does not include PSRC or other local governments.¹³

23 There is no support for Plaintiffs’ argument that the legislature intended RCW 70.235.020 to
24

25 ¹³ See *cf. United States ex rel. Norton Sound Health Corp. v. Bering Strait Sch. Dist.*, 138 F.3d 1281, 1284
26 (9th Cir. 1998), *cert. den.*, 525 U.S. 962. In *Norton Sound Health* the Ninth Circuit considered whether a school
27 district was the “state” for purposes of exemption from the Indian Health Care Improvement Act. Relying on the
28 definitions numbered 7 and 8 above, the Ninth Circuit concluded the “plain meaning” of the word “state” did not
include local government units. *Id.* at 1284. The Ninth Circuit distinguished local government units from state
agencies, and concluded that a local government unit with jurisdiction over a limited area, even though it may be
established under state law and funded by the state, “is not a ‘State.’” *Id.* The same rationale applies here.

1 apply to all types of governmental “operations, activities, and affairs.” This Court should
2 reject Plaintiffs’ request to apply a definition inconsistent with the context of the statute.

3
4 ***b. Plaintiffs’ proffered construction is inconsistent with the statute.***

5 Plaintiffs’ interpretation of “the state” is also inconsistent with the statute as a whole.
6 First, interpreting “state” to include PSRC would be inconsistent with all other uses of “state”
7 in the statute. The term “state” appears 19 times in RCW 70.235, including 14 times outside
8 of RCW 70.235.020(1)(a). For example:

- 9
10 • “In the event the state elects to participate in a regional multisector market-based
11 system...” RCW 70.235.005(4) (emphasis added).
12 • “If any revenues that accrue to the state are created by a market system, they must
13 be used to further the state's efforts to achieve the goals established in
14 RCW 70.235.020...” RCW 70.235.005(6) (emphasis added).
15 • “It is the intent of the legislature that the state will...reduce emissions at the lowest
16 cost to Washington’s economy, consumers, and businesses.”
17 RCW 70.235.005(3)(c) (emphasis added).
18 • “[Ecology and CTED recommendations must include:] Actions that the state
19 should take to prevent manipulation of the multisector market-based system
20 designed under this section.” RCW 70.235.030(1)(b)(iii) (emphasis added).

21 In these and every other instance that “state” appears in the statute, interpretation of “state” to
22 include entities such as PSRC would be nonsensical.

23 The statute’s definition of “person” also demonstrates that “the state” does not include
24 PSRC. “Person” means “an individual, partnership, franchise holder, association,
25 corporation, a state, a city, a county, or any subdivision or instrumentality of the state.”
26 RCW 70.235.010(7). Interestingly, the definition includes an “instrumentality of the state,”
27 the exact type of entity that Plaintiffs claim PSRC to be. Plaintiffs’ Hearing Memorandum
28 at 34. The legislature was aware of the different types of entities that could be included

1 within the scope of the statute. Had the legislature intended for other entities to be included
2 within RCW 70.235.020(1)(a), it could have expanded the requirement to apply to “all
3 *persons*,” or even just to “the state *and all instrumentalities of the state*.” But
4 RCW 70.235.020(1)(a) does not do this. Rather, the section is limited to “the state” – a
5 distinct and separate entity from instrumentalities of the state, as evidenced by the inclusion of
6 both terms in the definition of “person.” Indeed, while Plaintiffs attempt to argue that the
7 definition of “person” lends support for their interpretation of “state” (Plaintiffs’ Hearing
8 Memorandum at 28 n.67), the definition in fact does the opposite – further confirming that
9 “state” is not inclusive of entities such as PSRC.

12 Furthermore, when the legislature intended to impose requirements on state agencies
13 or local governments to limit greenhouse gas emissions, it did so expressly. One year after its
14 adoption of RCW 70.235.020, the legislature enacted RCW 70.235.050, requiring “state
15 agencies” to “meet the statewide greenhouse gas emission limits established in
16 RCW 70.235.020” by meeting certain reduction targets designed to comport with
17 RCW 70.235.020.¹⁴ In Section .020, the legislature established overall state-wide limits for
18 “the state”; in Section .050 the legislature, recognizing that state agencies should “lead by
19 example in reducing GHG emissions” (PSRC at S00029484) directed “state agencies” to take
20 actions to meet Section .020 in their own operations. If the legislature intended Section .020
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25 ¹⁴ Laws of 2009, ch. 519, § 2, codified at RCW 70.235.050. Ecology has explained that the “GHG emission
26 reduction targets” in .050 “correspond to the reduction targets established for Washington State . . . by the
27 Legislature . . . in RCW 70.235.020.” PSRC at S00030023; *see also* Second Substitute Bill Digest at 1 (noting
28 bill “[r]equires all state agencies to . . . [m]eet the statewide greenhouse gas emission limits established in
RCW 70.235.020”). Plaintiffs erroneously assert that the legislature’s directive to state agencies was included in
the 2008 greenhouse gas legislation, E2SHB 2815 (Plaintiffs’ Hearing Memorandum at 16), but it actually came
a year later.

1 to impose mandates on individual state agencies (or instrumentalities, as Plaintiffs now
2 argue), there would have been no need for the legislature to adopt Section .050 in 2009.

3 The comparison between Section .020 and Section .050 is stark. Unlike Section .020,
4 Section .050 clearly obligates state agencies to reduce their greenhouse gas emissions, and
5 gives agencies instructions for meeting the reduction requirements: state agencies must
6 calculate their emissions and report them to Ecology, and must develop a strategy to meet the
7 required reductions. Also unlike Section .020, Section .050 tells state agencies which of their
8 activities must be included in the greenhouse gas emissions reduction plan.
9
10

11 Plaintiffs ask this Court to believe that the legislature in Section .050 assigned state
12 agencies detailed requirements for meeting greenhouse gas emission reduction limits for their
13 own internal operations, yet was silent in Section .020 with respect to the much larger task of
14 reducing state-wide greenhouse gas emissions. This makes no sense. If the legislature had
15 meant for Section .020 to obligate every government entity to reduce greenhouse gas
16 emissions from specific sources, it would have said so, as it did in Section .050. The
17 legislature also would have required these entities to calculate their emissions using standard
18 methodologies, and would have required the entities to coordinate their efforts with Ecology
19 or another agency. That the legislature did none of these things in RCW 70.235.020 is
20 another strong indication that Plaintiffs' interpretation is wrong.
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23 Similarly, where the legislature intended to provide direction to RTPOs, it did so
24 expressly. For example, in addition to establishing emissions levels for "the state," the
25 legislature in HB 2815 also directed WSDOT to adopt goals to reduce annual per capita
26 VMTs based on future benchmarks, and required WSDOT, *in collaboration with RTPOs*, to
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28

1 report to the legislature on strategies to meet these benchmarks.¹⁵ Certainly the legislature
2 knew about RTPOs, and the role they could play. Yet RCW 70.235.020 never calls out any
3 responsibilities or requirements for RTPOs, nor has the legislature adopted subsequent
4 legislation to set specific greenhouse gas reduction requirements for RTPOs or MPOs, as
5 other states have done.¹⁶

7 Rather than reading “the state” in isolation, as Plaintiffs do, the Court must look to the
8 statute as a whole. *See Campbell & Gwinn*, 146 Wn.2d at 9-10. In doing so, the only
9 reasonable interpretation is that it refers to the state as a whole.
10

11 ***c. PSRC is clearly not “the state.”***

12 Plaintiffs’ attempt to expand “the state” to include PSRC is also contrary to the basic
13 facts regarding PSRC’s formation, history, and governance. PSRC is a voluntary, self-
14 governing, independent, regional¹⁷ entity. Although two of the 32 members of the PSRC
15 Executive Board are representatives of the state, with the rest being local government
16

17 ¹⁵ Laws of 2008, ch. 14, § 8, *codified at* RCW 47.01.440. This directive was consistent with the overall
18 statutory structure, which was collectively characterized as “An Act relating to *creating a framework* for
19 reducing greenhouse gases emissions in the Washington economy.” *See also* Exec. Order No. 09-05 at 3 (2009),
20 directing WSDOT to work with PSRC and other RTPOs to “cooperatively develop and adopt regional
21 transportation plans that will, when implemented...reduce greenhouse gases.” The Exec. Order contains no
22 reference to or discussion of RCW 70.235.020 as applicable to, or enforceable against, entities such as PSRC.
23 To the contrary, it clearly contemplates a framework in which RTPOs are collaborative partners in the
24 continuing development of strategies to reduce greenhouse gas emissions. Plaintiffs dismiss the relevance of the
25 Exec. Order on the basis that the Governor lacks authority to amend the statute. Plaintiffs’ Hearing
26 Memorandum at 45. However, PSRC does not suggest that the Exec. Order has the force of law, and in any
27 event, under the proper interpretation of RCW 70.235.020, there is no inconsistency between the statute and the
28 Exec. Order to resolve or explain.

¹⁶ In other states, there has been a specific role for MPOs established. Like Washington’s statute, both
California’s and Oregon’s greenhouse gas reduction statutes lack specific directives to (or even mention of)
MPOs. Cal. Health & Safety Code 38500 *et seq.*; ORS 468A.200 *et seq.* However, both California and Oregon
have passed companion statutes setting out specific requirements for MPOs. Ca. Gov’t Code 65080 *et seq.* and
Oregon SB 1059. California’s companion statute directs MPOs to develop reduction strategies in accordance
with regional reduction targets. Cal. Gov’t Code 65080(b)(2). Oregon’s companion statute directs MPOs to
assist in the development of local government reduction targets and work with local governments to meet those
targets. Oregon SB 1059, §§ 5 & 7. Washington has not enacted such a companion statute.

¹⁷ PSRC’s jurisdiction for transportation, economic development and growth management planning is
limited to the four-county Puget Sound region. PSRC at 00028999.

1 representatives (PSRC at 00003443), this hardly suggests PSRC is “the state.” Under the
2 plain meaning of the statute, PSRC is not “the state.”

3
4 After conceding that PSRC is not a state agency for purposes of RCW 70.235.050 or
5 under Washington’s Administrative Procedures Act (Plaintiffs’ Hearing Memorandum at 26,
6 29), Plaintiffs cite to a concurring opinion from a 1917 Washington Supreme Court case,
7 *State ex rel. Bd. of County Comm’rs of Pierce County v. Clausen*, as support for their
8 proposition that PSRC is an “agent of the state.” *Id.* at 29 (citing *Clausen*, 95 Wash. 214,
9 163 P. 744 (1917)). However, Plaintiffs inaccurately describe the quoted material from
10 *Clausen* as the opinion of the court. That quoted material is found only in the concurring
11 opinion of one justice, whom Plaintiffs’ misidentify. *Clausen*, 95 Wash. at 237 (Chadwick,
12 J., concurring). The concurring opinion cites to *Chisholm v. Georgia* for the limited
13 proposition that “[s]overeignty is the right to govern.” 2 Dall. 419, 471, 1 L. Ed. 440
14 (1783). Plaintiffs’ reliance on *Clausen* and *Chisholm* provides no support for the proposition
15 either that PSRC is an “agent of the state,” or that such determination is relevant to
16 interpretation and application of RCW 70.235.020.
17

18
19 Moreover, PSRC’s roles as MPO and RTPO do not make PSRC “the state.” The
20 transportation planning system is structured to ensure that a comprehensive and cooperative
21 planning process occurs at the federal, state, regional, and local levels. Plaintiffs’ argument
22 that PSRC is “the state” because of its role as an RTPO ignores the separate and distinct
23 function that RTPOs serve in the larger transportation planning context. Indeed, the
24 legislature has made clear that RTPOs are separate from “the state” for purposes of
25 transportation planning:
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1 While significant authority for transportation planning is vested with local
2 agencies and regional transportation planning organizations under the growth
3 management act, the legislature recognizes that certain transportation issues
4 and facilities cross local and regional boundaries and are vital to the statewide
5 economy and the cross-state mobility of people and goods. Therefore, the state
6 has an appropriate role in developing statewide transportation plans that
7 address state jurisdiction facilities and services as well as transportation
8 facilities and services of state interest.

9 RCW 47.06.010 (emphasis added). PSRC does not dispute that it serves “an essential role in
10 state transportation planning.” Plaintiffs’ Hearing Memorandum at 31. However, its role is to
11 produce a regional transportation plan. It is up to the state, not PSRC, to produce the state-
12 wide transportation plan. RCW 47.01.071. PSRC’s collaborative work with the state, and
13 other agencies, does not transform PSRC into “the state.”

14 **2. Legislative History Does Not Support Plaintiffs’ Conclusion that**
15 **“the state” Includes PSRC.**

16 Finding nothing in the statute to support their proposition, Plaintiffs look to the
17 “legislative history” to argue that when the legislature amended the legislation to add the term
18 “the state,” it must have intended for that phrase to apply broadly to all instrumentalities of
19 the state, not just Ecology, and not just state agencies. Plaintiffs’ Hearing Memorandum
20 at 33. Because the statute’s plain meaning can be discerned from the statute, it is unnecessary
21 “to resort to aids to construction, including legislative history.” *City of Olympia v. Drebeck*,
22 156 Wn.2d 289, 295, 126 P.3d 802 (2006) (quoting *Campbell & Gwinn*, 146 Wn.2d at 12);
23 *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 709, 985 P.2d 262 (1999)
24 (“Where the statutory language is clear and unambiguous, the statute's meaning is determined
25 from its language alone; we may not look beyond the language nor consider the legislative
26 history.”). However, if this Court were to consider the legislative history of
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28

1 RCW 70.235.020, that history only confirms that the term “the state” means “the state” and
2 does not include PSRC, or any state instrumentalities or local governments.

3 House Amendment 1293, to which Plaintiffs refer, served two purposes: first, it
4 removed “direct price signals” as a recommended alternative proposal to reduce emissions;¹⁸
5 and second, it clarified Ecology’s role in implementing the Act.¹⁹ The original language
6 provided that “[t]he department [of ecology] shall use its existing statutory authority and any
7 additional authority granted by the legislature to limit emissions of greenhouse gases to
8 achieve the following emission reductions for Washington state . . .”²⁰ The bill left the issue
9 of Ecology’s responsibility for implementation uncertain. The amendment altered the
10 language to provide “the state shall” language, and added, for the first time, subsection
11 .020(1)(b), requiring Ecology to submit a greenhouse gas reduction plan for the legislature’s
12 review and approval, “describing those actions necessary to achieve the emission reductions”
13 set out in .020(1)(a). The amendment did not broaden the scope of the bill’s application.²¹

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16
17 In moving for adoption of the amendment on the House Floor, Rep. Upthegrove, the
18 amendment sponsor, explained:

19
20 Thank you Mr. Speaker, this amendment takes out any references to the use of
21 direct price signals . . . and also provides more clarity around the scope of
22 authority of Ecology and I’d ask for your yes vote.²²

23 ¹⁸ A “direct price signal” alternative is often commonly referred to as a “carbon tax.”

24 ¹⁹ Amendment 1293 (Feb. 19, 2008), available online at <http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Amendments/House/2815-S2%20AMH%20UPTH%20FORD%20159.pdf> (last viewed Feb. 28, 2011).

25 ²⁰ Striker Amendment 1234 (Feb. 19, 2008), available online at
26 <http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Amendments/House/2815-S2%20AMH%20UPTH%20H5643.4.pdf> (last viewed Feb. 28, 2011).

27 ²¹ The amendment’s statement of effect succinctly summarizes its effect as “require[ing] the department of
28 ecology to develop a plan to limit emissions of greenhouse gases to achieve emission reductions for Washington state.”

²² Debate on House Floor regarding Amendment 1293 to HB 2815 (Feb. 19, 2008) (statement of Rep. Upthegrove), available online at

1 Nothing in the legislative history of E2SHB 2815 supports Plaintiffs’ argument that
2 Rep. Upthegrove sought to amend the Act to impose a broad individualized mandate on all
3 “instrumentalities of the state.”
4

5 **3. PSRC Is Not “the state,” and Whether or Not PSRC Is an “Agent,”**
6 **“Arm,” or “Instrumentality” of the State Is Not Controlling.**

7 Even assuming *arguendo* that PSRC could be considered an “arm of the state” for
8 transportation purposes, such characterization *still* does not bring PSRC within
9 RCW 70.235.020’s mandate. Contrary to Plaintiffs’ argument, RCW 70.235.020 does not
10 apply to all “instrumentalities” and “arm[s] of the state;” by its terms it applies only to “the
11 state.”
12

13 As discussed above,²³ the Ninth Circuit addressed a similar issue in *Norton Sound*
14 *Health*, where it considered whether a school district was the “state” for purposes of a
15 provision of the federal Indian Health Care Improvement Act. *Norton Sound Health Corp.*,
16 138 F.3d at 1284. Like PSRC, the school district in *Norton Sound Health* was a governmental
17 entity, authorized under state statute, representing a defined geographic scope, principally
18 managed by a local board, subject in some instances to state oversight and approval, and the
19 recipient of some (and in the case of the school district, substantially all) state funding. *Id.*
20 at 1283. The district court found the school district to be an “arm of the state.” *Id.* at 1282.
21 On review, the Ninth Circuit noted that the proper question, based on the language of the
22 statute, was not whether the district was an “arm of the State” but whether it was a “State,”
23 and concluded it was not. *Id.* at 1283-84. Similarly, as RCW 70.235.020 applies to “the
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27 [http://www.tvw.org/media/mediaplayer.cfm?evid=2008020152B&TYPE=V&CFID=2891256&CFTOKEN=549](http://www.tvw.org/media/mediaplayer.cfm?evid=2008020152B&TYPE=V&CFID=2891256&CFTOKEN=54930506&bhcp=1)
28 30506&bhcp=1 (last viewed Feb. 26, 2011) (statement of Rep. Upthegrove at 01:27:00).

²³ See discussion *supra* at Section VI.B.1.a.

1 state,” not to discrete “agents of the state,” whether PSRC could ever be considered to operate
2 as an “arm of the state” is not the relevant inquiry.

3
4 **4. Plaintiffs’ Interpretation Would Lead to Absurd Results.**

5 Plaintiffs’ interpretation of RCW 70.235.020 would result in “unlikely, absurd or
6 strained consequences,” *Kilian*, 147 Wn.2d at 21, clearly not intended by the legislature. For
7 example, Plaintiffs never clarify how broad they believe “the state” is. In addition to arguing
8 that PSRC should be included within the scope of RCW 70.235.020, Plaintiffs suggest that
9 the term “state” should be even more expansive, to include all of those in the statute’s
10 definition of “person.” Plaintiffs’ Hearing Memorandum at 28 n.67. The definition of
11 “person” includes: “an individual, partnership, franchise holder, association, corporation, a
12 state, a city, a county, or any subdivision or instrumentality of the state.”

13
14 RCW 70.235.010(7). Under Plaintiffs’ interpretation, therefore, the greenhouse gas limits
15 would be enforceable not only against every local city and county, but also against
16 corporations, associations, and even individuals. Under Plaintiffs’ view, each city, county,
17 entity, and individual in the state would need to figure out his or her “proportionate share” of
18 the state-wide limits, and develop some means of accurately monitoring its emissions in order
19 to meet that “proportionate share.” Moreover, because no enforcement mechanism is
20 described in the statute, the enormous task of enforcing the statute as to all entities and
21 individual residents of the state would apparently be left to the judiciary. Such an
22 interpretation is absurd and clearly not what the legislature intended.

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25 **C. ADOPTION OF T2040 WAS NOT ARBITRARY AND CAPRICIOUS.**

26 Plaintiffs do not appear to argue that PSRC’s adoption of *T2040* was arbitrary and
27 capricious. However, if that is their argument, they must show that adoption of *T2040* was a
28

1 willful and unreasonable action taken in disregard of the facts or circumstances. If there is
2 room for two opinions, or even if the Court believes PSRC's actions were erroneous, adoption
3 of *T2040* cannot be found to be arbitrary and capricious. *See* cases cited in Section V.A.
4
5 Plaintiffs bear a heavy burden in suggesting that PSRC acted in disregard of facts or
6 circumstances.

7 **1. PSRC Acted with Full Awareness of the State's Emissions Limits.**

8 The record amply demonstrates that PSRC was well aware of the state-wide emissions
9 limits in RCW 70.235.020. The specific statute was mentioned repeatedly in *T2040* and its
10 EIS. PSRC carefully quantified the emissions from each alternative. The state emissions
11 limits, and projected emissions from the EIS alternatives, were discussed frequently in
12 Executive Board and Transportation Policy Board meetings. There is no evidence whatsoever
13 that PSRC acted in disregard of the provisions in RCW 70.235.020.²⁴
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16 Specifically, PSRC staff and decision makers became aware that the aspects of on-
17 road transportation under PSRC's planning jurisdiction, by themselves, could only achieve
18 modest reductions in the projected increases in emissions. Therefore, PSRC, in conjunction
19 with Ecology and many other experts, undertook extensive research and analysis to help the
20 scientific and governmental community identify how changes in fuel and vehicle technology
21 (areas outside of PSRC's planning jurisdiction) could lead to more significant emission
22

23 ²⁴ Plaintiffs take a single policy out of the VISION 2040 PSRC land use plan and assert that it committed
24 PSRC "to compliance with the state's GHG reduction requirements." Plaintiffs' Hearing Memorandum at 18. In
25 considering and adopting VISION 2040, PSRC's Growth Management Policy Board explicitly discussed the
26 possibility of a strict, binding greenhouse gas reduction policy, and rejected that approach, instead adopting an
27 Environmental Action Policy 7 that required PSRC "to investigate ways" to address climate change reduction,
28 given the lack of specificity of state initiatives. PSRC at S00030341, S00030155. The state had not at that time
(and has not since then) produced any specific initiatives or directives regarding how regions or particular
sectors are to address climate change and greenhouse gas reductions. *T2040* specifically commits PSRC to
monitoring climate change legislation and directives, and through the *T2040* amendment process, to track
updates that are made. This approach continues to implement VISION 2040, and is not inconsistent with the one
policy cited by Plaintiffs.

1 reductions. That research and analysis was specifically conducted in order to aid future
2 legislative action at the federal or state levels with regard to fuel and vehicle technology. All
3 of PSRC's efforts were conducted in full awareness of what the statute set as state-wide
4 emission limits, and those efforts were certainly not arbitrary and capricious.
5

6 **2. Plaintiffs' Assertion of "Proportionate Share" Lacks**
7 **Methodological Rigor.**

8 In arguing that *T2040* should meet a "proportional share" of the overall state
9 emissions, Plaintiffs first have to combine disparate data sources and perform their own
10 mathematical calculations to try to figure out what would be a "proportional share." Plaintiffs
11 attempt to combine information from two different publications in order to assert that: "[t]he
12 transportation sector in the Puget Sound region produces about one fourth of the state's total
13 greenhouse gas production." Plaintiffs' Hearing Memorandum at 14, 48, with citations to the
14 two publications in the Record. However, that assertion is based on simplistic multiplication
15 of two different figures from two different sources that used two different methodologies for
16 estimating emissions.
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19 For example, the December 2007 Washington State Department of Community, Trade
20 and Economic Development ("CTED") report cited by Plaintiffs has data that is state-wide
21 and not apportioned to individual regions. PSRC at 00021407. In addition, the two
22 publications referred to by Plaintiffs use different methodologies, such as CTED's use of total
23 VMT to estimate emissions, and neither publication utilized EPA's MOVES software, which
24 is the current state-of-the-art methodology for emissions estimates. Finally, Plaintiffs'
25 reliance on estimates from the "transportation sector" includes emissions from marine, air,
26 and rail modes of transportation.
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1 In sum, a sound methodological basis is lacking for Plaintiffs' assertion that *T2040*'s
2 "proportionate share" is 25 percent of the state-wide emission reductions.

3 **3. Plaintiffs' Arguments Also Are Based on Two False Premises.**

4 Plaintiffs' analysis of *T2040*'s four-part greenhouse gas strategy is at the heart of their
5 factual allegations about *T2040*. Plaintiffs' Hearing Memorandum at 34-44. However, their
6 argument is based on two false premises. Here is the first: Plaintiffs allege that PSRC's
7 documents state that the greenhouse gas reductions from *T2040* would be "comparable" to the
8 state's emission limits in RCW 70.235.020. *Id.* at 39, 43 & 44. But PSRC never made that
9 statement. The emissions levels from the *T2040* alternatives were stated factually, and the
10 state-wide limits in RCW 70.235.020 were provided for reference, but PSRC never claimed
11 that the emission reductions from the alternatives or the four-part greenhouse gas strategy
12 resulted in emission reductions comparable to the limits in RCW 70.235.020.

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16 Page 38 of Plaintiffs' Hearing Memorandum includes Figure 18 from *T2040* (PSRC
17 at 00003352) and then borrows from text underneath a different version of the same figure in
18 Appendix L to *T2040*. PSRC at 00004265. The word "comparison" is used in the text
19 underneath the figure in Appendix L merely to draw the reader's eye to differences in the
20 figures. There is certainly no attempt here or elsewhere to suggest that the emission
21 reductions from PSRC's four-part greenhouse gas reduction strategy are the same as the state
22 emissions limits in RCW 70.235.020.²⁵

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²⁵ A review of the complete record shows that 2006 was consistently used as the Base Year for comparison of greenhouse gas emissions and every other area of study for *T2040*. Among the thousands of pages documenting PSRC's meetings to develop the EIS and *T2040*, there is an occasional reference to "1990 levels" based on state-wide data. PSRC at 00005931 and 11491. However, those references are only to show that the emissions from *T2040* alternatives were expected to be above 1990 levels, as well as 2006 levels.

1 The second false premise is that PSRC should have used “the proper 1990 baseline”
2 rather than 2006 as the Base Year. Plaintiffs’ Hearing Memorandum at 39. Plaintiffs cobble
3 together pieces of data from various studies to conclude that PSRC “should have included an
4 adjustment showing 1990 levels to be 20 percent lower than 2006 levels.” *Id.* at 42; *see* 40-42
5 for the overall argument and charts excerpted from early presentations on *T2040*. Plaintiffs
6 try to make much of the fact that the 20 percent figure was referred to in an early PSRC
7 presentation on *T2040*, using that to assert that PSRC “knew” that 1990 levels were
8 20 percent lower than 2006 levels. However, the data sources are indicated on the PSRC
9 materials, and the 20 percent figure is based on national, not Puget Sound area data. PSRC
10 at 00006667. As stated in both the EIS and *T2040* many times, comparing data and analysis
11 results using one methodology to a baseline created using an entirely different methodology is
12 comparing “apples to oranges.”
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16 The *T2040* analysis is based on a specific modeling framework utilizing a
17 sophisticated travel demand model, a land use forecast model, and EPA’s MOVES software
18 to estimate emissions specific to on-road vehicles in the Puget Sound region. As explained
19 throughout the EIS and *T2040*, PSRC knew that the state had selected 1990 as its base year
20 for emissions, but PSRC also knew that there are no 1990 baseline data for emissions
21 attributable to on-road vehicles in the Puget Sound region (or any other region of the state).
22 Thus, PSRC needed to use 2006 data (which it did have) as its Base Year, rather than 1990.
23 *See, e.g.*, PSRC at 00003351 and 4265 for some examples of where PSRC explains it does not
24 have adequate data for 1990 and thus must use 2006 as a surrogate, *i.e.* a substitute, for 1990
25 when discussing RCW 70.235.020. PSRC had extensive 2006 data from the Household
26 Activity Survey of 4,700 households in the region, which was a critical part of forecasting
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1 travel demand; that was the most up-to-date data to use, and it certainly was not arbitrary or
2 capricious to rely on the best available information. In fact, MPO planning regulations
3 require use of “latest available estimates and assumptions” for development of transportation
4 plans. 23 CFR 450.322.

6 Further, since RCW 70.235.020 applied to the state overall and did not call out a
7 proportionate share method for reaching the state-wide reductions, and since nothing had
8 directed PSRC or any other regional or city planning entity to re-do its research and
9 methodology back to 1990, it was reasonable to use 2006 as the Base Year.

11 Finally, no one was misled or confused by reliance on 2006 as the Base Year for
12 modeling. It was commonly known, including by the Plaintiffs, that 2006 Base Year
13 emissions were *above* 1990 levels. The comment letters provided by Plaintiffs Futurewise
14 and the Sierra Club acknowledge this very point. PSRC at 00002896, 2965. *T2040* itself
15 notes that emissions increased from 1990 to 2006. PSRC at 00003351. *See also* PSRC
16 at 00000258-59. Obviously, if they increased, that must mean the 1990 levels were lower
17 than the 2006 levels. Thus, in showing that future emission levels would be above 2006
18 levels, it was obvious that they would also be above 1990 levels.

21 For all of the above reasons, Plaintiffs’ arguments are unpersuasive, and they have not
22 met their burden to show it was arbitrary or capricious of PSRC to use 2006 as its Base Year.

23 **4. Plaintiffs Imply Incorrectly that T2040 Alternatives Could Have**
24 **“Met” the State-wide Emissions Limits in RCW 70.235.020.**

25 The assertion underlying Plaintiffs’ entire case is that *T2040* alternatives could have
26 “met” the “proportional share” that Plaintiffs read into the statute. It may be an inconvenient
27 truth, but there is no such feasible alternative. The emissions from each alternative were
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1 clearly set forth in the EIS and in *T2040*, and the estimated emissions for all alternatives are
2 above the 2006 Base Year, even with significant tolling and investments in transit and non-
3 motorized travel. PSRC at 00000259-61, 3351. In fact, Alternative 5 would have imposed
4 tolls on every vehicle on every highway and every arterial in the entire four-county region,
5 and even then, emissions from on-road vehicles would still be above the 2006 Base Year. *Id.*,
6 and PSRC at 00001217.

8 Plaintiffs include Figure 18 from *T2040* in their Hearing Memorandum (Plaintiffs'
9 Hearing Memorandum at 38), but they refuse to see what it shows. The simple truth is that
10 the types of measures available to PSRC in *T2040* to control on-road vehicle emissions (the
11 "Transportation Strategies" referenced in Figure 18) have an effect on reducing vehicle
12 emissions, but by themselves, that effect is modest, particularly in a region that will grow by
13 approximately 1.5 million new residents by 2040.

16 The conclusion from PSRC's analysis was consistent with the conclusions in other
17 studies. *Moving Cooler* assumed unprecedented levels of parking costs; vehicle tolls to enter
18 downtowns, employment centers, and retail centers; an increased gas tax of \$2.71 per gallon;
19 substantial peak period per mile tolls; and many other measures. PSRC at S00029341-54.
20 And yet, even such draconian and inequitable measures are not enough to reduce
21 transportation emissions to 1990 levels. PSRC at 00022292. Also, *Leading the Way* showed
22 that in order to achieve more significant reductions in emissions, a multisector, market-based
23 system was essential. PSRC at 00023299. As stated in the EIS, PSRC can help others
24 evaluate emission reductions from technological changes to our vehicle fleet, but these are not
25 programs over which *T2040* has control. *See, e.g.*, PSRC at 00001221-22. Federal and state
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1 legislative action as to vehicle and fuel technology is needed, along with market incentives, in
2 order to achieve more significant reductions in emissions from the transportation sector.

3 The above point was discussed many times with the Transportation Policy Board and
4 Executive Board. At the May 28, 2009 Executive Board meeting, the analytical results were
5 discussed, including that none of the *T2040* Alternatives, relying just on transportation
6 strategies, would result in emissions below the 2006 Base Year. Executive Board Meeting,
7 PSRC at 00011491. At the December 3, 2009 Executive Board meeting, there was discussion
8 that significant reductions in emissions could only occur with technology improvements.
9 PSRC at 00015407-09. The same discussion occurred at the February 11, 2010 joint meeting
10 of the Transportation Policy Board and Growth Management Policy Board, and at the
11 March 11, 2010 Transportation Policy Board meeting. PSRC at 00015910, 15952, and
12 16183, respectively. PSRC Executive Vice-President Josh Brown summarized the situation
13 as follows:
14
15

16 I think the challenges with the greenhouse gas emissions, I think when we
17 went through the various alternatives, we realized that the problem is not just
18 going to be solved just by making strategic investments and linking
19 transportation with land use; there's a strong technology component. And, I
20 think what this plan says is that all of us in local government need to be part of
21 that discussion, and I think we need to be leading and motivating our state and
22 federal leaders to put policies in place that are helping the efficiency of our
23 fleet.

24 PSRC at 00016225, at 2:08:16.

25 In sum, it was certainly not arbitrary or capricious for PSRC to evaluate emissions
26 with methodological rigor, do its part to adopt specific measures to reduce emissions, and
27 advance the study of additional vehicle and fuel strategies that could be implemented through
28 future legislative action.

1 **D. PLAINTIFFS’ CLAIMS REGARDING RCW 70.235.020 SHOULD BE DISMISSED**
2 **FOR JURISPRUDENTIAL REASONS.**

3 Washington courts adhere to the “virtually universal rule that there must be a
4 justiciable controversy before the jurisdiction of a court may be invoked.” *Washington Educ.*
5 *Ass’n v. Washington State Public Disclosure Comm’n*, 150 Wn.2d 612, 622, 80 P.3d 608
6 (2003) (citations and quotations omitted). The purpose of the justiciability requirement is to
7 “ensure that the court will be rendering a final judgment on an actual dispute between
8 opposing parties with a genuine stake in the resolution.” *To-Ro Trade Shows v. Collins*,
9 144 Wn.2d 403, 411, 27 P.3d 1149 (2001). Washington courts have recognized that, in
10 addition to the four traditional justiciability doctrines of standing, mootness, ripeness and the
11 federal case-or-controversy requirement,²⁶ there are “political question[s] not appropriate for
12 the judiciary to resolve.” *Nw. Animal Rights Network v. State of Washington*, 158 Wn. App.
13 237, 242, 242 P.3d 891 (2010). Because Plaintiffs lack standing to seek a constitutional writ
14 of review, and because their claim that *T2040* violates RCW 70.235.020 presents a political
15 question, Plaintiffs’ claim is not justiciable and should be dismissed.

16 **1. Plaintiffs Lack Standing Under a Constitutional Writ of Review.**

17 Because RCW 70.235 contains no express private right of action, Plaintiffs seek a
18 constitutional writ of review under article IV, section 6 of the Washington State Constitution
19 in order to challenge PSRC’s adoption of *T2040*. To invoke such review, Plaintiffs bear the
20 burden of demonstrating that they have standing. *See Harris v. Pierce County*, 84 Wn. App.
21 222, 230, 928 P.2d 1111 (1996).

22

23 ²⁶ *Id.* Justiciability requires: “(1) ... an actual, present and existing dispute, or the mature seeds of one, as
24 distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties
25 having genuine and opposing interests, (3) which involve interests that must be direct and substantial, rather than
26 potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and
27 conclusive.” *Washington Educ. Ass’n*, 150 Wn.2d at 622-23 (citations and quotations omitted).
28

1 Recognizing that there must be certain limitations upon access to the judicial
2 process,²⁷ Washington courts have adopted a two-part standing test for persons seeking a
3 constitutional writ of review. *See Newman v. Veterinary Bd. of Governors*, 156 Wn. App.
4 132, 142, 231 P.3d 840 (2010). First, the interests that the Plaintiffs are seeking to protect
5 must be within the “zone of interests” to be protected by the statutory or constitutional
6 guarantee in question. *See Snohomish County Prop. Rights Alliance v. Snohomish County*,
7 76 Wn. App. 44, 52, 882 P.2d 807 (1994). Second, the Plaintiffs must allege an “injury in
8 fact,” *i.e.*, that they will be “specifically and perceptibly harmed” by the proposed action. *See*
9 *id.* at 53. If the injury is *threatened*, rather than existing, the plaintiffs must show that the
10 injury will be “immediate, concrete and specific.” *See Harris*, 84 Wn. App. at 231. A
11 conjectural or hypothetical injury will not confer standing. *See id.* “In other words, [a
12 plaintiff] must present evidentiary facts that show a direct adverse effect upon it if the court
13 does not exercise its extraordinary authority.” *See Snohomish County Prop. Rights Alliance*,
14 76 Wn. App. at 53.

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18 Plaintiffs allege that T2040 violates RCW 70.235 because “projects and programs
19 authorized by [T2040] will cause the Puget Sound region to far exceed the GHG reduction
20 limits set forth at RCW 70.235.020(1)(a).” Plaintiffs’ Hearing Memorandum at 22. The
21 alleged violation of RCW 70.235 would occur in the future, as the specific greenhouse gas
22 reduction limits set forth in RCW 70.235.020(1)(a) are established for the years 2020, 2035,
23 and 2050. Plaintiffs’ claim regarding violation of RCW 70.235 is, therefore, one of
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26 ²⁷ *See, e.g., Coughlin v. Seattle Sch. Dist. No. 1*, 27 Wn. App. 888, 893, 621 P.2d 183 (1980) *abrogated on*
27 *other grounds by* 111 Wn.2d 250 (1988) (“It must be recognized, however, that courts cannot be open to every
28 citizen’s objection to every action of our governmental representatives in the legislative or executive branches of
government. Consequently, the rules of standing have been promulgated by the legislatures and the courts to
regulate access to the judicial process.”).

1 threatened injury, rather than existing injury, and so Plaintiffs must show that they will suffer
2 an “immediate, concrete and specific” injury.

3 Plaintiffs fail to meet this burden. They allege in their complaint that they will suffer:

4
5 adverse impacts of climate change and global warming, including, but not
6 limited to, the greater frequency and severity of rainfall events, the damage to
7 public transportation through increased flooding, the diminution in snow pack,
8 the increased frequency of forest fires, decreases in fresh water supplies, sea
level rise and coastal flooding, and the increasing acidification of marine
waters and declines in shellfish production.

9 *See* Complaint for Direct Review, Declaratory Relief and Constitutional Writ of Review
10 (“Complaint”) at 4, lines 6-13 (allegations regarding Plaintiff Cascade Bicycle Club); *see also*
11 Complaint at 6, lines 14-20 (similar allegations as to Plaintiff Futurewise) and at 8, lines 14-
12 23 (similar allegations as to Plaintiff Sierra Club).

13
14 But the premise underlying these allegations is speculative. Plaintiffs assume that if
15 greenhouse gas emissions do not decline as a *result of T2040*, they will not decline, and the
16 state will therefore not meet its limits under RCW 70.235.020. However, as discussed above,
17 *T2040* represents planning for one portion (on-road transportation), of one sector
18 (transportation), in one region (Puget Sound), of the state. In addition to the numerous
19 greenhouse gas reduction measures adopted in *T2040*, a number of measures are already in
20 place across the state, and across all sectors, to reduce greenhouse gas emissions, and others
21 are underway, as detailed in Section VI.A.4. Absent a comprehensive, economy-wide
22 evaluation of all sectors, across the entire state, it is speculative to presume the state-wide
23 limits will not be met. Plaintiffs cannot demonstrate a violation of the statute based solely on
24 a single, sector-specific, regional plan.
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1 Moreover, *T2040* is a *planning* document, not a project-specific implementation
2 document. *T2040* establishes a framework for specific transportation projects that will be
3 implemented by others in the future.²⁸ Whether or not those specific projects will be
4 implemented will depend on additional factors, not just their presence in *T2040*, including
5 availability of state, federal, or local funding. Courts are reluctant to grant standing where, as
6 here, the challenged actions involves broad planning policies, not specific to any particular
7 parcel of property, nor to any particular person: “. . . because of its broad nature, a planning
8 policy does not regulate specific parcels, and thus, standing of a citizen is not as easily
9 established.” *See Snohomish County Prop. Rights Alliance*, 76 Wn. App. at 54-55.
10

11 Washington courts are also reluctant to find a cognizable injury in fact where an
12 alleged future injury hinges upon several other intervening actions that may or may not occur.
13 *See Harris*, 84 Wn. App. at 232 (where plaintiff’s claim of potential future condemnation of
14 its property was dependent upon the makeup of a yet-to-be-approved final engineering plan).
15 Courts have found a lack of standing where plaintiffs’ claims are speculative, and where, as
16 here, plaintiffs “assert conclusions as to anticipated future effects of the county-wide
17 planning.” *See Snohomish County Prop. Rights Alliance*, 76 Wn. App. at 53. Here, it remains
18 wholly speculative at this time whether or not the state will meet the emissions reduction
19 requirements nine, 24, and 39 years in the future, and if it does not, whether *T2040* will be the
20 cause of the harm alleged by Plaintiffs. Plaintiffs’ claims are conjectural, hypothetical, and
21 speculative.
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27 ²⁸ See PSRC at 00001211 (“PSRC will adopt Transportation 2040 as the transportation plan for the Puget
28 Sound region. Choosing to move forward with planning and implementation of individual projects is the responsibility of city, county, state, and federal agencies; ports; transit agencies; tribal nations; and non-governmental organizations.”).

1 In presenting these arguments, PSRC in no way attempts to refute or diminish the
2 evidence that greenhouse gas emissions contribute to global warming, and that global
3 warming poses serious threats to human health and the environment. But that is not the
4 necessary analysis for the legal issue raised by Plaintiffs' request for a constitutional writ of
5 review. Rather, the legal issue is whether Plaintiffs have met their burden to demonstrate that
6 the adoption of *T2040* in 2010 would result in immediate injury to Plaintiffs by causing the
7 state to fail to meet the 2020, 2035, and 2050 greenhouse gas limits in RCW 70.235.020, or
8 that adoption of *T2040* would cause immediate, concrete, and specific injury to Plaintiffs.
9
10 Because Plaintiffs have not shown that the state will not or cannot meet the emission limits in
11 RCW 70.235.020 through other measures and initiatives, and because Plaintiffs have not
12 shown that *T2040* is the cause of alleged harm to them, Plaintiffs have failed to meet their
13 burden. Plaintiffs therefore lack standing to seek a constitutional writ of review.
14
15

16 **2. Plaintiffs' Claims Regarding RCW 70.235.020 Raise Political**
17 **Questions that Are Not Justiciable.**

18 Plaintiffs' claim is dependent upon an assertion that PSRC is required to
19 proportionally reduce emissions. Although Plaintiffs assert such a requirement, Plaintiffs
20 never expressly state that the *statute* requires PSRC to enact a transportation plan that plans
21 for proportional reductions. As noted previously, it does not. Plaintiffs' determination that
22 proportional reductions are "warrant[ed]" (Plaintiffs' Hearing Memorandum at 47-48), and its
23 assertion that Puget Sound transportation "must" (*id.* at 48), proportionally reduce emissions
24 does not change the legislative scheme.
25

26 Since Plaintiffs are asking this Court to impose requirements not found in the statute,
27 they are presenting a political question that is not justiciable. *Nw. Animal Rights Network*,

1 158 Wn. App. at 247 n.8. Whether PSRC should proportionally reduce emissions is a
2 political question involving public policy determinations not appropriate for resolution in this
3 Court. Moreover, judicial resolution of such questions would ignore the separation of powers
4 doctrine.
5

6 Although, Washington's constitution does not contain a formal separation of powers
7 clause, the concept is well recognized in our jurisprudence. "Nonetheless, the very definition
8 of our government into different branches has been presumed throughout our state's history to
9 give rise to a vital separation of powers doctrine." *Brown v. Owen*, 165 Wn.2d 706, 718,
10 206 P.3d 310 (2009), quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994).
11 To determine whether a particular action would violate the separation of powers doctrine,
12 Washington courts analyze whether "the activity of one branch threatens the independence or
13 integrity or invades the prerogatives of another." *Brown*, 165 Wn.2d at 718 (citations and
14 quotations omitted).
15

16
17 In 2009, the Washington Supreme Court recognized that the separation of powers
18 doctrine is similar to the political question doctrine, quoting and citing a seminal federal
19 political question doctrine case. *Id.* at 718-19. In *Baker v. Carr*, the United States Supreme
20 Court outlined the following formulations describing a "political question:"
21

22 Prominent on the surface of any case held to involve a political question is
23 found a textually demonstrable constitutional commitment of the issue to a
24 coordinate political department; or a lack of judicially discoverable and
25 manageable standards for resolving it; or the impossibility of deciding without
26 an initial policy determination of a kind clearly for non judicial discretion; or
27 the impossibility of a court's undertaking independent resolution without
28 expressing lack of the respect due coordinate branches of government; or an
unusual need for unquestioning adherence to a political decision already made;
or the potentiality of embarrassment from multifarious pronouncements by
various departments on one question.

1 *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691 (1962).

2 The hallmarks of a political question are inherent in the determination of whether
3 proportional reductions should be required under RCW 70.235.020. The decision would
4 require the Court to make initial policy determinations that are not of a kind for judicial
5 discretion. The Court would have to evaluate the potential environmental, social, and
6 economic value of requiring proportional reductions by sector, by region, and by industry.
7

8 There are not right or legal answers to the issues outlined above because the decisions
9 involve policy tradeoffs. Courts have neither the “expertise nor the authority to evaluate these
10 policy judgments,” *Massachusetts v. Env’t Prot. Agency*, 549 U.S. 497, 533, 127 S. Ct. 1438
11 (2007), and there are no judicially discoverable and manageable standards for such
12 determinations. *Nw. Animal Rights Network*, 158 Wn. App. at 246 (“This court is not
13 equipped to legislate what constitutes a successful regulatory scheme by balancing public
14 policy concerns, nor can we determine which risks are acceptable and which are not. These
15 are not questions of law; we lack the tools.”) (citations and quotations omitted). How to best
16 accomplish emissions reductions is a question for politically accountable, experienced, and
17 knowledgeable policy makers who are in a better position to determine a coherent and
18 achievable emissions reduction strategy for our state. The judiciary should “not be drawn into
19 a task more appropriate to another branch.” *Brown*, 165 Wn.2d at 718 (citations and
20 quotations omitted). “Indeed, it is the role of the legislature, not the judiciary, to balance
21 public policy interests and enact law.” *Nw. Animal Rights Network*, 158 Wn. App. at 245.
22 Plaintiffs’ claim is not justiciable and should be dismissed.
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1 **E. PLAINTIFFS’ COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF**
2 **CAN BE GRANTED.**

3 Taken together, the above arguments demonstrate that, as a matter of law, Plaintiffs’
4 Complaint fails to state a claim against PSRC based on RCW 70.235.020 upon which any
5 relief can be granted. CR 12(b)(6); *see also Berge v. Gorton*, 88 Wn.2d 756, 759, 567 P.2d
6 187 (1977) (“Where it is clear from the complaint that the allegations set forth do not support
7 a claim, dismissal is proper.”) In support of its request for relief under CR 12 (b)(6) (*see*
8 footnote 7 above), PSRC submits the Declaration of Janice Adair, Special Assistant on
9 Climate Change to the Director of the Department of Ecology, filed herewith.
10

11 **VII. ARGUMENT ON SEPA**

12 Plaintiffs also assert that *T2040* was adopted in violation of SEPA. Specifically,
13 Plaintiffs contend that the EIS prepared for *T2040* is inadequate under SEPA for the following
14 reasons:
15

- 16 • The EIS should have disclosed that *T2040* violates RCW 70.235.020 (Plaintiffs’
17 Hearing Memorandum at 48-49, 55);
- 18 • The EIS should have included alternatives compliant with RCW 70.235.020 (*id.* at
19 49, 65-67); and
- 20 • The EIS should have included mitigation measures that would significantly
21 mitigate the exceedance of statutory limits in RCW 70.235.020 (*id.* at 49, 63-65).

22 Plaintiffs’ SEPA claims all relate to the adequacy of the EIS. As discussed above, the
23 adequacy of an EIS is a question of law, reviewed de novo. *See Klickitat County Citizens*,
24 122 Wn.2d at 633. However, PSRC’s decision that the EIS is adequate is to be accorded
25 substantial weight. *See, e.g., id.*; *see also* RCW 43.21C.090.
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1 Before analyzing any of the specific SEPA claims, this Court must determine whether
2 Plaintiffs have demonstrated standing to raise these claims. Plaintiffs have failed to meet this
3 burden.
4

5 **A. PLAINTIFFS LACK STANDING TO RAISE SEPA CLAIMS.**

6 Plaintiffs bear the burden of demonstrating standing to bring their SEPA appeal.
7 Washington courts apply the same two-part standing test in the SEPA context as they apply in
8 determining whether a party has standing to seek a constitutional writ of review. *See, e.g.,*
9 *Kucera v. State Dep't of Transp.*, 140 Wn.2d 200, 213, 995 P.2d 63 (2000). First, the alleged
10 endangered interest must fall within the zone of interests protected by SEPA. *See id.* Second,
11 the appellant must demonstrate an injury in fact. *Trepanier v. City of Everett*, 64 Wn. App.
12 380, 383, 824 P.2d 524 (1992). When alleging a threatened injury, the appellant must present
13 sufficient evidentiary facts to show that a threatened injury is “immediate, concrete, and
14 specific to him or herself. If the injury is merely conjectural or hypothetical, there can be no
15 standing.” *Id.*
16
17

18 For all of the reasons discussed above in Section VI.D.1, Plaintiffs’ claims are
19 conjectural, hypothetical, and speculative, and Plaintiffs have therefore failed to meet the
20 second prong of the SEPA standing test, demonstration of a cognizable injury in fact.
21

22 Plaintiffs fail to meet their burden of demonstrating standing under SEPA.

23 **B. UNDER THE RULE OF REASON, THE EIS IS ADEQUATE.**

24 Washington courts review challenges to the adequacy of an EIS under the “rule of
25 reason.” *See, e.g., Residents Opposed to Kittitas Turbines v. State Energy Facility Site*
26 *Evaluation Council*, 165 Wn.2d 275, 311, 197 P.3d 1153 (2008). The rule of reason has been
27 described as “‘a broad, flexible cost-effectiveness standard,’ in which the adequacy of an EIS
28

1 is best determined ‘on a case-by-case basis guided by all of the policy and factual
2 considerations reasonably related to SEPA's terse directives.’” *Citizens Alliance to Protect*
3 *our Wetlands (CAPOW) v. City of Auburn*, 126 Wn.2d 356, 362, 894 P.2d 1300) (quoting
4 R. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*
5 § 14(a)(i) (4th ed.1993)). Under this test, a “reasonably thorough discussion of the significant
6 aspects of the probable environmental consequences is all that is required.” *Solid Waste*
7 *Alternative Proponents (SWAP) v. Okanogan County*, 66 Wn. App. 439, 442, 832 P.2d 503
8 (1992).

9
10
11 In applying the rule of reason, courts examine whether the environmental impacts of
12 the proposed action were “sufficiently disclosed, discussed, and substantiated by supportive
13 opinion and data.” *CAPOW*, 126 Wn.2d at 362. Courts will analyze whether the EIS
14 provided decision makers with sufficient information so as to allow for an informed decision.
15 *See Residents Opposed to Kittitas Turbines*, 165 Wn.2d at 311-13. As the Supreme Court
16 described:

17
18 [A]n EIS is not a compendium of every conceivable effect or alternative to a
19 proposed project, but is simply an aid to the decision making process. That is,
20 the EIS need include only information sufficiently beneficial to the decision
21 making process to justify the cost of its inclusion. Impacts or alternatives
22 which have insufficient causal relationship, likelihood, or reliability to
influence decision makers are “remote” or “speculative” and may be excluded
from an EIS.

23 *Klickitat County Citizens*, 122 Wn.2d at 641. Each of Plaintiffs’ specific SEPA arguments is
24 briefly addressed below.

25
26 **1. There Was No Violation of RCW 70.235 to be Disclosed in the EIS.**

27 Plaintiffs claim that the EIS is inadequate because it fails to disclose the extent to
28 which the identified greenhouse gas emissions impacts would exceed the statutory limits set

1 forth in RCW 70.235.020. Plaintiffs' Hearing Memorandum at 48-49, 55. This claim fails on
2 multiple levels.

3 First, for the reasons discussed above in Section VI.A and B., PSRC had no legal
4 requirement to meet the overall state emissions levels set forth in RCW 70.235.020.
5 Plaintiffs' repeated emphasis on PSRC's obligation to disclose its "violation" of that statutory
6 provision simply has no merit. Showing the "extent of *T2040*'s non-compliance with the
7 GHG reduction requirements," as Plaintiffs urge (*id.* at 58), would require a statutory limit
8 that is specific to the Puget Sound region's on-road transportation portion of the transportation
9 sector, and would also require that "the state" be interpreted to include PSRC. Neither is
10 appropriate in light of the analysis presented above. The EIS's omission of any stated
11 "violation" of an inapplicable emissions limit does not render the EIS inadequate.

12 Second, it is important to note what the Plaintiffs do not claim regarding the EIS.
13 Plaintiffs make no claim that the EIS failed to adequately describe or disclose the potential
14 *impacts* of *T2040* on climate change, or any other element of the environment.²⁹ Rather, their
15 sole SEPA argument is based upon failure to disclose an alleged violation of the statute – one
16 which we have shown has no basis. In making this argument, Plaintiffs neglect to understand
17 the underlying purpose of the EIS: to disclose environmental impacts in sufficient detail to
18 permit an informed, reasoned decision. *See, e.g., CAPOW*, 126 Wn.2d at 362. Plaintiffs
19 never suggest that this disclosure of impacts was not done. SEPA does not require that there
20 be no impacts, or that projects not proceed when impacts are identified. In fact, project
21 impacts are anticipated under the SEPA rules. *See, e.g., WAC 197-11-440(6)(c)(v)*; *see also*

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²⁹ In light of the extensive analysis devoted to climate change in the *T2040* EIS, such an argument would of course have no merit. See detail regarding the *T2040* EIS's thorough discussion of climate change and greenhouse gas emissions in Section II.E, above.

1 CAPOW, 126 Wn.2d at 368-69 (EIS held to be adequate in spite of disclosure that project will
2 lead to worsening traffic impacts). Here, the impacts were disclosed in the EIS, and that is
3 not contested by Plaintiffs. This should therefore be the end of the inquiry. The EIS meets
4 SEPA requirements, and, under the rule of reason, is clearly adequate.
5

6 Third, Plaintiffs are just inaccurate in implying that PSRC was somehow hiding the
7 ball regarding the EIS discussion of RCW 70.235.020. *See, e.g.*, Plaintiffs' Hearing
8 Memorandum at 58 ("The EIS as well obscures the point."). Contrary to Plaintiffs'
9 assertions, PSRC *did* address RCW 70.235.020's statutory limits, and there are numerous
10 references to the statutory emissions limits in the EIS. *See, e.g.*, PSRC at 00001221, 1456,
11 2459. Moreover, neither the EIS, nor T2040 itself, "misrepresent" compliance with
12 RCW 70.235.020. *See, e.g.*, Plaintiffs' Hearing Memorandum at 44 ("T2040's claim that its
13 plan is comparable to the statute's required limits is a gross misrepresentation."). As
14 discussed above in Section II.F, the EIS clearly discloses that all of the alternatives would
15 result in emissions above 2006 levels, *see, e.g.*, PSRC at 00001465, and in no place does the
16 EIS ever assert that the claimed reductions would be "comparable" to the overall levels
17 identified in the statute. The decision makers were well aware of the emissions levels
18 anticipated under each of the alternatives in the EIS, and that these impacts were due to a
19 number of factors. Plaintiffs have no basis for suggesting otherwise.
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23 Finally, what Plaintiffs urge in their brief is contrary to the underlying purpose of
24 SEPA. SEPA requires that "the *environmental* effects of the proposed action are sufficiently
25 disclosed, discussed, and substantiated by supportive opinion and data." *Klickitat County*
26 *Citizens*, 122 Wn.2d at 644 (emphasis added). That is exactly what was done in the EIS for
27 T2040: the environmental impacts of the proposed action and all alternatives were reviewed
28

1 thoroughly, methodically, and in exceptionally detailed fashion. Far from a “lackadaisical”
2 approach (Plaintiffs’ Hearing Memorandum at 52), the EIS went above and beyond what is
3 required in SEPA in order to provide decision makers with the best available information.
4

5 Perhaps because Plaintiffs could find no grounds for objection within the substantive,
6 detailed analysis of the EIS, they now rest their claims solely on an alleged failure of the EIS
7 to disclose how the identified impacts would or would not be consistent with the state-wide
8 emissions limits. This is an attempt to distract us from the basic purpose of SEPA. Would
9 disclosure or discussion of consistency or inconsistency of *T2040* with the statute in any way
10 have altered the environmental impacts identified in the EIS? The answer, of course, is “No,”
11 as consistency with an inapplicable state regulation has no bearing on the emissions
12 anticipated in *T2040*. Indeed, had RCW 70.235 never been adopted, or if RCW 70.235 were
13 repealed tomorrow, neither of these scenarios would in any way alter the estimates of future
14 vehicle emissions set forth in the EIS, as the EIS assessment of impacts is driven by SEPA
15 rules and policies, and *not* by inapplicable statutes.³⁰
16
17

18 **2. The EIS Included A Reasonable Range Of Alternatives.**

19 Plaintiffs also claim that the EIS is inadequate for “failing to identify and analyze
20 alternatives that would meet the GHG reduction requirements of RCW 70.235.020.”
21 Plaintiffs’ Hearing Memorandum at 65. For the following reasons, Plaintiffs fail to
22 demonstrate that the alternatives presented in the EIS were inadequate under the rule of
23 reason.
24
25

26 ³⁰ Plaintiffs also allege that *T2040* is an irreversible and irretrievable commitment of resources, due to the
27 “violation” of RCW 70.235.020. There is no “violation,” and moreover, *T2040* includes a process to regularly
28 evaluate and update *T2040* in light of new information, legislative action, and the changing needs of the region.
PSRC at 00003318. Given that amendment process, there is nothing “irreversible or irretrievable” about the
T2040 EIS or *T2040* itself.

1 First, in compliance with SEPA, the EIS presents a wide range of reasonable
2 alternatives. Reasonable alternatives are defined as “actions that could feasibly attain or
3 approximate a proposal’s objectives, but at a lower cost or decreased level of environmental
4 degradation.” WAC 197-11-786; *see also* WAC 197-11-440(5)(b). Washington courts give a
5 great deal of discretion to the agency in developing the range of alternatives,³¹ and in
6 determining what alternatives are reasonable:
7

8 Nonetheless, SEPA does not require that every remote and speculative
9 alternative to an action be included in the EIS. The adequacy of an EIS must be
10 judged by application of the rule of reason. At some point, a decision must be
11 made between what is reasonable and what is not. *The agency's decision
should be given great weight.*

12 *SWAP*, 66 Wn. App. at 445 (internal citations omitted and emphasis added).

13 As described in Section II.D., the EIS was the culmination of a rigorous, multi-year
14 process by which PSRC defined its objectives, identified the major challenges and issues to be
15 addressed by the EIS alternatives, and formulated the alternatives.³² PSRC at 00001270. The
16 EIS analyzed seven alternatives – a baseline, no-action alternative, plus six action alternatives
17 including the Preferred Alternative, which was developed after review of extensive agency
18 and citizen comment. PSRC at 00001271. In developing these alternatives, PSRC sought to
19 balance its many objectives, such that the transportation investments recommended under
20 each of the alternatives could “improve efficiency and expand the system’s ability to handle
21
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23

24 ³¹ See R. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*
25 § 14.01[2][b], at 14-62, 14-62.1 (4th ed.1993) (“the mandatory range of alternatives is subject to quite lenient
26 judicial supervision under the rule of reason.”). See also, e.g., *CAPOW*, 126 Wn.2d at 367-68 (“[W]e conclude
Auburn acted within the discretion delegated under the SEPA rules to narrow consideration of alternative
sites.”).

27 ³² The challenges identified in the EIS are: (1) Congestion and Mobility: Reduce congestion for all types of
28 freight and person travel; (2) Environmental Concerns: Reduce greenhouse gas emissions linked to climate
change, and reduce water quality impacts on Puget Sound; and (3) Transportation Finance: Support the
development of sustainable transportation funding. PSRC at 00001270-71.

1 future demand, while at the same time support the region’s goals for managing urban growth
2 and protecting the environment.” *Id.* This comprehensive process of alternative selection and
3 analysis culminated in the EIS, a document that complies with all SEPA requirements, and
4 that fulfills the basic purpose of SEPA, to provide the decision makers with sufficient
5 information to make a reasoned decision on the proposed action. *See, e.g., CAPOW,*
6 *126 Wn.2d at 370.*

8 Second, in developing the alternatives for the EIS, PSRC was required under SEPA to
9 select actions “that could feasibly *attain or approximate a proposal's objectives*, but at a
10 lower environmental cost or decreased level of environmental degradation.”
11 WAC 197-11-440(5)(b) (emphasis added). Although the EIS certainly included objectives for
12 *T2040* related to reducing greenhouse gas emissions (*i.e.*, “Improve the region’s water and air
13 quality and find creative ways to address climate change”) (PSRC at 00001255), *T2040* also
14 included many other objectives related to the development of an efficient, effective regional
15 transportation system (*i.e.*, “Improve freight mobility to increase the health of the national,
16 state, and regional economy”; or “Meet the region’s present and anticipated travel needs.”).
17 *Id.* Plaintiffs might have preferred an alternative that curtailed any increases in vehicle traffic,
18 despite the anticipated population growth of 1.5 million people to our region. However, the
19 EIS alternatives need to respond to a variety of objectives, not just greenhouse gas emissions.
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22 Finally, Plaintiffs’ suggested alternative of meeting the emission limits in
23 RCW 70.235.020 is not feasible, and therefore is unreasonable. Again, reasonable
24 alternatives under SEPA include those actions “that could *feasibly* attain or approximate a
25 proposal's objectives.” WAC 197-11-440(5)(b) (emphasis added). While Plaintiffs claim that
26 there must be an alternative capable of meeting the limits in RCW 70.235.020 or some
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1 derived “proportional share” of those limits, they offer no suggestion for how this could be
2 achieved.

3 Indeed, the reality is that Plaintiffs’ suggested alternative simply does not exist. There
4 is not a viable way, within the confines of the on-road transportation portion of the
5 transportation sector in the Puget Sound region, and based upon the technologies existing
6 today, that PSRC could have crafted an alternative capable of meeting the overall, state-wide
7 greenhouse gas emissions requirements in RCW 70.235.020 or some invented “proportional
8 share” of those requirements. The various reasons for this conclusion are detailed in
9 Section VI.C. The emissions reductions achievable through on-road transportation and land
10 use strategies available to PSRC are modest in scope. To achieve more significant reductions,
11 indeed to achieve reductions below 2006 emission levels, PSRC showed that it was necessary
12 to have a substantially different fuel mix and vehicle fleet – items that are beyond PSRC’s
13 planning function and are dependent upon federal and state legislative action. Plaintiffs’
14 suggested alternative is not feasible, and therefore is unreasonable. *See, e.g., CAPOW*,
15 126 Wn.2d at 370 (“CAPOW contends *further* alternatives do not appear in the FEIS.
16 CAPOW offers no additional, feasible on-site alternatives. This court upholds the discussion
17 of on-site alternatives in the FEIS.”).

18 The EIS clearly contains a reasonable range of alternatives. PSRC was not required
19 under SEPA to include unreasonable alternatives in its EIS. Under the rule of reason, and
20 giving great weight to the decision of PSRC that the EIS was adequate, Plaintiffs’ claims to
21 the contrary have no merit.

1 **3. The EIS Presented Reasonable Mitigation Measures to Address**
2 **Applicable Impacts.**

3 Finally, Plaintiffs claim that the EIS is inadequate for “failing to present and analyze
4 measures that would significantly mitigate *T2040*’s noncompliance with the statutory GHG
5 reduction requirements.” Plaintiffs’ Hearing Memorandum at 63. Again, this argument fails
6 for several reasons.

7
8 First, the premise for Plaintiffs’ claim regarding inadequate mitigation in the EIS is
9 once again PSRC’s alleged non-compliance with what PSRC has shown is an inapplicable
10 statutory requirement. Plaintiffs call for measures “that would significantly mitigate the
11 violation of statutory limits” (*id.* at 64), but no such violation exists. For this reason,
12 Plaintiffs’ claim has no merit.

13
14 Second, Plaintiffs suggest that the mitigation presented in the EIS must be tied back to
15 the greenhouse gas limits in RCW 70.235.020. *Id.* This is incorrect. Under SEPA, the EIS is
16 to include discussion of “reasonable mitigation measures that would significantly mitigate
17 [the significant impacts of alternatives including the proposed action].”

18
19 WAC 197-11-440(6)(a). The mitigation contained in the EIS for *T2040*, therefore, must
20 relate back to the climate change *impacts* identified in *T2040*, and *not* to the alleged non-
21 compliance with an inapplicable statute. Washington courts apply the rule of reason in
22 analyzing the adequacy of recommended mitigation. *See, e.g., Residents Opposed to Kittitas*
23 *Turbines*, 165 Wn.2d at 312. Where the EIS provides sufficient detail to allow the decision
24 makers to make an informed decision, the courts have held that the EIS is adequate. *See, e.g.,*
25 *id.* Here, the suggested mitigation in the EIS is clearly adequate under the rule of reason. As
26 detailed above in Section II.F., the EIS contains extensive discussion of the potential
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1 environmental impacts of *T2040* on climate change, and offers a four-part strategy specific to
2 the reduction of greenhouse gas emissions arising from on-road vehicles in Puget Sound. The
3 EIS goes above and beyond what is required by SEPA, and is adequate under the rule of
4 reason.
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6 Finally, in citing the SEPA rules requiring discussion of mitigation in the EIS,
7 Plaintiffs fail to acknowledge that SEPA clearly contemplates that there may be impacts
8 identified in an EIS for which no reasonable or feasible mitigation exists. *See, e.g.,*
9 RCW 43.21C.031(1) (“Discussions of...significant environmental impacts which cannot be
10 mitigated should be consolidated...”); *see also* WAC 197-11-440(6)(c)(v) (“Summarize
11 significant adverse impacts that cannot or will not be mitigated.”). The basic purpose of the
12 EIS is not necessarily to provide a remedy for every identified impact,³³ but rather to provide
13 sufficient information regarding the environmental impacts of a proposal, such that the
14 decision makers can make a reasoned decision regarding the proposal. *See, e.g., CAPOW,*
15 *126 Wn.2d at 370.* This was done in *T2040*, and Plaintiffs’ arguments to the contrary have no
16 merit.
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28 ³³ *See Residents Opposed to Kittitas Turbines*, 165 Wn.2d at 312 (“However, a FEIS does not require inclusion of specific remedies of each environmental impact.”).

1 **VIII. CONCLUSION**

2 Plaintiffs advance novel interpretations of RCW 70.235.020 essentially because they
3 wish the law was different, as a policy matter. But they are aiming at the wrong target. PSRC
4 proactively addressed greenhouse gas emissions in *T2040* and has committed to ongoing
5 advancement of improved emission reduction strategies, as our knowledge base expands and
6 federal and state policies and laws take greater shape. PSRC has complied with the law, and
7 Plaintiffs' appeal should be denied.
8

9 DATED this 25th day of March, 2011.

10 HILLIS CLARK MARTIN & PETERSON P.S.

11
12 By *s/Melody B. McCutcheon*

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