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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CASCADE BICYCLE CLUB, et. al.,

Plaintiffs,

v.

PUGET SOUND REGIONAL COUNCIL,

Defendant.

No. 10-2-22228-6 SEA

**PUGET SOUND REGIONAL COUNCIL'S
REPLY ON AFFIRMATIVE DEFENSES**

I. INTRODUCTION

The parties agreed that in lieu of bringing separate dispositive motions, affirmative defenses would be combined with the briefing on the merits. To provide the Puget Sound Regional Council ("PSRC") with the ability to reply on its affirmative defenses, the parties stipulated, and the Court so ordered, that PSRC could file such a reply. (Stipulation and Agreed Order Amending Case Schedule at 4 (Dkt. #13).) In keeping with that Stipulation and Agreed Order, PSRC files this reply on its three affirmative defenses: 1) of failure to state a claim, 2) that nonjusticiable political questions are raised, and 3) of lack of standing.

1 requirement could be squared with the statute. Rather than defend “proportionate share,”
2 Plaintiffs sidestep the issue of what RCW 70.235.020 specifically requires PSRC to do by
3 stating that they are not “arguing for the rigid application of proportionate shares by sector or
4 geographic area.” Instead, they say, they merely “advocate for compliance with
5 RCW 70.235.020.” (Pls.’ Reply Mem. at 6 (Dkt #54).)

7 To make out a claim based on PSRC’s noncompliance with RCW 70.235.020,
8 Plaintiffs must be able to articulate what the statute requires PSRC to do. If PSRC is not
9 required to make the state-wide reductions required by the statute, nor make proportional
10 reductions, then what is it that the statute requires PSRC to do? Even after filing two lengthy
11 briefs, Plaintiffs still have not answered this fundamental question.

13 No one disputes that RCW 70.235.020 sets greenhouse gas reduction limits for the
14 state. But Plaintiffs cannot establish that RCW 70.235.020 requires PSRC to reduce
15 greenhouse gas emissions by any particular amount. They have therefore failed to state a
16 claim for which relief can be granted.

18 **B. PLAINTIFFS HAVE FAILED TO STATE A CLAIM AGAINST PSRC BASED ON AN**
19 **ALLEGED VIOLATION OF RCW 70.235.020 BECAUSE PSRC IS NOT “THE**
20 **STATE.”**

21 Targeting “overall” state-wide emissions, the legislature in ESSHB 2815 mandated
22 that “the state” meet certain reduction limits in 2020, 2035, and 2050. Because PSRC is not
23 “the state” under RCW 70.235.020, PSRC cannot have “violated” or “failed to comply with”
24 the statute, and for this reason also, Plaintiffs have failed to state a claim against PSRC upon
25 which they are entitled to relief. CR 12(b)(6).

1 In an effort to bring PSRC into the statute's requirements, Plaintiffs' characterization
2 of PSRC keeps changing. Plaintiffs have alleged PSRC to be a state agency,¹ an "arm of the
3 state,"² an "instrumentality of the state,"³ and lastly, in their reply brief, "a political
4 subdivision of the state."⁴ Plaintiffs have abandoned their reliance on dictionary definitions
5 of "state" (a key part of their hearing memorandum) and now put forth these morphing
6 arguments because nothing in RCW 70.235.020 supports the notion that the legislature
7 intended "the state" to mean anything other than Washington state, as a whole. This Court
8 should decline to create a cause of action against PSRC, based solely on a strained reading of
9 the statute.⁵

12 The authorities Plaintiffs cite do not support a cognizable claim against PSRC as "the
13 state" under RCW 70.235.020. Plaintiffs cite *Wash. State Dep't of Transp v. Wash. Nat'l*
14 *Gas Co.*, 59 F.3d 793 (9th Cir. 1995) to argue that courts have held state agencies to be
15 included within the term "the state." However, Plaintiffs concede that PSRC is not a state
16 agency, so that case is of no help to Plaintiffs. (Pls.' Hr'g Mem. at 26-27, 29 n.68
17 (Dkt #21).)⁶ Moreover, Congress' use of the defined term "State" in CERCLA (permitting

21 ¹ (Pls' Complaint at ¶ 4.2 (Dkt #1) (describing PSRC as "an agency created by state statute under
22 Chapter 47.80 RCW").) In their hearing memorandum, Plaintiffs abandon this argument and instead seek to
23 distinguish PSRC from typical state agencies. (Pls.' Hr'g Mem. at 26-27, 29 n.68 (Dkt #21) ("The PSRC is not
24 included in the definition of agency" set forth in Washington Administrative Procedure Act))

25 ² (Pls' Hr'g Mem. at 33 (Dkt #21).) ("For purposes of RCW 70.235.020(1), the PSRC is an arm of the
26 state")

27 ³ (Pls' Hr'g Mem. at 34 (Dkt #21) (asserting RCW 70.235.020 applies to "all of the instrumentalities of the
28 state"))

⁴ (Pls' Reply Mem. at 22, 25 (Dkt #54) ("PSRC effectively is a political subdivision of the state."))

⁵ See *State ex rel. Evergreen Freedom Found v Wash. Educ. Ass'n*, 140 Wn.2d 615, 632, 999 P.2d 602
(2000) ("General rules of statutory construction require avoidance of unlikely, absurd, or strained results.")

⁶ Courts have held that CERCLA's term the "State" as addressed in *Washington State Department of*
Transportation does not include counties, municipalities, and other political subdivisions. See, e.g., *City of New*
York v Chemical Waste Disposal Corp, 836 F. Supp. 968, 977 (E.D.N.Y. 1993) ("CERCLA's definition of

1 cost recovery for state led cleanup actions)⁷ differs significantly from our legislature's use of
2 the undefined term "the state" in setting overall emissions limits for Washington state.

3 Plaintiffs next cite to a 1976 criminal case as supporting their proposition that "[u]nder
4 Washington law, the term 'state' applies generically to [sic] state and its political
5 subdivisions." (Pls.' Reply Mem. at 24-25 (Dkt #54) (citing *State v. Durham*, 87 Wn.2d 206,
6 550 P.2d 685 (1976)).) Plaintiffs use this criminal case out of context. It is well understood
7 that county prosecutors prosecute crimes under the state criminal code on behalf of and in the
8 name of the state.⁸ This does not lead to the conclusion that every time the legislature
9 requires the state to take some action or meet some state-wide benchmark, it is placing a
10 statutory obligation on each discrete county or other subdivision of the state. In fact, the way
11 in which the legislature uses the term "the state" throughout chapter 70.235 RCW plainly
12 evinces otherwise. (PSRC's Resp. to Pls' Hr'g Mem. at 36 (Dkt #28) (citing statutory
13 provisions).)

14 Finally, Plaintiffs cite *Skagit County Pub Hosp. Dist. No. 1 v State, Dep't of Revenue*,
15 158 Wn. App. 426, 242 P.39 909 (2010) in support of their proffered construction of the term
16 "instrumentality," where the court interpreted a state statute providing tax deductions for
17 payments received from "the United States or any instrumentality thereof." *Id.* at 436

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23 'state' does not include political subdivisions"); see also *Miami-Dade County v United States*, 345 F. Supp. 2d
24 1319, 1334 (2004) (citing cases)

25 ⁷ In the CERCLA context, it is clear that a "State" usually acts through its state agencies in furtherance of
26 environmental cleanups, and the parties in *Washington State Department of Transportation* did not dispute that
27 actions of the "State" included actions by state agencies. They disputed only which state agencies were the
28 "State" for purposes of the statute entitled to certain presumptions under CERCLA. *Wash State Dep't of
Transp*, 59 F.3d at 800.

⁸ RCW 36.27.005 (authorizing county prosecuting attorneys to appear for and represent the state and their
counties); RCW 36.27.020(3) (providing prosecuting attorney shall appear for and represent the state in all
criminal and civil proceedings).

1 (quoting RCW 82.04.4297) (emphasis added). This case also is distinguishable because
2 RCW 70.235.020 does not apply to the state “or any instrumentality thereof;” it applies only
3 to “the state” and only with regard to “overall emissions” within the state.
4

5 Whether PSRC is included within RCW 70.235.020’s use of the term “the state” is a
6 predicate question of law and issue of statutory interpretation. For Plaintiffs to state a claim
7 against PSRC under RCW 70.235.020, Plaintiffs must show that the legislature intended the
8 term “the state” to include PSRC. Just as Plaintiffs have avoided a clear expression of what
9 they believe RCW 70.235.020 requires PSRC to do or which entities constitute “the state”
10 under RCW 70.235.020, they also fail to provide any evidence that the legislature intended
11 RCW 70.235.020 to apply to PSRC individually or to regional transportation planning
12 organizations in general. In fact, examination of three other pieces of legislation shows that
13 the legislature *did not intend* for planning entities such as PSRC to be subject to
14 RCW 70.235.020.
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17 First, also as part of the 2008 legislative package on greenhouse gas emissions, the
18 legislature directed the State Department of Transportation to work in collaboration with
19 “regional transportation planning organizations” to develop strategies to reduce annual per
20 capita Vehicle Miles Traveled (“VMT”). Laws of 2008, ch. 14, § 8, codified at
21 RCW 47.01.440. Thus, as part of the very legislative package that included
22 RCW 70.235.020, the legislature evidenced awareness of regional transportation planning
23 organizations, and specifically identified them as have a role in VMT strategies. It is striking,
24 then, that such organizations were not mentioned or assigned a role in RCW 70.235.020. This
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1 is evidence that the emission limits in RCW 70.235.020 were not intended to apply to regional
2 transportation planning organizations such as PSRC.

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4 Second, although Plaintiffs now assert RCW 70.235.020 to be self-implementing,
5 applying to “agents,” “instrumentalities,” or “political subdivisions of the state,” the
6 legislature has at least twice rejected this concept. In 2008, also as a part of the legislative
7 package on greenhouse gas emissions, the legislature considered amendments to the Growth
8 Management Act (“GMA”) that would have required cities and counties planning under the
9 GMA to “[a]dopt a comprehensive plan or ... update that reduces greenhouse gas emissions
10 consistent with the emission reductions” established by statute.⁹ The legislature declined to
11 adopt that legislation. Then, in 2009, the very Plaintiffs in this case sought a similar change
12 in the law,¹⁰ requesting the legislature to amend the GMA to mandate county-wide planning
13 policies to, “at a minimum, support and achieve” the “state emission reduction requirements
14 adopted under RCW 70.235.020.”¹¹ Once again, this was rejected by the legislature. Thus, in
15 2008 and again in 2009, the legislature declined to extend the state-wide emission reduction
16 requirements to individual political subdivisions or entities within the state. Essentially,
17 through this present litigation, Plaintiffs are asking the Court to do what the legislature would
18 not do.
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22 In sum, since the legislature did not intend RCW 70.235.020 to impose a mandate on
23 PSRC (and presumptively also impose a similar mandate on every other “agent,” “arm,”
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25 ⁹ Senate Bill 6580, § 3(7)(b)(iii) (2008), *adopted as amended* by Engrossed Substitute Senate Bill 6580
26 (2008) without proposed emission reduction requirements for cities and counties.

27 ¹⁰ See House Bill Report, HB 1490, 61st Leg., Reg. Sess., at 14-15 (2009) identifying Plaintiffs Futurewise
and Cascade Bicycle Club as supporters.

28 ¹¹ House Bill 1490, § 6(3)(h) (2009).

1 “instrumentality,” and purported “political subdivision” of the state, without clarifying this
2 fact or its scope), Plaintiffs have failed to state a claim against PSRC upon which they are
3 entitled to any relief, regardless of any facts plead or hypothesized. CR 12(b)(6); *see*
4 *Talarico*, 105 Wn.2d at 115 (dismissal under CR 12(b)(6) appropriate where plaintiff fails to
5 plead “legally cognizable claim” against purported defendant).¹² As PSRC is not “the state”
6 under RCW 70.235.020, Plaintiffs’ claim against it is not cognizable.
7

8 III. PLAINTIFFS RAISE NONJUSTICIABLE POLITICAL QUESTIONS

9 Plaintiffs’ inability in over 130 pages of briefing to clearly articulate how
10 RCW 70.235’s emissions limits are to be applied, and to whom the limits apply, clearly
11 demonstrates the unanswered questions that remain for the legislature, and not the courts, to
12 resolve. Although not all greenhouse gas cases inherently raise political questions, it is
13 certainly the case that Plaintiffs’ claims under RCW 70.235 raise political questions that are
14 nonjusticiable.
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16 Plaintiffs argue that they are merely asking the court to apply “established legislative
17 standards” to the actions of PSRC, and that even PSRC “has understood how those standards
18 apply to its work.” (Pls’ Reply Mem. at 29, 31 (Dkt #54).) That is wrong. While state-wide
19 limits are established in the statute, Plaintiffs’ attempt to impose those limits on *T2040* is not
20 only contrary to proper interpretation of the statute¹³ and the clear intent of the legislature,¹⁴
21 but also presents numerous policy decisions that extend beyond the proper jurisdiction of this
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25 ¹² It is evident that Ecology does not share Plaintiffs’ proffered interpretation. *See* PSRC at 00023897 and
26 PSRC at S00029454 (Ecology’s 2008 Plan and 2010 Report to the legislature describing RCW 70.235.020’s
27 reductions as directed to “Washington” and creating a framework for reducing GHG emissions in “Washington’s
28 economy”) Ecology’s construction of RCW 70.235.020 is entitled to “great weight.” *Port of Seattle v*
Pollution Control Hearings Bd, 151 Wn 2d 568, 593, 90 P.3d 659 (2004).

¹³ (PSRC Resp. to Pls’ Hr’g Mem. at 34-39 (Dkt #28).)

¹⁴ (*Id.* at 41-43.)

1 Court. Moreover, while PSRC was certainly aware of the existence of the state-wide
2 emissions limits in RCW 70.235, (PSRC Resp. to Pls.' Hr'g Mem. at 45-46 (Dkt #28)), PSRC
3 was also clear in its understanding that the state-wide limits were just that – *state-wide*
4 requirements – and that while PSRC would adopt many initiatives to reduce greenhouse gas
5 emissions, it was under no statutory obligation to meet a particular limit or proportion of the
6 state-wide limit.
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8 **A. PSRC'S JUSTICIABILITY DEFENSE IS TIMELY IN LIGHT OF CURRENT**
9 **GREENHOUSE GAS-RELATED LITIGATION.**

10 Plaintiffs characterize the political question doctrine as a “rarely invoked” doctrine,
11 with little precedent. But this ignores the fact that multiple courts across the country are
12 currently grappling with political question issues in the greenhouse gas emissions context, and
13 that includes the U.S. Supreme Court in a case argued on April 19, 2011.
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15 In the past few years, several federal district courts have determined that greenhouse
16 gas-related claims present political questions beyond the jurisdiction of the courts. *See, e.g.,*
17 *Native Vill. of Kivalina v. Exxonmobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal*
18 *docketed*, No. 09-17490 (9th Cir. Nov. 6, 2009); *Connecticut v. American Electric Power*
19 *(AEP) Co.*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009),
20 *cert. granted*, 131 S. Ct. 813 (2010). While the Second Circuit reversed the district court's
21 political question determination in *AEP*, the U.S. Supreme Court granted certiorari, and a
22 decision is pending. In the April 2011, oral arguments before the U.S. Supreme Court on
23 *AEP*, several justices posed similar questions as those presented here, of whether the policy
24 decisions that arise in analysis of the case render the case nonjusticiable as a political
25 question:
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1 JUSTICE GINSBURG: [T]he relief that you're seeking, asking a court to set
2 standards for emissions, sound like the kind of thing that EPA does. I mean,
3 Congress set up the EPA to promulgate standards for emissions, and now what
4 – the relief you're seeking seems to me to set up a district judge, who does not
5 have the resources, the expertise, as a kind of super EPA.

6 . . .
7 JUSTICE ALITO: How does a district judge decide what is reasonable and
8 cost-effective? There are considerations – this is not a situation in which the
9 emission of greenhouse gases can be totally prohibited.

10 . . .
11 JUSTICE ROBERTS: [W]hat factors go into the cost-benefit analysis that
12 would have to be undertaken to decide what level of emissions are reasonable
13 in light of the threat of global – global warming . . . Obviously the greatest
14 benefit to reduce global warming would be, of course, to shut down the power
15 plants, right? . . . But I mean, across the economy, the whole problem of
16 dealing with global warming is that there are costs and benefits on both sides,
17 and you have to determine how much you want to readjust the world economy
18 to address global warming, and I think that's a pretty big burden to post – to
19 impose on a district court judge.

20 Transcript of Oral Argument at 37-41, *Connecticut v. American Electric Power (AEP) Co.* ,
21 No. 10-174 (argued Apr. 19, 2011), available at [http://www.supremecourt.gov/
22 oral_arguments/argument_transcripts/10-174.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-174.pdf).

23 While many of the currently pending greenhouse gas-related federal cases present
24 common law claims such as nuisance, Plaintiffs' claim is similar since there is no specific
25 standard in RCW 70.235.020 that applies to PSRC and the legislature has not provided
26 guidance on how the statute might govern the activities of local or regional transportation
27 entities. Thus, many of the same political questions arising in the common law cases also
28 arise under Plaintiffs' claims.

29 **B. THIS COURT LACKS JUDICIALLY DISCOVERABLE AND MANAGEABLE
30 STANDARDS.**

31 Contrary to Plaintiffs' assertion, the mere existence of state-wide emissions limits in
32 RCW 70.235.020 is insufficient to establish the "judicially discoverable and manageable
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1 standards” required under the U.S. Supreme Court’s political question analysis in *Baker v.*
2 *Carr*, 369 U.S. 186, 217, 82 S. Ct. 691 (1962). In determining whether this factor is met, the
3 necessary focus is “not whether the case is unmanageable in the sense of being large,
4 complicated, or otherwise difficult to tackle from a logistical standpoint. Rather, courts must
5 ask whether they have the legal tools to reach a ruling that is ‘principled, rational, and based
6 upon reasoned distinctions.’” *Kivalina*, 663 F. Supp. 2d at 873-74, quoting *Alperin v. Vatican*
7 *Bank*, 410 F.3d 532, 552 (9th Cir. 2005). Here, although the statutory limits inform the state
8 of Washington’s ultimate requirements in terms of emissions reductions, the legislature has
9 not imposed specific requirements on individual entities. Accordingly, this Court lacks the
10 legal tools to reach a reasoned decision regarding application of RCW 70.235 to *T2040*.

13 For example, nowhere in Plaintiffs’ Reply Memorandum do they explain how this
14 Court should determine whether a violation of RCW 70.235 has occurred, nor do they suggest
15 how the Court would determine the appropriate remedy if a violation is found. Indeed,
16 despite Plaintiffs’ earlier assertions that a proportionate share analysis is required by the
17 statute (Pls.’ Hr’g Mem. at 48 (Dkt #21): “. . . transportation in the Puget Sound area must at
18 least bear a proportionate share of the state’s GHG reduction requirements”), Plaintiffs now
19 suggest instead that PSRC should have figured out some other unspecified method of meeting
20 the state-wide emissions limits:
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23 On pages 24 through 27 of their Response, the PSRC accuses Cascade of
24 arguing for the rigid application of proportionate shares by sector or
25 geographic area. That is incorrect, we advocate for compliance with
26 RCW 70.235.020. The PSRC was free to propose more cost-effective
27 measures to meet the GHG reduction requirements *if they exist*, but apparently
28 chose not to.

1 (Pls.' Reply Mem. at 6 (Dkt #54) (emphasis added).) Plaintiffs' change in position on
2 whether a proportionate allocation is required under the statute is likely the result of PSRC's
3 extensive arguments as to why proportionate allocation has no support in the language of the
4 statute and is contrary to the clear legislative intent.¹⁵ However, Plaintiffs' refusal to present a
5 method by which the numerical limits of the statute could be applied to *T2040* is even more
6 problematic, leaving this Court with no rational process by which to determine compliance
7 with the statute. Because the statutory standards are not "manageable" as to particular
8 defendants like PSRC, Plaintiffs' claims raise political questions.
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11 **C. NONJUDICIAL POLICY DETERMINATIONS WOULD BE REQUIRED BY THE**
12 **COURT.**

13 In addition to a lack of judicially discoverable and manageable standards for the court,
14 Plaintiffs' claims also raise nonjusticiable political questions under another of the *Baker*
15 factors: "the impossibility of deciding without an initial policy determination of a kind clearly
16 for nonjudicial discretion." 369 U.S. at 217. Plaintiffs' elusiveness regarding how the statute
17 is to be applied, and to whom it is to be applied, makes clear the numerous policy judgments
18 that would be forced upon the courts if the statutory emissions limits were imposed on
19 individual entities, or even plans such as *T2040*.
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21 For example, in order to determine if RCW 70.235.020 was violated, courts would
22 need to resolve each defendant's share of the greenhouse gas emissions reductions necessary
23 to reach the statutory limits. Since the limits in RCW 70.235 are expressed as *state-wide*
24 limits, in order to determine a particular defendant's share of the emissions limits so that the
25 state-wide limits could be met, the courts would need to figure out a way to allocate the state-
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27 _____
28 ¹⁵ (PSRC Resp to Pls.' Hr'g Mem. at 23-33 (Dkt #28).)

1 wide limits not just to the defendants in the case, but also in consideration of what everyone
2 else's share would be. And by "everyone else," it is clear that Plaintiffs believe the state-wide
3 limits apply to every regional transportation planning organization, county, city, and town in
4 the state – and unspecified other entities that fit into Plaintiffs' loose category of
5 "instrumentality of the state." Indeed, Plaintiffs' interpretation of "state" for purposes of
6 RCW 70.235 appears to be so expansive that it includes associations, corporations, and even
7 individuals. (Pls.' Hr'g Mem. at 28 n.67 (Dkt #21).)

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10 Acceptance of Plaintiffs' expansive interpretation would mean that courts would be
11 required to determine the appropriate proportionate share for each and every entity, and even
12 individual emitters would be liable for failure to reduce their own emissions to 1990 levels by
13 the year 2020. Or, if such an interpretation were deemed too far-reaching, where would the
14 court draw the line? Such a determination again raises political questions that are properly
15 left to the legislature. As the *Kivalina* court noted:

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17 To the extent that the combustion of fossil fuels is causing global warming, it
18 is evident that any person, entity or industry which uses or consumes such
19 fuels bears at least some responsibility for Plaintiffs' harm... The seemingly
20 arbitrary selection of Defendants, coupled with the gravity and extent of the
21 harm alleged in this case, underscores the conclusion that the allocation of
22 responsibility for global warming is best left to the executive or legislative
23 branch.

24 663 F. Supp. 2d at 876 n.4.

25 In determining whether RCW 70.235.020 was violated by individual entities, courts
26 would also need to heed the legislative directive that the state "reduce emissions at the lowest
27 cost to Washington's economy, consumers, and businesses." RCW 70.235.005(3)(c). In
28 balancing individual entities' emissions reductions with economic considerations, courts
would be forced to weigh the advantages and disadvantages of particular sectors or industries,

1 to determine if each entity had violated its reduction requirement. The balancing and policy
2 trade-offs that would necessarily rest with the courts, were individualized RCW 70.235 claims
3 to be permitted, raise improper political questions for the courts, and thus extend beyond the
4 proper jurisdiction of the courts. *See, e.g., Nw. Animal Rights Network*, 158 Wn. App. 237,
5 246, 242 P.3d 891 (2010) (“Indeed, the judiciary’s making such public policy decisions would
6 not only ignore the separation of powers, but would stretch the practical limits of the
7 judiciary.”).

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10 Finally, even if the court were able to determine that a statutory violation has
11 occurred, what is the appropriate remedy? As the *Moving Cooler* study demonstrated, even
12 with numerous extraordinary measures, such as an increased gas tax of \$2.71 per gallon and
13 peak hour tolls of \$.65 per mile in all urban and rural areas, the resulting emissions reductions
14 would still be insufficient to reduce transportation emissions to 1990 levels. (PSRC Resp. to
15 Pls.’ Hr’g Mem. at 12-13 (Dkt #28)); *see also* PSRC at S00029341-54. Although Plaintiffs
16 assert that PSRC “could likely produce an alternative that complies with
17 RCW 70.235.020(1)(a)” (Pls.’ Reply Mem. at 18 (Dkt #54)), this statement has no support in
18 the record. The fact of the matter is that PSRC spent three years developing *T2040*, aided by
19 state, regional, and local agencies, and the best scientific and technical analysis that can be
20 found. PSRC’s conclusion was that the types of measures available to PSRC in *T2040* to
21 control on-road vehicle emissions do reduce such emissions, but by themselves, that effect is
22 modest. PSRC was not alone in that conclusion. Comprehensive national and state studies,
23 such as *Moving Cooler* and *Leading the Way*, reached the same conclusions about the limited
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1 ability of the transportation sector to significantly reduce greenhouse gas emissions, without
2 national changes in vehicle technology and fuel standards.

3 Any attempt to craft a remedy particular to *T2040* and sufficient to meet the emissions
4 limits in RCW 70.235 would bring this Court into the realm of policy determinations properly
5 left for the legislative branch. Because this Court lacks the basis to make a reasoned decision
6 on how the statute is to be applied, and because this Court would be forced to balance
7 economic and environmental considerations in order to determine whether a statutory
8 violation has occurred, and to craft an appropriate remedy, Plaintiffs' statutory claims raise
9 political questions, and must be dismissed as nonjusticiable.

12 IV. PLAINTIFFS LACK STANDING

13 Plaintiffs present in a single section their arguments on standing for both their SEPA
14 claim, and their request for a constitutional writ of review. (Pls.' Reply Mem. at 50
15 (Dkt #54).) By combining their standing responses, however, Plaintiffs blur the distinctions
16 between their claims, distinctions which are significant in determining whether Plaintiffs have
17 standing as to each separate claim. Although Washington courts do apply the same standing
18 test for each of the two claims (zone of interests, and injury in fact),¹⁶ this Court's analysis of
19 whether Plaintiffs have demonstrated an injury in fact¹⁷ will be unique for each claim, because
20 the alleged *source* of the injury for each of Plaintiffs' claims is different. Whereas Plaintiffs'

23 ¹⁶ Under the Washington test, to demonstrate standing for constitutional writs of review or under SEPA,
24 Plaintiffs must demonstrate an injury in fact, *i e*, that they will be "specifically and perceptibly harmed" by the
25 proposed action, and that their alleged endangered interests fall within the appropriate "zone of interests." *See*,
26 *e g*, *Snohomish County Prop Rights Alliance v Snohomish County*, 76 Wn. App. 44, 52, 53 882 P.2d 807
(1994); *see also Kucera v. State Dep't of Transp*, 140 Wn 2d 200, 213, 995 P.2d 63 (2000).

27 ¹⁷ PSRC does not claim that Plaintiffs' alleged interests are outside of the "zone of interests" for either of
28 their claims. That portion of the standing test was merely cited in PSRC's Response Memorandum in order to
present the complete test for the benefit of the court. Plaintiffs' discussion of the zone of interests portion of the
standing test on pages 51-53 of Plaintiffs' Reply Memorandum is therefore not relevant.

1 alleged injuries under SEPA arise from the adequacy of the T2040 EIS, Plaintiffs' alleged
2 injuries under the constitutional writ of review arise from the claimed violation of
3 RCW 70.235.020 by T2040. In light of this distinction between the two claims, Plaintiffs'
4 standing to seek the constitutional writ of review must be analyzed separately from Plaintiffs'
5 standing to raise the SEPA claim. As presented below, separate analysis of each of the claims
6 makes clear that Plaintiffs have failed to meet their burden to demonstrate an injury in fact for
7 either of the claims.
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9
10 **A. PLAINTIFFS LACK STANDING TO INVOKE A CONSTITUTIONAL WRIT OF REVIEW.**

11 Under Washington's standing test,¹⁸ Plaintiffs alleging a threatened injury must
12 demonstrate that the injury will be "immediate, concrete and specific." *Harris v. Pierce*
13 *County*, 84 Wn. App. 222, 231, 928 P.2d 1111 (1996). If the injury is merely conjectural or
14 hypothetical, there can be no standing. *Id.* Plaintiffs must present sufficient evidentiary facts
15 to "show a direct adverse effect upon [them] if the court does not exercise its extraordinary
16 authority." *See Snohomish County Prop Rights Alliance*, 76 Wn. App. at 53. "The pleadings
17 and proof are insufficient if they merely reveal imagined circumstances in which the plaintiff
18 could be affected." *Coughlin v Seattle Sch. Dist. No. 1*, 27 Wn. App. 888, 893, 621 P.2d 183
19 (1980) *abrogated on other grounds by* 111 Wn.2d 250 (1988).
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22 Plaintiffs seek a constitutional writ of review based upon their allegation that the
23 "projects and programs authorized by T2040 will cause the Puget Sound region to far exceed
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26 ¹⁸ Plaintiffs base much of their response regarding the injury in fact test on standing cases from federal
27 courts, including discussion regarding traceability and causation – a specific component of the federal standing
28 test that does not exist under Washington's standing jurisprudence. Because, as Plaintiffs acknowledge,
Washington courts do not apply the same standing test as federal courts, PSRC's reply focuses on the test set
forth by Washington courts.

1 the GHG reduction limits set forth at RCW 70.235.020(1)(a).” (Pls.’ Hr’g Mem. at 22
2 (Dkt #21).) This is a claim of *threatened* injury – that the future violation of RCW 70.235
3 will cause injuries to Plaintiff’s members. Accordingly, Plaintiffs must present sufficient
4 evidence to demonstrate that their claimed injuries are immediate, concrete, and specific.
5

6 Here, Plaintiffs’ claimed injuries hinge upon violation of RCW 70.235. In other
7 words, the source of Plaintiffs’ alleged injuries, for purposes of their RCW 70.235 claim, is
8 the potential failure of the state to meet the emissions limits in the years 2020, 2035, or 2050.
9 However, Plaintiffs have failed to provide sufficient evidence to demonstrate that the statutory
10 violation will even occur at all. This is the fundamental flaw in Plaintiffs’ argument on
11 standing under the constitutional writ of review. Absent any evidence that *violation of the*
12 *statute* is imminent, Plaintiffs have no basis to argue that their *injuries* are imminent.
13 Plaintiffs have not, and indeed cannot, demonstrate an injury in fact.
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16 Despite the fundamental importance of this issue, however, Plaintiffs make no attempt
17 to show that violation of the statute is imminent.¹⁹ Rather, Plaintiffs assert that they “need
18 only show that implementation of *T2040* would increase GHG emissions.” (Pls.’ Reply Mem.
19 at 56 (Dkt #54).) That is incorrect. Where the claimed injuries arise from violation of
20 RCW 70.235, merely showing that greenhouse gas emissions would continue to rise even
21 with *T2040* is insufficient to demonstrate that those injuries are in fact imminent. Moreover,
22 Plaintiffs’ declarations are of no help to Plaintiffs in this regard. For purposes of Plaintiffs’
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25 ¹⁹ Plaintiffs instead focus on why *T2040* need not be the sole source of emissions that leads to a future
26 violation of RCW 70.235. (Pls.’ Reply Mem. at 54-56 (Dkt #54).) Here, Plaintiffs appear to have
27 misunderstood PSRC’s statement that “Plaintiffs cannot demonstrate a violation of the statute based solely on a
28 single, sector-specific, regional plan.” (PSRC’s Resp. to Pls.’ Mem. at 54 (Dkt #28).) PSRC is not suggesting
that Plaintiffs must prove that *T2040* will be the single and only cause of a violation of RCW 70.235. What
PSRC does insist upon, however, is that, in order to confer standing upon Plaintiffs for its constitutional writ
claim, Plaintiffs must demonstrate that a violation of RCW 70.235 will occur.

1 request for a constitutional writ of review, the declarations need to provide the evidentiary
2 basis to demonstrate that the alleged injuries will occur from the action. *See Snohomish*
3 *County Prop. Rights Alliance*, 76 Wn. App. at 53. Here, however, Plaintiffs' declarations
4 provide no specific evidence that the statute will be violated at all, nor do they make any
5 attempt to link their claimed injuries to the alleged statutory violation.
6

7 Perhaps underlying Plaintiffs' inability to demonstrate an imminent violation of the
8 statute is the fact that the many efforts underway across the state to address greenhouse gas
9 emissions suggest that violation of the statute is far from certain. (PSRC Resp. to Pls.' Hr'g
10 Mem. at 30-33 (Dkt #28) (discussing the many emissions reductions efforts already underway
11 around the state, and noting the fact that a state-wide emissions trading program, the
12 "centerpiece policy to address emissions throughout the economy," may yet be authorized).)
13 Indeed, the state's ever-expanding efforts to reduce overall state-wide emissions are most
14 recently reflected in the legislation adopted in April 2011, related to coal-fired electric
15 generation facilities, one of the largest sources of greenhouse gas emissions in the state. *See*
16 *LAWS OF 2011, ch. 180 (E2SSB 5769)*, at § 101. Under the new legislation, the single largest
17 source of greenhouse gas emissions in the state, the TransAlta facility, will be shut down,
18 with one of its two coal-fired boilers to be taken offline in 2020, and the other in 2025. *Id.*
19 at § 103(3)(c)(i). This groundbreaking legislation, and the emissions reductions that will
20 result, are but another indicator of the ever-evolving nature of this field. A future violation of
21 RCW 70.235 is anything but certain.
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26 Finally, Plaintiffs cite to several Washington cases for the fact that standing can still
27 be established where injuries arise from planning decisions, rather than projects. These cases
28

1 have no bearing upon this analysis. PSRC does not disagree that a threatened injury can be
2 sufficient to establish standing, although courts will apply additional scrutiny in instances
3 where the injury is threatened rather than existing. (PSRC Resp. to Pls.' Hr'g Mem. at 53
4 (Dkt #28).) However, none of the Washington cases cited by Plaintiffs contained the same
5 fundamental flaw as is present in this case. As evidenced by Plaintiffs' brief descriptions of
6 its cited cases, in all of those cases the underlying source of the alleged injuries was neither
7 uncertain nor speculative. (Pls.' Reply Mem. at 57 (Dkt #54) (citing four state cases
8 involving standing challenges where the underlying actions included a rezone, an annexation,
9 and/or a plan amendment).)²⁰ Whereas the plaintiffs in all of those cases had to demonstrate
10 that their injuries were imminent, there was no question that the underlying action would
11 occur, or had occurred. Indeed, this basic premise is so fundamental to the injury in fact
12 portion of the standing analysis that it is not typically even part of the courts' inquiry.
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16 Plaintiffs bear the burden of demonstrating injury in fact. Here, where the alleged
17 injuries arise from a future violation of RCW 70.235, Plaintiffs' inability to demonstrate that
18 the statutory violation will occur at all is fatal to their claim that their injuries are direct and
19 imminent. Plaintiffs' injuries are merely speculative and conjectural, and are insufficient to
20 grant standing for this claim.
21

22 **B. PLAINTIFFS LACK STANDING UNDER SEPA.**

23 Plaintiffs also have the burden of demonstrating standing for their SEPA claim. *See*
24 *Trepanier v. City of Everett*, 64 Wn. App. 380, 383, 824 P.2d 524 (1992). As discussed
25

26 ²⁰ So too in the federal cases cited by Plaintiffs, the underlying action that was the alleged source of the
27 injuries was not uncertain or speculative. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497 (2007) (alleged injuries
28 based upon EPA's denial of petition for rulemaking to regulate greenhouse gas emissions from motor vehicles);
see also Nw. Env'tl. Def. Ctr v Owens Corning Corp., 434 F. Supp. 2d 957 (D. Or. 2006) (injuries alleged under
Clean Air Act based upon failure of new facility to obtain preconstruction permit).

1 above, under the Washington standing test, Plaintiffs must show that they will suffer an injury
2 in fact. *Id.* at 382. When alleging a threatened injury, as here, Plaintiffs must present
3 sufficient evidentiary facts to show “an immediate, concrete, and specific injury to him or
4 herself. If the injury is merely conjectural or hypothetical, there can be no standing.” *Id.*
5 at 383. Because Plaintiffs have failed to demonstrate that their alleged injuries are either
6 imminent or specific, Plaintiffs have failed to meet their burden of demonstrating an injury in
7 fact.
8

9
10 Plaintiffs’ alleged injuries are not imminent. All of Plaintiffs’ claims under SEPA
11 arise from the alleged violation of RCW 70.235.020 by *T2040*. Specifically, Plaintiffs allege
12 that the EIS prepared for *T2040* is inadequate under SEPA because it: (1) should have
13 disclosed a violation of RCW 70.235.020; (2) should have included alternatives compliant
14 with RCW 70.235.020; and (3) should have included mitigation measures to mitigate the
15 exceedance of emissions limits in RCW 70.235.020. (Pls.’ Hr’g Mem. at 48-67 (Dkt #21))
16 However, for all of the reasons set forth in PSRC’s briefing, there is no legal requirement that
17 *T2040* must meet the overall state-wide emissions levels set forth in RCW 70.235.020.
18 Moreover, as discussed above, Plaintiffs have failed to demonstrate that a violation of
19 RCW 70.235.020 will occur. Where the source of Plaintiffs’ injuries is an inapplicable
20 statute, and Plaintiffs have not even shown that the statute will be violated, Plaintiffs’ alleged
21 injuries are merely conjectural and hypothetical, and Plaintiffs lack standing.
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24 Plaintiffs’ injuries are also not sufficiently specific to confer standing for their SEPA
25 claims. Plaintiffs present a number of declarations in an attempt to support their standing.
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1 The declarations list Plaintiffs' members' alleged injuries, including the following common
2 example:

3 These changes directly affect us by changing precipitation patterns that in turn
4 increase lowland flooding and the closing of roads, by reducing snow pack
5 available for the region's water supply and by making forests drier and more
6 susceptible to forest fire, thereby reducing the ability of members to enjoy
7 forested areas.

8 (Decl. of Charles D. Ayers ¶ 9 (Dkt #46).) Plaintiffs contend that these injuries would
9 allegedly arise from the "increased highway miles, motor vehicle miles traveled and
10 greenhouse gas emissions." (*Id.*)

11 PSRC does not, of course, dispute that motor vehicle use can lead to greenhouse gas
12 emissions, which can lead to climate change. But the effects of motor vehicle use or
13 greenhouse gas emissions are not specific only to Plaintiffs' and their members, nor are they
14 specific even to all members of the region or the state. By asserting injuries that could be
15 similarly asserted by countless other individuals or groups, Plaintiffs have failed to
16 demonstrate that they are directly and specifically harmed by the adoption of *T2040*. Because
17 the injury is not specific to Plaintiffs, Plaintiffs have failed to demonstrate an injury in fact.
18 *See, e.g., Concerned Olympia Residents for Env't v. City of Olympia*, 33 Wn. App. 677, 684,
19 657 P.2d 790 (1983) ("Unless a litigant can demonstrate a direct stake in the controversy, i.e.,
20 that he will be specifically and perceptibly harmed, he cannot invoke judicial intervention.
21 Otherwise, the judicial process will become no more than a vehicle for the vindication of
22 value interests of concerned bystanders."). Indeed, a case cited by Plaintiffs makes clear that
23 generalized injury such as that alleged by Plaintiffs is insufficient to confer standing in the
24 context of climate change-related claims:
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1 [C]limate change is a harm that is shared by humanity at large, and the redress
2 that Petitioners seek – to prevent an increase in global temperature – is not
3 focused any more on these petitioners than it is on the remainder of the world’s
4 population. Therefore Petitioners’ alleged injury is too generalized to establish
5 standing.

6 *Center for Biological Diversity v Dep’t of Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009).²¹

7 Because Plaintiffs have failed to present sufficient evidentiary facts to show that their
8 alleged injuries are immediate and specific, Plaintiffs have not met their burden to
9 demonstrate standing for their SEPA claim.

10 **V. CONCLUSION**

11 For the reasons stated herein, and in PSRC’s Response to Plaintiffs’ Hearing
12 Memorandum (Dkt #28), Plaintiffs’ appeal should be denied.

13 DATED this 20th day of May, 2011.

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25 ²¹ The court in *Center for Biological Diversity* also made clear that the U.S. Supreme Court’s grant of
26 standing in *Massachusetts v. EPA* must be narrowly interpreted in light of the importance the Court assigned to
27 the fact that the party seeking review was a sovereign State, and not a private individual. 563 F.3d at 476-77
28 (“*Massachusetts* stands only for the limited proposition that, where a harm is widely shared, a sovereign, suing
in its individual interest, has standing to sue where that sovereign’s individual interests are harmed, wholly apart
from the general harm.”)