

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  
OPPOSITION TO MOTION BY  
PLAINTIFFS TO STRIKE  
DECLARATION OF JANICE ADAIR**

**I. RELIEF REQUESTED**

The Puget Sound Regional Council ("PSRC") offered Janice Adair's declaration in support of its affirmative defense that Plaintiffs fail to state a claim upon which relief may be granted. (Decl. of Janice Adair ("Adair Decl.") filed Mar. 25, 2011 (Dkt. #29).) Because Ms. Adair's declaration is consistent with the parties' stipulation to permit declarations in support of affirmative defenses, and provides relevant testimony and context regarding the Department of Ecology's ("Ecology") interpretation of greenhouse gas legislation, PSRC requests that this Court deny Plaintiffs' motion to strike.



1           Since its enactment in 2008, Ms. Adair has been instrumental in leading Ecology's  
2 policy formulations in conformity with ESSHB 2815, and in directing Ecology's legislatively  
3 mandated reporting. (Adair Decl. ¶¶ 7-12 (Dkt #29).) ESSHB 2815, after setting overall  
4 emissions reductions for the state for 2020, 2035, and 2050, required Ecology to "submit a  
5 greenhouse gas reduction plan for review and approval to the legislature, describing those  
6 actions necessary to achieve [.020(1)(a)'s] emission reductions." RCW 70.235.020(1)(b).  
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8 Ms. Adair was a primary author of Ecology's 2008 greenhouse gas reduction plan, *Growing*  
9 *Washington's Economy in a Carbon Constrained World. A Comprehensive Plan to Address*  
10 *the Challenges and Opportunities of Climate Change* (Dec. 2008) ("Ecology's 2008  
11 Comprehensive Plan"). PSRC at 00023883-977. After the legislature did not immediately  
12 adopt a cap-and-trade program, Ecology updated that Plan, reporting on the state's continued  
13 efforts to comply with RCW 70.235.020. *Path to a Low-Carbon Economy: An Interim Plan*  
14 *to Address Washington's Greenhouse Gas Emissions* (Dec. 2010) ("Ecology's 2010 Interim  
15 Plan"). PSRC at S00029454-492. Ms. Adair was also a primary author of Ecology's 2010  
16 Interim Plan. PSRC at S00029456.

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19           Neither Ecology's 2008 Comprehensive Plan nor its 2010 Interim Plan interprets the  
20 law as requiring proportionate reductions of greenhouse gasses from individual sources or  
21 sectors. Yet, Plaintiffs ask this court to hold that PSRC's adoption of *T2040* "violated" and  
22 "failed to comply with" RCW 70.235.020. Because RCW 70.235.020 addresses only state-  
23 wide emission reductions and does not impose any directives on PSRC, PSRC asserts  
24 Plaintiffs have failed to state a claim. In support of its affirmative defenses, PSRC submitted  
25 the Adair Declaration.  
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1 PSRC, or apply in the manner Plaintiffs suggest, they have failed to state a claim. PSRC  
2 raises a valid affirmative defense.

3 The Adair Declaration provides relevant context regarding the enactment of  
4 ESSHB 2815 (Adair Decl. ¶¶ 4-6, 8 (Dkt #29)) and details regarding Ecology’s post-  
5 ESSHB 2815 policies and actions aimed at reducing greenhouse emissions in the state (*Id*  
6 ¶¶ 7-15), describes Ecology and the state’s ongoing efforts to meet the statutory greenhouse  
7 gas reduction limits (*Id.* ¶ 12) and Ecology’s understanding of the difficulty of making  
8 immediate and significant reductions in the transportation sector (*Id.* ¶ 11), and confirms  
9 Ecology’s interpretation of RCW 70.235.020’s requirements, both generally (*Id.* ¶¶ 8, 14-15),  
10 and in the SEPA planning context (*Id.* ¶ 15). Specifically, the Adair Declaration confirms  
11 Ecology’s interpretation of the law as requiring state-wide emission reductions, and not  
12 proportionate reductions from sources of greenhouse gases within the various sectors. *Id.* ¶ 8  
13 (Ecology does not understand the law to “require[ ] proportionate reductions from sources of  
14 greenhouse gases within the various sectors,” and ESSHB 2815 was “drafted around the  
15 expectation of a cap and trade program . . . not on proportional reductions from each  
16 individual sector”). Ms. Adair’s declaration also explains Ecology’s interpretation of the  
17 interplay between RCW 70.235.020 and SEPA, noting that “Ecology does not believe that  
18 state law requires planning entities to limit themselves to alternatives that meet sector-specific  
19 proportionate reductions . . . .” (*Id.* ¶ 15.)

20 Each of these points supports PSRC’s argument that Plaintiffs’ claim, premised on a  
21 purported “violation” of RCW 70.235.020, fails as a matter of law, and as such, fails to state a  
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1 claim upon which any relief may be granted. The Stipulated Order allowed declarations  
2 related to affirmative defenses, and the Adair Declaration should be considered by this Court.

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4 **B. THE ADAIR DECLARATION IS RELEVANT AND ADMISSIBLE.**

5 Plaintiffs argue that portions of the Adair Declaration are “inadmissible [ ] legislative  
6 history,” “inadmissible [ ] statutory construction,” or “inadmissible legal opinion.” (Mot. to  
7 Strike at 7, 8, and 9 respectively (Dkt #41).) While Plaintiffs may disagree with her  
8 testimony, or the weight that it should be afforded, it is certainly relevant, and as such,  
9 admissible. ER 402 (“all relevant evidence is admissible”).

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11 **1. The Adair Declaration testimony regarding the history of  
12 RCW 70.235.020 is admissible.**

13 Plaintiffs first assert that paragraphs 5 through 9 of the Adair Declaration (in total and  
14 without differentiation) constitute “inadmissible” evidence of legislative history. (Mot. to  
15 Strike at 7-8 (Dkt #41).) To the extent any portion of paragraphs 5 through 9 could be  
16 categorized as legislative history,<sup>3</sup> they are not “inadmissible” based on that fact.

17 Paragraphs 5 through 9 of the Adair Declaration explain that ESSHB 2815 was  
18 “drafted around an expectation of a cap and trade program,” (Adair Decl. ¶¶ 5, 8 (Dkt #29),  
19 and “not on proportional reductions from each individual sector.”) (*Id.* ¶¶ 5-9). The  
20 legislature and Ecology intended a cap and trade program would be adopted to meet these  
21 limits. RCW 70.235.005 (legislative intent section discussing proposed “regional multisector  
22 market-based system”); PSRC at 00023897. Ms. Adair provides context for understanding a  
23 cap and trade, *i.e.* market-based system. (*Id.* ¶¶ 5-9.) Plaintiffs cite no rule of evidence

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27 <sup>3</sup> Plaintiffs’ motion is unclear regarding what specific statements they allege as objectionable “legislative  
28 history.” For example, Ms. Adair’s description of the intended cap and trade model and Ecology’s actions are  
not legislative history, but simply a description of Ecology’s actions in response to RCW 70.235.020. Adair  
Decl. ¶¶ 5-12 (Dkt #29).)

1 establishing that Ms. Adair’s description of this context is somehow “inadmissible as  
2 legislative history,” and the cases cited (Mot. to Strike at 8 (Dkt #41)), while addressing the  
3 weight that should be accorded the different forms of legislative history, say nothing about  
4 their underlying admissibility.  
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6 As Ms. Adair was instrumental in ESSHB 2815’s legislative process, her declaration  
7 testimony is relevant. *Wash State Leg v Lowry*, 131 Wn.2d 309, 326-27, 931 P.2d 885  
8 (1997) (“The intent of legislative sponsors of a measure is noteworthy, but not conclusive as  
9 to our interpretation of the plain language of a measure.”) (citing *Chrysler Corp v Brown*,  
10 441 U.S. 281, 311, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979)). Furthermore, it is a well-  
11 established principle that agency interpretations of laws within their field of expertise and  
12 under their charge are admissible, and in fact, “should be given great weight *in determining*  
13 *legislative intent.*” See *Hama Hama Co v Shorelines Hearings Bd.*, 85 Wn.2d 441, 536 P.2d  
14 157 (1975) (emphasis added). The Adair Declaration establishes facts relevant to and  
15 evincing the legislature’s intent in adopting RCW 70.235.020.  
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18 **2. The Adair Declaration testimony regarding Ecology’s**  
19 **interpretation, policies, and practices related to RCW 70.235.020 is**  
20 **admissible.**

21 Plaintiffs next assert that evidence of Ecology’s interpretation of ESSHB 2815  
22 (paragraphs 8, 14, and 15) is inadmissible “statutory construction.” Our supreme court has  
23 held that “statutory construction may involve a consideration of . . . administrative  
24 interpretation of the statute.” *State, Dep’t of Transp v State Employees Ins. Bd.*, 97 Wn.2d  
25 454, 458-59, 645 P.2d 1076 (1982). Plaintiffs’ motion cites but does not meaningfully apply  
26 *Cowiche Canyon Conservancy v Bosley*, which provides:  
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1 If an agency is asserting that its interpretation of an ambiguous statute is entitled  
2 to great weight it is incumbent on that agency to show that it has adopted and  
3 applied such interpretation as a matter of agency policy. It need not be by formal  
4 adoption equivalent to an agency rule, but it must represent a policy decision by  
5 the person or persons responsible.

6 118 Wn.2d 801, 815, 828 P.2d 549 (1992). First, Ms. Adair is undisputedly one of the  
7 “person or persons responsible” at Ecology for adopting agency climate change policy.  
8 (Adair Decl. ¶¶ 1-4 (Dkt #29).) Second, Plaintiffs ignore the record when they blithely assert  
9 that “[o]ther than her say so, Ms. Adair offers nothing to show that Ecology has adopted her  
10 proffered interpretations and that it has actually applied these interpretations as a matter of  
11 policy.” (Mot. to Strike at 8 (Dkt #41).) For example, Ms. Adair’s explanation that  
12 ESSHB 2815 “was drafted around the expectation of a cap and trade program,” which  
13 program is “based on the market determining the lowest cost reductions throughout the  
14 economy” and not proportional sector-specific reductions, (Adair Decl. ¶ 8 (Dkt #29)), is  
15 consistent with Ecology’s 2008 Comprehensive Plan, identifying participation in a regional  
16 cap and trade program as Ecology’s “central policy.” PSRC at 00023891.<sup>4</sup> Additionally,  
17 Ms. Adair declares:  
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19 An argument that RCW 70.235.020 requires proportionate reductions from  
20 sources of greenhouse gases within various sectors that produce greenhouse gases  
21 is not consistent with Ecology’s understanding of what is required under the law.

22 (Adair Decl. ¶ 8 (Dkt #29).) Ms. Adair goes on to explain that Ecology does not interpret  
23 ESSHB to mandate that transportation plans meet proportional transportation reductions, as  
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26 <sup>4</sup> Ecology’s interpretation of RCW 70.235.020 in the 2008 Comprehensive Plan is particularly instructive as it  
27 was formulated the same year the legislature enacted RCW 70.235.020. *State ex rel. Evergreen Freedom*  
28 *Found. v. Wash. Educ. Ass’n*, 140 Wn.2d 615, 635-36, 999 P.2d 602 (2000) (“An administrative construction  
nearly contemporaneous with the passage of the statute, especially when the legislature fails to repudiate the  
contemporaneous construction, is entitled to great weight”).

1 argued by Plaintiffs. (*Id.* ¶ 14 (Dkt #29).) These statements are consistent with Ecology’s  
2 2010 Interim Plan and report to the legislature, which states:

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

7 PSRC at S00029466.<sup>5</sup>

8 Finally, regarding RCW 70.235.020’s interplay with SEPA, Ms. Adair explained  
9 Ecology’s position:

10 . . . Ecology does not believe that state law requires planning entities to limit  
11 themselves to alternatives that meet sector-specific proportionate reductions . . .

12 . . . [SEPA analysis] should include discussion of baseline emissions and statutory  
13 reductions and should also measure various alternatives for their potential to  
14 reduce emissions. In this regard, PSRC’s Final EIS deserves high marks. In fact,  
15 Ecology has posted the PSRC plan on its website and holds it out as an example  
16 of how to properly analyze greenhouse gases and climate change in a non-project  
17 EIS.

18 (Adair Decl. ¶ 15 (Dkt #29).)<sup>6</sup> This policy position by the “person or persons responsible” is  
19 consistent with Ecology’s practice and interpretation of state law. (*Id.* ¶¶ 14, 15.)

20 In sum, the Adair Declaration provides evidence regarding Ecology’s “uniformly  
21 applied interpretation.” *Cowiche Canyon Conservancy*, 118 Wn.2d at 815. Ample evidence  
22 in the record, supported by Ms. Adair’s declaration, reflects Ecology’s uniform interpretation

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23 <sup>5</sup> When Ecology has considered transportation impacts, it has proposed consideration of state-wide strategies  
24 (strategies outside the purview of *T2040*), such as evaluation of a low carbon fuel standard. PSRC  
25 at S00028474-475

26 <sup>6</sup> Ecology is the state agency charged with implementing the SEPA. *Public Util Dist No 1 of Clark*  
27 *County v Pollution Control Hearings Bd*, 137 Wn. App. 150, 157, 151 P.3d 1067 (2007) (giving deference to  
28 Ecology’s interpretations of SEPA’s requirements). Ecology’s construction of RCW 70.235.020’s in the SEPA  
context is particularly relevant as Plaintiffs’ SEPA argument is premised on their allegation that PSRC failed to  
disclose in the FEIS its “violation” of RCW 70.235.020’s “standards,” and “its failure to develop alternatives or  
mitigations fully compliant with those standards.” (Pls’ Hr’g Mem. at 48-49, 54 (Dkt #21).) PSRC maintains  
these claims fail as a matter of law.

1 of RCW 70.235.020 as not requiring planning agencies to meet specific proportionate  
2 greenhouse gas reductions, including:

- 3 • Ecology’s 2008 Comprehensive Plan proposing to meet the limits in .020 through  
4 the “central policy” of a cap and trade model, not proportionate sector-specific  
5 reductions. PSRC at 00023897-906; (Adair Decl. ¶¶ 5-8 (Dkt #29).)
- 6 • Ecology’s post-2008 policies and efforts related to RCW 70.235.020, none of  
7 which involved sector or geographic specific proportionate reductions, including:
  - 8 • Negotiations this year to close the state’s largest emitter of greenhouse gases  
9 (TransAlta) as a reduction strategy to meet RCW 70.235.020 limits. PSRC  
10 at S00029476; (Adair Decl. ¶ 7-14 (Dkt #29).)<sup>7</sup>
  - 11 • Proposing adoption of a low carbon fuel standard to address state-wide  
12 transportation impacts. PSRC at S00029474-475; (Adair Decl. ¶ 12  
13 (Dkt #29).)
  - 14 • Ecology’s 2010 Interim Plan, again not recommending proportionate  
15 reductions. PSRC at S00029454; (Adair Decl. ¶ 12(Dkt #29).)

16 Ms. Adair’s declaration provides relevant testimony regarding Ecology’s policies and  
17 practices related to RCW 70.235.020, which evidence is supported by the record.

18 **3. Ms. Adair’s declaration testimony is not inadmissible legal opinion.**

19 Finally, Plaintiffs erroneously assert that the Adair Declaration amounts to  
20 inadmissible legal opinions. However, Ms. Adair’s testimony regarding how Ecology’s  
21 “central policy” of a cap and trade program would work is not a legal opinion, but an  
22 explanation of how a cap and trade program would meet ESSHB 2815’s requirements, (Adair  
23 Decl. ¶ 7 (Dkt #29)), and, unlike proportionate reductions, why Ecology views cap and trade  
24 as an appropriate reduction strategy. (*Id.* ¶ 10.) This testimony is consistent with adopted  
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28 <sup>7</sup> See LAWS OF 2011, ch 180 (E2SSB 5769) (requiring closure of TransAlta’s coal-fired boilers, the first in  
2020, and the second in 2025)

1 Ecology policy, *see* PSRC at 00023891. Nothing in these statements can be interpreted as  
2 forming a legal opinion.

3 Ms. Adair's testimony regarding her opinions as Ecology's departmental lead  
4 regarding climate change, the costs of different strategies, and the economically inefficient  
5 nature of proportionate reductions are likewise not inadmissible legal opinions, but are  
6 relevant facts and opinions related to Ecology's interpretation of the law and its various policy  
7 foundations. For example, Ms. Adair declares:  
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10 . . . the bill directs the state to accomplish the reductions at the lowest possible  
11 cost. According to studies I have reviewed, most of the lowest cost strategies to  
12 reduce emissions involve improvements in residential, commercial, and industrial  
13 energy efficiency while reductions from transportation and clean energy are less  
14 cost-effective. Requiring all sectors to reduce emissions at the same rate will  
15 increase the cost of meeting the state's statutory reductions compared with  
16 developing policies that target the lowest cost reductions, such as a cap and trade  
17 policy. Thus, proportionate reductions from each sector or sources within sectors  
18 would undermine the legislative direction to achieve reductions at the lowest  
19 possible cost.

20 (Adair Decl. ¶ 9 (Dkt #29).)

21 What the law provides is incontrovertibly an issue for this Court to decide. However,  
22 Ms. Adair's declaration is relevant in establishing Ecology's interpretation, and showing that  
23 Ecology's position has been uniform and adopted as a matter of policy consistent with *Hama*  
24 *Hama* and *Cowiche Canyon Conservancy*.<sup>8</sup> Compare (Adair Decl. ¶¶ 12, 14-15 (Dkt #29))  
25 with PSRC at 00023883, S00029454. It is that interpretation, supported by adopted policies  
26 and practices, that is entitled to weight and deference. *State ex rel. Evergreen Freedom*

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27 <sup>8</sup> To the extent Ms. Adair's declaration describes the statute in detail, those descriptions, often in the form of  
28 direct quotes, (Adair Decl ¶¶ 5, 6 (Dkt #29)), are provided simply for context. In any event, quoting a statute  
can hardly be characterized as a "legal opinion."

1 *Found. v. Wash. Educ. Ass'n*, 140 Wn.2d 615, 635-36, 999 P.2d 602 (2000) (according “great  
2 weight” to agency interpretation of law in dismissing case under CR 12(b)(6)).  
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4 **VI. CONCLUSION**

5 Because PSRC asserts a valid affirmative defense under Civil Rule 12(b)(6), the Adair  
6 Declaration is properly offered in support of that defense. Further, Plaintiffs have not  
7 established that Ms. Adair’s declaration testimony is otherwise inadmissible under the Rules  
8 of Evidence. PSRC respectfully requests that this Court deny Plaintiffs’ motion to strike.  
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10 DATED this 20<sup>th</sup> day of May, 2011.

11 HILLIS CLARK MARTIN & PETERSON P.S.

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