

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Honorable Carol A. Schapira  
Hearing Date: May 31, 2011

SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KING COUNTY

CASCADE BICYCLE CLUB, a  
Washington non-profit corporation,  
FUTUREWISE, a Washington non-profit  
corporation and SIERRA CLUB, a  
California non-profit corporation,

Plaintiffs,

v.

PUGET SOUND REGIONAL COUNCIL,  
a state regional transportation planning  
organization and a federally designated  
metropolitan planning organization,

Defendant.

NO. 10-2-22228-6 SEA

MOTION BY PLAINTIFFS TO STRIKE  
DECLARATION OF JANICE ADAIR

**I. RELIEF REQUESTED**

The Cascade Bicycle Club, Futurewise and Sierra Club move to strike  
the Declaration of Janice Adair on grounds that it offers legal opinions and

MOTION BY PLAINTIFFS TO STRIKE  
DECLARATION OF JANICE ADAIR - 1

**ARAMBURU & EUSTIS LLP**  
720 Third Avenue, Suite 2112  
Seattle, Washington 98104  
Tel. (206) 625-9515 Fax (206) 682-1376

1 inadmissible legislative history and exceeds the scope of the parties' stipulation  
2 regarding the admissibility of evidence beyond the PSRC decision record.

## 3 II. RELEVANT FACTS

4 Through this action plaintiffs challenge *Transportation 2040*, the 30 year  
5 plan adopted by the Puget Sound Regional Council governing the funding and  
6 development of transportation projects in the four county Puget Sound Region.

7 This action has been brought under Article IV, Section 6 of the Washington  
8 State Constitution and Chapters 7.24, 7.40, and 43.21C RCW.

9  
10 By Stipulation and Agreed Order approved by the court on November 5,  
11 2010, provisions at Paragraphs B 1 and 2 govern the review of this action,  
12 which are set forth in part below:

13 1. The trial in this matter shall be conducted as a hearing on the  
14 decision record, briefing and argument of counsel under the  
15 schedule below, without the presentation of additional evidence or  
16 testimony at the hearing. ...

17 2. The parties do not anticipate the presentation of dispositive  
18 issues by motion. The briefing of any affirmative defenses shall be  
19 combined with the briefing on the merits and presented under the  
20 schedule set forth within Part D below. The parties reserve the  
21 right to include affidavits or declarations as part of their briefing in  
22 order to raise and respond to affirmative defenses.

23 A copy of this Stipulation and Agreed Order is set forth for the court's reference  
24 at Attachment A to this motion. Pursuant to this Stipulation and Agreed Order,  
25 as amended the PSRC filed its decision record by electronic disk (due to its  
size).

1 Plaintiffs filed and served their initial Hearing Memorandum on January  
2 14, 2011. Apart from footnotes to recognized authorities plaintiffs'  
3 memorandum made no reference to documentation lying beyond the T2040  
4 decision record.

5 The PSRC filed and served its response on March 25, 2011. However,  
6 PSRC included with its response the Declaration of Janice Adair, in which Ms  
7 Adair:

8 identifies herself and her position and her responsibilities with the  
9 Department of Ecology, ¶¶ 1-3;

10 states that during the 2008 legislative session her work included  
11 proposing, tracking and testifying on climate change related legislation,  
12 including HB 2815 (amended to ESSHB 2815), which in turn included  
13 the provisions eventually enacted into law at RCW Chapter 70.235, ¶ 4;

14 opines as to core purposes of ESSHB 2815, ¶¶ 5 & 6;

15 speaks to efforts to enact "cap and trade " programs by legislation and  
16 other means, ¶ 7;

17 offers an argument that proportionate reductions of GHG is not  
18 consistent with Ecology's understanding of the law, ¶ 8;

19 states her own opinion as to what she believes to be lowest cost  
20 strategies for GHG reductions, ¶ 9;

21 offers an argument in support of cap and trade measures, ¶ 10;

22 contends that reducing GHG emissions from the transportation sector  
23 will take time, ¶ 11;

24 speaks to efforts to reduce GHG emissions from other, non-  
25 transportation sources, including the TransAlta coal plant, and cites to an  
economic analysis that is not contained in the decision record, ¶ 12;

summarizes letters submitted by Ecology to PSRC in 2008 and 2009,  
¶13;

1 offers an opinion that in part contradicts Ecology's statements in those  
2 letters, ¶ 14; and

3 opines as to Ecology's belief as to the requirements of state law,  
4 contends that PSRC's Final EIS "deserves high marks" and cites it as  
5 providing a good example as to how to analyze GHG emissions and  
6 climate change, ¶15.

6 For ease of reference a copy of the Declaration of Janice Adair is set forth for  
7 the court's reference at Attachment B to this motion. The above indented  
8 paragraphs serve only to summarize the paragraphs of the declaration and not  
9 to alter Ms. Adair's words.

10 Although the parties agreed and the court ordered that "[t]he trial in this  
11 matter shall be conducted as a hearing on the decision record ... without the  
12 presentation of additional evidence or testimony", the PSRC offers Ms Adair's  
13 testimony on the asserted ground it is allowed under Stipulation B.2 which  
14 "allows the parties to include declarations as part of their briefing in order to  
15 raise and respond to affirmative defenses." PSRC Response at 17, fn 7. PSRC  
16 purports to offer Ms. Adair's testimony in support of its affirmative defense that  
17 plaintiffs' Complaint fails to state a cause of action. *Id.*

18 Plaintiffs move to strike ¶¶ 5-15 on grounds that the declaration exceeds  
19 the scope of the Stipulation and Agreed Order. But even if it did not, the  
20 statements within the declaration would be inadmissible because they amount  
21 to inadmissible evidence of legislative history, legal opinion and assertion of  
22 Ecology's interpretation of state law.  
23  
24  
25

### III. EVIDENCE RELIED UPON

- 1
- 2 A. Stipulation and Agreed Order approved by the court on November
- 3 5, 2010 (Attachment A)
- 4 B. Declaration of Janice Adair (Attachment B)
- 5 C. Complaint for Direct Review Under SEPA, Declaratory Relief And
- 6 Constitutional Writ of Review (by reference)
- 7 D. Answer (by reference)
- 8 E. Plaintiffs' Hearing Memorandum (by reference)
- 9 F. Puget Sound Regional Council's Plaintiffs' Hearing Memorandum
- 10 (by reference)
- 11 G. *Transportation 2040* (by reference)

### IV. ARGUMENT

#### A. **The Declaration of Janice Adair Exceeds the Scope of the Stipulation and Agreed Order.**

12

13

14 While the Stipulation and Agreed Order does state that “[t]he parties

15 reserve the right to include affidavits or declarations as part of their briefing in

16 order to raise and respond to affirmative defenses[,]” the PSRC does not

17 genuinely offer the Declaration of Janice Adair in support of any affirmative

18 defense. Certainly, the PSRC does allege in its Answer at Affirmative Defense

19 V.2 that “[p]laintiffs fail to state a claim on which relief may be granted[,]” a

20 defense commonly pled in most every civil action. But support of that

21 affirmative defense is not the reason for Ms Adair’s declaration. Rather, her

22 declaration serves to interject into the record her opinions regarding: the

23 legislative history of ESSHB 2815 (including the GHG reduction requirements

24

25

1 at RCW 70.235.020) ¶¶5-7 and 9; Ecology's claimed understanding of RCW  
2 70.235.020, ¶¶ 8, 12, 14 and 15; and her own opinions regarding GHG  
3 emissions, transportation generated emissions, other GHG-related work and  
4 the adequacy of the *T2040 EIS*. ¶¶ 10, 11. None of these opinions relate to  
5 whether plaintiffs' complaint sets forth a viable legal claim.

6 Under CR 12(b)(6) dismissal for failure to state a claim "is appropriate  
7 only when it appears beyond doubt that the claimant can prove no set of facts,  
8 consistent with the complaint, which would justify recovery." *San Juan County*  
9 *v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831(2007). A motion to  
10 dismiss for failure to state a claim should be granted "sparingly and with care,  
11 and only in the unusual case in which the plaintiff's allegations show on the face  
12 of the complaint an insuperable bar to relief." *Id.* (internal quotations and  
13 citations omitted).

14 Plaintiffs' Complaint plainly does allege facts entitling them to relief:  
15  
16 RCW 70.235.020 sets GHG reduction limits; *T2040*, directly and through its EIS  
17 applies those limits; and PSRC's own data and analysis show that  
18 implementation of *T2040* would violate those limits. See Complaint, ¶¶ 3.1, 3.5  
19 and 4.1 - 4.6. PSRC's principal opposition to plaintiffs' claims is grounded on a  
20 legal construction of RCW 70.235.020, not an issue on which Ms Adair's  
21 declaration would be admissible. PSRC's assertion that Ms Adair's declaration  
22 would be admissible under Stipulation and Order ¶B2 is simply pretext.  
23  
24  
25

1           Apart from PSRC's defense that plaintiffs fail to state a claim under RCW  
2 70.235.020, Ms Adair's declaration at ¶¶ 10, 11 and 15 offers opinions on the  
3 nature of GHG emissions, the time needed for making changes in the  
4 transportation sector and on the adequacy of the EIS. The opinions in no way  
5 relate to PSRC's failure to state a claim defense, but rather are offered in  
6 support of their response as to the adequacy of the EIS, on which the parties  
7 agreed that evidence would be limited to the decision record.  
8

9           **B.     The Adair Declaration Purports to Offer Evidence That Is  
10           Inadmissible As Legislative History.**

11           In her declaration at ¶¶ 5-9 Ms Adair offers her opinions on the purpose  
12 of ESSHB 2815, the intent of the legislation, a construction of the legislation  
13 based upon the failure of the legislature to enact cap and trade legislation, her  
14 understanding of the bill and her review of studies concerning low cost  
15 strategies to reduce GHG emissions. None of these opinions are admissible as  
16 legislative history.

17           It is well established that the intent of a legislative body may not be  
18 shown through statements by vocal proponents for the program, *King County v.*  
19 *Taxpayers of King County*, 104 Wn.2d 1, 5, 700 P.2d 1143 (1985), by memos  
20 not contained within a written committee report, *LeBeuf v. Atkins*, 28 Wn. App.  
21 50, 621 P. 2d 787 (1980), or by an individual legislator's later statement offered  
22 to show prior intent of the entire legislative body. *Convention Center Coalition v.*  
23 *Seattle*, 107 Wn.2d 370, 375, 730 P.2d 636 (1986). Ms Adair's role in the  
24 enactment of ESSHB 2815 was effectively that of a lobbyist for the Department  
25

1 of Ecology. Her declaration three years after the fact is inadmissible as  
2 evidence of legislative history.

3 **C. The Adair Declaration Purports to Offer Evidence That Is**  
4 **Inadmissible As Statutory Construction.**

5 Ms Adair Declaration opines as to “Ecology’s understanding of what is  
6 required under the law”, ¶8, Ecology’s “understanding of state law” in 2008 and  
7 2009 when it commented to the PSRC, ¶14, and Ecology’s belief as to state  
8 law requirements, ¶15. But none of these statements of claimed agency  
9 understanding are supported by anything more than her own declaration.

10 Under the holding in *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d  
11 801, 815, 828 P.2d 549 (1992), “[I]f an agency is asserting that its  
12 interpretation of an ambiguous statute is entitled to great weight it is incumbent  
13 on that agency to show that it has adopted and applied such interpretation as a  
14 matter of agency policy.” Other than her say so, Ms Adair offers nothing to  
15 show that Ecology has adopted her proffered interpretations and that it has  
16 actually applied those interpretations as a matter of policy. Essentially, Ms  
17 Adair and PSRC attempt what the court chastised Ecology for in *Cowiche*  
18 *Canyon Conservancy* at 815, that Ecology again “attempts to bootstrap a legal  
19 argument into the place of agency interpretation.”

20 Ms Adair’s opinions as to Ecology’s claimed understandings and beliefs  
21 with regard to RCW 70.235.020 and climate change measures in general are  
22 simply inadmissible.  
23  
24  
25

1                   **D.     The Adair Declaration Purports to Offer Inadmissible Legal**  
2                   **Opinion.**

3                   Ms Adair's Declaration advances a number of opinions as to: the effect  
4 of an unadopted cap and trade program, ¶ 7 & 10; the statute's provisions for  
5 lowest cost GHG reductions, ¶9; and RCW 70.235.020's requirement for  
6 proportional GHG reductions. These opinions are inadmissible as opinions of  
7 law.

8                   Certainly, ER 704 allows an expert to offer testimony "an ultimate issue  
9 to be decided by the trier of fact." 5B Teglund, *Washington Practice* §704.3  
10 (2007). However, this rule does allow for testimony on questions of law. As Mr.  
11 Teglund explains at §7.04.5:

12                   No witness is permitted to express an opinion that is a conclusion  
13 of law, or merely tells the jury what result to reach. If a question  
14 calling for a conclusion of law is put to a lay witness, the response  
15 is barred under Rule 701 because it is not "helpful to a clear  
16 understanding of the witness's testimony or of a fact in issue." If  
17 the question is put to an expert witness, the response is barred  
under Rule 702 because it does not "assist the trier of fact to  
understand the evidence or to determine a fact in issue."

18 In the case at hand, Ms Adair's declaration purports to offer opinions on issues  
19 of law, the meaning of RCW 70.235.020. These opinions are not admissible  
20 under the Rules of Evidence.

21 //

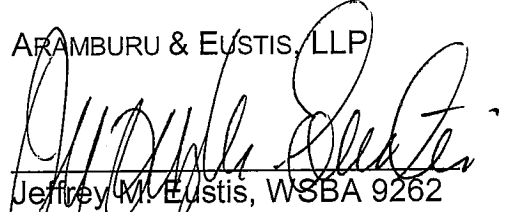
22 /


1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

**V. CONCLUSION**

For the reasons above, the Declaration of Janice Adair at ¶¶ 5-15 should be stricken. A proposed order is attached.

DATED this 28<sup>th</sup> day of April 2011.

ARAMBURU & EUSTIS, LLP  
  
Jeffrey M. Eustis, WSBA 9262  
Attorneys for the Cascade Bicycle Club and the Sierra Club

  
Tim Trohimovich, WSBA 22367  
Attorney for Futurewise

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

**DECLARATION OF SERVICE**

I am an employee in the law offices of Aramburu & Eustis, LLP, over eighteen years of age and competent to be a witness herein. On the date written below, copies of the foregoing document were electronically delivered to:

Melody McCutcheon, WSBA #18112  
mbm@hcmp.com  
HILLIS CLARK MARTIN & PETERSON  
Attorney for Puget Sound Regional Council

Rodney L. Brown, Jr., WSBA # 13089  
rbrown@cascadialaw.com  
CASCADIA LAW GROUP  
Attorney for Puget Sound Regional Council

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED: This 28<sup>th</sup> day of April, 2011.

  
\_\_\_\_\_  
Carol Cohoe

# Attachment A

RECEIVED

NOV 8 2011

ARAMBURU & EUSTIS  
Honorable William Dowling

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KING COUNTY

CASCADE BICYCLE CLUB, a  
Washington non-profit corporation,  
FUTUREWISE, a Washington non-profit  
corporation and SIERRA CLUB, a  
California non-profit corporation,

Plaintiffs,

v.

PUGET SOUND REGIONAL COUNCIL,  
a state regional transportation planning  
organization and a federally designated  
metropolitan planning organization,

Defendant,

NO. 10-2-22228-6

STIPULATION AND AGREED ORDER  
AMENDING CASE SCHEDULE

STIPULATION

The parties agree and stipulate to entry of the following Agreed Order:

1 DATED this 4<sup>th</sup> day of November, 2010.

3 ARAMBURU & EUSTIS, LLP

4 By

*Jeffrey M. Eustis*

5 Jeffrey M. Eustis, #9262  
6 ARAMBURU & EUSTIS LLP  
7 720 Third Avenue, Suite 2112  
8 Seattle, WA 98104  
9 Telephone: (206) 625-9515  
Email: eustis@aramburu-  
eustis.com

10 Attorneys for Cascade Bicycle Club and  
the Sierra Club

FUTUREWISE

*Tim Tronimovich*

By: *Tim Tronimovich*  
Tim Tronimovich, #22367  
FUTUREWISE  
814 Second Avenue, Suite 500  
Seattle, WA 98104  
Telephone: (206) 343-0681  
Email: tim@futurewise.org

Attorney for Futurewise

12 HILLIS CLARK MARTIN & PETERSON

13 By

*Melody B. McCutcheon*

14 Melody B. McCutcheon, #18112  
15 HILLIS CLARK MARTIN & PETERSON, P.S.  
16 1221 Second Avenue, Suite 500  
17 Seattle, Washington 98101-2925  
Telephone: (206) 623-1745  
Email: mbm@hcmp.com

18 Attorneys for Defendant, Puget Sound  
19 Regional Council

CASCADIA LAW GROUP

*Rodney L. Brown, Jr.*

By: *Rodney L. Brown, Jr.*  
Rodney L. Brown, Jr., #13089  
CASCADIA LAW GROUP  
1201 Third Avenue, Suite 320  
Seattle, Washington 98101  
Telephone: (206) 292-6300  
Email: rbrown@cascialaw.com

Attorneys for Defendant, Puget Sound  
Regional Council

20 **AGREED ORDER**

21 Based upon the above stipulation, it is hereby ordered as follows:

22 **A. Administrative Decision Record.**

23 1. Contents of the Decision Record. The prior Stipulation and Order

24 Authorizing Filing of Administrative Record in Electronic Form and Revising the

25 STIPULATION AND AGREED ORDER AMENDING  
CASE SCHEDULE - 2

ARAMBURU & EUSTIS LLP  
720 Third Avenue, Suite 2112  
Seattle, Washington 98104  
Tel. (206) 625-9515 Fax (206) 682-1376

1 Filing Date in the Case Schedule approved by the court on August 17, 2010  
2 governs the form and filing date of the record. Through the initial designation  
3 by the Puget Sound Regional Council ("PSRC"), requests for supplementation  
4 by plaintiffs and PSRC's subsequent supplementation, the record filed on  
5 September 24, 2010 constitutes the decision record. The parties do not  
6 anticipate that the decision record would be supplemented through motions for  
7 supplementation or through testimony, affidavits or declarations of witnesses.  
8

9       2.     Additional measures. The parties agree that additional means for  
10 compiling a decision record will not be utilized, such as those available through  
11 under Article IV, Section 6 of the Washington State Constitution, Chapters 7.24,  
12 7.40, and 43.21C RCW, and the rules of discovery under CR 26-37. The parties  
13 agree that PSRC's actions may be reviewed on the decision record filed with  
14 the court, without issuance of a writ of review.  
15

16 **B.   Trial/Hearing.**

17       1. The trial in this matter shall be conducted as a hearing on the  
18 decision record, briefing and argument of counsel under the schedule below,  
19 without the presentation of additional evidence or testimony at the hearing.  
20 However, documents in Category 7 of the Administrative Agency Record are  
21 draft, working files that were added to the Record at Plaintiffs' request. PSRC  
22 added those documents to the Record subject to its express reservation of  
23 rights to object to Plaintiffs' use of those materials, including the intent to  
24 present such objections by affidavit or declaration. Plaintiffs do not agree that  
25

1 such affidavits or declarations are appropriate. If necessary, this matter would  
2 be resolved by motion presented as part of the briefing by the parties.

3 2. The parties do not anticipate the presentation of dispositive issues by  
4 motion. The briefing of any affirmative defenses shall be combined with the  
5 briefing on the merits and presented under the schedule set forth within Part D  
6 below. The parties reserve the right to include affidavits or declarations as part  
7 of their briefing in order to raise and respond to affirmative defenses.  
8

9 **C. Schedule for Briefing and the Hearing.**

10 The case schedule shall be amended as follows:

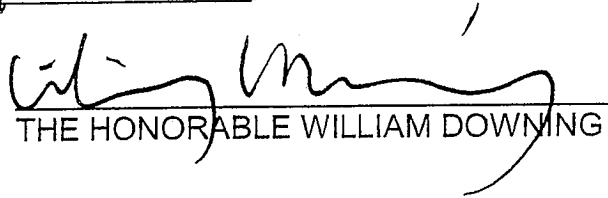
Deadline	Event
January 14, 2011	Plaintiffs' opening brief
March 25, 2011	PSRC responsive brief
April 29, 2011	Plaintiffs' reply brief
May 13, 2011	Deadline for engaging in alternative dispute resolution
May 20, 2011	PSRC reply, limited to plaintiffs' response to affirmative defenses raised in PSRC's responsive brief, if any
May 31, 2011	Hearing, or as determined by the court's schedule

21 //

22 /

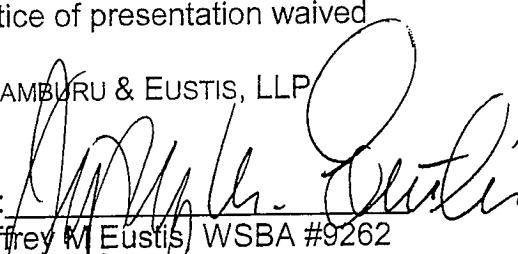
1 3. This Stipulation and Agreed Order may be amended upon agreement of  
2 the parties and approval by the court.

3 Dated this 5 day of November, 2010.

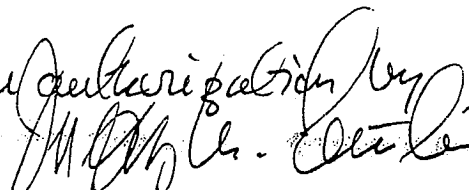
4  
5   
6 THE HONORABLE WILLIAM DOWNING

7 Approved for entry;  
8 notice of presentation waived

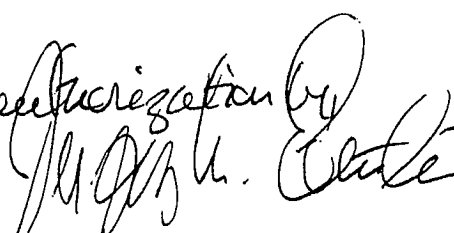
9 ARAMBURU & EUSTIS, LLP

10 By:   
11 Jeffrey M. Eustis, WSBA #9262  
12 Attorney for Cascade Bicycle Club and Sierra Club

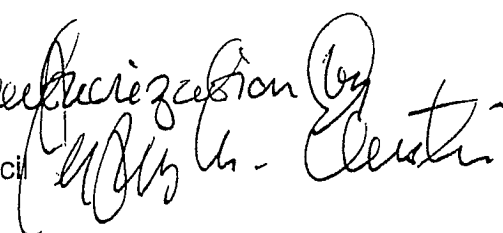
13 FUTUREWISE

14 By: Tim Trohimovich, per authorization by  
15 Tim Trohimovich, WSBA #22367  
16 Attorney for Futurewise 

17 HILLIS CLARK MARTIN & PETERSON

18 By: Melody McCutcheon, per authorization by  
19 Melody McCutcheon, WSBA #18112  
20 Attorney for Puget Sound Regional Council 

21 CASCADIA LAW GROUP

22 By: Rodney L. Brown, Jr., per authorization by  
23 Rodney L. Brown, Jr., WSBA # 13089  
24 Attorney for Puget Sound Regional Council 

# Attachment B

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

STATE OF WASHINGTON  
KING COUNTY SUPERIOR COURT

CASCADE BICYCLE CLUB, et al.,  
Plaintiffs,

NO. 10-2-2228-6 SEA

DECLARATION OF JANICE ADAIR

v.

PUGET SOUND REGIONAL  
COUNCIL,

Defendant.

I, JANICE ADAIR, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

1. I am over the age of 18, am competent to testify in a court of law, and voluntarily provide this statement from my own personal knowledge and recollection.

2. I currently serve as a Special Assistant on climate change to the Director of the Department of Ecology (Ecology). I also head the Climate Policy Group within Ecology. I have held this position for 4.5 years.

3. My responsibilities for Ecology include serving as the senior leadership position of the agency's overall strategy to address climate change including emission reductions and preparing for its impacts. I formulate policy positions for the agency and the Governor's Office and direct activities in coordination with executive agency managers to ensure the State's climate strategy is implemented and/or followed. I am the Governor's sole

1 representative on the Western Climate Initiative, a coalition of seven states and four Canadian  
2 provinces that are working together to design policies to reduce greenhouse gases. I have  
3 recently been appointed to the Executive Board of The Climate Registry. I also work closely  
4 with the Governor's Office to develop national policy positions related to climate change,  
5 clean energy, and climate impacts.

6 4. My job duties including proposing, tracking, and/or testifying on climate  
7 change related bills before the Washington State Legislature. During the 2008 legislative  
8 session, I was actively involved in supporting House Bill 2815, a governor-requested bill  
9 related to greenhouse gas emissions. My involvement included collaborating with the  
10 Governor's Office on the scope of the legislation, working with Ecology's assistant attorneys  
11 general in drafting the bill, meeting with and responding to stakeholders and other interested  
12 parties on the legislation and its underlying policy objectives, working with legislators,  
13 testifying in support of the bill, and drafting amendments to respond to concerns expressed by  
14 legislators and interested parties. The bill was passed as an Engrossed Second Substitute  
15 House Bill (ESSHB) by both legislative chambers and signed into law by Governor Gregoire  
16 on March 13, 2008. Parts of the bill created a new chapter, Chapter 70.235 RCW, which is  
17 the subject of the current litigation.

18 5. A core purpose of ESSHB 2815 was to lay the groundwork for Washington's  
19 participation in a regional cap and trade program for the reduction of greenhouse gases. For  
20 example, the Department of Ecology was charged with developing a cap and trade program  
21 and delivering recommendations for its implementation to the legislature by December 1,  
22 2008. *See* RCW 70.235.030. The bill's legislative findings and statements of intent include  
23 multiple references to the anticipated cap and trade program as a "regional multisector  
24 market-based system." *See* RCW 70.235.005.

25 6. The legislative findings and intent section also contains a key statement that  
26 guides implementation of ESSHB 2815: "It is the intent of the legislature that the state

1 will . . . reduce emissions *at the lowest cost* to Washington's economy, consumers, and  
2 businesses." RCW 70.235.005(3) (emphasis added).

3         7.         A cap and trade program caps the overall level of greenhouse gas emissions  
4 and lets the market determine the cost of making those reductions. As a result, a cap and trade  
5 program is expected to both reduce emissions to the "cap" and to do so at the lowest cost.  
6 Governor Gregoire requested passage of a bill in 2009 to set an overall "cap" in the form of  
7 the statutory reductions in RCW 70.235.020(1) and to authorize the State to participate in a  
8 regional cap and trade program. The bill did not pass, but the statutory reductions remain on  
9 the books. Ecology and other agencies have been exploring alternatives to cap and trade for  
10 meeting the reductions at the "lowest cost to Washington's economy, consumers, and  
11 businesses." In addition, other laws have passed that seek to reduce greenhouse gas emissions  
12 such as the greenhouse gas tailpipe standards for passenger vehicles and the requirement that  
13 state agencies reduce their carbon footprints.

14         8.         An argument that RCW 70.235.020 requires proportionate reductions from  
15 sources of greenhouse gases within the various sectors that produce greenhouse gases is not  
16 consistent with Ecology's understanding of what is required under the law. First, nothing in  
17 the bill suggests that the legislature intended to mandate proportionate reductions from  
18 individual sources or sectors. To the contrary, the bill was drafted around the expectation of a  
19 cap and trade program, which is based on the market determining the lowest cost reductions  
20 throughout the economy, not on proportional reductions from each individual sector.

21         9.         Second, the bill directs the State to accomplish the reductions at the *lowest*  
22 *possible* cost. According to studies I have reviewed, most of the lowest cost strategies to  
23 reduce emissions involve improvements in residential, commercial, and industrial energy  
24 efficiency while reductions from transportation and clean energy are less cost-effective.  
25 Requiring all sectors to reduce emissions at the same rate will increase the cost of meeting the  
26 State's statutory reductions compared with developing policies that target the lowest cost

1 reductions, such as a cap and trade policy. Thus, proportionate reductions from each sector or  
2 sources within sectors would undermine the legislative direction to achieve reductions at the  
3 lowest possible cost.

4 10. Third, greenhouse gas emissions are unique in that they mix uniformly in the  
5 atmosphere thus any reduction wherever it is made will reduce the overall concentration of  
6 these gases. This is why a cap and trade program has been considered an appropriate  
7 reduction strategy.

8 11. It is well understood that making reductions in the transportation sector will  
9 take time. Vehicle miles traveled, vehicle technology, and fuel types are the three major  
10 contributors to emissions from this sector. Making changes to vehicle miles traveled will  
11 require increased transit, land use changes, and other community improvements, not to  
12 mention behavioral changes. Changes to vehicle technology also require considerable time.

13 12. Rather than focusing on proportionate reductions, Ecology and other state  
14 agencies are working to identify strategies that are most likely to cost effectively achieve the  
15 statutory reductions. For example, Ecology, the Department of Commerce, and the  
16 Governor's Office have been negotiating with the owners of the State's only coal plant  
17 (TransAlta), and the biggest single source of greenhouse gas emissions, to transition off of  
18 coal energy by 2025. In fact, the Governor's Office, TransAlta, environmental groups, labor  
19 unions, and utilities recently reached an agreement to accomplish this transition. The  
20 agreement is reflected in Engrossed Second Substitute Senate Bill (ESSSB) 5769,<sup>1</sup> which has  
21 passed the Senate, and if enacted into law, will result in a sizable decrease to the State's total  
22 emissions. For an example within the transportation sector, Ecology did an economic analysis  
23 of a low carbon fuel standard and identified it as a reasonable means to achieve near-term  
24

25 <sup>1</sup> The current proposed legislation (ESSSB 5769) and status of the bill is available at  
26 <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5769&year=2011>.

1 emission reductions. Other strategies are included in a report available on Ecology's website  
2 at <http://www.ecy.wa.gov/climatechange/2010CompPlan.htm>.

3 13. On January 30, 2008, Ecology's former director Jay Manning submitted a letter  
4 to the Puget Sound Regional Council (PSRC) during the scoping process for the updated  
5 transportation plan. The letter stated that the updated plan should "ensure that the region's  
6 proportional share of ghg emissions from the transportation sector will be reduced, consistent  
7 with the state's ghg reduction goals." Ecology made a similar statement in 2009 in its  
8 comments on the draft environmental impact statement (EIS): "Ecology believes it is  
9 critically important for PSRC to develop a plan that ensures GHG emissions consistent with  
10 the region's proportional share of the transportation sectors [sic] GHG emissions reductions."

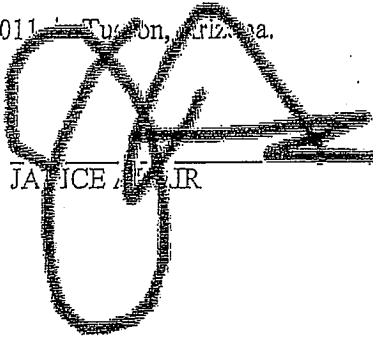
11 14. At the time that Ecology made these statements, the agency's understanding of  
12 state law was that it did not mandate transportation plans to meet proportional transportation  
13 reductions. However, Ecology did want to urge PSRC to analyze the concept of proportional  
14 reduction to ensure that PSRC gave a hard look at the reductions when doing its planning.  
15 After evaluating PSRC's Transportation 2040 plan, I had follow-up conversations with PSRC  
16 staff where I stated that Ecology was pleased with PSRC's work on the transportation plan  
17 and that the concept of proportional reductions was not a requirement. Nonetheless, Ecology  
18 continues to believe that the statutory greenhouse gas reductions present a useful starting point  
19 for planning purposes. Ecology would like planners to be mindful of the State's statutory  
20 reductions and to prefer alternatives that reduce or limit emissions in order to assist the State  
21 in achieving the reductions.

22 15. Although Ecology does not believe that state law requires planning entities to  
23 limit themselves to alternatives that meet sector-specific proportionate reductions, we do  
24 believe that the State Environmental Policy Act requires planners to do a robust analysis of  
25 climate change impacts that will result from non-project decisions. This analysis should  
26 include discussion of baseline emissions and statutory reductions and should also measure

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

various alternatives for their potential to reduce emissions. In this regard, PSRC's Final EIS  
deserves high marks. In fact, Ecology has posted the PSRC plan on its website and holds it  
out as an example of how to properly analyze greenhouse gases and climate change in a  
non-project EIS.

DATED this 24 day of March, 2011, in Tucson, Arizona.

  
\_\_\_\_\_  
JANICE ADAIR