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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

AMICUS CURIAE BRIEF OF THE
SNOQUALMIE INDIAN TRIBE

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I. INTEREST OF *AMICUS CURIAE*

The Snoqualmie Indian Tribe is a group of Coast Salish Native American peoples from the Snoqualmie Valley in east King and Snohomish Counties in Washington State.¹ The Tribe is a signatory to the Point Elliott Treaty with the Washington Territory of 1855. In 1953, the Tribe lost federal recognition, but the Bureau of Indian Affairs re-recognized the Tribe in 1999. Today, the Tribe has approximately 650 members living in East King and Snohomish counties.²

The Snoqualmie Tribe’s Constitution proclaims that “[n]ature and its biodiversity, the environment and the tribal heritage are the responsibility of every tribal member.” The tribal government further “endeavor[s]” to guarantee that every tribal member have a right to a healthy environment.”³

The Tribe’s commitment to preservation and restoration of its natural environment showcases the Tribe’s historical and cultural connection to its rivers and ecosystem. From time immemorial, the Snoqualmie Indian Tribe has used the rivers as highways for access to fishing and gathering areas, for economic activities, and as spiritual highways for ceremonial activities. For these reasons, many Tribal members choose to live near the rivers.⁴

The rivers in many traditional areas are home to several salmonid species, including endangered and threatened populations of Chinook and steelhead, which use the rivers for spawning, rearing, and migration. Restoring riverine processes that naturally create habitat are essential for the life cycle of native salmonid species.⁵ The Tribe’s Environmental Department is

¹ Declaration of Cindy Spiry at ¶2.

² Spiry Decl. at ¶3.

³ *Snoqualmie Tribal Constitution, Article XIV.*

⁴ Spiry Decl. at ¶6.

⁵ Spiry Decl. at ¶¶5, 7.

1 actively working to restore degraded habitats along the Snoqualmie River and tributaries
2 throughout the Snoqualmie/Snohomish watershed back to a functioning, intact ecosystem.⁶

3 The Snoqualmie Tribe is familiar with this case and has read the public documents
4 concerning Transportation 2040, including the Final Environmental Impact Statement and the
5 Transportation 2040 Plan itself, the Plaintiffs’ hearing memorandum, and the Defendant’s
6 response.⁷

7 The Snoqualmie Tribe submits this amicus memorandum in support of Cascade Bicycle
8 Club, Futurewise, and Sierra Club. In its sovereign capacity, the Tribe is constitutionally
9 required to manage, conserve, improve, and develop fish, wildlife, and other natural resources –
10 including its rivers – in a manner that both protects the resources and provides the maximum
11 benefit to its people.⁸ Based on these public trust responsibilities and its research and
12 management interests in its rivers and lands, the Tribe submits this amicus memorandum for the
13 Court’s consideration.
14

15
16 **II. ISSUES ADDRESSED BY THE *AMICUS***

17 A. SEPA’s Policies and Purposes Require Consideration of T2040’s
18 Environmental Impacts on Future Generations.

19 B. PSRC’s Failure to Evaluate the Foreseeable Environmental Impacts of T2040
20 on Future Generations Contravenes the Procedural Requirements and Substantive
21 Policies of SEPA and Warrants a Remand of the EIS.

22 **III. BACKGROUND**

23 **A. Puget Sound Regional Council’s (PSRC) Transportation 2040 Plan (T2040)**

24 As the state Regional Transportation Planning Organization for the four county Puget
25 Sound region, PSRC is required to adopt, and to periodically update, a regional transportation

26 ⁶ Spiry Decl. at ¶16.

⁷ Spiry Decl. at ¶18.

⁸ Spiry Decl. at ¶5.

1 plan, which must be developed in coordination with the state Department of Transportation,
2 port authorities, local governments and transportation providers within the region.⁹ On May
3 29, 2009, PSRC issued a Draft Environmental Impact Statement (EIS) for T2040 and on
4 March 19, 2010, PSRC issued its Final EIS for T2040. In the plan, PSRC discussed generally
5 climate impacts from transportation activities such ocean acidification and increased
6 atmospheric temperatures.

7 **B. Evidence of Climate Change in the Puget Sound Region**

8
9 The increasing concentration of greenhouse gases (GHG) in the atmosphere is well
10 established and recognized as responsible for producing climate change, the most serious
11 environmental problem faced by human civilization.¹⁰ GHG include carbon dioxide (CO₂),
12 methane (CH₄), nitrous oxide (NO₂) and various fluorocarbons and fluorides.¹¹ Increased levels
13 of GHG have caused an increase in average global temperature. Over the 20th Century, the
14 earth's global average surface level temperature has risen approximately 1.3°F (.74°C).¹² Over
15 the same time frame in the US, the average temperature has risen approximately 1.25°F with an
16 average warming of .13°F per decade.¹³

17 **C. Impact of Climate Change on Water Bodies in Washington State**

18
19 The Climate Impacts Group at the University of Washington has prepared projections of
20 climate change impacts for the state in its publication, *The Washington Climate Change Impacts*
21 *Assessment: Evaluating Washington's Future in a Changing Climate* (June 2009).¹⁴ As reported
22

23 ⁹ Wash. Rev. Code. § 47.80.023(2)-.030.

24 ¹⁰ Department of Ecology, et al., *Growing Washington's Economy in a Carbon-Constrained World* at 5 (December 2008), Category 4, PSRC 023895, excerpts set forth at Exhibit 10.

25 ¹¹ Department of Ecology, *Washington Greenhouse Gas Inventory, etc.* at ES-1 (December 2007), Category 4, PSRC 021409, excerpt at Exhibit 11. Greenhouses gases also include ozone and water vapor.

26 ¹² NHTSA, *Draft Environmental Impact Statement, CAFÉ Standards* at 3-60, PSRC 026149.

¹³ NHTSA, *DEIS* at 3-68, PSRC 026157; PSRC at 00001449.

¹⁴ See University of Washington Climate Impacts Group, *Washington Climate Change Impacts Assessment 1* (2009), located in PSRC Record at 00021838, PSRC 021841.

1 by the Climate Impacts Group, temperatures within the State of Washington have increased 1.5°F
2 since 1920.¹⁵ Based upon 20 different climate models, the Climate Impacts Group has projected
3 temperature increases in Washington of 2°F by the 2020s, 3.2°F by the 2040s and 5.3°F by the
4 2080s, as compared to temperatures between 1970 and 1999.¹⁶

5 Over the 21st century, the models project sea level rise of 2-13 inches, depending upon
6 location.¹⁷ Over the period of 2010 - 2080, increased temperatures and the shift of precipitation
7 from snow to rain are projected to reduce the snow water content (*i.e.*, snowpack) by 53 to
8 65%.¹⁸ Increased precipitation and reduced snowpack are projected to cause increased winter
9 stream flows and reduced spring and summer flows, which in turn would result in increased
10 winter flooding events, but lower water supplies available for agriculture, hydropower and
11 anadromous fish during the rest of the year.¹⁹

12 The Climate Impacts Group projects that increased temperatures will increase the number of
13 heat-related deaths. From heat events under a medium climate change scenario, an additional 101
14 deaths can be expected by 2025 and an additional 150 deaths by 2045.²⁰

17 **D. Climate Change's Contribution to Ocean Acidification and the Impact on** 18 **Waters and Wildlife in the Puget Sound**

19 Increased GHG concentrations and the resultant increase in global temperatures have
20 produced a number of other climate and environmental changes, including ocean acidification.
21 Ocean acidification occurs when the ocean absorbs carbon dioxide, which reacts with carbonate
22 ions in water to form carbonic acid.²¹ Increased acidity of marine waters produces a number of
23

24 ¹⁵ *Id.*, Executive Summary at 1, PSRC 021844.

25 ¹⁶ *Id.*

26 ¹⁷ *Id.* at 6, PSRC 021849

¹⁸ *Id.* at 8, PSRC 021851.

¹⁹ *Id.* at 8,10, PSRC 021851, 53.

²⁰ *Id.* at 18. PSRC 021861.

²¹ See *Center for Biological Diversity v. Lubchenco*, 2010 WL 5288188, *24 (N.D. CA 2010).

1 cascading effects, including the reduction of available calcium carbonate for the formation of
2 shells, skeletons and other protective structures of marine organisms such as corals, crustaceans
3 and mollusks.²² Scientists have explained that the “process of ocean acidification is well
4 documented in field data, and the rate will accelerate over this century unless future CO₂
5 emissions are curbed dramatically.”²³

6 Scientific studies demonstrate that the oceans are becoming more acidic and this corrosive
7 water is entering the Puget Sound.²⁴ NOAA oceanographer Richard Feely researches the impact
8 of these corrosive waters in the Puget Sound on local wildlife and the environment. In 2010, *The*
9 *Seattle Times* released an article documenting Feely’s scientific research following the impact of
10 ocean acidification on local marine creatures.²⁵ The Washington State Department of Ecology
11 (Ecology) explains that ocean acidification is the likely cause for the failure of Pacific oysters to
12 reproduce.²⁶ Even coastal shellfish like mussels and barnacles are showing signs of weakened
13 shells, possibly due to ocean acidification.²⁷ Ecology further notes that ocean acidification
14 currently impacts “people in coastal communities, scientists, and those working in the shellfish
15 industry in Washington.”²⁸ The PSRC’s FEIS also explains that climate change may already be
16 limiting populations of Pacific cod.²⁹ Climate change and higher temperatures may also affect
17 the reproduction of species’ population and lead to extinctions.³⁰ As acidic water travels
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22 ²² *Washington Climate Change Impacts Assessment* at 3-72 to 3-73, PSRC 026161-62.

23 ²³ Scott C. Doney, et. al, “Ocean Acidification: The Other CO₂ Problem.” *Annu. Rev. Mar. Sci.* 2009. 1:169-92.

24 ²⁴ Craig Welch, “Acidification threatens wide swath of sea life.” *Seattle Times*. July 31, 2010.

25 ²⁵ http://seattletimes.nwsourc.com/html/localnews/2012502655_acidification01.html

26 ²⁶ *Id.*

27 ²⁷ ECOconnect, Washington State Department of Ecology Blog. Nov. 17, 2010.

28 ²⁸ <http://ecologywa.blogspot.com/2010/11/what-makes-shellfish-unhappy-ocean.html>

29 ²⁹ *Id.*

30 ³⁰ *Id.*

²⁹ PSRC at 00001536.

³⁰ *Id.*

1 throughout the Puget Sound, ocean acidification will have an even greater effect on populations
2 like the Snoqualmie Tribe.

3 **E. Geographic Impact of Climate Change on the Snoqualmie Indian Tribe**

4 The effects of climate change are already being borne out in the Snoqualmie Valley, the
5 traditional lands of the Snoqualmie Indian Tribe. Smaller snowpacks, earlier runoff (snowmelt)
6 periods, and increasing frequency of rain-on-snow events in the headwaters areas negatively
7 affect downstream habitats that support culturally important fish, wildlife, and plants.³¹ These
8 factors lead to excessively high summer temperatures, due to a lack of soil moisture, and low
9 dissolved oxygen levels.³² Indeed, the Snoqualmie River is already a state-listed impaired water
10 body.³³ While it is true that development and urbanization play a role in this impairment, a large
11 contribution to the problem comes from changes in climate and precipitation patterns.³⁴ In fact,
12 four of the top five worst floods in recorded history have occurred within the last five years.³⁵

13
14 Ocean acidification also negatively impacts the Tribe. In addition to hunting and gathering
15 along the river, the Snoqualmies traditionally used ocean resources, especially during the
16 summer months.³⁶ Traditionally, some Snoqualmies would travel to Whidbey Island in the
17 summer months to live, fish, and hunt. Shellfish was one of the resources the Snoqualmies
18 utilized during this annual trip.³⁷

19
20 In recent years, acidic waters in Puget Sound, Hood Canal and the Washington coast have
21 prevented successful recruitment of new shellfish. Acidic water affects the calcium carbonate in
22 these animals' shells at vulnerable life stages, which ultimately result in their death. These
23

24 ³¹ Spiry Decl. at ¶2.

25 ³² Spiry Decl. at ¶2.

26 ³³ Spiry Decl. at ¶3.

³⁴ Spiry Decl. at ¶2-3.

³⁵ Spiry Decl. at ¶3.

³⁶ Spiry Decl. at ¶3.

³⁷ Spiry Decl. at ¶3.

1 shellfish shortages directly impact the Snoqualmie Tribe. If Tribal members wanted to gather
2 shellfish on their own or with members of other tribes (a common practice during summer
3 potlatches), they would not be able to do so or wouldn't be able to do so to the same extent as
4 they might have been able to, had acidic conditions not deleteriously affected shellfish
5 recruitment. Acidic conditions in Puget Sound have also caused the loss of recent cohorts of
6 shellfish—yet another traditional resource that will no longer be available to future generations
7 of the Snoqualmie people.³⁸

9 IV. STANDARD OF REVIEW

10 Although an agency's determinations under SEPA are "accorded substantial weight," the
11 adequacy of an EIS is ultimately a question of law for the court to determine *de novo*.³⁹

12 V. ARGUMENT

13 The Final Environmental Impact Statement for Transportation 2040 violates the substantive
14 mandate and procedural requirements of SEPA by failing to consider the impacts of climate
15 change on future generations of Washington citizens, and specifically Snoqualmie tribal
16 members. By not planning for and adequately addressing the climate crisis, the PSRC's T2040
17 has the potential to contribute to the loss of opportunity for a traditional way of life for members
18 and future generations of the Snoqualmie Tribe.

20 A. SEPA's Policies and Purposes Require Consideration of T2040's Foreseeable 21 Environmental Impact on Future Generations.

22 SEPA requires the state of Washington to use all practicable means and measures to "fulfill
23 the social, economic, and other requirements of present and future generations of Washington
24 citizens." RCW 43.21C.020(1). Although the purposes and policies of SEPA may not impose
25

26 ³⁸ Spiry Decl. at ¶3.

³⁹ *Leschi Improvement Council v. Washington State Highway Commission*, 84 Wn.2d 271, 285, 525 P.2d 774 (1994).

1 enforceable obligations, they have a profound influence on judicial interpretation of SEPA.⁴⁰
2 Similar to the Snoqualmie Tribal Constitution, SEPA also contains an explicit policy of
3 intergenerational stewardship that requires all governmental bodies to use *all practicable means*
4 to improve and coordinate planning activities so that the state and citizens of Washington may
5 ‘[f]ulfill the responsibilities of each generation as trustee of the environment for succeeding
6 generations.’⁴¹

7
8 SEPA’s policies to preserve the environment for future generations are relevant to the
9 American-Indian idea of seventh generation sustainability and the special role tribal members
10 play in the protection of their traditional environment and natural resources.⁴² “American-Indian
11 tribes have traditionally asserted a governing ethic of acting in such a way as to preserve
12 resources for seven generations in the future.”⁴³ The “seventh generation” ethic is a common way
13 that many indigenous nations govern, particularly in relation to the protection of the environment
14 and natural resources.⁴⁴

15
16 The notion of Indian tribes as trustees of natural resources is well recognized in the laws of
17 the United States. The Comprehensive Environmental Response, Compensation and Liability
18 Act of 1980 (“CERCLA”), directs American-Indian Tribes to serve as natural resources trustees,
19 along with their state and federal counterparts.⁴⁵ Under the statute, “a governmental entity
20 responsible for a natural resource that has been injured is designated as a trustee to protect the
21

22 ⁴⁰ See R. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis* § 3.01[1], at 3-3 (5th
ed. 2002).

23 ⁴¹ Wash. Rev. Code. § 43.21C.020(2)(a).

24 ⁴² William H. Rodgers Jr., Tribal Government Roles in Environmental Federalism, *Nat. Resources & Env't*, Winter
2007, at 3, 5. (concern for the “seventh generation” and a philosophy of permanence may make Indians better
claimants in environmental cases).

25 ⁴³ Jacqueline P. Hand, Protecting the Seventh Generation: Saginaw, Chippewa Tribe serves as natural resource
trustee. *Michigan Bar Journal*, July 2004.

26 <http://www.michbar.org/journal/article.cfm?articleID=718&volumeID=56&viewType=archive>

⁴⁴ Lorie Graham, Reparations, Self-Determination, and the Seventh Generation, 21 *Harv. Hum. Rts. J.* 47, 47 n.1
(2008).

⁴⁵ Hand at 1; 42 USC 9607.

1 public's interest in restoring the environment."⁴⁶ The Snoqualmie Tribe pursues this idea through
2 its constitution, which declares that the Tribe will preserve its ecosystem for future generations.⁴⁷
3 SEPA similarly recognizes these environmental and cultural interests through its purpose to
4 "encourage harmony between man and environment, prevent or eliminate damage to the physical
5 environment, foster public health and welfare, and enrich understanding of ecological systems
6 and natural resources."⁴⁸ The Court can and should take this purpose into account when
7 reviewing the issues presented in this case.⁴⁹
8

9 *i. The Washington State Constitution and other Washington State Laws*
10 *Mandate Consideration of the Impacts on Future Generations.*

11 Other areas of Washington State Law mandate consideration of the impacts of natural
12 resource decisions on future generations. Article 17, section 1 of the Washington state
13 constitution contains a formal declaration of public trust rights regarding shorelands and
14 tidelands of navigable waters created "by virtue of [the state's] sovereignty."⁵⁰ Specifically
15 mindful of this constitutional obligation as well as the State's underlying public trust obligation,
16 the Washington Legislature adopted SEPA. The Legislature recognized that:

17 (2) It is the continuing responsibility of the state of Washington and all agencies
18 of the state to use all practicable means...to improve and coordinate plans,
19 functions, programs, and resources to the end that the state and its citizens may:
20 (a) *Fulfill the responsibilities of each generation as trustee of the environment for*
21 *succeeding generations;* (b) Assure for all people of Washington safe, healthful,
22 productive, and aesthetically and culturally pleasing surroundings; (c) Attain the
23 widest range of beneficial uses of the environment without degradation, risk to
health or safety, or other undesirable and unintended consequences;...(e)
Maintain, wherever possible, an environment which supports diversity and variety
of individual choice; (f) Achieve a balance between population and resource use

24 ⁴⁶ <http://www.michbar.org/journal/article.cfm?articleID=718&volumeID=56&viewType=archive>

25 ⁴⁷ *Snoqualmie Tribal Constitution, Article XIV.*

26 ⁴⁸ R. Settles, § 3.01[1] at 3-1, 3-2; RCW 43.21C.010.

⁴⁹ *Id.* at 3-3 (SEPA's statements of purpose and policy "profoundly influence judicial interpretation of SEPA.").

⁵⁰ *Caminiti v. Boyle*, 107 Wn.2d 662, 666, 732 P.2d 989 (1987) ("The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes.").

1 which will permit high standards of living and a wide sharing of life's amenities;
2 and; (g) Enhance the quality of renewable resources and approach the maximum
3 attainable recycling of depletable resources.

4 (3) *The legislature recognizes that each person has a fundamental and
5 inalienable right to a healthful environment and that each person has a
6 responsibility to contribute to the preservation and enhancement of the
7 environment.*⁵¹

8 The Washington Supreme Court has also recognized that public trust principles are reflected in
9 the Shoreline Management Act's⁵² ("SMA") underlying policy of preserving the state's
10 shorelines while protecting the public's right to use and enjoy the natural resources associated
11 with shorelines.⁵³ The SMA provides:

12 It is the policy of the state to provide for the management of the shorelines of the
13 state by planning for and fostering all reasonable and appropriate uses. This
14 policy is designed to insure the development of these shorelines in a manner
15 which . . . will promote and enhance the public interest. This policy contemplates
16 protecting against adverse effects to the public health, the land and its vegetation
17 and wildlife, and the waters of the state and their aquatic life, while protecting
18 generally public rights of navigation and corollary rights incidental thereto.⁵⁴

19 To implement its public trust responsibilities in regards to wildlife, the Washington legislature
20 has asserted public ownership of, and thus the state's sovereign responsibility to manage,
21 wildlife found within the state:

22 Wildlife, fish, and shellfish are the property of the state. The commission,
23 director, and the department shall preserve, protect, perpetuate, and manage the
24 wildlife and food fish, game fish, and shellfish in state waters and offshore
25 waters. The department shall conserve the wildlife and food fish, game fish, and
26 shellfish resources in a manner that does not impair the resource.⁵⁵

These constitutional and statutory provisions, in conjunction with the state common law public
trust jurisprudence, make it clear that the purposes of the public trust doctrine to protect critical

⁵¹ RCW 43.21C.020(2), (3) (emphasis added).

⁵² RCW 90.58.020.

⁵³ *Orion Corp. v. State*, 109 Wn.2d 621, 641 n. 11, 747 P.2d 1062 (1987).

⁵⁴ RC 90.58.020.

⁵⁵ RCW 77.04.012; *see also Geoduck Harvest Ass'n*, 124 Wn. App. at 449; *Nelson Alaska Seafoods, Inc. v. State* 143 Wn. App. 455, 462 (2008) (finding that the public trust doctrine applies to the Department of Natural Resources' sale of commercial geoduck harvesting rights on public lands).

1 natural resources for future generations underpin constitutional and statutory environmental
2 protections of natural resources in Washington state.

3 *ii. Washington Courts Recognize the Interests of Future Generations in Agency*
4 *Decisions Related to Natural Resource Management*

5 Washington Courts have long recognized the interests of future generations, particularly
6 when construing statutes related to natural resource management. In *State v. Dexter*, the
7 Washington State Supreme Court considered whether the defendants violated the state’s Forest
8 Practices Act in light of the Act’s policy to “keep timber lands productive by seeking to maintain
9 continuous growth of timber.”⁵⁶ The court viewed this as a requirement to consider
10 intergenerational stewardship and stated that, “where natural resources can be utilized and at the
11 same time perpetuated for future generations, what has been called ‘constitutional morality’
12 requires us to do so.”⁵⁷

14 SEPA’s statements of legislative policy are also relevant to a court’s determination of SEPA
15 compliance in individual cases. The Washington State Supreme Court has indicated that SEPA’s
16 statements of legislative policy are not merely precatory, but are relevant to a court’s
17 determination of SEPA compliance in an individual case. In *Eastlake Community Council v.*
18 *Roanoke Assoc.*, the Washington State Supreme Court explained that the legislature intended the
19 state to observe the “unusually vigorous statement of legislative purpose contained in [the] act”
20 when deciding major matters that affect the environment.⁵⁸ The Washington State Supreme
21 Court further held that SEPA’s statements of purpose and policy are not an unconstitutional
22

23
24 ⁵⁶ 32 Wn.2d 551, 553, 202 P.2d 906 (1949).

25 ⁵⁷ 82 Wn.2d 475, 487, 513 P.2d 36, 44 (1973). *See also Citizens For Responsible Wildlife Management v. State*, 124
26 Wn. App. 566, 576-77 (Wn. App. Div. 2, 2004) (Quinn-Brintnall, J., concurring) (“the sovereign authority to regulate natural resources is circumscribed by its duty to manage natural resources well for the benefit of future generations.”).

⁵⁸ 82 Wn.2d 475, 487, 513 P.2d 36 (1973). *See also Barrie v. Kitsap County*, 93 Wn.2d 843, 858-59 (1980) (invalidating WACs based on their inconsistency with SEPA’s policy of evaluating economic and social effects of proposals).

1 delegation of policy and “may have regulatory effect to the extent that they provide a valid basis
2 for declaring environmental impacts unacceptable in a particular case.”⁵⁹

3 SEPA’s Statement of Policy recognizes that humans have an impact on the environment and
4 explicitly declares that “it is the continuing policy of the state of Washington . . . to use all
5 practicable means and measures . . . [to] fulfill the social, economic, and other requirements of
6 present and *future generations* of Washington citizens.”⁶⁰ The legislature further declared that
7 Washington State and its state agencies must use all practical means to “improve and coordinate
8 plans, functions, programs, and resources to the end that the state and its citizens may” insure
9 that the state and its citizens may “[f]ulfill the responsibilities of each generation as trustee of the
10 environment for *succeeding generations*.”⁶¹ These policy statements mandate that agencies like
11 the PSRC use all practical means to fulfill the requirements and responsibilities of future
12 generations to restore and maintain the environment.

13
14 *iii. The PSRC did not Consider SEPA’s Statements of Legislative Policy in its
15 FEIS Analysis Considering the Adequacy of T2040*

16 In light of *Eastlake* and *Dexter*, the PSRC’s FEIS must recognize and analyze the
17 transportation impacts associated with T2040 on future generations. Specifically, this requires
18 the PSRC to consider carefully the ramifications on future generations of continued increase in
19 GHG emissions from the transportation sector due to implementation of the PSRC 2040. In its
20 response brief, the PSRC acknowledges that implementation of the preferred alternative will lead
21 to an increase in GHG emissions, but claims that it was not legally obligated to analyze an
22 alternative that complies with the state’s mandatory GHG reduction statute, nor was it feasible to
23
24

25
26 ⁵⁹ *West Main Assoc. v. City of Bellevue*, 49 Wn. App. 513, 527, 742 P.2d 1266 (1987) (citing *Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 66, 578 P.2d 1309 (1978)).

⁶⁰ RCW 43.21C.020 (emphasis added).

⁶¹ RCW 43.21C.020(2)(a) (emphasis added).

1 develop such an alternative.⁶² The PSRC’s position in this regard illustrates that it failed to
2 develop and analyze an alternative that would be compliant with SEPA’s statements of
3 legislative policy in regards to future generations. This failure warrants a remand to the PSRC for
4 completion of an adequate EIS.⁶³

5 In its FEIS, the PSRC sought to “improve efficiency and expand the system’s ability to
6 handle future demand, while at the same time support the region’s goals for managing urban
7 growth and protecting the environment.”⁶⁴ Despite this goal, the FEIS’s discussion of climate
8 effects does not consider T2040’s impact on future generations of citizens and tribes like the
9 Snoqualmie. The Preferred Alternative did not provide an alternative that curtailed vehicle traffic
10 or drastically reduced GHG emissions from the transportation sector in this region, and thus was
11 short of presenting a meaningful way to prevent devastating climate change impacts on future
12 citizens of Washingtonians.⁶⁵

13
14 In its FEIS, the PSRC explained that traffic congestion is an everyday occurrence in the
15 central Puget Sound region that will likely increase due to forecasted population increases.⁶⁶ The
16 PSRC also explained that traffic congestion likely worsens localized GHG emissions.⁶⁷ Yet
17 rather than reduce vehicle miles traveled and GHG emissions by curtailing vehicle traffic, the
18 PSRC’s Preferred Alternative aims to minimize issues like congestion by providing more
19 roadway space for cars to travel.⁶⁸ In addition, the Preferred Alternative relies on “advanced
20 technology” to improve signal coordination and traffic management, which allow users to use the
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24 ⁶² Response to Plaintiff’s Hearing Memorandum at 67.

25 ⁶³ *Eastlake*, 82 Wn.2d 475.

26 ⁶⁴ Response to Plaintiffs’ Hearing Memorandum at 65-66.

⁶⁵ PSRC at 00001300-01. *See* discussion *supra* Part V.C.

⁶⁶ PSRC at 00001338.

⁶⁷ PSRC at 00001470.

⁶⁸ PSRC at 00001301.

1 system more easily, but not necessarily less frequently.⁶⁹ Implementation of the Preferred
2 Alternative will increase vehicle miles traveled and GHG emissions, which contravenes the
3 policies of SEPA by failing to take future generations into account.

4 The Washington State legislature has spoken and decided that entities that are subject to
5 SEPA must consider their climate change impacts on future generations.⁷⁰ The Limiting
6 Greenhouse Gas Emissions statute, RCW 70.235.005, demonstrates the legislature’s specific
7 intent to avoid climate change impacts on present and future generations of Washington citizens.
8 The statute requires the state to reduce its GHG emissions to specified limits by years 2020,
9 2035, and 2050.⁷¹ By recognizing Washington’s national and international leadership on energy
10 conservation and environmental stewardship, the legislature committed the state to mandatory
11 emissions reductions and to work towards a clean energy future.⁷² The obvious reason for
12 adoption of this statute was to protect present and future generations of Washingtonians from the
13 devastating effects of climate change, both environmental and economic. Since PSRC’s plan
14 fails to consider climate change impacts on future generations, in light of SEPA’s policies to
15 preserve and protect the environment for future generations, this court must find the FEIS
16 inadequate and remand to the PSRC for completion of an EIS that complies with all provisions
17 of SEPA.⁷³

23 ⁶⁹ PSRC at 00001304.

24 ⁷⁰ Wash. Rev. Code § 43.21C.020 (declaring that Washington state and its agencies must use all practical means to
25 restore and maintain the environment in order to fulfill the requirements of future generations); *Eastlake*, 82 Wn.2d
26 at 487 (state agencies must consider SEPA’s “unusually vigorous statement of legislative purpose.”).

⁷¹ Wash. Rev. Code § 70.235.020.

⁷² Wash. Rev. Code. § 70.235.005.

⁷³ *ASARCO Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 601 P.2d 501 (holding that agency’s EIS “was clearly
erroneous in view of the entire record as submitted and the public policy contained in SEPA,” which warranted a
remand to the agency for preparation of a proper EIS pursuant to SEPA).

1 **B. PSRC’s Failure to Evaluate the Foreseeable Environmental Impacts of T2040 on**
2 **Future Generations Contravenes the Procedural Requirements and Substantive**
3 **Policies of SEPA and Warrants a Remand of the EIS.**

4 As discussed above, SEPA’s procedural and substantive policies require agencies like the
5 PSRC to evaluate the foreseeable environmental impacts of T2040 on future generations. In
6 addition, when performing an environmental review, an agency must consider its project’s
7 cumulative and future impacts. The PSRC’s failure to conduct a cumulative and future
8 impacts analysis for T2040 warrants a remand of the EIS.

9 *i. SEPA Requires PSRC to Conduct a Cumulative and Future Impacts Analysis*
10 *in the Preparation of an Environmental Impact Statement*

11 PSRC should be required to consider the cumulative impacts of an increase in greenhouse
12 gas emissions from transportation-related infrastructure in its EIS. Consideration of
13 cumulative impacts is important to show how T2040 will affect the Puget Sound region
14 throughout the lifespan of the program, rather than only looking at the effect of each
15 individual project or the emissions from each individual year.⁷⁴ The PSRC FEIS states that
16 carbon dioxide, a GHG, would increase beyond the 2006 baseline under all alternatives.⁷⁵
17 The FEIS only looks at GHG emissions in an individual year, 2040, and does not
18 contemplate the cumulative effects of thirty years of GHG emissions that are above the
19 mandatory targets set by the Washington legislature in the Limiting Greenhouse Gas
20 Emissions statute.⁷⁶

21 SEPA requires an agency performing an environmental review to consider cumulative and
22 future impacts of a project. RCW 43.21C.030 states: “all branches of government of this state,
23 including state agencies, municipal and public corporations, and counties shall . . . [i]nclude in
24
25

26 ⁷⁴ PSRC at 00001465.

⁷⁵ PSRC at 00001464.

⁷⁶ See RCW §70.235.020

1 every recommendation . . . the relationship between local short-term uses of the environment and
2 the maintenance and enhancement of long-term productivity.”⁷⁷ In *Cheney v. City of Mountlake*
3 *Terrace*, the Washington State Supreme Court interpreted this section as requiring the preparing
4 agency to consider more than the “narrow, limited impact of the immediate, pending action.”⁷⁸
5 Rather, the Court explained that the EIS must cover subsequent phases of the project that are
6 dependent on or likely to result from the project undergoing SEPA review.⁷⁹ Further, in
7 *Cathcart-Maltby-Clearview Cmty. Council v. Snohomish County*, the Court required an agency
8 to consider cumulative effects when determining whether a project’s “environmental effects are
9 reasonably disclosed, discussed, and substantiated . . . analysis of ultimate probable
10 consequences, including those secondary and cumulative . . .” is required.⁸⁰ Agencies must also
11 consider and mitigate impacts upon other jurisdictions, which include the Tribe.⁸¹

12
13 Only one section in SEPA deals with the time frame that must be assessed in the preparation
14 of an EIS: “[Environmental Impact] statements are required to analyze only reasonable
15 alternatives and probable adverse environmental impacts which are significant”⁸²
16
17

18 ⁷⁷ RCW §43.21C.030(2)(c)(iv); *see also* RCW §43.21C.030(2)(f) (an agency must: “Recognize the worldwide and
19 long-range character of environmental problems” that could potentially be created by its project).

20 ⁷⁸ 87 Wn.2d 338, 344, 552 P.2d 184, 188-89 (1976) (“The agency cannot close its eyes to the ultimate probable
21 environmental consequences of its current action.”); *see also* *Sisley v. San Juan County*, 89 Wn.2d 78, 84, 569 P.2d
22 712 (1977) (holding that in making a determination of no significant impact, cumulative environmental effects must
23 be sufficiently considered to meet the procedural requirements of SEPA).

24 ⁷⁹ *Cheney*, 87 Wn.2d at 345.

25 ⁸⁰ 96 Wn.2d 201, 209, 634 P.2d 853, 858 (1981) (citing *Cheney supra*).

26 ⁸¹ *See* *Barrie v. Kitsap County*, 93 Wn.2d 843, 613 P.2d 1148 (1980); *Leschi Improvement Council v. State*
Highway Comm'n, 84 Wn.2d 271, 525 P.2d 774 (1974). *See also*, *Cheney*, 87 Wn.2d 338 (agencies must analyze
ultimate probable consequences, including those secondary and cumulative, whether social or economic); *Save A*
Valuable Environment v. Bothell, 89 Wn.2d 862, 576 P.2d 401 (1978) (SEPA mandates that extra-jurisdictional
effects be addressed and mitigated when possible).

⁸² RCW §43.21C.110; *see* WAC 197-11-794 (“The severity of an impact should be weighed along with the
likelihood of its occurrence. An impact may be significant if its chance of occurrence is not great, but the resulting
environmental impact would be severe if it occurred”); *but see* *Mentor v. Kitsap County*, 22 Wn. App. 285, 588 P.2d
1226 (1978) (stating that if a project is to be broken into multiple segments, cumulative impacts or future impacts
need not be studied in the programmatic EIS so long as the programmatic EIS mentions that further analysis will be
required for these future segments).

1 The Washington Administrative Code (“WAC”) sheds some light on the concept of SEPA-
2 type probability: “[a]gencies shall carefully consider the range of probable impacts, including
3 short-term and long-term effects.”⁸³ The WAC further states: “SEPA’s procedural provisions
4 require the consideration of ‘environmental’ impacts . . . that are likely, not merely speculative”⁸⁴
5 and defines “probable” as: “likely or reasonably likely to occur, as in a reasonable probability of
6 more than a moderate effect on the quality of the environment. Probable is used to distinguish
7 likely impacts from those that merely have a possibility of occurring, but are remote or
8 speculative.”⁸⁵ Finally, regarding the time frame for analyzing cumulative and future impacts, the
9 WAC says: “[i]mpacts shall include those that are likely to arise or exist over the lifetime of a
10 proposal or, depending on the particular proposal, longer.”⁸⁶ Therefore, an EIS needs to take into
11 account the cumulative and future impacts that a project will have, even if the project is to last a
12 long time, provided the impacts are not speculative.
13

14 *ii. Climate Change is Among the Probable Future Impacts that Need to be*
15 *Analyzed in the T2040 EIS*

16 As discussed above, SEPA requires that an EIS analyze all “[i]mpacts . . . that are likely to
17 arise or exist over the lifetime of a proposal.”⁸⁷ Climate change is necessarily one of these
18 impacts, the state has acknowledged that GHG from transportation infrastructure are a major
19 source of climate change.⁸⁸ As the PSRC acknowledges in its EIS, “most of the warming in
20 recent decades is very likely the result of human activities.”⁸⁹
21

22
23 ⁸³ WAC 187-11-060.

⁸⁴ *Id.*

⁸⁵ WAC 197-11-782 (internal citations and quotations omitted).

⁸⁶ WAC 187-11-060; *see Tugwell v. Kittitas County*, 90 Wn. App. 1, 951 P.2d 272 (1997) (holding that where no specific plans are available for review, examination of potential impacts would be speculative because there is nothing to consider).

⁸⁷ WAC 187-11-060

⁸⁸ Hearing Memorandum for Plaintiff at 5, 13, *Cascade Bicycle Club v. Puget Sound Regional Council*, No. 10-2-22228-6 SEA; *see also* Richard B. Alley et al., Summary for Policymakers, in Intergovernmental Panel on Climate Change, *Climate Change 2007: The Physical Science Basis of Climate Change: Contribution of Working group I to*

1 Under RCW 43.21C.060, the agency preparing the EIS must identify specific adverse
2 environmental impacts that a project will create.⁹⁰ Climate change is an environmental impact
3 that is largely created by human activities, especially through the release of GHG.⁹¹ In addition,
4 climate change in the form of global warming, the melting of polar ice caps, and changing of
5 seasons is an adverse environmental impact as contemplated under RCW 43.21C.060. Because
6 SEPA requires analysis of all *probable* and *adverse* impacts, climate change caused by the
7 release of GHG in the Puget Sound region requires a more in-depth analysis that that provided by
8 PSRC's FEIS.⁹²

10 PSRC's FEIS purports to discuss air quality impacts, but does not detail the adverse effects
11 of additional GHG emissions (above and beyond what the state contemplates under RCW
12 70.235.020) upon climate and the oceans, and it omits any reference to the importance of making
13 GHG reductions to attain long-term climate stability at a level that can preserve our civilization
14 for future generations.⁹³ Because T2040 includes a project area that accounts for over one quarter
15 of Washington State's GHG emissions,⁹⁴ PSRC should be required to take into account the
16 cumulative effects of greenhouse gas emissions on climate change in the T2040 EIS under the
17 "rule of reason" set out in *Kiewit*.⁹⁵ Because the T2040 EIS does not consider the cumulative
18 effects of exceeding year after year the necessary and mandatory GHG limits, it fails to meet the
19 standard for legal adequacy spelled out in *Kiewit* and other SEPA cases.

22 the Fourth Assessment Report of the IPCC (Susan Solomon et al. eds., Cambridge Univ. Press 2007), available at
23 <http://ipcc-wg1.ucar.edu/wg1/wg1-report.html>.

24 ⁸⁹ PSRC at 00001449.

25 ⁹⁰ Wash. Rev. Code § 43.21C.060; *see also* *Levine v. Jefferson County*, 116 Wn. 2d 575, 807 P.2d 363 (1991).

26 ⁹¹ *See* Richard B. Alley et al., Summary for Policymakers, in Intergovernmental Panel on Climate Change, *Climate Change 2007: The Physical Science Basis of Climate Change: Contribution of Working group I to the Fourth Assessment Report of the IPCC* (Susan Solomon et al. eds., Cambridge Univ. Press 2007), available at <http://ipcc-wg1.ucar.edu/wg1/wg1-report.html>.

⁹² *See* Wash. Rev. Code 43.21C.060.

⁹³ PSRC at 00001456-00001473.

⁹⁴ *See* Plaintiff's Exhibit 11 at Table ES-1; Plaintiff's Exhibit 13 at 30.

⁹⁵ *See Kiewit Const. Group Inc.*, 83 Wn. App. at 140.

1 **C. PSRC’s Failure to Present Adequate Alternatives Violates SEPA.**

2 The PSRC’s failure to present adequate alternatives and reasonable mitigation measures
3 warrants a remand of the FEIS. To address the environmental impacts of a proposal, SEPA
4 requires that an FEIS contain alternatives to and mitigation measures for the proposed action.⁹⁶
5 The WAC defines reasonable alternatives as “actions that could feasibly attain or approximate a
6 proposal’s objectives, but at a lower cost or decreased level of environmental degradation.”⁹⁷
7 PSRC’s FEIS analyzed seven alternatives: a baseline, no action alternative, plus six action
8 alternatives.⁹⁸ However, PSRC’s process of alternative selection and analysis does not comply
9 with all of SEPA’s directives to preserve the environment for future generations. The PSRC
10 failed to provide an alternative that considers and minimizes the environmental degradation
11 associated with the transportation sector’s contribution to climate change.
12

13 The PSRC’s response brief rests on the unsupported claim that the analysis of alternatives
14 that curtail increase in vehicle traffic (and hence reduce GHG emissions) was not a viable
15 alternative.⁹⁹ The PSRC makes this claim based upon the findings of one study, *Moving*
16 *Cooler*.¹⁰⁰ Yet this approach disregards the PSRC’s legal obligation to consider realistic and
17 available technologies available to balance a future larger population while limiting GHG.
18 Although the alternatives did consider future impacts on some – namely those who prefer to
19 drive vehicles – the PSRC failed to provide alternatives that considered the future impacts on all.
20 For example, climate change will have a devastating impact on future human and wildlife
21
22

23 _____
24 ⁹⁶ *Weyerhaeuser v. Pierce Co.*, 124 Wn.2d 26, 38, 873 P.2d 498 (1994) (“RCW 43.21C.030 requires that an EIS
25 contain a detailed discussion of alternatives to the proposed action. The required discussion of alternatives to a
26 proposed project is of major importance, because it provides a basis for a reasoned decision among alternatives
having differing environmental impacts.”).

⁹⁷ WAC 197-11-786.

⁹⁸ PSRC at 00001271.

⁹⁹ Response to Plaintiffs’ Hearing Memorandum at 66.

¹⁰⁰ *Id.* at 12.

1 populations and on the environment, and SEPA’s policies obligated PSRC to provide a
2 meaningful alternative that curtailed vehicle traffic or otherwise drastically reduced GHG
3 emissions from the transportation sector in this region.¹⁰¹

4 *i. Agencies Must Impose Mitigation Measures that are Reasonable and Capable*
5 *of Being Accomplished.*

6 The Washington State Supreme Court has held that SEPA “mandates governmental bodies to
7 consider the *total environmental and ecological factors to the fullest* in deciding major matters . .
8 . to insure that the ‘attempt by the people to shape their future environment by deliberation, not
9 default,’ will be realized.”¹⁰² RCW 43.21C.030 requires that agencies interpret and administer
10 other state laws in accordance with SEPA’s policies.¹⁰³ Agencies must also impose mitigation
11 measures that are reasonable and capable of being accomplished, and that mitigate the impacts
12 described in the EIS.¹⁰⁴ RCW 43.21C.030(2)(c)(ii) requires the disclosure of “any adverse
13 environmental impacts, which cannot be avoided,” thereby implicitly requiring a demonstration
14 of why the impacts are unavoidable and why no mitigation measures exist to avoid the impacts
15 so the public has an opportunity to comment on these conclusions.¹⁰⁵

18
19 ¹⁰¹ See WAC 197-11-440(5)(b) (the reasonable alternatives which must be considered are those which could
20 “feasibly attain or approximate a proposal’s objectives, but at a lower environmental cost or decreased level of
environmental degradation.”); see also *Weyerhaeuser*, *supra* note 96.

21 ¹⁰² *Eastlake Community Council v. Roanoke Associates, Inc.*, 82 Wn.2d 475, 490 (1973) (quoting *Stempel v. Dept. of*
Water Resources, 82 Wn.2d 109, 118 (1973); see also *Cathcart-Maltby-Clearview Cmty. Council v. Snohomish*
County, *supra* note 80.

22 ¹⁰³ See *Adams v. Thurston County*, 70 Wn. App. 471, 475 (1993) (SEPA overlays and supplements all other state
23 laws and mandates that government agencies consider all environmental and ecological factors to the fullest extent
possible.)

24 ¹⁰⁴ See Wash. Admin. Code 197-11-660(1) (a proposal can be denied on substantive grounds if the agency finds that
the proposal would result in significant adverse impacts identified in the FEIS, and that reasonable mitigation
measures will not mitigate environmental impact.).

25 ¹⁰⁵ See Wash. Admin. Code 197-11-408(2)(a) (the lead agency must invite comments from appropriate agencies,
26 affected tribes, and the public); Wash. Admin. Code 197-11-410(1), (2) (The WAC encourages agencies to expand
the scoping process in order to “promote interagency cooperation, public participation, and innovative ways to
streamline the SEPA process.” The Rules further state that “[s]teps shall be taken . . . to encourage and assist public
participation.”).

1 The PSRC acknowledged that all of its alternatives would contribute to increased emissions
2 of GHG yet did not set forth reasonable mitigation measures to address the impacts.¹⁰⁶ In its
3 Response brief, the PSRC cited to the *Moving Cooler* study’s demonstration of possible GHG
4 mitigation measures, yet refused to adopt even one of *Moving Cooler*’s ten mitigation
5 recommendations based upon a presumption (without independent analysis nor the public’s
6 comments) that the mitigation measures were cost prohibitive.¹⁰⁷ Rather than implement at least
7 one of the recommendations and mitigate a portion of T2040’s projected GHG increases, the
8 PSRC generally stated it would implement a GHG reduction strategy that “centers on” land use,
9 user fees, citizen choices, and technology.¹⁰⁸ In failing to set forth specific mitigation measures
10 that will meaningfully reduce GHG, the PRSC basically stated that climate change impacts were
11 unavoidable and that the duty to mitigate T2040’s impact on climate change was not the PSRC’s
12 responsibility.¹⁰⁹ This conclusion is unacceptable and violates SEPA.
13

14 *ii. PSRC’s Proposed Mitigation Strategies are Deficient and will not Further*
15 *Reduce GHG Emissions*

16 The PSRC’s EIS fails to present and analyze mitigation measures that would significantly
17 mitigate T2040’s impact on local fisheries, rivers, and the human environment due to the
18 transportation sector’s contribution to climate change. Specifically relevant here, ocean
19 acidification has the potential to devastate Snoqualmie tribal members’ environment, livelihood,
20 and cultural connection to the environment for present and future generations.¹¹⁰ Not only does a
21 30-year regional transportation plan provide a unique opportunity for the people of Washington
22 to shape their future environment by deliberation, denial of the opportunity to do so by failing to
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24

25 ¹⁰⁶ Response to Plaintiff’s Hearing Memorandum at 63.

26 ¹⁰⁷ *Id.* at 12-13.

¹⁰⁸ *Id.* at 18.

¹⁰⁹ *Id.* at 50;

¹¹⁰ *See* discussion *infra* Part III.E.

1 develop reasonable mitigation measures is contrary to the dictates of SEPA, especially in light of
2 the mandatory GHG emission limits set forth in RCW 70.235.020.¹¹¹ Approving T2040
3 constitutes an abuse of discretion because the mitigation measures are not significant enough and
4 are not designed to mitigate the impacts of the proposal.¹¹²

5 In its EIS, PSRC recognized that environmental damage could be mitigated by GHG
6 reduction strategies like land use strategies, user fees, transportation choices, and assumed
7 technology measures.¹¹³ However, when factoring in these strategies, by 2040, the mitigations
8 are only projected to reduce GHG emissions by 5% below 2006 GHG level. The Limiting
9 Greenhouse Gas Emission statute would require reductions of about 33% below 1990 levels by
10 2040, which in turn are about 20% below 2006 levels. T2040 recognizes that greenhouse gas
11 reductions are necessary to curb impacts of climate change, but 5% emissions reductions from a
12 2006 baseline year are not nearly high enough to mitigate the potential impacts.
13

14 In addition, the EIS's mitigation measures do not provide sufficient detail to allow the
15 decision makers to make an informed decision. The EIS did not provide detail about how ocean
16 acidification will likely contribute to loss of fish and water creatures and how this would affect
17 tribal fishing and gathering rights.¹¹⁴ The mitigation measures did not address how T2040 would
18 insure that tribes like the Snoqualmie, who for centuries have fought to maintain their fishing and
19 dwelling areas, will survive in the face of ocean acidification, rising populations, and decreased
20 snowmelt, among other detrimental climate change effects.
21
22

23
24 ¹¹¹ See RCW § 43.21C.060 (explaining that in accordance with the policies and goals set forth in SEPA,
25 “[m]itigation measures shall be reasonable and capable of being accomplished.”).

26 ¹¹² RCW § 43.21C.060; WAC 197-11-660.

¹¹³ PSRC at 00003349-51.

¹¹⁴ *Cf. Brinnon Group v. Jefferson Co.*, 159 Wn. App. 446, 482, 245 P.3d 789 (2011) (“the final EIS described in detail how the [county’s plan] and hybrid alternatives would impact shellfish, water, shorelines, fish and wildlife, and critical areas, and described mitigation measures for each alternative.”).

1 PSRC's four-part strategy, which addressed the reduction of GHG emissions arising from on-
2 road vehicles, will do little to mitigate climate change's effects on future generations. As the
3 Plaintiffs discussed, the PSRC measures its claimed reductions from the wrong baselines, those
4 for 2006 and 2040.¹¹⁵ When its claimed emission reductions are measured against the 1990
5 baseline, they far exceed the adopted statutory limits.¹¹⁶ Failing to utilize the proper baseline
6 further confuses the decision maker and highlights PSRC's failure to adequately mitigate its
7 effects on GHG emissions. Although an EIS need not provide a remedy for every identified
8 impact, it must do so to the extent that decision makers can make a reasoned decision regarding
9 the proposal.¹¹⁷ Exceeding by roughly 50% the mandatory GHG emission levels necessary to
10 achieve climate stability is not an insignificant impact that the PSRC can ignore in light of
11 SEPA's forward looking policies. In this instance, decision makers are unable to discern the
12 impacts of T2040 on future generations.

14 Furthermore, the mitigation measures (discussed at 6-25 to 6-29) do not disclose the extent of
15 T2040's noncompliance with the GHG reduction requirements of the Limiting Greenhouse Gas
16 Emission statute. Approval of a plan without adequate consideration of mitigation strategies and
17 less damaging alternatives can constitute an abuse of discretion.¹¹⁸ The unsatisfactory evaluation
18 of alternatives and mitigations in T2040 – when considered in the light of the inherently
19 intergenerational issue of climate change and the readily available scientific data to assess long-
20 term impacts – so abdicates PSRC's *substantive* responsibilities under SEPA as to constitute an

24 ¹¹⁵ Plaintiff's Hearing Memorandum at 38.

25 ¹¹⁶ *Id.*

26 ¹¹⁷ *Cf. Citizens Alliance To Protect Our Wetlands v. City of Auburn*, 126 Wn.2d 356, 370, 894 P.2d 1300,
1308 (1995) (the FEIS informed decision makers where the agency did not minimize or gloss over the disadvantages
of the construction's impacts).

¹¹⁸ *See Eastlake Community Council v. Roanoke Assoc., Inc.* 82 Wn.2d 475, 497 FN 6(1973) (approval of project
“may reveal an abuse of discretion by the public agency where mitigation or avoidance of damage was possible.”).

1 abuse of discretion. Therefore, a remand of T2040 is necessary so that PSRC can prepare an EIS
2 that is consistent with SEPA policies.

3 **D. NEPA Requires Consideration of the Impacts of Climate Change in the**
4 **Preparation of an Environmental Impact Statement.**

5 SEPA and NEPA are similar in the wording and application of procedural requirements to
6 analyze environmental impacts of proposed projects, and the Washington Supreme Court has
7 said that provisions in SEPA should be interpreted in a similar manner as those in NEPA.¹¹⁹
8 Since courts have held NEPA to be solely procedural in nature,¹²⁰ requiring a federal agency to
9 consider climate change impacts in a NEPA analysis should lead this court to require similar
10 treatment of climate change in the T2040 EIS.

11 NEPA requires an agency to consider a project’s impacts on air quality.¹²¹ In *Center for*
12 *Biological Diversity v. National Highway Traffic Safety Admin.*, the Ninth Circuit held that a
13 failure by the NHTSA to consider the cumulative effects of greenhouse gases on climate change
14 required a remand of the EIS to the agency.¹²² The court explicitly stated, “[t]he impact of
15 greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis
16 that NEPA requires agencies to conduct.”¹²³ Similarly here, the Court should remand the FEIS
17 back to PSRC for an adequate analysis of climate change impacts that complies with SEPA.
18
19

20 **VI. CONCLUSION**

21 The Snoqualmie Indian Tribe respectfully requests that the Court consider the impacts of
22 Transportation 2040’s inconsistency with the mandates of SEPA and its requirement that an
23

24 ¹¹⁹ See *Public Utility Dist. No. 1 of Clark County v. Pollution Control Hearings Bd.*, 137 Wn. App. 150, 158, 151
25 P.3d 1067 (2007) (citing *Des Moines v. Puget Sound Regional Council*, 98 Wn. App. 23, 28 n. 28, 988 P.2d 27
(1999)).

26 ¹²⁰ See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353, 109 S.Ct. 1835 (1989).

¹²¹ See 40 C.F.R. §§1502.16, 1508.8(b).

¹²² *Center for Biological Diversity v. National Highway Traffic Safety Admin.*, 538 F.3d 1172, 1216-1217 (9th Cir.
2008).

¹²³ *Id.* at 1217.

1 agency consider cumulative and future impacts for the benefit of future generations. Adopting
2 Transportation 2040 as proposed will make compliance with SEPA effectively optional and set a
3 dangerous precedent of not holding an agency to the substantive and procedural requirements of
4 SEPA.

5 Despite the impact that T2040 will have on Washington's environment for present and
6 future generations, the PSRC failed to follow the mandates of SEPA to consider future and
7 cumulative impacts to the environment. Moreover, the PSRC made no attempt to develop
8 mitigation alternatives to T2040 as required under SEPA.

9 In view of the PSRC's unique ability to dictate the fate of Washington's long term
10 environmental health, the unprecedented risks associated with ignoring SEPA, and the lack of
11 clarity concerning the PSRC's actual legal obligations under SEPA, the Snoqualmie Indian Tribe
12 urges this Court to remand this matter to PSRC as requested by the Plaintiffs.

13
14 RESPECTFULLY SUBMITTED this 28th day of April, 2011,

15
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