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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 TAHOMA AUDUBON SOCIETY

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26

1 **I. INTEREST OF *AMICUS CURIAE***

2 Tahoma Audubon, a nonprofit corporation, conserves and restores natural ecosystems to
3 protect bird and wildlife habitat for the benefit of humanity and Earth’s biodiversity. *See*
4 Declaration of Krystal Kyer (“Kyer Decl.”) at ¶ 2. Established in 1969, Tahoma Audubon serves
5 approximately 1700 members in the Pierce County area. *Id.* Tahoma Audubon offers
6 educational programs for youth and adults and conducts scientific monitoring in significant
7 habitat areas in the South Puget Sound region. *Id.* at ¶ 3.
8

9 Consistent with its mission, Tahoma Audubon is actively engaged in conservation
10 advocacy at the municipal, county and regional levels regarding issues of land use, transportation
11 planning and climate change. *Id.* Tahoma Audubon closely follows land use and transportation
12 planning activities in the South Puget Sound region and participates in municipal- and county-
13 level task forces, working groups and advocacy coalitions. *Id.* Tahoma Audubon also files
14 public comments in local administrative proceedings concerning land use and climate change¹
15 and participates in selected litigation.² *Id.*
16

17 Tahoma Audubon has actively monitored the development of the Puget Sound Regional
18 Council’s (“PSRC’s”) Transportation 2040 proposal. *Id.* at ¶ 4. The organization’s staff have
19

20
21 ¹ Tahoma Audubon filed public comments with the Federal Highway Administration on the final environmental
22 impact statement for the State Route 704 (Cross-Base Highway) project in 2004 (*See* FHWA-WA-WA-EIS-98-3-F).
The Cross-Base Highway project is anticipated as part of Transportation 2040.

23 ² Tahoma Audubon is currently a plaintiff in *Woodbrook Hunt Club et al. v. U.S. Dep’t of Transportation et al.*,
24 Complaint, No. 3:10CV05527 (W.D. Wash. July 28, 2010), 2010 W.L. 4657692 (challenging the adequacy of the
25 environmental impact statement for the Cross-Base Highway project under the National Environmental Policy Act
and the State Environmental Policy Act); and participated as a petitioner in *Tahoma Audubon Society et al. v. City of*
Tacoma, No. 06-3-0001, Central Puget Sound Growth Management Hearings Board (2007) (challenging Tacoma
City ordinance for failure to adequately protect designated marine shoreline critical areas).

1 attended several public meetings concerning Transportation 2040, filed written comments with
2 the PSRC, and reviewed all publicly available documents, including the draft and final
3 environmental impact statements. *Id.*

4 **II. ISSUES ADDRESSED BY THE *AMICUS***

- 5 A. The emission reductions required by RCW 70.235 reflect clear legislative intent to
6 achieve statewide greenhouse gas emission levels consistent with climate
7 stabilization, which cannot be realized if Transportation 2040 is adopted as proposed.
8
- 9 B. The PSRC has failed to carry its burden of proving that compliance with RCW
10 70.235 is legally impossible.
11
- 12 C. Adopting Transportation 2040 as proposed would lead to foreseeable noncompliance
13 by the State of Washington with federal Clean Air Act and Clean Water Act
14 requirements.
15

16 **III. ARGUMENT**

17 **A. The Emission Reductions Required by RCW 70.235 Reflect Clear Legislative 18 Intent to Achieve Statewide Greenhouse Gas Emission Levels Consistent with 19 Climate Stabilization, Which Cannot be Realized if Transportation 2040 is 20 Adopted as Proposed.**

21 If adopted as proposed, Transportation 2040's admitted nonconformity with the statewide
22 greenhouse gas emission reductions mandated by RCW 70.235 will undermine the State's ability
23 to achieve emission levels consistent with climate stabilization. Aside from precluding effective
24 implementation of the statute, extensive scientific research indicates that failure to achieve

1 climate stabilization will have severe, far-reaching consequences in the State of Washington.³ In
2 light of this evidence and the State’s acknowledgment that transportation dwarfs all other sources
3 of greenhouse gas emissions in Washington,⁴ the Court should read RCW 70.235 to apply to
4 transportation plans such as Transportation 2040.

5
6 *1. The emission reductions mandated by RCW 70.235.020 are designed to achieve*
7 *climate stabilization and avoid catastrophic environmental, human, and economic*
8 *climate change impacts in the State of Washington*

9 Recognizing the significant threat posed by climate change, the Washington legislature
10 enacted statewide mandatory greenhouse gas reduction requirements:

11 The state *shall* limit emissions of greenhouse gases to achieve the following emission
12 reductions for Washington state: (i) By 2020, reduce overall emissions of greenhouse gases
13 in the state to 1990 levels; (ii) By 2035, reduce overall emissions of greenhouse gases in
14 the state to twenty-five percent below 1990 levels; (iii) By 2050, the state will do its part to
15 reach global climate stabilization levels by reducing overall emissions to fifty percent
16 below 1990 levels, or seventy percent below the state's expected emissions that year.⁵

17 Unlike federal and state air and water quality statutes that base their requirements on economic
18 and/or technological feasibility,⁶ RCW 70.235.020 is a mandatory directive⁷ requiring specific

19 ³ See Dep’t of Ecology, Pub. No. 08-01-025, *Growing Washington’s Economy in a Carbon-Constrained World: A*
20 *Comprehensive Plan to Address the Challenges and Opportunities of Climate Change* 9 (2008), located in PSRC
00023899.

21 ⁴ See Department of Ecology, *Washington State Greenhouse Gas Emissions Inventory 1990-2008* 6 (Dec. 2010),
22 available at <http://www.ecy.wa.gov/pubs/1002046.pdf>. The Legislature has explicitly recognized the unique role
23 that transportation plays in Washington’s emissions profile and the attendant necessity of reducing emissions in that
sector. See RCW 80.80.005 (2007) (noting that “Washington state greenhouse gases are substantially caused by the
transportation sector of the economy”).

24 ⁵ RCW 70.235.020 (emphasis added).

25 ⁶ See, e.g., Federal Water Pollution Control Act § 307, 33 U.S.C. §1317(a)(2) (2006) (mandating effluent limitations
for toxic pollutants based on the “best available technology economically achievable”); Washington Clean Air Act,
RCW 70.94.030(6) (establishing emission limitations based on the best available control technology).

1 emission reductions, based on legislative intent to mitigate the predicted catastrophic impacts of
2 climate change.⁸

3
4 The predicted environmental and human impacts of climate change in Washington are
5 severe and well documented. The University of Washington Climate Impacts Group estimates
6 that temperatures in the Pacific Northwest will increase by 3.2°F by 2040.⁹ Consequences of
7 increased temperatures include decreased snow pack, decreased water availability for agriculture,
8 and reduced freshwater salmon habitat due to increased stream temperatures.¹⁰ Hotter
9 temperatures coupled with decreased precipitation will increase wildfire danger, threatening the
10 state’s forests, delicate ecosystems, and rural populations.¹¹ Shifting rainfall patterns and
11 temperatures may adversely affect forest productivity, water availability, and food availability
12 for migratory birds.¹² Warmer winters are already altering bird migration and scientists warn
13 that climate change may lead to the extinction of many bird species.¹³
14
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17
18 ⁷ See *Waste Management of Seattle, Inc. v. Utilities and Transp. Com'n*, 123 Wn. 2d 621, 629, 869 P.2d 1034
(1994)(“The use of the word ‘shall’ imposes a mandatory duty.”)

19 ⁸ See Exec. Order No. 07-02 (2007) (establishing greenhouse reduction goals later codified as RCW 70.235
standards).

20 ⁹ See University of Washington Climate Impacts Group, *Washington Climate Change Impacts Assessment 1* (2009),
located in PSRC at 00021844.

21 ¹⁰ *Id.*

22 ¹¹ *Id.*

23 ¹² See Washington Dep’t of Ecology, *What is Climate Change*, <http://www.ecy.wa.gov/climatechange/whatis.htm>.
(last visited April 17, 2011).

24 ¹³ National Audubon Society, *Bird Movements Reveal Global Warming Threat in Action*, Audubon Magazine
25 (February 2009), [http://www.audubon.org/newsroom/press-releases/2009/birds-movements-reveal-global-warming-
threat-action](http://www.audubon.org/newsroom/press-releases/2009/birds-movements-reveal-global-warming-threat-action).

1 In addition, rising temperatures have the potential to cause a “public health crisis.”¹⁴ The
2 Climate Impacts Group predicts that higher summer temperatures will increase the number of
3 heat-related deaths in Washington, especially among those over age 65.¹⁵ Under a moderate
4 warming scenario, the greater Seattle area will experience 101 excess heat-related deaths in 2025
5 and 156 excess heat-related deaths annually by 2045.¹⁶ Reduced air quality due to climate
6 change will cause an estimated 132 additional deaths annually by 2050.¹⁷
7

8 The environmental and public health impacts of climate change cannot be separated from
9 the impacts on Washington’s economy.¹⁸ A 2006 report by the Washington Department of
10 Ecology (“Ecology”), *Impacts of Climate Change on Washington’s Economy: A Preliminary*
11 *Assessment of Risks and Opportunities*, indicates that climate change will likely cause increased
12 water prices, decreased dairy revenue, and increased State expenditures to fight wildfires.¹⁹
13 Additionally, the report projects that decreased snowpack will decrease Seattle’s available water
14 supply by millions of gallons per day unless the City spends millions of dollars on conservation
15 projects.²⁰ Either option will significantly impact Seattle and its residents. Rising sea levels due
16 to melting glaciers will likely adversely affect low-lying agricultural areas such as the Skagit
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18

19 ¹⁴ Exec. Order No. 07-02 (2007).

20 ¹⁵ See *Washington Climate Change Impacts Assessment 1*, located in PSRC at 021844.

21 ¹⁶ *Id.* at 2, PSRC 00021845.

22 ¹⁷ *Id.*

23 ¹⁸ See *Growing Washington’s Economy in a Carbon-Constrained World 5*, located in PSRC at 00023895
(describing climate change as “the economic and environmental issue of our lifetime”).

24 ¹⁹ Dep’t of Ecology and Dep’t of Community, Trade and Economic Development, *Impacts of Climate Change on*
Washington’s Economy: A Preliminary Assessment of Risks and Opportunities 8 (2006).

25 ²⁰ *Id.* at 41.

1 River Delta and communities such as Tacoma and Olympia that sit just above sea level.²¹ For
2 example, Tacoma could experience a rise in sea level of two feet within fifty years.²² These
3 rising waters will impact commerce flowing through the port as well as recreational activities.²³
4 While climate change may bring some new economic opportunities to the area,²⁴ current
5 projections indicate that the negative environmental, health and economic impacts will outweigh
6 the positive. As the Legislature recognized, “emissions must be reduced significantly below
7 current levels to avert catastrophic climate change.”²⁵
8

9 While compliance with RCW 70.235.020’s reduction requirements may not fully mitigate
10 these effects, it will forestall even more severe impacts and ensure that Washington does “its
11 part” to combat the climate crisis.²⁶ Moreover, irrespective of RCW 70.235.020’s applicability
12 to the PSRC, the Transportation 2040 Environmental Impact Statement (“EIS”) should have
13 considered alternatives and mitigation strategies designed to achieve similar reductions based on
14 international scientific consensus that climate stabilization depends upon developed countries’
15 reducing their emissions below 1990 levels.²⁷ By neglecting to assess the environmental impacts
16 of failure to achieve climate stabilization, the PSRC violated SEPA’s mandate that governmental
17

18 ²¹ *Id.* at 63.

19 ²² *Id.* at 65.

20 ²³ *Id.*

21 ²⁴ *See Id.* at 7; *see also Growing Washington’s Economy in a Carbon-Constrained World 5*, located in PSRC at
00023895 (emphasizing that a strong climate change policy can create a strong green business climate).

22 ²⁵ RCW 80.80.005(1)(b).

23 ²⁶ RCW 70.235.020.

24 ²⁷ *See Intergovernmental Panel on Climate Change, Fourth Assessment Report: Climate Change 2007*, ch. 13, 775
25 (2007) (outlining GHG emission reduction levels that developed countries must reach to achieve low to medium
stabilization levels. These reduction levels require emissions to fall -10% to 40% below 1990 levels in 2020 and to
40% to 95% below 1990 levels by 2050).

1 entities “consider the total environmental and ecological factors to the fullest in deciding major
2 matters.”²⁸

3
4 2. *There is no indication that the Legislature intended to exempt transportation
5 planning activities from the statewide greenhouse gas emission reductions
6 required by RCW 70.235, and doing so would render the statute ineffective*

7 Washington’s emissions profile and the Legislature’s findings strongly indicate that the
8 drafters of RCW 70.235 did not intend to exempt the thirty-year transportation plan for the
9 state’s most populous region from compliance with the statute. The PSRC acknowledges that
10 the transportation sector is responsible for approximately 47% of statewide greenhouse gas
11 emissions²⁹ and approximately 50% of greenhouse gas emissions in the four-county area covered
12 by Transportation 2040.³⁰ In light of these figures, the Legislature explicitly recognized the
13 critical role that the transportation sector plays in Washington’s greenhouse gas emissions profile
14 and the attendant need to reduce emissions in that sector to achieve statewide reductions.³¹

15
16 Failure to construe RCW 70.235 to reach Transportation 2040 will render the statute
17 meaningless.³² As the Plaintiffs point out, Transportation 2040 should incorporate emission

18
19 _____
20 ²⁸ *Eastlake Community Council v. Roanoke Associates, Inc.*, 82 Wn.2d 475, 490, 513 P.2d 46 (1973).

21 ²⁹ See Ecology, *Washington Greenhouse Gas Inventory, etc.* at ES-1 (December 2007), located in PSRC at 00021409.

22 ³⁰ See Puget Sound Clean Air Agency Climate Protection Advisory Committee, *Roadmap for Climate Protection: Reducing Greenhouse Gas Emissions in Puget Sound* at 12, located in PSRC at 00017453.

23 ³¹ See RCW 80.80.005 (observing that “Washington State greenhouse gases are substantially caused by the transportation sector of the economy”).

24 ³² See *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) (“Statutes must be
25 interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.”)

1 reductions on the order of 53% below 2006 levels by 2040 to track the statutory requirements,
2 but the Plan only aims to reduce emissions by 5% below 2006 levels by 2040.³³ This 48%
3 disparity will make it difficult, if not impossible, for the state’s most populous region to achieve
4 meaningful greenhouse gas emission reductions because 50% of the area’s emissions come from
5 transportation, with 74% of these emissions coming from on-road motor vehicles.³⁴ Moreover,
6 an interpretation by this Court that the PSRC has no duty to comply with RCW 70.235 could
7 preclude the statute’s application to transportation planning activities across the state, taking the
8 single greatest source of emissions off the table in the effort to achieve statewide emissions
9 consistent with climate stabilization and the statutory requirements. This construction of RCW
10 70.235 is irreconcilable with the law’s stated goals.

11
12
13 The State’s environmental authorities have recognized the need to reduce emissions in
14 the transportation sector in order to satisfy the mandate of RCW 70.235. In its comments on the
15 Draft EIS for Transportation 2040, Ecology noted the immense contribution that the
16 transportation sector makes to Washington’s total greenhouse gas emissions.³⁵ Thus, Ecology
17 concluded that “[t]he state will not reach its statutory emissions reductions unless we
18 significantly reduce emissions from transportation.”³⁶ In Ecology’s estimation, this necessarily
19 imposes a specific, affirmative obligation on the PSRC to develop a Transportation 2040
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³³ See Plaintiffs’ Hearing Memorandum at 42.

23 ³⁴ See Puget Sound Clean Air Agency etc, *Roadmap for Climate* 12, 30, located in PSRC Record at 00017453,
00017471..

24 ³⁵ See Department of Ecology comment to *T2040* EIS 13, located in PSRC at 00002534.

25 ³⁶ *Id.*

1 alternative that is “consistent with the region’s *proportional share* of the transportation sector’s
2 greenhouse gas emission reductions.”³⁷

3
4 The Puget Sound Clean Air Agency (PSCAA) joined Ecology in strongly advocating that
5 the PSRC develop a Transportation 2040 alternative that satisfies the statutory greenhouse gas
6 reduction requirements.³⁸ Like Ecology, the PSCAA observed that implementation of RCW
7 70.235 will be impossible if the PSRC fails to develop a compliant alternative for Transportation
8 2040, expressing concern that “there is significant potential for a disconnect between
9 Transportation 2040 and the key policy directives on climate coming from the state.”³⁹ Taken
10 together, Ecology and the PSCAA’s statements highlight that Transportation 2040’s failure to
11 reduce emissions in line with the statutory requirements renders meaningless the Legislature’s
12 greenhouse gas reduction strategy.⁴⁰
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19 ³⁷ *Id.* (emphasis added).

20 ³⁸ PSCAA comment to *T2040* EIS 65, located in PSRC at 00002586. (Importantly, the Puget Sound Clean Air
21 Agency also observed that federal requirements for greenhouse gas reductions in transportation plans developed by
22 MPOs such as the PSRC are imminent. *See id.* at 66, PSRC at 00002587. Beyond the Agency’s argument that
23 Transportation 2040 presents a critical opportunity for the State and region to prepare itself for compliance, *id.*, the
promise of federal requirements for plans such as Transportation 2040 begs the question whether the PSRC simply
plans to reprise its argument that further reductions in greenhouse gas emissions are “not feasible” before the
federal authorities, and whether this will result in Washington being out of compliance with the new federal
requirements.)

24 ³⁹ *Id.*

25 ⁴⁰ *See Whatcom County*, 128 Wn.2d at 546 (emphasizing that statutes should be construed to effectuate the purpose
and intent of the statute and to render no portion of the statute meaningless.)

1 3. *The PSRC misconstrues the Legislature’s intent to achieve cost-effective emission*
2 *reductions as a basis for excusing noncompliance with RCW 70.235 on account of*
3 *cost*

4 Contrary to the unified position of Ecology and the PSCAA and the Legislature’s clear
5 purpose to reduce transportation emissions in RCW 70.235, the PSRC has repeatedly disavowed
6 any responsibility for developing a statutorily-compliant plan – both in its responses to
7 comments received on the Draft EIS and in its arguments to this Court.⁴¹ The PSRC has also
8 disregarded Ecology’s specific recommendation that it develop a Transportation 2040 alternative
9 that reduces emissions in proportion to the share of statewide emissions captured by
10 Transportation 2040.⁴²

11
12 To justify its noncompliance with RCW 70.235, the PSRC argues that the Legislature’s
13 intent to achieve emission reductions at the “lowest cost” excuses Transportation 2040 from
14 compliance with the statute.⁴³ This excuse is premised on the PSRC’s assertion that it would be
15 too expensive to reduce emissions in proportion to the region’s share of statewide transportation
16 emissions⁴⁴ and because the PSRC lacks control over policy areas such as market incentives that
17 present emission-reduction opportunities.⁴⁵ The PSRC cites the *Leading the Way* study for the
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21 ⁴¹ *See id.* at 2.

22 ⁴² *See id.* (stating that “without knowing what portion of the overall emission reduction is expected of the
23 transportation sector and what portion is expected of the Puget Sound region it is difficult to determine whether any
24 Transportation 2040 alternative would reach the 1990 statewide greenhouse gas reduction goals”).

25 ⁴³ Defendant’s Response at 25.

26 ⁴⁴ *Id.*

⁴⁵ *See* Defendant’s Response at 49-50.

1 proposition that market incentives are key to achieving meaningful emission reductions,⁴⁶ and
2 the *Moving Cooler* study for the proposition that compliance with RCW 70.235 is prohibitively
3 expensive.⁴⁷

4
5 This argument has three significant flaws. First, the PSRC fails to demonstrate, or even
6 consider, how it will be less expensive for other sectors of the economy to achieve reductions in
7 excess of their proportional share of emissions, which will be necessary to implement RCW
8 70.235 if Transportation 2040 is adopted as proposed. Under SEPA, the PSRC should have
9 analyzed the cost of implementing a transportation plan that complies with RCW 70.235 as well
10 as the cost of passing the burden of compliance to other sectors.⁴⁸ Second, this “lowest cost”
11 argument inverts the statute’s stated priorities, placing economic considerations ahead of the
12 Legislature’s primary purpose of reducing emissions to achieve climate stabilization.⁴⁹ While
13 the Legislature recognized the need to make the required emission reductions at the lowest cost
14 to the state’s economy, this does not indicate that economic considerations can be used to
15 undermine the statute’s implementation.⁵⁰ Instead, the Legislature’s instruction to consider costs
16 provides guidance on how to achieve the mandatory reductions. Had the Legislature intended to

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19 ⁴⁶ See *id.* at 50.

20 ⁴⁷ See Defendant’s Response at 12-14, 49-50.

21 ⁴⁸ See *Cathcart-Maltby-Clearview Community Council v. Snohomish County*, 96 Wn.2d 201, 209, 634 P.2d 853, 859
22 (1981) (noting that SEPA requires “an analysis of ultimate probable consequences, including those secondary and
cumulative, whether social or economic. It also mandates that extra-jurisdictional effects be addressed and
mitigated, when possible”) (internal citations omitted).

23 ⁴⁹ See RCW 70.235.005(3) (stating that the Legislature’s intent in enacting RCW 70.235 is to limit and reduce
24 greenhouse gas emissions as prescribed in RCW 70.235.020 and subsequently stating that those reductions should
be achieved in a manner that will minimize “the potential to export pollution, jobs, and economic opportunities” and
at the lowest cost).

25 ⁵⁰ See RCW 70.235.005(3).

1 allow economic considerations to trump the mandatory reductions, they would not have included
2 the mandatory language that the state “shall” achieve the stated reductions. Third, there is no
3 statutory support for the PSRC’s inference that only up-front costs are relevant to the question of
4 “lowest cost” reductions.⁵¹ Over the life of Transportation 2040, unconstrained generation of
5 greenhouse gases will likely be far more costly to the State than taking action to reduce
6 emissions now.⁵²

8 Further, the legislature’s goal of reducing greenhouse gas emissions in an economically
9 feasible manner does not give one sector (notably the sector responsible for the largest share of
10 greenhouse gas emissions in this state) license to refuse compliance with the reduction
11 requirements based upon its own estimation that compliance is too expensive. The statute aims
12 to limit greenhouse gas emissions from all sectors, to maintain Washington’s role as a national
13 and international leader in environmental stewardship and clean energy, and to reduce
14 Washington’s dependence on imported fuels.⁵³ As the largest source of greenhouse gases in the
15 State, the transportation sector must play an active role in realizing the purpose of the law.⁵⁴ It
16 would be paradoxical for the legislature to pass a law requiring the state to significantly reduce
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21 ⁵¹ See RCW 70.235.020 (the long term scope of the statutory reductions suggests that cost considerations should be
22 considered over time, not merely in the short-term).

23 ⁵² See Ecology, et al., *Growing Washington’s Economy in a Carbon-Constrained World 1* (2008), located in PSRC
at 00023891 (“Without action, climate change will negatively affect nearly every part of Washington’s economy
through changes in temperature, sea level, and water availability.”).

24 ⁵³ See RCW 70.235.005(1).

25 ⁵⁴ See RCW 80.80.005; see also Department of Ecology comment to T2040 EIS, located in PSRC at 00002534.

1 its emissions while providing an implied economic loophole exempting the state’s leading
2 emission source from compliance.⁵⁵

3
4 **B. The PSRC Has Failed to Carry its Burden of Proving that Compliance with
5 RCW 70.235 is Legally Impossible.**

6 In addition to its cost-based arguments, the PSRC also argues that developing a
7 Transportation 2040 alternative that complies with RCW 70.235 is impossible as a matter of
8 law.⁵⁶ The PSRC errs in suggesting that the burden rests on the Plaintiffs to establish that
9 compliance with the statute is “feasible.” Moreover, the PSRC fails to carry its heavy burden of
10 proving the impossibility of statutory compliance as a matter of law.
11

12 Though Washington lacks a developed body of case law on the defense of administrative
13 impossibility, federal court precedent establishes that agencies bear a heavy burden in proving
14 impossibility.⁵⁷ In the present case, the parties dispute the applicability of RCW 70.235 to the
15 PSRC. However, insofar as the PSRC relies on the argument that there is no feasible way for
16 Transportation 2040 to achieve its proportional share of the statutory emission reductions,⁵⁸ the
17

18
19 ⁵⁵ Further, the PSRC’s “lowest cost” argument ignores the high costs of failing to achieve climate stabilization. As
20 shown in Section A(1), the economic costs of dealing with and adapting to climate change will negatively affect the
21 four-county region of the PSRC and the rest of the State. This high cost of failing to achieve climate stabilization
22 should not surprise the PSRC. Indeed, Transportation 2040 recognizes that a healthy environment *supports* regional
economic growth and indicates that “sustaining the environment” is an “economic priority.” *See* Puget Sound
Regional Council, *Transportation 2040 Plan* b31, *located in* PSRC Record at 00003295. (*emphasis added*). Yet, the
PSRC proceeds to undermine the economic, human, and environmental health of the state by implementing a thirty-
year Plan that blatantly refuses to comply with legislature’s mandatory reduction levels.

23 ⁵⁶ *See* Defendant’s Response to Plaintiffs’ Hearing Memorandum at 66 (“Plaintiffs’ suggested alternative of meeting
the emission limits in RCW 70.235.020 is not feasible, and therefore is unreasonable”).

24 ⁵⁷ *See, e.g., Alabama Power Co. v. Costle*, 636 F.2d 323, 357 (D.C. Cir. 1979); *NRDC v. Costle*, 568 F.2d 1369
(D.C. Cir. 1977).

25 ⁵⁸ *See* Defendant’s Response at 49-51.

1 PSRC bears the burden of proving that compliance is impossible as a matter of law.⁵⁹ The
2 PSRC’s suggestion that the Plaintiffs bear the burden of demonstrating the feasibility of
3 compliance with RCW 70.235 confuses the issue and is irrelevant to the Court’s analysis of the
4 impossibility defense proffered.⁶⁰ To the extent that the PSRC relies on the alleged impossibility
5 of complying with RCW 70.235 to support the rationality of Transportation 2040, the PSRC—
6 not the Plaintiffs—bears the burden on the issue of legal impossibility.⁶¹
7

8 This burden of proving impossibility is especially heavy where, as here, a public entity
9 seeks a prospective exemption from a statutory requirement based on its prediction, not analysis,
10 that compliance is infeasible.⁶² Where a public entity claims impossibility without first
11 demonstrating a good-faith effort to comply with the statute (which is required under SEPA), the
12 reviewing court must “carefully study the governing statute” to see if it authorizes deviations
13 from its mandate due to claimed infeasibility.⁶³
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18 ⁵⁹ See, e.g., *Public Citizen v. Shalala*, 932 F.Supp. 13, 17 (D.D.C. 1996) (rejecting FDA’s defense of administrative
19 impossibility where the agency had not borne its “especially heavy burden” of proving that compliance with the
20 statute was in fact impossible).

21 ⁶⁰ See Defendant’s Response at 66-67 (stating that the PSRC is not required by SEPA to develop a statutorily
22 compliant alternative because the Plaintiffs “offer no suggestion for how this could be achieved”).

23 ⁶¹ See *Environmental Defense Fund v. EPA*, 636 F.2d 1267, 1283 (D.C. Cir. 1980) (rejecting impossibility defense
24 where the agency made an inadequate evidentiary showing that statutory compliance was in fact impossible).

25 ⁶² See *Alabama Power*, 636 F.2d at 359.

26 ⁶³ *Id.* The circumstances of this case make this close judicial scrutiny particularly important. As both Ecology and
the PSCAA have observed, accepting Transportation 2040 as proposed will preclude effective implementation of
RCW 70.235. A bare assertion from the PSRC that compliance is legally impossible—particularly where the
agency also seeks to disclaim any legal obligations under the statute—should not satisfy the Court where
noncompliance will be fatal to the legislative design. See *id.* (expressing skepticism about the availability of an
impossibility defense before the agency has made a good-faith effort to comply with the statute).

1 The record before the Court is simply insufficient to facilitate the close judicial scrutiny
2 necessary to properly assess the PSRC’s impossibility claim. As the Plaintiffs point out, the data
3 relied upon by the PSRC to assess the greenhouse gas emissions associated with the various
4 Transportation 2040 alternatives obfuscates the extent to which the Plan deviates from the
5 emission reductions required by RCW 70.235.⁶⁴ Thus, the public alternatives for Transportation
6 2040 neither disclose nor discuss the Plan’s inconsistency with the statutory requirements or the
7 feasibility of developing a compliant alternative. The PSRC’s *post-hoc* arguments in its brief to
8 the Court⁶⁵ are not a substitute for an objective analysis of its legal obligations under RCW
9 70.235 and the feasibility of developing a plan that incorporates a proportional share of the
10 emission reductions the statute requires. At a minimum, therefore, the Court should remand
11 Transportation 2040 to the PSRC so that it may make specific findings regarding the scope of its
12 statutory obligations and its actual ability to comply.
13

14
15 **C. Adopting Transportation 2040 as Proposed Would Lead to Foreseeable**
16 **Noncompliance by the State of Washington with Federal Clean Air Act and**
17 **Clean Water Act Requirements.**

18 In addition to tolling the death knell of RCW 70.235, accepting Transportation 2040 as
19 proposed will lead to the foreseeable failure by the State of Washington to meet its obligations
20 under the federal Clean Air Act and Clean Water Act. Simply put, failure to control the
21 emissions covered by Transportation 2040 will cause a “domino effect” of noncompliance with
22 federal environmental standards as statewide greenhouse gas emissions continue to rise. This
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24 ⁶⁴ See Plaintiffs’ Hearing Memorandum at 39.

25 ⁶⁵ See Defendant’s Response at 49-51.

1 phenomenon strongly counsels against accepting the PSRC’s impossibility argument,
2 particularly where the PSRC has made no findings concerning its precise statutory duties and its
3 ability to comply with RCW 70.235 prior to the commencement of litigation.

4
5 *I. Adopting Transportation 2040 as proposed would undermine the State of
6 Washington’s ability to comply with the federal Clean Air Act*

7 As proposed, Transportation 2040 sets the State of Washington on a collision course with
8 federal air quality standards for ground level ozone and particulate matter under the Clean Air
9 Act.⁶⁶ Washington already struggles to maintain compliance with federal air quality
10 requirements,⁶⁷ and the costs of noncompliance are high.⁶⁸ Transportation 2040 fails to address
11 this critical issue and in fact promises to make the situation worse.

12
13 Washington’s struggles to maintain legal concentrations of ground level ozone illustrate
14 the inadequacy of the PSRC’s proposal with respect to regional and statewide air quality issues.

17
18 ⁶⁶ See Clean Air Act § 109(a)(1), (b)(1)-(2), 42 U.S.C. § 7409(a)(1), (b)(1)-(2) (2011) (providing for national
ambient air quality standards for, *inter alia*, ground level ozone and particulate matter).

19 ⁶⁷ See Department of Ecology comment to T2040 EIS 14, located in PSRC Report at 00002535; see also PSCAA
comment to T2040 EIS 66, located in PSRC 00002587.

20 ⁶⁸ Ecology has repeatedly documented the public health risks associated with ground level ozone and particulate
21 matter. See, e.g., *Health Effects and Economic Impacts of Fine Particle Pollution in Washington* (Dec. 15, 2009),
22 <http://www.ecy.wa.gov/pubs/0902021.pdf>; Air Quality Program, Focus on Ozone Standard, *EPA is Setting a New
Ozone Standard to Protect Public Health*, <http://www.ecy.wa.gov/pubs/1002001.pdf> (last visited April 24, 2011)
(describing health risks of breathing ozone). The deleterious economic effects of air pollution on Washington’s
23 economy are likewise well known. For example, the PSCAA notes on its website that exceeding the federal
standards for ozone more than three times in three years will cause Washington to lose its status as a “clean air
24 region.” *What is Smog?*, <http://www.pscleanair.org/airq/basics/weather/smog.aspx> (last visited April 24, 2011).
The PSCAA observes that, “[i]f this were to happen, we would have expensive new regulatory requirements, new
25 businesses may not want to come to the region, and existing businesses would face tougher requirements for
expansion.” *Id.*

1 The majority of our region’s ground level ozone comes from the transportation sector,⁶⁹ and
2 vehicle exhaust is among the primary sources of summertime particulate matter pollution.⁷⁰
3 Climate change is expected to exacerbate both ozone and particulate matter pollution in
4 Washington.⁷¹ As a result, the PSCAA observed in its comments on Transportation 2040 that,
5 “it is unrealistic to try and fund significant additional single occupancy vehicle capacity and still
6 meet current and anticipated air quality and climate goals.”⁷²
7

8 Failure to develop and analyze an alternative that significantly reduces the greenhouse
9 gas emissions associated with Transportation 2040 will lead to foreseeable noncompliance with
10 federal ozone standards. In its comments on the draft environmental impact statement for
11 Transportation 2040, Ecology noted that the Puget Sound region is already “on the verge of
12 violating federal standards for ground-level ozone and vehicle emissions are a major source of
13 ozone precursors.”⁷³ Moreover, the U.S. Environmental Protection Agency (“EPA”) has
14 committed to tightening the federal ozone standard by July 29, 2011.⁷⁴ According to Ecology,
15 this impending revision makes it “likely that EPA will find much of the PSRC region out of
16 attainment with ozone levels.”⁷⁵ In its comments on Transportation 2040, the PSCAA
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20 ⁶⁹ PSCAA, <http://www.pscleanair.org/airq/basics/criteria/ozone.aspx>.

21 ⁷⁰ PSCAA, <http://www.pscleanair.org/airq/basics/criteria/particulate.aspx>.

22 ⁷¹ CIG Public Health Impacts 347 (ozone); WA DOE Detailed Health Impacts 2 (PM).

23 ⁷² PSCAA comment on *T2040* EIS 67, *located in* PSRC Report at 002588.

24 ⁷³ *Id.* at 14, 66 (similar observation by the PSCAA).

25 ⁷⁴ *See* EPA, National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. 2,938 (proposed Jan. 19, 2010);
26 EPA’s Revised Motion Requesting an Abeyance and Response to the State Petitioners’ Cross-Motion, *Mississippi v. EPA*, D.C. Cir., No. 08-1200 (D.C. Cir. Dec. 8, 2010).

⁷⁵ Department of Ecology comment to *T2040* EIS 14, *located in* PSRC at 00002535.

1 accordingly urged that the difficult task of complying with the revised ozone standards makes it
2 “important to have transportation strategies in place that reduce vehicle emissions *as*
3 *aggressively as possible.*”⁷⁶ This requires that the PSRC develop an alternative for
4 Transportation 2040 that not only aligns with the emission reduction requirements of RCW
5 70.235,⁷⁷ but also complies with other applicable state and federal environmental requirements.
6 Disregarding these concerns, the PSRC adopted a Plan that will lead to transportation emissions
7 48% greater than the statutory requirements by 2040, securing for Washington a future of
8 noncompliance with federal air quality standards.
9

10 *2. Adopting Transportation 2040 as proposed would undermine Washington’s ability to*
11 *combat ocean acidification and comply with the Clean Water Act*

12
13 Adopting Transportation 2040 as proposed will also undermine the State’s ability to
14 comply with the federal Clean Water Act, as rising greenhouse gas emissions will contribute to
15 the growing problem of ocean acidification in the State’s coastal waters.⁷⁸ Though EPA has not
16 yet promulgated binding regulations concerning ocean acidification, the agency formally stated
17 its intent to regulate ocean acidification caused by greenhouse gas emissions under section
18

19 ⁷⁶ PSCAA comment to T2040 EIS 67, located in PSRC at 00002588 (emphasis added).

20 ⁷⁷ See *id.* at 65, PSRC at 00002586.

21 ⁷⁸ See Ecology, Climate Change Frequently Asked Questions, *Ocean Acidification* (Oct. 2010),
22 <http://www.ecy.wa.gov/pubs/1001006.pdf>; Intergovernmental Panel on Climate Change, *Climate Change 2007: Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* 213 (2007) (M.L. Parry, et al. eds.),
23 http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_wg2_report_impacts_adaptation_and_vulnerability.htm. Ocean acidification is the process by which the pH of marine waters is decreasing as oceans soak up excess carbon dioxide from the atmosphere. See Ecology, *Ocean Acidification*, at 1. Acidification of ocean waters threatens the survival of organisms such as shellfish that are critical for the viability of marine ecosystems and the State’s shellfish industry. See *id.* Ecology has stated that Washington’s waters are particularly vulnerable to ocean acidification and will likely experience negative impacts before other areas of the country. See *id.* at 2.

1 303(d) of the Clean Water Act prior to the PSRC’s adoption of Transportation 2040.⁷⁹ In this
2 statement, EPA advised all states to begin reporting any coastal waters that fail to meet pH
3 standards imposed under the Clean Water Act.⁸⁰ EPA also indicated that further guidance on
4 Clean Water Act compliance issues raised by ocean acidification will be forthcoming as the
5 agency shapes its regulatory strategy on this high-priority issue.⁸¹
6

7 Instead of preparing the State for the vexing confluence of increased pollutant
8 concentrations in a warming climate and increasingly stringent federal regulations,
9 Transportation 2040 locks Washington into three more decades of runaway, “business as usual”
10 emissions in the State’s most populous region. As described above, the failure to achieve
11 greenhouse gas emissions consistent with climate stabilization as required by RCW 70.235 will
12 cause foreseeable noncompliance with Clean Air Act standards for ground level ozone and
13 particulate matter. Though the precise contours of Washington’s future legal obligations to
14 control greenhouse gas emissions under the Clean Water Act are less defined at present, it is
15 clear that the Legislature has taken affirmative action to prevent ocean acidification by enacting
16 mandatory greenhouse gas reduction requirements. Moreover, the failure of entities such as the
17 PSRC to aggressively reduce emissions now will exacerbate ocean acidification and make
18 compliance with pH standards for marine waters an unattainable goal. This begs the question:
19 would this Court’s acceptance of the PSRC’s argument that complying with RCW 70.235 is
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23 ⁷⁹ See EPA, Memorandum, Integrated Reporting and Listing Decisions Related to Ocean Acidification 4 (Nov. 15,
2010), http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/upload/oa_memo_nov2010.pdf (citing 33 U.S.C. §
1313(d)).

24 ⁸⁰ See *id.*

25 ⁸¹ See *id.*

1 impossible mean that Washington will have to defend its noncompliance with federal law on
2 impossibility grounds in years to come?

3 4 **IV. CONCLUSION**

5 Tahoma Audubon respectfully requests that the Court consider the far-reaching
6 implications of Transportation 2040's inconsistency with the emission reductions required by
7 RCW 70.235, which are based on the Legislature's intent to achieve statewide emissions
8 consistent with climate stabilization. Adopting Transportation 2040 as proposed will make
9 compliance with RCW 70.235 effectively impossible and herald potentially catastrophic
10 environmental, economic, and public health impacts in Washington.

11
12 Despite the unique impact that Transportation 2040 will have on Washington's
13 greenhouse gas emissions for the next three decades, the PSRC failed to make specific findings
14 regarding its obligations under the State's mandatory greenhouse gas reduction statute.
15 Moreover, the PSRC made no attempt to develop a proposal for Transportation 2040 that tracks
16 the statutory requirements. The PSRC's bare assertions to the State's environmental authorities
17 that developing such an alternative would be "difficult," and its *post hoc* rationalizations to this
18 Court that doing so is legally impossible, are inadequate.

19
20 In view of the PSRC's unique ability to dictate the fate of Washington's greenhouse gas
21 emissions profile for the next thirty years, the unprecedented risks associated with runaway
22 emissions, and the lack of clarity concerning the PSRC's actual legal obligations under RCW
23 70.235, Tahoma Audubon urges the Court to remand this matter to the PSRC as requested by the
24 Plaintiffs.

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RESPECTFULLY SUBMITTED this 28th day of April, 2011.

/s/ Andrea K. Rodgers Harris
Andrea K. Rodgers Harris, WSBA #38683
MATTSON RODGERS, PLLC
149 NE 52nd Street
Seattle, WA 98105
T: (206) 696-2851
E-mail: akrodgersharris@yahoo.com

On the Brief:

/s/ Aurora Janke
Aurora Janke, University of Washington School of Law '12
Greenlaw Environmental Law Society

/s/ Katherine Kirklin
Katherine Kirklin, University of Washington School of Law '12
Greenlaw Environmental Law Society