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

CASCADE BICYCLE CLUB, et.al.,  
  
Plaintiffs,  
  
v.  
  
PUGET SOUND REGIONAL COUNCIL,  
  
Defendant.

No. 10-2-22228-6 SEA

**PUGET SOUND REGIONAL COUNCIL’S  
RESPONSE TO *AMICUS CURIAE* BRIEF  
OF TAHOMA AUDUBON SOCIETY**

**I. INTRODUCTION**

The Tahoma Audubon Society’s (“Tahoma”) *amicus curiae* brief makes three assertions: 1) Transportation 2040 (“*T2040*”) will prevent the state from achieving emission reductions consistent with climate stabilization; 2) that the Puget Sound Regional Council (“PSRC”) has alleged a legal impossibility defense; and 3) that *T2040* will undermine compliance with the federal Clean Air Act and Clean Water Act. As demonstrated below, Tahoma’s sweeping assertions are not supported by the record (or any facts for that matter), mischaracterize PSRC’s legal arguments, and raise issues outside the scope of this litigation. None of Tahoma’s arguments establishes that PSRC’s adoption of *T2040* violated RCW 70.235.020.

1 I. RESPONSE ARGUMENT

2 A. NEITHER THE STATUTE NOR THE ADMINISTRATIVE RECORD SUPPORTS  
3 TAHOMA’S ARGUMENTS.

4 1. Nothing in the Record Supports Tahoma’s Claim That Statutorily-  
5 Required Greenhouse Gas Emissions Reductions “cannot be  
6 realized” if T2040 Is “Adopted as Proposed.”

7 Tahoma claims that the statewide greenhouse gas emission reductions required by  
8 RCW 70.235.020 “cannot be realized if Transportation 2040 is adopted as proposed.”<sup>1</sup>  
9 (*Amicus Curiae* Brief of Tahoma Audubon Society (“Tahoma Amicus Br.”) (Dkt. #34) at 4.)  
10 However, Tahoma cites nothing in the Administrative Record that substantiates this claim  
11 because there is nothing that substantiates it.<sup>2</sup>

12 As PSRC has previously pointed out, there are several measures already underway to  
13 reduce greenhouse gas emissions across the state. (PSRC’s Resp. to Pls.’ Hr’g Mem. (“Resp.  
14 Br.”) at 30-33 (Dkt. #28) (discussing those measures, and noting that a state-wide emissions  
15 trading program, the “centerpiece policy to address emissions throughout the economy,” may  
16 yet be authorized).) After PSRC filed its Response Brief, the legislature passed a bill that will  
17 shut down the single largest source of greenhouse gas emissions in the state, the TransAlta  
18 facility in Centralia. See LAWS OF 2011, ch. 180 (E2SSB 5769), § 101. One of TransAlta’s  
19 two coal-fired boilers will be taken offline in 2020, and the other in 2025. *Id.*, § 103(3)(c)(i).

23 <sup>1</sup> T2040 was adopted on May 20, 2010, more than a year ago. PSRC at 00003773.

24 <sup>2</sup> Tahoma makes essentially the same hyperbolic claim repeatedly throughout its brief:

- 25 • T2040 will “preclud[e] effective implementation of the statute.” (Tahoma Amicus Br. (Dkt. #34)  
26 at 4.)  
27 • “Adopting Transportation 2040 as proposed will make compliance with RCW 70.235 effectively  
28 impossible.” (*Id.* at 22.)  
• “[N]oncompliance [with RCW 70.235] will be fatal to the legislative design.” (*Id.* at 16 n.63.)  
• Transportation 2040 “toll[s] the death knell of RCW 70.235.” (*Id.* at 17.)

Not one of these statements is supported by the record.

1 The emission reduction deadlines in RCW 70.235.020 are years in the future, and  
2 efforts to meet those deadlines are continuing. The record simply does not support Tahoma's  
3 claim that the adoption of *T2040* will prevent the State's compliance with the statutory limits.  
4

5 **2. The Statute Will Not Be Rendered "Meaningless" if This Court**  
6 **Concludes That It Does Not Apply to *T2040*.**

7 Tahoma also claims that unless the Court construes RCW 70.235.020 as applying to  
8 *T2040*, it will be "difficult or impossible" for the Puget Sound region to achieve "meaningful"  
9 greenhouse gas emission reductions. (Tahoma Amicus Br. at 10 (Dkt. #34).) Tahoma further  
10 suggests that no efforts will be made to reduce emissions from the transportation sector if this  
11 Court concludes that RCW 70.235.020 does not apply to *T2040*. (*Id.* (greenhouse gas  
12 emissions from the transportation sector are allegedly taken "off the table" if this Court rules  
13 in favor of PSRC).) Finally, Tahoma describes *T2040* as providing for three more decades of  
14 runaway, "'business as usual' emissions." (*Id.* at 21.) Tahoma's exaggerated claims are not  
15 supported by the facts and demonstrate a lack of understanding of *T2040*'s commitment to  
16 reducing the transportation sector's impact on emissions.  
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18  
19 The record shows that the greenhouse gas strategy adopted by PSRC does result in  
20 meaningful reductions in greenhouse gas emissions, and further, that PSRC has already  
21 committed to addressing climate change through additional future efforts. In *T2040*, PSRC  
22 adopted a four-part strategy for reducing greenhouse gas emissions that will result in  
23 reductions of between nine percent (without technology changes) to 31 to 48 percent (with  
24 technology changes) over the 2040 Baseline trend. PSRC at 00003351. PSRC also pledged to  
25 identify "additional strategies to reduce greenhouse gas emissions" in its 2010 Action  
26 Strategy, and to revisit its existing strategy "[w]hen state targets are set for the transportation  
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1 sector and regions.” *Id.* Tahoma simply ignores the fact that *T2040* is not a static document,  
2 but includes an express plan amendment component. PSRC will review, monitor, and update  
3 the plan consistent with state and federal transportation planning law requirements. PSRC at  
4 00003419-21; *see also* RCW 47.80.023; 23 U.S.C. § 134(i).

6 Finally, Tahoma claims that both the Department of Ecology (“Ecology”) and the  
7 Puget Sound Clean Air Agency (“PSCAA”) agree with its position that state-wide emission  
8 limits cannot be met unless *T2040* does more to reduce emissions. (Tahoma Amicus Br. at 11  
9 (Dkt. #34).) Once again, however, the record does not support Tahoma’s claim. While  
10 Ecology and PSCAA encouraged PSRC to make aggressive emissions reductions in *T2040*,  
11 neither one predicted that implementation of RCW 70.235 would be “impossible” without the  
12 Puget Sound region meeting some proportionate reduction of the state-wide limit, or that  
13 implementation of RCW 70.235.020 relied on a proportionate reduction scheme. PSRC  
14 at 00002534 and 2586. In fact, Ecology has commended PSRC’s work in addressing  
15 greenhouse gas emissions within the transportation sector, reporting to the legislature and the  
16 Governor that “PSRC took a proactive stance to address the state’s GHG limits . . . in the  
17 Transportation 2040 process.” PSRC at S00029511.

21 Furthermore, Tahoma is wholly inaccurate in attributing to Ecology the belief that  
22 RCW 70.235.020 “necessarily imposes a specific, affirmative obligation on the PSRC” to  
23 make proportionate reductions in transportation sector emissions. (Tahoma Amicus Br. at 10-  
24 11 (Dkt. #34).) In fact, Ecology said just the opposite in its 2010 Report to the legislature:

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

28 PSRC at S00029466. Tahoma’s arguments are simply not supported by the record.

1                   **3. The Legislature’s Intent That Greenhouse Gas Emission**  
2                   **Reductions Be Made at the “Lowest Cost to Washington’s**  
3                   **Economy” Demonstrates That Reductions Are Not to Be Made**  
4                   **Proportionately.**

5                   Tahoma misunderstands the relevance of the legislative intent that emission reductions  
6                   be made “at the lowest cost to Washington’s economy, consumers, and business.”

7                   RCW 70.235.005(2). The legislature’s directive does not serve to “justify noncompliance”  
8                   with the statute; rather, it is one of many indicators that the legislature never intended  
9                   RCW 70.235.020’s greenhouse gas emission reductions to be bluntly made sector-by-sector  
10                  or region-by-region on a proportionate basis, as Plaintiffs propose.

11                  Nevertheless, Tahoma suggests that PSRC should demonstrate and balance the “costs”  
12                  to Washington’s economy of reductions in the transportation sector as compared to alternative  
13                  reductions, presumably including a cap-and trade model, a carbon tax, closure of coal-  
14                  generation facilities, and sector-wide fuel technology improvements, to name just a few.

15                  (Tahoma Amicus Br. at 13 (Dkt. #34).) How PSRC or other local entities could make such  
16                  state-wide policy determinations is uncertain, but if they did so, it is inevitable that reviewing  
17                  courts would then also be asked, on a case-by-case basis, to consider whether the balancing of  
18                  economic costs was appropriate and consistent with the statute. The reviewing courts as well  
19                  as the local entities would have to make this evaluation without any applicable standards.  
20                  These are the very types of policy determinations reserved for the legislature,<sup>3</sup> and about  
21                  which Ecology, at the legislature’s direction, has made recommendations. PSRC  
22                  at 00023833-977; PSRC at S00029454-92. Notably, Ecology does not recommend

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27                  <sup>3</sup> See, e.g., *Native Vill. of Kivalina v. Exxonmobile Corp.*, 663 F. Supp. 2d 863, 873-74, 876 n.4 (N.D. Cal.  
28                  2009) (“courts must ask whether they have the legal tools to reach a ruling that is ‘principled, rational, and based  
upon reasoned distinctions,” and to avoid arbitrary results, “allocation of responsibility for global warming is  
best left to the executive or legislative branch”).

1 proportionate transportation reductions, and the legislature has declined to impose such  
2 requirements. *Id.*

3 **B. PSRC DID NOT ARGUE THAT MEETING PROPORTIONATE GREENHOUSE GAS**  
4 **EMISSIONS REDUCTIONS WOULD BE “LEGALLY IMPOSSIBLE.”**

5 Tahoma makes the novel assertion that PSRC “fails to carry its heavy burden of  
6 proving” what Tahoma describes as the defense of “administrative impossibility.” (Tahoma  
7 Amicus Br. at 15-17 (Dkt. #34).) However, that legal concept is borrowed from a federal law  
8 context that does not apply to this case, and PSRC never asserted that defense.

9  
10 Federal courts have recognized “administrative impossibility” (sometimes referred to  
11 as “administrative necessity”) as a defense to strict compliance with statutory mandates. *See,*  
12 *e.g., Alabama Power Co. v. Costle*, 636 F.2d 323, 357-60 (D.C. Cir. 1980); *see also Env'tl.*  
13 *Defense Fund, Inc. v. Env'tl. Prot. Agency*, 636 F.2d 1267, 1283 (D.C. Cir. 1980) (“Under the  
14 heading of ‘administrative necessity,’ this court has recognized that an agency may depart  
15 from the requirements of a regulatory statute.”). Thus, the defense of “administrative  
16 impossibility” applies where there is a clear statutory mandate, and an agency seeks to be  
17 excused from compliance with that mandate. That concept is inapplicable here because  
18 RCW 70.235.020 does not impose any mandate on PSRC to meet the state-wide limit on  
19 emissions, or a particular portion of the state-wide limit, as argued extensively in PSRC’s  
20 Response Brief. Thus, an impossibility defense is inapplicable to this case.

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24 In fact, nowhere did PSRC argue that its “compliance” with RCW 70.235.020 is  
25 impossible as a matter of law and thus “excused” on that basis. Instead, PSRC argued that  
26 RCW 70.235.020 does not impose proportionate reduction requirements on PSRC. The  
27 assumption underlying Plaintiffs’ entire argument is that PSRC could easily have “met” an  
28

1 undefined “proportionate share” of the state-wide emissions limit, as if such a requirement  
2 existed. In order to dispel this assumption, to respond to a potential “arbitrary and capricious”  
3 argument, and to support the range of SEPA alternatives considered, PSRC pointed out that  
4 even with extreme measures (including, among other things, tolling every vehicle on every  
5 highway and arterial, unprecedented levels of parking costs, downtown, retail center, and  
6 employment center entry tolls, peak hour tolls, and a gas tax increase of \$2.71 per gallon),  
7 transportation related greenhouse gas emissions would not return to 1990 levels. (Resp. Br.  
8 at 50 (Dkt. #28).)<sup>4</sup> However, this information was in no way presented as a legal impossibility  
9 defense, but just to counter Tahoma and Plaintiffs’ arguments with some practical reality.  
10  
11

12 Tahoma’s attempt to recast PSRC’s explanations as an “administrative impossibility”  
13 defense inaccurately shifts the burden of proof from Plaintiffs to PSRC and confuses the  
14 SEPA issues presented. First, the issue before this Court is whether *T2040* “violated”  
15 RCW 70.235.020 as Plaintiffs allege; Plaintiffs indisputably hold the burden on this issue.  
16 PSRC did not assert an administrative impossibility defense because there is no statutory  
17 mandate; therefore, there is no burden for PSRC to carry.  
18

19 Second, both Tahoma and Plaintiffs argue that PSRC was required to consider “a  
20 GHG reduction compliant alternative” under RCW 70.235.020 and SEPA. (Tahoma Amicus  
21 Br. at 16 (Dkt. #34); Reply Mem. of Pls.’ at 40 (Dkt. #42).) (alleging SEPA requires  
22 demonstration of good faith effort to comply with RCW 70.235.020). They can make this  
23 argument only if RCW 70.235.020 imposes proportionate reduction mandates on PSRC’s  
24 adoption of *T2040*. As explained in PSRC’s Response to the Snoqualmie Tribe *Amicus* Brief,  
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28 <sup>4</sup> PSRC at 00022292 (*Moving Cooler*), PSRC at 00023299 (*Leading the Way*), and PSRC at S00029341-54  
(*Moving Cooler* technical appendix).

1 SEPA requires planning agencies to consider reasonable alternatives; it does not require  
2 consideration of alternatives based on legal “requirements” that do not exist. Because  
3 RCW 70.235.020 does not operate in the manner Tahoma and Plaintiffs assert, SEPA does not  
4 mandate the development of an alternative that “complies” with their faulty interpretation of  
5 the statute.  
6

7 **C. TAHOMA’S CLEAN AIR ACT AND CLEAN WATER ACT CLAIMS ARE OUTSIDE**  
8 **THE SCOPE OF PLAINTIFFS’ APPEAL.**

9 Tahoma asks this Court to consider federal Clean Air Act (“CAA”) and Clean Water  
10 Act (“CWA”) issues outside the scope of this litigation. Plaintiffs’ claims rest solely on  
11 RCW 70.235.020; Plaintiffs did not raise any CAA or CWA claims in their Complaint,  
12 (Complaint (Dkt. #1)); and none of the parties’ briefings address CAA or CWA issues.  
13 Washington courts have made clear that they will not consider new issues raised only by  
14 *amicus*, and not argued by the parties. *Citizens for Responsible Wildlife Mgmt. v. State of*  
15 *Washington*, 149 Wn.2d 622, 632, 71 P.23d 644 (2003). Since allegations regarding the  
16 federal CAA and CWA are new issues not raised by the parties, this Court should not consider  
17 this portion of the Tahoma brief.  
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19  
20 Even if considered, Tahoma’s CAA and CWA assertions are not relevant to this suit.  
21 Despite acknowledging that *T2040* does not violate either the federal CAA or the CWA,<sup>5</sup>  
22 Tahoma makes dramatic and unfounded arguments alleging that *T2040* sets the state “on a  
23 collision course” with federal clean air standards, “promises to make the situation worse,” and  
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27 <sup>5</sup> In reply to PSRC’s objections, Tahoma backed down from its original claims that *T2040* violates the CAA  
28 and CWA. (Combined Reply of *Amici Curiae* at 6-7 (Dkt. #54) (Tahoma “does not allege violations of the  
federal Clean Air Act and Clean Water Act by the PSRC.”).) However, since Tahoma did not withdraw this  
claim, it is briefly addressed.

1 ultimately will result in “securing for a Washington a future of noncompliance.” (Tahoma  
2 Amicus Br. at 18, 20 (Dkt. #34).) These statements disregard both the law and the record.

3  
4 First, there is no existing CAA greenhouse gas emissions standard. Second, the Puget  
5 Sound region is currently maintaining compliance with the enforceable federal ground-level  
6 ozone standards from the CAA. PSRC at 00001451-53. As the region is not a designated  
7 nonattainment area for these criteria pollutants, federal law does not require PSRC to  
8 demonstrate transportation conformity with the existing ozone standard. Nevertheless, PSRC  
9 did perform an analysis of ozone precursors, a fact Tahoma ignores. PSRC analyzed ozone  
10 precursors nitrogen oxide (NOx) and volatile organic compounds (VOCs) in the FEIS (PSRC  
11 at 00001463) and demonstrated that emissions of these precursors under the Preferred  
12 Alternative will be significantly below base year 2006 levels. PSRC at 00001465.  
13 Specifically, PSRC’s analysis of the Preferred Alternative (Constrained) demonstrated a  
14 76 percent reduction in NOx and a 51 percent reduction in VOCs compared to the 2006 base  
15 year. *Id.*

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18 Next, without a single citation to the Administrative Record to support its claims,  
19 Tahoma argues that *T2040* will “undermine” the state’s ability to comply with the CWA, and  
20 will make future compliance an “unattainable goal.” There is absolutely no factual evidence  
21 to support this claim. Moreover, Tahoma focuses on the issue of ocean acidification, an area  
22 where EPA has not even adopted regulations,<sup>6</sup> let alone binding limits that would apply to  
23 PSRC.  
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27 <sup>6</sup> Tahoma mischaracterizes both the record and agency action related to ocean acidification. Tahoma asserts  
28 as the basis for its CWA issues that EPA “formally stated its intent to regulate ocean acidification caused by  
greenhouse gas emissions under Section 303(d) of the Clean Water Act” and further, did so “prior to the PSRC’s  
adoption of Transportation 2040.” (Tahoma Amicus Br. at 20-21 (Dkt. #34) (citing Memorandum from Denise

1 III. CONCLUSION

2 Tahoma’s *amicus* brief relies on a strained interpretation of RCW 70.235.020,  
3 inaccurately characterizes PSRC’s arguments, misstates Ecology’s policies related to  
4 greenhouse gas reductions, and makes numerous statements not supported by the record.  
5  
6 Certainly, Tahoma’s *amicus* brief does not advance the Court’s consideration of the issues in  
7 this case.

8 DATED this 17th day of June, 2011.

9  
10 HILLIS CLARK MARTIN & PETERSON, P.S.

11  
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20 psrc answer to tahoma audubon amicus.docx

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26 Keehner, Office of Wetlands, Oceans and Watersheds on Directors, Integrated Reporting and Listing Decisions  
27 Related to Ocean Acidification to Water Division Directors (Nov. 15, 2010) (available at  
28 [http://water.epa.gov/lawsregs/lawguidance/cwa/tmdl/upload/oa\\_memo\\_nov2010.pdf](http://water.epa.gov/lawsregs/lawguidance/cwa/tmdl/upload/oa_memo_nov2010.pdf))).) First, the agency  
memorandum on which Tahoma relies was issued November 15, 2010, nearly six months after PSRC adopted  
*T2040*. Moreover, it does not state a formal agency intent to regulate ocean acidification; rather it provides a  
mechanism for collecting data and identifying impacted water bodies, where information is available, and noting  
that EPA will provide additional guidance to the states in the future. *Id.*