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September 1, 2015

The Honorable Doug Ericksen  
State Senator, District 42  
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Dear Senator Ericksen:

By letter previously acknowledged, you have requested our opinion on three questions, which we have paraphrased for clarity as follows:

1. **Does RCW 70.235.020 require the legislature to create a program that will achieve the greenhouse gas emission reductions listed in RCW 70.235.020(1)(a)(i)-(iii)?**
2. **Does RCW 70.235.020 create a cause of action to require the state to enforce the greenhouse gas emission reductions listed in RCW 70.235.020(1)(a)(i)-(iii)?**
3. **Does RCW 70.235.020 create liability for damages for the state if it fails to achieve the greenhouse gas emission reductions listed in RCW 70.235.020(1)(a)(i)-(iii)?**

**BRIEF ANSWERS**

1. No. The statute imposes no specific requirement on the legislature to create a program, and, in any event, the legislature generally cannot pass legislation that binds a future legislature.

2. No. The statute does not create an express or implied cause of action for requiring the state to enforce the emission reductions, and a writ of mandamus would not be available to enforce the emission reductions because those reductions are not a ministerial duty of any specific state official.

3. No. The statute does not create an express or implied cause of action for damages against the state should the emission reductions in RCW 70.235.020 not be reached. The state is generally not liable for damages for a violation of a statute that articulates a duty to the general public rather than an identifiable group of people.



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### ANALYSIS

Your questions concern the greenhouse gas emission reductions identified in RCW 70.235.020. RCW 70.235.020, passed into law in 2008, says that the “state shall limit emissions of greenhouse gases” to certain levels by the years 2020, 2035, and 2050. RCW 70.235.020(1)(a). The statute also says that the Department of Ecology shall submit a greenhouse gas reduction plan to the legislature, and implement and utilize a system for monitoring and reporting emissions of greenhouse gases, with certain reports being statutorily required. RCW 70.235.020(1)(b), (1)(d), (2)-(3). Your questions concern the enforceability of, and consequences of failing to meet, the greenhouse gas emission reductions levels identified in RCW 70.235.020(1)(a).

**1. Does RCW 70.235.020 require the legislature to create a program that will achieve the greenhouse gas emission reductions listed in RCW 70.235.020(1)(a)(i)-(iii)?**

There is no language in the statute requiring the legislature to create a program to achieve greenhouse gas emission reductions. Though the statute’s use of the word “shall” suggests that the legislature intended the reductions goals to be taken seriously, it does not assign a duty to achieve those reductions to itself. Even if it had intended to assign a duty to a future legislature, such a requirement would be unenforceable. Generally, one “legislature cannot bind a future legislature.” *Fabre v. Town of Ruston*, 180 Wn. App. 150, 161, 321 P.3d 1208 (2014) (citing *Washington State Hosp. Ass’n v. State*, 175 Wn. App. 642, 648, 309 P.3d 534 (2013)); *see also Washington State Farm Bureau Fed’n v. Gregoire*, 162 Wn.2d 284, 290, 174 P.3d 1142 (2007).<sup>1</sup> To construe RCW 70.235.020 as requiring a future legislature to pass *any* legislation at all would plainly violate this rule. As a result, RCW 70.235.020 does not require the legislature to create a program to achieve the emission reductions identified in that statute.

**2. Does RCW 70.235.020 create a cause of action to require the state to enforce the greenhouse gas emission reductions listed in RCW 70.235.020(1)(a)(i)-(iii)?**

RCW 70.235.020 does not expressly create a cause of action for obtaining a court order requiring that the greenhouse gas emission reductions identified in that statute be enforced. When there is no express statutory authority for requiring the enforcement of a statute, in some circumstances courts will nonetheless imply such authority or require enforcement by means of a writ of mandamus. These possibilities are considered in turn below, but we conclude that no such cause of action is created by this statute.

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<sup>1</sup> An exception to this rule is where “the legislative act is equivalent to a contract.” *Gruen v. State Tax Comm’n*, 35 Wn.2d 1, 54, 211 P.2d 651 (1949), *overruled on other grounds by State ex rel. State Fin. Comm. v. Martin*, 62 Wn.2d 645, 384 P.2d 833 (1963). As your questions do not raise issues of a legislative act as a contract, this exception is not relevant to this opinion’s analysis and will not be addressed further.

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Three factors determine whether a statute creates an implied cause of action for injunctive relief. *Braam v. State*, 150 Wn.2d 689, 711-12, 81 P.3d 851 (2003). “[F]irst, whether the plaintiff is within the class for whose “especial” benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.” *Braam*, 150 Wn.2d at 711 (quoting *Bennett v. Hardy*, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990)).

Implying a cause of action for requiring enforcement of RCW 70.235.020’s emission reductions does not satisfy any of these three factors. No plaintiff could be “within the class for whose ‘especial’ benefit the statute was enacted” because RCW 70.235.020 protects the general public rather than an identifiable class of persons. “When a statute protects the general public instead of an identifiable class of persons, a plaintiff is not a member of the class for whose especial benefit the statute was enacted.” *Protect the Peninsula’s Future v. City of Port Angeles*, 175 Wn. App. 201, 210, 304 P.3d 914 (2013) (citing *Fisk v. City of Kirkland*, 164 Wn.2d 891, 895, 194 P.3d 984 (2008)). Further, there is no evidence the legislature intended to permit private citizens to initiate legal proceedings to enforce RCW 70.235.020’s emission reductions. On the contrary, RCW 70.235.020 reveals an intent that the Department of Ecology submit to the legislature for “review and approval” a plan for how to achieve these reductions. RCW 70.235.020(1)(b). In other words, in enacting RCW 70.235.020, the legislature envisioned a role for itself and the Department of Ecology, but not private litigants. As a result, a private cause of action to enforce the statute would be inconsistent with the statute’s purpose. *See Roe v. Teletech Customer Care Mgmt. (Colo.) LLC*, 171 Wn.2d 736, 754, 257 P.3d 586 (2011) (“[I]mplying a cause of action against a private entity [under the Medical Use of Marijuana Act] is inconsistent with a statutory scheme intended to provide an affirmative defense to state criminal prosecution.”). Thus, I conclude that RCW 70.235.020 does not create an implied cause of action for requiring enforcement of RCW 70.235.020’s emission reductions.

A court may issue a writ of mandamus “to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station[.]” RCW 7.16.160. “Mandamus is an extraordinary remedy appropriate only where a state official is under a mandatory ministerial duty to perform an act required by law as part of that official’s duties. The mandate must specify the precise thing to be done[ a]nd the mandate must define the duty with such particularity as to leave nothing to the exercise of discretion or judgment.” *Freeman v. Gregoire*, 171 Wn.2d 316, 323, 256 P.3d 264 (2011) (citations omitted) (internal quotation marks omitted). A person seeking a writ of mandamus must show the following before the writ will issue: “(1) the party subject to the writ is under a clear duty to act; (2) the applicant has no plain, speedy and adequate remedy in the ordinary course of law; and (3) the applicant is beneficially interested.” *Eugster v. City of Spokane*, 118 Wn. App. 383, 402, 76 P.3d 741 (2003) (citations omitted) (internal quotation marks omitted).

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A writ of mandamus could not issue to compel enforcement of RCW 70.235.020 emission reductions for at least two reasons. First, RCW 70.235.020 does not identify any state official whose responsibilities include enforcement of the emission reductions—the statute merely states that the “state” shall limit emissions—and thus there is no state official who is “under a clear duty to act” to enforce the emission reductions. *Eugster*, 118 Wn. App. at 402; see also *Clark County Sheriff v. Dep’t of Soc. & Health Servs.*, 95 Wn.2d 445, 447-50, 626 P.2d 6 (1981) (affirming issuance of writ where statute stated that “[t]he superintendent of the correctional institution . . . shall receive all male persons convicted of a felony”). Second, the duty, if any, articulated in RCW 70.235.020 is not “ministerial” in nature. The Washington Supreme Court has explained that an act is ministerial when “the law prescribes and defines the duty to be performed with such precision and certainty *as to leave nothing* to the exercise of discretion or judgment[.]” *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 599, 229 P.3d 774 (2010) (emphasis added by *SEIU* Court) (quoting *State ex rel. Clark v. City of Seattle*, 137 Wash. 455, 461, 242 P. 966 (1926)). RCW 70.235.020 does not create a ministerial duty because it does not identify which of the many ways to limit emissions in the state is the method to be compelled—i.e., as stated above, whether to use a hard cap on emissions, a “cap and trade” system, a carbon tax, etc. *Freeman*, 171 Wn.2d at 327-28 (holding that duty was not ministerial because, even though statute said Department of Transportation “shall complete the process of negotiations with sound transit,” the statute did “not provide any parameters for the negotiations” and did “not indicate what the final result of the negotiations shall be or what form of transfer the negotiations will result in”).

Thus, as RCW 70.235.020 does not expressly or impliedly create a cause of action to enforce its emission reductions, and a writ of mandamus could not issue to compel enforcement of RCW 70.235.020, RCW 70.235.020 does not create a cause of action to enforce the emission reductions detailed therein.

**3. Does RCW 70.235.020 create liability for damages for the state if it fails to achieve the greenhouse gas emission reductions listed in RCW 70.235.020(1)(a)(i)-(iii)?**

There is no language in RCW 70.235.020 that expressly creates a cause of action for damages against the state for a failure to achieve the greenhouse gas emission reductions identified in that statute. Whether RCW 70.235.020 implicitly supports a cause of action for damages is determined by application of the public duty doctrine. Under the public duty doctrine, there is no private cause of action for damages for a violation of a statute that serves the general public welfare rather than any identifiable class of specific people—i.e., “a duty owed to all is a duty owed to none” (*Beal v. City of Seattle*, 134 Wn.2d 769, 784, 954 P.2d 237 (1998))<sup>2</sup>—unless one of four exceptions applies. These four exceptions are: (1) “when the terms of a legislative enactment evidence an intent to identify and protect a particular and circumscribed class of

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<sup>2</sup> See also *Hoffer v. State*, 110 Wn.2d 415, 421-22, 755 P.2d 781 (1988) (applying doctrine to the state).

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persons” (the “legislative intent” exception); (2) “where governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, fail to take corrective action despite a statutory duty to do so, and the plaintiff is within the class the statute intended to protect” (the “failure to enforce” exception); (3) “when governmental agents fail to exercise reasonable care after assuming a duty to warn or come to the aid of a particular plaintiff” (the “rescue doctrine”); and (4) “where a relationship exists between the governmental agent and any reasonably foreseeable plaintiff, setting the injured plaintiff off from the general public and the plaintiff relies on explicit assurances given by the agent or assurances inherent in a duty vested in a governmental entity” (the “special relationship” exception). *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987).

RCW 70.235.020 establishes greenhouse gas emission reductions for the whole of the state, and not just for the benefit of an identifiable subgroup of the population. It follows that the public duty doctrine applies to any analysis regarding whether RCW 70.235.020 may give rise to liability for damages.

This leaves a question of whether any of the four exceptions to the public duty doctrine apply to RCW 70.235.020. With regard to the legislative intent exception, the “public duty doctrine does not bar a plaintiff’s action if a regulatory statute, by its terms, evidences a clear legislative intent to identify and protect a particular and circumscribed class of persons.” *Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 929, 969 P.2d 75 (1998). As explained in response to your second question, RCW 70.235.020 addresses a general public interest, rather than an interest of any identifiable class. “In order for the legislative intent exception to apply, the regulation establishing a duty must intend to identify and protect a particular and circumscribed class of persons, and this intent must be clearly expressed within the provision—it will not be implied.” *Id.* at 930. The text of neither RCW 70.235.020 nor RCW 70.235.005 (the “Findings—Intent” section of RCW 70.235), evidences any legislative intent for the greenhouse gas emission reductions to protect any subgroup of Washington’s population rather than to serve the general public as a whole. As a result, RCW 70.235.020 does not create a cause of action against the state for damages under the legislative intent exception if the state fails to achieve the greenhouse gas emission reductions listed in RCW 70.235.020.

The second exception is the failure to enforce exception. Under this exception, the state may be held liable where all of the following requirements are met: (1) a governmental agent is responsible for enforcing statutory requirements, (2) that agent has actual knowledge of a violation of that statute, (3) that agent fails to take corrective action despite a statutory duty to do so, and (4) the plaintiff is within the class of people the statute intended to protect. *Bailey*, 108 Wn.2d at 268. This exception is narrowly construed. *Atherton Condo. Apt.—Owners Ass’n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 531, 799 P.2d 250 (1990).

Liability under RCW 70.235.020 could not be imposed under the first requirement because the statute does not impose a duty upon any particular state actor to engage in a specific

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action.<sup>3</sup> *Cf. Bailey*, 108 Wn.2d at 269 (applying the exception where police officer had statutory duty to take publicly intoxicated person into custody under RCW 70.96A.120(2)); *see also Pierce v. Yakima County*, 161 Wn. App. 791, 799, 251 P.3d 270 (2011) (The failure to enforce exception “applies solely if the relevant statute mandates a specific action to correct a violation. Such a mandate does not exist if the government agent has broad discretion regarding whether and how to act.” (Citation omitted.)). As explained in response to your second question, the statute does not identify a government officer or agency responsible for achieving the emission reductions. Further, the statute does not mandate a specific action to be taken to limit emissions.

The final two exceptions to the public duty doctrine can be disposed of quickly. These exceptions to the public duty doctrine—the rescue doctrine and special relationship exception—turn on specific facts concerning interactions between particular state actors and putative plaintiffs. Given that liability under these exceptions would turn on that conduct, which your question does not entail, rather than on the statutory text of RCW 70.235.020 itself, these exceptions are outside the scope of this opinion and will not be discussed further.

In summary, because RCW 70.235.020 (1) does not expressly create a cause of action for damages, (2) seeks to benefit the whole of the state rather than an identifiable subgroup of the population, and (3) none of the exceptions to the public duty doctrine apply, RCW 70.235.020 does not create liability for damages against the state.

I hope the foregoing information will prove useful. This is an informal opinion and will not be published as an official Attorney General Opinion.

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<sup>3</sup> As this alone is sufficient to prevent the application of the failure to enforce exception, we do not analyze or discuss the remaining requirements for application of the failure to enforce exception.