IN THE COURT OF APPEALS OF THE STATE OF OREGON

NORTHWEST NATURAL GAS COMPANY, AVISTA CORPORATION, and CASCADE NATURAL GAS CORPORATION,
Petitioners,
v.
ENVIRONMENTAL QUALITY COMMISSION,
Respondent,
BEYOND TOXICS; CLIMATE SOLUTIONS; ENVIRONMENTAL DEFENSE FUND; OREGON BUSINESS ALLIANCE FOR CLIMATE—dba OREGON BUSINESS FOR CLIMATE; OREGON ENVIRONMENTAL COUNCIL; and NATURAL RESOURCES DEFENSE COUNCIL,
Intervenors-Respondents.

Court of Appeals No. A178216 (Control)

OREGON FARM BUREAU FEDERATION; OREGON BUSINESS & INDUSTRY ASSOCIATION; OREGON MANUFACTURERS AND COMMERCE; ALLIANCE OF WESTERN ENERGY CONSUMERS; ASSOCIATED OREGON LOGGERS, INC.; NORTHWEST PULP AND PAPER ASSOCIATION; OREGON ASSOCIATION OF NURSERIES; OREGON FOREST AND INDUSTRIES COUNCIL; OREGON TRUCKING ASSOCIATIONS, INC.; WESTERN WOOD PRESERVERS INSTITUTE; OTLEY LAND AND CATTLE, LLC; and SPACE AGE FUEL, INC.,
Petitioners,
NATIONAL FEDERATION OF INDEPENDENT BUSINESS,
Intervenor-Petitioner,
v.
ENVIRONMENTAL QUALITY COMMISSION,
Respondent.

Court of Appeals No. A178217

WESTERN STATES PETROLEUM ASSOCIATION,
Petitioner,
v.
ENVIRONMENTAL QUALITY COMMISSION,
Respondent.

Court of Appeals No. A178218

COALITION PETITIONERS AND INTERVENOR-PETITIONER'S OPENING BRIEF AND EXCERPT OF RECORD

On Judicial Review of Administrative Rules adopted by Respondent Environmental Quality Commission

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I. STATEMENT OF THE CASE

A. Nature of the Action and Relief Sought

Respondent Oregon Environmental Quality Commission ("EQC") promulgated administrative rules establishing the Climate Protection Program on December 16, 2021 ("CPP Rules"). The CPP Rules adopted a new division 271 of OAR chapter 340 and amended certain provisions of OAR chapter 340, division 12. The CPP Rules are at ER-112 – ER-189 and Administrative Record Document ("AR Doc.") 263.

Pursuant to ORS 183.400(1), Petitioners and Intervenor-Petitioner (collectively, "Coalition Petitioners") challenge the CPP Rules. Coalition Petitioners seek an order that the CPP Rules are invalid because:

(1) EQC adopted the CPP Rules without compliance with applicable rulemaking procedure, by failing to provide information required by ORS 468A.327 in the notice of intended action;

(2) the CPP Rules exceed EQC's statutory authority by regulating emissions from agricultural operations and equipment, residential barbecue equipment, and residential heating equipment, contrary to ORS 468A.020(1);

(3) the CPP Rules exceed EQC's statutory authority because they regulate emissions of greenhouse gases that do not constitute "air

contamination" or "air pollution" within the meaning of ORS 468A.005(3), (5) as defined by the Legislature in 1961; and/or

(4) the CPP Rules exceed EQC's statutory authority by imposing compliance obligations on businesses that do not constitute "air contamination source[s]" within the meaning of ORS 468A.005(4).

If Coalition Petitioners prevail, they will seek an award of costs and attorneys' fees pursuant to ORS 183.497(2)(c), ORAP 13.05, and ORAP 13.10.

B. Nature of the Rules Under Review

The primary purpose of the CPP Rules is to reduce greenhouse gas emissions. ER-128 (OAR 340-271-0010(3)). Their "primary mechanism" is "placing declining caps on fossil fuel suppliers rather than end-users."[1] ER-107. With narrow exceptions, fuel suppliers incur compliance obligations for *all* of the emissions that ultimately result from Oregon businesses' and residents' use of liquid or gaseous fossil fuels, including transportation fuels. ER-129 (OAR 340-271-0020(15)); ER-134 – ER-135 (OAR 340-271-0110(3)(b)(A), (4)(b)(A)); ER-103. For each ton of emissions attributed to a fuel supplier, it must obtain a "compliance instrument" (the number of which is capped and shrinks every year) or, as to a small portion of its compliance

[1] In addition, certain stationary sources also must limit their emissions from industrial processes through best available emissions reduction ("BAER") actions. ER-144 – ER-146 (OAR 340-271-0320; OAR 340-271-0330).

obligations, it may pay money to state-approved nonprofits in exchange for "community climate investment credits." ER-129 (OAR 340-271-0020(7)-(11); ER-154 (OAR 340-271-0450(3)(a)). The CPP Rules mandate that emissions be cut approximately 50 percent by 2035 and 90 percent by 2050. ER-181 – ER-185 (OAR 340-271-9000).

C. Basis for Appellate Jurisdiction

The Coalition Petitioners have standing and this Court has jurisdiction because "[t]he validity of any rule may be determined upon a petition by any person to the Court of Appeals * * *." ORS 183.400(1). Each of the Coalition Petitioners is a nonprofit corporation, a domestic corporation, or a limited liability company. As such, each constitutes a "person" under ORS 183.310(8).

The Coalition Petitioners are as follows:

- Oregon Farm Bureau Federation is a voluntary, grassroots, nonprofit organization representing more than 6,300 farm families and the interests of Oregon's farmers and ranchers.
- Oregon Business & Industry Association is a general business association with more than 1,600 members from a variety of industries and all areas of the state.
- Oregon Manufacturers and Commerce is a business association representing Oregon manufacturers, including producers of forest

products, fabricated metals, machinery, paper, rail cars, aerospace products, and food and beverage products.

- Alliance of Western Energy Consumers is an association of approximately 40 end-users of natural gas and electricity in the Pacific Northwest, including food processing, pulp and paper, wood products, aluminum, steel, chemicals, electronics, and aerospace businesses.
- Associated Oregon Loggers, Inc. is a local trade association representing nearly 1,000 small forest contractors in Oregon.
- Northwest Pulp and Paper Association is a regional trade association with 11 member companies and 15 pulp and paper mills in Oregon, Washington, and Idaho, including five mills in Oregon.
- Oregon Association of Nurseries represents more than 700 individual nursery stock producers, retailers, landscapers, and related companies in the nursery industry.
- Oregon Forest and Industries Council represents more than 50 Oregon forest products manufacturers and forestland owners.
- Oregon Trucking Associations, Inc. represents the interests of the Oregon trucking industry, including approximately 600 trucking companies and industry suppliers.
- Western Wood Preservers Institute represents 13 wood treating facilities in Oregon that process primary wood products into materials

that support energy and transportation infrastructure and are utilized in commercial and residential construction.

- Otley Land and Cattle, LLC is a is a family-owned Oregon cattle ranch, alfalfa hay farm, and custom haying business.
- Space Age Fuel, Inc. is a family-owned fuel distributor and marketer with 23 retail fueling stations and approximately 100 retail and wholesale fueling facilities across Oregon.
- National Federation of Independent Business is the nation's leading small business association, representing more than 5,500 small businesses in Oregon across all industries.

The CPP Rules will decrease fuel availability and increase costs for the Coalition Petitioners and/or their members. Many of the Coalition Petitioners and/or their members are price takers in the market, including families and businesses in farming, ranching, forest products, pulp and paper production, and commodity manufacturing. Where they cannot pass increased fuel, raw material, and supply costs on to their customers, the CPP Rules will erode already-thin profit margins, making it harder to continue in business. Even where increased costs can be passed along, they will decrease the competitiveness of Coalition Petitioners and/or their members in national and global marketplaces relative to companies operating in localities without similar greenhouse gas controls and pricing. For Petitioner Space Age Fuel, Inc.,

which has direct compliance obligations under the CPP Rules based on the emissions of its customers, the CPP Rules ultimately will leave it with no viable choice but to significantly curtail its existing operations in Oregon.

D. Timeliness of Petition

This Petition is timely. ORS 183.400 does not prescribe a deadline for substantive review of administrative rules and imposes a two-year deadline for certain procedural challenges. The CPP Rules were adopted by EQC on December 16, 2021, and an enforcement provision was amended on March 16, 2022. AR Doc. 262 at 8-9; ER-112; AR Doc. 263. Coalition Petitioners filed this Petition on March 18, 2022.

E. Jurisdictional Basis for Agency Action

The agency action subject to judicial review is EQC's issuance of the CPP Rules pursuant to authority purportedly granted to it by provisions of ORS chapters 468 and 468A. *See* ER-108.

F. Questions Presented on Judicial Review

1. Are the CPP Rules invalid because EQC adopted them without compliance with applicable rulemaking procedure, by failing to provide information required by ORS 468A.327 with the notice of intended action?

2. Are the CPP Rules invalid because EQC exceeded its statutory authority by regulating emissions from agricultural operations and equipment,

residential barbecue equipment, and residential heating equipment, contrary to ORS 468A.020(1)?

3. Are the CPP Rules invalid because EQC exceeded its statutory authority by regulating emissions of greenhouse gases that do not constitute "air contamination" or "air pollution" within the meaning of ORS 468A.005(3), (5) as defined by the Legislature in 1961?

4. Are the CPP Rules invalid because EQC exceeded its statutory authority by imposing compliance obligations on businesses that do not constitute "air contamination source[s]" within the meaning of ORS 468A.005(4)?

G. Summary of Argument

This Petition does not ask this Court to decide whether the State can or should regulate greenhouse gas emissions or adopt policies aimed at addressing global climate change. Instead, this Petition is about whether the Executive branch may do so without any clear grant of authority from the Legislature or the people, and, even if it can, whether in promulgating the CPP Rules EQC properly exercised the authority delegated to it by the Legislature. For the reasons that follow, EQC may not act to regulate the emission of greenhouse gases for purposes of mitigating climate change unless and until the Legislature provides it with authority to do so. Moreover, even if the Legislature had given EQC some authority to do so, EQC exceeded the bounds of that authority and

failed to follow the legislatively mandated rulemaking procedure when it promulgated the CPP Rules.

Most fundamentally, the CPP Rules must be vacated because the 1961 Legislature did not grant EQC the statutory authority to regulate greenhouse gases for purposes of mitigating climate change when it directed EQC's predecessor to regulate "air contamination" and "air pollution," as it understood those terms. The authority that EQC cites for its sweeping CPP Rules comes from the air pollution laws enacted in 1961, decades before lawmakers had any awareness of global climate change from anthropogenic greenhouse gas emissions. But statutes are construed to give effect to the intent of the Legislature at the time of enactment, and the 1961 Legislature did not intend to delegate authority to the Executive branch to address a type of problem that there is no hint it understood.

Nor has the Legislature since taken any action to expand its delegation of authority to EQC to allow it to broadly regulate emission of greenhouse gases. The Legislature's self-described "first step" into climate regulation came in 2007. But at that time the Legislature *expressly declined* to provide any new authority to the Executive branch and declined to pass two bills that would have directed agency action. ORS 468A.205(3). And in 2009, the Legislature directed EQC to regulate greenhouse gas emissions from transportation fuels in the Low Carbon Fuel Standard ("LCFS") program, but in a manner completely

different than the CPP Rules. Since then, the Legislature has twice more considered, but not passed, legislation that would have given EQC the precise authority it purported to exercise in adopting the CPP Rules. Tellingly, just days after the Legislature did not pass a major cap-and-trade climate bill, the Governor directed EQC to do what the Legislature did not.

But EQC's authority comes from the Legislature, not the Governor. And in light of the Legislature's history of *not* granting this authority to EQC and the separation-of-powers concerns inherent in the delegation of broad, undefined law-making power to the Executive branch, the Court should not construe Oregon's 1961 air pollution laws as giving EQC limitless authority to regulate the emission of any gases to address any risk at any time. Accordingly, EQC's promulgation of the CPP Rules exceeded its statutory authority.

Furthermore, assuming for the sake of argument that EQC possessed authority to regulate greenhouse gas emissions, the CPP Rules are invalid under ORS 183.400(4)(b) because they exceed EQC's statutory authority in two other respects. Both result from the CPP Rules' approach of limiting the emissions of Oregon businesses and residents "indirectly, through limits applicable to fuel suppliers." ER-32.

First, the CPP Rules exceed EQC's statutory authority by disregarding the Legislature's decision to exempt certain entire categories of activities and equipment from the air pollution laws. ORS 468A.020(1) provides that the

state's air pollution laws "do not apply" to agricultural operations and equipment, barbecue equipment, and certain residential heating equipment. Yet the CPP Rules regulate those operations and equipment anyway, by including their emissions in the declining total that fuel suppliers must either limit or purchase compliance credits for. By limiting the emissions of these exempt activities in this manner, the CPP Rules are an attempted end run around the statutory bounds on EQC's authority.

Second, EQC exceeded its statutory authority by treating fuel suppliers as "sources" of the emissions that occur when end-users—Oregon businesses and residents—use the fuels. Fuel suppliers are not "sources" of their customers' emissions, and EQC has no statutory authority to impose regulatory obligations on entities that are not air contamination sources as defined by ORS 468A.005(4).

Finally, even if EQC had statutory authority for the *substance* of the CPP Rules, EQC must follow the proper rulemaking *procedures* to exercise that authority. EQC failed to do so. ORS 468A.327 prescribes that before enacting rules that affect federal Title V sources—as the CPP Rules do—EQC must include additional information in the notice ordinarily required under the Administrative Procedures Act. As pertinent here, pursuant to ORS 468A.327, the notice of intended action required under ORS 183.335(1) must include (1) a statement of whether the proposed rules impose additional requirements beyond

any applicable federal requirements and, if so, (2) any alternatives that EQC considered and the reasons that the alternatives were not pursued. Here, EQC improperly omitted *all* of that information from the notice that was given in the Secretary of State's bulletin as required under ORS 183.335(1)(b). ER-79 – ER-99. And even the notice that EQC may have given by other means failed to include the statutorily mandated information about alternatives and why they were not pursued. ER-105. As a result of EQC's neglect of the applicable rulemaking procedure, the CPP Rules are invalid under ORS 183.400(4)(c).

H. Statement of Facts

1. Adoption of Air Pollution Legislation in 1961

In 1961, the Oregon State Legislature passed the state's air pollution law. 1961 Or Laws ch 426; *see* ORS 468A.005, *et seq*. That legislation set a state policy to

> "maintain such a reasonable degree of purity of the air resources of the state to the end that the least possible injury should be done to human, plant or animal life or to property and to maintain public enjoyment of the state's natural resources and consistent with the economic and industrial well-being of the state."

App-16 (1961 Or Laws ch 426, § 1). Among other things, the law directed the pertinent agency (then known as the Sanitary Authority[2]) to develop a comprehensive plan for the control and abatement of existing and new air

[2] The Sanitary Authority was the predecessor to EQC. *See* 1969 Or Laws ch 593, § 3.

pollution, set air quality and air purity standards for areas of state, and adopt regulations to control, reduce, or prevent air pollution. App-17 – App-21 (§§ 6, 7, 10). The definitions of "air contamination" and "air contaminant" enacted in 1961 remained unchanged in ORS chapter 468A today, and the definition of "air pollution" has not been amended since 1973. *Compare* ORS 468A.005(2), (3), (5), *with* App-16 (1961 Or Laws ch 426, § 3(2), (4)), *and* App-28 (1973 Or Laws ch 835, § 48). Legislative history, however, indicates that the 1973 amendment to the definition of "air pollution" was not substantive. App-25 – App-26. Thus, the scope of EQC's authority remains unchanged since 1961.

The 1961 legislation also provided that the provisions of the statutory scheme "do not apply to" a set of exemptions, including agricultural operations and the use of equipment therein, residential barbeque equipment and outdoor fireplaces, residential furnaces and incinerators, and land clearing or grading operations. App-17 (1961 Or Laws ch 426, § 5). Components of the exemption set have been amended since 1961, but the operative language has remained the same: Oregon's air pollution laws "do not apply" to the exempt categories. ORS 468A.020(1).

2. Climate Change Legislation

In 2007, the Legislature took its "first step" (App-38; App-39) into climate legislation when it set emission reduction goals and established the Oregon Global Warming Commission to study climate change and make policy

recommendations. ORS 468A.205(1); ORS 468A.240(1). In that legislation, the Legislature provided that its newly stated policy goals did "not create any additional regulatory authority for an agency of the executive department." ORS 468A.205(3). At that time, the Legislature considered two other bills that would have empowered the Executive branch to take further action to reduce greenhouse gas emissions, including by employing a cap-and-trade regime. App-38. The Legislature, however, chose to establish the Global Warming Commission rather than passing either of the other bills. *Id.*

In 2009, the Legislature took a carefully circumscribed next step into regulating greenhouse gases, directing EQC to create an LCFS program for transportation fuels that would not cap the total amount or mass of emissions, but rather would reduce the average intensity of greenhouse gas emissions per unit of fuel energy. *See* ORS 468A.266(1).

The Legislature took up climate change legislation again in the 2019 regular session when it considered a sweeping climate bill that would have, among other things, established a cap-and-trade system of regulation for various types of entities. App-44 – App-50. The Legislature, however, did not pass that bill.

Similarly, in the 2020 regular session, the Legislature considered another sweeping piece of proposed climate legislation. App-52 – App-58. The proposed 2020 legislation also contained a cap-and-trade system for regulated

entities including fuel and natural gas suppliers. *Id.* The Legislature, however, also did not pass that bill before adjourning on March 8, 2020.

3. Promulgation of the CPP Rules

On March 10, 2020, just two days after the Legislature adjourned, Governor Brown issued Executive Order 20-04 ("EO 20-04"), in which she directed EQC to develop rules establishing a "[s]ector-specific GHG Cap and Reduce Program," including for the transportation fuels and natural gas sectors. ER-6. The Governor justified her action on "the failure of the Oregon Legislature to attain quorum" and pass cap-and-trade legislation. ER-3.

Rulemaking work began promptly. In July 2020, the Department of Environmental Quality ("DEQ") issued a memorandum to EQC in which it set out a work plan for carrying out the "cap and reduce" directive in EO 20-04. ER-27 – ER-33. DEQ reminded EQC that the air pollution laws placed limits on EQC's authority and that EQC lacked authority to regulate categories exempted from application of the air pollution laws. ER-29. DEQ also endorsed the device of limiting emissions from sources by moving the point of regulation up one level in the distribution chain from the emitter to its suppliers of transportation fuels and natural gas. ER-29; ER-32.

In August and September 2020, DEQ conducted a series of workshops to consider how to design the CPP Rules. Options regarding the scope, stringency, and compliance mechanisms for a cap-and-reduce program were

discussed. *See* ER-24 – ER-25. EQC then proceeded with the formal rulemaking process by instituting a rulemaking advisory committee and meetings to further discuss issues including, again, scope (what emissions to regulate, at what point of regulation), stringency, and compliance structures. AR Doc. 83; AR Doc. 93. In particular, the workshops and rulemaking advisory committee grappled with whether to place the point of regulation "downstream" or "upstream"—*i.e.*, whether to regulate emissions downstream by imposing compliance obligations directly on the emitters, or whether to regulate the emitters only indirectly by regulating fuel suppliers upstream.[3] ER-35 – ER-39; ER-41; ER-50; ER-53 – ER-54; ER-59 – ER-61; ER-77 – ER-78. The possibility of setting caps and measuring reductions by intensity rates (*e.g.*, emissions per unit of energy or productivity) rather than simply the mass of greenhouse gas released was also a point of discussion.[4] ER-24; ER-43 – ER-

[3] Ultimately, EQC structured the CPP Rules as a combination of approaches. Liquid or gaseous fuel users (*e.g.*, farmers, residential households, hospitals, retailers, the vast majority of manufacturers) are regulated "upstream" at the supplier of the fuels they combust. ER-134 – ER-135 (OAR 340-271-0110(3)(a), (3)(b)(A), (4)(a), (4)(b)(A)); ER-140 (OAR 340-271-0150(1)); ER-154 (OAR 340-271-0450). A small subset of Oregon manufacturers holding Title V air permits or air contaminant discharge permits (estimated by DEQ as 13 sources or portions of sources statewide, ER-111) are directly regulated for certain industrial process emissions and/or emissions associated with gaseous fuel not provided by a local distribution company. ER-140 – ER-146 (OAR 340-271-0150 – OAR 340-271-0330); ER-135 (OAR 340-271-0110(5)(b)(B)(iv)).

[4] Ultimately, EQC adopted a mass-based approach. *See* ER-134 – ER-135

(continued . . .)

44; ER-46 – ER-47; ER-49. EQC was kept apprised and provided input during this work. *See, e.g.*, ER-63; ER-68; ER-73; ER-75.

A year after the scoping work began, EQC formally gave notice of its intent to adopt the CPP Rules. Notice was published in the Secretary of State's bulletin, as required by ORS 183.335(1). ER-79 – ER-99; AR Doc. 217. A notice containing additional information omitted from the bulletin also appears to have been disseminated in other ways. *See* ER-100 – ER-105; AR Doc. 214; AR Doc. 216. That version of the document contained a "Federal Relationship" section that admitted the CPP Rules would impose additional requirements on sources with Title V permits. ER-105. It asserted that "many alternatives" had been considered but that they were all "contained in the proposed rule." *Id.* Neither the notice published in the Oregon Bulletin nor the other version said anything about the alternatives to the proposed rule design that had been rejected and why. ER-79 – ER-99; ER-105.

On December 16, 2021, EQC adopted the CPP Rules. AR Doc. 262, at 8-9. As the Governor ordered in EO 20-04, the CPP Rules create a "cap and reduce" system that applies to fuel suppliers (including natural gas distribution companies) under which covered suppliers are required to obtain permits, and DEQ will distribute a decreasing number of "compliance instruments" for

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(OAR 340-271-0110(3)(b)(A), (4)(b)(A), (5)(b)(A) ("emissions of anthropogenic greenhouse gases in metric tons of CO2e")).

"covered emissions," which limits the amount of fuel that each covered entity may sell in Oregon each year. *See* ER-140 (OAR 340-271-0150(1)); ER-148 – ER-151 (OAR 340-271-0410; OAR 340-271-0420); ER-154 (OAR 340-271-0450); ER-180 – ER-189 (OAR 340-271-9000). Notably, the "covered emissions" of fuel suppliers are *not* emitted by the fuel suppliers. They are the greenhouse gases emitted by *other* Oregon businesses and residents when they use the fuels. ER-134 – ER-135 (OAR 340-271-0110(3)(b)(A), (4)(b)(A)). Aside from certain enumerated exceptions—which fail to exempt emissions from agricultural operations or equipment, barbecues, or residential furnaces—the CPP Rules specify that "covered emissions" include "emissions of anthropogenic greenhouse gases * * * that would result from the complete combustion or oxidation of" the total annual quantity of liquid fuels, propane, and natural gas imported, sold, or distributed by the supplier for use in Oregon. *Id.*

II. ARGUMENT

In a challenge to administrative rules under ORS 183.400, this Court first determines whether the agency failed to comply with applicable rulemaking procedures, then whether the rules exceed the agency's statutory authority, and lastly, whether the regulations are unconstitutional. *Gilliam County v. Dep't of Env't Quality of State of Or.*, 316 Or 99, 106, 849 P2d 500 (1993), *rev'd on other grounds sub nom Or. Waste Sys., Inc. v. Dep't of Env't Quality of Or.*,

511 US 93 (1994). Coalition Petitioners accordingly present their assignments of error in that order.

A. First Assignment of Error

EQC erred by failing to comply with the applicable rulemaking procedures in adopting the CPP Rules, because EQC failed to include obligatory information with the notice of intended action as required by ORS 468A.327(1).

1. Preservation of Error

ORS 183.400(1) provides that "[t]he court shall have jurisdiction to review the validity of the rule whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question * * *." Accordingly, preservation of error is not required here.

2. Standard of Review

Pursuant to ORS 183.400(4)(c), this Court shall invalidate an administrative rule if the rule was adopted "without compliance with applicable rulemaking procedures." The Court may examine the rule, the statutory provisions authorizing the rule, and documents necessary to demonstrate compliance with applicable rulemaking procedures. ORS 183.400(3).

3. Argument

EQC is not free to ignore a rulemaking procedure prescribed by the Legislature. But here, EQC omitted information required by ORS 468A.327(1)

from the notice prescribed by ORS 183.335(1) and thereby failed to comply with applicable rulemaking procedures. As a result, the CPP Rules are invalid.

a. ORS 468A.327(1) Sets an Applicable Rulemaking Procedure.

ORS 468A.327(1) provides:

> "Prior to the adoption, amendment or repeal of any rule pursuant to ORS chapter 183 that applies to any facility required to pay fees under ORS 468A.315, the Environmental Quality Commission shall include with the notice of intended action required under ORS 183.335(1) a statement of whether the intended action imposes requirements in addition to the applicable federal requirements and, if so, shall include a written explanation of:
>
> "* * * * *
>
> "(b) Any alternatives the commission considered and the reasons that the alternatives were not pursued."

ORS 468A.327(1). The phrase "facility required to pay fees under ORS 468A.315," *id.*, means any facility with a Title V operating permit. *See* App-33 (Testimony, Jt Subcomm on Nat Res, SB 107, Apr. 19, 2007 (DEQ administrator Andrew Ginsburg informing the Legislature that the legislation now codified at ORS 468A.327(1) "would require us to do more public disclosure when we adopt rules that affect Title 5 sources")).[5] Thus,

[5] Tracing the statutory cross-references confirms that "facility required to pay fees under ORS 468A.315" refers to Title V sources. ORS 468A.315(1) sets fees for sources "subject to the federal operating permit program," a phrase

(continued . . .)

ORS 468A.327 mandates a rulemaking procedure for any EQC administrative rules that apply to any facility with a Title V operating permit.

Moreover, ORS 468A.327(1) is an "applicable rulemaking procedure"[6] here. ORS 183.400(4)(c). First, the CPP Rules were adopted pursuant to Oregon's Administrative Procedures Act, ORS chapter 183. *See, e.g.*, ER-109. Second, the CPP Rules apply to facilities with Title V operating permits. *See* ER-135 (OAR 340-271-0110(5) ("A person is a covered stationary source if the person * * * owns or operates an existing source required to obtain * * * a Title V Operating Permit * * * or * * * owns or operates a new source, * * * required to obtain * * * a Title V Operating Permit * * *."); *see also* ER-133 (OAR 340-271-0100(2) ("A person who owns or operates a covered entity identified in OAR 340-271-0110 must apply for and hold a CPP permit or CPP permit addendum * * * that authorizes the person's covered emissions * * *.")); ER-129 (OAR 340-271-0020(5) (defining "CPP permit addendum" in part as "written authorization that incorporates the requirements of this division into a

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which ORS 468A.300(3) defines as "the program established by [EQC] and the Department of Environmental Quality pursuant to ORS 468A.310." And ORS 468A.310 requires EQC and DEQ to establish "a federal operating permit program as required to implement Title V [of the federal Clean Air Act, *see* ORS 468A.300(5)]."

[6] The phrase "applicable rulemaking procedures" in ORS 183.400(4)(c) includes rulemaking procedures imposed by statutes beyond the Administrative Procedures Act. *W. States Petroleum Ass'n v. EQC*, 296 Or App 298, 308, 439 P3d 459 (2019).

permit by amending * * * a Title V Operating Permit")); *see also* ER-104 ("Covered stationary sources may need to pay permit modification fees. * * * For sources with a Title V permit, fees will depend on the type of modification * * *."). Accordingly, because the CPP Rules meet both of the ORS 468A.327(1) statutory criteria, ORS 468A.327(1) mandates that "[p]rior to the adoption" of the CPP Rules, EQC had to include all of the statutorily specified information in the notice of intended action required under ORS 183.335(1). Yet EQC failed to do so, in three respects.

b. EQC Omitted Multiple Obligatory Pieces of Information from the Notice Given via the Secretary of State's Bulletin.

EQC violated ORS 468A.327(1) by disregarding the requirement to include the necessary information in the notice given in the Secretary of State's bulletin. ORS 468A.327(1) mandates that EQC "shall include" the specified information "with the notice of intended action required under ORS 183.335(1)." In turn, ORS 183.335(1) provides that EQC "shall give notice" by four means. Those means include "[i]n the bulletin referred to in ORS 183.360," which requires the Secretary of State to publish a monthly bulletin of proposed rulemakings. ORS 183.335(1)(b). Importantly, ORS 183.335(1) requires EQC to give notice by *all* four means. *See* ORS 183.335(1) (using the conjunction "and" in list of required means). Thus, ORS 468A.327(1) mandates that EQC must include the information about

federal regulatory requirements and alternatives in the notice given by each of the four means, including in the notice in the Secretary of State's bulletin. But EQC failed to do so.

(i) EQC Omitted from the Secretary of State's Bulletin Whether the Proposed CPP Rules Would Impose Additional Requirements on Top of Federal Requirements.

The rulemaking notice published in the Secretary of State's bulletin for the proposed CPP Rules did *not* contain any statement as to "whether the intended action imposes requirements in addition to the applicable federal requirements." ORS 468A.327(1); *see* ER-79 – ER-99. The failure to include that information in the notice published in the Secretary of State's bulletin means the CPP Rules were adopted without compliance with the rulemaking procedure mandated by ORS 468A.327(1). The CPP Rules are invalid for this reason under ORS 183.400(4)(c).

(ii) EQC Omitted Information About Alternatives from the Secretary of State's Bulletin.

The CPP Rules *do* impose additional requirements. ER-105 ("The proposed rules are 'in addition to federal requirements' * * *."). As such, ORS 468A.327(1)(b) required EQC to also include in the Secretary of State's bulletin a written explanation of

> "[a]ny alternatives the commission considered and the reasons that the alternatives were not pursued."

Legislative history confirms that this provision requires EQC to "describe what alternatives we considered and why we rejected the alternatives." App-33 (Testimony, Jt Subcomm on Nat Res, SB 107, Apr. 19, 2007 (DEQ administrator Andrew Ginsburg)).

No such information was included in the notice published in the Secretary of State's bulletin (ER-79 – ER-99), although alternatives to the draft CPP Rules were in fact considered and not pursued. *See* ER-102 ("DEQ considered numerous options that were informed by other jurisdictions' greenhouse gas programs."); ER-68 (update at EQC meeting "described * * * ways the program could be implemented under several different policy scenarios for greenhouse gas emissions reductions, and noted key decisions about what sectors are and are not proposed for inclusion in the program"); ER-73 (presentation to EQC: "Key Program Design Issues * * * • Point of regulation, * * * –Determining the regulated entities"); ER-75 (EQC members "provided feedback on the program's design elements" after presentation of "policy and modeling scenarios and examples of way the program could be implemented"); *see also, e.g.*, ER-35 – ER-39; ER-41; ER-50; ER-53 – ER-54; ER-59 – ER-61; ER-77 – ER-78 (considering whether to regulate stationary source emissions at the stationary sources as opposed to upstream at their fuel suppliers); ER-24; ER-43 – ER-44; ER-46 – ER-47; ER-49; ER-63 (considering

whether the emissions cap and distribution of compliance instruments should be intensity-based rather than mass-based).

The violation of ORS 468A.327(1)(b) by omitting the mandatory information about alternatives from the Secretary of State's bulletin is another way in which EQC failed to comply with the applicable rulemaking procedure. Under ORS 183.400(4)(c), the CPP Rules are invalid for this reason too.

c. EQC Also Omitted the Information Required by ORS 468A.327(1)(b) from Other Means of Notice.

EQC may attempt to argue that its violations of ORS 468A.327(1) regarding the Secretary of State's bulletin are cured by information published via one of the other means also prescribed by ORS 183.335(1). Any such argument would fail.

To begin with, ORS 468A.327(1) was adopted precisely to compel EQC "to do more public disclosure when [it] adopt[s] rules that affect Title 5 sources." App-33 (Testimony, Jt Subcomm on Nat Res, SB 107, Apr. 19, 2007 (DEQ administrator Andrew Ginsburg)). And ORS 468A.327(1) dictates that the information must be "include[d] with the notice of intended action required under ORS 183.335(1)," which requires giving notice by all four means. To interpret ORS 468A.327(1) as permitting EQC to pick and choose which of the four means of notice will include the mandated information—and especially to allow EQC to omit the information from the formal notice mechanism to the

general public—would be contrary to the text and legislative history of ORS 468A.327(1).

Furthermore, the partial information that may have been included via other means of giving notice was itself *yet another violation* of ORS 468A.327(1)(b). As discussed above, EQC was required by ORS 468A.327(1)(b) to include in the statutory notice a written explanation of any alternatives considered and the reasons that the alternatives were not pursued. ORS 468A.327(1)(b); App-33. Instead, the "Federal Relationship" section of a notice that EQC may have posted on its website and/or linked in emails to certain recipients stated:

> "In designing the Climate Protection Program, DEQ considered many alternatives contained in the proposed rule. Extensive outreach with stakeholders beginning in March 2020, input from the advisory committee in 2021, and public comment throughout the process informed the design of the program. Documentation is in the rulemaking record."

ER-105. In other words, that notice purported that unspecified "alternatives" were *all accepted*, it listed some categories of sources that provided unspecified information to EQC, and it pointed vaguely to the entirety of the rulemaking record, which is more than 15,000 pages long. That falls short of the statutory standard. It does not constitute an explanation of EQC's consideration of alternatives *to* the rules as proposed or EQC's reasons for *not* pursuing those alternatives. Thus, even the notice given by means other than the Secretary of

State's bulletin also violated the rulemaking procedure required by ORS 468A.327(1)(b). Under ORS 183.400(4)(c), the CPP Rules are invalid for this reason as well.

B. Second Assignment of Error

The CPP Rules exceed EQC's statutory authority by regulating emissions from agricultural operations or equipment, residential barbecue equipment, and certain residential heating equipment, where the authority granted to EQC by ORS chapter 468A to regulate air pollution does not extend to such emissions.

1. Preservation of Error

Under ORS 183.400(1), preservation of error is not required.

2. Standard of Review

Pursuant to ORS 183.400(4)(b), this Court shall determine whether the regulation exceeds the agency's statutory authority by "decid[ing] whether the promulgation of the regulation was within the jurisdictional authority of the promulgating agency and whether the substance of the regulation neither departed from the legal standard expressed or implied in the enabling statute, nor contravened any other applicable statute." *Gilliam County*, 316 Or at 106. "To the extent that the rule departs from the statutory policy directive, it 'exceeds the statutory authority of the agency' within the meaning of those words in ORS 183.400(4)(b)." *Planned Parenthood Ass'n v. Dep't of Hum. Res.*, 297 Or 562, 573, 687 P2d 785 (1984).

3. Argument

"Administrative agencies may adopt rules only pursuant to statutory authority granted by the legislature." *Marolla v. Dep't of Pub. Safety Standards & Training*, 245 Or App 226, 230, 263 P3d 1034 (2011). But here, EQC adopted rules that intrude into areas where the Legislature expressly withheld authority from EQC.

a. The Legislature Limited EQC's Authority to Regulate Air Pollution.

In interpreting a statute, the Court examines the text in context of the statute, giving weight to any proffered legislative history as appropriate. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). Here, the text, context, and legislative history all confirm that EQC lacks statutory authority to promulgate rules that will regulate air pollution generated by agriculture, barbecues, and residential heating equipment.

EQC's purported authority to promulgate the CPP Rules is found exclusively in ORS chapters 468 and 468A. *See* ER-108 (listing statutory authority). But with limited exceptions,[7] ORS 468A.020(1) withholds from

[7] The exceptions in ORS 468A.020 cannot supply authority for the scope of the CPP Rules. The exceptions are limited to field burning, agricultural propane flaming other than mint stubble, stack or pile burning of crop residues, certain boilers used in nurseries, regulations necessary to implement the federal Clean Air Act, recommendations of the Task Force on Dairy Air Quality, and certain residential solid fuel burning devices.

EQC any authority under those chapters to regulate certain emissions.

ORS 468A.020(1) provides:

> "Except as provided in subsection (2) of this section, the air pollution laws contained in ORS chapters 468, 468A and 468B do not apply to:
>
> "(a) Agricultural operations, including, but not limited to:
>
> "* * * * *
>
> "(E) Propane flaming of mint stubble * * *.
>
> "(b) Equipment used in agricultural operations * * *.
>
> "(c) Barbecue equipment used in connection with any residence.
>
> "(d) Heating equipment in or used in connection with residences used exclusively as dwellings for not more than four families * * *."

By stating that the air pollution laws "do not apply" to the enumerated subjects, the text clearly indicates that the rulemaking authority granted to EQC in these ORS chapters would *not* extend to emissions generated by agriculture, barbecues, and residential heating equipment.

Furthermore, the statutory context confirms that the exemptions encompass the combustion of fuels in the exempt operations and equipment. First, ORS 468A.020(1)(a)(E) specifies that the agricultural operations exemption includes "[p]ropane flaming of mint stubble," which shows that the exemption includes, at a minimum, this type of agricultural fuel combustion. Second, the exceptions to the exemptions—*i.e.*, activities to which the air

pollution laws *do* apply—include ORS 468A.555 to ORS 468A.620. ORS 468A.020(2)(a). Those statutes authorize regulation of field burning and certain propane flaming. *See* ORS 468A.560; ORS 468A.595. *But see* ORS 468A.550(1)(a). Burning and propane flaming *are* fuel combustion. It would be surplusage for ORS 468A.020(2)(a) to call these out as exceptions if ORS 468A.020(1)(a)-(b) did not deprive EQC of authority to regulate air pollution from fuel combustion in agricultural operations and equipment.

The legislative history also confirms that controlling the exempt operations and emissions is beyond EQC's authority. The statutory text providing that the air pollution laws "do not apply" to them was enacted in 1961 as part of broader air pollution legislation. Section 5 of that legislation included versions of all four exemptions listed above, in addition to an exemption for land clearing and land grading. *See* App-17 (1961 Or Laws ch 426, § 5). The legislative history is clear that these exemptions would be beyond the agency's authority to regulate. They were pervasively referred to using the terminology of "exempt" and "exemptions." *See, e.g.*, App-1 ("should be exempted from control by the Sanitary Authority"); App-2 ("exemption," "specifically exempted so as to foster construction regardless of temporary dust or smoke," "exempted"); App-11 – App-12 ("exempts," "exemptions"). Indeed, the Chief Deputy City Attorney of the City of Portland stated that the legislation "would *remove from the jurisdiction* of the State

Sanitary Authority regulation of land clearing or land grading operations." App-5 (emphasis added).

The Legislature was also well aware that the exemptions would make the agency wholly unable to control air pollution resulting from the specified activities and equipment. The minutes of one Senate committee meeting record that a senator proposed deleting the entire section that created the exemptions because he "felt that you shouldn't have a commission and then *tie their hands* so they could not operate." App-7 (emphasis added). That senator "was opposed to leaving subsection 5 in at all." *Id.* But the majority was fine with tying the agency's hands; Section 5 stayed in the bill. And the Sanitary Authority confirmed the result of enacting a particular exemption: "If you exempt it, *the sanitary authority would exercise no control over it*." App-14 (emphasis added).

b. The CPP Rules Regulate Emissions from Exempt Operations and Equipment.

The CPP rulemaking acknowledged that EQC has no authority over these categories of emissions. *See* ER-29 (noting that "there are a series of exemptions to the EQC's authority to regulate air quality, in ORS 468A.020," including "the regulation of air quality from most agricultural operations and residential barbecue equipment, and from certain residential heating

equipment"). And EQC knows how to respect the limits to its authority—but failed to do so as to agriculture, barbecues, and home furnaces here.

In the CPP Rules, EQC specifically carved out a different category of emissions that ORS 468A.020 denies EQC authority to regulate, namely biomass fuels. *Compare* ORS 468A.020(3)(a), *with* ER-134 – ER-135 (OAR 340-271-0110(3)(b)(B)(i), (4)(b)(B)(i)). The CPP Rules also include carve-outs for various other fuel uses and types of emissions that are not even addressed by ORS 468A.020. *See* ER-134 – ER-135 (OAR 340-271-0110(3)(b)(B), (4)(b)(B)) (exempting from "covered emissions" fuels used for aviation, natural gas used by electric power generating plants, and emissions described by certain federal regulations). But the CPP Rules contain no similar exclusion for the emissions exempted from EQC authority by ORS 468A.020(1).

Likewise, in its other air pollution regulations, EQC has expressly excluded the categories that are beyond its authority under ORS 468A.020. OAR 340-200-0030(1) provides that "OAR chapter 340 *divisions 200 through 268 do not apply to*" agricultural operations and equipment, barbecues, and residential heating equipment. (Emphasis added.) But the CPP Rules are not located in OAR chapter 340 divisions 200 through 268, where virtually all air pollution regulations are. Instead, the CPP Rules were promulgated as OAR chapter 340, division 271 and amendments to division 12. *See* ER-112.

Thus, OAR 340-200-0030(1) fails to set any bounds on the scope of the CPP Rules.

As a result of EQC's failure to exclude from the CPP Rules the categories that are beyond its authority under ORS 468A.020, all the emissions from agriculture, barbecues, and home furnaces are included in the "covered emissions" under the CPP Rules. *See* ER-134 (OAR 340-271-0110(3)(b)(A) (for fuel supplier of liquid fuel or propane: "Covered emissions include emissions of anthropogenic greenhouse gases in metric tons of CO2e that would result from the complete combustion or oxidation of *the annual quantity of propane and liquid fuels * * * imported, sold, or distributed for use in this state*." (emphasis added))); ER-135 (OAR 340-271-0110(4)(b)(A) (for a natural gas distribution company: "Covered emissions include emissions of anthropogenic greenhouse gases in metric tons of CO2e that would result from the complete combustion or oxidation of *the annual quantity of natural gas imported, sold, or distributed for use in this state*." (emphasis added))). In turn, the CPP Rules impose regulatory obligations on the covered fuel suppliers and natural gas distribution companies with regard to agricultural, barbecue, and residential heating emissions: they must obtain compliance instruments or community climate investment credits for them.[8] In other words, despite these

[8] ER-154 (OAR 340-271-0450(3)); ER-129 (OAR 340-271-0020(11)).

emissions being statutorily exempt from EQC's authority, the CPP Rules still count them against a covered fuel supplier's or natural gas distribution company's cap and require that they be reduced year by year.

Moreover, any attempt by EQC to argue that it is not actually regulating emissions from agriculture, barbecues, or home furnaces because it is instead regulating intermediate entities in the distribution chain would fail. DEQ confirmed the obvious fact that the approach of imposing compliance obligations on fuel suppliers is merely a means of regulating emissions from the end-users. *See* ER-32 ("*[E]missions from smaller sources could * * * be limited indirectly*, through limits applicable to fuel suppliers * * *." (emphasis added)); ER-54 ("[Natural gas] emissions from other sources, such as *smaller residential and commercial gas users, may be regulated at the natural gas utility*." (emphasis added)); *see also* ER-83 ("The cap on emissions from covered fuel suppliers is a market-based regulatory approach to reduce greenhouse gas emissions from *combustion* of fuels * * *." (emphasis added)). The Legislature intentionally "tied [EQC's] hands," App-7, and ORS 468A.020 should not be interpreted as allowing EQC to untie its hands at will and control the emissions of farmers, barbecue enthusiasts, and homeowners' furnaces merely by the expedient of placing the compliance obligation for their emissions on another party. The air pollution agency told the Legislature if it

exempted an activity, the agency "would exercise no control over it"—not that the agency would control it at one step's remove. App-14.

Because the CPP Rules regulate emissions from agriculture, barbecues, and residential heating equipment—to which the air pollution laws "do not apply," ORS 468A.020(1)—the CPP Rules are *not* "within the jurisdictional authority" of EQC. *Gilliam County*, 316 Or at 106. In addition, by regulating those exempt emissions, the substance of the CPP Rules "departed from the legal standard"—namely, that EQC may *not* regulate them—that is expressed in ORS 468A.020(1) and thereby implied in all of the other air pollution statutes in ORS chapters 468 and 468A. *Id.* Finally, by regulating the exempt emissions, the CPP Rules "contravene" ORS 468A.020(1), which constrains EQC from regulating them under the air pollution laws of ORS chapters 468 and 468A. *Id.* In sum, the rule "departs from the statutory policy directive" of ORS 468A.020(1) and thereby "'exceeds the statutory authority of the agency' within the meaning of those words in ORS 183.400(4)(b)." *Planned Parenthood*, 297 Or at 573. As a result, the CPP Rules are invalid under ORS 183.400(4)(b).

C. Third Assignment of Error

The CPP Rules exceed EQC's statutory authority because they regulate emissions of greenhouse gases that do not constitute "air contamination" or "air pollution" within the meaning of ORS 468A.005(3), (5).

1. Preservation of Error

Preservation of error is not required. ORS 183.400(1)

2. Standard of Review

Pursuant to ORS 183.400(4)(b), this Court shall declare invalid any regulation that exceeds the agency's statutory authority. *See supra* Part II.B.2.

3. Argument

The CPP Rules are invalid because EQC, operating pursuant to a mandate from the Governor and not the Legislature, exceeded the statutory authority with which the Legislature endowed it when EQC created a cap-and-trade system to regulate greenhouse gases without any legislative imprimatur for doing so. The regulation of greenhouse gases for the purpose of mitigating climate change falls well outside the Legislature's intended delegation to the Executive branch in 1961 when it originally enacted Oregon's air pollution laws. Rather than a faithful execution of the laws passed by the Legislature, the CPP Rules are an impermissible attempt by the Executive branch to legislate after the 2020 Legislature did not. Such action is *not* "within the jurisdictional authority" of EQC and departs from the legal standard expressed in ORS 468A.005(3), (5) and incorporated into the other provisions of ORS chapter 468A. *Gilliam County*, 316 Or at 106. The CCP Rules are, therefore, invalid under ORS 183.400(4)(b).

The Oregon Constitution vests the legislative power in the Legislature and directs the Executive branch to "take care that the Laws be faithfully executed." Or Const, Art V, § 10; *see also id.* Art III, § 1; Art IV, § 1. Accordingly, "an agency has only those powers *that the legislature grants* and cannot exercise authority that it does not have." *SAIF Corp. v. Shipley*, 326 Or 557, 561, 955 P2d 244 (1998) (emphasis added). An executive agency's "tendency to make law without a clear direction to do so must be curbed by the overriding constitutional requirement that substantial changes in the law be made solely by the Legislative Assembly, or by the people." *Or. Newspaper Publishers Ass'n v. Peterson*, 244 Or 116, 124, 415 P2d 21 (1966). As a result, "an administrative agency must, when its rule-making power is challenged, show that its regulation falls within a *clearly defined* statutory grant of authority." *Id.* at 123 (emphasis added).

EQC relied on the authority that the Legislature granted in ORS chapter 468A to justify its promulgation of the CPP Rules, specifically ORS 468A.025, ORS 468A.040, ORS 468A.045, ORS 468A.050, and ORS 468A.135. ER-108. Of these, ORS 468A.025 and ORS 468A.040 are the lynchpins undergirding the CPP Rules because those statutes authorize EQC to set a maximum limit on emissions and to require regulated entities to obtain permits to effectuate those

emissions limits.[9] But the scope of authority granted by ORS 468A.025 depends on the scope of the terms "air pollution" and "air contamination" and, likewise, ORS 468A.040 authorizes EQC to require permits only for "air contamination sources." *See* ORS 468A.025(1), (3) (authorizing EQC to establish standards that "prescribe the degree of air pollution or air contamination that may be permitted" or that "set forth the maximum amount of air pollution permissible"); ORS 468A.040(1) ("By rule, [EQC] may require permits for air contamination sources * * *.").

The Legislature defined "[a]ir contamination" as "the presence in the outdoor atmosphere of one or more air contaminants[10] which contribute to a

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[9] The other statutes cited by EQC (ER-108) relate to reporting and division of regulatory authority between EQC and regional authorities; they would not be sufficient to authorize the CPP Rules' "cap" and "reduce" aspects. And those statutes, too, depend on the scope of terms like "air pollution" and "air contamination source." *See* ORS 468A.045 (prohibiting emission without a permit of "any air contaminant for which a permit is required" "from any air contamination source"); ORS 468A.050 (authorizing EQC to classify sources according to "characteristics which cause or tend to cause or contribute to air pollution"); ORS 468A.135 (providing that regional authorities may exercise certain "functions relating to air pollution control" and that EQC and regional authorities each regulate "air contamination sources" within their respective jurisdictions).

[10] An "air contaminant" is defined as "a dust, fume, gas, mist, odor, smoke, vapor, pollen, soot, carbon, acid or particulate matter or any combination thereof." ORS 468A.005(2). The word "carbon" in this definition, which was adopted in 1961, does not evince an anachronistic legislative desire to prevent climate change. In the 1960s, the term "carbon" referred to particulate matter from the incomplete combustion of coal or other hydrocarbons. *See, e.g.*, *Am. Air Filter Co. v. Cont'l Air Filters, Inc.*, 347 F2d 931, 932 n 1 (6th Cir 1965)

(continued . . .)

condition of air pollution." ORS 468A.005(3). In turn, it defined "air pollution" as

> "the presence in the outdoor atmosphere of one or more air contaminants, or any combination thereof, in sufficient quantities and of such characteristics and of a duration as are or are likely to be injurious to public welfare, to the health of human, plant or animal life or to property or to interfere unreasonably with enjoyment of life and property throughout such area of the state as shall be affected thereby."

ORS 468A.005(5). Whether EQC has the authority to regulate greenhouse gases thus depends on whether that is the type of "air contamination" or "air pollution" that EQC is authorized to regulate under ORS chapter 468A.

Oregon courts interpret statutes to give effect to the meaning of the terms *at the time of enactment*. *Matter of Comp. of Robinette*, 369 Or 767, 776, 511 P3d 1074 (2022). Here, the definitions of "air contamination" and "air contaminant" have remained unchanged since the passage of Oregon's air pollution laws in 1961. *Compare* ORS 468A.005(2), (3), *with* App-16 (1961 Or Laws ch 426, § 3(2), (4)). The definition of "air pollution" has remained unchanged since the 1973 amendments to Oregon's air pollution laws, which were not themselves intended to substantively change the 1961 definition. *Compare* ORS 468A.005(3), *with* App-28 (1973 Or Laws ch 835, § 48); *see*

(dust includes "'minute particles of clay, silica, smoke, soot and carbon, decayed animal and vegetable matter'"); *People v. Oswald*, 116 NYS2d 50, 51 (NY Magis Ct 1952) ("smoke is finely divided carbon or soot").

also App-25 – App-26. Accordingly, the determinative question for whether ORS chapter 468A authorizes EQC to regulate greenhouse gases to mitigate climate change is whether that is the type of pollution that the Legislature empowered the Sanitary Authority to address in 1961.

a. The 1961 Legislature Did Not Authorize the Sanitary Authority to Regulate Anthropogenic Greenhouse Gases to Prevent Climate Change.

The Legislature set the scope of EQC's authority to regulate air pollution *decades before* the effect of anthropogenic greenhouse gases on the global climate was commonly understood and long before advocates or policymakers began to consider regulation of greenhouse gases to mitigate climate change. To interpret Oregon's air pollution laws as providing the Executive branch with authority to regulate greenhouse gases to mitigate climate change would be to find that the Legislature intended to address a type of problem that there is no suggestion it foresaw at the time of enactment. Such a construction plainly contravenes the Court's mandate to "determine the intent of the legislature *at the time that it enacted the relevant statutes*." *Robinette*, 369 Or at 776 (emphasis added). Simply put, anthropogenic climate change was not the type of risk to public welfare, health, or the environment that the Legislature tasked the Sanitary Authority with preventing or mitigating in 1961. The regulation of greenhouse gases for the purpose of addressing climate change, therefore, falls

well outside the "air contamination" and "air pollution" that the Legislature in 1961 empowered the Executive branch to regulate.

b. The Court Should Also Reject EQC's Interpretation of the 1961 Legislation Because It Raises Serious Constitutional Questions.

Interpreting the definitions of "air pollution" and "air contamination" as a grant of authority to regulate greenhouse gases for the purpose of mitigating climate change, as EQC apparently interprets it, would raise serious questions about the extent to which the Legislature can delegate its lawmaking powers to the Executive branch.

"It is well established that the legislature cannot grant an administrative agency the power to regulate unless some standard or yardstick is provided in the act as a guide to the administrative agency; in other words, the authority to regulate may not be left wholly to the whim and caprice of such agency." *Demers v. Peterson*, 197 Or 466, 469-70, 254 P2d 213 (1953); *Van Winkle v. Fred Meyer, Inc.*, 151 Or 455, 462, 49 P2d 1140 (1935) ("[T]he Legislature cannot confer upon any person, officer, agency, or tribunal the power to determine what the law shall be."). Interpreting the 1961 grant of authority as extending to the authorization of climate regulation—where the Legislature in 1961 would not have even conceived of the *type* of threat—would "le[ave] wholly to the whim and caprice of such agency" at any point in the future what types of emissions and what types of risks fall within the scope of Oregon's air

pollution laws. *Demers*, 197 Or at 470. Such an interpretation would, at minimum, give rise to serious questions as to whether the Legislature impermissibly delegated its law-making power to the Executive branch. *See Westwood Homeowners Ass'n v. Lane County*, 318 Or 146, 160-61, 864 P2d 350 (1993) (where an interpretation of a statute is even "arguably" unconstitutional, court must adopt any other interpretation that is plausible). EQC cannot rely on the authority granted to it in 1961 to justify its promulgation of the CPP Rules.

c. The Legislature Did Not Subsequently Grant EQC Authority to Broadly Regulate Greenhouse Gases.

Nor has the Legislature taken any action since 1961 to empower the Executive branch to broadly regulate greenhouse gases for the purpose of mitigating climate change. The Legislature's "first step" into climate regulation (App-38; App-39) came in 2007, when it set goals for the reduction in greenhouse gas emissions and created the Oregon Global Warming Commission to study climate change and recommend policy responses. ORS 468A.205(1); ORS 468A.240(1). But at that time, the Legislature was careful to make clear that its new policy goals did "not create any additional regulatory authority for an agency of the executive department." ORS 468A.205(3). The Legislature's expression of intent ***not*** to create any new regulatory authority in its first piece of climate legislation strongly indicates that it did not endow EQC

or any other executive agency with the authority to regulate greenhouse gases to mitigate climate change.

This conclusion is further supported by legislative history that shows the Legislature intended the creation of the Global Warming Commission, and its study of climate change and *potential* policy responses, to be its "first step" into regulating climate change. During its consideration of the 2007 legislation, the chief sponsor of the legislation and chair of the subcommittee that primarily drafted the legislation, made clear that then-HB 3543 represented the Legislature's "first step" into climate legislation. App-38; App-39. She further noted that the Legislature considered two other bills that would have granted the Executive branch authority to regulate in this space, *including one bill that would have established a cap-and-trade regulatory scheme similar to the CPP Rules*, but declined to take those steps at that time in favor of proceeding with the "first step" of establishing the Global Warming Commission. App-38. In other words, in 2007 the Legislature elected to look before it leapt into the space of climate regulation.

Since 2007, the Legislature has only once adopted legislation authorizing EQC to regulate greenhouse gases when, in 2009, it directed EQC to reduce greenhouse gas emissions caused by gasoline, diesel, and substitute fuels via the LCFS program. ORS 468A.266(1). The LCFS program authorized regulation of the same transportation fuels that are subject to the CPP Rules, but in a

manner significantly different from the CPP Rules. Specifically, the Legislature expressly directed EQC to adopt rules reducing the amount of greenhouse gases emitted by gasoline, diesel, and substitute fuels using an intensity-based measure. *See* ORS 468A.266(1), (2)(a) ("reduce the average amount of greenhouse gas emissions *per unit of fuel energy* of the fuels by 10 percent below 2010 levels by the year 2025" (emphasis added)); *see also* OAR ch 340, div 253. Put plainly, this is how the Legislature specifically intended to regulate greenhouse gas emissions from transportation fuels. But the CPP Rules were neither promulgated under nor authorized by the LCFS statute. *See* ER-108. Instead, through the CPP Rules, EQC has marched in a new direction by imposing *additional* mass-based—rather than intensity-based—requirements on fuel suppliers. ER-134 (OAR 340-271-0110(3)(b)(A)). In other words, EQC has—on its own—acted to regulate greenhouse gas emissions from transportation fuels differently than and beyond the authority the 2009 Legislature granted to regulate such fuels through the LCFS.

In 2019 and 2020, the Legislature considered two bills that would have amended Oregon's air pollution laws to empower the Executive branch to establish a cap-and-trade system with many similarities to the CPP. *See* App-43 – App-50; App-51 – App-58. Like the CPP Rules, these bills would have granted the Executive branch authority to impose cap-and-trade regulations on,

among others, fuel and natural gas suppliers. *Id.* But the Legislature did not pass those bills.

Days after the Legislature adjourned its 2020 session without passing legislation to authorize cap-and-trade regulations, Governor Brown issued EO 20-04 which, among other things, directed EQC to develop a "[s]ector-specific GHG Cap and Reduce Program," including for the transportation fuels and natural gas sectors. ER-6. In other words, immediately after the Legislature considered and did not act on the issue, the Governor directed EQC to do what the Legislature did not. In response, DEQ and EQC began the process that culminated in the promulgation of the CPP Rules. ER-18 – ER-19.

But EQC's authority does not derive from the Governor; it derives from the Legislature. *Shipley*, 326 Or at 561. And the Legislature expressly declined to extend to EQC the authority to regulate greenhouse gases for the purpose of combating climate change in 2007, and—despite repeated opportunities to do so—has subsequently granted that authority only to the LCFS program.

The Oregon Supreme Court holds that agencies cannot depend on vague suggestions of regulatory authority. "[A]n administrative agency must, when its rule-making power is challenged, show that its regulation falls within a *clearly defined* statutory grant of authority." *Or. Newspaper Publishers Ass'n*, 244 Or at 123 (emphasis added); *see also W. Va. v. Env't Prot. Agency*, 142 S Ct 2587, 2609 (2022) ("The agency instead must point to 'clear congressional

authorization' for the power it claims." (quoting *Util. Air Regul. Grp. v. E.P.A.*, 573 US 302, 324 (2014))). Before employing sweeping authority to impact every household and business in the state, EQC must point to clear legislative authorization for the power that it claims. The Legislature did not clearly grant EQC broad authority to regulate greenhouse gas emissions in 1961 or at any point thereafter.

Thus, the Court should invalidate the CPP Rules under ORS 183.400(4)(b) to ensure that the Executive branch does not claim authority not clearly granted it by the Legislature.

D. Fourth Assignment of Error

The CPP Rules exceed EQC's statutory authority by imposing compliance obligations on businesses that do not constitute "air contamination source[s]" within the meaning of ORS 468A.005(4).

1. Preservation of Error

Preservation of error is not required. ORS 183.400(1).

2. Standard of Review

Pursuant to ORS 183.400(4)(b), this Court shall declare invalid any regulation that exceeds the agency's statutory authority. *See supra* Part II.B.2.

3. Argument

Coalition Petitioners adopt and incorporate by reference the arguments made by Petitioners in Nos. A178216 (as applicable to businesses other than

natural gas distributors) and A178218 regarding their respective first assignments of error.

III. CONCLUSION

For all the foregoing reasons, Coalition Petitioners respectfully request that the Court declare the CPP Rules invalid.

DATED: September 21, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that this brief complies with the word count limitation in ORAP 5.05(1)(b)(ii)(A), with a word count of 9,995 words.

I certify that the font size in this brief is Times New Roman 14-point for both the text of the brief and footnotes, as required by ORAP 5.05(1)(b)(ii)(A).

DATED: September 21, 2022

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