

IN THE COURT OF APPEALS OF THE STATE OF OREGON

NORTHWEST NATURAL GAS,
AVISTA CORPORATION, and
CASCADE NATURAL GAS
CORPORATION,

Petitioners,

v.

ENVIRONMENTAL QUALITY
COMMISSION,

Respondent.

CA Nos. A178216 (Control),
A178217, and A178218

MOTION — INTERVENE

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,

v.

OREGON ENVIRONMENTAL
QUALITY COMMISSION,

Respondent.

WESTERN STATES PETROLEUM
ASSOCIATION,

Petitioner,
v.
ENVIRONMENTAL QUALITY
COMMISSION,
Respondent.

Prospective Intervenor-Petitioner National Federation of Independent Business (“NFIB”) moves this Court for an order allowing it to intervene in CA No. A178217 as an intervenor-petitioner.

The Petitioners in CA No. A178217 (collectively, the “Coalition Petitioners”) do not oppose this motion. Counsel for the Petitioners in CA No. A178216 and the Petitioner in CA No. A178218 have also stated that they do not oppose this motion. Counsel for Respondent Oregon Environmental Quality Commission (“EQC”) has stated that EQC does not oppose this motion.

In support of this motion, Prospective Intervenor-Petitioner respectfully refers the Court to the Declaration of Karen Harned in Support of National Federal of Independent Business’ Motion — Intervene (“Harned Decl.”) submitted herewith.

MEMORANDUM OF POINTS AND AUTHORITIES

These consolidated petitions seek judicial review of the Climate Protection Program rules (the “CPP Rules”) adopted by Respondent EQC on December 16,

2021. As set forth below, NFIB has a direct, significant, and tangible interest in CA No. A178217. NFIB is a business association representing more than 5,500 small businesses in Oregon that will be impacted by the increased cost and decreased availability of fuel that the CPP Rules are designed to bring about.

Moreover, NFIB's intervention in CA No. A178217 at this stage of the proceedings will not delay or prejudice adjudication of the rights of the original parties in CA No. A178217 or the other two cases consolidated with it. For these reasons, the Court should permit intervention by NFIB in CA No. A178217.

A. NFIB

NFIB is the nation's leading small business association, representing members in all fifty states and Washington, D.C. (Harned Decl., ¶ 2.) In Oregon specifically, NFIB represents more than 5,500 small businesses in every industry. (*Id.*, ¶ 3.) Small businesses consistently rank energy-related costs as significant obstacles in running their business. According to the NFIB Research Center's 2020 Problems and Priorities survey, small businesses ranked Electricity Costs and the Costs of Natural Gas, Propane, Gasoline, Diesel, and Fuel Oil as their 16th and 19th most important problems, respectively. (*Id.*, ¶ 4.) The CPP Rules will make fuel less available and raise energy costs for small businesses in Oregon—including NFIB members—forcing them to raise prices or suffer a decrease in revenue. (*Id.*, ¶ 5.)

NFIB is a nonprofit corporation. (*Id.*, ¶ 6.) NFIB is not a party to an order or contested case in which the validity of the CPP Rules may be determined by a court. (*Id.*, ¶ 7.)

B. The CPP Rules

The CPP Rules aim to reduce statewide greenhouse gas (“GHG”) emissions by 90 percent by 2050. To achieve that sweeping objective, the CPP Rules target suppliers of natural gas, gasoline, diesel and other covered liquid and gas fuels. Among other things, the CPP Rules set, and make fuel suppliers responsible for meeting, a total statewide limit (which declines annually) on GHG emissions. In other words, the CPP Rules hold fuel suppliers directly accountable for the GHG emissions from covered fuels used by all Oregonians. The CPP Rules were designed to limit the availability of covered fuels and thereby make it too expensive to combust those same fuels in Oregon, or in certain cases, to prohibit manufacturing facilities from using specific fuels.

EQC adopted the CPP Rules on December 16, 2021. The petition for judicial review pursuant to ORS 183.400 was filed in CA No. A178217 on March 18, 2022. That same day, two other petitions for review of the CPP Rules were filed in CA No. A178216 and CA No. A178218. On April 18, 2022, the Court ordered the three cases consolidated.

The agency record has not yet been filed. EQC has moved twice for extensions of the time to file the agency record, and the agency record is currently due on June 16, 2022.

C. The Court Should Permit NFIB to Intervene

ORCP 33 permits trial courts to allow interested third parties to intervene in civil proceedings. ORCP 33 C provides:

“At any time before trial, any person who has an interest in the matter in litigation may, by leave of court, intervene. In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.”

While the plain language of ORCP 33 C provides only for intervention “before trial,” the Oregon Supreme Court in *Barendrecht v. Clark*, 244 Or 524, 419 P2d 603 (1966), held that appellate courts have the power to allow an interested party to intervene at the appellate stage of a case. Construing the statutory predecessor to ORCP 33, which contained language identical to the first sentence of ORCP 33 C, the Oregon Supreme Court instructed:

“Read literally, this section permits intervention only before trial. However, in *Duke v. Franklin*, 177 Or. 297, 304, 162 P.2d 141 (1945), the court explained that ORS 13.130 was intended to make provision for intervention only in those instances in which the court ‘*must* hear and determine an application in intervention.’ (Emphasis ours.) The court held that ‘(s)ubsequent to the commencement of the trial, leave to intervene may be

granted in the exercise of sound discretion, but is not a matter of right.’¹¹ Adopting this interpretation, we find no obstacle in granting the petition for intervention
* * *.”

Berendrecht, 244 Or at 528 (internal footnote omitted). The court also noted that courts of equity possess inherent discretionary authority to permit intervention at any time and that there was nothing to suggest that, in enacting ORCP 33’s predecessor statute, the legislature intended to deprive the courts of that authority. *Id.* at 528 n 1. Relying on *Barendrecht*, this Court reached the same result in *Nakashima v. Board of Education*, 204 Or App 535, 543-45, 131 P3d 749 (2006), concluding that it had authority to allow a motion to intervene on appeal.

The text of ORCP 33 C and intervention decisions establish two criteria for intervention: (1) an interest in the matter in litigation; and (2) the absence of undue delay or prejudice to the adjudication of the rights of the original parties. *See* ORCP 33 C; *Rendler v. Lincoln County*, 302 Or 177, 181-82, 728 P2d 21 (1986); *see also Nakashima*, 204 Or App at 545 (granting motion after finding, among other things, that no other party objected to the motion and that intervention would not prejudice any other party). NFIB plainly meets both criteria.

First, NFIB possesses a clear interest in the CPP Rules that are the subject of this litigation. NFIB is eligible to petition for review of the CPP Rules under

ORS 18.400.¹ And NFIB represents more than 5,500 small businesses in Oregon that will be affected by the CPP Rules. (Harned Decl., ¶ 3.) As noted above, energy-related costs are already a significant obstacle for small businesses (*id.*, ¶ 4), yet the CPP Rules are designed to reduce GHG emissions precisely by limiting the availability and increasing the cost of covered fuels in Oregon. Thus, the intended effect of the CPP Rules will be to exacerbate one of the challenges that NFIB members and small businesses in Oregon are already struggling with.

Second, NFIB’s intervention at this stage of the litigation is timely² and would not unduly delay or prejudice the adjudication of the rights of any of the original parties in these consolidated cases. The three petitions were filed on March 18, 2022, and nothing substantive has yet transpired in the litigation. The agency record has not yet been filed and it is not due until June 16, 2022.

Moreover, NFIB’s interests are aligned with those of the Petitioners in all three consolidated petitions and are identical to those of the Coalition Petitioners in CA No. A178217, whose counsel will also represent NFIB. Accordingly, no prejudice,

¹ As a nonprofit corporation (Harned Decl., ¶ 6), NFIB is a “person” as defined by ORS 183.310(8). ORS 183.400 authorizes “any person” to petition this Court to determine the “[v]alidity of any rule.” NFIB also is not a party to an order or contested case in which the validity of the CPP Rules may be determined by a court. (Harned Decl., ¶ 7.)

² There is generally no time limit on petitioning for judicial review of a rule under ORS 183.400. *Re v. Oregon Public Employees Retirement Sys.*, 256 Or App 52, 53 n 3, 301 P3d 932 (2013).

delay, or inefficiency will result from NFIB's intervention. *See Rendler*, 302 Or at 181 (intervention properly allowed where "intervenor did not inject an issue that was 'entirely new and different'"); *Nakashima*, 204 Or App at 545 (allowing intervention where intervenors' interests aligned with interests of petitioners).

D. Conclusion

NFIB satisfies the established criteria for intervention, and no party opposes this motion. NFIB therefore respectfully requests that the Court enter an order allowing it to intervene in CA No. A178217 as an intervenor-petitioner.

DATED: June 13, 2022.

STOEL RIVES LLP

/s/ Rachel C. Lee

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and for Coalition Petitioners (A178217)*

CERTIFICATE OF FILING AND SERVICE

I certify that on June 13, 2022 I filed the original of this **MOTION** — **INTERVENE** with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system.

I certify that on June 13, 2022, I served a true copy of this **MOTION** — **INTERVENE** using the Appellate Court Electronic Filing System on:

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I further certify that on June 13, 2022 service of a copy of this **MOTION** — **INTERVENE** will be accomplished on the following participants in this case by

U.S. Mail:

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CA Nos. A178216 (Control),
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**DECLARATION OF KAREN R.
HARNED IN SUPPORT OF
NATIONAL FEDERATION OF
INDEPENDENT BUSINESS'
MOTION — INTERVENE**

OREGON FARM BUREAU
FEDERATION; OREGON BUSINESS
& INDUSTRY ASSOCIATION;
OREGON MANUFACTURERS AND
COMMERCE; ALLIANCE OF
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ASSOCIATED OREGON LOGGERS,
INC.; NORTHWEST PULP AND
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DECLARATION IN SUPPORT OF MOTION — INTERVENE

I, Karen R. Harned, declare as follows:

1. I am the Executive Director of the National Federation of Independent Business Small Business Legal Center, a public interest law firm and supporting organization to the National Federation of Independent Business (“NFIB”). I make this declaration based on personal knowledge. I make this declaration in support of NFIB’s motion to intervene in CA No. A178217 as an intervenor-petitioner.
2. NFIB is the nation’s leading small business association, representing members in all fifty states and Washington, D.C.
3. In Oregon specifically, NFIB represents over 5,500 small businesses in every industry.
4. According to the NFIB Research Center’s 2020 Problems and Priorities survey, small businesses ranked Electricity Costs and the Costs of Natural Gas, Propane, Gasoline, Diesel, and Fuel Oil as their 16th and 19th most important problems, respectively.

5. By making fuel less available and raising energy costs on small businesses in Oregon, including NFIB members, the Climate Protection Program rules will force those small businesses to raise prices or suffer a decrease in revenue.

6. NFIB is a non-profit corporation organized under the laws of the State of Tennessee.

7. NFIB is not party to an order or contested case in which the validity of the Climate Protection Program rules may be determined by a court.

I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.

Executed this 9 day of June, 2022, at Washington, D.C.


Karen R. Harned

CERTIFICATE OF FILING AND SERVICE

I certify that on June 13, 2022 I filed the original of this **DECLARATION OF KAREN HARNED IN SUPPORT OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS' MOTION — INTERVENE** with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system, and that on June 13, 2022 I served a true copy of it using the Appellate Court Electronic Filing System on:

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I further certify that on June 13, 2022 service of a copy of this

**DECLARATION OF KAREN HARNED IN SUPPORT OF NATIONAL
FEDERATION OF INDEPENDENT BUSINESS' MOTION — INTERVENE**

will be accomplished on the following participants in this case by U.S. Mail:

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