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,

NATURAL RESOURCES DEFENSE COUNCIL,
Intervenor-Respondent,

BEYOND TOXICS; CLIMATE SOLUTIONS; ENVIRONMENTAL DEFENSE FUND; OREGON BUSINESS ALLIANCE FOR CLIMATE (d/b/a OREGON BUSINESS FOR CLIMATE); and OREGON ENVIRONMENTAL COUNCIL,
Intervenor-Respondents.

No. A178216 (Control)

OREGON FARM BUREAU FEDERATION; OREGON BUSINESS & INDUSTRY ASSOCIATION; OREGON MANUFACTURERS & COMMERCE; ALLIANCE OF WESTERN ENERGY CONSUMERS; ASSOCIATED OREGON LOGGERS, INC.; NORTHWEST PULP & PAPER ASSOCIATION; OREGON ASSOCIATION OF NURSURIES; OREGON FOREST & INDUSTRIES COUNCIL; OREGON TRUCKING ASSOCIATIONS, INC.; WESTERN WOOD PRESERVERS INSTITUTE; OTLEY LAND & CATTLE, LLC; and SPACE AGE FUEL, INC.,
Petitioners,

NATIONAL FEDERATION OF INDEPENDENT BUSINESS,
Intervenor-Petitioner,

v.

ENVIRONMENTAL QUALITY COMMISSION,
Respondent.

No. A178217

WESTERN STATES PETROLEUM ASSOCIATION,
Petitioner,

v.

ENVIRONMENTAL QUALITY COMMISSION,
Respondent.

No. A178218

ANSWERING BRIEF OF INTERVENOR-RESPONDENT NATURAL RESOURCES DEFENSE COUNCIL

January 2023

Clifford S. Davidson, OSB # 125378
Drew Eyman, OSB # 163762
SNELL & WILMER LLP
1455 SW Broadway, Suite 1750
Portland, OR 97201
(503) 624-6800
csdavidson@swlaw.com
deyman@swlaw.com

Megan H. Berge, *pro hac vice*
BAKER BOTTS L.L.P.
101 California Street
San Francisco, CA 94111
(415) 291-6233
megan.berge@bakerbotts.com

Scott Novak, *pro hac vice*
Sterling Marchand, *pro hac vice*
BAKER BOTTS L.L.P.
700 K Street, NW
Washington, D.C. 20001
(202) 304-5099
scott.novak@bakerbotts.com
sterling.marchand@bakerbotts.com

Attorneys for Petitioners in A178216

Maura C. Fahey, OSB # 133549
Erin Hogan-Freemole, OSB #212850
CRAG LAW CENTER
3141 E Burnside Street
Portland, OR 97214
(503) 525-2724
maura@crag.org
erin@crag.org

Attorneys for Intervenor-Respondents Beyond Toxics, Oregon Environmental Council, Climate Solutions, Environmental Defense Fund, and Oregon Business for Climate

Ellen F. Rosenblum, OSB # 753239
Denise G. Fjordbeck, OSB # 822578
Carson L. Whitehead, OSB #105404
Oregon Department of Justice
400 Justice Bldg., 1162 Court St. NE
Salem, OR 97301-4096
(503) 378-6002
denise.fjordbeck@doj.state.or.us
carson.l.whitehead@doj.state.or.us
Attorneys for Respondent EQC

Daniel C. Snyder, OSB # 105127
PUBLIC JUSTICE
1620 L Street NW, Suite 630
Washington, D.C. 20036
(202) 861-5251
dsnyder@publicjustice.net

Pete Huffman, *pro hac vice*
Natural Resources Defense Council
1152 15th Street, NW, Suite 300
Washington, DC 20005
(202) 289-2428
phuffman@nrdc.org

Attorneys for Intervenor-Respondent Natural Resources Defense Council

Rachel C. Lee, OSB # 102944
Thomas Wood, OSB # 934601
Geoffrey Tichenor, OSB # 050958
STOEL RIVES LLP
760 SW Ninth Avenue, Suite 3000
Portland, OR 97205
(503) 224-3380
rachel.lee@stoel.com
tom.wood@stoel.com
geoffrey.tichenor@stoel.com

Attorneys for Petitioners in A178217 and Intervenor-Petitioner NFIB

Steven G. Liday, OSB # 075975
Joshua M. Sasaki, OSB # 964182
Iván Resendiz Gutierrez, OSB # 154617
Katelyn J. Fulton, OSB # 183404
MILLER NASH LLP
3400 U.S. Bancorp Tower
111 SW Fifth Avenue
Portland, OR 97204
(503) 224-5858
steven.liday@millernash.com
josh.sasaki@millernash.com
ivan.resendiz@millernash.com
katelyn.fulton@millernash.com

Attorneys for Petitioner in A178218

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INTRODUCTION

Legislatures often set broad policy goals and entrust expert agencies with the regulatory authority necessary to achieve them. Just so here. In pursuit of the goal of clean air, the legislature tasked the Environmental Quality Commission ("EQC") to identify harmful air contaminants; to identify the sources of those contaminants; and then to regulate those sources to improve air quality. This is a rational regulatory scheme. It is suited to the multifaceted problem of air pollution, and its basic structure has been adopted by legislatures nationwide.

The EQC has identified greenhouse gases as harmful air contaminants. It adopted the Climate Protection Plan ("CPP") rules to regulate significant sources of these contaminants. These rules are authorized by plain statutory text.

Petitioners contend this statutory text must mean something less than it says. According to petitioners, when the statutes were adopted in the 1960s, there was a well-settled nationwide consensus that regulators should have only a limited authority over certain specific air contaminants and sources. Thus, they say, the legislature could only have meant to confer such a limited authority on the EQC.

Petitioners are incorrect. Their claims about the national regulatory backdrop are both unsubstantiated and irrelevant. Almost all of their federal and other state citations post-date the Oregon statutes. And petitioners are simply wrong about the nature and development of air pollution control from the 1950s on.

STATEMENT OF THE CASE

Intervenor-Respondent Natural Resources Defense Council ("NRDC") concurs with and adopts by reference the brief submitted by the EQC, including the Statement of the Case and answers to petitioners' assignments of error. ORAP 5.77(4)(b). NRDC submits this brief as additional argument in response to petitioners' arguments about the nature of air pollution control outside of Oregon.

Summary of Argument

The plain text of ORS chapter 468A provides the EQC authority for the CPP rules. Under these statutory provisions, greenhouse gases are air contaminants, and the EQC can regulate fuel suppliers as sources of these contaminants. Petitioners' arguments that the EQC exceeded its statutory authority lack merit. In particular, petitioners' claims about the nature of air pollution regulation outside of Oregon—and the effect that backdrop should have on the construction and interpretation of the EQC's authority—are wrong.

First, the coalition petitioners[1] contend the EQC cannot regulate greenhouse gas pollution because legislators in the 1960s could not have been aware of the potential dangers posed by greenhouse gases. That contention is unsubstantiated.

[1] For consistency with the EQC's brief, the various petitioners are referred to as the "coalition petitioners" (No. A178217), the Western States Petroleum Association or "WSPA" (No. A178218), and the "utility petitioners" (No. A178216).

Regardless, legislatures routinely grant agencies general regulatory authority for the very reason that it enables them to address new specific problems as they arise.

Second, petitioner WSPA argues that federal and other states' laws establish that in the 1960s, "source" and "emission standard" were narrow terms of art. But the hodgepodge of laws WSPA cites do not establish that either term had any specialized meaning at the relevant time, and certainly not the construction that WSPA assigns to them. Instead, contemporaneous statutes show legislatures recognized that air pollution was a multifaceted problem; that regulators needed broad-based authority to achieve the goal of clean air; and that scientific understanding of the causes and necessary responses to pollution would continue to improve over time.

Finally, the utility petitioners assert, in essence, that it would have been irrational for the legislature to give the EQC the authority indicated by the plain statutory text. If the statutes are not cabined to a more limited scope, they say, a parade of regulatory horribles will ensue. But in fact the EQC's authority is typical of that of agencies in other jurisdictions. The CPP rules represent an incremental exercise of that authority with precedential analogs across the country.

ANSWER TO WSPA'S FIRST ASSIGNMENT OF ERROR, UTILITY PETITIONERS' FIRST ASSIGNMENT OF ERROR, AND COALITION PETITIONERS' THIRD AND FOURTH ASSIGNMENTS OF ERROR

The EQC has statutory authority for the CPP rules. The EQC can regulate greenhouse gases because they are "air contaminants" that cause "air pollution" as defined in ORS 468A.005(2), (3), and (5). The EQC can regulate fuel suppliers because they are sources of these contaminants as defined in ORS 468A.005(4). The EQC set an authorized standard because the rules "set forth the maximum amount" of permissible contaminants from these sources as allowed in ORS 468A.025(3).

Preservation of Error

Preservation is not required in a rule challenge under ORS 183.400.

Standard of Review

Whether the CPP rules are within the EQC's statutory authority is a question of law. *See* ORS 183.400(3)–(4).

ARGUMENT

The legislature tasked the EQC to identify harmful air contaminants; to identify the sources of these contaminants; and then to regulate these sources to improve air quality in Oregon. *See* ORS chapter 468A. That is exactly what the EQC has done in adopting the CPP rules. Petitioners' arguments that the EQC exceed its statutory authority lack merit.

In particular, petitioners make a number of quasi-contextual arguments about the nature of air pollution regulation outside of Oregon, which they say compels a narrow reading of the EQC's authority. But little—if any—of this supposed extra-jurisdictional "context" is legally relevant to the interpretation of the EQC's enabling statutes. And to the extent the backdrop of national regulation is relevant, it does not support petitioners' arguments.

A. The EQC can regulate greenhouse gases because they meet the statutory definition of air contaminants and contribute to air pollution.

Alone among the three opening briefs, only the coalition petitioners argue that greenhouse gases are not pollutants. That argument is patently atextual. The legislature defined an "air contaminant" broadly to include any "gas" without limitation. ORS 468A.005(2). A greenhouse gas is indisputably a gas. And the presence of greenhouse gases in the air causes "air pollution" as defined in ORS 468A.005(5). *See* OAR 340-271-0010(2). Therefore, the EQC may regulate greenhouse gases.

The coalition petitioners nevertheless claim that greenhouse gases fall outside the statutory definition of "air contaminant." This is because, they say, the EQC's enabling statutes were enacted "decades before lawmakers had any awareness" of the risks of greenhouse gas pollution. (Br at 8). That claim is both unsubstantiated and legally irrelevant.

First, petitioners are simply wrong that information on greenhouse gas pollution was not available to interested policymakers in 1961. *E.g.*, W.K., *How Industry May Change Climate*, N.Y. Times, May 24, 1953, at E-11; L. Barnett*, The Canopy of Air*, Life Magazine, June 8, 1953, at 74, 97; *Second Supplemental Appropriation Bill: Hearing Before the H. Comm. on Appropriations*, 84th Cong. 467 (1956) (statement of Roger Revelle, Director, Scripps Institution of Oceanography) ("Effects of Fossil Fuels on Climate"). For example, as early as 1951, the American Petroleum Institute formed its "Smoke and Fumes Committee" out of concern that "the oil industry would continue to be blamed for the bulk of air pollution." C.A. Jones, *A Review of the Air Pollution Research Program of the Smoke and Fumes Committee of the American Petroleum Institute*, J Air Poll Control Ass'n, No 1958, at 268, https://www.smokeandfumes.org/documents/9. Aware of the risk of regulatory legislation, *id.*, industry funded research into the increasing atmospheric concentration of carbon dioxide, *id*. at 270, with plans to "prominent[ly]" disseminate it to government officials. *See id*. at 268–270.[2]

[2] As reported by the U.S. House Committee on Oversight and Reform, wider knowledge of the dangers posed by fossil fuel use may have been obscured by a "decades-long campaign to mislead the American people about the [fossil fuel] industry's role in climate change." *See* Memorandum from Carolyn B. Maloney and Ro Khanna, Chairpersons, H Comm on Oversight and Reform, to Committee Members (Sept. 14, 2022) (memorandum available at http://bit.ly/3Z8rPsJ).

Second, whether legislators had specific air contaminants "in mind" in 1961 "is not realistically the right question" for interpreting the statute. *See S. Beach Marina, Inc. v. Dep't of Revenue*, 301 Or 524, 531, 724 P2d 788, 792 (1986). "The legislature may and often does choose broader language that applies to a wider range of circumstances than the precise problem that triggered legislative attention." *Id*. And when "the express terms of a statute indicate such broader coverage," a petitioner must make an "affirmative showing" that the legislature considered and rejected a specific circumstance as falling outside the general statutory language. *Id*.

Here, the legislature did not define "air contaminant" by enumerating specific contaminants. Instead, it referred to general classes of substances: "dust, fume, gas, mist, odor, smoke, vapor, pollen, soot, carbon, acid or particulate matter or any combination thereof." ORS 468A.005(2). Petitioners provide no evidence that this general language only covers certain specific gases. Nor do they provide any evidence that the legislature specifically considered and rejected greenhouse gases as air contaminants. Indeed, petitioners' theory—which would require the Court to speculate about the precise contaminants legislators had "in mind" in 1961—provides no standard to determine which contaminants fall within the

general statutory definition.[3] Instead, the statute makes clear that the legislature's purpose was not to regulate specific contaminants for their own sake, but rather to ensure that "the outdoor atmosphere" was not "injurious to public welfare," "health," or "property." ORS 468A.005(5). Put simply, the goal was clean air, and the legislature gave the EQC a broad mandate to attain that goal.

Because the text of the 1961 statute does not support their argument, the coalition petitioners look elsewhere. They observe (Br at 8) that in 2007 the legislature codified goals for reducing greenhouse gas pollution while declining to give the EQC additional regulatory authority. *See* ORS 468A.205. Petitioners contend that action compels reading the legislature's 1961 grant of authority to the EQC to exclude greenhouse gases. But legislative action in 2007 is legally irrelevant to determining legislative intent in 1961. *See DeFazio v. Washington Pub. Power Supply Sys.,* 296 Or 550, 561, 679 P2d 1316 (1984). Further, petitioners do not explain why the legislature would codify a goal to reduce greenhouse gas pollution—to "at least 75 percent below 1990 levels"—while simultaneously leaving the agency powerless to achieve that goal. Indeed, there is

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[3] *Cf., e.g.*, Environmental Protection Agency, *Air Pollution: Current and Future Challenges* (identifying numerous types of air pollutants, including gases such as carbon dioxide as well as more than 187 different hazardous air pollutants or air toxics), https://www.epa.gov/clean-air-act-overview/air-pollution-current-and-future-challenges.

a rational explanation for why the legislature chose not to create *additional* authority in 2007—the agency *already had* the authority to regulate greenhouse gases.

More broadly, the basic regulatory model in ORS chapter 468A—providing a general grant of authority to an expert agency—is not unique. It is commonplace. Legislatures often set policy goals, and then grant expert agencies broad authority to achieve those goals over time. For example, in 1938 Congress empowered the Federal Trade Commission ("FTC") to "prevent . . . unfair methods of competition in commerce." *See* Mar. 21, 1938, Pub L, ch 49, § 3, 52 Stat 111. Of course, Congress did not say precisely *which* unfair methods the FTC could regulate. But under this general grant of authority, the FTC has regulated a host of activities that the 1938 Congress likely never contemplated, such as billing practices for over-the-phone access to adult content. *See, e.g.*, *FTC v. Verity Int'l, Ltd.*, 443 F3d 48, 63 (2d Cir 2006); *see also* FTC, *The Antitrust Laws*, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws ("Courts have applied the antitrust laws to changing markets, from a time of horse and buggies to the present digital age.").

As another example, the 1968 Gun Control Act—which sought to reduce firearm deaths—authorized federal regulation of "machine guns." *See* Gun Control Act, Pub L 90-618, § 201, 82 Stat 1213, 1231 (Oct. 22, 1968). Fifty years later, a

shooter used a device called a "bump stock" to increase the firing rate of his rifles and kill more than fifty people at a Las Vegas concert. In response, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) began regulating bump stocks as "machine guns," even though the stocks post-dated the Gun Control Act by thirty years. *See Bump-Stock-Type Devices*, 83 Fed Reg 66,514, 66,517 (Dec. 26, 2018); *see* A. Chung, *U.S. Supreme Court again spurns challenge to "bump stock" ban*, Reuters (Nov. 14, 2022), https://www.reuters.com/legal/us-supreme-court-again-spurns-challenge-gun-bump-stock-ban-2022-11-14/.

In sum, the coalition petitioners have not made "an affirmative showing" that the legislature considered and rejected greenhouse gases as air contaminants. Thus, the Court must "take the legislature at its word" that a "gas" means a "gas." *South Beach Marina*, 301 Or at 531; *see also City of Portland v. Bartlett*, 369 Or 606, 626–27, 509 P3d 99, 112 (2022).

B. "Source" was not a narrow term of art in 1961.

For its part, petitioner WSPA does not dispute that greenhouse gases are air contaminants. Instead, WSPA argues that fuel suppliers cannot be "air contamination sources" as defined in ORS 468A.005(4), because in 1961 the term "source" had a "specialized meaning" in the context of air pollution—*i.e.*, it was a term of art that excluded fuel suppliers. (Br 23). According to WSPA, the term

"source" only ever refers to "sources of *direct* air pollution emissions." (Br 23). In support, WSPA cites primarily to post-1961 versions of the federal Clean Air Act.

But there are three clear problems with WSPA's argument. First, as explained by the EQC, petitioner relies on statutes adopted after 1961, which say nothing about what the legislature intended in 1961. *See DeFazio*, 296 Or at 561.

Second, WSPA tellingly ignores the other state air pollution laws that existed before 1961. This is presumably because those laws authorized broad regulation of air pollution sources, which went far beyond the cramped reading that WSPA advocates here. *See, e.g.*, 1954 Mass Acts, ch 672, § 4 (Massachusetts) (authorizing municipal authorities to adopt any "reasonable rules and regulations for the control of atmospheric pollution"); 1954 NJ Laws, ch 212, § 8 (New Jersey) (creating an agency that "shall have the power to formulate and promulgate . . . rules and regulations controlling and prohibiting air pollution throughout the State"). Moreover, those pre-1961 statutes did not define "source" uniformly as WSPA supposes. Some defined "air contamination source," but those definitions varied in substance; others provided no definition; and still others barely used the word "source." *Compare, e.g.*, 1959 Pa Acts, no 787, § 3 (Pennsylvania) (defining "air contamination source" similarly to Oregon), *with, e.g.*, 1954 NJ Laws, ch 212 (no definition, and limited, disparate uses of "source").

Thus, to the extent non-Oregon regulatory practices are relevant, they cut strongly against WSPA. State statutes from before 1961 did indeed recognize diverse contributors to air pollution, and authorized a broad and comprehensive regulatory response. *See, e.g.*, 1957 Ha Acts, no 60, §§ 2, 4 (Hawaii) (declaring that "the people of the Territory of Hawaii have a primary interest in atmospheric purity and freedom of the air from any air contaminants" and providing the agency authority to promulgate regulations "controlling and prohibiting air pollution . . . throughout the Territory"). More fundamentally, however, WSPA does not point to any evidence that the Oregon legislature borrowed from any extra-jurisdictional statute. In other words, WSPA has not shown that any extra-jurisdictional statute is relevant context for interpreting the plain text of ORS chapter 468A.

Third, even if statutes enacted *after* 1961 were somehow relevant, WSPA misconstrues both the text and history of its principal authority—the federal Clean Air Act. According to WSPA, that law only authorizes narrow regulation of what WSPA calls "direct sources." (Br 23–24). But WSPA has simply cherry-picked isolated provisions that it believes regulate "direct" sources, while ignoring adjacent provisions that regulate non-"direct" sources.

For example, WSPA asserts (Br 23) that 42 USC § 7571 is one provision that shows that "source" means "direct source." Section 7571 authorizes the U.S. Environmental Protection Agency ("EPA") to set emission standards for aircraft.

But that provision does not use the word "source" at all. *See* Pub L 91-604 § 11(a)(1), 84 Stat 1703 (Dec. 31, 1970); 42 USC § 7571. And there is no reason for the Court to consider that provision, but not the contemporaneously enacted Section 7545. That section authorizes EPA to regulate "any fuel or fuel additive for use in a motor vehicle" if "any emission products of such fuel . . . will endanger the public health or welfare." *See* Pub L 91-604 § 9(a), 84 Stat at 1698; 42 USC § 7545. This provision clearly authorizes regulation of sources like fuel suppliers that do not meet WSPA's cramped "direct" source test.

WSPA's use of federal legislative history (Br 32–37) is just as selective. The legislative history of the Clean Air Act is voluminous, and WSPA barely scratches the surface. As just one example, in the run-up to the 1970 amendments, Congress heard testimony from the agency Administrator that vehicular air pollution "is a problem that must be attacked simultaneously from many directions. Attention must be given not only to the motor vehicle engine but also to the fuel it uses." Congressional Research Service, *A Legislative History of the Clean Air Act Amendments of 1970*, Serial No 93-18, vol 2, p 1322–1325 (January 1974), *available at* https://catalog.hathitrust.org/Record/003215009.

In any event, the history of the Clean Air Act is replete with examples of federal regulation of non-"direct" sources. Section 7545 is just one example of how federal law has consistently authorized regulation of the fuel supply to control air

pollution.[4] The 1963 Clean Air Act directed federal officials to research "improved, low-cost techniques for extracting sulfur from fuels." Pub L 88-206, § 3(a)(4), 77 Stat 392, 394 (Dec. 17, 1963); *see also* S Rep 90-403, at 17, 29 (1967) (explaining that the 1967 Air Quality Act would require federal regulators to publish pollution control methods—including "fuel use limitations"—for areas of the country with poor air quality).

In the early 1970s, EPA issued regulations capping the lead content of gasoline and creating an affirmative duty for most gas stations "to sell at least one grade of unleaded gasoline." *See Amoco Oil Co. v. EPA*, 501 F2d 722, 744 (DC Cir 1974) (upholding these regulations). And in one of Intervenor-Respondent's earliest clean air cases, NRDC successfully challenged EPA's failure to require that state air quality plans account for non-"direct" sources of pollution. *See NRDC v. EPA*, 475 F2d 968, 970 (DC Cir 1973). In response, EPA prepared regulatory guidance on "complex sources," "defined as a facility that has or leads to

[4] Fuel supply regulation has been a persistent feature of state and federal air pollution control for decades. *See, e.g.*, OAR 340-228-0100 (prohibiting sale and distribution of "any residual fuel oil containing more than 1.75 percent sulfur by weight"); California Air Resources Board, *California Reformulated Gasoline*, https://ww2.arb.ca.gov/our-work/programs/fuels-enforcment-program/california-reformulated-gasoline (describing multi-decade regulation of fuel formulation to improve air quality); US EPA, *Phase II Reformulated Gasoline: The Next Major Step Toward Cleaner Air*, EPA420-F-99-042 (Nov. 1999) (starting in 1995, 18 jurisdictions "used fuel blended to burn cleaner and reduce emissions"), *available at* https://nepis.epa.gov/Exe/ZyPDF.cgi/00000FG5.PDF?Dockey=00000FG5.PDF.

secondary or adjunctive activity which emits or may emit a pollutant," including, but not limited to, shopping centers, parking lots, recreational areas, and drive-in theaters. 38 Fed Reg 6279, 6279–80 (Mar. 8, 1973).

In sum, WSPA has not shown that any extra-jurisdictional statute is relevant context for interpreting the word "source" in ORS 468A.005(4). And even if such authorities were relevant, they cut strongly against WSPA's cramped interpretation of the EQC's authority.

C. "Emission standard" was not a narrow term of art in 1969.

WSPA also argues that the phrase "emission standard" had a "common meaning in the context of air pollution" (Br 40)—*i.e.*, that the phrase was a term of art in 1969 when the Oregon legislature added it to ORS 468A.025(3). Or Laws 1969, ch 593, §30. This argument fails for the same reasons discussed above. *See supra* Section B. WSPA again selectively cites to later-enacted statutes from other jurisdictions, while failing to address contemporaneous statutes that are inconsistent with its cramped interpretation.

First, although several state statutes defined "emission standard" as of 1969, WSPA conspicuously cites none of them. In 1969, for example, Maine provided that its pollution control agency could establish standards, "herein called 'emission standards,' limiting and regulating in a just and equitable manner the amount and type of air contaminants which may be emitted to the ambient air within a region."

1969 Me Laws, ch 474, § 585. Presumably if post-1969 statutes were relevant context, this 1969 statute would be as well. Regardless, WSPA has not shown that the Oregon legislature considered any extra-jurisdictional statute to give meaning to "emission standard."

Second, even if post-1969 statutes were somehow legally relevant, WSPA again misconstrues its selected authorities. For example, WSPA cites a California statute defining "emission standard" (Br 41), but then fails to cite controlling California case law that rejects WSPA's interpretation of that phrase. The California Supreme Court has held that a regulation governing automotive fuel content is an "emission standard" under California law. As the Court explained, "merely because [an agency's] authority is expressed in terms of controlling 'emissions' or setting 'emission standards' does not in itself compel a conclusion that it is prohibited from regulating fuel content. . . . The regulation of an emission may be accomplished either by mechanical means which control the pollutants released by an engine using leaded gasoline, or by specifying the ingredients of the gasoline used in the engine." *W. Oil & Gas Assn. v. Orange Cnty. Air Pollution Control Dist.*, 14 Cal 3d 411, 418, 534 P2d 1329 (1975). Thus, to the extent the California example is relevant, it supports the EQC's authority.

The only other statutory definition WSPA cites is from the federal Clean Air Act. As an initial matter, that statute's definition of "emission standard" is quite

different than the California definition. *Compare* California Health & Safety Code, § 39027, *with* 42 USC § 7602(k). And WSPA does not explain how two disparate definitions can establish a "common" meaning of a term. Moreover, WSPA also elides that the federal definition includes limits on the quantity or rate of emissions "on a continuous basis," as well as "any design, equipment, work practice or operational standard promulgated under this chapter." 42 USC § 7602(k). The Clean Air Act is sprawling, and WSPA makes no attempt to show that all of these other possible regulatory means fit its narrow conception of emission standards. In fact, at least one court—interpreting similar language in its state air pollution control act—has rejected WSPA's narrow reading. *Cf. Espinosa v. Roswell Tower*, 121 NM 306, 311, 910 P2d 940 (Ct. App. 1995) (upholding various work practice standards for asbestos removal at construction sites as "emission standards").

At bottom, WSPA fails to grapple with the actual text of the Oregon statute, and with the differences between the Oregon statute and extra-jurisdictional statutes. This is illustrated by petitioner's reliance on the Washington Supreme Court's decision in *Ass'n of Washington Bus. v. Washington State Dep't of Ecology*, 195 Wash 2d 1, 5, 455 P3d 1126, 1128 (2020). WSPA describes the Washington case as addressing "a nearly identical" question. (Br 42). But it did no such thing. Washington's air pollution statute defines "sources" and "emission standards" in materially different language than the Oregon statute. *Compare* Rev

Code Wash 70A.15.1030 (does not define "air contamination source"; does not include "by reason of which" language; and defines "emission standard" by reference to federal law), *with* ORS 468A.005(4) (defines "air contamination source" using "by reason of which" language) *and* ORS 468A.025 (describes "emission standards" as a type of "air quality standard," which "set forth the maximum amount of air pollution permissible in various categories of air contaminants").

The text of the Oregon statute is the best evidence of the Oregon legislature's intent, particularly where the legislature has specifically addressed and defined the relevant terms. *See PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993); *State v. Couch,* 341 Or 610, 617, 147 P3d 322 (2006). WSPA has not shown that the legislature intended to adopt any other jurisdiction's meaning of "emission standard," and the Court should apply the statute by its plain terms.

D. The CPP rules are incremental regulations that advance the expressed legislative policy of clean air.

Like WSPA, the utility petitioners never grapple with the full text of the EQC's authorizing statutes. As the EQC explains, the utility petitioners' interpretation fails to account for, among other things, the phrase "by reason of

which" in ORS 468A.005(4).[5] The Court should decline petitioners' invitation to read this key phrase out of the statute.

In particular, petitioners' concerns about the supposedly "unprecedented" nature of the CPP rules or their "controversial implications" (Utility Br 18) provide no basis to rewrite the statute. Those concerns are also not well-founded. The CPP rules represent an incremental step toward the express legislative goal of clean air, *see* ORS 468A.010, and are commensurate with actions already taken by air quality regulators in other jurisdictions.

First, there is nothing "unprecedented" about the CPP rules in any legally relevant sense. The specific combination of regulatory elements, standards, and covered entities might be new; but on that basis, virtually every new regulation would be unprecedented. For example, a statute might authorize a regulator to limit additives in fuels. If the regulator first limits sulfur in gasoline, there is no reason that action prevents the regulator from later limiting lead in diesel fuel. In each

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[5] Intervenor-Respondent also notes the Supreme Court's decision in *Am. Fed'n of Tchrs.-Oregon, AFT, AFL-CIO v. Oregon Taxpayers United PAC*, 345 Or 1, 189 P3d 9 (2008). In a different statutory context, the Court concluded that the phrase "by reason of" includes the "intended" outcomes of an action. *Id.* at 17. Here, the utility petitioners imply that there is some doubt about whether their customers will combust the natural gas supplied to them. (Br 3) (customers "presumed" to combust the natural gas supplied); (Br 9) (customers "may" combust the natural gas supplied). But fuel exists to be burned. A utility that sells fuel intends for the end-consumer to burn it. The resulting emissions are a determined, tangible outcome of petitioners' products being used exactly as intended.

case, absent legislative history revealing "that certain situations were expressly considered to be included or excluded," the relevant legal question is whether the agency's application of the statute "is consistent with or tends to advance a more generally expressed legislative policy." *Springfield Educ. Ass'n v. Springfield Sch Dist. No. 19*, 290 Or 217, 226, 621 P2d 547, 554 (1980). And in each case, what matters is the terms of the authority delegated to the agency—"the words of the statutes." *Id*. at 222–223.

The utility petitioners place great weight on the fact that the statute does not say "natural gas distribution" when defining air contamination sources. (Br 13). But the statutory definition of "air contamination source" also does not include "aluminum smelting" or "rubber vulcanization." And it would be absurd to claim that the EQC therefore cannot regulate industrial smelters as air contamination sources. The statute does not define sources at that level of granularity. It instead provides an expansive, functional definition of "air contamination source," which includes "any source . . . by reason of which" contaminants are emitted in Oregon. *See* ORS 468A.005(4).[6] The EQC is authorized to regulate any source meeting that definition, regardless of whether it has previously done so. *Cf. Albany & E. R.R.*

[6] In contrast, some statutes do define concepts in granular terms. For example, the Oregon Racketeer Influenced and Corrupt Organization Act defines prohibited "racketeering activity" by enumerating a list of four dozen specific offenses. *See* ORS 166.715(6).

Co. v. Martell, 319 Or App 816, 831, 511 P3d 1101, 1109–10, *rev. den.*, 370 Or 303, 518 P3d 124 (2022) ("It is, of course, an ancient maxim that remedial statutes are to be construed liberally to effectuate the purpose for which they were enacted.").

Second, the CPP rules are not "unprecedented" in any practical sense either. As discussed above, regulations on fuel suppliers are some of the longest-standing means used to control emissions. *See* Section B *supra*; *Amoco Oil Co. v. EPA*, 501 F2d 722, 744 (DC Cir 1974); *W. Oil & Gas Assn. v. Orange Cnty. Air Pollution Control Dist.*, 14 Cal 3d 411, 418, 534 P2d 1329 (1975). Regulators also long ago implemented average standards that applied across an activity or industry. *See, e.g.*, *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F2d 506, 512 (DC Cir 1983) (discussing lead-content standards set as "a 'pooled' average for all gasoline . . . produced by a particular refiner"). Other longstanding features of agency regulation include the ability of regulated entities to bank or trade compliance credits, *see, e.g., Union Oil Co. of California v. EPA*, 821 F2d 678, 680 (DC Cir 1987); the assessment of monetary penalties for compliance shortfalls, *see, e.g.*, Pub L 103-272, § 1(e), 108 Stat 1072 (July 5, 1994) (penalties for failure to achieve vehicular fuel economy standards); and the ability to offset direct compliance with credits earned for alternative actions that advance the underlying statutory goals, *see, e.g.*, 40 CFR § 86.1869-12 (allowing credit towards

tailpipe emission standards for automakers who invest in, for example, improved vehicle window glazing or high efficiency exterior lights).

In particular, cap-and-reduce structures like the CPP rules have been a common regulatory means to address distributed pollution problems. For example, the Regional Greenhouse Gas Initiative is a market-based agreement among a dozen eastern states to cap and reduce carbon dioxide emissions from the power sector. *See* Elements of RGGI, RGGI, https://www.rggi.org/program-overview-and-design/elements. The federal Acid Rain Program set "a permanent cap on the total amount of [sulfur dioxide] that may be emitted by electric generating units" and "a system of allowance trading" "to achieve emission reductions." *See* EPA, *Acid Rain Program*, https://www.epa.gov/acidrain/acid-rain-program. And California regulators oversee several cap-and-credit-trading-type programs, *see, e.g.*, California Air Resources Board, FAQ Cap-and-Trade Program, https://ww2.arb.ca.gov/resources/documents/faq-cap-and-trade-program. In short, the elements of the CPP rules have regulatory predecessors and employ tested regulatory designs.

Finally, the utility petitioners' suggestion that the CPP rules have "controversial implications" (Br 18) is not legally relevant. Petitioners provide no standard for determining the "controversial-ness" of a regulation, or any authority holding that interpretive standards vary depending on how "controversial" a

regulation is.[7] Nor have petitioners shown that any of the supposed "implications" of the CPP rules—controversial or otherwise—are anything but hypothetical. "[I]n a challenge to [a] rule's validity," this Court "do[es] not adjudicate particular hypothetical applications." *See Indep. Contractors Rsch Inst. v. Dep't of Admin. Servs.*, 207 Or App 78, 95, 139 P3d 995, 1005 (2006). For example, the CPP rules do not actually regulate "supermarkets" for their food waste (Utility Br 18), and whether the EQC *can* regulate supermarkets is irrelevant here.

Petitioners also overstate the implications of the CPP rules for petitioners' own activities. They contend, for example, that the rules "forc[e] them to drastically reduce the natural gas they supply to Oregon residents and businesses." (Br 10). But they do not explain why that is so.

In fact, petitioners themselves acknowledge elsewhere that other compliance options exist. For instance, in federal regulatory filings, petitioner Northwest Natural Gas Company ("NW Natural") has described its investments in renewable natural gas (RNG) or biomethane. *See* Northwest Natural Gas Co., 2021 Annual

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[7] Petitioners misstate the holding of *Morgan v. Stimson Lumber Co.*, which did not "strik[e] down an agency action" (Br 18), but in fact "h[e]ld that the rule itself is within the [respondent's] authority" and "affirmed" the respondent's order. 288 Or 595, 604–605, 607 P2d 150 (1980). Moreover, *Morgan* expressly highlights the insufficiency of generalized attacks on agency authority that are not grounded in the text of the specific authorizing statute. *See id.* 600–602 ("different holdings on the validity of agency rules . . . do not result from different generalizations about agency rulemaking but from scrutiny of . . . the particular law at issue").

Report on SEC Form 10-K (Feb. 25, 2022), at 13, 15, 22, 38, 48, 59, *available at* https://ir.nwnaturalholdings.com/financials/sec-filings/default.aspx. For example, "[i]n 2016, NW Natural initiated a multi-pronged, multi-year strategy to accelerate and deliver greater GHG emission reductions in the communities we serve," with "[k]ey components of this strategy including customer energy efficiency . . . and seeking to incorporate RNG and hydrogen into our gas supply." *Id*. at 48. Both strategies should facilitate compliance with the CPP rules in ways other than "drastic" reductions in service. Energy efficiency means customers need less fuel. And because RNG appears to be excluded from the CPP rules, displacing fossil gas with organically derived RNG would reduce petitioner's overall compliance obligations. *See* OAR 340-271-0020(3), 340-271-0110(3)(b)(B)(i) (covered emissions do not include emissions from "combustion of biomass-derived fuels," including biomethane).[8]

In short, the utility petitioners' arguments about the design or implications of the CPP rules do not provide any legal basis to narrow the scope of the EQC's statutory authority under ORS chapter 468A.

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[8] NW Natural is not alone in expanding into RNG. *See* Avista Corp., 2021 Annual Report on SEC Form 10-K (Feb. 23, 2022), at 15, *available at* https://investor.avistacorp.com/financial-information/sec-filings?field_nir_sec_date_filed_value=&items_per_page=10#views-exposed-form-widget-sec-filings-table (announcing strategy to "diversify or transition from fossil fuel-based natural gas to renewable natural gas" to reach goal of "100 percent" reduction in carbon emissions for natural gas by 2045).

CONCLUSION

The Court should deny the petitions for judicial review.

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Respectfully submitted,

/s/ Daniel C. Snyder
Daniel C. Snyder
OSB No. 105127
PUBLIC JUSTICE
1620 L Street NW, Suite 630
Washington, D.C. 20036
dsnyder@publicjustice.net

Pete Huffman
pro hac vice
Natural Resources Defense Council
1152 15th Street NW, Suite 300
Washington, DC 20005
phuffman@nrdc.org

Counsel for
Natural Resources Defense Council

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limitation in ORAP 5.05, which word count is 5,562 words.

I certify the font type and size in this brief is Times New Roman 14-point for both the text and footnotes, as required by ORAP 5.05.

CERTIFICATE OF FILING

I certify that on January 4, 2023, I filed the foregoing brief by causing it to be electronically filed with the APPELLATE COURT ADMINISTRATOR through the appellate court e-Filing system.

CERTIFICATE OF SERVICE

I certify that service of the foregoing brief will be accomplished on all parties of record by the appellate court e-Filing system at the participants' email addresses as recorded on January 4, 2023, in the appellate court e-Filing system.

Clifford S. Davidson, OSB # 125378
Drew Eyman, OSB # 163762
SNELL & WILMER LLP
1455 SW Broadway, Suite 1750
Portland, OR 97201
(503) 624-6800
csdavidson@swlaw.com
deyman@swlaw.com
Attorneys for Petitioners in A178216

Ellen F. Rosenblum, OSB # 753239
Denise G. Fjordbeck, OSB # 822578
Carson L. Whitehead, OSB #105404
Oregon Department of Justice
400 Justice Bldg., 1162 Court St. NE
Salem, OR 97301-4096
(503) 378-6002
denise.fjordbeck@doj.state.or.us
carson.l.whitehead@doj.state.or.us
Attorneys for Respondent EQC

Megan H. Berge, *pro hac vice*
BAKER BOTTS L.L.P.
101 California Street
San Francisco, CA 94111
(415) 291-6233
megan.berge@bakerbotts.com

Scott Novak, *pro hac vice*
Sterling Marchand, *pro hac vice*
BAKER BOTTS L.L.P.
700 K Street, NW
Washington, D.C. 20001
(202) 304-5099
scott.novak@bakerbotts.com
sterling.marchand@bakerbotts.com

Attorneys for Petitioners in A178216

Maura C. Fahey, OSB # 133549
Erin Hogan-Freemole, OSB #212850
CRAG LAW CENTER
3141 E Burnside Street
Portland, OR 97214
(503) 525-2724
maura@crag.org
erin@crag.org

Attorneys for Intervenor-Respondents Beyond Toxics, Oregon Environmental Council, Climate Solutions, Environmental Defense Fund, and Oregon Business for Climate

Daniel C. Snyder, OSB # 105127
PUBLIC JUSTICE
1620 L Street NW, Suite 630
Washington, D.C. 20036
(202) 861-5251
dsnyder@publicjustice.net

Pete Huffman, *pro hac vice*
Natural Resources Defense Council
1152 15th Street, NW, Suite 300
Washington, DC 20005
(202) 289-2428
phuffman@nrdc.org

Attorneys for Intervenor-Respondent Natural Resources Defense Council

Rachel C. Lee, OSB # 102944
Thomas Wood, OSB # 934601
Geoffrey Tichenor, OSB # 050958
STOEL RIVES LLP
760 SW Ninth Avenue, Suite 3000
Portland, OR 97205
(503) 224-3380
rachel.lee@stoel.com
tom.wood@stoel.com
geoffrey.tichenor@stoel.com

Attorneys for Petitioners in A178217 and Intervenor-Petitioner NFIB

Steven G. Liday, OSB # 075975
Joshua M. Sasaki, OSB # 964182
Iván Resendiz Gutierrez, OSB # 154617
Katelyn J. Fulton, OSB # 183404
MILLER NASH LLP
3400 U.S. Bancorp Tower
111 SW Fifth Avenue
Portland, OR 97204
(503) 224-5858
steven.liday@millernash.com
josh.sasaki@millernash.com
ivan.resendiz@millernash.com
katelyn.fulton@millernash.com

Attorneys for Petitioner in A178218

Dated: January 4, 2023

/s/ Daniel C. Snyder

Daniel C. Snyder, OSB No. 105127

Counsel for
Natural Resources Defense Council