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THE HONORABLE ANN L. AIKEN

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, a trade association; **AMERICAN TRUCKING ASSOCIATIONS, INC.**, a trade association; and **CONSUMER ENERGY ALLIANCE**, a trade association,

Plaintiffs,

v.

JANE O'KEEFE, **ED ARMSTRONG**, **MORGAN RIDER**, **COLLEEN JOHNSON**, and **MELINDA EDEN**, in their official capacities as members of

No. 3:15-cv-00467-AA

CONSERVATION DEFENDANT-INTERVENORS' MOTION FOR JUDGMENT ON THE PLEADINGS

ORAL ARGUMENT REQUESTED

Oregon's Environmental Quality Commission; **DICK PEDERSEN**, **JONI HAMMOND**, **WENDY WILES**, **DAVID COLLIER**, **JEFFREY STOCUM**, **CORY-ANN WIND**, **LYDIA EMER**, **LEAH FELDON**, **GREG ALDRICH**, and **SUE LANGSTON**, in their official capacities as officers and employees of Oregon's Department of Environmental Quality; **ELLEN F. ROSENBLUM**, in her official capacity as Attorney General of the State of Oregon; and **KATE BROWN**, in her official capacity as Governor of the State of Oregon,

Defendants,

and

OREGON ENVIRONMENTAL COUNCIL, INC., **CLIMATE SOLUTIONS**, **NATURAL RESOURCES DEFENSE COUNCIL**, **ENVIRONMENTAL DEFENSE FUND**, and **SIERRA CLUB**,

Defendant-Intervenors.

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MOTION

Defendant-Intervenors Oregon Environmental Council, *et al.* (collectively "Oregon Environmental Council") hereby move for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). This motion will not delay resolution of this case as the pleadings closed within the past two weeks and the Oregon State Defendants and Defendant-Intervenors California Air Resources Board and State of Washington ("California-Washington Intervenors") have filed motions to dismiss presenting the same defenses. Pursuant to Local Rule 7-1, undersigned counsel for Oregon Environmental Council certifies that she conferred with counsel for Plaintiffs who indicated that Plaintiffs will oppose this motion. In support of this motion, Oregon Environmental Counsel submits the following Memorandum of Points and Authorities and incorporates by reference the arguments made on the merits of Plaintiffs' claims by the California-Washington Intervenors.

MEMORANDUM OF POINTS AND AUTHORITIES

"Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.,* 896 F.2d 1542, 1550 (9th Cir.1990); *McGlinchy v. Shell Chem. Co.,* 845 F.2d 802, 810 (9th Cir.1988) (quoting *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984)) (the court can grant a Rule 12(c) motion when "it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations" in the complaint). On the face of the pleadings, Plaintiffs American Fuel & Petroleum Manufacturers, *et al*. ("Plaintiffs") have failed to state a claim and no relief can be granted.

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I. BACKGROUND

The Oregon legislature has found that "[g]lobal warming poses a serious threat to the economic well-being, public health, natural resources and environment of Oregon." ORS 468A.200(3). These threats include "[r]educed snowpack, changes in the timing of stream flows, extreme or unusual weather events, rising sea levels, increased occurrences of vector-borne diseases and impacts on forest health." ORS 468A.200(4). Due to these and other impacts, "[g]lobal warming will have detrimental effects on many of Oregon's largest industries, including agriculture, wine making, tourism, skiing, recreational and commercial fishing, forestry and hydropower generation, and will therefore negatively impact the state's workers, consumers and residents." ORS 468A.200(6).

To minimize these impacts, the legislature has declared it the policy of the state to reduce statewide greenhouse gas emissions by specified levels, ORS 468A.205(1), and directed the Oregon Environmental Quality Commission ("Commission") to issue low carbon fuel standards as one critical step toward meeting these goals. *See* SB 324, §§ 2-3, Or. Laws 2015. This direction is consistent with prudent public policy, which requires substantial reductions in all major sources of greenhouse gas emissions to avoid catastrophic climate change. Transportation produces over a third of Oregon's greenhouse gas emissions. *See* Oregon Dep't of Envtl. Quality Advisory Committee, Final Report: Oregon Low Carbon Fuel Standards at 8 (2011), available at http://www.deq.state.or.us/aq/committees/docs/lcfs/reportFinal.pdf. Raising fuel economy and tailpipe emission standards can play a positive role, but it is widely recognized that reducing the carbon intensity of fuels is also necessary. Toward that end, Oregon's Clean Fuels Program is designed to reduce the average greenhouse gas emission of transportation fuels by 10 percent below 2010 levels by 2025. SB 324, §§ 2-3, Or. Laws 2015.

In January 2015, the Commission adopted the Clean Fuels Rule (also called the Low

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Carbon Fuel Standard or "LCFS") to reduce emissions of greenhouse gas pollutants from transportation fuels sold in the state. The LCFS limits the carbon intensity of most transportation fuels used in Oregon. In the rule, Oregon used life cycle analysis – the best available scientific method for calculating the carbon intensity of fuels. Such a life cycle emissions approach establishes neutral criteria for distinguishing among fuels based on their climate impacts. The methodology was developed by the Argonne National Laboratory, is used as the basis of California's LCFS and by the U.S. Environmental Protection Agency in its renewable fuel standard and, most importantly for purposes of this motion, has been upheld by the Ninth Circuit in the face of the Commerce Clause challenges presented by Plaintiffs to California's comparable rule. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1081-82 (2013), *rehearing en banc denied*, 740 F.3d 507, *cert. denied*, 134 S.Ct. 2875 (2014). By using this methodology, the LCFS establishes an objective basis for promoting clean fuels and creates incentives for innovators (whether in Oregon, other states, or overseas) to develop less-polluting fuels. We refer to the motions filed by the Oregon State Defendants and the California-Washington Intervenors for a more detailed description of the Oregon Clean Fuels Rule.

II. THE NINTH CIRCUIT'S DECISION IN *ROCKY MOUNTAIN FARMERS UNION* REQUIRES DISMISSAL OF PLAINTIFFS' COMMERCE CLAUSE CLAIMS.

Plaintiffs are among the parties who have challenged California's LCFS. In *Rocky Mountain Farmers Union*, the Ninth Circuit ruled against Plaintiffs on the core of their Commerce Clause claims. Yet Plaintiffs repeat the same challenges to Oregon's Clean Fuels Rule. A brief recitation of the key rulings in *Rocky Mountain* demonstrates why Plaintiffs' repackaged claims have no merit.

In *Rocky Mountain*, the Ninth Circuit upheld the use of life cycle greenhouse gas emissions as a permissible, nondiscriminatory method for regulating the carbon intensity of

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transportation fuels, rejecting the suggestion that California is constitutionally limited to regulating fuels based only on the emissions produced when the fuel is burned in California. As the Ninth Circuit explained, life cycle analysis is the only accurate way to measure and compare the greenhouse gas emissions of fuels:

> Without lifecycle analysis, all GHGs emitted before the fuel enters a vehicle's gas tank would be excluded from California's regulation. Similarly, the climate-change benefits of biofuels such as ethanol, which mostly come before combustion, would be ignored if CARB's regulatory focus were limited to emissions produced when fuels are consumed in California.

730 F.3d at 1081.

The Ninth Circuit held that distinguishing among fuels based on their life cycle emissions does not constitute impermissible discrimination:

> Under dormant Commerce Clause precedent, if an out-of-state ethanol pathway does impose higher costs on California by virtue of its greater GHG emissions, there is a nondiscriminatory reason for its higher carbon intensity value. . . . Stated another way, if producers of out-of-state ethanol actually cause more GHG emissions for each unit produced, because they use dirtier electricity or less efficient plants, CARB can base its regulatory treatment on these emissions. If California is to successfully promote low-carbon-intensity fuels, countering a trend towards increased GHG output and rising world temperatures, it cannot ignore the real factors behind GHG emissions.

730 F.3d at 1090; *see also id*. at 1089 (explaining that California's "Fuel Standard does not base its treatment on a fuel's origin but on its carbon intensity" and considers origin only when that location affects the actual greenhouse gas emissions associated with the fuel); *id*. at 1094 ("The dormant Commerce Clause does not require California to ignore the real differences in carbon intensity among out-of-state ethanol pathways, giving preferential treatment to those with a higher carbon intensity. These factors are not discriminatory because they reflect the reality of assessing and attempting to limit GHG emissions from ethanol production.").

The *Rocky Mountain* court also held that the California fuel standard did not impermissibly regulate conduct in other states:

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> The Fuel Standard regulates only the California market. Firms in any location may elect to respond to the incentives provided by the Fuel Standard if they wish to gain market share in California, but no firm must meet a particular carbon intensity standard, and no jurisdiction need adopt a particular regulatory standard for its producers to gain access to California.

730 F.3d at 1101. The Ninth Circuit explained that states remain "free to regulate commerce and contracts within their boundaries with the goal of influencing the out-of-state choices of market participants." *Id.* at 1103.

Despite these clear and controlling holdings, Plaintiffs are mounting an identical (indeed, sometimes verbatim) challenge to Oregon's LCFS, asserting impermissible discrimination and extra-territorial regulation. *See* California-Washington Intervenors' Motion at 13-14 (highlighting identical claims in the complaints in this case and *Rocky Mountain*). Plaintiffs' Commerce Clause claims collapse like a house of cards under the *Rocky Mountain* precedent. Oregon, like California, "if it is to have any chance to curtail GHG emissions, must be able to consider all factors that cause those emissions when it assesses alternative fuels." *Id.* at 1090. In our system of federalism, Oregon's right to encourage the development of alternative fuels in order to reduce carbon emissions follows the cherished tradition of encouraging state experimentation. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

III. PLAINTIFFS HAVE FAILED TO STATE A VIABLE PREEMPTION CLAIM.

A state's police power to regulate to protect the health of its residents and the state's environment can be overridden only when it is the clear and manifest purpose of Congress to do so. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Plaintiffs cannot prove facts showing that this preservation of state authority has been overridden.

The relevant provision of the Clean Air Act preempts state environmental regulations of fuels or fuel additives only "(i) if the Administrator has found that no control or prohibition of

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the characteristic or component of a fuel or fuel additive … is necessary and has published his finding in the Federal Register," or (ii) if the Administrator has prescribed federal controls of such characteristic or component. 42 U.S.C. § 7545(c)(4)(A).

Nor has EPA made or published the "unnecessary" finding described in 42 U.S.C. § 7545(c)(4)(A)(i). Plaintiffs point to EPA's 1994 reformulated gasoline rule that controls ozone-forming pollution, not GHGs. Complaint, ¶¶ 96-98, 132-36, citing 59 Fed. Reg. 7716 (Feb. 16, 1994). Indeed, the reformulated gasoline rule never mentions GHGs or climate pollution. Instead, it focused on the ozone-forming potential of various pollutants, and excluded methane solely because it lacked such potential. 59 Fed. Reg. 7716. Plaintiffs have pointed to no EPA finding that it is unnecessary to regulate methane (let alone carbon dioxide) as a fuel component because of its carbon intensity.[1]

Second, plaintiffs contend that EPA's Renewable Fuel Standard conflicts with Oregon's LCFS. As the California-Washington Intervenors explain at 27, EPA explicitly rejected a request in that rulemaking to preempt state low carbon fuels standards, seeing no conflict in such concurrent regulation, and rather identified compatible goals of promoting alternative fuels served by both.

CONCLUSION

For these reasons and those given by the California-Washington Intervenors on the merits in their memorandum of points and authorities in support of their June 5, 2015 motion to dismiss, Oregon Environmental Council respectfully requests that this Court grant this motion for

[1] To the contrary, EPA has repeatedly affirmed that methane and other GHGs "may reasonably be anticipated both to endanger public health and to endanger the public welfare," thereby warranting further regulatory controls. 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009); EPA, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830, 34,895 (June 8, 2014).

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judgment on the pleadings and dismiss Plaintiffs' complaint.

Respectfully submitted this 17TH day of June, 2015.

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CERTIFICATE OF SERVICE

I certify that on June 17, 2015, I filed the foregoing document via CM/ECF, which automatically noticed the following the parties:

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Executed this 17th day of June, 2015, at Seattle, Washington.

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