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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

SPACE AGE FUEL, INC., an Oregon corporation; A&M TRANSPORT, LLC, an Oregon limited liability company; OTLEY LAND AND CATTLE, LLC; an Oregon limited liability company; OREGON BUSINESS & INDUSTRY, an Oregon nonprofit corporation; OREGON MANUFACTURERS AND COMMERCE, an Oregon nonprofit corporation; OREGON FOREST & INDUSTRIES COUNCIL, an Oregon nonprofit corporation; OREGON FARM BUREAU FEDERATION; an Oregon nonprofit corporation; and OREGON TRUCKING ASSOCIATION, an Oregon nonprofit corporation,

Plaintiffs,

v.

KATE BROWN, in her official capacity as Governor of Oregon,
{FIRST AMENDED} ENVIRONMENTAL QUALITY COMMISSION, OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY,

[Defendant]
{Defendants}.

No. 20CV26872

{FIRST AMENDED} COMPLAINT

(Declaratory Judgment)

(Not Subject to Mandatory Arbitration)

Fee Authority: ORS 21.135(2)(f)

Plaintiffs Space Age Fuel, Inc.; A&M Transport, LLC; Otley Land and Cattle, LLC; Oregon Business & Industry; Oregon Manufacturers and Commerce; Oregon Forest & Industries Council; Oregon Farm Bureau Federation; and Oregon Trucking Association (collectively, "Plaintiffs") allege for their **first amended** complaint against Governor Kate Brown, in her official capacity as the Governor of Oregon (the "Governor") **and the**

1 Environmental Quality Commission (“EQC”) and the Oregon Department of
2 Environmental Quality (“DEQ”) (collectively, “Agency Defendants”)}, as follows:

3 INTRODUCTION

4 1.

5 On March 10, 2020, the Governor issued Executive Order No. 20-04 (“EO 20-04”).
6 Through EO 20-04, the Governor unilaterally set a minimum 80 percent reduction in
7 greenhouse gas (“GHG”) emissions for the State of Oregon, {an interim 45 percent
8 reduction by 2035}, and doubled the carbon intensity reduction standard previously
9 established by the Legislative Assembly. EO 20-04 mandates that 16 separate state agencies
10 and commissions, including the [*Oregon Department of Environmental Quality (“DEQ”)*
11 *and the Oregon Environmental Quality Commission (“EQC”)*]{Agency Defendants}, adopt
12 rules to achieve those standards. The Governor issued EO 20-04 after the Legislative
13 Assembly, the department of state government charged with making laws, failed in
14 successive legislative sessions to adopt nearly identical efforts to amend the existing statutory
15 GHG goals and low carbon fuel standards found in ORS 468A.205 and ORS 468A.266.

16 2.

17 The issue presented by this complaint is straightforward: Does the Governor have the
18 power under Article III, Section 1 of the Oregon Constitution to mandate action to achieve
19 GHG emission and low carbon fuel standards that contravene those adopted by the
20 Legislative Assembly and enacted into law. The issue is ripe for adjudication: The Governor
21 has directed state agencies to comply with the mandates of the order, and has rejected
22 requests for delay during the pandemic {, and the Agency Defendants are, in fact, moving
23 forward with complying with the mandates of the order}.

24 3.

25 In accordance with the Governor’s schedule for agency action set by EO 20-04, on
26 May 15, 2020 and June 30, 2020, DEQ issued reports on proposed actions to achieve GHG

1 reductions to achieve the [*standard*] {**standards**} fixed in EO 20-04, including the adoption
2 of stricter emission standards for medium and heavy-duty trucks and a process to implement three
3 cap and reduce programs for large stationary sources, transportation fuels, and other fuels,
4 including natural gas, as well as rulemaking to carry out the Governor’s unilateral doubling of the
5 carbon intensity standard [*previously*] established by the Legislative Assembly for the Clean Fuels
6 Program. DEQ {**continues its implementation of EO 20-04 and**} anticipates an expansive and
7 complex program of permits, emission caps, compliance instruments, enforcement mechanisms,
8 trading, and alternative compliance pathways.¹

9 4.

10 Plaintiffs bring this action because EO 20-04 is an unconstitutional exercise of power by
11 the Governor. Under the Oregon Constitution, the Governor is not vested with the power to make
12 law, regardless of the policy objective. Rather, as Oregon’s Attorney General has argued in
13 challenging the actions of the [*current*] {**outgoing**} federal administration, “the executive branch’s
14 exertion of general statutory authority where Congress has spoken specifically on a subject would *
15 * * do violence to the Constitution’s separation of powers.”² The concept of separation of powers
16 is even more fundamental to Oregon’s form of government. Oregon’s Attorney General
17 recognized in 1983 that Article III, section 1, of the Oregon Constitution “mandates a strictly
18 compartmentalized tripartite system of government. * * * Underlying the principle of
19 separation of powers is the recognition that the consolidation of power permits despotism and
20 the division of power prevents it.”³ EO 20-04 violates the separation of powers required by
21 Article III, section 1 because it purports to make law, a function committed by the Oregon
22 Constitution to the Legislative Assembly and the People. Pursuant to ORS chapter 28,

23 _____
24 ¹ See Oregon Department of Environmental Quality, Program Options to Cap and Reduce Greenhouse
Gas Emissions Final Report (June 2020), <https://www.oregon.gov/deq/ghgp/Documents/ghgCapRedf.pdf>.

25 ² *Sierra Club v. Trump*, Amicus Brief of the States of California, et al. at 10, Ninth Circuit Case No. 19-16102,
filed June 11, 2019.

26 ³ *Mr. C. Gregory McMurdo*, 43 Op Atty Gen 205 (No 8143 June 16, 1983).

1 Plaintiffs seek a judgment declaring Sections 2, 3.A, 4.A, and 4.C of EO 20-04, the parts of
2 EO 20-04 that purport to make new law, unconstitutional. A true and correct copy of EO 20-
3 04 is appended to this Complaint as Exhibit 1.

4 {5.}

5 {But for EO 20-04, DEQ would not be engaged in the current rulemaking
6 process with the pre-determined objective to implement at least an 80 percent reduction
7 in GHG emissions with an interim reduction of 45 percent by 2035 and to double the
8 carbon intensity standards. A determination that EO 20-04 is unconstitutional would
9 remove any vestige of authority that the Agency Defendants have to engage in
10 rulemaking with these pre-determined objectives and end this rulemaking process.}

11 THE PARTIES

12 [5]{6}.

13 **Plaintiff Space Age Fuel, Inc. (“Space Age Fuel”).** Space Age Fuel is an Oregon
14 corporation with its principal place of business in Clackamas County, Oregon. Space Age
15 Fuel is a family-owned fuel distributor and marketer. Its business includes operation of 21
16 retail fueling stations and approximately 60 retail and wholesale fueling facilities across
17 Oregon. It also transports products for other fuel companies.

18 [6]{7}.

19 **Plaintiff A&M Transport, LLC (“A&M Transport”).** A&M Transport is an
20 Oregon limited liability company with its principal place of business in Douglas County,
21 Oregon. This multigenerational, family-owned and managed company primarily engages in
22 hauling truckload shipments of general commodities throughout Oregon and other states.
23 The types of freight carried by A&M Transport include consumer products, retail
24 merchandise, food products, paper products, beverages, industrial products, steel products,
25 and lumber and building materials. A&M Transport relies on a fleet of vehicles that run on
26 gasoline and diesel fuel.

1 [7]{8}.

2 **Plaintiff Otley Land and Cattle, LLC (“Otley Land and Cattle”).** Otley Land and
3 Cattle is an Oregon limited liability company with its principal place of business in Harney
4 County, Oregon. Otley Land and Cattle is a family-owned Oregon cattle ranch, alfalfa hay
5 farm, and custom haying business. Like many family-owned farms across Oregon, Otley
6 Land and Cattle’s business depends on a host of equipment powered by gasoline and diesel
7 (including tractors, trucks, and other equipment).

8 [8]{9}.

9 **Plaintiff Oregon Business & Industry (“OBI”).** OBI is an Oregon domestic
10 nonprofit corporation. As the largest business association in Oregon, OBI advocates on
11 behalf of nearly 1,600 different businesses, including consumer products manufacturers and
12 food processors.

13 [9]{10}.

14 **Plaintiff Oregon Manufacturers and Commerce (“OMC”).** OMC is an
15 association dedicated to promoting, protecting, and advancing Oregon manufacturers and
16 their allied partners in commerce. OMC’s members include producers of forest products,
17 fabricated metals, machinery, paper, rail cars, aerospace products, and food and beverage
18 products.

19 [10]{11}.

20 **Plaintiff Oregon Forest & Industries Council (“OFIC”).** OFIC is an Oregon
21 domestic nonprofit corporation. OFIC represents more than 50 Oregon forest products
22 manufacturers and forestland owners who protect and manage more than five million acres of
23 Oregon forestland, and employ nearly 60,000 Oregonians. OFIC represents its members’
24 interests to advance the Oregon forest products and resources industry’s leading role in
25 delivering economic and environmental benefits.

26

1 [11]{12}.

2 **Plaintiff Oregon Farm Bureau Federation (“OFBF”).** OFBF is an Oregon
3 domestic nonprofit organization. It is a grassroots organization that represents the interests
4 of the state’s farmers and ranchers in the public and policymaking arenas. As Oregon’s
5 largest general farm organization, OFBF represents more than 6,700 farm and ranching
6 families, and its goal is to ensure the survival of family-owned farms and ranches in Oregon.

7 [12]{13}.

8 **Plaintiff Oregon Trucking Association (“OTA”).** OTA is an Oregon domestic
9 nonprofit corporation. As Oregon’s official trucking trade organization, OTA has been an
10 advocate for Oregon’s trucking industry for over 80 years. Its members consist of over 500
11 interstate and intrastate motor carriers as well as allied partners of those motor carriers. They
12 are responsible for transporting 88% of manufactured tonnage in Oregon as well as providing
13 96,000 jobs in the state. These motor carriers rely on gasoline and diesel fuel to power their
14 fleets.

15 [13]{14}.

16 Each of the named plaintiffs are “persons” within the meaning of the Declaratory
17 Judgment Act whose rights, status, or legal relations are directly affected by EO 20-04’s
18 regulation of GHG and the state’s low carbon fuel standards. **{Specifically, Plaintiffs are**
19 **injured by Sections 2, 3.A, 4.A, and 4.C of EO 20-04 because absent EO 20-04, the**
20 **Agency Defendants would not have undertaken the current rulemaking process to**
21 **implement the directives in those sections, nor would they have authority to do so.**

22 [14]{15}.

23 Defendant Kate Brown is the Governor of the State of Oregon who issued EO 20-04.
24 This action is brought against her in her official capacity as Governor of Oregon.

25 {16.}

26

1 Venue is proper pursuant to ORS 14.050(2) or 14.060 because EO 20-04 was issued
2 in Marion County and, therefore, the declaratory cause of action arose there.

3 [18]{20}.

4 Pursuant to ORS 28.110, the Oregon Attorney General is being served with a copy of
5 this complaint contemporaneous with its filing.

6 **BACKGROUND**

7 ***The Oregon Constitution Mandates Separation of Powers.***

8 [19]{21}.

9 The principle of separation of powers—*i.e.*, “that the legislative, executive, and
10 judiciary departments ought to be separate and distinct” has long been recognized as an
11 “essential precaution in favor of liberty” in American democracy. Federalist No. 47 (James
12 Madison).

13 [20]{22}.

14 The Oregon Constitution expressly mandates separation of powers amongst the three
15 branches of government. Article III, Section 1 of the Oregon Constitution provides that

16 “The powers of the Government shall be divided into three
17 separate branches, the Legislative, the Executive, including the
18 administrative, and the Judicial; and *no person charged with*
19 *official duties under one of these branches, shall exercise any*
20 *of the functions of another, except as in this Constitution*
21 *expressly provided.*”

22 (Emphasis added.)

23 [21]{23}.

24 Article IV, Section 1 of the Oregon Constitution sets out the official duties of the
25 legislative branch and provides that “[t]he legislative power of the state, except for the
26 initiative and referendum powers reserved to the people, is vested in a Legislative Assembly,
consisting of a Senate and a House of Representatives.”

1 [22]{24}.

2 In turn, the executive branch executes the laws passed by the Legislative Assembly
3 (or by the People via initiative or referendum). Article V, Section 10 of the Oregon
4 Constitution provides that the Governor “shall take care that the Laws be faithfully
5 executed.”

6 *The Statutory Framework Regarding Greenhouse Gas Emissions.*

7 [23]{25}.

8 The Oregon Legislative Assembly has, by statute, addressed the reduction of
9 greenhouse gas emissions in Oregon. Specifically, in 2007, the Legislative Assembly
10 enacted ORS 468A.265, which “declares that it is the policy of this state to reduce
11 greenhouse gas emissions in Oregon pursuant to [a series of] greenhouse gas emissions
12 reduction goals.” Those goals include “[b]y 2020, achieve greenhouse gas levels that are 10
13 percent below 1990 levels,” and “[b]y 2050, [to] achieve greenhouse gas levels that are at
14 least 75 percent below 1990 levels.” ORS 468A.205(1)(a), (b). These “goals” amount to
15 policy pronouncements by the Legislative Assembly, not legally binding mandates.

16 [24]{26}.

17 The Legislative Assembly has further, by statute, set a carbon intensity standard for
18 transportation fuels and delegated to the EQC the authority to “adopt low carbon fuel
19 standards for gasoline, diesel and fuels used as substitutes or alternatives for gasoline or
20 diesel[.]” ORS 468A.266(1)(a). Specifically, the EQC is delegated with the authority to
21 adopt “[a] schedule to phase in implementation of the standards in a manner that reduces the
22 average amount of greenhouse gas emissions per unit of fuel energy of the fuels by 10
23 percent below 2010 levels by the 2025 or by a later date if the commission determines that an
24 extension is appropriate to implement the low carbon fuel standards.” ORS 468A.266(2)(a).
25 Stated differently, ORS 468A.266(2)(a) establishes a maximum standard for the reduction of
26

1 carbon intensity for transportation fuels (10 percent) and authorizes the EQC to adopt rules to
2 achieve that maximum standard.

3 [25]{27}.

4 House Bill 2020 was introduced during the 2019 legislative session. Section 1 of
5 House Bill 2020 (B-Engrossed) proposed to amend ORS 468A.265(1)(a), and (b) to set more
6 ambitious greenhouse gas reduction goals than currently enacted, including “a reduction of
7 greenhouse gas emissions “to at least 45 percent below 1990 emissions levels by 2035” and
8 “to at least 80 percent below 1990 emissions levels by 2050.” Section 16 would have
9 directed an Oregon agency to enact rules that would set a declining cap on GHG emissions
10 sufficient to achieve those specific goals. The bill would have established a complex program
11 of permits, emission caps, compliance instruments, enforcement mechanisms, trading and
12 alternative compliance pathways. The Legislative Assembly did not pass House Bill 2020
13 before the adjournment of the 2019 legislative session.

14 [26]{28}.

15 Senate Bill 1530 was introduced during the 2020 legislative session. Section 5 of SB
16 1530 (2020) (B-Engrossed) proposed substantively identical greenhouse gas reduction goals
17 as were proposed by HB 2020 (2019). Senate Bill 1530 would have similarly established a
18 complex program of permits, emission caps, compliance instruments, enforcement mechanisms,
19 trading and alternative compliance pathways. The Legislative Assembly did not pass Senate
20 Bill 1530 before the adjournment of the 2020 legislative session on March 5, 2020.

21 ***The Governor Issues Executive Order 20-04.***

22 [27]{29}.

23 On March 10, 2020, only five days after the adjournment of the 2020 legislative
24 session, the Governor issued EO 20-04.

25 [28]{30}.

26

1 Section 2 of EO 20-04 purports to “establish” the same “[greenhouse gas] emissions
2 reduction goals” that were included within Section 1 of HB 2020 (2019) and SB 1530 (2020),
3 but which have not been enacted into current law. Specifically, Section 2 of EO 20-04 “calls
4 for the State of Oregon to reduce its GHG emissions (1) at least 45 percent below 1990
5 emissions levels by 2035; and (2) at least 80 percent below 1990 emissions levels by 2050.”
6 [29]{31}.

7 In the prefatory wording of EO 20-04, the Governor recognizes that “the Legislature
8 previously established the goal of achieving GHG levels ‘at least 75 percent below 1990
9 levels’” but asserts that the “State has an urgent, moral obligation to set and achieve more
10 ambitious GHG reduction goals,” including because the “failure of the Oregon Legislature to
11 attain quorum has thwarted legislative action to achieve science-based GHG emissions
12 reduction goals.”
13 [30]{32}.

14 In Section 3.A of EO 20-04, the Governor purports to require agencies to “exercise
15 any and all authority and discretion vested in them by law to help facilitate Oregon’s
16 achievement of the GHG emission reduction goals” set forth in paragraph 2. In Section 3.C
17 of EO 20-04, the Governor purports to mandate that the EQC and DEQ “shall take action
18 necessary to” cap and reduce greenhouse gas emissions from certain specified sources
19 “consistent with the science-based emissions reduction goals set forth in paragraph 2 of this
20 Executive Order.” Thus, the Governor, by executive fiat, has directed that Oregon agencies
21 adopt the same kind of “cap” on greenhouse gas emissions that did not pass in the 2019 and
22 2020 Oregon Legislative Assemblies{, notwithstanding the fact that the Agency
23 Defendants lack statutory authority to take such actions}.

24 {33.}

25 {DEQ is currently engaged in rulemaking to implement new GHG emission
26 reduction goals that are identical to those in section 2 and, but for directives of EO 20-

1 04 would not be engaged in that rulemaking with the predetermined objective of
2 meeting those standards. As DEQ stated on July 29, 2020, “Executive Order 20-04
3 directs agencies to develop a suite of new programs to address climate change. DEQ is
4 working to implement key directives in the Executive Order, including capping and
5 reducing GHG emissions from key sectors.”}

6 [31]{34}.

7 Separately, Section 4.A {of EO 20-04} directs that the DEQ and the EQC “shall take
8 actions necessary to amend the low carbon fuel standards, and the schedule to phase in
9 implementation of those standards, with the goal of reducing the average amount of GHG
10 emissions per unit of fuel energy by 20 percent below 2015 levels by 2030, and 25 percent
11 below 2015 levels by 2035.” Thus, the Governor, by executive fiat, has doubled the
12 stringency of the low carbon fuel carbon intensity standard previously adopted by the 2007
13 Oregon Legislative Assembly (from 10 percent to 20 percent). {The Agency Defendants
14 lack statutory authority to adopt standards more stringent than those adopted by the
15 2007 Oregon Legislative Assembly.}

16 {35.}

17 {DEQ is currently engaged in rulemaking to implement new low carbon fuel
18 standards that are identical to those in section 4.A and, but for the directives of EO 20-
19 04 would not be engaged in rulemaking with the predetermined objective of meeting
20 that standard. As DEQ stated on May 15, 2020:

21
22 “Executive Order: Governor Brown issued Executive
23 Order 20-04 on March 10, 2020 that directs DEQ and
24 EQC to expand the CFP to achieve reductions in
25 average carbon intensity of transportation fuels used in
26 Oregon of at least 20% (relative to 2015) by 2030, and
of at least 25% by 2035. EO 20-04 also directs DEQ
and the EQC to ‘advance methods [for] accelerating the
generation and aggregation of clean fuels credits by

utilities that can advance the transportation electrification goals set forth in Senate Bill 1044 (2019). The goals set forth in SB 1044 include having at least 50% of the new motor vehicles sold in the state by 2030 be zero-emission vehicles, and at least 90% by 2035.'

"Work Plan: The following work plan describes the steps necessary to carry out this expansion of the Clean Fuels Program, along with a high-level summary of some of the key policy issues that will be addressed leading up to and including rulemakings by the EQC. The work plan is summarized in the following chart, and then described in more detail on the following page."

Similarly, in an email dated October 8, 2020, under the subject "DEQ Rulemaking – Clean Fuels Program Electricity 2021 – The Next Advisory Committee Meeting Will Take Place Oct. 22, 2020." DEQ once again acknowledged that it is engaged in rulemaking solely in response to the directives of EO 20-04:

DEQ proposes the Environmental Quality Commission approve amendments to the Clean Fuels Program rules to implement Section 4B of Governor Kate Brown's Executive Order 20-04. The Executive Order directs the Environmental Quality Commission and the Department of Environmental Quality to advance methods accelerating the generation and aggregation of clean fuels credits by utilities in order to advance transportation electrification. DEQ will also consider changes or additions to the regulation that will further incent the generation and aggregation of electricity credits including but not limited to ways to:

Reduce the carbon intensity of electricity used as a transportation fuel

Increase access to renewable electricity used as a transportation fuel

Encourage new electric vehicles such as micro-mobility, medium- and heavy-duty, and non-road applications

**Create opportunities to maximize transportation
electrification in an equitable manner**

36.

**On a determination that EO 20-04 is unconstitutional, DEQ would be without
authority to engage in rulemaking with the predetermined objective to implement the
new GHG reduction standards and the low carbon fuel standards, and would halt that
process.}**

CLAIM FOR RELIEF

(Declaratory Judgment - ORS 28.010, 28.020, 28.050)

[32] **{37}**.

Plaintiffs incorporate paragraphs 1 through 31 as though fully set forth herein.

[33] **{38}**.

Plaintiffs request that the court declare the parties' rights, status, and legal relations
pursuant to ORS 28.010, 28.020, and 28.050.

[34] **{39}**.

The Legislative Assembly has already established, by statute, greenhouse gas
emission reduction goals and directed the EQC to adopt a schedule for low carbon fuel
standards. *See* ORS 468A.205(1), ORS 468A.266(2)(a). EO 20-04, (a) sets more ambitious
greenhouse gas emission reduction goals (Section 2), (b) directs agencies, including the EQC
and the DEQ to take necessary action to implement those targets (Section 3.A and 4.C), and
(c) mandates EQC to adopt a schedule to phase in implementation of more ambitious low
carbon fuel standards (Section 4.A) than those expressly chosen by the Oregon legislature.
By issuing and implementing EO 20-04, the Governor is performing a law-making function
committed by the Oregon Constitution specifically to the Oregon Legislative Assembly (or
the People), in violation of Article III, Section 1, and acting in excess of the authority
delegated to her under Article V.

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{40.}

{Whether a state agency has been delegated authority by the Oregon legislature to take a certain action is a question for this Court to decide, regardless of the state agency’s view of the scope of its own authority. The Agency Defendants have not been delegated statutory authority by the Oregon Legislative Assembly to (a) take necessary action to implement the greenhouse gas emission reduction goals set forth in Section 2 of EO 20-04 (Sections 3.A and 4.C), or (b) adopt a schedule to phase in implementation of more ambitious low carbon fuel standards (Section 4.A) than those expressly chosen by the Oregon legislature. But for EO 20-04, the Agency Defendants would not be taking such actions.}

[35]{41}.

Plaintiffs are entitled to a judgment pursuant to ORS 28.010, 28.020, [and] 28.050 [declaring that] {, and 28.080}:

- (a) {Declaring that} Sections 2, 3.A, and 4.C of EO 20-04 are unconstitutional because they violate Article III, Section 1, of the Oregon Constitution and/or exceed the scope of authority delegated to the executive branch under Article V of the Oregon Constitution.
- (b) {Declaring that} Section 4.A of EO 20-04 is unconstitutional because it violates Article III, Section 1, of the Oregon Constitution and/or exceeds the scope of authority delegated to the executive branch under Article V of the Oregon Constitution.
- (c) {For necessary and proper supplemental relief based on the above declaratory judgments, specifically an injunction against the Agency Defendants prohibiting them from (1) amending the low carbon fuel standards, and the schedule to phase in implementation of the same as directed by Section 4.A of EO 20-04, and (2) taking actions necessary to

cap and reduce GHG emissions consistent with Section 2 of EO 20-04 as
directed by Section 4.C of EO 20-04.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief as follows:

1. Pursuant to ORS 28.010, 28.020, [and] 28.050, {and 28.080,} for a
declaration {and injunction} consistent with paragraph [35] {41} *supra*;
2. Awarding Plaintiffs' costs and disbursements therein; and
4. For all other relief as the Court deems just and equitable.

DATED: [October]

{December} __, 2020.

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/s/

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