

IN THE COURT OF APPEALS OF THE STATE OF OREGON

FRIENDS OF FAMILY FARMERS, an Oregon non-profit corporation; CENTER FOR FOOD SAFETY, a Washington D.C. non-profit corporation; FRANK MORTON, doing business as Wild Garden Seed; UNIVERSAL SEED COMPANY, an Oregon corporation; and WILD WEST SEED, INC., an Oregon corporation,
Petitioners,

v.

OREGON DEPARTMENT OF AGRICULTURE, an agency of the State of Oregon,
Respondent,

and

KATHLEEN HADLEY, WILLAMETTE VALLEY OILSEED PRODUCERS ASSOCIATION, an Oregon non-profit corporation, WILLAMETTE BIOMASS PROCESSORS INC., an Oregon corporation, and U.S. CANOLA ASSOCIATION, a Washington D.C. non-profit association.
Intervenors-Respondents.

Court of Appeals No. A152202

ORDER GRANTING MOTION TO STAY

Petitioners have moved to stay enforcement of OAR 603-052-0870(1)(c)-(d) (2012) pending judicial review under ORS 183.400 of those rule provisions. For the reasons that follow, the motion is granted and temporary stay previously granted by the court by order dated August 16, 2012, will remain in effect.

The court has determined that it has the inherent authority to stay enforcement of an administrative rule if necessary to preserve the court's jurisdiction or to prevent irreparable harm. *Northwestern Title Loans, LLC v. Division of Finance and Corporate Securities*, 180 Or App 1, 10, 42 P3d 313, *vacated as moot by order dated June 12, 2002*; *Lovelace v. Board of Parole*, 183 Or App 283, 288 n 3, 51 P3d 1269 (2002) (court will refer to parts of *Northwestern Title Loans* that remain persuasive). The court's authority to grant a stay is discretionary and, in the exercise of that discretion, the court's practice is to consider also the likelihood that the petitioner will prevail on judicial review and the harm that will result to the parties or to the public depending on whether a stay is granted or denied. *See, for example, Cascadia Wildlands et al v. Department of Fish and Wildlife et al*, Oregon Court of Appeals No. A149672, *Order Staying Enforcement of Rule Pending Judicial Review* (November 15, 2011).

Petitioners have demonstrated a very substantial likelihood of prevailing on the merits of this rule challenge. That is so for either of two interrelated reasons.

First, ORS 183.335(5)(a) requires a state agency adopting a temporary rule (like the challenged rule) to prepare a "statement of its findings that its failure to act promptly

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will result in serious prejudice to the public interest or the interest of the parties concerned and the specific reasons for its findings of prejudice." (Emphasis added.) ODA's "Statement of Need and Justification" for the challenged rule states that "[f]ailure to adopt temporary rules governing the planting of [rapeseed] *could* result in serious prejudice to the agriculture industry in the protected districts * * *." (Emphasis added.) Nevertheless, ODA asserts that, notwithstanding its use of "could" in the statutorily prescribed justification, that justification, read as a whole, embodies the requisite determination and expression that failure to adopt the temporary rules "will" result in the requisite prejudice.

The court disagrees. Language--including, and perhaps especially, statutory language describing standards of proof--has meaning. An agency's choice of language has real legal effect, far transcending mere "semantics." "Could" connotes abstract potential; "will" connotes concrete consequence. The latter is qualitatively different--and far more demanding and rigorous--than the former. ODA employed the former, not the latter, and the court, in performing its review function, cannot deem that choice to be thoughtless or whimsical.

Second, ODA's suggestion that its statement read as a whole establishes the requisite likelihood of serious prejudice from inaction (and adherence to the regulatory status quo) is inscrutable. Petitioners contend (quite persuasively, at least for present purposes) that ODA's proffered justification for promulgating the temporary rule is, effectively, a *non sequitur*. See, e.g., petitioners' motion for stay pending judicial review at pages 24-27; petitioners' reply to response to motion to stay at pages 6-9.¹ Accordingly, petitioners have shown a substantial likelihood that they will prevail in their challenge to the temporary rule.

The court further determines that petitioners have demonstrated the requisite prospect of irreparable harm. The court has carefully reviewed the parties' comprehensive and detailed submissions (as well as that of *amicus curiae* Oregonians for Food and Shelter) addressing the potential--and vehemently disputed--environmental and economic impacts of permitting rapeseed cultivation as a seed crop in the Willamette Valley generally and more particularly during the period of the proposed temporary rule. To be sure, petitioners have not demonstrated a *certainty* of irreparable harm; indeed, some of the harms posited by petitioners may be, as intervenors and *amicus curiae* assert, merely speculative. Nevertheless, the court is persuaded that petitioners have, in the totality of the circumstances, demonstrated a sufficient likelihood of severe and irremediable harm as to warrant the requested stay. Accordingly, the temporary stay previously granted by the court by order dated August


¹ The court emphasizes that, in so observing, it is not impermissibly assessing the purported substance of ODA's decision to promulgate the temporary rule. *Accord Vier v. SOSCF*, 159 Or App 369, 376, 977 P2d 425 (1999). Rather, as a matter of logic, ODA's express justification does not scan: There appears to be no rational nexus between the reasons given for promulgating the challenged temporary rule and the content of the rule itself.

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16, 2012, will remain in effect.

Unless the court sooner modifies or vacates this order, the order will be deemed vacated upon issuance of the appellate judgment terminating this judicial review.

 8/31/2012
9:07:00 AM

RICK T. HASELTON
CHIEF JUDGE, COURT OF APPEALS

c Anna Marie Joyce
R Scott Jerger
William Sherlock
John DiLorenzo, Jr

Ej/81612

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