

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
OF THE STATE OF OREGON  
for the  
OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY

IN THE MATTER OF: )  
J.H. Baxter & Co., Inc. ) BEYOND TOXICS' PETITION FOR  
an Oregon corporation, ) PARTY STATUS  
Respondent. ) OAH Case No. 2021-ABC-04953  
DEQ Case No. LQ/HW-WR-2020-204

Pursuant to OAR 137-003-0535, Beyond Toxics hereby moves and petitions to participate as a party (or in the alternative as a limited party) in any and all aspects of the above referenced contested case proceeding. Pursuant to OAR 137-003-0630(2), Petitioners conferred with the Department of Environmental Quality and the Respondent on this petition. Respondent reserved taking any position on the petition until after it is filed.

In support of this petition, and pursuant to OAR 137-003-0535(4), Petitioners state as follows:

- Petitioner's Name and Address. Petitioner is Beyond Toxics, an Oregon nonprofit corporation; 120 Shelton McMURPHEY Blvd., Suite 280, Eugene, OR 97401.
- Petitioner's Attorney. Petitioners are represented by Rebeka Dawit and Maura Fahey of Crag Law Center; 3141 E Burnside Street, Portland, Oregon 97214.
- Status Sought. Petitioner seeks full party status for the proceeding. In the alternative, Petitioners seek limited party status to participate in the following aspects of the proceeding:

1           A.     The magnitude of impacts from Respondent’s activities on the West  
2 Eugene community and surrounding residents;

3           B.     Legal arguments related to the violations alleged in DEQ’s Notice of Civil  
4 Penalty and Respondent’s asserted affirmative defenses;

5           C.     Any policy implications of DEQ’s and Respondent’s positions regarding  
6 DEQ’s jurisdiction over the alleged violation and civil penalty associated with use of  
7 retorts to evaporate process wastewater;

8           D.     The “H”, “O”, “M”, and “C” elements of the civil penalty calculations for  
9 the alleged violations.

10         4.     Interests Represented. Petitioner seeks to represent the public interest in reducing  
11 industrial pollution to improve the health of the community and environment in the West Eugene  
12 area. Petitioner is based in Eugene and represents many members who live near the  
13 Respondent’s facility who have reported to Petitioner numerous adverse health impacts caused  
14 by the Respondent’s activities and pollution. Petitioner seeks to use its experience in the West  
15 Eugene community and with related issues to represent the public interest in ensuring that those  
16 community voices are heard in this contested case and that affected community members are  
17 informed about the proceedings. Petitioner also seeks to represent the public interest by ensuring  
18 thorough enforcement of state and federal laws and regulations on hazardous waste, air pollution,  
19 and water pollution.

20         5.     Effects on Public Interests Represented. The public interests represented by  
21 Petitioner are affected by this proceeding because it will determine whether Respondent, who is  
22 a repeat violator, is held accountable for the harmful impacts to the health of the local  
23 community and environment caused by its ongoing violations. And, as discussed below,

1 Petitioner fears that without its involvement, the affected community will not be adequately  
2 involved with the proceeding. Additionally, this proceeding will determine how state and federal  
3 laws and regulations on hazardous waste, air pollution, and water pollution apply to  
4 Respondent's facility and whether those laws are adequately enforced.

5 6. Petitioners' Qualifications. Beyond Toxics has worked for more than 20 years to  
6 advocate for environmental justice and public health in the state of Oregon. Beyond Toxics has  
7 been involved in efforts across the state to reduce the effects of pollution on vulnerable  
8 communities. Additionally, Beyond Toxics has deep ties to the West Eugene community  
9 stemming from a long history of organizing and advocacy, including years of work related to the  
10 Respondent's facility.

11 Since its inception, Beyond Toxics has represented community voices across the state of  
12 Oregon in proceedings involving industrial pollution, focusing on elevating the voices of  
13 underrepresented communities that face disproportionate levels of pollution. For instance,  
14 Governor Kate Brown appointed Beyond Toxics to serve on the Cleaner Air Oregon Rulemaking  
15 Committee where it advocated for stronger air pollution controls to protect vulnerable  
16 communities from toxic air pollution. Beyond Toxics has also led many grassroots efforts for  
17 enforcement of the Clean Air Act, Clean Water Act and other state and federal environmental  
18 laws.

19 Much of Beyond Toxics' work has focused on the West Eugene area, which has  
20 experienced disproportionate levels of environmental harm and is where the Respondent's  
21 facility is located. Because of Beyond Toxics' work in West Eugene, it has unmatched  
22 knowledge of the area and strong relationships with the local community and other civic  
23 organizations that serve West Eugene. Beyond Toxics' work in West Eugene is centered around

1 four goals: 1) to support community members who are experiencing higher burdens of pollution  
2 and health impacts from that pollution, 2) to use science to define what that pollution is, 3) to  
3 represent the community in front of state and local decisionmakers, and 4) to disseminate  
4 information back to the community, including the community-based data and environmental  
5 monitoring data that Beyond Toxics gathers. Beyond Toxics has staff and board members who  
6 are from West Eugene who have experienced the harmful impacts of industrial pollution in the  
7 area and Respondent's illegal pollution firsthand. Beyond Toxics also has one staff member who  
8 is dedicated specifically to community organizing in West Eugene and other staff members who  
9 are bilingual in Spanish and able to reach out to the Spanish-speaking community in West  
10 Eugene. A recent example of Beyond Toxics' work in the area is its success in collaborating  
11 with community members and other organizations to pressure a railroad company to clean up a  
12 pile of creosote railroad ties that it had left immersed in a West Eugene wetland.

13 Beyond Toxics has long been involved with advocacy surrounding the health impacts of  
14 pollution from Respondent's facility. Beyond Toxics first got involved with Respondent's  
15 facility around a decade ago, when it received a call from a teacher at a school downwind from  
16 the facility who reported that her students could not go outside for recess as they had a hard time  
17 breathing because of chemicals in the air. Since then, Beyond Toxics has been highly engaged  
18 with advocacy around the facility's pollution. For example, Beyond Toxics has collected stories  
19 on their website from its members on how they have been impacted by Respondent's pollution,  
20 written blogs about the issue, raised awareness in local media, and held an environmental justice  
21 bus tour that focused largely on educating the public about the pollution coming from the  
22 Respondent's facility. The stories Beyond Toxics has collected from its members range from  
23 reports of not being able to open home windows during the summer because of smells

1 originating from the facility, to people vomiting immediately after stepping outside. Several of  
2 these stories overlap with the time period during which Respondent used the retorts to boil off  
3 process wastewater at the facility. Beyond Toxics has also been involved with proceedings  
4 surrounding Respondent's past environmental violations and has been in frequent  
5 communication about the issues with the Environmental Protection Agency, the Lane Regional  
6 Air Protection Agency, and the Oregon DEQ.

7 7. Adequacy of Representation. The existing parties are Respondent, J.H. Baxter &  
8 Co., and DEQ. The public interests that Petitioner seeks to represent are not adequately  
9 represented by these parties.

10 Respondent cannot reasonably represent the public interests in enforcement of federal  
11 and state environmental regulations and in protecting the community and environment from  
12 illegal pollution. Respondent is responsible for the violations at issue in this preceding and  
13 Respondent seeks to prevent or restrain the application and enforcement of the relevant  
14 environmental regulations. Respondent is also a repeat violator of these environmental  
15 regulations.

16 DEQ cannot adequately represent the public interests identified above because its  
17 position is more intermediary than advocate. DEQ must respond to many varied interests—  
18 industry interests that seek relaxed enforcement of environmental laws and regulations (and to  
19 their advocates in politics and law) as well as those who seek to protect Oregonians from the  
20 harms of violating polluters. DEQ must answer to elected officials, including the governor and  
21 state legislators, and DEQ's budget must be approved by those officials. Parties seeking fewer  
22 government regulations on business and industry frequently complain to elected officials about  
23 DEQ's efforts to improve air quality. Elected officials, in turn, pressure DEQ to moderate or

1 abandon its efforts. DEQ also has limited staffing and limited resources relative to the number  
2 of matters it must address. This reduces DEQ's ability to thoroughly develop the public interest  
3 issues identified above on its own. It also creates incentive to compromise for administrative  
4 efficiency, even when the public interests identified above are not fully protected.

5 DEQ also does not have the relationships with the community in West Eugene that  
6 Petitioner has spent decades cultivating and thus cannot adequately represent affected  
7 community members as Petitioner seeks to do. The community members in West Eugene are the  
8 people most impacted by Respondent's violations and DEQ cannot adequately represent their  
9 interests because of its lack of involvement in the community and its representation of other  
10 interests discussed above.

11 8. Conclusion. For the foregoing reasons, Petitioner's request for party status should  
12 be granted.

13  
14 DATED this 24th day of November, 2021.  
15  
16

17 Crag Law Center

18 /s/ Rebeka Dawit

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30 *Attorneys for Petitioner Beyond Toxics*  
31

1 **CERTIFICATE OF FILING**

2 Pursuant to OAR 137-003-0535(2) and OAR 340-011-0525(3), I certify that on  
3 November 24, 2021, I filed this **Petition for Party Status** on the Department of Environmental  
4 Quality by emailing and mailing two copies to:

5 Sarah Wheeler  
6 [Sarah.wheeler@deq.state.or.us](mailto:Sarah.wheeler@deq.state.or.us)  
7 Oregon Department of Environmental Quality  
8 1240 SE 12<sup>th</sup> Ave,  
9 Portland, OR 97214  
10

11 I further certify that I provided a copy of this **Petition for Party Status** to Respondents  
12 and the Office of Administrative Hearings by emailing and mailing copies to:

13 Laura Kerr  
14 [Laura.kerr@stoel.com](mailto:Laura.kerr@stoel.com)  
15 Stoel Rives LLP  
16 760 SW Ninth Ave. Suite 3000,  
17 Portland, OR 97205  
18

19 Office of Administrative Hearings  
20 P.O. Box 14020  
21 Salem, OR 97309  
22 [OED\\_OAH\\_REFERRAL@oregon.gov](mailto:OED_OAH_REFERRAL@oregon.gov)  
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24 DATED this 24th day of November, 2021.

25 /s/ Rebeka Dawit  
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