March 22, 2021

VIA TESTIMONY SUBMISSION FORM

TO: Chair Marsh, Vice Chair Helm, and Members of the House Committee on Energy and Environment

FR: Tony Belot, Government and Public Affairs Manager, Schnitzer Steel Industries, Inc.

RE: Comments on HB 3372 and the Proposed -1 Amendment

Dear Chair Marsh and Members of the Committee:

Schnitzer Steel Industries, Inc. ("Schnitzer") appreciates the opportunity to present testimony on House Bill 3372 ("HB 3372") and the proposed -1 Amendment ("-1 Amendment"). HB 3372, as originally proposed, would have granted new, unprecedented authority to the Oregon Department of Environmental Quality ("DEQ") to first designate a person or business as a "chronic violator" of certain environmental laws and then summarily, and in perpetuity, refuse to issue or renew permits to any person or business that is related, however remotely, to the chronic violator. The -1 Amendment narrowed the scope of HB 3372 and eliminated some of its most concerning provisions. As explained in this testimony, further revisions to the -1 Amendment would ensure that the bill addresses the specific problem it is intended to address—repeat, egregious violators of Oregon's environmental laws[1]—without creating uncertainty for regulated entities that could discourage investments in Oregon.

Schnitzer plays an important role in Oregon's recycling ecosystem. Sustainability is at the core of what we do and how we operate. Over the years, Schnitzer has made considerable investments in its facilities to comply with Oregon's environmental laws. We continue to introduce industry-leading technologies and practices at our Oregon recycling operations. Compliance is and always will remain a top priority for Schnitzer, but HB 3372 (as amended) would introduce new uncertainty for all Oregon businesses regulated by DEQ due to the overly broad and burdensome disclosure requirements and unnecessary discretion that would be delegated to the agency. This will incentivize businesses to consider whether new investments in facilities are better made outside of Oregon. That would not be good for either Oregon's workers or its environment.

[1] *See* Nigel Jaquiss, *Tina Kotek Will Seek to Give DEQ More Authority to Deny Permits to Bad Actors*, Willamette Week (Mar. 10, 2021) (quoting Speaker Kotek's statement that "DEQ should have the authority to deny permits based on multiple past violations so we can prevent avoidable catastrophes like the 2018 fire at NW Metals").

The -1 Amendment would authorize DEQ to require applicants for permits under certain environmental laws[2] to disclose extensive information—some of which is highly confidential, and some of which bears little relation to the permitting process. Based on that information, DEQ could refuse to issue, modify, suspend, revoke, or refuse to renew any permit issued pursuant to ORS 468.065 (DEQ's general authority to issue permits). In exercising its discretion, DEQ could consider not only the compliance history of the permit applicant or permit holder but also the compliance history of *any* of the following persons or businesses: a corporate officer, manager, member of the board of directors, general partner, other person who exercises substantial control over the applicant, a parent or subsidiary of the applicant, or any other business entity similarly related to the applicant. Moreover, DEQ's authority to deny or revoke permits is not sufficiently limited to circumstances in which past violations caused or had the potential to cause substantial harm to human health or the environment—as opposed to readily correctable paperwork violations.

For the foregoing reasons, and for the reasons provided below, Schnitzer urges the Committee to continue its work to further revise HB 3372. Schnitzer looks forward to a collaborative process that will result in an improved bill.

Schnitzer urges the Committee to consider the following revisions to the -1 Amendment:

- Section 1(1). Replace "sufficient information" with "information that is reasonably sufficient." This change avoids an overly broad delegation of authority to DEQ and ensures regulated entities are not faced with unduly burdensome information requests.

- Section 1(1). Require that DEQ be required to preserve the confidentiality of any confidential information submitted pursuant to this provision.

- Section 1(2)(c). Information regarding past violations of environmental laws should be readily available to DEQ; applicants should not be required to provide this information.

- Section 2(1)(c), (d). The proposed deletion of "applicable" is concerning; DEQ's analysis of compliance history should be limited to applicable laws.

- Section 3(3)(a). Revise Section 3(3)(a) such that violations by any of the following should be considered ***only if*** the person has authority to exercise substantial control over the permit applicant or permit holder: (i) a corporate officer, manager, member of the board of directors, general partner or other person who exercises substantial control on behalf of or over the applicant; or (ii)

[2] HB 3372 would apply to permit decisions under ORS 448.305, 454.010 to 454.040, 454.205 to 454.255, 454.505 to 454.535 and 454.605 to 454.755 and ORS Chapters 459, 459A, 465, 466, 468, 468A and 468B and any rule or standard adopted under those statutes or any order or permit issued by DEQ or the Environmental Quality Commission (the "Environmental Laws").

a parent or subsidiary corporation of the applicant or other business entity similarly related to the applicant.

- Section 3(3)(b). Revise Section 3(3)(b) such that DEQ may consider past violations only if the past violation caused or had potential to cause substantial harm to human health or the environment; DEQ should also be required to consider factors such as the likelihood of repeated violations, cooperation of the applicant or permit holder, efforts to cure past violations, length of time since last violation, and other factors related to the likelihood of future, material violations of environmental laws.

- Other Suggested Revisions.

    - The bill is currently silent as to whether an applicant would be forever barred from obtaining a permit from DEQ; consider limiting the relevant look-back period to five years.

    - The bill should provide a process by which an applicant can demonstrate previous violations—even those within the previous five years—are unlikely to be repeated and, as such, the applicant should be eligible to obtain a permit from DEQ.

    - The bill should provide a process by which separate facilities under common ownership can each be analyzed separately, such as by allowing an applicant to demonstrate that past violations at one facility are unlikely to occur at another facility under common ownership.

The remainder of this testimony provides further rationale to support certain of the suggested revisions that are outlined above.

1. The -1 Amendment Is an Overly Broad Delegation of Authority Without Sufficient Objective Standards.

HB 3372 was introduced in response to a discrete event—a fire that occurred at the NW Metals facility in March 2018. But the -1 Amendment is not a narrow, carefully tailored response to that event. The -1 Amendment fails to provide clear standards, criteria, or thresholds to guide DEQ's discretion; for example, the -1 Amendment does not require DEQ to find a predetermined number of prior violations or enforcement actions or to consider the nature or severity of such violations—potentially including a limited number of readily corrected paperwork violations as the basis for denying a permit application or revoking a permit.

2. The -1 Amendment Does Not Provide Sufficient Procedural Protections.

The -1 Amendment does not provide the procedural and due process protections necessary to protect the rights of permit applicants and permit holders. The -1 Amendment does not provide adequate safeguards such as a public notice and comment period, hearing, and

formal decision-making standards and procedures. Rather, the -1 Amendment would allow DEQ to collect extensive, and likely confidential, business information and deny a permit application or revoke a permit outside of the public eye. The sole means of redress would be an appeal to the Environmental Quality Commission ("EQC").

The -1 Amendment provides no limitation on the look-back period for past violations. Moreover, other than the initial appeal to the EQC, the -1 Amendment provides no standard or process for removing the designation, such as undertaking corrective actions, audits, inspections, or other actions that demonstrate compliance. Therefore, the -1 Amendment would arguably allow DEQ to prevent any business remotely related to a bad actor from *ever* obtaining environmental entitlements, which raises due process concerns.

3. The -1 Amendment Ignores Corporate Rights and Formalities.

The -1 Amendment disregards the general principle of observing and respecting separate business entities.[3] Oregon statutes and common law recognize rights associated with the formation of business organizations, including the right to "[c]onduct its business . . . and exercise the powers granted by [statute] within or without this state" and to "purchase, receive, lease or otherwise acquire, and own, hold, improve, use and otherwise deal with real or personal property, or any interest in property, wherever located[.]" ORS 60.077(2). Oregon law also recognizes the separation between a corporation and its owners and officers and the protections afforded by the corporate form.[4]

The -1 Amendment ignores the principle of corporate formality by giving DEQ authority to deny permits based on the compliance history of *any* of the following persons or businesses: (i) a corporate officer, manager, member of the board of directors, general partner or other person who exercises substantial control over the applicant; or (ii) a parent or subsidiary corporation of the applicant or other business entity similarly related to the applicant. The denial need not be based on a determination that the person or business with the history of non-compliance has any authority to control, or actually exercises any control over, the permit applicant or permit holder. The overly broad scope of the -1 Amendment could lead to unfair and costly consequences to applicants with unblemished records of environmental compliance due to a tangential connection between an applicant and a person or business with a history of non-compliance.

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[3] *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1070 (9th Cir. 2015) ("A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities [and as] a general principle, corporate separateness insulates a parent corporation from liability created by its subsidiary, notwithstanding the parent's ownership of the subsidiary." (citing *United States v. Bestfoods*, 524 U.S. 51, 61 (1998)).

[4] *See*, *e.g.*, ORS 60.151(2) ("A shareholder of a corporation is not personally liable for the acts or debts of the corporation merely by reason of being a shareholder."); *Hambleton Bros. Lumber Co. v. Balkin Enterprises, Inc.*, 397 F.3d 1217, 1227–28 (9th Cir. 2005) ("[I]n Oregon, as elsewhere, generally corporate shareholders are not responsible for the debts of a corporation beyond their capital contributions." (citing ORS 60.151)); *City of Salem v. H.S.B.*, 302 Or. 648, 655 (1987) (Oregon courts "have been extremely reluctant to disregard the corporate form unless exceptional circumstances exist.") (citation omitted).

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For the reasons outlined in this letter, Schnitzer urges you to further revise HB 3372 to address the concerns outlined in this testimony. Thank you for the opportunity to testify and for considering the above stated reasons why HB 3372 should not move forward as currently drafted. If you would like to discuss Schnitzer's position further, please reach out to our consultant, Hasina Wittenberg, or me.