

March 22, 2021

To: Chair Marsh and Members of the House Committee on Energy & Environment
From: Sharla Moffett, OBI
RE: OBI Testimony in Opposition to HB 3372

Chair and Members of the Committee:

Thank you for the opportunity to submit written testimony on this important issue for Oregon Business & Industry members. OBI is Oregon's most comprehensive business association representing approximately 1,600 businesses that employ nearly 250,000 people.

Although we do understand the intent of this bill, OBI, nevertheless, has concerns with the broad authority it grants to DEQ to deny permits to regulated entities without well-defined boundaries.

We understand the need to address significant and numerous permit violations from businesses. But we don't want to create a circumstance in which good actors are punished, through unintended consequences of the bill, for other businesses violations. It is important to note that DEQ currently has the authority to refuse to issue, modify, suspend, revoke, or refuse to renew any permit.

Although some problematic issues are addressed in the -1 amendment, we remain concerned that the bill lacks important due process safeguards such as notice and hearing, and formal decisionmaking standards for deciding how to apply the heightened requirements of the bill.

We note below several of our concerns and questions about how the bill would work to create more appropriate and clear regulatory sideboards.

- What permitting records would DEQ need to review? Would these be Oregon only records or would this be expanded to other states and EPA's records?
- If the review includes compliance history by other jurisdictions (outside DEQ), how will violations or compliance issues be handled that were in other jurisdictions and outside DEQ's scope?
- If the review is limited to DEQ's compliance records, the agency should already have those records. Permit applicants should not be required to provide the records.
- Would all applicants go through this vetting? We are certain that this would be more costly for all permit holders and permit applicants, and we have to assume that it would require more resources for DEQ as well. Given DEQ's constrained budgets and permit backlogs, we wonder whether additional resources would be allocated to DEQ, where those funds would come from and what the estimated cost would be? We would note that there were very significant increases just last year for air and water quality fees paid by permit holders.
- If all permit applicants will go through this process, how will the applicants without any compliance history be vetted?

- If an applicant is pursuing a permit in one media (air, water, waste) and they had violations confined to a different media, would that impact DEQ's determination whether to issue the permit?
- The bill and amendment do not specify any limitation on the "look back" time period for reviewing compliance history. Three years of compliance history should be adequate to make a determination. How would facilities be handled that have significant history, but have addressed past problems?
- There are different classes of violations that correspond to the severity of the violation. Many of these are very minor and do not result in impacts to the environment. For example, if a data point must be entered into a log book at weekly intervals and an employee fails to enter the data one week out of 52, that is a permit violation. Under the -1 amendment, this could fall under "knowledge that the act was a violation," since the permit holder knew they were required to report weekly, but inadvertently failed to do so. As written, the bill appears to treat all classes of violations the same.
- What will be the structure and process at DEQ for making these decisions?
- How will DEQ meet their permit issuance timeline, given that this will be a significant extra step in the permitting process? DEQ's permit staffing and resources are already strained, which extends permit timelines, delays projects and causes business disruptions. Could a mandatory timeframe for DEQ's review be included in the bill?
- In general, we have concerns with the language related to entities or people who are "substantially related." Individuals who sit on a corporate board are not likely to have a nexus to the violations. Corporate managers and officers change. We believe the bill inadvertently ascribes violations to corporate officers and board members without due process or justification of these findings when these individuals may or may not have operational control of a facility that caused a violation.
- What period of time constitutes "substantial control" or "similarly related"? We see multiple potential conflicts with well-established DEQ enforcement and Oregon corporate liability laws.
- Several definitional issues remain in the -1 amendment that conflict with the underlying DEQ Enforcement Rules in Oregon Administrative Rules, Chapter 340, Division 12. It is essential that new terms are clearly defined, specifically, "(A) An intentional act; (B) An act committed with the knowledge that the act was a violation; or (C) A reckless act." Although DEQ enforcement rules touch on similar definitions, these should be linked to statutory definitions.
- We believe the bill could confuse longstanding rules with respect to who the "permittee" is and would retroactively create penalties or liability which did not exist at the time of the underlying actions.

Overall, we believe DEQ currently has adequate tools and authority to properly investigate and address violations at the time of occurrence with specific offenders without creating a new enforcement framework that has the potential to punish a large group of businesses that work hard to comply with all applicable law and regulation. This would better protect human health and the environment and would also avoid an enforcement structure that assigns liability for past violations in the form of permit denials.

We are aware that many other states have bad actor laws and we understand the important need for them. However, we have very serious concerns that the bill and amendment lack basic due process and appropriate regulatory sideboards to ensure even and fair application of these

provisions. As currently drafted, OBI opposes HB 3372. We hope to work with Speaker Kotek and the committee to address our concerns.

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