May 6, 2021

VIA TESTIMONY SUBMISSION FORM

TO: Chair Beyer, Vice-Chair Findley, and Members of the Senate Committee on Energy and Environment

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

RE: Opposition to HB 3372-A

Dear Chair Beyer, Vice-Chair Findley, and Members of the Committee:

Schnitzer Steel Industries, Inc. ("Schnitzer") appreciates the opportunity to present testimony in opposition to House Bill 3372-A. HB 3372 was originally introduced to give DEQ authority to deny applications for certain environmental permits where the applicant has a history of repeated and flagrant violations of environmental laws and non-compliance with related agency orders.[1] But DEQ already has sufficient authority under ORS 468.070 to address these bad actors.

The focus of HB 3372-A has since shifted to clarifying the type of information DEQ can request from permit applicants. Reducing uncertainty in statutes benefits regulated entities, like Schnitzer, that make compliance a top priority. Schnitzer is also focused on ensuring that HB 3372-A places reasonable limits on the expanded authority to collect information that is being given to DEQ under HB 3372-A. The A-Engrossed version of the bill authorizes DEQ to collect extensive information regarding an applicant's officers, managers, board members, general partners, parent entities, and subsidiary entities. Schnitzer believes HB 3372-A should place reasonable limits on DEQ's use of the collected information **to ensure that applicants and permittees are not denied permits based on violations by individuals and entities that lack control over the applicant, permittee, or facility that is the subject of the permit**.

Schnitzer believes DEQ's existing authority is sufficient to address the concerns underlying HB 3372-A and, as a result, we do not support the bill. Schnitzer supports the -A5 amendments to the bill and urges the committee to adopt these sensible changes to the bill that will provide more certainty to regulated entities that depend on environmental permits to operate. The changes proposed in the -A5 amendment are summarized below.

Imputation of Violations; Corporate Formalities. The general rule in Oregon (and across the country) is that no person or entity is liable or responsible for the actions of another person or

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[1] *See Testimony in Support of House Bill 3372 with –1 Amendment*, House Committee on Energy and Environment, 2021 Leg. Reg. Sess. (Or. Mar. 22, 2021) (statement of Speaker of the House Tina Kotek); 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").

entity.[2] **HB 3372-A would authorize DEQ to consider the compliance history of persons and entities *other than* the applicant or permittee.**

- The -A5 amendment clarifies the circumstances under which DEQ can impute the compliance history of another person or entity on the applicant or permittee and use that history as a basis for a decision to refuse to issue, revoke, modify, suspend, or refuse to renew a permit. The amendment makes clear that:

    - DEQ cannot impute on an applicant or permittee a violation by the applicant's or permittee's corporate officers, managers, board members, general partners, or similar persons **unless the person who committed the violation exercises substantial control on behalf of or over the facility that is the subject of the application or permit**;

    - DEQ cannot impute on an applicant or permittee a violation by the parent entity of the applicant or permittee **unless the parent entity exercises substantial control over the facility that is the subject of the application or permit**; and

    - DEQ cannot impute on an applicant or permittee a violation by a subsidiary entity of the applicant or permittee **unless the applicant or permittee exercises substantial control over the subsidiary entity.**

The following example helps to illustrate why the proposed changes are important:

> Example: Company X has an 11-person board of directors. One board member previously owned and operated a wood waste facility that received numerous violations from DEQ. Under HB 3372-A, DEQ could arguably refuse to issue Company X a permit because of the past violations by one of its board members, even though that single board member lacks the authority to exercise control over Company X or the specific facility at issue.

Separate Facilities under Common Ownership or Control. HB 3372-A does not provide clear authority for DEQ to separately analyze the compliance history of two separate facilities that are under common ownership or control.

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[2] *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."); *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))); *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)).

- The -A5 amendment provides clear authority for DEQ to consider whether the compliance history of one facility should be imputed onto another facility.

The following example helps to illustrate why the proposed changes are important:

> Example: Company Y owns and operates two separate, state-of-the-art facilities but used to operate a third facility. The third facility was shut down three years ago because its stormwater system was obsolete and, due to lax oversight by a former EHS manager, DEQ issued several stormwater-related violations to the facility. Because the EHS manager was aware of the applicable legal requirements, the violations were described by DEQ as "reckless." Despite the fact that Company Y shuttered the third facility and terminated the former EHS manager, under HB 3372-A, DEQ would arguably be able to revoke or refuse to renew permits to the two new, state-of-the-art facilities based on the violations of the former facility, even though there is no evidence that the new facilities are likely to violate applicable laws.

Director-Level Decisions. The decision to refuse to issue, revoke, or refuse to renew a permit is a business-ending decision that should be made by the DEQ Director, not at the staff level. HB 3372-A requires director approval to *refuse to issue* a permit, but **director approval should also be required if DEQ proposes to *revoke* or *refuse to renew* a permit** because the impact to the affected business is at least as significant—the business would no longer have the permit necessary to operate. In fact, the impact of a decision to revoke or refuse to renew a permit for an existing facility would likely be even greater than the refusal to issue a new permit because the affected business would have already made significant investments in its existing facilities. The economic impacts would extend to employees whose jobs might be eliminated due to facility closures and the communities in which those facilities are located.

- The -A5 amendment elevates decisions to revoke or refuse to renew permits to the director level, while allowing decisions regarding permit modifications or temporary suspensions to be made at the staff level.

Standard to Apply. Schnitzer remains concerned that HB 3372-A **does not provide an objective standard for DEQ to apply in deciding whether to refuse to issue, modify, suspend, revoke, or refuse to renew a permit.** Since HB 3372 was introduced, Schnitzer has suggested various iterations of an objective standard that could be added to the bill. DEQ has opposed adding such a standard, explaining that the existing appeals process set forth under the Oregon Administrative Procedures Act (ORS Chapter 183) is sufficient to "protect[] businesses/applicants from arbitrary or capricious decisions." Unfortunately, ORS Chapter 183 does not explicitly contain such a standard. In fact, the words "arbitrary" and "capricious" appear nowhere in ORS Chapter 183.

- The -A5 amendment makes explicit that a decision to refuse to issue, revoke, or refuse or renew a permit under ORS 468.070(1) must be set aside or remanded "if the decision is arbitrary and capricious, an abuse of discretion or otherwise not in accordance with law." This ensures that individuals and businesses are afforded the protections that DEQ suggests are implied under existing law.

Significance of Violation. HB 3372-A would arguably **allow DEQ to consider *any* past violation, regardless of whether the violation was willful and regardless of its significance or materiality**.

- The -A5 amendment makes the following changes:

    - *Willful Violations.* DEQ can consider only "willful" violations, using DEQ's own definition of willful: a violation committed by a person who (a) had a conscious objective to cause the result of the conduct, and (b) knew or had reason to know that the result of the conduct was not lawful. This aligns with the purpose underlying HB 3372—that is, to address applicants with a history of repeated and flagrant violations. DEQ has broad authority to address other types of violations without taking the drastic step of refusing to issue, revoking, or refusing to renew a permit.

    - *Environmental Harm.* DEQ can consider only violations that caused or had the potential to cause substantial environmental harm. This aligns with the purpose underlying HB 3372, places reasonable limits on DEQ's discretion, and ensures that DEQ considers only material violations. The decision to refuse to issue, revoke, or refuse to renew a permit should not be based on violations that did not cause or have the potential to cause substantial environmental harm, such as minor recordkeeping, reporting, or other ministerial violations.

Mitigating Evidence. HB 3372-A is **silent as to whether an applicant or permittee would have the opportunity to submit mitigating evidence to DEQ and whether DEQ would be obligated to consider that evidence**.

- The -A5 amendment requires DEQ to consider mitigating factors or circumstances presented to DEQ by an applicant or permittee. DEQ has explained that this is already DEQ's standard practices, so Schnitzer expects this change to not be controversial.

Compliance History. A **10-year lookback period is unnecessary** to satisfy the objectives underlying HB 3372 and is longer than most relevant statutes of limitations. HB 3372-A includes a 10-year lookback period.

- The -A5 amendment reduces that to a five-year lookback period. DEQ has explained that it is comfortable with a 10-year lookback period but opposes a five-year lookback period. Other than DEQ's desire for *more* discretion rather than less, it is unclear to Schnitzer why a lookback period of more than five years is necessary. A five-year lookback period more closely aligns with other compliance-related policies at both EPA and DEQ. Moreover, a 5-year lookback period is adequate to evaluate historical violations of potential relevance to a current-day permitting decision,

particularly given the significant changes that can occur over a 10-year period, such as changes in ownership, investment, control, management, policies, and equipment.

Settlement Agreements. HB 3372-A is **silent as to whether DEQ may consider violations that were resolved through a mutual agreement and order or similar settlement agreement**.

- The -A5 amendment precludes DEQ from considering such violations. This change is important to preserve incentives for settlement and avoid bogging down DEQ, the Office of Administrative Hearings, and courts with disputes that could have been easily resolved through settlement. This reasonable limitation at DEQ discretion will not inhibit DEQ's ability to address the repeated and flagrant violators that are the target of HB 3372.

Schnitzer appreciate the spirit in which HB 3372 is brought before the legislature by the bill sponsor. We also appreciate the dialogue that the bill sponsor engaged in that led to a series of changes from the printed bill to the A-Engrossed version. However, we cannot support HB 3372-A in its current form and urge the committee to further modify the bill's provisions by adopting the -A5 amendments to the bill. Thank you for the opportunity to submit these comments and amendments for your consideration.