

25 February 2013

To: House Energy and Environment Committee

From: John Krallman

Re: HB 2336 – Testimony for 26 February 2013 Committee Meeting

Hello my name is John Krallman. I am the staff attorney for Neighbors for Clean Air. I live in northwest Portland.

Thank you, Chair Bailey, Vice-chairs Boone and Johnson, and all the committee members for this opportunity to speak in support of House Bill 2336, the industrial emissions reduction bill, introduced by my state representative, Rep. Greenlick.

As Mary has pointed out, exposure to toxic pollution is a significant problem throughout all of Oregon and specifically in urban areas like Portland, Eugene, Springfield, or Salem. There is currently no comprehensive approach to protecting the health of Oregonians from this toxic pollution. While there are federal and state programs aimed at toxic pollution, they are clearly insufficient to protect the health of Oregonians.

At the federal level, the Clean Air Act includes National Emission Standards for Hazardous Air Pollutants or NESHAPs. These standards have been around since 1970.¹ When they were first added to the Clean Air Act in 1970, they were intended to be health-based standards. However, because of the massive scope of implementing nationwide health based standards on industry, the NESHAPs were an utter failure. After 20 years, EPA had only passed regulations of 7 hazardous substances – asbestos, beryllium, mercury, radionuclides, inorganic arsenic, benzene and vinyl chloride.² Even this overstates these regulations because their applicability was limited to only certain uses: for instance, arsenic was only regulated at three industries; all other sources of inorganic arsenic went unregulated.³

Congress attempted to address these shortcomings in the 1990 Clean Air Act Amendments. The NESHAP program was changed from a health-based program to a technology-based program. Congress laid out a list of 189 chemicals or groups of chemicals that EPA should consider hazardous.⁴ EPA was given authority to add or subtract from this list based on additional research and upon petition.⁵ There are currently 187 chemicals or groups of chemicals listed as hazardous air pollutants.⁶ The amendments to the Clean Air Act required EPA to create a list of industrial categories that emitted one or more of the listed HAPs.⁷

¹ See Arnold W. Reitze, Jr., *Stationary Source Air Pollution Law* (ELI 2005).

² 40 C.F.R. Part 61.

³ 40 C.F.R. Part 61, Subparts N, O, and P.

⁴ 42 U.S.C. § 7412(b)(1).

⁵ 42 U.S.C. § 7412(b)(2), (b)(3).

⁶ <http://www.epa.gov/ttn/uatw/pollutants/atwsmod.html>.

⁷ 42 U.S.C. § 7412(c).

EPA was then required to create technology-based standards for the industrial categories it listed. However, it is a misnomer to refer to these regulations as “technology forcing” because they do not push for continual technology improvement. Rather, these standards only require that all sources in an industrial category install the same control technology. All existing facilities in the industrial source category must meet the average of the top 12% of facilities and all new sources must meet the best currently achieved.⁸ If most of the facilities in a source category have never installed newer control technology, this standard would not push facilities to install newer control technology. While the NESHAPs have provided some significant improvement in toxic pollution in certain areas, as the evidence in Oregon clearly shows, they have been insufficient to protect our health.

Part of the reason is that most NESHAP conditions only apply to major sources that emit more than 10 tons of one hazardous air pollutant or 25 tons of total hazardous air pollutants.⁹ This is a tremendous amount of pollution. For instance, ESCO Steel in northwest Portland, which DEQ has identified as one of the largest sources of metal toxics in that area, is not a major source. Instead of being subject to more stringent requirements, ESCO only had to use generally available control technology; essentially, the federal standard only required them to avoid using mercury-containing scrap metal in their process.¹⁰ Fortunately for local community members, ESCO has voluntarily engaged with their neighbors and has undertaken numerous projects to reduce toxic emissions from their facility.

The NESHAPs do include a provision that requires EPA to review these standards after 8 years to assess whether the source category presents a residual risk to local communities.¹¹ However, this assessment is insufficient to fully protect our health. First, it uses a national dataset, not local data. Second, EPA often ignores emissions from other facilities located nearby. While this may be reasonable for a facility that is not located near any other source of toxic pollution, it is completely inadequate for urban areas where there are dozens of industrial sources of pollution in a neighborhood.

Oregon is one of about a dozen states that have developed their own toxics program on top of this federal program. However, according to a law review article by Professor Victor Flatt, a well-respected environmental professor at the University of Houston, Oregon’s program is one of the weakest of these state programs.¹² While Oregon’s program is broader than most other state programs in that it is not limited to addressing industrial sources, it is weaker and shallower.

The flaw in the health-based review for NESHAPs – failing to look at other sources in the

⁸ 42 U.S.C. § 7412(d)(3).

⁹ 42 U.S.C. 7412(a)(1).

¹⁰ 40 C.F.R. 63, Subpart ZZZZZ.

¹¹ 42 U.S.C. § 7412(f).

¹² Victor B. Flatt, “Gasping for Breath: The Administrative Flaws in Federal Air Pollution Regulations and What We Can Learn From the States,” 34 *Eco. L. Q.* 107 (2007).

surrounding area – is the same flaw that is present in Oregon’s only real control on toxic emissions at this point, the Safety Net program. Under this program, if a source, by itself, results in an unreasonable risk, then DEQ can add additional controls to reduce toxic emissions.¹³ In urban areas this is clearly insufficient to protect the public from unreasonable risk because of the density of sources of toxic pollution which, in and of themselves, do not present an unreasonable risk.

In addition, unlike other states that have set enforceable ambient standards, Oregon’s ambient benchmarks are only guidelines for future action. Violation of these standards has no consequence. Despite the fact that the Portland airshed is violating 19 of these benchmarks, after a 10-year process, the Portland Air Toxics Solution came up with nothing. PATS was a failure. The only thing that came out of PATS was list of priorities of categories that DEQ could target with its other authorities. In other words, despite significant toxic pollution problems in the Portland metro area, DEQ has no strategy specifically aimed at reduction of toxics; any toxic reductions are merely co-benefits to reductions in other pollutants. These authorities are insufficient to truly address toxic pollution. The Portland airshed is currently under all of the National Ambient Air Quality Standards, greatly limiting DEQ’s authority to implement additional controls. Given the level of toxic pollution in the state and the documented risk to our children from industrial sources alone, this tangential approach to toxics is unsatisfactory. Oregonians deserve better.

The bill before this committee is aimed at helping to develop more information regarding potential solutions to Oregon’s air toxic problem. We have a wealth of data showing that there is a problem, but we currently have no clear idea of what can be done to solve this problem. DEQ simply does not have the resources or expertise to analyze pollution reduction opportunities at all of the industrial sources in Oregon. By requiring each individual polluter to consider what they, individually, can do, DEQ can work to tailor solutions to the specifics of each facility. Companies that have been doing their part to reduce emissions all along should have to do less since there will be less additional opportunities for reductions. And companies that have refused to be good corporate citizens and have continued to sacrifice our health for their short-term profits should be required to make more reductions. By providing DEQ with information about pollution reduction possibilities, DEQ will have the ability to weight the options and develop the comprehensive approach to toxic reductions that Oregonians deserve.

This bill also helps local residents better engage with industrial sources. In our experience, when local communities complain about emissions from an industrial source we are often told two things: “We are in compliance with all requirements of the law” and “There is nothing else we can do to reduce emissions.” The fact that the first is often true, despite Oregonians being exposed to toxic pollution resulting in an unreasonable risk is, frankly, saddening. As for the latter point, the community has no way to determine whether the company is being truthful or simply blowing smoke. This bill is about the community’s right-to-know whether companies are truly doing what they can

¹³ OAR 340-246-0190 to -0230.

do to protect our health and be good corporate citizens and good neighbors.

This should be but a first step in attempting to address the significant problem of air toxics, especially in urban areas. It is not unreasonable to ask 135 facilities in Oregon to review every 5 to 7 years what they can do to reduce toxic pollution. Oregonians deserve laws and regulations that live up to our reputation as a green state and a safe place to raise a family. I urge you to give House Bill 2336 serious consideration. Thank you.