

My name is David Ashton, Assistant General Counsel for the Port of Portland. This testimony is provided by the Port of Portland in support of HB 2968.

I have specialized in environmental and natural resources law for 26 years and have extensive experience representing a variety of clients around the country in purchasing and leasing contaminated brownfields for redevelopment. I represent the Port on brownfields redevelopment matters. Redeveloping contaminated brownfields is a central component of the Port's regional economic development mission.

A single, coordinated process for parties to satisfy federal and state hazardous substance cleanup requirements and thereafter obtain a legal release from liability would facilitate brownfields cleanup and redevelopment and add an important tool to the toolbox for tackling brownfields sites that otherwise languish abandoned or severely underutilized due to the complexities and costs of cleanup process and cleanup.

Reconciling and streamlining process and procedure while maintaining protective levels of cleanup definitely warrants study, a report to the Legislative Assembly, and, as necessary, future legislative action.

An Objective Worthy of Study

Working within the constraints of United States federalism, the proposed study holds out the prospect of a party involved in brownfields redevelopment being able to enter one cleanup path for the investigation and cleanup of a brownfield site to applicable federal and state standards, and upon completion of cleanup, secure the benefit of a release of liability that will shield the parties involved in redevelopment from later having to go back and do more investigation and cleanup.

A brownfields redeveloper should be able to clean up contamination on a site from whatever regulated source under one process and procedure: whether the problem encountered is (i) a leaking underground storage tank (LUST) governed by the federal and state tanks program; (ii) a hazardous or solid waste disposal site that has triggered compliance with the federal Resource Conservation and Recovery Act (RCRA) and the program thereunder delegated to the Department of Environmental Quality; (iii) a hazardous substance release triggering possible listing and actual liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and ORS Chapter 465; or (iv) a polychlorinated biphenyl (PCB) spill governed by the federal Toxic Substances Control Act (TSCA) and ORS Chapter 465.

As Pennsylvania and EPA Region 3 have demonstrated, federal tools are available to advance the concept of one cleanup. Under CERCLA Section 128(b), 42 U.S.C. 6928(b), when a state cleanup program meets threshold requirements relating to (i) inventorying contamination sites, (ii) oversight and enforcement, (iii) meaningful opportunities for public participation, and (iv) review and approval of cleanups, and a site is being cleaned up under that program, then EPA is statutorily barred from pursuing cleanup or cost

recovery under CERCLA. Federal overfilling is prohibited in favor of the site cleanup under one state program.

And under Pennsylvania's Land Recycling and Environmental Remediation Standards Act section 501(a), a brownfield redeveloper that demonstrates completion of cleanup under the state program is released from further cleanup liability and shielded from contribution actions by third parties. The liability release runs in favor not only of the current or future site owner participating in cleanup, but the developer, future tenants, successors or assigns of these protected people, and public utilities that undertake activities on the site.

Under this one cleanup approach, there is protection from federal CERCLA liability under Section 128 and there is protection from state cleanup liability for all the parties involved in the development of the brownfield: the party doing the cleanup, the developer, future tenants, and public utilities undertaking activities on the site.

How Could Such an Approach Enhance Brownfields Redevelopment in Oregon?

Through a single coordinated state process for cleanup that satisfies minimum federal thresholds and a mechanism added to state law that allows for legal releases of liability in favor of the parties involved in cleanup and redevelopment (owners, developers, tenants, public utilities):

- Sites could be cleaned up faster with less transactional costs.
- Sites could be cleaned up under Oregon's Prospective Purchaser Program, ORS 465.327, with legally enhanced assurance to owners, developers, future tenants and public utilities that there is a very low risk of contamination liability.
- Sites deferred from CERCLA federal lead to state cleanup could secure the same benefits.
- Ports could address a TSCA-regulated PCB spill without fear of conflicting or duplicative procedural requirements.
- Ports could have speedier and greater success convincing public utilities to support their brownfields redevelopment efforts.

The Goal is Procedural Coordination: Standards of Protection Are Untouched

Reconciling and coordinating potentially conflicting processes and procedures does not involve changing applicable standards of environmental and human health protection under existing state and federal law. The focus is working smarter to achieve cleanup objectives, not altering those objectives.