



February 24, 2021

Chair Holvey and Members of the House Committee on Business and Labor  
Oregon State Capitol  
900 Court Street NE  
Salem, OR 97301

Chair Holvey and Members of the Committee,

My name is David Ashton and I am here to represent the Port of Portland in support of HB 2377. I am an assistant general counsel with the Port of Portland, 7200 NE Airport Way, Portland, Oregon 97218. I have been involved in brownfields redevelopment of property contaminated by hazardous substances and insurance cost recovery matters for many years. The Port of Portland is actively engaged with our partners in the Oregon Brownfields Coalition, seeking to advance economic development and land restoration through the creation of a toolbox of tools for brownfields cleanup, restoration and redevelopment.

By far and away the biggest impediment to getting contaminated sites redeveloped into facilities benefitting commerce and local communities is finding the funds to clean up the contamination. Unaddressed contamination is not merely a blight on the environment but also puts local residents' health at increased risks of cancer and other diseases.

I live near Sherwood. The cleanup and residential redevelopment of the former Ken Foster Farm in Sherwood where defunct Frontier Leather Company operated a tannery years ago could never have been performed on the timeline that it was without access to insurance assets like those at issue in HB 2377. The assets were accessed through litigation and the appointment of a receiver. See *Ironwood Homes, Inc. v. Bowen*, No. 08-CV-0098-BR, 2010 WL 2465384 (D. Or. June 14, 2010). (advancing a claim against defunct entity to access its insurance).

Beginning in 1941, with the insurance industry's creation of the comprehensive general liability or CGL insurance policy, businesses could obtain comprehensive general liability coverage for all hazards other than those explicitly excluded from coverage. The insurance was long tail coverage in that the coverage and protection of the CGL policy existed until long after the expiration of the policy (this is known as "long tail" coverage). These comprehensive general liability policies covered unexpected and unintended pollution through 1985 when the insurance industry created the absolute pollution exclusion to place an additional limit on the hazards covered.

The availability of pollution coverage under the CGL was confirmed by the Oregon Supreme Court in *McCormick v. Baxter*, 324 Or. 184 (1996). CGL policies typically provided coverage for defending the potentially liable policy holder (here, the defunct entity) from claims (the duty to defend) and for the costs of cleanup (the duty of indemnity). These purchased insurance assets should be available for cleanups.

This is particularly so for sites like Portland Harbor. It would be fundamentally unfair to public entities like the Port to have to bear the brunt of a multi-million dollar cleanup in situations when the defunct polluting entities' insurance assets can be found through insurance archaeology in public archives and used to hold private polluters responsible for some or all of their fair shares.

HB 2377 would be an additional valuable tool to assist with cleanup of contamination, including brownfields redevelopment, for these reasons:

- It advances the principle that dissolved corporate entities' assets should be distributed.
- It is consistent with established law on appointing a receiver or custodian to represent informally or administratively dissolved entities to deal with a contamination liability through the corporate entities' insurance assets. (The Ken Foster Farm/Frontier Leather matter mentioned above).
- It clarifies that defunct entities' CGL coverage is a corporate asset available to address pollution liabilities that would otherwise not be addressed by the polluting entities. (In

bankruptcies, insurance policies must be listed on debtor's schedules as corporate assets.

Matter of Shondel, 950 F.2d 1301, 1305 (7th Cir.1991)).

- The bill revives limited statutory rights and confirms that the CGL insurance assets, if found, are legally available to corporate entities to address contamination problems that may come to light years after corporate entities have dissolved.
- It can be implemented in a way that does not create any additional costs to dissolved entities. (The appointment of a receiver or custodian is paid for out of the insurance asset and/or by the claimant).
- And it advances the Polluter Pays principle, helping minimize shifting the burden of cleanup of defunct entities' messes to public entities and precious taxpayers' dollars.

Thank you for your consideration. I am available to answer any questions.

A handwritten signature in black ink, appearing to read "D. Ashton", is enclosed in a thin black rectangular border.

David Ashton