OREGON BUSINESS & INDUSTRY | OBI

Feb. 14, 2023

TO: Members of the Senate Committee on Rules

FR: Sharla Moffett, Oregon Business & Industry

RE: SB 38

Oregon Business & Industry (OBI) is a statewide association representing businesses from a wide variety of industries and from each of Oregon's 36 counties Our 1,600 member companies, more than 80% of which are small businesses, employ more than 250,000 Oregonians. Oregon's private sector businesses help drive a healthy, prosperous economy for the benefit of everyone.

Thank you for the opportunity to provide testimony on SB 38, which would resolve an increasingly distressing problem the regulated community deals with continuously—clarity about the rules governing a permit application. All too often there is a lack of clarity and inconsistency at the Department of Environmental Quality when it comes to this. SB 38 simply states that the rules in effect at the time a permit application is submitted are the rules that apply to the permit. This is fair and reasonable.

I'll provide three examples of problems that demonstrate the need for this bill:

The first is that a facility submits a permit application to DEQ and, while that permit is pending, regulations change, the permitting goal posts are moved, and aspects of the permit application, including costly environmental analyses, must be redone. With the frequency and volume of rulemaking at DEQ, this can become an endless loop.

An example of this relates to SB 1541, which passed in 2018 and established Cleaner Air Oregon, a human health risk-based regulatory program specifically designed to protect people living closest to facilities.

A facility was called in to demonstrate compliance in March 2019 and began working through complex and costly air dispersion modeling as required under the tight regulatory deadlines. Modeling and risk assessment analyses demonstrated this facility posed no measurable risk to the people living closest to the facility.

Almost immediately, DEQ announced its intention to change the regulation and subsequently increased the stringency for noncancer risks. The rule changes required the facility to model its emissions and assess risk for a second time. The results still showed no measurable health impacts to people living closest to the facility.

DEQ adopted yet again more stringent rules and required the facility to conduct modeling and assess risk for a third time. It was still determined to pose no measurable health impacts on residents living closest to the facility.

By the time the permit was issued, the Cleaner Air Oregon process had taken more than three years to complete; the company spent a quarter of a million dollars to demonstrate that the business did not pose a measurable health risk to people living closest to the facility, did not need to install control technology and did not need to implement a risk reduction plan. The agency staff spent untold hours and resources engaged in this repeat process when these limited resources should have been directed toward facilities that could have an actual impact on human health.

A second challenge is that there is no consistency in the answers DEQ gives permit applicants. DEQ overhauled its air permitting program in November 2022. The rules indicated that any permit application received before March 1, 2023 would be considered under the old permitting rules to allow for this transition since the old and new permitting programs are very different. A DEQ air specialist confirmed this at an environmental conference in December. I was actually in the room and heard this myself.

However, DEQ responded to a permit application filed in July 2022 by saying that it would be considered under the *new* rules. This permit application was filed four months before the new rules were adopted, and yet the applicant was told the new rules would apply to the permit despite DEQ's own statements to the contrary.

Another applicant sought clarification about whether DEQ would consider a permit application filed before March 1 under the old rules. The permit writer's response was that DEQ would have to take a look at the permit application before deciding, implying that this is a subjective, circumstantial decision, not one rooted in established policy.

There should not be three different responses to the same question about which rules apply to a permit application. The rules that apply should be clear to permit applicants. Further, given the agency's backlog of permits, it should want clarity for its own sake.

A third example resulted in a lawsuit in which a regulated entity prevailed. DEQ has now appealed the decision. DEQ had long applied certain rules to auto dismantlers when it changed course without notice and began applying new rules to these businesses one by one without any notice or rule changes. A business operating legally one day cannot wake up the next to find it is in violation for implementing what were previously legal practices. The court determined that agencies must undertake formal rulemaking when adopting a new policy. The outcome of the appeal is pending.

These examples are not isolated incidents. I hear these stories regularly, but regulated entities are reluctant to challenge the agency for fear of retribution.

This bill is crucial to giving the regulated community certainty about what rules apply on the day a permit application is submitted.

Thank you for the opportunity to speak to you today about this very troubling issue. I urge you to pass SB 38.