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Testimony of Harold D. Miller
Director, Southwestern Pennsylvania Growth
Alliance
before the
House Environmental Resources and Energy
Committee
March 16, 1995

The Southwestern Pennsylvania Growth Alliance is a public-private partnership consisting of public officials and private business leaders from each of the nine counties in southwestern Pennsylvania and the City of Pittsburgh. The mission of the Growth Alliance is to identify problems and opportunities which are critical to the economic growth of the region and to seek support from state and federal officials in responding to those issues.

Importance of Reusing Industrial Sites for
Economic Development and Competitiveness of
Southwestern Pennsylvania

When the county committees of the Growth Alliance met two years ago to develop state and federal legislative agendas, the issue of industrial site reuse was at or near the top of everyone's list of critical issues. In their efforts to develop new jobs for their residents, both large and small communities throughout our region have sought to encourage development at the many former industrial sites which already have extensive investments in roads, water, utilities, and other infrastructure. Yet these communities have found that existing environmental cleanup standards and procedures have discouraged development at these sites regardless of their ready-made advantages or the other incentives that are offered. The seriousness of this problem throughout our region led the Growth Alliance to make industrial site reuse legislation one of its two top legislative priorities both last year and this year.

The lack of appropriate standards and procedures for reuse of industrial sites is one of the most serious impediments to business growth and expansion in our region. Not only does it tend to steer new development away from older industrial communities such as those in the Mon Valley and towards suburban and rural "greenfield" sites, it also steers development away from our region entirely,

resulting in businesses locating in neighboring states such as Ohio. Last summer, the Conference on Real Estate released a study entitled "A Comparative Assessment of Southwest Pennsylvania as a Business Location" prepared by the consulting firm Tripp Umbach & Associates. The study found that while the Pittsburgh region had many qualities that made it a desirable location, environmental roadblocks to manufacturing projects were a major problem for the region in trying to attract new businesses. The study said:

One clear conclusion of this research is that if the Pittsburgh region is going to compete for manufacturing projects, it has to have [state] legislation ... to indemnify companies against potential legal liability related to their occupancy of brownfield sites. Charlotte and Minneapolis/St. Paul are already benefiting from such legislation, and Ohio is working on it. Pennsylvania must develop legislation to ensure that the Pittsburgh region's prime developable sites (many of which are brownfield) do not stand empty...The Pittsburgh region is short on good, developable sites. Most of the flat, infrastructurally serviced sites have had previous industrial users on them. It is no good having marketing programs, incentives, loans, tax abatements, and all the other tools of economic development if the region is going to saddle every potential company that uses these sites with multi-million dollar legal environmental liabilities. The companies simply will not come when they can receive a more welcome reception in, say, Ohio.

Since that study was issued, Ohio has passed new legislation designed to facilitate environmental cleanups at former industrial sites.

Disincentives to Reuse of Industrial Sites

There are two fundamental reasons why former industrial sites are not reused — (1) the magnitude of cleanup costs, and (2) the uncertainty about what those costs will be and who must pay for them. There is no escaping the fact that it costs money to clean up contamination. The costs can vary dramatically, however, depending on how clean you try and force a site to be. For example, the Growth Alliance reviewed a case study of a 48 acre industrial site adjacent to a river, 9 acres of which were contaminated by PCP, arsenic, and other chemicals. Under the current standards used by the Department of Environmental Resources, the total cost of investigating and cleaning up the site would range between \$25 million and \$37 million. The cleanup costs alone would be between one-half and three-quarter million dollars per acre. Yet under more reasonable, risk-based standards such as have already been put in place in Ohio and other states, the costs would drop dramatically, to between \$1.7 million and \$4.9 million, or a cleanup cost of less than \$70,000 per acre. When faced with the choice of developing this brownfield site in Pennsylvania, a similar brownfield site in Ohio, or a greenfield site anywhere, which would you choose? Not likely the brownfield site in Pennsylvania.

In other cases, the costs of cleaning up to current standards may essentially be infinite, because it is simply technologically impossible to achieve those standards.

Regardless of how much you spend, you will never achieve the standards. A report issued in June of 1994 by the National Research Council found that total cleanup of groundwater contamination to the level required by federal and state laws is not feasible at many sites. Yet the drinking water standards that this report says are impractical are less stringent than the "background" level that the Pennsylvania Department of Environmental Resources has generally insisted on when sites are to be cleaned up.

Of course, not every former industrial site will have this much contamination or cost this much to clean up. In fact, many sites, despite former commercial or industrial uses, may have little or no contamination. This is where the problem of uncertainty rears its head. Before it can find out that a site is not contaminated or that the contamination will be affordable to clean up, a business has to spend a significant sum to conduct an environmental assessment. That is money that has to be invested before anything can be known about cleanup costs. But even after the assessment is completed, cleanup costs can only be determined after a negotiation with DER. DER could decide to demand an unreasonably expensive cleanup, particularly since the stated goal has been for cleanups to achieve "background" standards. However, even if a cleanup using the best available cleanup technology would be affordable, DER has then reserved the right to require additional cleanup at some point in the future if new technology comes along.

In contrast, other states are establishing clear cleanup standards that enable companies to determine — in advance, with no negotiation — how much a cleanup will cost, and they have laws or documents which assure a company that if the cleanup meets the standards today, they will not be asked to do more at some time in the future. Once again, when faced with the choice of developing a brownfield site in Pennsylvania, a similar brownfield site in Ohio, or a greenfield site anywhere, which would you choose? Once again, not likely the brownfield site in Pennsylvania.

Essential Elements of Successful Legislation

The Growth Alliance believes that in order for legislation to successfully resolve the existing environmental disincentives to reuse of industrial sites, it must have the following elements:

1. **Reasonable, risk-based cleanup standards.** Remediation standards should facilitate cost-effective cleanups that provide reasonable protection for human health and safety. Standards for industrial properties should be based on the amount of exposure that workers are likely to experience.
2. **Predictable costs and timeframes for cleanup.** Cleanup standards and criteria need to be formalized and made available to current owners and prospective developers to assure them that cleanup costs will be reasonable before they purchase property or invest in environmental assessments. The Department of Environmental Resources must respond to cleanup proposals in a timely manner.
3. **Finality of cleanup efforts.** There must be a formal certification that a cleanup has been adequate and that the current owner of a site will not be expected to do

additional remediation in the future unless additional contamination is found or cleanup efforts have failed.

4. **Protection from liability for past contamination for purchasers, banks, and economic development agencies.** The chain of liability should be broken following the completion of a cleanup plan. New owners should be liable for any new pollution that they cause, but new owners, banks, and economic development agencies should not be saddled with liability for the actions of past owners.

Prior to S.B. 1, legislative proposals had focused on reducing cleanup standards and correcting liability for innocent purchasers and for so-called "orphan" sites. However, most idle industrial sites, despite the fact that they are not currently being operated, have current, viable owners, and the first step in bringing those properties back to productive use is to convince the current owners to sell them. No matter how little liability is imposed on a prospective innocent purchaser, if the current owner believes it will be required to conduct or pay for an unaffordable cleanup at a site in order to sell it, it is likely to continue allowing it to sit idle.

S.B. 1 contains language which addresses all of these essential elements. Moreover, it applies reasonable cleanup standards and liability protections to both current owners and potential innocent purchasers, thereby solving the problems that face both sellers and buyers of former industrial sites.

Because of this, the Growth Alliance strongly supports S.B. 1.

Responses to Concerns

A number of important concerns and objections have been raised about S.B. 1, particularly by environmental advocacy groups. While the Growth Alliance is anxious to promote economic growth in our region, we do not want to do so at the expense of human lives or the environment. Consequently, we have closely examined all of the concerns that have come to our attention to determine their validity and whether it would be appropriate to modify the legislation to address them.

Several groups have suggested that the bill will actually encourage the contamination of greenfield sites, while reducing the likelihood that brownfield sites will be cleaned up and reused. We have reviewed this concern carefully, since it directly contradicts one of the most important goals of the bill. Fortunately, our analysis indicates that this concern is based on several false assumptions.

The first false assumption is that businesses are somehow actively seeking a place to pollute soil and groundwater, and that they will be more attracted to sites where cleanup standards are low than where they are high. I think most businesses and their employees would take great offense at this concept. Responsible businesses seek to prevent pollution and to clean it up when it does occur. And we now have so many procedures in place to prevent pollution and penalties for non-compliance that even an irresponsible business owner would feel compelled to behave the same way. There are

significant penalties — including jail time — in both state and federal law for failure to properly store and track hazardous materials, for failure to report a chemical spill, and for failure to clean up a spill as promptly and completely as possible. Senate Bill 1 would do nothing to change these and consequently would do nothing to make a greenfield site more attractive for pollution than it is now.

The second false assumption is that businesses on greenfield sites will be less vigilant about preventing pollution or less vigorous about cleaning it up if Senate Bill 1 passes. It is important to realize that Senate Bill 1 does not explicitly say that you have to clean up less than you did before. It says that the standard for cleaning up is based on risk, rather than an absolute standard of eliminating all traces of contamination. Unless a business wanted to pay for a risk assessment in advance on all possible spills that could occur, that business would not know how much less it would cost to do a cleanup. And for any spill that did occur, the business would still have to pay for an environmental assessment and a risk assessment, as well as some level of cleanup. These are not trivial costs and any rational business will try to avoid them completely, rather than relax its prevention efforts because the cleanup costs might turn out to be lower.

Setting unreasonably high cleanup costs to try and prevent pollution from occurring is a little like imposing the death penalty on automobile drivers who run red lights. Most people don't run red lights because they're afraid of getting hit in the intersection, not because the law prohibits it. Increasing the penalty might make some risk-takers less likely to try and beat the light, but it might also discourage some people from driving at all. And since a jury is unlikely to convict if it knows an unreasonable penalty will be imposed, this reduces people's respect for the law. In Pennsylvania, by claiming to impose cleanup standards that are in practice unachievable, we do far more to discourage businesses from locating here than to discourage businesses from polluting.

The third false assumption is that brownfield sites will be less likely to be cleaned up and reused under the standards set in Senate Bill 1. It is difficult to imagine that brownfield sites could be any less likely to be cleaned up than they are today, when many sites sit fenced and unused because of concerns about cleanup liability. Senate Bill 1 will certainly not allow or encourage this kind of behavior. First of all, the bill explicitly says that fencing and land use restrictions cannot be used to achieve the statewide health standard (Section 303(e)(3)) and that DER can disapprove a site-specific remediation plan that consists solely of fencing or land use restrictions (Section 304(i)). Second, fencing and land use restrictions will not prevent contamination from affecting groundwater, so it is likely that any serious contamination will have to be cleaned up in some fashion. Third, it is difficult to imagine why a company would choose to spend all of the money needed for an environmental assessment, risk assessment, and cleanup just to fence the property off and let it sit on their books. It will be in the company's best interest to sell the site, particularly since the cleanup standards will insure that the site can be sold for alternative uses.

The final false assumption is that restricting the new cleanup standards to former industrial sites will somehow provide an "incentive" to reuse those sites. A business

considering locating or expanding in Pennsylvania will *select* a site for consideration based on its access to customers, suppliers, and workers, the facilities available at the site, and other factors. It will *reject* that site if the costs or uncertainties of environmental contamination and cleanup are too great. Even if the cleanup standards in Senate Bill 1 were limited to industrial sites, a business will almost always be able to find a greenfield site which is easier and cheaper to redevelop, particularly since most state economic development assistance programs can be used at both greenfield and brownfield sites. At best, industrial site reuse legislation will be able to significantly reduce, but not eliminate, the environmental disincentives associated with a brownfield site. The best way to promote economic development in the region is to facilitate consideration of the largest number of potential sites in order to maximize the chances that a business will find a site within, rather than outside, the region.

In one important way, it is true that changing the cleanup standards for contamination at greenfield sites will make them more attractive to businesses. Various business climate studies, including the one conducted by the Conference on Real Estate last year, have concluded that unreasonable and adversarial environmental regulations deter businesses from locating in Pennsylvania. We all hope that by establishing more reasonable environmental regulations in our state, such as through the reforms in Senate Bill 1, businesses will be more likely to locate and expand here, both on greenfield sites and brownfield sites. This is not an unintentional result of the bill, but a very deliberate attempt to both promote economic development *and* improve the quality of the environment by encouraging cleanups.

It has been suggested that businesses only be permitted to use cleanup standards based on industrial use assumptions when there is a reasonable probability that the property will be committed to that use in the foreseeable future. Any business that owns a property that is now unused has a strong economic interest in trying to sell that property or to reuse it for some purpose. If it cleans it up using industrial use standards when there is no reasonable chance of that reuse, then it is limiting its own ability to recover its costs. In fact, the structure of the cleanup standards is such that, if all other factors are equal, businesses will have an incentive to select the background standard over the statewide health standard when possible, and to select the statewide health standard over the site-specific standard when possible, since deed restrictions, more elaborate analyses, and greater public participation will be required when the statewide health standard for industrial uses or a site-specific standard is applied.

Some groups continue to feel that it is inappropriate to make cleanups more feasible for current owners because it would mean that we are not making polluters "pay" for their negligence. In fact, where contamination has occurred through negligence or intentional violation of environmental standards, the responsible party is subject to civil and/or criminal penalties, and that liability will not and should not be changed by Senate Bill 1. In most cases, however, the contamination at former industrial sites occurred over many decades when environmental standards were non-existent and the effects of contamination were unknown. Treating every former owner of industrial property as

though they were illegal “midnight dumpers” is misguided and impedes progress in cleaning up sites.

There are also those who still feel that Senate Bill 1 inappropriately lowers cleanup standards to a point where health and safety are endangered. If that were true, of course, it would be a very serious concern. The Growth Alliance does not wish to promote economic development at the cost of peoples’ lives, nor, I believe, do other advocates of industrial site reuse legislation. The difficulty is that we are talking about risks and probabilities rather than certainties. No one has proposed that the state set cleanup standards which would, with certainty, result in illness or death. However, since it is rarely practical or even possible to remove all contaminants from a site, there will always be some risk associated with the site. The question is — how much risk is acceptable?

Some have argued that in cleaning up contaminated soils, a level of one in one-million is the most risk that is acceptable following a cleanup. It is important to understand not only what this means, but what to compare it to. The standard means that if one million individuals worked at the site over the course of their lifetimes, at most one of those individuals would develop a case of cancer that they would not have developed if they had not worked at the site. This is a very small risk, particularly when one realizes that the average American has a 1 in 4.4 chance of developing cancer in his or her lifetime. As John Graham, Director of the Center for Risk Analysis at Harvard University, has pointed out, the average American’s lifetime risk of being struck and killed on the ground by a crashing airplane is **four** chances in one-million — a greater risk than one in one million — yet no one seriously proposes that people should sleep and eat in their basements or that we require children to play indoors. Even cleaning up a site to a 1 in 50,000 risk level makes it safer than the 1 in 27,000 chance of being struck and killed by lightning. Is it really worth sending jobs to greenfield sites or other states just to be safer than that?

It is also important to insure that appropriate assumptions are made when calculating a particular risk level. For example, DER’s current soil cleanup standards are based on the assumption that a property will be used for residential purposes, and that children will be playing at the site, ingesting contaminated soil. These assumptions are unnecessarily stringent for sites that will be used for industrial purposes. Using industrial exposure assumptions can dramatically reduce the cost of cleaning up a site to meet a particular risk level — whether it is 1 in 1 million or 1 in 10,000.

It is easy to get lost in debates about alternative cleanup standards and which sites should be eligible, and to lose sight of the real issue. While we debate about how clean a cleanup needs to be or whether a business will be more likely to pollute a greenfield site, the unreasonable costs and unpredictable liability under current regulations result in sites sitting idle *with no cleanup at all*, while development continues to occur on farmland or pristine acreage, creating the risk of contamination in totally new areas. Moreover, where contamination exists, it does not sit idle, waiting for us to decide how much to clean it up. It migrates through soil, into groundwater, and across property boundaries. The longer we discourage cleanups from taking place, the more difficult and expensive they can

become, and the more likely it is that people outside of the site will be affected. The National Research Council report I referenced earlier stated that “ground water cleanup is more likely to be effective if initiated early” and recommended that environmental agencies “identify and eliminate disincentives to early implementation of ground water remedial actions.” While proponents of extremely high cleanup standards claim to be protecting the environment by assuring that cleanups, *when they occur*, are done to those high standards, if you look around at the hundreds of idle sites with no prospect of cleanup or reuse, and at the many new greenfield sites that are being developed, you will quickly realize that, as a practical matter, the environment is being made *worse*, not better. Establishing reasonable cleanup standards will *improve* the environment as well as promoting economic development.

Conclusion

In summary, we have found that Senate Bill 1 strikes the appropriate balance between economic development and environmental protection. It will help to encourage businesses to locate and expand in Pennsylvania by establishing reasonable environmental cleanup standards, and it will help to encourage the redevelopment of former industrial sites by enabling cleanups to be both safe and affordable.

The members of the Growth Alliance urge you to act promptly to consider and pass Senate Bill 1. Every month that passes without establishing reasonable cleanup standards, finality for cleanups, and limitations on the liability of new owners can result in lost jobs and the unnecessary development of greenfield sites. We cannot afford to let any more time pass before addressing this urgent problem.

Southwestern Pennsylvania Growth Alliance

Support for Senate Bill 1 to Promote Economic Development and Environmental Protection

Current Costs of Cleanup are Unreasonable

- 47.5 acre industrial site with soil contamination
 - » DER standards: \$24.7 million --
\$36.7 million
 - » Risk-based standards: \$1.7 million --
\$12.7 million
- 216 acre industrial site with soil and groundwater contamination
 - » DER standards: \$21.6 million --
\$23.4 million
 - » Risk-based standards: \$5.9 million --
\$6.5 million

Elements of Successful Legislation

- Reasonable, risk-based cleanup standards
- Predictable costs and timeframes for cleanup
- Finality of cleanup efforts
- Protection from liability for past contamination for innocent purchasers and others

S.B. 1 Does Not Give Incentive to Pollute Greenfields

- Responsible businesses prevent pollution and clean it up when it occurs
- Severe penalties still exist for not preventing or cleaning up pollution, regardless of cleanup standards
- Businesses incur significant costs from assessing and cleaning contamination, so incentive exists to prevent it

Brownfields Will Not Be Fenced And Abandoned

- S.B. 1 explicitly prohibits using fencing and land use restrictions to achieve standards
- Fencing and land use restrictions will not prevent groundwater contamination, so cleanup will still be necessary
- Companies will want to recover costs by selling or reusing property

Should Not Limit Legislation to Former Industrial Sites

- New cleanup standards will not provide *incentive* to reuse industrial sites, merely remove disincentive
- Businesses need access to a wide variety of sites depending on needs
- Pennsylvania's environmental regulations discourage businesses from locating at all types of sites

Standards Under S.B. 1 Are Not Too Low

- » Dying from cancer: 1 in 4.4
- » Dying in an automobile: 1 in 44
- » Upper bound S.B. 1: 1 in 10,000
- » Dying from lightning: 1 in 27,000
- » Dying on ground
from crashing airplane: 1 in 250,000
- » Lower bound S.B. 1: 1 in 1,000,000

Southwestern Pennsylvania Growth Alliance

Responses to Common Concerns About S.B. 1

- CONCERN:** S.B. 1 would allow the public to be exposed to increased levels of carcinogens.
- RESPONSE:** *There are currently hundreds of contaminated sites around the state with no prospect of cleanup or reuse. By encouraging these sites to be cleaned up, S.B. 1 will increase the safety of the surrounding communities. Moreover, the cleanup standards in S.B. 1 will protect everyone who could be exposed to or affected by contamination at a site, including residents of the surrounding community.*
- CONCERN:** S.B. 1 sets risk levels too low, and would allow dangerous levels of contamination to remain after cleanups are supposedly complete.
- RESPONSE:** *The risk levels established in S.B. 1 are the same as those used in national drinking water standards and in federal Superfund cleanups. The risks from dying from cancer caused by contamination remaining at a site would be less than the risk of being killed by lightning or dying in a car accident.*
- CONCERN:** S.B. 1 would discourage the cleanup of hazardous materials by allowing contaminated areas to simply be fenced off.
- RESPONSE:** *S.B. 1 clearly states that a company cannot simply fence off a site in order to comply with the law. Moreover, fencing or land use restrictions will not prevent contamination from affecting groundwater, so any serious contamination will have to be cleaned up in some fashion.*
- CONCERN:** S.B. 1 would encourage the contamination of greenfields by lowering cleanup standards for yet undeveloped areas.
- RESPONSE:** *Businesses do not intentionally cause pollution and they do not consciously look for locations that will allow them to do so. There are many procedures in place now to prevent pollution and penalties for non-compliance that do far more to prevent contamination than cleanup standards do. Moreover, since a business cannot know in advance what the cleanup costs will be, it is in its best interests to avoid contamination in the first place. S.B. 1 would reduce the pressure to use greenfield sites for development by making it more feasible to reuse existing sites.*
- CONCERN:** S.B. 1 should not change cleanup standards for contamination which occurred recently or which occurs in the future.
- RESPONSE:** *Reasonable environmental regulations are part of a good business climate that attracts jobs to the state, and Pennsylvania is currently perceived by many businesses as having hostile environmental*

regulations. We need reasonable cleanup standards regardless of when contamination occurred.

CONCERN: S.B. 1 should be limited to old industrial sites in order to provide an incentive to clean them up.

RESPONSE: *Even under liberal cleanup standards, a business will almost always be able to find a greenfield site which is easier and cheaper to redevelop. At best, industrial site reuse legislation will be able to significantly reduce, but not eliminate, the environmental disincentives associated with a brownfield site. In today's diverse economy, many manufacturing firms will choose to locate at sites other than traditional heavy industrial locations. The best way to promote economic development in the region is to facilitate consideration of the largest number of potential sites in order to maximize the chances that a business will find a site within, rather than outside, the region*

CONCERN: S.B. 1 allows businesses to decide how much to clean up a site.

RESPONSE: *S.B. 1 gives responsibility for the final approval of any cleanup plan to DER, not to the business that owns or is purchasing the site. S.B. 1 does give businesses a choice of which type of cleanup standard to follow because, as a practical matter, it is impossible to establish a single set of standards that will be applicable to all sites.*

CONCERN: S.B. 1 should only allow restricted use cleanups where it is likely that the property will be reused for that purpose.

RESPONSE: *Businesses will have an incentive to clean up to the maximum extent practical in order to maximize the value of their property. Cleaning up for industrial use when there is no likelihood of that use makes it impossible for the business to recover any of its costs.*

CONCERN: S.B. 1 would eliminate an affected citizen's right to contest a cleanup remedy.

RESPONSE: *S.B. 1 increases the ability of residents in the surrounding community to provide input into cleanup plans by requiring that the community be notified when a site remediation is proposed to be conducted. Moreover, for cleanups using site-specific standards, the bill specifies that the municipality can request that the public be involved in the cleanup plan.*

CONCERN: S.B. 1 would not require cleanups to take into account ecological or environmental considerations, only human health considerations.

RESPONSE: *S.B. 1 clearly states that the remediation standards are to be set so that "any substantial present or probable risk to human health and the environment is eliminated or reduced to protective levels."*