

# Cleanup News

## DEQ, Work Group Take New Look At Environmental Cleanup Program



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The Oregon Department of Environmental Quality (DEQ) is taking another close look at its Environmental Cleanup Program.

The agency is convening an 11-member Environmental Cleanup Work Group to re-examine the program's effectiveness, activities and priorities, as well as its role in addressing recent amendments to the federal environmental cleanup law and amendments proposed in other states to their environmental laws.

The group, which is expected to meet three to five times this year, had its initial meeting Feb. 9 at DEQ Headquarters in Portland. The meeting provided a quick overview of current agency cleanup issues and activities, and gave work group members an opportunity to respond about whether changes should be made to the program for the years ahead. A list of work group members may be found at the end of this article.

### *Program background*

DEQ formed its Environmental Cleanup Program in 1988. It's been nine years since Oregon adopted comprehensive revisions to the state's environmental cleanup rules, and six years since an external advisory group last evaluated the program's overall effectiveness.

"We felt the time was right to take another serious look at the program and where it is headed," said Al Kiphut, administrator of DEQ's Land Quality Division. "There have been some significant changes in federal environmental cleanup laws, and there is also a need to determine the scope and size of the state's cleanup program, given the issues of work needs, anticipated reductions in cleanup staffing, and budget realities."

"Basically, we want to find out from the group how well the program is working, what issues need more attention and what improvements need to be made."

DEQ's Environmental Cleanup Program has numerous components, including voluntary cleanup, site assessment, site response and orphan site work. The program also oversees dry cleaners in Oregon, working closely with the agency's hazardous waste and air quality program specialists. Two related but separate programs fill out the cleanup work slate: DEQ's Emergency Response program plans for and responds to spills of hazardous materials and oil, and the agency's Underground Storage Tank program regulates the storage of products and cleanup of releases from underground storage tanks.

Excluding underground storage tank releases, the Environmental Cleanup Program has identified about 3,750 contaminated and potentially contaminated sites in Oregon since 1988. DEQ identified 227 new sites in its 2005 fiscal year (July 1, 2004 through June 30, 2005), adding these sites to its Environmental Cleanup Site Information System (ECSI) for public-reporting purposes.

DEQ added 27 sites to its list of 650 sites where contamination has actually been documented (the Confirmed Release List) in 2005. DEQ also keeps an Inventory of Hazardous Substance Sites – a list of sites where contamination has been confirmed and where further investigation or cleanup is necessary. The Cleanup Program added 15 sites to the Inventory in FY 2005 for a total of 400 Inventory sites.

The majority of contaminated properties in Oregon are cleaned up through DEQ's Voluntary Cleanup Program. Under this program, a property owner may seek DEQ assistance in investigating contamination, selecting a cleanup remedy and then cleaning up the property. At the end of the process, DEQ issues a No Further Action letter which tells the current owner and potential purchasers that the site has been successfully cleaned up. Since 1988, DEQ has issued No Further Action notices for 1,100 sites, including 112 in FY 2005.

For sites that pose a significant risk to human health or the environment, DEQ's Site Response Program may use enforcement tools to ensure that the cleanup moves forward. Alternatively, if a property owner is unwilling or unable to perform necessary cleanup, DEQ may perform the cleanup using the state's orphan fund. Regardless of the program, DEQ seeks to recover its oversight and cleanup costs from those responsible for the contamination.

For a complete look at DEQ's cleanup programs and activities, plus its annual cleanup report, go to: <http://www.deq.state.or.us/wmc/cleanup/clean.htm>.

### ***New federal law and other changes***

While DEQ is not recommending any changes to state cleanup laws at this time, the agency hopes to get feedback from the work group on whether Oregon should consider making changes to its cleanup laws to more closely reflect recent changes to the federal cleanup law, CERCLA (Comprehensive Environmental Response, Compensation Liability Act of 1980).

Oregon originally adopted its environmental cleanup law in 1987 and, with few exceptions, closely modeled it on CERCLA. In particular, both CERCLA and Oregon's cleanup law provided that a buyer of contaminated property would be liable for cleanup of the property if the buyer knew or reasonably should have known about the contamination at the time of purchase. This provision has provided a strong incentive for sellers to clean up their properties before a sale and has been a significant reason for the interest in and success of DEQ's Voluntary Cleanup Program.

For those properties where concerns about potential cleanup liability might hinder a transaction and redevelopment, DEQ's Prospective Purchaser Program often provides assistance. Through this program, a buyer may enter into a Prospective Purchaser Agreement (PPA) with DEQ. A PPA is a legally binding agreement between DEQ and a prospective property purchaser which limits that purchaser's cleanup liability to DEQ in exchange for a commitment by the purchaser to provide cleanup and redevelopment benefits. DEQ recently completed its 82nd PPA.

In 2002, Congress adopted the "Small Business Liability Relief and Brownfields Revitalization Act," which amended CERCLA. Among other provisions, the 2002 amendments provided that a "bona fide prospective purchaser" of contaminated property is not liable for cleanup costs if the purchaser meets certain requirements, including completion of all appropriate inquiry into the property's past uses and potential contamination before purchase. Under the amended law, a purchaser may now buy a property knowing that the property is contaminated and still not be held liable for cleanup if it follows certain post-acquisition requirements, including using "due care" in follow-up and monitoring of the property.

With this amendment, CERCLA now provides a different liability scheme than does Oregon's cleanup law, at least where prospective purchasers are concerned. DEQ will ask the work group to evaluate whether the difference between federal and state cleanup law presents significant impediments to property transactions, redevelopment, or cleanup efforts of contaminated properties in Oregon.

DEQ will also ask the work group to examine if the state should look into adopting a rule similar to EPA's recently established "All Appropriate Inquiry Rule," which sets specific actions a buyer must complete before acquiring property in order to claim the benefit of several of the new CERCLA defenses and exemptions from cleanup liability, including the bona fide prospective purchaser exemption.

### *All Appropriate Inquiry*

Before the 2002 CERCLA amendments, property owners who performed "due diligence" in examining the property for contamination (before or after purchasing the property) could not be held liable for cleanup costs if contamination was found after the property owner conducted its investigation of the site. Specific actions that would meet the due diligence requirement were not spelled out in CERCLA. Instead, federal courts developed due diligence standards through cases they decided.

The new All Appropriate Inquiry rule, which EPA adopted Nov. 1, 2005 and which goes into effect Nov. 1, 2006, lists specific steps a buyer must complete in evaluating a property to meet CERCLA's due diligence requirements. Oregon's cleanup law includes due diligence provisions similar to those in CERCLA. DEQ will ask the work group whether DEQ should consider adopting due diligence standards by rule.

Finally, the Uniform Commission on State Laws, a non-governmental group dedicated to bringing uniformity to laws across the states, has drafted a model law regarding environmental property restrictions. Called the "Uniform Environmental Covenants Act," the law provides authority and guidance for property-based environmental restrictions. To date, 10 states have adopted the uniform law. A bill based on the uniform law was introduced in the 2005 Oregon legislative session but did not pass out of committee. DEQ will ask the work group whether Oregon should consider adopting the uniform law.

### *Work group members*

Members of the Cleanup Work Group represent the fields of environmental consulting, environment law and planning, local and federal government, environmental advocacy, and industry.

Its members are: Donald Haagensen (Chair), Cable Huston Benedict Haagensen & Lloyd LLP, Portland; Jan Betz, City of Portland; Stuart Brown, Bridgewater Group Inc., Lake Oswego; Dee Burch, Advanced American Construction Inc., Oregon City; Lori Cohen, U.S. Environmental Protection Agency (EPA), Region 10, Seattle; Glenn Klein, Harrang Long Gary Rudnick PC, Portland; Rhett Lawrence, Oregon State Public Interest Research Group (OSPIRG), Portland; John Ledger, Associated Oregon Industries, Salem; Mark Morford, Stoel Rives, LLP, Portland; Randy Tucker, METRO, Portland; and Tom Zelenka, Schnitzer Group, Portland.

### *How you can participate*

If you are interested in environmental cleanup program issues, DEQ and the Environmental Cleanup Work Group are requesting input on issues discussed in this article and about the state's cleanup program in general. Please see the "Request for Information" document available at: <http://www.deq.state.or.us/wmc/cu/cuworkgroup.html>. This link also provides additional information about the work group, including meeting agendas, handouts and meeting summaries. The work group's next scheduled meeting is at 1:30 p.m. on Tuesday, March 7, in Conference Room A/B at DEQ's Northwest Region Office, 2020 SW Fourth Ave. (SW Fourth and Lincoln), Portland.

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