



Environmental Cleanup Work Group Project Report May 2006

INTRODUCTION

Oregon's environmental cleanup program is eighteen years old. It has been nine years since comprehensive revisions were adopted in the state's environmental cleanup rules and six years since an external advisory group evaluated the overall effectiveness of Oregon's cleanup program.

The Department of Environmental Quality's (DEQ) Environmental Cleanup Program convened a work group in February 2006 to evaluate how well the program is operating, review program funding, and identify program issues requiring attention. Among other issues, the group was asked to discuss the effects of recent changes in federal law and regulations, and their potential impacts on assessment and cleanup work in Oregon. The group also discussed the effects of recent staff reductions in response to a projected budget shortfall.

GROUP MEMBERSHIP

The Environmental Cleanup Work Group (ECWG) was chaired by Don Haagensen, Cable Huston Benedict Haagensen & Lloyd. The group members were Jan Betz, City of Portland; Stuart Brown, Bridgewater Group, Inc.; Dee Burch, Advanced American Construction, Inc.; Lori Cohen, EPA Region 10; Glenn Klein, Harrang Long Gary Rudnick; Rhett Lawrence, OSPIRG; John Ledger, Associated Oregon Industries; Mark Morford, Stoel Rives Boley Jones & Grey; Randy Tucker, Metro; and, Tom Zelenka, Schnitzer Group.

DEQ staff that worked with the group included Al Kiphut, DEQ Land Quality Division Administrator; Jeff Christensen, DEQ Cleanup Manager – Headquarters; Ann Levine, DEQ Cleanup Program Coordinator; and Sheila Monroe, DEQ Cleanup Manager - Eastern Region. Other DEQ staff attended certain workgroup meetings to provide assistance including Bob Danko, Bruce Gilles, Charlie Landman and Kevin Parrett.

DEQ wishes to express their gratitude to the ECWG members for their participation and constructive contribution to the continued development of the program. We would also like to thank audience members for providing helpful feedback for the work group's consideration.

OVERVIEW

The work group held four meetings on 2/7, 3/7, 4/4, and 5/2, 2006. Meeting agendas, notes and handouts are posted on DEQ's Web site at <http://www.deq.state.or.us/wmc/cu/cuworkgroup.html>.

The specific charge for the group was to review a) cleanup program substantive issues, in particular issues related to the 2002 CERCLA Amendment as those amendments might relate to potential future legislative or rulemaking initiative in Oregon; and b) the Uniform Environmental Covenants Act; and c) the cleanup program's strategic plan and changes in response to projected budget shortfalls.

ALL-APPROPRIATE INQUIRY (AAI)

EPA adopted the AAI rule on November 1, 2005 to become effective November 1, 2006. The AAI rule applies to new purchasers, and is a pre-requisite for qualifying for the CERCLA "bona fide prospective purchaser" defense to liability for contaminated sites, as well as, the "innocent purchaser" and the "contiguous property owner" defenses.

In the absence of changes to Oregon's cleanup law, AAI in Oregon only potentially applies to parties who otherwise qualify for the innocent purchaser defense under ORS 465.255.

The Work Group requested Department of Justice (DOJ) advice on considerations for recognizing the federal AAI rule in Oregon for purposes of the innocent purchaser defense under state law. DOJ advised that DEQ may adopt a policy statement; however, such a statement is not legally binding. DOJ also stated that the Environmental Quality Commission (EQC) most likely has authority to develop an administrative rule on the topic. The administrative rule would be binding on

both the Department and other parties. The potential new rule would not make any change in the existing liability scheme defined in the statute; it would merely clarify existing statutory terms and, in effect, provide information on at least one way to comply with the statute.

The ECWG recommended EQC adoption of an administrative rule indicating that meeting federal AAI rule requirements is one way, but may not be the only way, to meet Oregon's all appropriate inquiry requirements as they relate to innocent purchasers. The ECWG also concluded that any rule should not affect whether other actions would satisfy the Oregon all appropriate inquiry requirements.

BONA FIDE PROSPECTIVE PURCHASER LEGISLATION

The 2002 CERCLA Amendment resulted in significant differences between provisions for liability under federal vs. Oregon law. Under Oregon law, individuals who acquire contaminated property--and knew about the contamination or should have known--are responsible for contamination cleanup costs. Whereas under Federal law, the bona fide prospective purchaser is protected from liability for cleanup costs if the purchaser conducts AAI in compliance with the new rule, prevents exposure to or migration of the contamination, and complies with other requirements specified in the federal law.

In general, the ECWG members did not support adopting changes from the bona fide prospective purchaser 2002 CERCLA amendments. Concerns expressed ranged from the risk of increasing the number of "orphan sites" (sites with unknown, unable, or unwilling responsible parties), to losing or adversely impacting Oregon's successful Prospective Purchaser Agreement process by adopting the federal approach.

A representative for the Port of Portland, David Ashton, gathered information from California and Nevada, states that have adopted state versions of the 2002 CERCLA changes. The California model includes a reporting requirement, and many of the federal requirements for due care and cooperation, but appears to vary from the federal rules by requiring implementation of a site assessment plan and if needed, a response plan.

The ECWG did not endorse adoption of the federal CERCLA amendments for bona fide prospective purchasers. The Chair's recommendation to the Port was to work with DEQ if the Port would like to pursue further development of any legislation regarding bona fide prospective purchasers.

UNIFORM ENVIRONMENTAL COVENANTS ACT

DEQ requested the opinion of the ECWG on a proposal raised at the '05 legislative session to adopt the Uniform Environmental Covenants Act (UECA). The Department noted that the bill was introduced in the last legislative session, although it failed to pass out of committee. After discussing, the ECWG recommended that the UECA is probably not a priority for the Department to lead efforts to enact. They noted that the model legislation is relatively complex and affects environmental, financial institution and real estate law and recommended that, if there is interest in developing this legislation, the proponents should work with the Oregon Bar Association and others.

CLEANUP PROGRAM PRIORITIES AND BUDGET

DEQ presented information about the Cleanup Program budget and our plan to make the program sustainable by reducing staff and re-prioritizing work. The ECWG held fairly wide ranging discussions on program issues and priorities. Several themes emerged through the discussions, and the group made several recommendations to DEQ.

The ECWG strongly recommended finding a way to support voluntary cleanup and independent cleanup project oversight, for example by using temporary employees; use of receipts authority agreements with DEQ oversight where project management staff is unavailable or limited; cross-training of other staff; use of our existing contractors to assist us with project work; expanding use of the independent cleanup pathway; or possibly by certifying contractors to review low priority project work. However, some members cautioned that they had experienced problems with one contractor reviewing another contractor's work.

The Cleanup Program guidance needs were discussed at all four ECWG meetings. Some group members who actively work on projects in the program believe guidance is important and needs to be maintained, especially in a time of shrinking staff support. ECWG remembered that a surcharge was used in the past to help pay for guidance development work. They also understand that EPA funding for grant work does not fully repay DEQ's costs. Several group members specifically emphasized the need for guidance on conducting ecological risk assessment in riparian areas, and assessing risk from sediment contamination.

Some discussion, but no support was expressed, for privatization of the cleanup program. Several members though expressed interest in the Massachusetts model and believe it works well, but acknowledged that it is very prescriptive, is heavy on regulations, and requires a separate administrative structure. The development of such a program would require significant agency resources.

There was some discussion about the overall structure of DEQ's cleanup program recognizing that voluntary cleanup projects currently "pay for" the state's oversight costs for the project as well as helping to subsidize the costs of implementing other programs such as site assessment and emergency response programs which are not as cost recoverable in nature. For example, some members suggested that the voluntary cleanup and the voluntary portion of Site Response should be a self-funded program; in other words, those who pay for voluntary cleanup work should pay only for the costs associated with running a VCP. A VCP program may include oversight of the projects, maintaining public access to information about sites, developing and maintaining guidance or updating rules that pertain to the VCP, etc. They suggested that costs associated with emergency response, site assessment and the orphan program should be funded by the legislature, grants, and direct cost recovery whenever possible; or, should not be conducted.

DEQ also presented information on potential legislative requests the Department is developing for the state's orphan site account and emergency response program. In discussing these potential legislative proposals:

- The ECWG supported the State's work on orphan sites. The ECWG conceptually support DEQ's proposal to request that the legislature fund emergency response from General Fund, and request authorization for another bond sale to re-capitalize the Orphan Site Account. The ECWG generally accepted that bonds are the typical funding mechanism for this work.
- The ECWG conceptually supported DEQ's proposal to fund the emergency response program from General Fund rather than the Hazardous Substance Remedial Action Fund (HSRAF). Work group members generally believe that the Arlington hazardous substance disposal fee and cleanup project cost recovery work (i.e., HSRAF) should not subsidize the emergency response program.

NEXT STEPS

DEQ appreciates the participation of the ECWG members and will keep the work group informed on major developments and issues. DEQ indicated that it may want to reconvene the work group in the near future—perhaps in the fall of 2006—to update the work group on the status of the cleanup program's budget, actions taken by the Department in response to the work group's recommendations, preparations for the legislative session, and any new issues as appropriate.