



Oregon

Kate Brown, Governor

Department of Environmental Quality

Land Quality Division

700 NE Multnomah Street, Suite 600

Portland, OR 97232

503) 229-5696

FAX (503) 229-5675

TTY 711

DATE: February 22, 2021
TO: House Committee on Business and Labor
FROM: Abby Boudouris, Legislative Analyst
SUBJECT: HB 2377 of 2021 Session

HB 2377 bill amends Oregon corporate law to allow access to insurance assets beyond the current period, which is five years after corporate dissolution. Insurance assets have provided significant contributions to the cleanup of contaminated sites statewide for many years, and this bill will provide policy holders increased access to insurance assets and is expected to bring significant resources to cleanup of contaminated sites not only in the Portland Harbor but also statewide.

Both the Oregon Removal and Remedial Action law and the federal Superfund law are based on the principle of polluter pays; specifically that Responsible Parties pay for the costs of cleanup when a site is contaminated by release of hazardous substances into the environment. Responsible Party assets have been defined since the earliest days of the Oregon Removal and Remedial Action law and also the federal Superfund law to include the Responsible Party insurance assets.

Since the inception of Oregon's cleanup program in the 1980s, numerous sites have been cleaned up in part by insurance assets – ranging from industrial and manufacturing sites with legacy releases, to agricultural properties and rural communities with leaking underground tanks. Though there is no requirement that a Responsible Party inform DEQ when insurance assets are involved in paying cleanup costs, DEQ is aware that for many sites insurance assets have brought significant resources to the cleanup process and made a significant difference to cleanup achieved by Responsible Parties.

Availability of insurance assets for cleanup also reduces the burden on the general public to pay for cleanup up through orphan bond sales, which are ultimately paid from the state's general fund, and free up other state and federal brownfield grant and loan funds for sites without a viable Responsible Party.

Current DEQ practices seek to bring insurance assets to the cleanup process. For example, DEQ encourages Responsible Parties to investigate potential insurance assets, and requires investigation in some circumstances such as when making Ability to Pay determinations and documenting whether a Responsible Party has resources available to pay for cleanup. DEQ has prepared a [Fact Sheet](#) to assist business owners with investigating potential insurance assets; has engaged services of insurance archeology firms to assist with locating historic insurance policies; and has utilized relatively recent changes to the state environmental insurance laws known as Oregon Environmental Cleanup Assistance to accept assignment of insurance claims from policy holders to bring insurance assets to the cleanup process.

This bill is consistent with the longstanding policy basis in state and federal laws that Responsible Parties are first sources for cleanup funding, and also that Responsible Party assets include insurance assets; and also is consistent with current DEQ practices that seek to maximize Responsible Party contribution to cleanup, including accessing insurance assets. While the bill does not have a direct fiscal or other impact to DEQ, the bill could make it possible to access more insurance proceeds to accomplish cleanup of contaminated sites.

DEQ has no position on this bill.

Contact: Abby Boudouris, Legislative Analyst, boudouris.abby@deq.state.or.us or 971-803-2462

Investigating Potential Insurance Assets

Oregon Department of Environmental Quality Fact Sheet
<https://www.oregon.gov/deq/Hazards-and-Cleanup/env-cleanup/Pages/Insurance.aspx>
accessed February 19, 2020

Many site owners and operators, particularly when faced with third-party claims asserted against them by agencies and adjacent property owners, struggle to pay for investigation and cleanup of contamination from past activities and operations at their properties.

In the past, site owners and operators often purchased comprehensive insurance for their properties and businesses in the form of Commercial General Liability policies. While modern CGL policies have specific language excluding coverage for contamination and pollution, those in effect before 1986 typically lacked such exclusions. Therefore, if a hazardous-substance release occurred before 1986, CGL policies in place from the date of release until 1986 may be a source of funding to perform needed investigation and cleanup.

The Q&A discussion below provides important information about historic insurance policies.

Why are old insurance policies still relevant?

Many policies are “occurrence based,” meaning that if a hazardous-substance release occurred during the policy period – no matter how long ago – the policy may pay for site investigation and cleanup.

What’s the point of looking for past policies if the named insured has passed away, the business has closed, or the insurer is no longer around?

Insurance policies may be an asset of an individual’s estate or a defunct business; if there’s reason to believe insurance coverage potentially applies to costs incurred now, the responsible party or the state may be able to ask a court to appoint an appropriate party, e.g., a receiver, to reopen the estate or act on behalf of the defunct business to access coverage. While insurance companies do go out of business, leaving no recourse for past policy holders except as may be available through a state-operated insurance fund, many insurers have changed names, merged with or been bought by another company, or sold or purchased assets and liabilities – including old policies. In such cases, the insurance policies may still be viable.

What if we think there was insurance, but can’t find a policy? Coverage would have been 30+ years ago!

Oregon is a “lost policy” state, meaning that even if the insured party cannot produce a copy of the insurance policy, there may be alternate means of proving past coverage – for example, a cancelled check or other business records. Since past insurance policies often had similar, standardized language, it may not be necessary to have an actual copy of an individual policy. It is important to at least find documentation of a policy’s purchase.

I heard something about an “owned-property exclusion.” What’s that?

Pre-1986 CGL policies often contained an “owned-property” exclusion of damage affecting only the insured’s property. In environmental cases, this often means a policy will not cover on-site contamination that affects soil only, which is considered owned property. However, because the state “owns” groundwater and surface water, the owned-property exclusion does not apply to claims for damage to these media. The policies may also cover soil remediation needed to prevent additional damage to

surface water or groundwater.

[Should I fund site cleanup now, and look into past insurance later?](#)

While DEQ encourages prompt investigation and cleanup at all sites, in Oregon and most states, insurance companies are not always obligated to reimburse costs you incur before notifying them about a claim – even if they would otherwise have been responsible for covering these costs. Therefore, it's best to search for records of old insurance sooner rather than later, and notify all potential insurance companies in writing of your actual or potential liability for site contamination.

[I am a small business; isn't insurance archeology most suited to larger companies?](#)

The [Oregon Environmental Assistance Cleanup Act](#), passed in 1999 and strengthened by amendments in 2003 and 2013, ensures that Oregon law applies to all cleanup sites. Also, most properties that have been in any kind of commercial or industrial use – including small businesses, dry cleaners, auto service stations and repair shops, and many others – have had potential insurance coverage often extending from the turn of the 20th century through the mid-1980s with policies that contained no pollution exclusion.

[How do I search for evidence of historical insurance coverage?](#)

Insurance archeology is an intensive search for old policies, often including an assessment of whether any policies found will cover cleanup costs for contamination that occurred during the coverage period. Resources such as attorneys or specialists in insurance archeology may be able to assist you. It may be helpful to reconstruct the history of the property from the early 1900s through the present, including the types of site uses and names of individuals, businesses, lessees and others affiliated with the property. These may be potentially responsible parties (PRPs) who caused site contamination and may have purchased insurance policies. A search for insurance coverage might include reviewing internal records to find actual copies of policies, or other evidence of a policy. You may want to search for names of insurance agencies and brokers, and records of communications with them. If you know the insurance carrier(s) name, ask them about historical insurance coverage. The recollection of an insurance broker (or your own), are also evidence of insurance. References to insurance might be found in corporate minutes or annual reports; worker's compensation records; government contracts; litigation and bankruptcy proceedings; old property leases; and mortgage or business loan documents.

[How do I make a claim on an insurance policy?](#)

DEQ recommends you consult with a qualified attorney. If you need a referral, the [Oregon State Bar](#) can provide one.

DISCLAIMER: Any information DEQ provides about historic insurance policies is purely for educational purposes, and is not intended as legal advice. Persons or entities who may be covered under old insurance policies should consult experienced professionals with knowledge in these areas.