

Leaking Underground Storage Tank Program

LUST Cleanup Information Packet

This packet includes:

1. LUST Cost Recovery Program Information
2. LUST Invoicing for Cleanup Program Costs
3. Information about Oregon DEQ's No Further Action Decisions
4. Investigating Potential Insurance Assets

Additional Downloadable Guidance Documents:

1. UST Cleanup Manual

<http://www.deq.state.or.us/lq/pubs/docs/tanks/USTCleanupManual.pdf>

2. Permit Requirements for UST Cleanup Sites

<http://www.oregon.gov/deq/tanks/Pages/Permit-Requirements.aspx>

3. Risk-Based Decision Making for the Remediation of Petroleum Contaminated Sites

<http://www.oregon.gov/deq/tanks/Pages/Risk-Based-Decision-Making.aspx>

Downloadable Forms:

1. Initial (Twenty Day) Report Form for UST Cleanup Projects

<http://www.deq.state.or.us/lq/pubs/forms/tanks/USTInitial20DayReportForm.pdf>

2. Leaking Underground Storage Tank Cost Recovery Agreement Form

<http://www.deq.state.or.us/lq/pubs/forms/tanks/USTCostRecoveryAgreement.pdf>



State of Oregon
Department of
Environmental
Quality

Operations Division LUST Program

700 NE Multnomah St.
Suite 600

Portland, OR 97232
Phone: 503-229-6704
800-742-7878

Fax: 503-229-6977

Contact: Mitch Scheel
www.oregon.gov/DEQ

Leaking Underground Storage Tank Program

Leaking Underground Storage Tank Cost Recovery Program



State of Oregon
Department of
Environmental
Quality

Cost recovery

Since Oregon began administering the federal leaking underground storage tank (UST) program in 1988, over 7,475 petroleum releases have been reported to the Department of Environmental Quality (DEQ). Approximately 6,625 of these releases (sites) have been cleaned up, leaving 850 active sites. As DEQ must focus its efforts on environmental priorities, (e.g., sites with significant groundwater contamination), some of these sites are simply not being addressed by DEQ and are part of a backlog of sites needing closure, or “no further action” letters from DEQ.

Federal funding for Oregon's leaking underground storage tank program provides a minimum (core) program to carry out the federal requirements, as well as the Oregon public and legislative mandate to protect human health, safety and the environment from leaking petroleum UST's. The bulk of these resources are spent on high priority sites. Federal and state law also requires that DEQ recover all reasonable costs associated with a cleanup project, including our oversight costs.

Because of the large number of sites needing cleanup and DEQ oversight, a prioritization system is needed to adequately address these sites and make best use of limited DEQ staff resources. This system creates three categories of sites. They are:

- 1) high environmental priority sites;
- 2) responsible party priority sites; and
- 3) responsible party cleanup without DEQ oversight.

High environmental priority sites - we contact you

If your site is a high environmental priority, you can expect to hear from us. As mentioned above, DEQ is focusing its limited resources primarily on those sites presenting the greatest risk to human health, safety, and the environment. To make this determination, DEQ uses a prioritization system to determine the risk the site poses. As one high priority site is completed or is determined to be lower

environmental priority, the next highest priority site is selected for work. Currently, DEQ oversight and payment of oversight costs is done informally without any written agreement between the responsible party and DEQ. For these sites, as long as the cleanup is progressing and the responsible party continues to pay our oversight costs, no change in this arrangement will occur. For sites where the informal arrangement is not working, DEQ may require the responsible party to conduct cleanup and enter into a formal agreement with DEQ as part of an enforcement action. When a site is no longer a high environmental priority, DEQ may decide not to actively provide oversight. A responsible party can request that DEQ continue providing oversight by signing a voluntary agreement. The agreement will allow us to more effectively schedule our resources.

Responsible party priority sites - you contact us

This option is available for those responsible parties who wish to proceed with cleanup and need DEQ signoff (e.g., to sell their property, obtain financing or insurance, etc.). The responsible party must sign a voluntary agreement requesting DEQ oversight and agree to pay oversight costs. The signed agreement should be sent to the appropriate regional office. These sites are handled on a first come, first serve basis and there may be a waiting list. The agreement is used as a tool for assigning sites to a project manager for review. Not signing the agreement does not release you from an obligation to pay oversight costs or to conduct cleanup. A “no further action” letter will be issued when all regulatory requirements have been met.

You are required to proceed with site investigation/cleanup and to comply with all regulatory requirements, (including all reporting requirements and payment of any oversight costs), even if you don't sign up for priority review. You must also carefully weigh the fact that over time DEQ requirements may change, so waiting for your site to work its way up DEQ's priority list does carry some risk. To minimize this risk, you should carefully follow all DEQ guidance associated with the UST Cleanup Rules. Eventually, your site will be at

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the top of our priority list and we will work on it. We expect that if a competent service provider or consultant carefully follows the rules and the guidance, there should be no unexpected surprises when your site comes up for DEQ review.

The following are some questions we are frequently asked:

What is cost recovery?

Oregon law (ORS 465.330) requires DEQ to recover all reasonable costs associated with the investigation and cleanup of contaminated sites from the responsible party(s). A responsible party is usually the owner or operator of the facility or property. However, under certain situations, previous owners or operators or anyone who by his or her acts or omissions causes, contributes to, or worsens the contamination may be considered a responsible party. If this situation applies to you, you may wish to seek legal counsel.

What DEQ costs will be assessed?

DEQ oversight costs include both direct and indirect costs. Direct costs include DEQ staff time (such as reviewing reports, preparing correspondence, technical assistance, site inspections, enforcement actions, etc.), sample analysis (if we need to collect samples for compliance purposes), and other costs specific to your cleanup project. Direct costs may also include the cost of DEQ using its contractor to respond to an emergency or to investigate and clean up the contamination when the responsible party is unwilling to do so. Indirect costs are those general management and support costs of DEQ's cleanup program and are applied as a percentage of the direct personal services. The average hourly rate, including indirect costs, is in the range of \$166 to \$187.

When will I be invoiced?

Invoices are generally sent about the third week of the month, after any time has accrued during the previous month. Payment is expected within thirty (30) days of receipt. For sites with a signed agreement, or high priority sites that have been working cooperatively with DEQ, DEQ provides a "no further action" letter when it is demonstrated that the cleanup requirements have been met and all outstanding invoices have been paid. If you have a property transaction pending with a specific closing date, it may be possible to receive an estimate of your final billing amount in order to expedite closure of your site. An estimate is generally

somewhat higher than actual charges; refunds are issued within 45-60 days.

If you have any questions concerning the cost recovery process or your invoice please feel free to contact Dawn Ismerio at 503-229-5812. Should you have any questions regarding the specifics of the investigation or cleanup activities at your site, please contact the appropriate regional office. When contacting us, please refer to the site with the DEQ file number (file number is located on the invoice and on all correspondence to you) and the site name.

Alternative formats

Documents can be provided upon request in an alternate format for individuals with disabilities or in a language other than English for people with limited English skills. To request a document in another format or language, call DEQ in Portland at 503-229-5696, or toll-free in Oregon at 1-800-452-4011, ext. 5696; or email deqinfo@deq.state.or.us.

Leaking Underground Storage Tank Program

Leaking Underground Storage Tank Invoicing for Cleanup Program Costs



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Who pays and why?

Owners and operators of facilities or property contaminated by hazardous substances are responsible, under Oregon law, for cleaning up the site. The Oregon Department of Environmental Quality ensures that the cleanup is done in a way that protects human health and the environment. Oregon law requires that those responsible for the contamination reimburse DEQ's costs of carrying out this responsibility.

What DEQ costs are charged to responsible parties?

Cleanup and hazardous waste laws authorize DEQ to charge all reasonable costs *attributable to or associated with* cleanup or hazardous waste activities at a particular site. DEQ accounts for these costs as *direct* and *indirect* costs.

Direct costs are expenditures made specifically for the site, such as cost to travel to the site, and DEQ staff time directly associated with the site including time spent to:

- Consult with the owner and/or environmental consultants;
- Review data and reports describing the type and extent of contamination;
- Review proposed cleanup actions;
- Provide information about the site and opportunities for the public to comment on the cleanup; and
- Provide comments and/or direction on the preferred cleanup method or remedy.

Indirect costs are those that support the operation of the program in general, but are not directly related to specific projects. Examples of indirect costs are:

- Office space, equipment and supplies;
- Non-site-specific activities of project staff, such as training and program administrative activities;
- Clerical, computer network, time accounting, invoicing and grants management;
- Management and supervision;
- Development of technical guidance and policies; and

- A share of DEQ centralized services, such as accounting, budgeting, human resources, and information systems.

DEQ charges for two types of indirect charges. One is costs incurred by the DEQ Land Quality Division and the other is Land Quality's share of DEQ-wide costs. Both the Land Quality and DEQ agency indirect rates are designed to charge each project its share of all indirect costs.

How are indirect rates established?

DEQ establishes **the Land Quality rate** by calculating the pool of program costs and dividing by the wages and benefits charged to site cleanup work. This produces a factor that can be applied to the salary and benefit charges for each project invoiced.

The DEQ agency indirect rate is negotiated annually with the federal Environmental Protection Agency, so that indirect costs can be charged against federal grants and cooperative agreements. EPA requires that this indirect rate be charged to all DEQ activities regardless of funding source.

Rates as of October 1, 2015 are:

Land Quality indirect rate: 206%
DEQ agency indirect rate: 17.87%

As of October 1, 2015, the estimated average hourly rate for employee time, including indirect costs, is \$187.

How are individual site costs calculated?

DEQ's accounting systems record the time each employee works on a project. Staff time is charged to the project using the actual hourly cost of the wages and benefits (such as taxes and health insurance) for each employee. Indirect costs are then added to this hourly rate as a percent of directly-charged personnel costs. Separate costs incurred specifically for that cleanup project, such as supplies and travel expenses, are also recorded and invoiced as direct costs.

Oversight cost estimates

Individuals and businesses cleaning up property with DEQ review or oversight typically enter into some type of agreement with DEQ. The agreement varies depending on the nature of the cleanup or the statutory authority under which the cleanup is carried out. The document specifies the type of

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oversight or technical assistance to be provided by DEQ and the terms of payment for that oversight.

A written estimate of oversight costs is available for a specified timeframe or phase of a project to responsible parties in the Voluntary Cleanup, Site Response and Hazardous Waste programs. DEQ will also provide, on request, a written explanation when actual costs exceed projected costs by more than 20 percent.

What do invoices look like?

Employee wages, benefits and indirect charges are combined on one line called "personal services." Direct charges for costs such as supplies and travel are listed separately. Current and past due amounts are detailed.

A report that shows the number of direct hours charged by each employee and the nature of the work performed is available from DEQ on request.

The back of the invoice contains a general description of costs and a name and number to call if there are any questions.

When are payments due?

Payments are due 30 calendar days from the date of the invoice. Interest will be charged on past due amounts. DEQ is required by law to pursue collection of unpaid balances by assignment of the debt to the Oregon Department of Revenue or an independent collection agency or directly by recording liens on property owned by the responsible party.

Alternative formats

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Information about Oregon DEQ's *No Further Action* Decisions

Background

DEQ's Cleanup and Leaking Underground Storage Tank (LUST) programs manage a wide variety of sites with different levels and types of contamination from hazardous substances, including petroleum. Some sites may have one contaminant in a small area of shallow soil, while others may have high concentrations of many substances in soil, surface water, sediments or groundwater. A common goal of the Cleanup and LUST programs is to lead these sites to *No Further Action* (NFA) determinations.

What does an NFA mean?

DEQ's Cleanup and LUST programs make a No Further Action decision after determining that a site – or one part of a site – poses *no unacceptable risks* to human health or the environment. This usually follows investigative or cleanup activities under DEQ oversight or review. It means DEQ will not require additional remedial action, based on the agency's knowledge of site conditions when it issues the NFA. Some NFAs rely on [institutional or engineering controls](#) – often less expensive to implement than the removal of contamination – that are designed to prevent exposure to contaminants left in place. DEQ's Cleanup Program labels such sites as *Conditional* NFAs (CNFAs); the LUST Program uses the NFA label even at sites where such controls are in place.

How do LUST & Cleanup NFAs differ?

All No Further Action determinations are based on meeting established risk standards designed to protect human health and the environment. However, a LUST NFA usually applies only to the contamination relating to the underground storage tank system. The LUST NFA may not apply to other spills or releases not associated with tanks or piping. Conversely, a Cleanup NFA usually does apply to the entire facility and all suspected sources of contamination. Always review DEQ's *NFA letter* to know what environmental conditions it covers.

What about heating oil tanks?

Heating oil tanks (HOTs) are a special category. Until 1999, DEQ reviewed HOT releases and issued No Further Action letters for those sites. In 1999, the state legislature created a third-party certification program, implemented in 2000. Under this program, DEQ licenses independent contractors to perform tank decommissioning and cleanup, if needed. The contractor certifies whether the project involved a clean decommissioning or completion of a cleanup meeting DEQ's acceptable risk standards. Licensed contractors submit certifications to DEQ, and DEQ randomly audits a portion of these reports.

What contingencies might an NFA have?

Sites with Conditional No Further Action decisions, and some LUST sites with NFA decisions, have formal controls in place that are recorded on the property deed and must be maintained for the NFA to remain valid.

Other NFA determinations are based on current and reasonably likely land and water uses (as required by Oregon law), or on expectations of certain activities occurring (for example, well removal) or NOT occurring (for example, razing buildings). When such unanticipated uses or events occur, they may create unacceptable risks. In any case, site contingencies, which are typically identified in the NFA letter, may require future actions or ongoing considerations on the part of owners/lessees.

NFAs are not forever

While it does not happen often, DEQ may rescind an NFA or CNFA if:

- DEQ learns of a new contaminant release or a previously unknown past release;
- Contaminant risk factors change dramatically as scientific knowledge advances; or
- Conditions linked to the NFA are not implemented or maintained as expected.



Operations Division
Cleanup & Emergency
Response Section
700 NE Multnomah St.
Suite 600
Portland, OR 97232
Phone: (503) 229-5512
(800) 452-4011
Fax: (503) 229-6977
www.oregon.gov/DEQ/

How can I learn more about an NFA?

The single most important document to review is the site's NFA letter, which usually outlines the basis for the NFA and any associated conditions or contingencies. This is often accompanied by a DEQ *Staff Report* that provides details on the No Further Action decision process.

To find out more about a site's conditions, please review DEQ's [Cleanup program database](#) or DEQ's [LUST database](#).

Conclusions

Know your site. A CNFA label indicates that controls are in place, but an NFA (that is, no *Conditional* label) does not necessarily mean the site is available for unrestricted use. Before leasing, purchasing, or financing a site with a DEQ NFA or CNFA, know the circumstances or conditions that DEQ based its decision on. (See also the link to "Liability Management Tools for Buyers of Contaminated Property" on DEQ's [Prospective Purchaser Agreement page](#).) If you own or operate on such a site, be familiar with use restrictions or other conditions that DEQ may have attached to its NFA decision before you make changes to the property.

For more information

Contact Gil Wistar, Operations Division, Portland, 503-229-5512; toll-free in Oregon at 1-800-452-4011, x5512
wistar.gil@deq.state.or.us

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Leaking Underground Storage Tank Program

Investigating Potential Insurance Assets



State of Oregon
Department of
Environmental
Quality

Investigating potential insurance assets for investigative and cleanup costs at contaminated sites in Oregon

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 Question and Answer 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.

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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.

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