

MINUTES

Eugene Toxics Board
Pete & Jerry Room, Fire Station 1
Eugene, Oregon

April 15, 2010
4 p.m.

PRESENT: Cynthia Kokis, Dana Bollenbaugh, David Doll, Holly Jacobson, Stephen Flanagan, members; Glen Potter, Eugene Fire and Emergency Medical Services; David Beede, Lisa Arkin, guests.

I. Approval of Agenda/New Items

Those present introduced themselves. Mr. Doll called for a motion to approve the agenda.

Ms. Kokis, seconded by Mr. Doll, moved to approve the agenda. The agenda was deemed approved with no objections.

II. Public Comment

There were no members of the public who wished to speak at this time.

III. Approval of Minutes

Mr. Doll deemed the minutes of the board's March 18, 2010, meeting, with no objections, approved as written.

IV. Consideration of Oregon Toxics Alliance Petition

Mr. Doll said he considered City Attorney Glenn Klein's opinion to be very clear, that the Toxics Board was not in a position to grant the petition because state law pre-empts local governments from regulating pesticides.

Ms. Kokis wondered why ammonia was being referred to as a pesticide. Mr. Potter responded that J. H. Baxter had declared ammonia to be a pesticide and Mr. Klein had concurred. He said something could be a fugitive emission and the Toxics Board would still track it, if tracking it was within state law. He explained that for Baxter, ammonia was used in combination with other things to make a pesticide.

Mr. Flanagan pointed out that the Oregon Department of Agriculture (ODA) was referenced in the legal opinion. He said ammonia was a compound that was so basic it could fit into a lot of categories. He felt the use in Baxter was clearly that of a pesticide. He stated that ammonia was a simple molecule, but it had pesticidal characteristics.

Mr. Kokis questioned why they would not take action given that children had allegedly been affected by

the smell on their school playground. She wondered why the Toxics Board would not define it differently.

Mr. Flanagan reiterated that the definition was up to the ODA. He noted that ammonia could be considered differently if used differently.

Ms. Arkin, representing Oregon Toxics Alliance (OTA), said that Baxter was required to post that the chemicals it used were on site. She said they also reported to the Department of Environmental Quality (DEQ), which then submitted the information to the Environmental Protection Agency (EPA). She averred that ammonia was listed in the chemicals that must be reported under the Toxics Substance Control Act (TSCA). She thought that just as Baxter could make the case that ammonia was a pesticide, they could equally make the case that it was a toxic manufacturing substance. She considered the distinction to be arbitrary. She questioned the language in the attorney's opinion and declared it to be ambiguous. She thought it went back to the mission and purpose of the Toxics Board and the Toxics Right-To-Know program. She alleged that ammonia destroyed blood cells and caused blue baby syndrome and asserted that Baxter was right next to a residential neighborhood and an elementary school.

Mr. Flanagan clarified that ammonia did not cause blue baby syndrome. Ms. Arkin responded that ammonia was certainly a respiratory irritant. She said she would recheck her data.

Continuing, Ms. Arkin stated that creosote, which was a known carcinogen, was among the other things Baxter was emitting. She said if the Toxics Board could not collect data on ammonia, there was no reason they could not repost information from the DEQ web site regarding that chemical.

Ms. Bollenbaugh asked if there was a link on the site for the Toxic Release Inventory (TRI) reporting. Mr. Potter replied that there was not, but they could make one.

Ms. Bollenbaugh suggested that they do that. Mr. Flanagan concurred.

Mr. Doll said the main thing to consider for Baxter was the application of the chemical. He asked if they would need to seek another legal opinion before they added a link. Mr. Potter replied that he did not think so and added that it would not be much work.

Ms. Arkin hoped they would list the chemicals and make links from them. Mr. Potter responded that this could be a long list of chemicals. He noted that the list of chemicals that were required to be reported was longer than the list of chemicals that were in use and had been reported.

Ms. Arkin suggested they just make the link regarding the chemicals that Baxter used. Mr. Potter replied that it would not be appropriate to single out one business.

Ms. Jacobson supported including a link on the web site. She thought they could phrase a sentence or two in a way that they did not directly implicate Baxter that would direct someone to look at the link.

Mr. Doll had looked at the ODA web site and had not seen that there was an ongoing investigation into Baxter.

Mr. Beede, representing A & K Development, stated that from their perspective as a company that utilized chemicals for various applications in their processes, they were heavily regulated by other agencies well outside the community. He said there were permitted exposure levels that had been established by government toxicologists. He had worked as an environmental scientist for 15 years and had conducted air/gas monitoring using different techniques currently available. It was his understanding that Baxter was meeting the regulatory compliance criteria.

Ms. Arkin asked what the health standard was for ammonia. Mr. Beede responded that there were a lot of health standards for a lot of chemicals and he could provide her with names of some of the reference books.

Ms. Bollenbaugh, seconded by Ms. Jacobson, moved to direct staff to add a link to the Toxics Release Inventory on the Toxics Right-To-Know web site. The motion passed, 4:0:1; Ms. Kokis abstained.

Mr. Potter recommended a motion regarding the petition from the OTA. He said the petition asked the board to direct that Baxter be investigated.

Ms. Arkin said the petition had asked about specific things, such as metals, polycyclic aromatic hydrocarbons, as well as finding out what an unknown ignitable was.

Ms. Bollenbaugh stated that sometimes on a Material Safety Data Sheet (MSDS) they would refer to something as an unknown ignitable, for instance, because there was a trade secret involved.

Mr. Flanagan, seconded by Ms. Bollenbaugh, moved to reject the petition based on the legal opinion provided by the City Attorney and the fact that Baxter's pesticide operation was outside the purview of the Toxics Board.

Ms. Kokis commented that she tried to understand who was telling her something, who was profiting from it, and how it affected the powerless. She could not support this. She felt that she was being told this by the people who profited by it and the people who were being hurt were children in a schoolyard and others.

Ms. Jacobson understood that they had to deny the petition because the Toxics Board did not have the power to investigate in this situation. She thought that Baxter should be investigated, but this was not the proper forum for it.

Mr. Flanagan commented that he did not think for a minute that the emissions from Baxter were not an irritant to the neighbors. He said they had to work within their legal framework and the petition did not fit within it. He observed that cities grow up around manufacturing plants; it happened everywhere. He remarked that there were a lot of ways to make changes happen, but they could not initiate this change within the framework of the Toxics Board.

The motion passed, 4:1; Ms. Kokis voting in opposition.

Ms. Kokis asked if the Right-To-Know law had jurisdiction within the Urban Growth Boundary (UGB). Mr. Potter replied that it was restricted to within the city limits.

Ms. Kokis asked if they could change this. Mr. Potter responded that it would have to be by a vote of the people. He said in order to do so they would have to petition the Board of County Commissioners because it would apply to more than the citizens of Eugene. He noted that if they were to go to that extent, they could consider proposing a Right-To-Know ordinance for the whole county.

V. Staff Report

Mr. Potter said all of the reports from companies that were required to report were in. He related that three were late, as noted in the memorandum he had submitted to board members. He noted that Dave Beede

was present to represent A & K Development. He explained that Mr. Beede had originally thought the company had not been notified, but then the paperwork had turned up.

In response to a question from Ms. Jacobson, Mr. Potter replied that the deadline was the same every year, midnight on April 1.

Mr. Beede said the notice had not reached him when it was sent. He suggested that the notice be sent by more than a first class letter, especially if they were imposing fines that were up to \$1,000 per day. He listed some of the other reporting the company had to do and the various dates they were due. He stressed that it was not their intent to be non-compliant. He requested that they send the notice by certified mail. He noted that one agency gave a courtesy call. He felt that the Toxics Board should want everybody to succeed in this process. He asked for leniency and pointed out that between the two companies that he worked for, payments totaling \$4,000 were made to the Toxics Board.

Mr. Flanagan asked if Mr. Potter was faced with a last-minute flurry and was too busy to make an extra effort. Mr. Potter responded that he did not feel it was fair to everyone who submitted their report on time to engage in “hand holding” to help certain businesses remember. He noted that giving courtesy calls had crossed his mind. He surmised that he would likely end up making four or five phone calls and this would be simpler than sending certified letters.

Mr. Doll asked how long Mr. Beede had been doing this reporting. Mr. Beede replied that he had been doing it since 2005. He had been brought into the company and tasked with it.

Ms. Jacobson understood that regulatory agencies were not required to utilize certified mail.

Mr. Potter noted that a company could ask for an extension if it was unable to meet the deadline.

Ms. Kokis, seconded by Ms. Bollenbaugh, moved to direct staff to provide a courtesy call to those businesses who had not yet submitted their reports the Friday before the deadline. The motion passed unanimously, 5:0.

Mr. Potter explained that the Board would still need to make a motion regarding penalties for the late reports. Mr. Flanagan ascertained that it was the first violation for Emerald Forest Products and as such the company would not be assessed a fine.

Mr. Potter outlined the events that led to the violation by Gheen Irrigation. Apparently there had been confusion and the report had been thought to have been submitted or an extension requested. He noted that it was the second violation for the company. When Mr. Potter had called the company on April 2, the company submitted a report almost immediately.

It seemed to Mr. Doll that because the company had gone through many changes, their intentions were there but they had not followed through. He had been impressed that the company had submitted the report as soon as they were aware that it had not been submitted.

Mr. Doll, seconded by Ms. Kokis, moved to suspend the penalty for reporting after the deadline for Gheen Irrigation. The motion passed unanimously, 5:0.

Mr. Doll did not see the benefit of fining A & K Development. He pointed out that the company had submitted the report promptly once it had been made aware that it was past due. He added that asking for an extension would have helped the situation.

Mr. Flanagan, seconded by Ms. Kokis, moved to suspend the penalty for reporting after the deadline for A & K Development. The motion passed unanimously, 5:0.

Mr. Beede commented that after the company received notices of violations from other agencies – and it had received such notices more frequently before he had joined the company – those violations would be removed from the record after five years. He pointed out that A & K's last Toxics Right-To-Know violation was five years earlier and suggested that the Toxics Board adopt a statute of limitations.

Mr. Doll asked if they could change the guidelines. Mr. Potter responded that they were always able to take into consideration how long it had been since the last violation. Mr. Doll remarked that this should be part of their consideration when weighing whether or not to fine a business.

Mr. Potter stated that there would be an advertisement in the *Register-Guard* that indicated the names of the companies that had submitted their reports late.

Ms. Jacobson ascertained that the advertisement cost approximately \$300. She commented that it seemed wasteful.

Ms. Kokis thought that the opinion of the City Attorney should have been shared with Ms. Arkin prior to the meeting. She felt that Ms. Arkin had known that an attorney's opinion would be presented to the Board, but she had not been privy to it and this had placed her at a disadvantage.

Mr. Potter stated that Mr. Klein worked for the City and not the OTA. He pointed out that the content in the opinion had not been a surprise.

Ms. Jacobson agreed that the attorney worked for them. She had approached Ms. Arkin after the meeting and shared with her that she could access free legal advice from students at the University of Oregon School of Law.

It seemed to Ms. Kokis that the City Attorney worked for the citizens. Mr. Potter responded that it would not be possible for the City Attorney to respond to a great number of citizens and it was not his purview to do so. He reiterated that the City Attorney worked for the city organization.

VI. Status of Positions 1 and 6 on the Board

Mr. Potter related that Ms. Sowles was no longer able to serve because she was no longer employed by a reporting entity. He also reported that he had been unable to contact Ms. Weaver for the past several months. He recommended that the Board declare the positions vacant and direct him to initiate recruitment.

Ms. Kokis, seconded by Mr. Flanagan, moved to declare Positions 1 and 6 on the Toxics Board vacant and to direct staff to initiate recruitment. The motion passed unanimously, 5:0.

Mr. Potter indicated that he would email information regarding the term expirations for the vacant positions and recruitment information. He noted that he was aware that someone from Molecular Probes would likely apply, which would meet the need for a business representative. He thought they would need approximately a month to advertise and then another month for a deadline. He said he would see what applications were submitted and would provide them to the Board.

VII. Schedule Next Meeting

Mr. Doll recommended that they not establish the next meeting date at this time as there was no pending business.

Mr. Doll, seconded by Ms. Bollenbaugh, moved to adjourn and the meeting adjourned by unanimous consent at 5:15 p.m.

(Recorded by Ruth Atcherson)