

MINUTES

Eugene Toxics Board
Saul Conference Room—The Atrium Building—99 West 10th Avenue

May 12, 1999
3 p.m.

PRESENT: Cathy Verret, Chair; Mary O'Brien, Steve Morgan, Madronna Holden, Mike Friese, Steve Johnson, members; City Manager Jim Johnson; Glen Potter, Fire Department; Steve Chipman, Administrative Services Department; Jerome Lidz, City Attorney's Office; members of the public.

ABSENT: Don Upson, member.

I. APPROVAL OF THE AGENDA

Ms. Verret reviewed the agenda. At the request of Ms. O'Brien, the board adjusted the agenda by adding Identification of Chemicals within Mixtures to item X, General Direction.

The board also noted that Jim Johnson and Jerry Lidz were in attendance to discuss the recent Oregon Court of Appeals decision concerning the program, and added this item to the agenda as item IV.

II. PUBLIC COMMENT ON ITEMS NOT LISTED ON THE AGENDA

There was no public comment.

III. APPROVAL OF MINUTES OF APRIL 21, 1999

Ms. O'Brien said that she would like the minutes to indicate the explanations given by companies who had not declared hazardous substance user status, or who had not reported their hazardous substance use, in a timely fashion. The minutes were approved with those revisions.

Referring to the minutes, the City Manager suggested that the board follow through on Ms. O'Brien's suggestion to send a letter to the City Council regarding its action on the board's recommendations related to the fee structure, suggesting that the Council return issues to the board when there were serious concerns regarding board recommendations.

IV. COURT OF APPEALS DECISION

Mr. Lidz distributed and reviewed a memorandum entitled *Toxics Right-to-Know Charter Amendment*. He said that the court had rejected the plaintiffs' challenge to the reporting requirement itself, but had invalidated the charter provision that automatically updated the list of hazardous substances, as well as the reporting requirements regarding pesticides. In addition, the court ruled that the program did in fact charge fees based on quantity (because only businesses reaching the 2,640-pound reporting threshold were required to report and pay fees) and did not solely supplement the State Fire Marshal's reporting program; therefore, the local fees had been assessed in violation of ORS 453.402(6). Mr. Lidz disagreed with that conclusion as he interpreted a quantity-based fee as one that varied with the quantity of substances used.

Mr. Lidz indicated that the options available to the City were to request that the Court of Appeals reconsider the decision, or appeal the court decision to the State Supreme Court. He said that the sponsors of the charter amendment could also appeal the decision in their role as intervenors and the City could join in that appeal. It was also possible that the intervenors would seek a Supreme Court ruling.

The City could also come up with another way of funding the program. Mr. Lidz said that because the issue involved a charter amendment, the City Council would make the final decision on whether to appeal.

Ms. O'Brien noted her disagreement with the court's decision regarding the nature of the fee and its conclusion that the City's program duplicated the Fire Marshal's program. She said that any use of hazardous substances would be more than zero, and so any fee at all would be quantity-based by the Appeals Court's reasoning.

The board discussed next steps with the City Manager. The manager indicated that a half-hour council work session was scheduled to occur on May 19 so councilors could be updated on the court decision and asked if they wanted to appeal the decision. He asked whether the board wished to be asked by the council for its advice about a new fee structure, adding he did not want to ask the council that question without checking with the board to see if it was willing to spend some time on the topic.

Responding to a question from Ms. O'Brien, Mr. Lidz outlined the possible elements of an appeal and suggested that a downside to an appeal was the time it would require and the associated costs.

Ms. O'Brien asked what effect the Appeals Court ruling would have on other programs such as the Eugene Fire Marshal's hazardous substance survey. She believed that that program's fees would also be invalidated by the court decision. Mr. Lidz suggested that if the ruling put other programs into jeopardy, the Supreme Court might be more willing to hear the case.

Ms. Holden asked if the City was liable for the plaintiffs' legal fees. Mr. Lidz said that there

was no final decision on that question. If there was no appeal to the court's decision, the court would return the case to the Circuit Court for a final judgment.

Ms. Holden raised the possibility of amending the charter amendment to delete the reporting threshold requirement. The City Manager believed that the council would want the voters to approve any changes to the charter amendment, and said that any resolution on that topic must occur before the August deadline to place a measure on the November ballot. He noted the severability clause associated with the charter provisions related to the fee structure.

Mr. Friese asked when the board would need to make a recommendation to the City Council. The City Manager suggested mid-July as a possible target.

The board briefly discussed its position on whether the council should appeal the court decision, and concurred that it would be unable to reach agreement on the subject.

Mr. Potter strongly recommended that the board indicate to the council it was willing to work on a recommendation on the fee structure. He said that if the board was unable to reach consensus on the topic, it could communicate that to the council.

Responding to a question from Mr. Morgan, Mr. Lidz confirmed that the City was seeking a change in the State law related to the quantity-based fee. Steve Johnson suggested that an appeal could be a step toward a change in the State law.

Mr. Morgan asked what would happen to the fees that had been collected to this point. Mr. Lidz said that the City was not refunding the fees at this point because the decision was not final.

The board agreed that if the council solicited its input on the fee structure, it would be willing to spend time deliberating toward a recommendation.

The City Manager invited the board to attend the council's May 19 work session. The board members thanked the manager.

Mr. Potter distributed copies of the court decision.

The City Manager and Mr. Lidz left the meeting.

Ms. Holden suggested that the board send a letter to the manager thanking him for the courtesy of his visit. The board agreed. Mr. Potter said that he would draft a letter for Ms. Verret's signature.

V. CONSIDERATION OF PENALTIES

Mr. Morgan moved, seconded by Mr. Friese, to waive the penalties for failure to declare hazardous substance user status for all three companies under consideration: 1) Shelton-Turnbull Printers; 2) Western Attachment Com-

pany; and 3) Atlas Cylinder. The motion failed, 4:2; Mr. Morgan and Mr. Friese voting yes.

A. Shelton-Turnbull Printers

Dan French and Dave Nearing of Shelton-Turnbull Printers were present to answer questions.

Ms. O'Brien asked why the company did not think it had sufficient quantities of chemicals to report, given that it indicated it had 27,000 pounds of inputs and the threshold was 2,640 pounds.

Mr. French said that the company failed to consider characteristic substances, and had sought outside counsel to determine if it fell under the parameters of the program. He said that the characteristic solvents were improperly understood by the company, and once the company understood the implications it requested an extension from the City. Responding to a follow-up question from Ms. O'Brien, Mr. French said that the company decided to report because of the flammability of the chemicals involved.

Ms. O'Brien said that something like xylene was reportable as a chemical, whether in a mixture or as an individual chemical. She asked if the company was stating that within the other substances used there were no reportable chemicals. Mr. French said that the company broke the chemistry down by percentage and came up with numbers that did not meet the threshold. He said that he was not a chemist and had thought the company was compliant until he considered the written guidelines concerning characteristic substances.

Ms. O'Brien asked if there were reportable chemicals in washdown. Mr. French said no.

Ms. Holden moved, seconded by Mr. Johnson, to waive the penalty for failure to declare hazardous substance user status for Shelton-Turnbull Printers. The motion passed unanimously, 6:0

B. Western Attachment Company

Mr. Potter distributed a letter from Western Attachment Company. The letter stated that the company was unaware until recently of the reporting requirement. Mr. Potter said that he had talked to representatives of the company and he believed that they had in fact been unaware of the program. The company was in the State Fire Marshal's data base and should have received a notice in 1997, but no such notice was sent to this company.

Ms. O'Brien said that people were not notified of all laws but continued to have the obligation of obeying the law.

Ms. O'Brien moved, seconded by Mr. Johnson, to waive the penalty for failure to declare hazardous substance user status for Western Attachment Company. The motion passed unanimously, 6:0.

C. Atlas Cylinder Division

Mr. Potter said that the company's representative was unable to attend today's meeting.

Ms. O'Brien asked if acetylene was reportable. Mr. Potter said that it was flammable. A member of the audience disagreed. Mr. Morgan said that it depended on the MSDS for the substance. His MSDS had a flashpoint and he had reported acetylene.

Ms. O'Brien said that the company had listed xylene with the Fire Marshal's Office but not in the toxics report. Mr. Morgan suggested the Fire Marshal's report might be out of date. Ms. O'Brien said that she wanted to know whether the thinners listed contained listed chemicals. She said that it mattered because people were obliged to report listed reportable chemicals.

The company's consultant, Andy Poynter, explained the numbers did not add up to meet the threshold until the company incorporated the definition of characteristics. He said that documentation of the process was available.

Ms. O'Brien said that the report was an example of why the board needed a more clear definition of what was being reported. Mr. Johnson agreed. He said that the board had not done a good enough job in making it clear that, even in mixtures and compounds that are themselves characteristic, reportable individual chemicals must be reported.

Mr. Johnson moved, seconded by Ms. Holden, to waive the penalty for failure to declare hazardous substance user status for Atlas Cylinder. The motion passed unanimously, 6:0.

VI. STAFF REPORT

A. Materials Balance Reports

Mr. Potter reported that 49 of 49 reports had been received.

B. Fees Received

Mr. Potter reported that 44 of 48 checks had been received.

C. 1999 State Legislature

Mr. Potter reported that House Bill 2431 passed the House as amended in committee by a vote of 38:22. The bill would cap local penalties at \$1,000 per day immediately, but otherwise would leave Eugene's program largely intact until 2003. He said that the bill had been referred to the Senate Public Affairs Committee. Ms. O'Brien observed that Governor John Kitzhaber had threatened to veto the bill as passed by the House, and his veto was unlikely to be overridden.

D. Auditing

Mr. Potter referred the board to a memorandum in the meeting packet dated October 21, 1998, entitled *Fire Marshal Auditor Function*. He reviewed the memorandum, reminding the board that it had seen the information before. Mr. Potter outlined the process he intended to use when auditing toxics reports.

Responding to a question from Mr. Friese, Mr. Potter said that a company would receive a copy of its audit report. The reports were public records if there were no trade secrets involved.

Mr. Poynter suggested that Mr. Potter employ the protocols used by the Occupational Health and Safety Administration and provide an opportunity for companies to remedy problems on the spot. Ms. O'Brien believed what was found needed to be reported. Mr. Potter said that he would note problems in a company's file and require remediation with a specific timeline as appropriate.

Mr. Johnson observed that the auditing effort represented a substantial task, and asked if Mr. Potter intended to use random sampling of substances reported. Mr. Potter said yes. Responding to a follow-up question from Ms. O'Brien, Mr. Potter indicated he would secure outside expertise if needed. He agreed with Ms. O'Brien that there was confusion about the use of the term "consume" in the program, adding that the output category "consumed" had obviously been misunderstood and misused by a number of companies.

Mr. Potter announced that he intended to begin the auditing process immediately and planned to do approximately one audit per month, with the time required for the audit dependent on the size of the company and the extent and quality of its report.

E. Web Site

Mr. Chipman joined the board and shared some ideas he had for improvements to the program Web site. The board and guests present shared ideas and feedback about the Web site with Mr. Chipman. The board agreed that direct reporting via the Internet should not be required for 1999. The board agreed further that the City's reporting software should be more network-compatible. Mr. Chipman summarized the input and indicated he would develop a list of changes for the board's review.

VII. SET NEXT MEETING DATE

The board set June 10 as the next meeting date, and tentatively established September 22 as a meeting date.

VIII. PUBLIC NOTICE OF NONCOMPLYING ENTITIES

Mr. Potter announced that one company, Newwood Products of Oregon, was subject to the provisions of Charter Amendment Section 6.2(D) regarding public notice of noncompliance, because

it had not filed its report in a timely fashion. The other companies that had been subject to penalty had violated a City ordinance rather than the Charter Amendment. He asked the board what approach it wished to take regarding the public notice. The board briefly discussed various options agreed to provide public notice via a standard two-column display advertisement in *The Register-Guard*.

IX. IDENTIFICATION OF ADDITIONAL HAZARDOUS SUBSTANCE USERS

This item was postponed to a future agenda.

X. POLICY ON TESTIMONY

Due to the absence of Mr. Upson, the Toxics Board agreed to carry the item forward to a future agenda.

XI. GENERAL DIRECTION

A. 2000 Handbook

The board discussed the question raised by Ms. O'Brien regarding the identification of reportable chemicals within mixtures. She said that the mixture should not necessarily be reported, but the chemical should be. She asked why a primer with 100 percent zinc was not reported as zinc.

Mr. Morgan said that the 1998 handbook was unclear, but the board created more clarity on page 7 in the 1999 handbook, under "What Substances Must be Reported."

Mr. Potter suggested as an example that a company bought a barrel of paint and merely reported it as "paint, flammable." He said that he was unsure the paragraph cited by Mr. Morgan precluded such reporting.

Ken Luse, a member of the audience, referred the board to its earlier answer to a question regarding whether companies should report individual ingredients when the flashpoint of a mixture was less than 140 degrees. This is the second question under Question 24 in the Q&A section of the 1999 handbook, on page F-9.

Ms. O'Brien said that reporting the compound was not useful. The CAS numbers and percentages should be reported. She said that if the compound contained reportable chemicals, those should be reported. If nothing was reportable, but the whole material was characteristic, then the entire compound could be reported as characteristic.

Mr. Johnson said that if 100 pounds of a characteristic compound included 20 pounds of a reportable chemical, it would not necessarily be known whether the remaining 80 pounds was

characteristic. The MSDS would only indicate if the mixture was characteristic in its entirety. Mr. Potter suggested that the compound was then reportable. Ms. O'Brien asked how one avoided double-reporting in such a case. A member of the audience suggested eliminating characteristic materials from the reportable chemicals. Mr. Johnson said that the charter would not allow that.

Mr. Friese left the meeting.

The board discussed various options, including the possibility of requiring reporting of known individual reportable substances in characteristic compounds, but also requiring reporting of the remainder of such compounds as characteristic, even though it might not be.

Ms. O'Brien indicated she would do more investigation about the topic. She did not think that it was informative to tell the public that thinner 65 went into the air. Mr. Johnson agreed. He said that he also shared Mr. Morgan's concern about the need for a simple approach.

The meeting adjourned at 6 p.m.

(Recorded by Kimberly Young)

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