

MINUTES

Toxics Board
Saul Room--Atrium Building

April 1, 1998
3 p.m.

PRESENT: Don Upson, Chair; Mary O'Brien, Steve Morgan, Steve Johnson, Cathy Verret, Madronna Holden, Michael Friese, members; Glen Potter, Judi Ivy, Fire Marshal's Office staff; and various members of the public.

Mr. Upson called the meeting to order.

I. APPROVAL OF AGENDA

Mr. Upson noted that City Attorney Jerry Lidz would arrive at the meeting later. He suggested that item V regarding the status of "Company C" be taken up when Mr. Lidz arrived, and that any legal questions regarding fees and penalties be addressed next, so as to make most efficient use of Mr. Lidz's time. The board concurred.

II. PUBLIC COMMENTS ON ITEMS NOT LISTED ON THE AGENDA

Clyde Carson, Williams Bakery, submitted a list of questions. These, in addition to questions from business already before the board, were referred to a work group consisting of Mr. Moran, Ms. Verret, and Mr. Friese. Mr. Carson volunteered to work with the work group.

III. APPROVAL OF MINUTES

Mr. Upson asked if there were any amendments to the minutes of March 11, 1998.

Ms. O'Brien referred to paragraph 6 on page 3 and asked that it be revised as follows (italicized text added): "Responding to a questions from Ms. O'Brien *regarding the absence of Library funds in the FY99 budget*, Mr. Potter said that *for FY98*, the City had budgeted approximately \$18,000 at the Library to provide for public access to information reported under the Toxics Program. *Since this has not yet been spent, the \$18,000 can be applied for FY99 without raising additional funds.*"

Mr. Upson suggested that the words "for the board" should follow the term "ground rules" in the first line of the fifth paragraph on page 2.

The board approved the minutes with the above amendments.

IV. STAFF REPORT

A. Update on City Council Activities: Fees and Ordinances

Mr. Potter reported that the City Council on March 16 approved a program budget of \$113,366 for FY99, and also approved the board-recommended fee calculation methodology (\$500 base fee), but also made the recommendation that the fees charged in 1999 be based on chemical reports, and further that inequities resulting from this year's fee structure be addressed retroactively in 1999.

Ms. O'Brien suggested that the board make a recommendation to the Governor's Task Force on Community Right-to-Know, for forwarding to the State Legislature, that Oregon law be changed so as to allow local toxic reporting programs to charge fees based on quantities of chemicals reported. Mr. Upton agreed to work with Ms. O'Brien on this.

Mr. Potter reported that the ordinance adopting the reporting instructions would be before the City Council for action on April 6.

B. Update on Trade Secret Filings

Mr. Potter reported that Pepsi-Cola Bottling of Eugene had filed trade secret substantiation forms for three chemicals, and that the Fire Marshal was reviewing the forms. He noted that the required notice to the Toxics Board also had been filed by the company.

The board requested a brief written report from the Fire Marshal regarding his conclusions in this case and the steps he took to reach them.

C. Other

Mr. Potter reported that programming of reporting software for businesses was proceeding on schedule. He asked if the board would like to consider a date for a demonstration of the software. The board decided to have the demonstration on April 29, during its next regular meeting.

Because City Attorney Jerry Lidz was not yet present, the board reversed the order of items V and IV.

V. REVIEW DRAFT ANSWERS TO QUESTIONS SUBMITTED AT FEBRUARY 25, 1998, MEETING

The board reviewed a work group report from Ms. O'Brien, Mr. Morgan, and Mr. Friese offering recommended answers to questions submitted by businesses. After extensive discussion resulting in a number of changes, the board approved the responses to questions 1-24. The board referred remaining and new questions to the work group consisting of Mr. Morgan, Ms. Verret, and Mr. Friese.

Mr. Lidz arrived at the meeting at 3:40 p.m.

VI. CITY ATTORNEY PROVIDES ARGUMENTS FOR COMPANY C BEING OR NOT BEING A HAZARDOUS SUBSTANCE USER IN EUGENE

The board reviewed the question posed to it at its previous meeting by Mr. Potter:

*Company A employs nine people and uses reportable quantities of hazardous substances. It manufactures an intermediate product which it ships to several companies including Company B. Company B employs 26 people and is located on the same site as Company A. Company B manufactures a finished product using the intermediate product of Company A. Company B does not use reportable quantities of hazardous substances. Companies A and B are legally separate entities but are both owned by Company C. **Question: Is Company C a hazardous substance user under Eugene Charter Amendment IV?***

Mr. Potter identified Company C as Oregon Rubber Company and Company A as Oregon Rubber Mills. He noted that Paul Richards, representing Oregon Rubber Mills, was present.

Mr. Lidz offered as a caveat that he might not be in possession of all the facts related to the question. However, based on what he had been told, he confirmed his previous opinion that Company C was a hazardous substance user under the charter amendment.

Mr. Richards said that his company, Company A, was a separate company from Company B, with a separate facility paying separate State and federal taxes. He said that the Environmental Protection Agency and State of Oregon also considered the companies to be separate entities. Mr. Richards said that if the rubber he produced was made by a facility outside Eugene and imported into the city, it would not be an issue. He noted that the majority of the rubber used in the Eugene facility was brought from Corvallis.

Mr. Johnson said that it was the intent of the drafters of the charter amendment to address just this sort of issue. The drafters intended to ensure that a company could not, by creation of subsidiaries, avoid the law. Mr. Johnson said that he had doubted such a situation already existed.

Mr. Richards asked if it would make a difference if he brought the intermediate product to Company B from outside Eugene. Mr. Johnson said that it would. Mr. Richards said that it was easy to do so. He said that little of what was manufactured in Eugene went to Company B, but instead went outside of Oregon. He did not perceive a difference between material coming from Corvallis or Eugene. Mr. Johnson said that the difference was that Eugene had a law covering the production of toxic materials.

Mr. Johnson pointed out that if Company A had more employees, it would be required to report. Mr. Lidz added that the reason companies with fewer than ten employees were exempted was because such companies were too small to appropriately bear the burden of reporting; in this case, he did not see that as an issue.

Ms. O'Brien asked which company was required to report. Mr. Johnson believed that Company C was the reporting company. Mr. Lidz concurred. Mr. Richards asked if Company B and

Company C would be required to report if Company A moved to Corvallis. Mr. Johnson said no. He added it was not the goal of the drafters of the charter amendment to force companies to move out of the community.

After brief discussion further clarifying the ownership of the companies involved, the board concluded that Company C was subject to the charter amendment.

Mr. Lidz acknowledged that it was an odd result when a company could escape complying with the ordinance by shipping something to Corvallis and accepting the same materials back. However, he believed that if the ordinance were interpreted otherwise, it would create a loophole.

VII. ACCRUAL PERIOD FOR FEES

The board reviewed a memorandum from Mr. Lidz entitled "Enforcement of Required Fee Payments." Mr. Lidz indicated in the memorandum that the board's enforcement authority was likely restricted to violations of the reporting requirements rather than enforcing payment of fees. The board's discussion focused on the following articles from the charter amendment:

Article VII (A): Each hazardous substance user shall pay an annual fee to the City of Eugene, sufficient to jointly cover the implementation of this act, including expenses incurred by the Eugene Public Library, Fire Marshal, City of Eugene, and Toxics Board.

Article VIII (8.1): In the event of noncompliance, the Toxics Board shall have the authority to enforce the reporting requirements of this act and impose penalties as set forth in Section 8.2.

Article VIII (8.2.A): Any hazardous substance user or person who violates this act shall be subject to a penalty not less than \$250 and not greater than \$25,000 per day.

Article VIII (8.2.B): Each day that a violation continues shall be considered a separate violation subject to civil penalties. A violation occurs when a regulated entity fails to file a complete and correct report on or before the day the filing of a report is required.

Mr. Lidz explained that it was his belief that Article 8.2 was focused on reporting violations rather than on failure-to-pay violations; however, he was hesitant to make that determination given that he was not precisely sure what was intended by the charter amendment. He said that another issue was enforcement and collection; a company that was assessed a penalty was unlikely to pay it when it refused to pay the original assessment. Mr. Lidz believed such situations would end up in court.

Mr. Johnson acknowledged that the drafters of the charter amendment had not considered penalties for nonpayment of fees.

Responding to a question from Ms. O'Brien, Mr. Lidz did not think that Section 8.1 could be read in isolation, given its reference to Section 8.2.

Ms. O'Brien suggested that the board ask the City Council for authority to enforce failure-to-pay violations, or ask the Council to give another entity responsibility for enforcement.

Mr. Johnson said that clearly the City has the right to collect the fees. He said that one alternative for the board was to do nothing and let the City use the court system to collect fees; another alternative was for the City Council to give power to collect the fees to the board or some other entity. Mr. Lidz said that the board should consider whether it wanted an ordinance authorizing some penalty for nonpayment.

Mr. Upson said that the board should be considering how to get everyone that should be in the program into the program. He believed that an ordinance was necessary and suggested that it include penalties that represented a percentage of the fees as opposed to something that could be more than the original fee. Mr. Johnson agreed. He noted that City of Eugene parking fines double if not paid, but do not double again.

Ken Luse, a member of the audience, said that many companies were currently assessing whether they will report in the coming year, and would object to paying the fees because the reporting period does not end until December, while they are currently considering whether they could make adjustments to their manufacturing processes that would make reporting unnecessary. Ms. O'Brien pointed out that the companies would have their money returned to them if they did not have to report. Mr. Upson said that if there was any penalty in such a case it should be very small, particularly if the company was "on the edge" of the reporting requirements.

Ms. O'Brien responded that she did not think there would be a penalty for those companies that have no reason to believe now that they should report on April 1, 1999. Those companies with consistent usage, sufficient employees to qualify for the program, and who did not pay until April 1, 1999, without a compelling reason, should suffer a penalty because they did not obey the law.

Mr. Potter said that he did not think the board should penalize a company that it was not aware of or that had not been billed. Ms. O'Brien concurred. However, she believed that companies who indicated the need to report and had been billed should pay. She did not think that such companies would save any money from delaying. Members of the audience pointed out that companies could lose interest on the money.

Mr. Lidz said that there were several issues for the board to consider. One was how to address the fact that fees were due now while the reporting deadline was a year away. Another issue was what penalty should be assessed against a company required to pay that did not pay. Mr. Lidz recommended that an ordinance be drafted to create a penalty and enforcement action; he did not think council authority was needed for the City to collect the fees.

Ms. Holden suggested that the board institute an incentive for the early payment of fees. Ms. O'Brien endorsed the concept. Mr. Johnson said that alternatively, the fine structure could be designed to have a minimal impact on those who were within a few percentage points of the reporting requirements to protect those that will not know until the end of 1998 whether they need to report.

Responding to a question from Mr. Upson, Mr. Lidz said that the City currently had no penalty schedule that could be applied in an enforcement action in this instance. Mr. Upson said that it appeared the board should make a recommendation to the council regarding enforcement penalties.

Mr. Potter pointed out that if an incentive for payment were recommended by the board and adopted by the council, he would have to recalculate the fees. Mr. Johnson said that staff could recalculate the fees and refund in the case of overpayment.

Responding to a question from Mr. Potter regarding the timing of council action, Mr. Lidz did not think that there was a legal problem caused by the establishment of a penalty at this point.

Mr. Morgan asked when the billing cycle was. Ms. O'Brien said that the May 1, 1998, payment was intended to cover July 1998 through June 1999. Mr. Potter clarified that the payment was intended to fund the program for the upcoming fiscal year. The board was actually charging companies for 1997; in one year the board would be charging for the reportable 1998 calendar year. Mr. Johnson said that the board was not charging for program costs in 1997. Mr. Potter agreed. Ms. O'Brien said that the current billing applied to companies participating in materials accounting from January 1 to December 31, 1998.

The board agreed to assign a work group to recommend an enforcement and penalty process. The board appointed Ms. Holden, Ms. O'Brien, and Mr. Upson to the work group.

Mr. Lidz left the meeting.

VIII. PROCESS FOR PROVIDING BUSINESS WITH ADDITIONAL REPORTING INFORMATION

The board discussed an issue raised by Mr. Upson related to how and how frequently to communicate information to companies affected by the charter amendment. Mr. Upson suggested that as the board responded to questions from industry, it incorporate the questions and responses in the handbook on an annual basis, organizing the questions and answers by handbook sections. Ms. O'Brien endorsed the suggestion. She said that the text could refer to the questions, rather than attempt to incorporate every answer in the handbook. Mr. Upson concurred, suggesting that such a course would help make the handbook a "living document." He said that the board would have to commit to a format for the sections in the handbook to avoid changes to the references.

Mr. Morgan proposed that the title of the handbook stay the same when reissued, but indicate on the cover it was the second edition. The board could identify all the changes it made at the beginning of the handbook. He anticipated that the handbook would be revised and reprinted each fall. Mr. Morgan preferred that the handbook be organized around the reporting forms.

There was brief discussion of the reporting year that would be printed on the cover of the handbook. Mr. Johnson suggested that the issue was one of semantics.

The board discussed revising the handbook in the manner suggested by Mr. Morgan. Mr. Morgan indicated willingness to participate in revising the handbook.

Mr. Luse suggested that the board reissue the handbook after the reporting period of 1998 rather than introduce new information that might confuse readers. Ms. Holden proposed that the board issue a supplement to the handbook in the fall.

Ms. O'Brien suggested that board send copies of the questions and answers addressed by the board each quarter to participating businesses and interested parties. Responding to a question from Mr. Friese, Mr. Potter said that Ms. O'Brien's suggestion was doable as the cost involved was not large. Mr. Upson noted that he had included such an approach in the work plan on the strength of a suggestion made by Ms. O'Brien at the last meeting. The board accepted Ms. O'Brien's suggestion.

Ms. O'Brien asked that the materials sent to the companies be three-hole punched so that businesses could retain them, and that questions be arranged in the order of the handbook's table of contents.

IX. TRADE SECRETS

Mr. Friese distributed three draft documents for discussion: 1) a form letter from the Fire Marshal's Office approving a trade secret chemical exemption; 2) a form letter from the Fire Marshal's Office denying a trade secret exemption; and 3) a form application for reconsideration of a trade secret exemption denial. The board reviewed the documents and made several text changes, including extending from 15 days to 30 days the time period for a company to appeal a denial of a trade secret chemical. Mr. Friese agreed to work with Mr. Potter to finalize the documents.

X. ADJOURN

The board reviewed its meeting schedule and agreed to schedule a meeting on May 20 at 3 p.m. and a meeting on June 16 at 3 p.m. Ms. O'Brien announced that she would not be present at the meeting of April 29.

The meeting adjourned at 6 p.m.

(Recorded by Kimberly Young)
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