

MINUTES

Toxics Board
Saul Room--Atrium Building

December 8, 1997
11:30 p.m.

PRESENT: Mary O'Brien, Chair; Tim Foelker, Sam Frear, Steve Johnson, Steve Morgan, Don Upson, Cathy Verret, members; Glen Potter, Judi Ivy, Fire Prevention staff.

Ms. O'Brien called the meeting of the Eugene Toxics Board to order at 11:30 a.m.

I. APPROVAL OF AGENDA

The board accepted the agenda.

II. PUBLIC COMMENT

There were no public comments.

III. APPROVAL OF MINUTES

Mr. Upson referred to paragraph 5 on page 1 of the November 26, 1997, minutes and asked that it be revised as follows (italicized text added; struck text deleted): "Mr. Upson stated he believed *such substances could be in the Characteristic Chemicals category*, and that in such situations the '50 and 5 rule' would apply, in which reporting of inputs only was required when more than 2.2 ~~5~~ pounds but less than 50 pounds of a hazardous substance was used in a year's time. He noted that no reporting was required when less than 2.2 ~~5~~ pounds of a hazardous substance was used and that reporting of both inputs and outputs was required when more than 50 pounds of a hazardous substance was used."

Mr. Upson said that paragraph 10 on page 3 should be revised to indicate he, not Ms. O'Brien, distributed substitute text for the Hazardous Substance handbook. He also asked that his name be substituted for Ms. O'Brien's name in paragraph 2 on page 4 of the minutes.

Ms. Verret asked that the first sentence in paragraph 3 on page 1 be revised to read (italicized text added): "Mr. Upson stated that he had addressed the issue raised by Mr. Poynter in a memorandum to be considered by the board *at a later point in the meeting.*"

Ms. Verret asked that word "accepted" be changed to "accept" in paragraph 10 on page 4 of the minutes.

The board observed that it was incorrectly referred to as the "Toxics Right-to-Know Board" in paragraph 10 on page 4 of the 26 minutes.

The board accepted the minutes of November 26, 1997, as amended.

IV. STAFF REPORT

Mr. Upson asked that revised budget projections be provided to the board at its next meeting.

Mr. Potter reported that Michael Friese of HTM was the only applicant for the business position on the board to this point. He noted that the deadline for application was December 12, 1997. He said that the City Council would appoint both new members at the same time, and would be polled for interview times.

Mr. Potter announced that Judi Ivy would be assisting with the toxics program until further notice.

Mr. Potter reported that Ms. O'Brien and Mr. Upson were appointed by Governor John Kitzhaber to the Governor's Task Force on Community Right to Know, which would meet for the first time on December 12.

Mr. Potter called the board's attention to a memorandum from City Attorney Jerome Lidz regarding the trade secrets substantiation form. The memo also mentioned his belief that the charter amendment should be interpreted to read that the council should be imposing fees in 1998. In the memo, Mr. Lidz recommended that the council adopt the handbook by uncodified ordinance and allow amendments through the administrative rule process. Mr. Potter indicated that he would recommend to the City Attorney that the City Manager only adopt amendments to the handbook with the approval of the Toxics Board. The board indicated its tentative concurrence with Mr. Potter's recommendation and asked that he provide members with the text of his recommendation via electronic mail.

The board briefly discussed a concern raised by Mr. Morgan regarding the timing of the adoption of the handbook and whether the handbook needed to be adopted at this time given that businesses were not reporting for one year. Mr. Potter said that Mr. Lidz requested early council adoption of the handbook to give it the force of law. The board concurred that adoption was the most appropriate course if the language recommended by Mr. Potter to the attorney was included.

V. TRADE SECRET CHEMICALS

Mr. Potter distributed Mr. Lidz's memorandum, entitled "Trade Secrets." The board reviewed the memorandum and discussed it section-by-section.

General Comments

The board accepted general comments 1 and 2. Regarding comment 3, Mr. Upson indicated his strong opposition to requiring a business to provide the generic class or category of a chemical claimed as a trade secret as it was beyond the scope of the charter amendment. Other board members concurred.

Specific Comments

The board discussed Mr. Lidz's suggestion in specific comment 1 that it expand question 2.2 to encompass persons belonging to a local emergency planning committee. There was general concurrence to accept the recommended revision.

The board discussed Mr. Lidz's specific comment 2, which reflected his confusion over what was being referred to in Section 2.4(iii). Ms. O'Brien suggested the following text in its place: "If this use of the chemical claimed as a trade secret is unknown outside your company, explain how your competitors could deduce this use from disclosure of the chemical, together with materials accounting information under Eugene's law." The board accepted Ms. O'Brien's proposed modification as sufficiently broad to cover the situations that might arise, and agreed that it addressed Mr. Lidz's concerns.

The board accepted Mr. Lidz's proposed revision to Section 2.6(i).

The board accepted Mr. Lidz's suggested additions to Part 3 of the form.

Mr. Upson asked that the footnote on page 1 be revised to refer to *reportable* trade secret chemicals.

The board acknowledged the typographical errors identified by Mr. Lidz in his memorandum. Mr. Potter indicated he would make the needed changes. Ms. O'Brien asked Mr. Potter to place the Trade Secret Chemical Code Number above the form name.

Mr. Upson asked if the form should be modified with the addition of a facility identification number. The board agreed that given companies could have two facilities, tax identification numbers would not work. Mr. Johnson proposed that the City assign each facility a number as businesses begin to report, starting with E-001. The board agreed that the number should be included on every form completed by a business and precoded on the electronic reporting forms.

The board reviewed the form entitled "Public Report of the Precautions in Use and Alternatives to Use of Trade Secret Hazardous Substances." Mr. Upson asked that the note preceding questions A through I be revised to read, "The law does not require companies with trade secrets to make changes suggested by the auditor in their processes or chemicals." Mr. Upson also asked that the footnotes on the form be modified as in the substantiation form to refer to *reportable* trade secret chemicals. The board concurred with Mr. Upson's requests.

Ms. O'Brien clarified that the auditor would not transmit the form to the board; rather, the auditor would give the form to the business, which would transmit it to the board. Mr. Upson suggested that a statement to that effect be printed on the form. The board concurred.

Mr. Potter distributed a memorandum from Ms. O'Brien entitled "Summary of Reporting of Trade Secret Chemicals." Ms. O'Brien said that the summary was intended to be included as a cover memorandum for all trade secret reporting forms, and it described where each form should be filed. Mr. Upson approved of the memorandum, but reiterated his suggestion that the statement regarding where each form was submitted be printed on the form at the end because forms could become separated from the instructions. The board concurred.

Responding to a concern expressed by Mr. Morgan that there was inadequate space included for explanatory text on the audit form, Ms. O'Brien pointed out that there would be sufficient space on the computer disk forms to include explanatory text, or a business could attach added pages keyed to specific questions to the written form. Mr. Potter indicated he would include space for comments after every question on the form.

Responding to a request for direction from Mr. Potter, the board agreed to reword question E to read, "For a substance for which a previous year's audit report has been filed, has the company strengthened or relaxed protective measures for any inputs or outputs of this substance since the last audit report?" The board further agreed to reorder the questions, changing "E" to "I," and eliminating the italicized text preceding former question E. Mr. Potter indicated he would add the option "Not Applicable" to question I.

The board reviewed the memorandum proposed by Ms. O'Brien for inclusion with the forms related to trade secrets. Ms. O'Brien asked that the address and telephone number for the Fire Marshal and Toxics Board be added to the memorandum. Responding to a request for direction from Mr. Potter, Ms. O'Brien agreed that item 3 should be modified to indicate that aggregate accounting of all inputs and outputs of all trade secret chemicals was due on April 1, 1999. She said that the reference to instructions should actually be a reference to the title of the handbook.

Mr. Potter reported that the handbook was at the printer and would be ready the next day.

Responding to a question from Mr. Foelker regarding the need to report in aggregate on the materials accounting form if the business was filing a substantiation form identifying individual chemicals as trade secrets when notice of trade secret reports were given to the Toxics Board, Mr. Johnson pointed out that the board would know how many trade secret chemicals a business was using but nothing about quantity. The chemicals were not listed on the aggregate accounting form unless there was more than one chemical involved.

Mr. Upson noted his concerns about the lack of certified independent auditors and the lack of a plan to identify auditors and establish their qualifications and required training. Mr. Johnson pointed out that the City was more than a year away from any business filing the form involved. Ms. O'Brien noted that she had identified the same issue as a future task for the board. The board agreed to revise the explanation of the form to indicate the form must be submitted by a business each year beginning April 1, 1999.

The board indicated its acceptance of the memorandum prepared by Ms. O'Brien, as revised. The board further agreed it wished to include legal information prepared by the City Attorney regarding trade secrets and an excerpt from the charter amendment in the package of forms. Ms. O'Brien said that the excerpt should precede the legal information. She suggested that the legal information be entitled "Three Trade Secret Laws Relevant to the Charter Amendment," and further suggested that each law be numbered in the text.

The board agreed that Mr. Potter would revise the documents as directed, and provide them via electronic mail to all members. Members would have until December 15 to suggest further revisions.

Mr. Potter distributed a memorandum from Ms. O'Brien entitled "Some Remaining Tasks Re: Trade Secrets." Ms. O'Brien reviewed the memorandum and asked board members if they had additional tasks to suggest.

Mr. Morgan asked how much time the City would have to respond to a company submitting a substantiation form by January 5, 1998. Ms. O'Brien said that was not known at this time; she pointed out that she identified the need to understand and discuss the procedures that the Fire Marshal would use to determine the validity of trade secret claims as the second item on her lists of remaining tasks. She asked Mr. Potter who in the Fire Marshal's Office would review substantiation information. Mr. Potter indicated that he would make the necessary inquiries.

Responding to a concern raised by Mr. Foelker, Mr. Johnson said that the board should establish an appeal procedure if the Fire Marshal's Office was unable to certify a chemical's trade secret status. He said that the business would not be precluded from using the chemical but would have to report it, and had until April 1999 to establish the chemical's trade secret status. The board agreed that the subject of the Fire Marshal's procedures should be on an upcoming agenda.

Mr. Upson said that the materials given to those filing substantiation forms for trade secrets should include a suggestion that businesses track their use of all reportable substances in case the addition of a second trade secret chemical requires aggregation of data, or in the event that a trade secret claim is denied. The board concurred. Mr. Potter indicated he would add a box with text advocating that businesses track the information.

VI. FEES

The board invited comment from the public in response to the memorandum prepared by Mr. Johnson entitled "Fee Assessments."

Keith Dahle, Scientific Developments, Inc., suggested that the board consider waiting and charging double fees in 1999 to ensure that all companies were covered and to establish more of a basis for the fees. Ms. O'Brien pointed out that the program would be in a bit of a deficit because the board would not know in 1999 who would be reporting in 2000. Mr. Dahle concurred, but said he did not see how to solve that problem, which he believed would involve a smaller percentage of companies anyway. He indicated his disagreement with Mr. Johnson's statement that the costs of operating the program were not related to the size of a company.

He believed that the Fire Marshal would receive far more inquiries from the public about large companies than small companies. Subsequently, he did not think administrative costs should be borne equally by all companies. In addition, Mr. Dahle believed that the Fire Marshal would receive more inquiries about extremely hazardous materials than hazardous materials, and suggested an additional cost factor might be associated with such materials.

The board discussed the thoughts expressed in Mr. Johnson's memorandum. Ms. Verret stressed the need for equity but said she was also concerned that smaller companies would pay the same fees as large companies, which was a disparate burden for the smaller companies. Mr. Johnson feared that a fee based on the number or quantity of chemicals used would be perceived as punitive. He continued to believe that a large proportion of the program costs were fixed no matter the number or size of companies. He emphasized that the program was not intended to be punitive toward anyone's use of toxic chemicals.

Ms. O'Brien suggested that there were many ways a company could be considered "big"; for example, a company might have a small financial base but could employ many, many toxic chemicals in small quantities in its manufacturing processes, creating more of a burden on the program. Mr. Johnson concurred.

Mr. Morgan concurred with Mr. Dahle's suggestion that a cost factor for extremely hazardous substances be factored into the fee. He said that there should be a tiered base fee component based on the number of pounds used by a company and a component based on the number of employees. Mr. Morgan was also concerned about the impact of the program fees on small businesses, noting the record-keeping burden created by the program. He said that he favored an annual recovery basis for the fee.

Mr. Upson distributed and reviewed a memorandum he authored entitled "Fee Assessments Memo of Steve Johnson." The memorandum discussed the inequity of a flat fee for small businesses and proposed a variable fee that included a base fee component and a graduated component based on the number of employees in a business. The memorandum also proposed that compliance auditing be based on a sampling of records rather than examination of all records.

Mr. Johnson expressed concern that the sampling approach would be inadequate to catch false records in situations where a business does not use many chemicals. Mr. Upson said that he was motivated by his concern about the costs of the program to small companies and by the need to reduce the differential between large companies and small companies covered by the program. The board concurred that it would be relatively easy to secure the number of employees at a company. Ms. O'Brien suggested that employee hours worked was more relevant to the issue than the number of employees. Mr. Frear said that a flat fee approach would place small businesses at a disadvantage, so he supported a variable fee approach. Ms. O'Brien concurred. She said that a fee that included a base component and a graduated component would be the most simple to administer while maintaining a link between the fee and a company's ability to pay. Ms. O'Brien also did not think that the board had any choice but to assess fees in the upcoming year. She said that if more companies report than anticipated, the excess collected could be returned proportionately.

Mr. Potter said that while there were problems with billing in 1998, the board would have to make its case to the City Council if it chose not to bill. He believed that the City Council would have concerns if the program was to be in a deficit position for ten months of every year.

Susan Pierce, Century West Engineering, spoke to the issue of fees. She suggested that the board follow the precedents established by the Department of Environmental Quality and Environmental Protection Agency regarding hazardous waste generation fees, which were based on volume. Mr. Foelker said that the City could not base its fee on volume unless it allowed the State to collect the fees. Ms. Pierce envisioned a matrix fee structure that accounted for different variables such as employees, chemical quantities, and the nature of the hazardous substances.

VII. SCHEDULE OF UPCOMING MEETINGS

The board agreed to meet on January 7, 1998, at 11:30 a.m., and again on January 20, 1998, at 11:30 a.m.

The board briefly discussed a concern raised by Mr. Frear regarding the need for a fixed meeting time. Mr. Morgan indicated his dislike for lunch meetings. Ms. O'Brien urged the board to be flexible, saying that the meeting schedule to this point had been to ensure full attendance by all members. The board agreed to discuss the issue again in February.

VIII. AGENDA FOR NEXT MEETING/UPCOMING TASKS

Ms. O'Brien indicated she would include a draft 1998 work plan in the January 7 meeting packet for board discussion. Mr. Upson urged board members to think about their objectives for 1998.

The meeting adjourned at 1:30 p.m.

(Recorded by Kimberly Young)
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