

MINUTES

Eugene Toxics Board
Fire Conference Room, Second Floor
Eugene Emergency Services Center
1705 West Second Avenue, Eugene

October 22, 2014
3:30 p.m.

PRESENT: Christine Zeller-Powell, Chair; Lisa Arkin, Amber Everly, Rick Nicol, Andree Phelps, Randall Prince (arrived at 3:45 p.m.), members; Randy Groves, Al Gerard, Joann Eppli, Eugene Springfield Fire Department staff; Kathryn Brotherton, City Attorney's Office.

ABSENT: Wendy Cecil, member.

Ms. Zeller-Powell called the meeting of the Toxics Board to order at 3:33 p.m.

I. OPEN SESSION

Chief Groves introduced Kathryn Brotherton from the City Attorney's Office and introduced the discussion of streamlining and reducing costs of the Eugene Toxics Right-to-Know Program.

Ms. Brotherton reviewed her professional background and the sequence of events leading to the need to review ongoing program costs. During the budget process a few years ago, the City Council questioned why hazardous substance user fees and staff costs continued to increase substantially, and asked staff to develop a reduction plan. She said a request for a legal review of the Charter Amendment had resulted in a memorandum to the Toxics Board dated June 2, 2014, which identified ten actions required of the Toxics Board and the City to fulfill minimum charter requirements. She noted, as an example, that maintaining a master list of all reportable chemicals or actively seeking out reporting violators was not required. Such activities may be desirable and beneficial to the program, but they constituted policy decisions and were not legally required.

In response to Ms. Zeller-Powell, Ms. Brotherton said the Charter Amendment authorized the Toxics Board to make recommendations regarding the addition and subtractions to the lists adopted by the Charter Amendment. While a larger master list or database was not required, the City is required to keep the list of additions and subtractions that it had made to the lists adopted by the Charter Amendment. The City Code delegates the authority to the City Manager for adding chemicals to the Charter list through administrative rule adoption. Removal of a substance from the Charter listing required City Council approval.

Ms. Eppli commented that a recommendation to streamline the process by making removal of substances an Administrative Rule-based action was pending.

Ms. Arkin said it was cumbersome for businesses to fill out the required forms without assistance, similar to the assistance provided to citizens working on planning and development projects. Mr. Prince questioned if the savings achieved by not providing reporting assistance was greater than the cost of providing the service. If the costs to administer the program were 100 percent fee funded, it made sense to make it easier for businesses to comply with reporting requirements. The

compliance process should be made as easy and as inexpensive as possible for those reporting because they are paying the program fees.

Ms. Arkin said that if the City deemed it important to clarify what chemicals on the Charter Amendment were “not reportable”, than the requirement to inform businesses of reportable chemicals seemed considerably more important.

Ms. Brotherton said an on-line drop-down menu format that allowed reporting persons to select a chemical on a master list would make it easier for a business to report, however, that system was not a Charter mandate. When businesses were referred to the Charter list, they were informed of all legal reporting requirements. The City was not required to maintain a master list. Whether such a list should be maintained was a policy decision.

In response to Ms. Phelps, Ms. Brotherton confirmed from the time the Charter Amendment went into effect, a record of changes to the Charter-adopted lists has been kept.

Ms. Eppli added that at the beginning of each year, all businesses, both reporting and non-reporting, were provided a number of notifications, including information on changes to the reportable chemical list and reporting instructions. Twice each year, the federal lists and regulations were cross-referenced with the Charter list. Changes were reported to the Toxics Board, and the Toxics Board recommended that updates be processed.

Chief Groves said discontinuing maintenance of the on-line list had not been considered.

Ms. Eppli confirmed that few changes had been made since the Charter Amendment was adopted. The most recent updates were over two years ago and included a lot of catch-up. Those changes were then made in the Charter list and the on-line list.

Ms. Brotherton noted that the Charter Amendment did not require a biannual affirmative review, as was current practice. The Charter Amendment indicated that the Toxics Board *may recommend* additions when changes to the federal list were discovered. Then if a chemical was required to be added to the Charter, language required that the *City Manager* (Fire Marshal’s Office) *shall* do specific things within specific timeframes.

Chief Groves discussed the Toxics Program budget in the context of the overall City budget process. Review of the program budget process a few years ago revealed a Fiscal Year 2013 increase in both program FTE costs, and industry per FTE fees while participation decreased. Participants were leaving and no new participants were being added. He surmised that businesses had left the area, were changing practices and non-reporting had increased. He confirmed that the Toxics Program was fully fee supported and did not receive funding from the General Fund. Regardless of funding source, the City was committed to reducing its footprint and continuing efforts to achieve efficiencies in the use of public resources.

Ms. Arkin questioned equity between different City of Eugene boards. The Civilian Review Board (CRB) *may review the completed investigations, and all materials concerning completed investigation shall be provided to members of the Commission to review.* She commented that

CRB members were not expected to copy and look through file cabinets. She asked if CRB was asked to reduce staff support, to conduct independent research and provide documentation in order to carry out the *may* in the statute.

Ms. Brotherton clarified that staffing levels assigned to the Toxics Board was a policy question not a legal question. The use of *may* and *shall* in a Charter Amendment were very important and must be reviewed in the context of the document. Policy decisions may go beyond mandates, which were minimum standards. She emphasized that everyone had an interest in having an efficient program that accomplished program goals, provided information to the public in a way that did not create obstacles for those required to comply. How that was accomplished would not change her legal opinion on what was mandated by the Charter Amendment.

In response to Mr. Prince, Ms. Brotherton said doing more than was mandated by the Charter Amendment was an option in terms of program functionality. However, the court has made clear what the city cannot do, which included requiring reporting on pesticides or structuring fees on chemical load.

Ms. Zeller-Powell said through the citizen pursuit provision in the Charter Amendment, if a complaint was filed with the Toxics Board and the Toxics Board does not take action within a certain number of days, the complainant can pursue court action. If there was no system in place for finding companies who were not reporting and the Charter Amendment specifically says the Toxics Board shall report to the Fire Marshal hazardous substance users in noncompliance, as a Toxics Board member, she felt very uncomfortable.

Mr. Prince commented that if enforcement efforts went beyond that explicitly spelled out in the Charter Amendment, it may be worth the personnel time because fines for not reporting were imposed.

Chief Groves said having some companies follow the rules of reporting and paying fees when competitors were not was not fair and did not meet the intent of the Charter Amendment enacted by the voting public, nor was creating an unfair competitive advantage for businesses or allowing the level of reporting to continue to decline. The legal question aside, the pieces must be balanced---meeting legal requirements of the program, having a program that was equitable and fair for reporting purposes, but meeting City Council concerns about cost increases.

Ms. Brotherton said for any actions taken the question of authority applied. She confirmed that the City has the inherent authority and mandate to pursue compliance when credible evidence was reported to the Fire Marshal's Office.

In response to Mr. Prince, Chief Groves said the goal was to achieve a staff reduction to the original FTE allocation. Adjustments to the work model would be made if future evaluations determined it was not working; for example, if an inequity was being created between businesses.

Ms. Phelps asked if FTE were reduced and the City was not in compliance with the Charter Amendment, the exposure to litigation increased. She questioned how minimal compliance was determined if there was a reduction in FTE.

Ms. Brotherton was adamant that the City had no intent to allow the program to become non-compliant with the Charter Amendment.

Chief Groves said if participation continued to decline, FTE costs continued to increase, and there

was no staff time for investigation and compliance, that would signal a system failure, but the City would still be in compliance with the Charter.

Ms. Phelps commended Ms. Eppli on her efforts to achieve efficiency. She expressed concern that if Ms. Eppli was replaced the program design could be ineffective.

Mr. Prince questioned if there was a legal requirement to analyze the cost of time, or how long it took for the business to fill out the mandated forms.

Ms. Brotherton said she was not aware of efficiency tracking requirements.

Ms. Eppli added that the Toxics Board was completing a gap analysis report that included a question to businesses on reporting costs under Toxics Right-to-Know.

Ms. Arkin said the Toxics Board was mandated to make recommendations on FTE and tasks necessary to carry out the intent and mandates of the Charter. She questioned if the current feedback and possible reductions take into account those recommendations.

Chief Groves said Toxics Board recommendations were taken into account for the current budget. The current discussion was in preparation for the upcoming budget cycle. The two areas currently being identified for reduction were the cost per FTE for industry, which Ms. Eppli had accomplished through increased participation, and a reduction to .5 FTE to align with original program staffing levels.

Ms. Brotherton said the per FTE industry fee was reviewed and adopted by the City Council every year by Ordinance. She said the program was behind in increasing participation previously. Based on the City Council's previous questions and concerns about fees being increased, staff wanted to be much more proactive in estimating the fee and identifying efficiencies for the upcoming budget calculations. She emphasized that the current budget-related efforts were not intended to be a rejection of the Toxics Board recommendations.

Ms. Arkin expressed appreciation for the clarification. She emphasized that the goal should not be to meet a predetermined .5 FTE allocation, but rather to increase efficiency and effectiveness in implementing the Charter Amendment.

Ms. Brotherton said that it is important to provide information to the City Council so that the City Council could have an informed discussion about how and why the numbers were determined.

Ms. Zeller-Powell asked if the City Council understood the significance of the \$2,000 cap on fees.

Chief Groves said because the City Council reviewed a very large volume of materials each year, during the budget process, some details may be lost between years. More than 50 percent of participating businesses were paying at the cap level.

Ms. Brotherton said a very detailed discussion on fee equity was held with the City Council ten years ago. There was considerable analysis, court decisions were reviewed, and a number of options were developed before a structure was chosen. She clarified that the \$2,000 cap was a legislative decision.

Ms. Arkin expressed concern that personnel costs increased annually, and at some time the

budget was not sufficient.

Chief Groves said a common complaint from industry was that overall government reporting was not coordinated, that one report should be distributed to all the agencies that need to know. While onerous on industry, the Charter Amendment mandated specific reporting requirements, which do not necessarily align with other reporting requirements.

Ms. Arkin recognized issues of having different state, federal and county reporting and said the Toxics Board had no way to resolve those issues.

Ms. Brotherton clarified that not even the City Council can change the Charter Amendment, because the voters mandated it.

In response to Mr. Prince, Chief Groves said the Eugene Toxic Program had no relationship with the emergency response system. Other specific information and intelligence systems were in place, particularly after September 11, 2001.

In response to Ms. Phelps, Chief Groves said it was difficult to compare staff allocations made to other boards and commissions. Most staff, even though they were full FTE within a specific program, they had a significant number of other duties assigned. He added that Ms. Eppli has other activities assigned to her besides Toxics Board support.

Ms. Arkin added that many staff in Planning had a small portion of their FTE costs assigned to Planning Commission support, but spent most of their time on other planning duties.

Mr. Brotherton emphasized that her June 17, 2014 memorandum answered only very specific legal questions and was not intended to undermine goals that the Toxic Board and staff want to achieve in the program.

Chief Groves said discussions may feel awkward because all the details were not yet clear. As the process moved forward and the next budget was prepared, there were also opportunities for public testimony directly to the City Council.

Ms. Arkin commented that in her experiences with the city and county, volunteers were encouraged to increase program implementation, not reduce it. Although the City Attorney's memorandum was a legal opinion, the minimum mandate was not the standard the Toxics Board was setting for itself, or consistent with her other volunteer efforts with the City of Eugene. The message to the Toxics Board appeared to be one of diminishment and reduction, which was not good for the community.

Ms. Brotherton clarified that the focus was not on diminishment and reduction, but rather emphasized the focus was on efficiencies. She questioned if more could be accomplished at the Toxics Board level while maintaining fees and staff FTE levels lower.

Ms. Zeller-Powell commented that as a Toxics Board member for the past four years, she had seen a lot of catch-up and efficiency measure implemented. She was hesitant to support a return to .5 FTE because the job being done when the program was staffed at that level was not sufficient.

Chief Groves said the Toxics Board knew what staff was trying to accomplish. He asked the Toxics Board to develop a proposal for a more streamlined and efficient program given the basic

target.

Fire Marshal Gerard expressed agreement, that finding the “sweet spot” was the target: the right allocations that meet both policy requirements and budget goals.

Chief Groves expressed confidence that the process, although a bit frustrating, can result in a good solution.

VI. SCHEDULE NEXT MEETING/FUTURE AGENDA ITEMS

The next meeting was scheduled for November 20, at 3:30 p.m.

- Advocacy Section of Gap and Impact Analysis Report Finalization, Advocacy members – Thursday October 30, 2014, 3:30 p.m.
- Gap and Impact Analysis Report Finalization
 - Mr. Nicol to provide approximate costs for inclusion
- Preparation for Budget Review in November and/or December
- Review Characteristics Chemicals from Thermo Fisher Scientific for Addition to List of Reportable Chemicals—deferred to a future meeting.
- Special Project Request from Willamette Valley Company—deferred to a future meeting.
 - Review Reporting of Petroleum Distillates (CAS #064742-47-8) as an Ignitable Characteristic Chemical and Determine Whether to Remove from List of Reportable Chemicals
- Review Draft Envision Eugene Clear Lake Area Recommendations—deferred to a future meeting.
- Presentation by Beyond Toxics: Review of Recent Reports that Include Data from Eugene’s Toxics Right-to-Know Program—deferred to a future meeting.
- Lane County Local Emergency Planning Committee (LEPC) Presentation—deferred to a future meeting.

The meeting adjourned at 4:47 p.m.

(Recorded by Janis McDonald)