

ENVIRONMENTAL ADVISORY COUNCIL
Lansing, Michigan
Thursday, April 21, 2005, 1:00 – 4:00 p.m.

Members in attendance: Jack Bails, Jon Allan for William Beckman, Neil Kagan for Andy Buchsbaum, Steven Chester, Jim Frey, Kurt Giberson, Mike Johnston, Ellen Kohler, Philip Korson, Terry Link, Lisa Locke, Kevin Kruszewski for Steve Luzkow, Terry Miller, Allen Reilly, Diane Rekowski, Debra Rowe, Pamela Smith, Tom Woiwode.

DEQ Staff in attendance: Linda Albro Sparks, Dennis Armbruster, Frank Baldwin, John Craig, Tom Hess, Andy Hogarth, Diana Klemans, Tim McGarry, Frank Ruswick, Milton Scales, Barb Schaibly, Jim Sygo, Barry Selden.

OPENING

Meeting began with Frank hoping that most EAC members got a chance to look in on the DEQ's Earth Day celebrations. We had a really good turnout and I'm sure you noticed a lot of young people in the building today. This is our second meeting of the new EAC group. Table introductions followed. Frank reported that Pat Lawton, from the Remediation and Redevelopment Division (RRD), had asked him to let EAC members know that sometime within the next few weeks, they will be receiving a copy of the new RRD newsletter. EAC members should take a look at it and decide whether they would like to continue receiving it.

One of the things we did at the last meeting was to take a look at watershed management issues. The EAC recommended that the DEQ form an interdivisional team to take a look at watershed management activities in the DEQ and determine if there were ways to improve it. The DEQ was asked to report back in April with a response to this recommendation. Frank reported that the divisions primarily involved with watershed management issues met with Director Chester and were to consider the EAC's recommendation. That discussion recognized that the Water Bureau is currently spearheading a review of the Non-Point Source (NPS) program. That review involves other DEQ divisions, as well as organizations outside the DEQ. It involves many of the same issues and parties that would be involved in a broader review of watershed management generally. In order to most efficiently use the limited resources of both the DEQ and outside organizations, the DEQ is proposing that the NPS review occur first, and then the DEQ report back to the EAC on lessons learned and whether a continuing inquiry into watershed management programs is appropriate. Frank introduced Frank Baldwin and Diana Klemans of the Water Bureau to discuss the NPS review.

Frank Baldwin distributed a handout titled "Watershed Approach to Restoring and Protecting Michigan's Waters" (Attachment 1). The handout describes the wide variety of Water Bureau programs that are organized around watershed principles.

Frank Baldwin indicated that the NPS review is looking at how to make that program more effective and efficient. The Water Bureau has gathered a multi-disciplinary team, including outside stakeholders. There are twenty-six members on the committee. This expands the inquiry beyond the traditional NPS programs to include related items such as soil erosion and storm water. There have been two meetings to date, and the group is looking at how the NPS programs affect outside organizations, as well as how other states are organizing their NPS programs. The plan is to provide recommendations to the Bureau Chief by the end of the fiscal year.

A member indicated that she was glad to hear of the DEQ's efforts to review the NPS program. The member indicated that there is a lot of frustration among outside organizations in working with the NPS program, primarily related to the administrative difficulties in obtaining and working with grants. The member hoped the grant part of the NPS program would be part of the review.

A member asked whether the DEQ had determined if there is sufficient legislative authority to make needed changes to the program? Frank Baldwin responded that the need for legislative changes, if any, will be balanced against the costs and benefits of obtaining legislative amendments.

Frank Ruswick asked if there were any concerns with the DEQ's proposal to work through the NPS review as a means of reviewing watershed management issues. None were indicated by EAC members.

Frank Ruswick distributed 3 handouts: The first is a draft titled "Public Involvement Handbook." This handbook has been developed by staff in response to the EAC's recommendations for improving public involvement in DEQ activities. Frank asked that the EAC review this draft in preparation for a discussion at the May EAC meeting. If members have specific comments on the draft, they can also mark them on the copy and return them to Frank.

The other two handouts are background material on Environmental Justice (EJ). The DEQ will be asking the EAC to consider the issue of EJ starting next month. The second two handouts are background material on what environmental justice is, what the movement is about, and what USEPA has done. We are planning to arrange for a presenter from the academic community joining us to initiate the EAC's consideration of the issue. One of the documents was excerpted, but if anyone is interested in the entire document, they should contact Frank Ruswick.

CURRENT ISSUES

Since Director Chester had not yet been able to join the meeting because of conflict, Frank Ruswick began the discussion of current issues. He summarized the results of our outreach sessions held in the Saginaw, Tittabawassee, Midland, and Bay City areas in relation to dioxin. The DEQ was criticized for the format of the meeting, in which specific members of the respective communities were invited to participate in a roundtable setting. Other interested parties were allowed to participate as observers, and they could submit written comments and questions. The roundtable format did prove successful at generating a dialogue among those participants. At the third and fourth meetings, we were able to provide an opportunity for the observers to also make statements. This proved to be very helpful. The DEQ is obviously learning as the process goes forward. We anticipate a series of broader community meetings as the next step in the process.

Frank Ruswick also touched on the budget development process. The DEQ is currently appearing before the House DEQ Appropriations Subcommittee. Those meetings are going pretty well and generating interesting questions and discussions. There is apparently some disparity between how the House and Senate will be handling review of the budget, since the House is using the Price-of-Government approach and the Senate appears to be moving away from that approach.

A member asked if there was an opportunity for the Department to recapture expenses through enforcement activities. Is that a revenue stream that could subsidize expenses?

Tim McGarry, Chief of the Office of Civil Enforcement Coordination, explained that the Legislature already includes in the budget a revenue stream of about \$3.2 million from fines and penalties collected through enforcement actions. Fines and penalties collected above that amount are credited to the state's General Fund. Andy Hogarth, Chief of the Remediation and Redevelopment Division (RRD), explained that the RRD has also recovered approximately \$100 million in cleanup costs incurred by the state from parties responsible for the contamination. These funds are used to conduct further remediation activities.

A member asked if there is any effort to benchmark how much the state can reasonably expect to collect from cost recovery actions. Andy explained that the public funds tend to be spent on sites where the responsible party cannot be identified nor has no assets. This makes cost recovery actions difficult.

DEQ CIVIL ENFORCEMENT PROGRAM

Tim McGarry gave a power point presentation on the DEQ civil enforcement program. See Attachment 2.

DEQ CRIMINAL ENFORCEMENT PROGRAM

Milt Scales, Chief, Office of Criminal Investigations, gave a power point presentation on the DEQ criminal enforcement program. See Attachment 3.

DISCUSSION

Frank Ruswick presented the topic for discussion. He indicated that EAC members had received a short, but good, grounding in DEQ enforcement programs through the presentations just given. One way of looking at the DEQ's job is to use the tools available to us as a means of encouraging the regulated community to meet its legal obligations. Enforcement should be viewed as one of those tools. While recognizing the role of other tools (e.g., compliance assistance) not under discussion at this time, how can the DEQ make more effective and efficient use of the tool of enforcement?

A member suggested that it would be helpful to make enforcement presentations to others outside the DEQ. This would help in understanding the role of enforcement and how the DEQ conducts its enforcement activities.

Another member agreed, and indicated that although employees are often reminded about the need to meet legal obligations, the understanding of the implications of criminal penalties would assist in maintaining compliance. This is especially true since employers sometimes do not pay to defend employees charged with intentional (i.e., criminal) wrongdoing.

A member commented that one of the purposes of civil enforcement is to create a level playing field. It is not fair to those who do their best to meet environmental requirements if a competitor can offer lower prices by avoiding compliance costs.

A member noted that the calculation of penalties is supposed to account for the economic benefit of non-compliance. Director Chester agreed, but noted that the economic benefit component of penalty calculations is both difficult and controversial.

A member noted that one of the problems with enforcing wetlands protection laws is the ideological conflict between the need to protect wetlands and perceived freedoms over the use of private property. The member suggested that perhaps community organizations might be able to help in some way.

A member indicated that in some parts of the state, the primary issue is follow-up on improper development affecting wetlands and other sensitive resources. Is there a way that someone outside the DEQ can assist in conducting follow-up when these complaints are received? Another issue is inconsistency in application of requirements. In some cases, permits are granted; and in other cases, denied for what appeared to be the same actions in different locations. This makes it difficult for people to understand and comply with what the law requires.

Tim McGarry responded that consistency is an important issue for the DEQ. One reason Director Chester created the Office of Civil Enforcement Coordination is to help encourage consistency in administration of DEQ programs.

Director Chester indicated that because of the site-specific aspect of the permits they administer and the sheer number of such applications, the Land and Water Management Division (LWMD) has one of the most decentralized decision-making systems in the DEQ (by way of comparison, the Air Quality Division processes about 400 applications annually.) This decentralization makes consistency difficult. However, the LWMD is using the Vision Stream Mapping (VSM) process to develop recommendations for program improvement, and further decentralization is intended. This will need to be done in a way that fosters consistency through good guidance to staff and other mechanisms.

A member noted that one difficulty with enforcement on wetlands and similar cases is the reluctance of prosecutors to take cases involving what are perceived as minor cases, especially when they involve only small parcels of land.

Milt suggested that one way of assisting with that problem is for local citizen groups to make sure that local prosecutors and judges understand the significance of environmental violations.

A member asked if the DEQ had any trend data describing the types of violations it sees. For example, given the decline in manufacturing in Michigan, has the DEQ seen a decline in pollution-related violations and, given the increase in land development, an increase in wetlands and similar violations? If not, perhaps that data collection should be started now so that the information could be used in the future. It would provide one mechanism to inform the public about the types of environmental issues we face.

Director Chester responded that Governor Granholm does want to provide compliance and enforcement information on the website. We need to be careful how this is done since the data may not be self-explanatory. For example, an increase in the number of violations discovered could mean that violations have actually increased, or that the DEQ has improved its ability to detect such violations.

A member agreed that how the data is presented is important and recommended the DEQ provide explanations indicating what the data means.

A member asked how the enforcement programs of the various divisions are evaluated. The member provided an example about perceived lack of adequate enforcement by one of the DEQ divisions. How would such an issue become known to management?

Tim McGarry explained that there is quite a bit of variation among the divisions. In the Air Quality Division, for example, the Enforcement Section Chief reviews every letter of violation and assesses the adequacy of follow-up by district staff. In other divisions, the volume of such letters makes that step difficult, but field coordinators who oversee district supervisors may review data on a district-by-district basis. That is the practice, for example, that the Waste and Hazardous Materials Division employs.

Frank Baldwin, Assistant Chief in the Water Bureau, explained that the enforcement process really begins when DEQ inspectors become aware of violations. Therefore, it is important that inspectors be well-trained. The Water Bureau is planning on such training for its inspectors this fall.

A member noted that sometimes enforcement can be a “lose-lose” proposition because of the costs it imposes on both the regulated party and the DEQ. While enforcement may serve as a deterrent to illegal behavior, it can also serve to drive behavior underground. The member strongly supported the use of multimedia compliance and enforcement techniques. No one wants to be subject to multiple inspections by the DEQ or separate enforcement actions. The member suggested that the best way to obtain compliance is to generate a culture among inspectors that supports working with the regulated community. It is better to be collaborative in finding solutions than to be adversarial. The member expressed concern that since part of DEQ funding comes from enforcement actions, there is a motivation to escalate conflict. The members indicated a desire in seeing data which compared the cost of pursuing an enforcement case with the amount of revenue generated.

Director Chester indicated that negotiating resolution of violations through administrative settlements can be done very efficiently. It becomes very expensive if a case must be taken to litigation. However, the DEQ does not view enforcement as an activity to generate revenue. Enforcement is a tool to obtain compliance and sometimes is necessary both to address individual cases and to provide a general deterrence.

A member suggested that perhaps the DEQ should have two different sets of staff: one would visit facilities as an auditor to notify of shortcomings; the other would be inspectors charged with obtaining compliance, through the use of enforcement if necessary. Tim responded that this is similar to the model used in the occupational safety and health program.

Director Chester indicated that the DEQ is developing a new program, called the Environmental Results Program, which is designed to work directly with the dry cleaners in a collaborative way to obtain compliance. This program is funded by the Environmental Protection Agency and modeled after a similar program in Massachusetts.

CLOSING

Frank Ruswick thanked EAC members for their thoughts on improving the DEQ's enforcement program. He reminded members to review the material previously provided in preparation for the next meeting on May 19th. That meeting will return to the EAC's regular meeting location in the ConCon Room.

Notes by Linda Albro-Sparks; summarized by Frank Ruswick.