Division 12 Advisory Committee Meeting Minutes – 1st Meeting 11/28/12

Committee Members:

Phil Houk, Mayor, City of Pendleton, Union Pacific Railroad

Gerald Linder, Clean Water Services; Assoc. of Clean Water Agencies

Paul Koprowski, US Environmental Protection Agency

Donald A. Haagensen, Cable Huston law firm; Associated Oregon Industries

Christopher Rich, Perkins Coie law firm

David Misel, Rejuvenation, small business and manufacturing representative

Aubrey Baldwin, Earthrise Law Center, representing citizens and environmental conservation

Merlyn Hough, Director, Lane Regional Air Protection Agency

Matthew Criblez, Portland Bureau of Environmental Services

Mike O’Connor, Continental Cleaners, small business owner

Courtney Johnson, Crag Law Center, conservation and environmental justice advocate

DEQ Representatives:

Ron Doughten, Facilitator

Les Carlough, Senior Policy Advisor, Office of Compliance and Enforcement

Jenny Root, Environmental Law Specialist, Office of Compliance and Enforcement

The meeting commenced at 10:00 a.m. All members were present. Leah gave a brief welcome to committee members and introduced Ron Doughten as the meeting facilitator. DEQ then gave the following orientation presentations:

* Les provided information on the background of senate bill 105A that increased DEQ’s civil penalty maximum from $10,000 to $25,000 per day
* Jenny explained general rulemaking procedures and the current timeline goals for this rulemaking
* Ron presented the Division 12 committee charter and goals for this meeting
* Jenny gave a brief overview of DEQ’s purpose and programs
* Les gave a presentation on enforcement philosophy and deterrence

The committee then took a break to grab its lunch and reconvene. Over lunch, Les gave a presentation to describe DEQ’s current civil penalty formula and matrices. His presentation included examples of different ways the civil penalty matrices could be changed to implement SB 105A. The committee then engaged in discussing these examples and other ideas and alternatives for utilizing the increased civil penalty maximum.

Aubrey stated penalties should be at the top. The matrices were set on 1973 numbers, capped at $10,000. She suggested increasing each matrix by 2.5 times since the new maximum is 2.5 times the old.

Phil questioned whether we use the entire $25,000 max. He thinks there should be room for movement up or down and likes the existing system where there are additional penalties for continuing violations. He is concerned about big penalty changes overnight.

Don wondered why penalties were topped at $10,000 in 1973. The $8,000 matrix became new in 2005/2006. He thinks DEQ should keep room in the system so growth can happen.

Merlyn thinks this is a well thought out system. He likes the objective cookbook approach and is in favor of Aubrey’s suggestion of 2.5 times increase. He thinks it would be conservative since its only half the inflation rate change since 1973.

Chris stated the numbers in 1973 are probably not that relevant as lots of programs and tools exist now that didn’t back then like the criminal program and $100,000 penalties for extreme harm. He suggested fixing whatever is missing in the formula and leaving room in the highest matrix to be able to capture economic benefit. It is the equalizer for those that spent the money to avoid violations. He doesn’t believe increases in penalties will create more compliance. High penalties result in more appeals and transaction costs. He wonders whether the increased cost will be offset by compliance gains.

Paul stated he thinks DEQ should start at the maximum and then deduct for good behavior or other factors. Mike then asked Paul whether there is a specific penalty number that would make EPA happy. Paul replied no, it up to what Oregon wants.

Aubrey said she is attracted to the 2.5 multiplier she suggested since the committee and DEQ don’t have data for what penalty amount maximizes compliance. She thinks a larger penalty is more likely to encourage compliance versus a small penalty that is blown off.

Jerry said the municipal community has a different perspective and does not give deference to the 1973 legislature. His clients aren’t for-profit entities; penalties come out of citizen’s pockets. He is more in favor of stretching the upper end (matrix) and leaving smaller communities alone.

Phil likes the idea of room for movement in the penalty. He thinks there should be reasonable increases and DEQ should utilize the factors for egregious scenarios. It’s not responsible to say we’re maximizing the penalties to the biggest extent possible just because we can.

Courtney stated that penalties should be increased because the legislature said it should by passing the bill. It’s more transparent to have matrices reflect closer to what actual caps are rather than possibility of $8,000 base penalty increased to $20,000 or more through the factors. She believes bigger penalties get more attention in the press and by word of mouth. She is more in favor of stretching at the upper end than an across-the-board multiplier.

Don felt more small businesses are getting hit and need to have more technical assistance. The base penalty doesn’t have anything to do with what the violator did, bad or good, like trying to prevent violations. He wants to leave room for the factors to increase or decrease the base penalties so that the factors have meaning to address good or bad behavior.

Aubrey agreed that it seems like the smaller entities are the ones getting fined. She would like more information on which violations get penalized the most and who the violators are. Jenny responded that the packet we handed out contains the last year and a half or so of press releases for each formal enforcement action/penalty issued. We could get additional information to the committee after the meeting.

Phil stated that larger entities have improved immensely but smaller ones don’t have the resources to change and that’s why there are more smaller entities on the penalty lists. He believes that public relations, reputation is the most important to the big corporations. He suggested raising the $8,000 matrix to $12,000 and let the factors play out.

Paul wondered how often DEQ bounces against the $10,000 maximum. He believes just making the maximum $25,000 is a good deterrent.

Mike stated that he is a big fan of the factors and thinks that DEQ should put more emphasis on the factors.

Don requested that OCE send the committee the last two months of penalty exhibits so that the committee can see how the penalty formula plays out under different scenarios and matrices.

Jerry stated that his agency recently received a $5,000 penalty from DEQ for a small violation. The penalty reached $5,000 due to the factors, priors. He said the deterrent value would have been the same regardless, because his agencies have other incentives for compliance. He stated the penalty amounts should be raised slightly because legislature said to do it. A big jump would be a problem and seem unfair.

Paul asked whether the matrices be based on entity size. Perhaps environmental effect should be the first inquiry.

Chris stated we should look at the matrices and maybe class and magnitude to figure out who should be where. Are there changes to the current assignments needed?

Aubrey commented that in doing citizen enforcement, she sees some who will fix problems and others who are outside the system. She is concerned about violations not being enforced and would like to see more penalties, even if matrices are not changed. She stated it seems like people are in the matrices just by who they are.

Matthew asked what is the average penalty per matrix? He commented that we don’t just want to start bumping against the new $25,000 max, but that DEQ needs latitude for when they need higher penalties.

Dave stated DEQ needs to give credit, have a bigger penalty difference between good and bad actors. Chris and others agreed.

Paul stated he wanted to keep in mind Aubrey’s suggestion for the 2.5 multiplier. Penalties must be an amount that will be taken seriously. Doing the factors and adding new ones has transaction costs for the agency.

Don suggested maybe giving DEQ discretion to move someone to a higher matrix.

Chris suggested having the magnitudes be more flexible to DEQ, being able to lower the magnitude for strict liability violations that have no harm or bad mental state. DEQ should have the ability to lower the magnitude.

Mike stated we should expand the existing factors without messing up the system and creating more work for DEQ.

Don stated that DEQ should be able to re-look at selected magnitudes and factors. Right now, you are locked in with no room to move if violation caused less or greater harm. Give DEQ discretion to consider surrounding circumstances to move the magnitudes up or down.

Merlyn suggested a new matrix for bumping up from the $8,000 matrix if we want that discretion. Change weighting of the multiplier to maybe 0.2 instead of 0.1.

Mike suggested using the multiplier to increase magnitudes.

Don stated that there is lots of talk about giving DEQ more discretion but that more discretion means more argument from violators and their lawyers and becomes resource intensive for DEQ. Also, “boxes” will less discretion creates greater consistency of penalties and transparency for the agency. He acknowledges that he is somewhat arguing against some of his earlier comments.

Aubrey stated that as discussion developed over the afternoon, she heard that more DEQ discretion increases costs for the agency. She is in favor of least-cost changes to penalty calculations so that more enforcement can happen.

Les gave a quick summary of comments and wrapped up the meeting. Les and Jenny committed to sending the group the PowerPoint presentations from earlier in the day and copies of the last two months of penalty exhibits. They encouraged the group to submit any additional written comments they may have. The meeting was adjourned at 4:00 p.m.