

# Minutes of the three hundred and sixtieth regular meeting of the Oregon Environmental Quality Commission

Feb. 16-18, 2011

DEQ headquarters: 811 SW 6th Avenue, Portland, 10th floor, room EQC-A

## **Wednesday, February 16**

**Present:** Commissioner O’Keeffe, Commissioner Uherbelau and Commissioner Dodson

*Chair Blosser joined the meeting at 2:20 p.m.*

*Vice-chair Williamson joined the meeting at 2:30 p.m.*

### **1. Hearing: Water quality standards for toxics**

Commissioner O’Keeffe opened the hearing and convened the commission meeting at 1:30 p.m.

Approximately 60 people attended the hearing. Thirty-six people submitted request-to-speak forms.

Neil Mullane, Jennifer Wigal and Gene Foster presented a brief overview of the rulemaking proposal. Wigal noted that DEQ must update its rules or EPA is prepared to adopt rules for Oregon. Foster explained the proposed nonpoint source changes included in the rulemaking information. Wigal noted that DEQ is in the public comment period for the rulemaking, and anticipates bringing the final rules to the commission for action in June 2011 and EPA action in fall 2011.

While 36 people submitted request-to-speak forms, only 35 people presented comment. Commissioner O’Keeffe officiated the hearing, and recessed the commission at 4:30 p.m., following the close of testimony.

*The commissioners and some DEQ staff met for an optional, informal and self-pay dinner at a restaurant in downtown Portland. This dinner was not a formal part of the meeting, but must be noticed under state public meeting law.*

## **Thursday, February 17**

**Present:** Chair Blosser, Vice-chair Williamson, Commissioner O’Keeffe, Commissioner Dodson and Commissioner Uherbelau

Chair Blosser reconvened the commission at 8:30 a.m.

### **A. Action item: Approval of meeting minutes**

The commissioners identified and corrected typographical errors in the Nov. 18, 2010, special meeting and Dec. 9-10, 2010, regular commission meeting minutes.

Action: Approve the November 2010 special meeting and December 2010 regular meeting minutes with corrections.

Move – Commissioner Uherbelau

Second – Commissioner Dodson

*The commission approved the minutes, as amended, unanimously*

## **B. Informational and discussion item: Hermiston Foods**

Joni Hammond, DEQ deputy director, introduced the item, and Linda Hayes-Gorman, Eastern Region Division administrator, presented a report and update on concerns associated with the Hermiston Foods processing facility and operations in Hermiston. The report outlined odor and overspray issues associated with Hermiston Foods. She explained that DEQ is addressing residents' concerns and working with the company to reduce odor, overspray and nuisance concerns from the site.

The commissioners asked clarifying and informational questions. Hayes-Gorman provided additional information and asked Bill Mason, DEQ hydrogeologist, to respond to questions about evapotranspiration and irrigation. Mason explained the 2010 actions and planned 2011 process for reducing odors from a process water storage pond. Dwayne Smith, DEQ water quality staff, addressed the commission about permit and monitoring requirements and enforcement. Director Pedersen noted that self-reporting is a standard practice at DEQ, and explained, generally, the enforcement process for permit violations or other incorrect reports. Vice-chair Williamson noted that the odors are likely caused by the source of organic materials, such as lima beans, in the process water or microbes active in the process water-holding lagoon. He encouraged Hermiston Foods to collect data on what is causing the odor, and begin to find solutions for those odor-contributing sources. The commission discussed ways to write permits or include conditions that can reduce odors.

Ray Stephen, Hermiston Foods general manager, presented information from the company about the Windblown Ranch and new sites used for processing and land applying the used process water on alfalfa and other crops. Stephen explained that the company started on the new site in the past year, and noted that the plans for future years will correct operational issues from this past year. He explained several changes that the company has made to improve processes and reduce odor and overspray issues for neighbors. Stephen stated the company's commitments to inform and work with neighbors for resolution of odor and overspray concerns.

Don and Karie Walchli presented comment on Hermiston Foods. Don Walchli noted that they are watermelon farmers, direct neighbors of the Hermiston Foods site and presented the commission with a map and photographs showing the company's violation of boundary lines. Don Walchli asked when Hermiston Foods and DEQ knew that the company was operating on his land, and asked what both DEQ and Hermiston Foods would do to remedy the boundary violation. Karie Walchli presented comments on the health concerns associated with odors from the Hermiston Foods process water pond and land-applied irrigation water. Karie Walchli noted that Hermiston Foods is valuable to the community, but so is Walchli Farms and the other residents. She stated that Hermiston Foods had negatively affected her quality of life. The commission and DEQ staff responded to questions from the Walchlis. Lisa Hansen, Oregon Department of Agriculture deputy director, addressed the commission on food safety concerns, generally.

Four people presented comment by telephone, from the Hermiston DEQ office.

1. Kay Vanhorn identified herself as a Hermiston resident and neighbor near the Walchlis and Hermiston Foods. Vanhorn noted that trees planted by the company have died from land-applied process water, and asked for Hermiston Foods to take additional action to remedy odor concern.
2. Neela Wallace identified herself as a Hermiston resident and stated that Hermiston Foods needs to make sure that any trees planted are on Hermiston Foods' land and not the neighbors' property. Wallace asked for information on the process and staff for monitoring the facility, and stated that the facility has violated mixing and evapotranspiration rates. She expressed concern for the land use associated with the facility and possible groundwater nitrate contamination.
3. Bill Elfering noted issues with boundary disputes, and stated that the boundary concern may be a cleanup issue for DEQ.

4. Lee Byrd identified herself as a neighbor of Hermiston Foods site and stated that she had an adverse reaction after the company pumped water out of a holding pond.

The commissioners asked Hermiston Foods to submit, in writing, a response to the issues raised by commenters. Commissioner O’Keeffe noted that she understands the frustration of addressing an agency that may not have authority to act, and encouraged the staff and neighbors to work in directions that DEQ has authority. The commission requested a quarterly update on this issue as part of the director’s dialogue.

### **C. Action item: City of Portland combined sewer overflow stipulated and final amended order**

Greg Geist, Northwest Region water quality manager, introduced the item and Mike Pinney, Northwest Region water quality senior environmental engineer, presented an outline of the project. Pinney stated that the 20-year project is in its last year with about 96 percent control of combined sewer overflows for Portland. Pinney explained that the post-2011 facility plan was required by the commission’s amended stipulated final order for the project, and the commission must approve the plan as part of that order. The commission asked several clarifying questions. Virgil Adderly, city of Portland, responded to the commissioners’ questions.

Action: Approve the city of Portland’s post-2011 Combined Sewer Overflow Facilities Plan and approach for further reductions of combined sewer overflow.

Move – Commissioner Uherbelau

Second – Commissioner O’Keeffe

*The commission approved the plan unanimously.*

Director Pedersen noted that the city has met all conditions of the order, and congratulated Portland as it is approaching a landmark point with the completion of the overflow project.

### **D. Action item: Ballast water management rules**

Wendy Wiles, Land Quality Division administrator, introduced the item. Rian Hooff, ballast water program coordinator, presented the proposed rule amendments that would revise the rules to align with updates to state laws. Hooff described the process DEQ used to develop the proposed rules, and noted the specific content of the proposed rules.

The commission asked clarifying and informational questions about the rule language and implementation of the ballast water program.

Action: Adopt the proposed rules as seen in attachment A of this item.

Move – Commissioner O’Keeffe

Second – Vice-chair Williamson

*The commission approved the rules unanimously.*

### **E. Informational item: Climate-friendly nurseries in Oregon**

Neil Mullane, Water Quality Division administrator, introduced Alison Hensey, Oregon Environmental Council, and Jeff Stone, Association of Oregon Nurseries. Stone presented information on the Oregon nursery and greenhouse industry, and explained that Oregon nurseries are dedicated to sustainable nursery and greenhouse practices. Hensey explained the Oregon Environmental Council has a Healthy Food and Farms Program that works collaboratively with businesses and farms to find sustainable solutions in farming. She explained that the Climate-Friendly Nurseries Program is one demonstration project of that

program, and enables the environmental protection community to work directly with nurseries and growers to reduce the perceived policy gap between the two groups. Stone explained that the two groups met four years ago to begin the project and relationship between OEC and OAN.

Hensey presented information on the three-year demonstration project, started in 2009, that works with 15 nurseries across the state that are measuring, documenting and reducing greenhouse gas emissions. She explained that the second part of the project is to work with nurseries to develop best management practices that nurseries can use to reduce their environmental impacts. Hensey explained that limiting factors for the project are data needs, and that Oregon State University professors are involved and are researching ways to find data collection methods and other incentives for the ecosystem services the nurseries are encouraged to provide through the demonstration projects. Stone explained that the nursery industry has always realized the environment benefit of its work, and is now working to quantify its carbon footprint and advance Oregon's nursery industry on a national level. Hensey recognized the good stewardship of many Oregon nurseries and the Oregon Association of Nurseries, and emphasized the benefit and value of collaborative problem-solving projects with industries to augment the regulatory efforts of DEQ.

The commissioners thanked the presenters for their work and information, and encouraged the nursery industry to help drive the demand for sustainable yards and home landscaping. Stone invited the commissioners to Fisher Farm, a participant in the Climate-Friendly Nurseries demonstration project, to see the principles and activities of the project in action. Commissioner O'Keeffe asked about the opportunity for certification of sustainable nursery products, and Stone explained that a certification or label does not yet exist for sustainable nursery products but that it would be very welcome by the industry for the expected market rewards. Hensey noted that the project is a three-year demonstration, but that OEC hopes to continue the work with Oregon nurseries to reduce their carbon footprints. Chair Blosser encouraged OEC to include specific best management practices for water and wastewater in its next update to the guide for nurseries.

Director Pedersen thanked Stone and Hensey for their presentation, and explained that he had an opportunity to observe the project at Fisher Farms and wanted to bring this example of partnership beyond the regulatory format to the commissioners.

#### **F. Action item: Senate Bill 737 temporary rule proposal**

Neil Mullane, Water Quality Division administrator, introduced the item. Jennifer Wigal, water quality manager, and Cheryl Grabham, Senate Bill 737 project coordinator, presented information on the proposed temporary rules. Grabham explained the proposed temporary rule revision that would suspend the requirement for municipalities to develop reduction plans for cholesterol and coprostanol. Grabham explained DEQ's rule development process and issues the agency considered when preparing the proposal. Grabham described the next steps for the temporary rule proposal and stated general process steps for the Senate Bill 737 project.

Larry Knudsen, the commission's legal counsel, clarified that the proposed temporary rule language must include a provision stating that the commission must approve the findings in attachment B as part of the rule approval. Commissioner Uherbelau asked for a summary of the legal opinion and analysis, and staff provided that information with comment from Knudsen. The commissioners asked clarifying questions for the proposed temporary rules, and DEQ staff provided responses.

The commission invited Mark Yaeger to present comment, per his request to address the commission. Yaeger submitted a written copy of his testimony to the commission. Yaeger noted his support for the proposed temporary rules, and explained that the Association of Clean Water Agencies does not support the inclusion of plant-based sterols, for which there are no feasible reduction options, in the permanent

rulemaking package. At the commission's request, Bruce Hope, DEQ toxicologist, addressed the inclusion of plant-based sterols in the future permanent rules and the commission discussed the two compounds.

Action: Temporarily revise rule 340-045-0100, Initiation Level Rule, to suspend municipalities' requirement to develop Persistent Pollutant Reduction Plans for cholesterol and coprostanol, as presented in attachment A of this item, and adopt the findings in attachment B of this item.

Move – Vice-chair Williamson

Second – Commission Dodson

*The commission approved the temporary rules unanimously.*

### **G. Action item: Petition to initiate rulemaking**

Neil Mullane, Water Quality Division administrator, introduced the item. Jennifer Wigal, water quality standards program manager, and Marilyn Fonseca, water quality hydropower coordinator, presented information on the petition submitted by Idaho Power Company requesting that the commission direct DEQ to initiate rulemaking for site-specific temperature criteria for the Hells Canyon reach of the Snake River.

Fonseca presented information on temperature criteria development at DEQ and described the content of the petition. Fonseca explained that the commission must address six items in its consideration of the petition, and she presented information on each of the six items. Fonseca explained that the commission has three options for action, and recommended that EQC deny the petition and direct DEQ staff to consider the proposed site-specific criterion during the next water quality standards (triennial) review and rulemaking.

Chair Blosser invited Rick Glick, representing Idaho Power Company from Davis Wright Tremaine LLP, to address the commission. Glick submitted a letter and a copy of his comments and introduced two co-presenters from Idaho Power Company. Glick explained that the petition asks the commission to initiate rulemaking, and does not ask for adoption of the standard without review and a rulemaking process. Glick noted that there may be a fourth alternative for commission action, which would be to table the decision and direct staff to work with Idaho Power Company to research the proposed criteria change.

The commission asked clarifying and informational questions related to the petition and proposed criteria. DEQ staff, the commission's legal counsel and representatives of Idaho Power provided responses and clarifying information.

Action: Deny the petition and direct DEQ staff to consider the proposed site specific criterion during the next water quality standards (triennial) review and rulemaking.

Move – Commissioner Uherbelau

Second – Vice-chair Williamson

*The commission approved the action unanimously*

### **Lunch and executive session**

Chair Blosser recessed the commission for an executive session and lunch from 1 to 1:50 p.m. The executive session was held pursuant to ORS 192.660(2)(i)

#### **H. Action item: Rule adoption for the Heat Smart program for residential woodstoves and other solid fuel burning devices**

Andy Ginsburg, Air Quality Division administrator, introduced the item. Rachel Sakata, air quality specialist, presented information about fine particulate matter, a history of the regulation of wood-burning devices and the components of the proposed rules for the Heat Smart program. Sakata described the public involvement and outreach process DEQ used to develop and solicit comment on the proposed rules. She noted that most of the comments DEQ received on the proposed rules focused on provisions and requirements related to outdoor wood boilers, also known as hydronic wood stoves.

Sakata summarized comments received for this proposed rulemaking, and explained that DEQ made several modifications in response to the comments. Sakata noted that the proposed rules include one typographical error in Division 262-0990 of the proposed rules, and corrected the error – delete “and/or” at the beginning of part two, add a period after “particle board” instead of a semicolon and capitalize the p of “paper” that would begin the next sentence. The correction was on page H 000032 of the meeting materials.

The commissioners asked clarifying and informational questions, and Sakata provided responses to the inquiries.

Action: Adopt the staff recommendation with the typographical corrections as noted.

Move – Vice-chair Williamson

Second – Commissioner O’Keeffe

*The commission approved the rules unanimously*

#### **I. Action item: Proposed adoption of federal air quality regulations and related permit rules**

Andy Ginsburg, Air Quality Division administrator, introduced the item and explained that the proposed rules would implement active federal regulations in Oregon. Gerry Ebersole, air toxics specialist, described the content of the proposed rules and explained that DEQ, as a delegated authority, must keep its rules in alignment with changes to the federal standards. Ebersole noted that the commission adopted a temporary rule in August 2010, which allowed DEQ to defer permitting for up to 12 months on certain permitting, and that the proposed rules would make that deferment permanent. Ebersole explained that the proposed rules also repeal two portions, pertaining to medical waste incinerators and stationary internal combustion engines, of the existing standards, which would mean that the federal standards would apply for these two types of equipment.

Action: Adopt proposed rule amendments to OAR chapter 340, divisions 200, 216, 230, 238, 242, and 244 as presented in attachment A; amend the Clean Air Act implementation plan (OAR 340-200-0040) to include the amendments made to OAR 340-216-0020 and 0060, OAR 340-242-0500, and OAR 340-0244-0234, 0236, 0238, 0242, 0244, and 0248; and authorize DEQ to submit these amendments to the U.S. Environmental Protection Agency for approval as revisions to Oregon’s Clean Air Act implementation plan.

Move – Commissioner Dodson

Second – Commissioner Uherbelau

*The commission approved the rules unanimously.*

#### **J. Action item: 401 Certification Program fee increase**

*This item was removed from the meeting agenda*

***This item was taken out of order***

**Q. Director's dialogue**

Director Pedersen presented updates on projects and activities at DEQ. Those updates included information about:

- 1200C and 1200CN permits for stormwater
- 2010 annual report from the U.S. Army Corps of Engineers on total dissolved gas for the four lower dams along the Columbia River
- Oregon E-Cycles 2010 results
- Davy Crockett barge scrapping and fuel spill on the Columbia River
- Additional barge scrapping on the Columbia River
- EPA National Air Toxics Assessment, scheduled for release Feb. 24, 2011.
- Accounting gold star certificate – DEQ staff received this award for the 18<sup>th</sup> year
- Senate Bill 737
- Low Carbon Fuel Standard
- Low-emission vehicles update on alignments between California and federal efficiency standards
- Portland-area air quality and the Portland Air Toxics Solutions committee and process
- ESCO audit contract and process update
- West Hayden Island beneficial use determination process update
- DEQ's managers' cohort group

***This item was taken out of order***

**S. Commissioner reports**

Vice-chair Williamson explained that the Oregon Watershed Enhancement Board is interested in using ecosystem services models within a TMDL to move money from funding municipal sectors directly to farmers or private industry for water quality improvements. Director Pedersen noted that DEQ is working on that project model in the Ashland area for a permit that will be issued within a year. He stated that DEQ would bring information on that process to a future commission meeting.

Chair Blosser recessed the commission at 3:35 p.m. until Friday, February 18.

**Friday, February 18**

**Present:** Chair Blosser, Vice-chair Williamson, Commissioner Dodson and Commissioner O'Keeffe  
*Commissioner Uherbelau joined the meeting at 8:05 a.m.*

Chair Blosser reconvened the commission at 8 a.m.

**K. Informational item: Water quality partnership work between DEQ and Oregon Department of Transportation**

Director Pedersen introduced this item and recognized Rodney Weick, Northwest Region water quality manager, for his work on this project. Matt Garrett, Oregon Department of Transportation director, noted that he and Director Pedersen recently spoke with the Oregon Transportation Commission and they were able to discuss the connections between DEQ and ODOT, including the connections of their missions over a recent Pioneer Mountain/Eddyville I-5 bridge project. Director Garrett discussed ODOT's organizational development and transformation as an agency that focused only on roadwork to one that works to improve Oregon's transportation needs and understands the importance and integration of

environmental improvements. Director Garrett noted that Director Pedersen and DEQ is a leader among the involved agencies, and all have worked together for more streamlined and coordinated work for environmental solutions and the ways government should work.

Rodney Weick explained that the new memorandum of understanding between DEQ and ODOT is the first of many steps to improve cooperation and coordination among state agencies and organizations. He noted that there have been many passionate discussions, but that the two agencies have missions that align very well and staff that are willing to move forward in partnership.

The commission asked clarifying and informational questions about the program improvements through this collaboration, and Director Garrett noted that the memorandum is the beginning of a rich and mutually beneficial working relationship. Vice-chair Williamson noted that ODOT staff members have been leaders in the work to understand and reduce greenhouse gas emissions in the transportation sector.

*From 8:15 to 9 a.m., Joni Hammond, deputy director, presided for Director Pedersen, who could not attend the commission meeting due to another commitment.*

#### **L. Public forum**

At 8:15 a.m., Chair Blosser opened the public forum. Two people submitted request-to-speak forms in-person at the Portland office. No people attended to present comment via telephone from the Bend and Medford DEQ offices.

1. Bob Short, board member of the Oregon Concrete & Aggregate Producers Association, thanked DEQ for removing its recommendation to increase fees in the 401 Water Quality Certification program and asked when DEQ will revisit the rule proposal. The commission asked Nina DeConcini, Northwest Region administrator, to respond, and DeConcini stated that DEQ expects to complete a review and streamlining process and then revisit the rule proposal in three to six months.
2. Denece Messenger, a small business owner, addressed the commission on assertions of staff misconduct related to repeated site inspections and alleged air quality violations. Messenger provided the commission with copies of a 2010 ombudsman report and evidence from legal proceedings. Messenger asked the commission to review her materials submitted, requested an apology letter from members of DEQ's executive management, requested that the role and position of DEQ's ombudsman to small businesses be reviewed and preserved and requested a meeting with Governor Kitzhaber to address the financial and personal harms allegedly caused by DEQ against her business.

*Neil Mullane, Water Quality Division administrator, presided for Deputy Director Hammond and Director Pedersen from approximately 9 to 11 a.m.*

#### **M. Action item: Magar contested case**

Larry Knudsen, the commission's legal counsel, introduced the item. Chair Blosser polled the commission for ex parte contact or conflicts of interest, and there were none reported. Mr. Magar, respondent, presented his opening argument for the contested case. Les Carlough, acting for Office of Compliance and Enforcement manager Leah Koss, and Bryan Smith, environmental law specialist, presented DEQ's argument for the contested case. Magar and Smith both provided short rebuttal arguments to the opening statements.



Magar requested that the commission remand the issue back to the administrative law judge for reconsideration. DEQ requested that the commission uphold the judge's decision and issue a final order for the contested case. The commission reviewed the material presented by the respondent and DEQ and discussed its options for action.

Action: Issue a final order adopting Judge Whitaker's order.  
Move – Commissioner O'Keeffe  
Second – Vice-chair Williamson

Commissioner Uherbelau noted her disagreement with the commission's function to rule on contested cases and stated her intent to abstain from the vote.

*The commission approved the motion with four commissions in support and one abstaining.*

Yes: Commissioner O'Keeffe, Vice-chair Williamson, Chair Blosser and Commissioner Dodson

No: None

Abstaining: Commissioner Uherbelau

#### **N. Informational item: Supplemental environmental projects**

Les Carlough, acting manager for the Office of Compliance and Enforcement, introduced the item and Jenny Root, environmental law specialist, presented an overview of DEQ's Supplemental Environmental Project program. Root described how the program operates, the qualifications a violator must meet to be eligible for these types of projects, the benefits of the program and presented examples of supplemental environmental projects completed.

The commission asked informational questions and discussed the benefits of the program for DEQ and the state of Oregon. Carlough noted that violators must advertise their projects, and include information that the project is part of a settlement of an environmental violation, and that advertisement can increase deterrence for potential violators. The commission encouraged DEQ to add the project partners to the enforcement action press release distribution list, as a way to connect organizations to violators in need of a project.

#### **O. Informational item: Budget and legislative updates**

Greg Aldrich, government relations manager, and Jim Roys, budget manager, presented updates on the Governor's Balanced Budget, the 25 percent-level reductions enacted in that budget and legislative developments for the 2011 Oregon Legislative session. Roys noted DEQ will present its annual financial report to the commission at the April EQC meeting. The commission asked clarifying and informational questions about the budget and legislative information.

#### **R. Action item: Director's financial transactions for 2010**

Kerri Nelson, Management Services Division Administrator, presented the director's 2010 financial transactions for commission review and approval. Nelson explained that the commission must review and approve the director's transactions under state law and DEQ policy, and she presented the five elements of the annual financial review. The commission asked clarifying and informational questions about the content of the report.

Action: Approve Director Pedersen's 2010 financial transactions as presented.

Move – Commissioner Dodson

Second – Commissioner O'Keeffe

*The commission unanimously approved Director Pedersen's 2010 financial transactions as presented.*

**P. Informational and discussion item: DEQ key performance measures**

Deputy director Joni Hammond introduced the item and representatives from DEQ's programs and divisions presented the agency's key performance measures. Director Pedersen will present this information to the Oregon Legislature's Joint Ways and Means Committee in April 2011.

Joanie Stevens-Schwenger, Margaret Oliphant, Tom Roick, Neil Mullane, Greg Pettit, Deputy director Hammond and Greg Aldrich presented key performance measures related to overall customer satisfaction, air quality, land quality, water quality, data and monitoring, involvement in the Oregon Economic Revitalization Team and the commission's self-evaluation, respectively.

The commissioners provided feedback for Director Pedersen to incorporate in his presentation to the Oregon Legislature's Joint Ways and Means Committee in April.

*Commissioner Uherbelau left the meeting from 12:15 to 12:40 p.m.*

*Commissioner O'Keeffe left the meeting from 11:50 a.m. to 12:35 p.m.*

**Lunch and adjournment**

Chair Blosser recessed the commission for an executive session at 12:40 p.m. The commission met in executive session from 12:40 p.m. to 1:30 p.m., and the session was held pursuant to 192.660(2)(f) and (h). Immediately following the executive session, Chair Blosser adjourned the commission meeting at 1:40 p.m.

**2011 EQC meeting dates and locations**

April 21-22: Portland

June 16-17: Eastern Region, Pendleton

August 18-19: Western Region, location to be determined

October 20-21: Northwest Region, Astoria

December 15-16: Portland