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## SPOKANE REGIONAL CLEAN AIR AGENCY BOARD MEETING MINUTES

**December 2, 2010**                      **9:30 a.m.**  
**Spokane Clean Air's Conference Room**  
**at 3104 E. Augusta Ave.**

### **BOARD MEMBERS PRESENT:**

Mayor Edward Crockett  
Board Member Jeff Corkill  
Councilmember Dempsey (Chair)  
Board Member Tom Brattebo  
Commissioner Bonnie Mager (Vice Chair)

### **STAFF MEMBERS PRESENT:**

William Dameworth, Director  
Barbara Nelson, Finance & Personnel Admin.  
Ron Edgar, Chief of Technical Services  
Matt Holmquist, Compliance Administrator  
Lisa Woodard, Public Info. Officer  
Margee Chambers, Public Information Specialist  
Michelle Wolkey, Legal Council  
Mary McDermott, Secretary

**WORK SESSION:** The work session began at 9:33 a.m.

### **1. Enforcement Review – Matt Holmquist & Michelle Wolkey**

Matt gave a brief overview of the Notice of Violation (NOV) that was issued to Spokane Hutterian Brethren and Don Wolley Construction. On July 26<sup>th</sup>, a Spokane Clean Air Inspector observed dust and rock crushing. On July 27<sup>th</sup>, the Inspector informed Don Wolley of Don Wolley Construction and Paul Gross of Spokane Hutterian Brethren of dust control and rock crushing requiring a permit. On July 28<sup>th</sup>, Paul Gross was informed that a NOV would be issued. On August 2<sup>nd</sup>, the NOV and associated fact sheet was delivered. On August 2<sup>nd</sup>, Don and Paul met with Spokane Clean Air to complete the permit application (SEPA checklist not completed). The NOV was discussed at that time also. On August 6<sup>th</sup>, Paul met with Spokane Clean Air to discuss and complete the SEPA checklist. On August 12, the permit was issued for the rock crusher (there is a 10 day public comment period from August 2<sup>nd</sup>). On September 3<sup>rd</sup>, the penalty was calculated for the NOV. The calculation consists of seven questions: 1. Was the violation emission related? 2. Did the violator know about the requirement? 3. Was the violator unresponsive in correcting the violation? 4. Was the violation a result of an improper or inadequate O&M? 5. Did the violator have a history of similar non-compliance? 6. Did the violation occur for an extended period of time? 7. Did the violator benefit economically from noncompliance? In calculating the penalty, Spokane Clean Air noted parties were responsive in correcting violations and noted it was their first violation for issues cited. On the penalty scale, 10+ points for a first time NOV is \$2,000. To be conservative Spokane Clean Air reduced the

penalty to \$1,000 which is normally assigned to penalties with eight to nine points. Spokane Clean Air also offered to suspend \$300 if paid the \$700 with no recurrences within five years. On September 9<sup>th</sup>, the penalty was received by both parties and included the mitigation/appeal information sheet. On September 15<sup>th</sup>, in this case, Spokane Clean Air received an offer to settle for \$500 and Spokane Clean Air accepted. On September 25<sup>th</sup>, the Settlement Agreement was signed, dismissing the appeal of the rock crusher permit and NOV #7942. On November 15<sup>th</sup>, Spokane Clean Air received payment of \$500 per agreement to resolve the civil penalty. December 2<sup>nd</sup>, was the due date for Wolley Construction to pay the balance of the original permit fee (\$1,125). There was some discussion between Matt and the Board Members.

Michelle Wolkey gave a quick overview of her involvement in any case, which begins when there has been an appeal filed with the PCHB. The first thing that happens is the PCHB schedules a pre-hearing conference where we identify what are the issues that we have to be decided, what is our schedule going to look like, when can the PCHB come to Spokane when everybody is available. In this particular case there were a number of issues that were determined to be important for the parties. First of all did they violate any of Spokane Clean Air's regulations; was the NOV appeal timely filed and served; were their activities exempt; were they required to submit a NOC; did they violate a Corrective Action Order; was the penalty reasonable; and had the Agency erroneously interpreted and applied the regulation or was there an exemption under state law. On a number of issues, very broad authority rest with the PCHB to have them determine whatever it is the apparent appellant thinks that might have gone wrong in a case. The Board asked at the last meeting how does the knowledge element play into the application of the Clean Air Act? It is a strict liability statute and what that means is there is no requirement of knowledge or intent as part of the violation. The PCHB has been very consistent in saying "The fact that you didn't know is not a basis for exclusion of violation, because it's a strict liability statute". One of the issues that the PCHB always looks at is the reasonableness of the penalty. The PCHB has a broader horizon that they look at which is the nature of the violation, prior history of violations and remedial actions taken by the penalized party. They consider what the Agency has imposed but they are not bound to it. One of the issues in this case was the agricultural exemption. Fugitive dust which is caused by agricultural practices is exempt if it is consistent with good agricultural practices and it doesn't have a substantial adverse affect on public health. The statute defines agricultural activity as the active part of growing things and fugitive dust is emissions made by human activity or forces of wind which don't go through a stack, chimney or vent. Indirect activities, when talking about agricultural work, as determined by the PCHB are that it has to be integral to the growing or production of the crop. The position of the Agency was that crushing rocks was not integral to those agricultural activities for growing crops. Even if it is within the definition but it is not consistent with a good agricultural practice or it is detrimental to public health, then you're not within the exemption. The Board also asked what authority is there for this Board as opposed to the PCHB to have these kinds of hearings. Statutorily, that authority has been given to the PCHB. The reason for that is that it prevents this Agency from policing itself. It also provides for consistent statewide decisions so that we don't have different interpretations and those decisions are available on line if the public has questions. The PCHB is very user friendly and helpful.

**BOARD MEETING:** The board meeting was called to order at 10:00 a.m.

## **1. Director's Report for November – Bill Dameworth**

EPA has informed us that our draft Indirect Source Rule should be acceptable for inclusion in the Washington State Implementation Plan (SIP). Having it in the SIP would make it federally enforceable and therefore much more likely to withstand a challenge. EPA does have some concerns and has assigned a person to work with us on resolving them. We are waiting for some specific comments, but in the meantime we can begin having workshops on the proposed rule, which are planned for January, 2011. We are planning on one workshop with affected sources and another with City and County Planning and Zoning and Building Departments.

We met with the City of Spokane and Wheelabrator representatives to discuss their most recent failed stack test and the NOV Spokane Clean Air issued as a result. While compliance issues are not normally a part of the director's report but this issue will likely be controversial and receive press coverage. We requested data on activated carbon purchases to verify the claim that the carbon injection system was in use whenever possible for the year preceding the test. It appears that the carbon injection system was in use almost all the time, so there was little to no cost savings associated with non-compliance. Our penalty policy indicated a \$9,000 fine would be appropriate, but we often reduce the penalty if there are mitigating factors. Waste-To-Energy presented information on their mercury reduction program which is intended to remove it from the waste stream. They also indicated they would be agreeable to mandatory operation of the carbon injection system to prevent future compliance issues. Given their voluntary efforts to remove mercury from the waste stream, voluntary operation of the carbon injection system and willingness to modify their permit to make such operation mandatory, we agreed to reduce the penalty to \$5,000 subject to all parties signing a Memorandum of Understanding to settle the matter. We should have a draft agreement completed in early December. There was some discussion between the Board and Bill.

The State Auditor's Office is planning an exit interview with staff and up to two board members after the December board meeting. Recommendations will be discussed, but the final report is likely several months away.

Due to increases in employee medical costs (regular cost increases plus the cost of adding more dependents) we are examining how other government entities are addressing this issue. We will have a report to the board at the January meeting along with any recommendations to amend our personnel manual.

## **2. Public Information/Education Update for November – Lisa Woodard**

Lisa gave a brief overview of November activities. Community outreach presentation/events consist of air quality information and materials provided to attendees of the Providence Holy Family Hospital employee fair and the Burn it Smart, Burn it Safe Seminars. Compliance assistance program included personal visits to permit centers and nine local jurisdictions to distribute CAP materials and to discuss other business outreach opportunities; created dry cleaner compliance monthly calendars for 2011 and sent them out to drycleaners; and we updated the NOV information sheet. Special projects include conducting the last of the "Burn it Smart, Burn it Safe" seminars; delivered 200 wood heating packets to SNAP for their firewood recipients; had a KHQ call center for wood burning questions; and pre-produced wood burning

spots began airing on KXLY; and there is a crawl on the weather channel that can be updated quickly if we go into a wood burning restriction. The 2011 Clean Air calendar is at the printer and CTR worksite promotional materials are finalized and prizes have been secured as incentives and rewards for reducing SOV travel in January. Media activities consisted of a news release on the final burn seminar.

**3. Compliance Activity for October – Matt Holmquist  
Permitting and Air Monitoring Activity for October – Ron Edgar**

Matt gave a brief overview of the compliance activity (complaints, inspections, etc.). Ron gave a brief overview of the permitting and air monitoring activity (NOCs, NOIs). Air quality for October was pretty good.

**4. Treasurer's Report for November – Barbara Nelson**

Barbara gave a brief overview of the treasurer's report. Spokane Clean Air is on track with its budget. There will be a reduction in the State money received by Spokane Clean Air. The FY-2010 financial statements and reports will be going to the state auditor soon. There were no questions from the Board Members.

**5. CONSENT AGENDA – ACTION ITEM – Approval of the November 4, 2010 Board Minutes. Approval of Vouchers for November 2010 – Numbered 5260 through 5333 totaling \$67,885.71 and November Payroll of \$125,800.00 for a Grand Total of \$193,685.71.**

There was no discussion between the Board and staff. Board Member Corkill moved to approve the Consent Agenda and Commissioner Mager seconded it. Motion passed unanimously.

**6. PUBLIC HEARING: 10:30 a.m.: Resolution 10-22 – Extension of a MOU with DOE and SNAP for the Vehicle Emission Repair Program (VERP) – Ron Edgar**

Ron stated that this resolution is to approve to move \$30,000 from the special projects fund into the VERP project. There was some discussion between the Board Members and Ron.

Karen Wood, Department of Ecology, stated that this is a very good program and it helps a lot of people in the communities. There were no other public comments. Commissioner Mager moved to approve Resolution 10-22 and Board Member Corkill seconded it. Motion passed unanimously. The public hearing was closed at 10:40 a.m.

**7. Resolution 10-23 – Amendment to the CTR Program – Margee Chambers**

Margee gave a brief history of the CTR program and the formal CTR program adopted by the Board for Spokane Clean Air participants. Adjustments include defining what commute alternatives qualify in the agency's program and simplify the definition of the transportation subsidy to 50% of the cost of an adult monthly bus pass. There was some discussion between the Board and Margee.

Board Member Corkill moved to approve Resolution 10-23 and Board Member Brattebo seconded it. Motion passed unanimously.

**8. Board Concerns** – The Board Members thanked Commissioner Mager for being on the board, expressed their pleasure working with her and all that she has done.

Commissioner Mager's concern is that there wasn't closure on Paul's issue and she sees from the presentation that the PCHB is where this needed to be addressed. Since it sounds like it was resolved before it came to this Board, they don't have any ability to anything for Paul. She also thinks that in another situation like this, because it was an agricultural situation, she is much more inclined to agree with Paul that most farmers think that nearly everything that they do is exempt. So it was an honest mistake which he rectified, which she holds with her opinion that it was adding insult to injury to get an NOV once it was brought to his attention and was rectified. Paul Gross stated that he still thinks he is exempt. Commissioner Mager stated that this is not in the right venue and Paul settled this. Paul stated "Actually this is the right venue, because this Agency has the right to make the call. I just think they made the wrong call." Councilmember Dempsey stated that this is the board concerns and Paul can speak during the public forum.

**9. Public Forum** –

Paul Gross: I'm Paul Gross, I'm with Spokane Hutterian Brethren. When I read these two laws, it's hard for me to believe that I'm not exempt. Of course it's probably like our attorney said that the law is whatever the judge says it is, so if I take it to the PCHB, I don't know. You know, to me this is more rock removal operation than it is a rock crushing. The rock crushing is just incidental. But you know just because I'm sizing the rocks before I remove them, this is converting from forestry to agriculture. So in order to do that we have to remove the rocks from the field and just because I'm sizing them before I'm removing them doesn't mean I lost my Ag exemption. I mean removing rocks from a field is very inherent to a farm operation. You can't plant and harvest crops with rocks in the fields. It's awful expensive and causes more damage than it's worth.

Councilmember Dempsey: I need to ask Michelle, does this fall under the policing our own decisions? Is that why we don't make a ruling on this?

Michelle Wolkey: Right, this is properly and was in front of the PCHB for a determination of this particular state statute as applied to this particular activity. That is the venue for that decision to be made and then all of the counties can then look at that decision if that situation comes up in their county and have some guide posts to that issue.

Councilmember Dempsey: If Mr. Gross wishes to pursue this can he still go to the PCHB?

Michelle: He cannot because he has settled it. He elected not to pursue that and have the PCHB render a decision.

Councilmember Dempsey: So is there any remedy or anything that he can do short of going to a legislator and having the law changed?

Michelle: That is the only thing that I would be aware of is on a broader scale, not his individual issue, but on a broader scale have more clarity added to the statute if that's his position.

Paul: I figured that was the Board's job here, to make that call.

Don Wolley: The law's already written there, it doesn't need to be changed.

Bill Dameworth: Well it wasn't written by our Board, though. It was written by the legislature. So our Board can't change state law.

Don: It's the state law right there; I think we're exempt from it.

Bill: That's a question for a hearing before a tribunal of some sort and that's what the PCHB does; is they decide how to apply the law. Isn't that right Michelle?

Michelle: That's right and you have consistent decisions.

Paul: That's not what our attorney told us, he said that the Spokane Regional Clean Air Agency, they're the ones that make the determination whether you're exempt or not and so it's your job to make the call whether it's exempt or not.

Michelle: The Agency determined that you were not and if you disagree with that decision then your remedy is to take it to the PCHB and say the Agency got it wrong. Tell them that they misapplied this law.

Paul: True, but it's wasn't worth the cost to do it. It's cheaper to pay the penalty.

Michelle: And that was your call to make.

Paul: Yes, the only reason I made that call is because he also told me that because this is a regulatory agency, you can't collect attorney fees from a regulatory agency; even if they made a bad call. Well, once I found that out then there was no point in pursuing the lawsuit. If I can't collect attorney fees then it's not worth the fee to go do it.

Commissioner Mager: But did he also tell you, you didn't need to have him as an attorney, that you could have come before that Board, because they are very user friendly and presented your case. I think you have a very compelling case Paul, but it turns out that the law has set it up that it needed to be brought before the PCHB instead of this Board. This Board can determine a certain amount of or give some guidance to the staff in terms of what we think in terms of how the laws apply, not the exemption part so much but just in terms of what the fine should be or if there should be a fine based on your particular circumstances. But it's gone beyond that now and I really think that it would have been helpful to you if your attorney had instructed you that you didn't really need to pay him and that it would be worth going through the process.

Paul: Well he said that you can do it yourself but most likely he said you're not going to fill the paper work out properly and these things run on such a time line that if you are missing one piece of paper, they're just not going to look at it. He said you're not going to do it properly, just pay the fine and forget it. I showed it to the Lincoln County Prosecutor too.

Bill: But you had it all filled out though and you had a hearing scheduled so you've already gone and paid the money to have the thing filled so you still could have gone forward and had the hearing. I don't understand why you didn't do that.

Paul: I thought for sure we'd get all three judges over here; but when I found out there's only one judge, well there's 30% of your case gone already.

Bill: It depends on how good of an arguer you are.

Paul: You know the whole intent is to put the gravel on dirt roads to reduce dust pollution. And then to get a penalty for doing the right thing, something's not right here. You should be paying me to do this, not giving me penalty for it. That's what I tried to tell Matt when I was in here to see him twice; and he thinks I didn't try to mitigate it; and I talked to Ron about it. Something's not right here.

Councilmember Dempsey: Mr. Gross, it looks to me like we are comparing apples and oranges here with your two different things. One is the exemption and then one is what constitutes our agricultural activity and forest practices. It's the definitions of what this is, but the exemptions are for the growing and harvesting and that sort of stuff. The agricultural activity of building your road and taking the rock and all of that is all part of the farm but it's not part of what's exempt.

Paul: It is when I read it, unless you are reading it different than me.

Councilmember Dempsey: There are two different statutes here. They're not the same one; one is not part of the other one, they are two separate statutes.

Paul: I know, but the second one is the nuisance statute, the one that somebody would file suit against you for doing something, that one is really much more clearer on what's allowed and what isn't allowed on the farm. And as far as I'm concerned, a NOV is like a nuisance to me. It's just being done by a regulatory agency instead of somebody from the public.

Board Member Brattebo: Will you do this again? Will you crush rock again or remove rock from the land?

Paul: I will, but I won't do it in Spokane County.

Board Member Brattebo: If you did, would you get a permit for the rock crusher? I mean it wasn't your rock crusher; you hired it, would he?

Paul: I'd go ask if I needed one. I mean if they still have the same rules, sure I'd get a permit, I'm not here to bypass the law.

Board Member Brattebo: I believe that the penalty is more for the not knowing that the law said get a permit and not getting the permit and operating for eight days; I believe that's probably the biggest part of the penalty as opposed to you ran a rock crusher, it does make dust, but you didn't follow the rules, the rock crusher owner wasn't aware apparently and ignorance of that law is not an excuse. I don't see you as in trouble for doing the right thing and all that, it's just that in Spokane County which is maybe different from Grant County or some of the others because of the population, there are rules in Spokane County that say rock crushing, which can be interpreted as not part of planting, etc. requires a permit. You weren't aware of it, ignorance is not allowed, you were fined, the NOV is for that short-coming not so much that yes you are doing a great thing with the rock and building good roads and that, that's how I see it and I would assume that a year from now, if you decide to do it in Spokane County, you will seek a permit or you'll make the decision not to do it in Spokane County because you don't want to have to get that permit; but depending on where the land is.

Paul: Sure, but I don't see where I lost my Ag exemption.

Commissioner Mager: We don't have the authority to decide that.

Don: If you read the rule, how would you know that you're supposed to have a permit in Spokane County? I read it, the rules there, and it looks like he's exempt, so why would you even apply for it?

Board Member Brattebo: But everybody interprets things a little bit differently, there are different judges, there are . . .

Don: How would anyone coming from out of the County know that Spokane County is different, they don't follow the RCWs.

Board Member Brattebo: Spokane County has an air pollution authority that is different from Adams County, etc.

Don: Even if it wasn't the Spokane Clean Air deal, how would you know from out of the county that they wouldn't say "oh yeah, these guys are exempt from it"; or . . .

Councilmember Dempsey: We're comparing definitions with law and they are two separate things and this Board does not have the authority to change the law or to add to the law.

Don: How am I supposed to know coming from Okanogan County that I need a permit in Spokane County?

Councilmember Dempsey: The rock crusher should have known. That's his business.

Don: There isn't any evidence that I would have to have one.

Councilmember Dempsey: Rock crushers all over the country need permits.

Don: If you're making dust that is detrimental or hazardous, we had photos of the crusher running with dust and it was right around the crusher area and nothing was getting to the road, it wasn't a hazard to the public.

Councilmember Dempsey: Were there water trucks there? Was the water truck doing anything? Was it doing anything to control the dust?

Don: There was a water truck there. It was sitting there. It was full of water. It wasn't bad enough, there was not hazard. The wind wasn't blowing, it wasn't drifting anyplace, and a little cloud of dust was right over the crusher only. I keep dust down because of the air cleaners and stuff around the crusher, so it wasn't bad enough to have to turn the water on and use it. It was just visible.

Councilmember Dempsey: Apparently it was bad enough. The thing of it is, is that we don't have the authority to change state law and this was done by our people. They saw a violation, they gave a NOV; perhaps if Mr. Gross had waited and not settled, then he would have some recourse. But there's nothing we can do. There is no place that we can go to provide mitigation for this and I'm very sorry but there's not. But you can't take definitions and say that they're law.

Don: Where do you get your information from? How do you know that the definition doesn't fit the law? How would you know that?

Commissioner Mager: You know I'm sympathetic to your story and if I were on a board that could go back, but I think right now what you are doing is trying to rectify something that's already finished. By having your lawyer, I think frankly, you were poorly advised and would have been better off to have gone to the board that had the authority to change the fee. But we find that we are in a situation where we can't do that no matter how sympathetic we are to your situation.

Paul: Okay, thank you.

**The meeting adjourned at 11:04 a.m.**

The next Board Meeting will be January 6, 2011 at 9:30 a.m. – Spokane Regional Clean Air Agency office at 3104 E. Augusta Avenue.

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COUNCILMEMBER ROSE DEMPSEY, CHAIR

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WILLIAM DAMEWORTH, SECRETARY