

**ENVIRONMENTAL ADVISORY COUNCIL**  
**Lansing, Michigan**  
**Thursday, June 19, 2008 1:00 – 4:00 p.m.**

Members: Steven Chester, David Gard, Larry Merritt, Vincent Nathan, Rick Plewa, Del Rector, Richard Rediske, Lee Schwartz, Mike Shriberg

Department of Environmental Quality (DEQ) Staff: Linda Albro Sparks, Danita Brandt, Patty Brandt, Lynelle Marolf, Liane Shekter Smith, Jim Sygo

Department of Natural Resources (DNR) Staff: Roger Storm

DEQ Leadership Academy Members: Karen Beauchamp, Christy Clark, Charles Hill, Tiffany Myers, Debbie Smith Ostrander, Kris Philip, Sarah VanDelfzijl

DEQ Law Student Interns: C. Sebastin Alvarado, Jen Charest, Jason Dinsmore, Leah Hall, Ryan Shannon, Teryl Yoder

**OPENING**

Steve Chester, DEQ Director, opened the meeting welcoming the Environmental Advisory Council (EAC) members, the DEQ/DNR Leadership Academy members, and the DEQ law student interns. Director Chester informed the EAC members that Frank Ruswick would not be joining them today, as he is involved in final negotiations on the water withdrawal legislation. Director Chester said that the EAC would be discussing the package of guidance documents that Frank Ruswick had sent out, and that the draft or proposed framework would be saved for a later discussion.

**CURRENT ISSUES**

Director Chester spoke about a group called Citizens for Environmental Inquiry headed by former Circuit Court Judge Joseph Swallow that requested the DEQ promulgate an administrative rule regarding carbon dioxide emissions from power plants. The group challenged the DEQ's decision to not promulgate rules, and the court upheld the DEQ's decision.

An EAC member spoke briefly about the energy package that is now on the Senate floor. Director Chester commented that he heard the Senate would like to complete the package before July 4, 2008.

**REQUEST TO EAC – REVIEW OF GUIDANCE DOCUMENTS**

Director Chester indicated that the EAC members should have received a number of DEQ guidance documents from Frank Ruswick including operational memoranda (Op Memos) and policy statements. Director Chester spoke about some of the criticisms that the DEQ has received over the years, e.g., has the DEQ crossed the line by their interpretation of rules and guidance to the DEQ staff? Additionally, how does the department assure adequate public

involvement in the document development process? Director Chester asked the EAC members for any initial comments on the various documents.

An EAC member commented that the documents lacked uniformity and suggested that it would be helpful to develop a template that all DEQ staff could work from. Another EAC member stated that some of the documents were clearly standard operating procedures; however, others were rules, and suggested the DEQ needed a classification system for these documents. An EAC member asked if these particular documents were the best examples about the various guidance documents that the department currently uses. Director Chester responded that the department uses many kinds of guidance documents, but he thought this was a fair representation. Following is the approximate breakdown of the DEQ's Op Memos by division: Remediation and Redevelopment Division (RRD) has less than 10; Air Quality Division (AQD) has approximately 20; Waste and Hazardous Materials Division (WHMD) has approximately 15-20; Water Bureau (WB) does not use Op Memos; and Land and Water Management Division (LWMD) has approximately 100. However, these estimates do not address other types of guidance documents that divisions use, but that are not characterized as "Op Memos".

Lynelle Marolf told the EAC members that when RRD writes Op Memos they use a format with the intention that these will be widely used and shared by all RRD staff, as well as the public. Lynelle Marolf described the RRD's peer review process as one where they notify various outside groups utilizing their listserv (an electronic mailing list) that RRD is about to embark on an Op Memo process, and asks if anyone is interested in participating in a group designed to solicit comments and develop documents. Lynelle Marolf added that RRD may go through several reiterations of this process.

Director Chester reminded the EAC members that one of the benefits of the EAC discussing these issues is that the EAC can categorize the various guidance documents, and discuss what the level of public involvement should be. Director Chester added that the DEQ makes policy as a result of final decisions from contested case proceedings; particularly LWMD.

## **OVERVIEW OF ADMINISTRATIVE LAW**

The DEQ law student interns presented a PowerPoint presentation (attached) covering the following topics: Separation of Powers, Permitting Process, and the Administrative Procedures Act. A document titled "The Takeaway Points" was distributed.

Following the presentation there was some discussion among the EAC members and the law students regarding the boundaries of the various documents. One EAC member questioned if the DEQ is using guidance documents in promulgating rules. Director Chester stated that guidance documents are used to further implement rules; and that guidance comes before a rule in most circumstances; however, in the case of some statutes the DEQ does not have rule making authority. The law students agreed that guidance documents bind DEQ staff and that rules bind parties outside the DEQ (as well as the DEQ itself). Director Chester indicated that it is not clear that the Legislature fully understands "implied powers," with respect to the authority of the department, and felt that the Legislature believes they empower the DEQ when they pass legislation. Liane Shekter Smith spoke about a recent court decision where WHMD was ordered to create a guidance document.

An EAC member talked about the work they do in their own job as one who translates rules and guidance documents into layman terms and has followed these general principles: (1) clearly

present what the regulatory requirements are; (2) identify direct action items, e.g., develop a simple checklist and determine what items are exempt; and (3) establish consistent policy throughout their business.

Some EAC members questioned if the DEQ loses flexibility when providing alternatives; however, unless the Legislature provides more guidance the EAC members were not sure what options the DEQ actually has. Director Chester mentioned that the Legislature is focused on Op Memos in RRD. An EAC member asked, given the rule-making authority, at what point does the DEQ need to develop a guidance document and run that through the United States Environmental Protection Agency as a rule. Jim Sygo talked about an instance when he was working in the WHMD, that the division started developing rules that blended federal and state rules; however, the rules became very complex and controversial. Jim Sygo added that the DEQ does try to promulgate rules when appropriate.

An EAC member asked if all the DEQ divisions go through a peer review process. Lynelle Marolf said that at times RRD has taken steps to issue an interim final when the RRD wants to give the community another opportunity to make comment, and then finalizes the process later. An EAC member asked if DEQ thought they got a better product by going through the peer review process. Lynelle Marolf believes the RRD peer review process adds value and gives interested parties a chance to participate in the process.

Liane Shekter Smith spoke about the WHMD's questions and answers (Q&A) documents on various issues in the division, that are posted and updated on a regular basis on the DEQ Web site, and indicated that many customers have found this information to be helpful. Director Chester spoke about the Q&A that was done on concentrated animal feeding operations (CAFOs). Lynelle Marolf indicated that she thought Q&A documents are helpful; however, sometimes users can turn Q&A documents into binding situations.

Director Chester thanked the law student interns for doing an excellent job with their presentation.

## **DISCUSSION OF SAMPLE GUIDANCE DOCUMENTS**

Director Chester told the EAC members he planned to go through the various individual documents that Frank Ruswick had sent to them. Frank Ruswick had detailed the following questions to the EAC members regarding the documents:

- (1) Did you observe anything noteworthy about one or more of them?
- (2) How would you compare and contrast them?
- (3) If you were to develop a system to classify this set of samples, what would that system look like?

Director Chester asked the EAC members for their thoughts on the various documents and created a matrix (attached) with information agreed upon by the EAC members. Director Chester indicated that many of these documents would fall under the procedural category; however, he was certain that after further review many of these documents could fall under other categories on the matrix.

Discussion of these documents follows:

LWMD 303-07-01: The EAC members agreed that this falls under the internal and procedural portion of the matrix.

LWMD 353-95-02: There was agreement among the EAC members that all parts of the document were procedural with the exception of Item No. 3. The question was whether or not a special procedure is spelled out in the statute, so it was agreed to place this item under the external and substantive portion of the matrix, but list the statute concerns with an asterisk.

WHMD Op Memo 115-27 Revision 1: The EAC members agreed that this Op Memo was very clearly written. Liane Shekter Smith indicated that this document was targeted both internally and externally. The EAC members agreed that this be placed in the external substantive portion of the matrix.

WHMD Op Memo 147-1: Liane Shekter Smith indicated that this is truly a rule interpretation. There is a state law for polychlorinated biphenyls (PCB) and this clarification explains what is necessary to stay in compliance. An agreement was reached among the EAC members to place this under the external procedural portion of the matrix.

Environmental Assistance Center Operating Procedures: The EAC members agreed that this was an internal procedural document.

WB-10: The EAC members agreed that this should be under the external substantive section of the matrix; however, it was agreed that we add a category titled “Rulemaking” in the matrix and this should fall under that category.

AQD Op Memo No. 18: The EAC members agreed that this falls under the external substantive portion of the matrix.

WB-DWEHS-001: The EAC members agreed that this document reads like a rule and, therefore, belongs under the rulemaking portion of the matrix.

There was an ongoing discussion among the EAC members about the various types of documents presented today. Director Chester indicated that the goal of reviewing these documents today is to make a decision as a group, how the EAC wants to spend their time; specifically, does the EAC want to focus their time on external procedural documents or on rulemaking documents. Director Chester told the EAC members that it was helpful for him to get their opinions on what level of public involvement needs to occur before these documents are finalized. Many EAC members indicated an interest in concentrating on external substantive documents. One EAC member stressed their opinion about the importance of developing a template and document uniformity. One EAC member requested that the group receive information about the amount of staff time being spent on developing the various documents. Director Chester agreed to do that. Most EAC members indicated a preference for a standard format or checklist for these documents. There was some discussion among EAC members and participants about the legal issues of guidance documents vs. rules, and what the differences would be. Director Chester indicated that there is some case law on how courts have reviewed guidelines. Director Chester stressed that much of this varies by division and there is not one set process. Lynelle Marolf stated that often the RRD will request the Department of Attorney General review documents and often times they decline.

Director Chester thanked the EAC members, the DEQ/DNR Leadership Academy members, and the DEQ law student interns for their participation today. Notes and discussion items from today’s meeting will be shared with Frank Ruswick.

Meeting Summary submitted by Linda Albro Sparks.