

**MINUTES**  
LANE REGIONAL AIR PROTECTION AGENCY  
BOARD OF DIRECTORS MEETING  
TUESDAY–SEPTEMBER 8, 2009  
LRAPA MEETING ROOM  
1010 MAIN STREET  
SPRINGFIELD, OREGON

ATTENDANCE

Board: Bill Carpenter, Chair–At-Large, Springfield; Glenn Fortune, Vice-Chair–Oakridge/Cottage Grove; Brian Forge–At-Large, General; Drew Johnson–Eugene (via phone); Kit Kirkpatrick–Eugene; David Monk–Eugene; Andrea Ortiz–Eugene  
(ABSENT: None)

Staff: Merlyn Hough–Director; Merrie Dinteman; Max Hueftle; Sally Markos; Nasser Mirhosseyni

Other: Earl Koenig, Chair, Amy Peccia, Vice-chair, and Chuck Gottfried–LRAPA Advisory Committee; Jim Daniels–Rosboro Lumber; Candace Hatch–Bridgewater Group, Inc.; Dale Riddle–Seneca Sustainable Energy; Jerry Ritter–International Paper, Springfield; Tom Wood–Stoel Rives LLP

1. **OPENING:** **Carpenter** called the meeting to order at 12:15 p.m. Before beginning the agenda, **Carpenter** made a statement regarding a four-to three vote regarding ADR, taken at the July meeting. He said that, based on advice of counsel, he had determined that he did not have the authority to deem that motion as being passed; therefore, that vote was not a passing vote, and that motion actually did not pass by a majority of the full board, as required by state rule. He said the Springfield Planning Commission that he has been on before had a different rule; but it was clearly not a state agency, as LRAPA is–or at least delegated by state statute. In addition, **Carpenter** commented on some communications that followed the July meeting, regarding the vote, stating specifically that he did not agree with **Drew Johnson**'s take, that the board can somehow classify its type of actions to require passing votes of less than five members. **Carpenter** said that, for the rest of his tenure as chair, it will take five affirmative votes to pass any motion, regardless of the number of members present, assuming a quorum exists for conducting business. Also, as elected chair, he is responsible for honoring any motion to take an action, that is made by a board members, if it is duly seconded. It is up to the motioning board member to take into account whether she or he believes the motion is appropriate, based on who is present, or more possibly important, who is absent. **Carpenter** said he does not have the luxury to anticipate who will be absent and attempt to control the agenda accordingly.

*[At this point the conference telephone rang, and an operator stated that she had **Drew Johnson** on the line. **Johnson** joined the meeting at this time.]*

**Carpenter** informed Johnson that the meeting had started, that no one had asked to speak under Public Participation, and that he was in the process of making a statement regarding the four-to-three motion at the July board meeting. **Carpenter** continued, stating that the LRAPA board meets only eleven times a year and, contrary to other boards and councils which meet weekly, some items can become a timely issue requiring immediate action. Therefore, board business will likely not be delayed based on the lack of attendance of an individual board member. It is up to those board members to make appropriate accommodations, if they cannot attend in person. **Carpenter** said he just wanted to let everyone know that those are the “rules of the road” until he is no longer chair of this board, and it will take five affirmative votes to pass any action the board takes.

**Monk** said he hoped to discuss the subject of the number of votes required during Agenda Item Number 9, later in the agenda. **Carpenter** agreed. **Monk** went on to say that he believes staff sought a legal opinion

on this question. He asked if the board is immediately required to follow that legal opinion, or if it is an opinion that the board should evaluate and then decide whether to adhere to it or not. He said there could be a differing legal opinion with which the board might agree.

**Carpenter** said he felt it was a correct legal opinion and for him, as chair, it will take five affirmative votes to pass motions as long as he is chair, unless someone challenges the opinion.

**Johnson** said he is concerned about the distinction between just governance and the board setting policy and directing staff, versus an agency action. He added that he is concerned that a majority vote of the members present was simply erased from the record, as if nothing had happened. In response, **Carpenter** said that, based on advice of legal counsel, and from his own reading of the statutes and administrative rules, he cannot approve board action which did not receive the required number of votes. He said staff knows that there were four members that wanted to do ADR, and the vote is still a part of the record. It has not been erased, but the motion is void because it was not done in accordance with law.

**Johnson** asked if the law applies equally to internal policy directives and to adoption of a rule or a quasi-judicial decision by the board. **Carpenter** responded that it would be too complicated to try to categorize every action the board takes as an internal action or a formal action of the board. There would be too many sub-categories and sub-decisions. He said he believes any action taken on a proper motion, duly seconded, to be an action of the board which must be done under the statutory requirements. **Carpenter** asked **Brotherton** if she had anything to add, and she said that the motion in question received only four affirmative votes, and so it was a failed motion. So it is recorded as a motion that did not pass, rather than being erased from the record as though it was never raised. She said the distinction between internal policy directions and formal board actions lives in the Administrative Procedures Act, not in Oregon Public Meetings Law. She said she believed the reason **Monk** had suggested that a discussion, under the Legal Framework for Local Government item later in the agenda, would be appropriate was because that will involve a discussion of Oregon Public Meetings Law and Oregon Public Records Law. **Brotherton** said that when the Administrative Procedures Act defines rulemaking and attaches other requirements to it, it also carves out internal policy directives, which is not what the board is dealing with in this situation. ORS 183 is the statute which defines handling of adoption of rules and conducting quasi-judicial contested case hearings. But what the board is talking about, the number of affirmative votes necessary to pass a motion, is covered by general public meetings law, which is in ORS 192.260. She added that the big distinction, here, is that the motion is still in the record, indicating that four board members wanted this action to be taken; however, it is not a formal action of the board because it did not receive sufficient votes.

2. PUBLIC PARTICIPATION: None

3. COMPARISON OF FORECAST VS. ACTUAL BUDGET FOR FY 2008/2009: **Hough** explained that this item had been placed on the agenda in response to the board's request to compare the forecasted and actual numbers for the fiscal year just passed. **Mirhosseyni** distributed copies of a revised report which had been reorganized and highlighted to make it as easy as possible to follow. **Mirhosseyni** explained that the way he would present the information would be to go from the summary figures to the detail figures. He said he had highlighted the numbers in each section that are the most important to the discussion, including the beginning fund balance, the total revenues, the total expenditures, and the ending fund balance. **Mirhosseyni** then reviewed those numbers for the General Fund, the Title V Fund, Airmetrics and Everybody Wins.

**Hough** called the board's attention to a graph which had been provided for board information. The graph included a twelve-month running average, a six-month running average, and a three-month running average.

**Hough** stated that, in looking at the numbers for the last quarter of the previous fiscal year and the first couple of months of the current fiscal year, it is clear that both of LRAPA's enterprise funds are being affected by the economy. For perspective, **Hough** pointed out that the December 2003 point on the graph showed the point at which LRAPA decided to phase out the Airmetrics program because sales were below the break-even point, and there was not assurance that sales would improve in the foreseeable future. Just as the program was in the process of being phased out, sales did pick up, and 2005 was a boom year for Airmetrics. **Hough** pointed to the last few months on the graph, indicating that sales are down. He said that it is not known whether this is just an end-of-fiscal-year dip in sales; however, staff has already taken some steps to reduce operating costs. One Airmetrics employee has been reduced to half time, in order to try to keep from going into a deficit. Airmetrics is at the break-even point and, if there is not an increase in sales, LRAPA will need to make some difficult decisions in the next few months. **Hough** said sales have been flat for the past couple of years, with Airmetrics providing a relatively small but consistent offset to LRAPA's costs, but he recommended taking a close look at this, on a monthly basis, until some stability is established one way or the other.

**Carpenter** referred to the write-down of some obsolete parts, or something, that occurred in Airmetrics in March of this year. **Mirhosseyeni** explained that inventory was counted during the audit process, and it was determined that Airmetrics needed to dispose of some obsolete items at the same time other annual adjustments were made. The auditors asked that staff wait until after the financial audit process was completed before making any adjustments. That was why the large adjustments were made in March of this year. **Carpenter** noted that the fund was essentially \$58,000 below the budgeted ending fund balance at that time, and he wondered if the books would have been much closer to the budgeted amount if that write-down had not occurred at that time. **Mirhosseyeni** responded that he knew the ending fund balance would show a deficit. **Hough** said one factor contributing to the large inventory adjustment was the shift from the old-style sampler to the new-style sampler. Part numbers needed to be changed, and the tracking system needed to be reoriented to the new product. The large write-down was more of a one-time event, and **Mirhosseyeni** has implemented checks and corrections, to make sure that there will not be adjustments of that significance again. **Hough** went on to say that break-even is about 20 samplers a month and, as long as Airmetrics stays comfortably above that rate, he is confident that the fund is bringing in enough revenue. If there is a dip below that break-even rate of sales, and forecasts suggest that sales will stay below that level, **Hough** said he wants to be sure he brings it to the board's attention to have a conversation about it, on a month-to-month basis. **Hough** added that the new sampler sales are not the total picture, because Airmetrics still sells parts and services such as filter weighing; but new sampler sales is a very good indicator of the health of the enterprise.

**Monk** said the March number was a \$146,000 annual adjustment. He said that could well be, as **Hough** had stated, because of the shift to the new product; however, the agency has never, in the past, done what **Mirhosseyeni** did in making this very large adjustment. It was always done and presented in the books to the auditor, prior to the audit occurring. In addition, **Monk** said, there was a periodic adjustment of \$46,000 in the same month, making almost a \$200,000 total adjustment. **Monk** questioned the break-even number, stating that, from the numbers presented to the board, Airmetrics sets aside money to reimburse LRAPA for staff time, in support of Airmetrics; but there was a \$33,000 loss from that (the difference between revenues and expenditures). **Monk** asked what is the measurement **Mirhosseyeni** uses to determine the break-even amount. He said, to him, when Airmetrics reimburses LRAPA for staff time, that is not a gain for LRAPA. It is neutral. He added that what Airmetrics is able to generate, in terms of its fund balance, is what determines whether or not it is a profitable enterprise. **Monk** said it seems to him that Airmetrics lost \$33,000 during the last fiscal year.

**Hough** said LRAPA counts about \$70,000 net revenue from Airmetrics to the agency when considering the agency's budget. Part of that includes expenses of the office building that would continue even if Airmetrics were shut down. Some of the indirect costs allocated from Airmetrics cover costs for LRAPA's office building. LRAPA would still have a finance manager and a director and would have to pay those salaries, but Airmetrics pays for parts of those salaries. **Hough** said as long as the contribution Airmetrics makes to LRAPA's budget is in the \$70,000 range, he considers that in the break-even category. If the enterprise can contribute more than \$70,000, that it is a bigger benefit to LRAPA. But it is not currently meeting LRAPA's budget expectations, and that is a concern.

**Mirhosseyni** referred to the variance column he had added to the revised report, stating that the difference in the federal revenue section includes the ethanol project, which is a grant LRAPA receives from the federal Department of Energy. It is budgeted every year for the total dollar amount of the grant. As those funds are spent, the money is drawn from the grant, and the balance is reduced for the following year's budget. He said the inclusion of that grant is the reason for the \$200,000 figure. **Hough** referred the board to the following page, the revenue detail page. Whereas the first page of the revenues shows minus-\$225,000 for federal and state revenues, the second page shows that the federal base grant was actually \$10,000 more than expected; so the deficit was not a problem with the base grant. For the Oregon General fund contribution, one of the budget-balancing things the Legislature did was to require state agencies to return five percent of what they received for the previous biennium. That extended to LRAPA's state General Fund contribution. **Mirhosseyni** added that the impact on LRAPA was greater because this agency had to take the whole five percent out of one year, whereas the state considers that for a biennium. The PM2.5 grant to LRAPA was also about the same as the previous year. The big variance in LRAPA's revenues was in the pass-through ethanol grant; however, there was a corresponding reduction in expenditures for that effort. **Hough** said if any of the board members had an interest in getting further details on those figures, **Mirhosseyni** could explain that in detail.

**Monk** referred to the General Fund line for expenditures and transfers and noted an expense for shop rent. He asked if that is for the Airmetrics shop. **Mirhosseyni** said Airmetrics occupies a portion of the space rented, and the rest is shop and storage space for LRAPA's monitoring section. LRAPA pays half of the space rental, and Airmetrics pays the other half.

Seeing no further questions from board members, **Carpenter** asked when staff might be prepared to do this same comparison for the current fiscal year. **Mirhosseyni** said the information for the first quarter will be ready for presentation at the November board meeting.

4. DISCUSSION OF WHETHER TO CONTINUE TO INCLUDE MONTHLY EXPENSE REPORTS IN CONSENT CALENDAR, FOR BOARD APPROVAL, OR TO INCLUDE THEM IN THE DIRECTOR'S REPORT, FOR INFORMATION: **Hough** said the expense reports are reports of expenditures for the previous month and, thus, are informational. Some concern had been raised in at least one previous meeting about whether to have these reports on the agenda as an actual approval item. **Hough** said he had spoken with the local government partners in LRAPA and found that none of them presents this kind of report for an approval process; however, there are some examples of other small cities, and some water boards, who bring their regular expense reports to their governing bodies for approval. **Hough** said it is a board decision as to whether to continue to keep the expense reports as an item on the consent calendar, or to provide them as informational attachments to the director's reports. He said staff is open, either way, but staff's recommendation is to move the expense reports to the director's report.

**Ralston** said he would rather keep it as part of the consent calendar that board members look at when they get their packets. If they have questions, they can ask them at the appropriate time. He said he really does not want to dedicate special time each month to the expense reports, especially when the board will now be doing quarterly budget review, to compare the budget forecasts with the actual revenues and expenditures.

**Carpenter** said he thought **Hough**'s suggestion was to move the expense reports to the director's report so that it would be commented on like the board comments on other items from that report, rather than actually having a vote on it. **Ralston** said he understood that but wanted to continue to approve it as part of the consent calendar unless there are objections or concerns.

**Monk** agreed with **Ralston** and said one reason that he thinks that is important is because preparation of the director's report seems to be one of the reasons why the packets do not get delivered further in advance of the meetings. He said he would hope that the board could start getting the packets, via e-mail, much in advance. The expense reports would be part of the consent calendar and would be easily reviewed, and board members would come to the meetings having already seen it, as opposed to having it in the director's report which might be delayed.

**Kirkpatrick** asked whether putting the expense reports in the director's report would save the board any time, and **Hough** said he did not believe it would. It would simply be recognizing that the reports are informational, rather than something that needs approval every month. The key financial document that the board needs to approve are the budget resolution adopting the budget, as well as any resolutions that might need to be approved during the year to amend the budget. **Mirhosseyni** added that the board has already approved the budget, itself, and the monthly expense reports are informational, to inform the board of how the budget is being expended.

**Monk** said he hoped that the board could discuss the letter sent to the board by **Dave Ralston** and **Faye Stewart** following the July meeting. He said this item on today's agenda was presented as a discussion item and, yet, had a recommendation for board action. He said if the board is going to get serious about when they vote and who votes, he wondered if this item had been noticed properly. **Brotherton** responded that the board could talk about this more during the discussion about Legal Framework for Local Governments, but the way this was worded on the agenda presented no problems for a board vote on the subject at this meeting.

**Stewart** asked if officially approving the monthly expense reports would have any impact on the budget that the board approves each year. **Mirhosseyni** said it would not. **Stewart** said he could see a benefit to including the expense reports with the director's report, since it is an informational update which does not officially have to be adopted by the board. He said he did not see how it would be any more time-consuming to have this item included with the director's report rather than being on the consent calendar.

**Fortune** said he sees the expense reports as financial reports, and he did not see the purpose of having the board approve them because the money has already been spent by the time the report gets to the board. If board members have questions about the expense reports, they should go to the director, or bring them up for discussion at the board meetings.

**Carpenter** said he was thinking along the same lines as **Stewart**, that the discussion might go quicker if the expense reports did not have to be approved each month. However, he said he had not considered **Monk**'s point, that adding the reports to the director's report might delay the timing of the reports until the packets are delivered. He said he could go either way, either leaving the reports on the consent calendar or moving them to the director's report.

**ACTION: MSP(Monk/Ralston)(7 yes and 2 no–Fortune and Stewart) to leave the expense reports as part of the consent calendar.**

5. CONSENT CALENDAR:

A. Approval of Minutes of July 14, 2009 Board Meeting.

**MOTION: Ralston MOVED approval of the minutes of the July 14, 2009 board meeting. Ortiz SECONDED THE MOTION.**

Discussion of Motion. **Ortiz** said she did not know whether she had actually said it or was just thinking, during the July 14 discussion about the ADR vote, that one of the reasons she wanted to wait on that action was that not all of the board members were present at the meeting. She said she had not listened to the recording of the meeting and did not know whether or not she was given that opportunity. But she thought there was a sentence or two about the full board not being there. **Carpenter** said he saw it somewhere, and **Hough** suggested that **Carpenter** might have seen it in the verbatim transcript of the recording which he had sent to **Carpenter**. **Carpenter** said he had not read the transcript. **Ortiz** said if that reference was in the minutes, that was good.

**Johnson** said he would oppose the motion for a couple of reasons. He said the timing of when the agenda packets were received, and not having had an opportunity to listen to the recording, was one reason. He said he thought that the motion that was made concerning ADR was consistently misinterpreted and mis-characterized in the minutes. He said that was why he wanted to listen to the recording, so that the board could discuss what the motion actually was. He said what he had put on the table was a motion not to direct staff to participate, but to not oppose it, and he thought that was a distinction.

**Carpenter** asked **Johnson** if he had read on page 5 of the minutes where it says, “**Johnson** moved that staff be directed to communicate to EPA LRAPA’s willingness to participate in the alternative dispute resolution process.” **Johnson** said that was not what the motion was, and that was why he could not vote to approve the minutes. He said the board talked about the motion more than once and that it had been changed before the vote. **Hough** commented that the original vote, as read by **Carpenter**, was seconded by **Monk**. **Johnson** asked if the transcript includes the subsequent conversations about clarifying the motion, and **Hough** responded that the transcript is a verbatim transcript of the entire recording. **Johnson** repeated that he had asked if he could listen to the digital recording of the meeting in an MP3 or a wave file, and had asked if it could be put on the agency’s website. He said he would still vote against approving the minutes.

**Monk** referred to page 6 of the minutes, regarding the four-to-three vote and the legality of that. He said the explanation that was put in the minutes does not belong there. He also wondered whether **Carpenter**, as chair, can retroactively take that vote away. He said the vote took place, and there is a legal opinion that says it was not correct. **Monk** said he thinks the board should determine whether or not they accept the legal opinion and, if so, then the vote would be deemed invalid. He said that decision should be a vote of the board, and the explanation should not be in the minutes.

**Carpenter** said that was why he made his statement at the beginning of today’s meeting. He said he cannot conduct illegal activities, and the four-to-three vote at the July meeting did not pass the motion,

under state statute. **Carpenter** said, in his opinion, the board does not have the authority to override the statute that requires the majority of the board to pass a motion. **Fortune** agreed, pointing out that legal counsel had said the vote was legal, but it did not pass the motion because of the number of affirmative votes. **Brotherton** confirmed that.

**Ortiz** said she has served on many boards and committees and has never been on a board where the board has passed a motion that was later deemed to be illegal. She said she had not yet seen the rule that makes that vote illegal and has never heard of the Oregon Revised Statute to which **Brotherton** had referred. She said she did not support the motion at the July meeting because she wants to have more information about an issue before voting on it. **Ortiz** said she is concerned, however, that if something is on the agenda, properly noticed, and there do not happen to be enough board members to get five affirmative votes, that action cannot be taken. **Carpenter** reminded her that there were enough people to get the required five votes, but only four of those present wanted the motion to pass.

**Johnson** asked if the LRAPA board has bylaws that speak to how the board does decision making and governance. **Brotherton** said the intergovernmental agreement under which LRAPA was formed and under which it operates serves as LRAPA's "charter," or governing document. She said that document states, "The majority of the members of the board shall constitute a quorum for the transaction of business at a meeting or hearing of the board. The act of the majority of the members of the board shall be the act of the board."

**Kirkpatrick** stated that the IGA does not have to stipulate that a majority of all board members is required, rather than just a majority of the board members present at a meeting. **Brotherton** said if the board wanted to talk about this, she was prepared to talk about it at this time. **Carpenter** suggested talking about that issue under Agenda Item Number 9.

**VOTE: The MOTION PASSED BY A VOTE OF 7 (Carpenter/Forge/Fortune/Kirkpatrick/Ortiz/Ralston/ Stewart) IN FAVOR, TO 2 (Johnson/Monk) OPPOSED.**

B. Approval of Expense Reports Through June 30, 2009.

**MOTION: Fortune MOVED approval of the expense reports through June 30, 2009. Ralston SECONDED THE MOTION.**

There was no discussion of the motion.

**VOTE: THE MOTION PASSED BY A VOTE OF 7 (Carpenter/Forge/Fortune/Kirkpatrick/Ortiz/Ralston/Stewart IN FAVOR, 1 (Monk) OPPOSED AND 1 (Johnson) ABSTENTION.**

C. Approval of Expense Reports Through July 31, 2009.

**MOTION: Fortune MOVED approval of the expense reports through July 31, 2009. Ortiz SECONDED THE MOTION.**

Discussion of Motion. **Monk** had several questions regarding the expense reports. He noted that what used to be called, "Materials & Services," under Airmetrics, is now called, "Materials/Purchases." He asked if the name change meant anything or was just a change in what the item is called. **Mirhosseyni**

said there is no change. It merely refers to purchases made. **Monk** added that would be in every context.

**Monk** noted that Materials & Contract Services under Everybody Wins showed 139 percent of the budgeted amount for the whole fiscal year having been spent in the first month. He asked if those expenditures were for a contract with Cascade Sierra Solutions. **Mirhosseyeni** said that was not for Cascade Sierra Solutions. Those funds went to LCOG for the GIS study that was part of the second phase of Everybody Wins. **Mirhosseyeni** said he had expected LCOG to finish the work and bill LRAPA for that by the end of June. They did complete the work but did not bill LRAPA until after the end of June. That is why that was paid in July rather than in June.

**VOTE: THE MOTION PASSED BY A VOTE OF 6 (Carpenter/Forge/Fortune/Kirkpatrick/Ortiz/Ralston/Stewart) IN FAVOR to 1 (Monk) OPPOSED AND 1 (Johnson) ABSTENTION.**

**Johnson** said he would have to leave the meeting for a while and would call back about 2:15 p.m. **Monk** asked **Johnson** if he would like to participate in the Legal Framework for Local Governments agenda item, and **Johnson** said he would. **Monk** said he would call **Johnson** on his cell phone when the board got to that item so that **Johnson** could call in to the conference phone at that time. **Johnson** then disconnected from the meeting.

6. DIRECTOR'S REPORT: **Hough** reminded board members that the director's report covered two months because the board had not met in August. Several items from the written report were discussed briefly.
  - A. Air Quality. Air quality has been generally good, even with some very hot temperatures. **Hough** pointed out two news releases attached to the written report which were sent out advising people of the potential for ozone formation and the resulting potential health impacts, especially for sensitive individuals. **Hough** said this has been a relatively low ozone summer, and the past three years will probably be the best three-year average for ozone on record when the season is over.
  - B. Portland Air Toxics Solutions Advisory Committee. **Hough** announced that LRAPA has been invited to be an ex-officio member of this committee. He said it should be a very informative process and should be very helpful to LRAPA for the future, in Lane County.
  - C. Proposed Dual-Site Air Toxics Monitoring. As requested at the July meeting, **Hough** had provided in the written director's report more details regarding staff's proposal to do dual-site air toxic monitoring during calendar year 2010. He said staff is not currently monitoring for air toxics at the Amazon site, in order to have the resources to monitor at two sites, starting January 1. Unless the budget situation changes, there will also be a gap in air toxics monitoring in the first half of 2011, to help keep it revenue-neutral. The location of the second monitor has not yet been determined; however, staff is targeting an area that would be north of the Willamette river and south of Beltline. It could be on either side of I-5, but staff has been focusing on the West Eugene area, between Beltline and Highway 99 (where Beltline comes around to the south), because that is the area from which most of the requests for air toxics monitoring have come.

**Hough** said one of the challenges for the monitoring will be deciding which collection methods to use. There are four methods, including: Volatile Organic Compounds (VOC) which would include benzene and other compounds; aldehydes and ketones; metals; and Semi-Volatile Organic Compounds (S-VOCs).

**Hough** said staff would monitor for VOCs at a minimum at both locations. LRAPA has been monitoring for aldehydes and ketones at Amazon and would likely continue that at both locations in 2010, especially with the MACT to control formaldehyde and because acetaldehyde has been a relatively high risk in the EPA air toxics assessment. Then there would need to be a choice between the metals, for which LRAPA has been monitoring at Amazon, and the SVOCs. There has not been as high a level of concern, overall, on metals; whereas some of the SVOCs could be of interest. **Hough** said within a method, there are not real cost savings by just doing half of the constituents. Once you begin through a method, it is easiest just to go through them and get the complete spectrum. The cost savings would come by eliminating a whole collection method. Conversely, it would be more expensive to add a whole method. **Hough** said he had wanted to explain that to the board and said he would have a more specific proposal in the next month or two.

**Monk** noted a section in the director's report discussion of the air toxics monitoring, where **Hough** said DEQ and LRAPA have done such monitoring at community-based population exposure or background sites, and that hot-spot sampling near roadways or industrial property lines has been avoided. **Monk** said when he thinks about needing an air toxics monitor, it is to try to determine whether there are populations, parts of neighborhoods, that are being impacted by motor vehicles emissions, industrial emissions, etc. He said he recognizes that the monitoring has not been done in hot-spot areas, but he thinks it should be done that way to determine whether any population is being impacted adversely. **Monk** added that he thinks monitoring at the Amazon site does not determine that. He said that before the second air toxics monitoring site is determined, the board should have an involved discussion about perhaps siting one in Eugene and one in Springfield and deciding where those locations should be. **Monk** reiterated his opinion that having an air monitoring station at the Amazon location is not as valuable as staff thinks it is. He agreed that it might be adequate for PM sampling, but he said in the near future he will be putting a motion on the table to direct staff that LRAPA needs a much more thorough assessment of what needs to be done in air toxics monitoring, regarding why it is being done and where it should be done.

**Carpenter** said he had also thought along the lines **Monk** was talking about; however, if you really want to see where the most people are exposed to chemicals, it doesn't make sense to site a monitor in a location where people aren't allowed to go. He asked, if you want to see what the impact of motor vehicle emissions are on people, do you want to put a monitor in the spot where the highest traffic congestion is, where people might only be for ten minutes of out of their day; or do you want to put it in the middle of a large concentration of people, to see what people are actually exposed to? **Carpenter** agreed that the board should have an in-depth discussion regarding the proper siting of the second air toxics monitoring site.

**Hough** clarified what he meant by "hot-spot, roadway monitoring." He said a roadside or hot-spot monitor would be like what LRAPA does for carbon monoxide, near 11<sup>th</sup> & Willamette in Eugene. That is a very motor vehicle dominated problem, and the monitor needs to be as close as possible to the air that people breathe. It needs to be on the sidewalk, at about the height where people would breathe. The height of three meters is used, simply to keep the equipment from being vandalized too easily, but still at about the height where people are breathing. **Hough** said the intent is to have confidence that, if you meet the carbon monoxide standards at that location, then you should meet it everywhere. He added that it is a luxury to be able to site a hot-spot, roadway-oriented site, according to very specific criteria to monitor for one specific pollutant. EPA guidance is very prescriptive and specifies how far from the intersection the monitor should be, how far from the roadway it should be, and how high it should be. That is very different from trying to assess community risk, from something like a mix of air toxics, from

a wide variety of sources, with a long list of analytes in which you may have an interest. **Hough** said he does not want to minimize the challenge involved in trying to meet all of the goals.

For something like particulate matter or air toxics, the monitor needs to be located in an area where a large number of people are located, where the overall risk is highest. **Hough** said LRAPA has the tool of the National Scale Air Toxics Assessment to identify those census tracts where there is that potential, and there will be a variety of those from which to choose. The assessment indicates that mobile sources and area sources are the primary risk drivers, and it is best to find an area that has the maximum overlap of mobile, area and point source impacts. If you place your monitor on Highway 99, the mobile sources will dominate. If you put a monitor on the property line of an industrial source, such as is the case with J. H. Baxter, that source will dominate and result in worst-case conditions. LRAPA will want to use a site that characterizes the higher air toxics risk for this area. The reason for keeping the Amazon site is because LRAPA's has invested almost a decade of air monitoring there, and the agency wants to be able to say, with some confidence, that if we monitor in 2010 we know how that year compares to the historical data. If Amazon is not used as one of the two sites, there will be some question as to how representative the 2010 data is. **Hough** said he would guess that what staff is putting together for the 2010 air toxics monitoring is much more closely aligned with Monk's opinion than these conversations make it appear to be.

**Ortiz** said the dual-site air toxics monitoring, and siting one of the monitoring stations in that specific area of West Eugene, is a direction of which she approves. She said, being from that area, this is one of her goals for being on this board. She said she wants to know what the people in her area are being exposed to so that she will have a better idea of what needs to be done, within the law, to improve the quality of life for the people who live in those areas of town.

- B. Alternative Dispute Resolution and Seneca Sustainable Energy proposal. **Hough** said staff has tried to objectively assess the applicability of the Alternative Dispute Resolution process to a variety of things in which the agency is involved. He said he has found that process to be very useful in the past; however, there are a number of obstacles to just trying to overlay that on top of an existing process, especially when the existing process is well underway. **Hough** also noted that there have been a number of individuals who have submitted comments during the public comment period for the Seneca permit, who have asked that the comments be forwarded to the board. He said staff has resisted that, because they do not want to complicate board members' lives by adding to ex-parte communications that board members may receive on this subject. Staff is trying to protect board members' objectivity, in case the board is involved in a future appeal. **Hough** added that those requests have come from both supporters and opponents of the Seneca proposal. If there is an appeal to the board, all of that information will come to board members as part of the permit issuance record.

**Ortiz** said a lot of board members have been getting e-mails from people, as well, She said she has received dozens of them, and she does not know if they also went to LRAPA. She asked if board members should be forwarding those to staff, or what would be Hough's recommendation. **Hough** said he has seen some LRAPA board members' names, or other elected officials' names, included in the loop on some of the e-mails received by LRAPA. For any such communications received during the public comment period, if board members do not see LRAPA listed as being on the e-mail list for a communication, and they believe it is something that should be a part of the permit issuance record, the board member should recommend to the sender that they also send it to the agency. **Ortiz** said she

cannot always tell whether the agency has received the e-mail or not, because there might be blind copies.

**Brotherton** said if the communications were received during the open comment period, the easiest thing would probably be for board members to just forward those to the agency. She said the best way to manage all of these comments is to just include them all in the public record.

**Carpenter** said, to play the Devil's advocate, that sending something to a board member is not necessarily sending it to where it needs to be put for a public comment. The applicant, or whoever has a chance to respond to public comments, in an appropriate time period, would not have that before them at this time. **Brotherton** asked if the public comment period was still open, and **Hough** said it closed on August 28. **Brotherton** asked when the rebuttal period would close, and **Hough** said that would be close of business on September 11. **Brotherton** said that does complicate things. She said it puts board members in an awkward position, to be receiving individual comment on this issue. Forwarding it as part of the public comments makes it part of the public record, and then there are opportunities for response. She said the rebuttal period could be extended, to allow the ability to review those comments. In that case, board members could forward those comments so that they could become a part of the public record. **Ortiz** asked who would be rebutting the comments, and **Brotherton** said it would be the permit applicant. They have until September 11 to provide information responding to what has been submitted into the public record.

**Carpenter** commented that the applicant could challenge, as invalid, any of those statements which were submitted directly to board members rather than being submitted to the agency. **Brotherton** said she is not too concerned about that. **Brotherton** said the cleanest option might be for board members to save those communications and, if an appeal comes to the board, they could submit that packet of documents as ex-parte comments. Then the permit applicant would have the opportunity to rebut that. She said that is the whole point of disclosing ex-parte comments, and that may be the easiest thing to do, for purposes of where the process is right now.

**Ralston** said he would concur with that because, at the city council, they have the opportunity to disclose ex-parte contacts they have had if the council has an important decision to make. Disclosing those contacts makes it legal, because then everyone has the same information.

**Brotherton** said board members could just hang onto any ex-parte communications for right now. They will only come into play if the permit is appealed by Seneca. **Monk** said he thinks the way DEQ does it is that, if the comment did not come to DEQ, they are not part of the public record. **Carpenter** said that was also his sense. **Brotherton** said her only concern was that someone thought they were putting a comment into the public record by sending it to whomever they are comfortable sending things to. She said you just don't want to cut someone off because they made a mistake; however, because of the stage the process is in right now, it makes more sense for board members to just hold onto any ex-parte communications they have received and not yet forwarded to staff.

- C. Woodstove Changeout Grant. **Ortiz** acknowledged the fact that LRAPA had received a \$25,000 grant from EPA to continue woodstove changeouts in Oakridge and encouraged staff to continue with that effort.

7. **ADVISORY COMMITTEE:** Before reporting on the committee's activities, LRAPA Advisory Committee Chair **Earl Koenig** expressed the committee's gratitude to **Russ Ayers** for his many years of service as chair of the committee, and also to **Maurie Denner** for his service as vice-chair. **Koenig** also welcomed **Amy Peccia** as the committee's new vice-chair.

**Koenig** reported that the bulk of the committee's July 29 meeting was devoted to the area source NESHAP rules in the proposed new Title 44, specifically to the gasoline dispensing requirements. He said the rules seem to be pretty straightforward. Stage I vapor recovery is pretty much under control with vapor recovery systems in place at gasoline stations, to recover the vapors between the tanker truck and the stations' underground fuel storage tanks. He noted that Stage I has been voluntary in Oregon, except in the Portland and Medford areas. Stage II vapor recovery keeps vapors from escaping into the ambient air when the fuel is pumped from the storage tank into a vehicle's gas tank. **Hough** said Stage II is only required in Portland, and that will be addressed with on-board canister systems on newer cars. **Hough** added that LRAPA staff has just started through that discussion with the advisory committee and is trying to cover a lot of ground in a short period of time.

**Monk** asked if committee member **Don Holkestadt** had developed a flow chart, in connection with the vapor recovery requirements for gas stations, and, if so, if it had been helpful. **Koenig** said **Holkestadt** had developed the flow chart which looks like it will help station owners understand how the rules will affect them, and what they can and cannot do. **Koenig** said that **Holkestadt** has had experience working with these requirements in California, and his experience has been helpful to the committee's discussions. **Monk** said he would like to have a copy of the flow chart, and **Hough** and **Carpenter** asked **Markos** to get copies to all board members.

**Koenig** said the committee also discussed the civil penalty matrix in Title 15 and made its recommendation to the board. **Hough** added that the board would be asked, under a different agenda item on today's agenda, to authorize public hearing on that portion of the enforcement rules at its November meeting. **Koenig** said the committee will be looking at the enforcement rules again to discuss such issues as expediting the enforcement process, removing obsolete language from Title 15, and the possibility of establishing interest fees on fines that are not immediately paid. **Koenig** said the committee had already discussed the topic of having an ombudsman to help respondents through the enforcement system; however, the committee did not support that because it would require either another staff member to serve in that capacity or contracting with someone from outside the agency to do that. In either case, the agency's current budget is not sufficient to add that expense.

8. **REQUEST FOR AUTHORIZATION OF PUBLIC HEARING TO ADOPT DEQ'S FOUR-TIERED CIVIL PENALTY MATRIX INTO LRAPA TITLE 15, ENFORCEMENT RULES:** **Hough** said that staff proposed to take the civil penalty matrix portion of Title 15 through public hearing, independent of the rest of the enforcement rule. He explained that the reason for doing so is that LRAPA does not have the authority to have a different fine structure than the EQC adopts for DEQ. Because LRAPA's current two-tiered civil penalty matrices are different from DEQ's recently adopted four-tiered matrices, staff proposed to adopt the DEQ matrices now, to make LRAPA's rules consistent with DEQ's. Then the other changes which the board has discussed over the past couple of years can be discussed at greater length, and whatever changes come out of those discussions can be adopted in a separate process.

**Hough** explained that the main difference between LRAPA's two-tiered civil penalty matrices and the DEQ's four-tiered matrices is that there is one tier that would provide higher penalties than LRAPA's current rules allow, and one which would allow lower penalties than are currently allowed. The change would give the agency greater flexibility to customize the penalty amount to be appropriate for an individual violation.

**Hough** asked the board to authorize public hearing on the adoption of the civil penalty matrices at its November board meeting.

**MOTION: Monk MOVED authorization of public hearing on the civil penalty matrices in Title 15 at the November 2009 board meeting. Forge SECONDED THE MOTION.**

Discussion of Motion. **Monk** asked for clarification of **Hough's** statement that one of the new tiers would be higher than the existing amount, when the four tiers in the DEQ rules are \$1,000, \$2,500, \$6,000 and \$8,000, and the existing LRAPA rule already has a \$10,000 matrix. **Hough** explained that what LRAPA refers to as its \$10,000 matrix actually has a high base amount of \$6,000. The amount of \$10,000 is the maximum fine that can be assessed after all aggravating and mitigating factors have been applied to the base fine. The new \$8,000 matrix would allow a higher maximum fine after all factors are applied.

**Carpenter** noted that the Oregon Legislature recently approved a new upper limit of more than \$10,000, and **Hough** confirmed that the Legislature took the DEQ's \$10,000 maximum fine which was set back in 1971 and adjusted it for inflation, adopting a new maximum fine of \$25,000. This was done at DEQ's request. The new higher figure gives the EQC the ability to consider a higher maximum; however, that would take a separate rulemaking by DEQ in order to use that higher number. If that happens, LRAPA will also make that change.

VOTE: THE MOTION PASSED BY UNANIMOUS VOTE (8 to 0—**Johnson** was not participating at the time of this vote).

**Hough** said the proposed rule changes, as drafted in redline and strikeout, will be put on public notice for the November 10, 2009 public hearing before the board. **Stewart** commented that, in the past, board members have had a lot of questions when it came time for the public hearing, saying that they had not had time to review the proposal. He said the board has two months between now and the public hearing to get answers to any questions they may have regarding the proposed rule changes. **Monk** said part of the issue in the past has been that staff made changes to the proposal prior to the hearing. He asked **Hough** if the proposed amendments to Title 15 is exactly what DEQ adopted, and **Hough** said the draft is exactly what DEQ adopted into its rules, and it is staff's intent is to incorporate into LRAPA's rules exactly what is in the draft proposal.

**Fortune** asked if this item could be placed on the October meeting agenda so that any board members who have questions can ask them at that time and get answers in advance of the hearing. **Hough** agreed to do that.

**Ralston** asked if staff intended to provide another copy of the draft rule amendments and said, if not, board members should keep the draft they had already received and not send out a new copy next month. **Carpenter** agreed and said **Dinteman** will not send out new copies of the proposed rule changes for next month's meeting.

9. LEGAL FRAMEWORK FOR LOCAL GOVERNMENTS, PART 1 OF 3: [*Monk called Johnson to tell him it was time to call and reconnect to the meeting. Johnson said he would not be available for that and asked to be called back when it was time for the executive session.*] **Brotherton** said the information she wanted to give to LRAPA board members is like a refresher course for the elected officials, which she thought they had probably already gotten either from their legal counsel or from the League of Oregon Cities. The material to be covered includes information regarding public meetings, public records, and a variety of different topics. She said she would cover general public meetings law at this meeting. A public meeting is considered called and held when there is a quorum of the members which, in the case of the LRAPA Board of Directors, would be five, because there is a total of nine members. **Brotherton** noted that the board had lately been discussing quorum vs. number of votes needed to take action. She said that question is not easy to answer because there are some questions when trying to figure out which laws apply to this body. One answer to that question would be statutory provision in ORS 174.130 which says that a quorum is a majority, and then it has been interpreted by every attorney general's opinion available that, if ORS 174.130 applies, you need a majority of the members of the board to make a decision or take action. **Ralston** clarified that she meant a majority of the members of the full board—not just a majority of those members present at a given meeting. **Brotherton** confirmed that was what she meant.

**Monk** said he believes that the attorney general has said that, if a body does not have by-laws or if by-laws do not speak to the voting process, then ORS 174.130 applies. **Brotherton** said that is correct, but it gets even more complicated than that, because the question becomes, do by-laws trump the statute. If there were a statutory provision that said that for purposes of the Lane Regional Air Protection Agency, the quorum is (a specified number of members), then that would get LRAPA out of the requirement that a majority of the members pass something. **Brotherton** said that, for purposes of this analysis, and knowing what conclusions would mean for this board, she wondered, what if ORS 174.130 did not apply? She concluded that LRAPA's Intergovernmental Agreement applies and requires the same thing as ORS 174.130, as described in Agenda Item 5.A, above. So even if ORS 174.130 did not apply to the LRAPA board, LRAPA's Intergovernmental Agreement (IGA) would. **Brotherton** said she has not encountered this situation in her years of practice. She looked at different clients' operating processes, and some of them operate under different requirements. She said she was surprised that this was the conclusion she reached, but there is no other conclusion that works.

**Carpenter** said there is a home rule provision which may allow certain city councils and county commissions to make their own rules; but he does not know if LRAPA would qualify for that because LRAPA is created by state statute and must do all of its rulemaking under state statute. **Brotherton** said she assumed LRAPA could set its own rules, and LRAPA is given pretty broad authority under state statute, to govern itself. She said the civil penalty matrix is a good example of where LRAPA has been explicitly told by state statute that LRAPA cannot set its own rule. **Brotherton** added that the ordinances that each of the cities and the county had to adopt, to establish LRAPA, had to go through EQC for approval, according to state statute. She said she presumed the IGA that formed the agency was also run through EQC. **Carpenter** said if that is the case, then any amendments to the IGA would also need to go through EQC. **Brotherton** responded that if the original was, then an amended version would also need EQC approval.

**Stewart** said that when he heard what had taken place at the July board meeting, he immediately went to the county's legal counsel and asked if "quorum" meant the same thing as "Board of Commissioners." With five commissioners, the quorum requirement is three commissioners. If only three commissioners are present at

a meeting, all three must vote affirmatively to pass a motion. He asked county's counsel if the situation is the same with the LRAPA board, and she came to the same conclusion **Brotherton** has made.

**Stewart** asked **Brotherton** to explain the difference between a legislative decision and an administrative decision, and when board members become personally liable. He said the Lane County Board of Commissioners is dealing with this subject now, and his understanding is that, as a legislative body, when the board makes a legislative decision, the organization is liable but the board members are not personally liable. When an individual board members makes an administrative decision, that person is then individually liable.

**Brotherton** said she was not prepared to talk about individual liability but she can be ready at a future board meeting. She said the time she has seen individual liability is with misappropriation of funds. When it comes to just general legislative decisions, she was not prepared because there is a lot of information out there on this topic and she will need to do some research before talking to the board about it. She said it could be one of the topics for discussion at one of the next two board meetings, and she would want one of her firm's extremely experienced litigators to be here with her to help answer those questions. She said she could put something together on that.

**Brotherton** said the distinction between administrative actions and legislative action is very significant when it comes to purposes of what rules must be followed. She used the example of when the board voted earlier to keep the monthly expense reports as part of the consent calendar, which she said is an internal decision discussion for LRAPA. It still needed five members to make that decision. The Administrative Procedures Act, which governs administrative actions such as rulemaking and contested case hearings considerations, has its own set of rules that LRAPA is statutorily required to follow. The statutes that created LRAPA say that the board must follow ORS 183 while performing those types of acts. With those exceptions, most of what the LRAPA board does is governed by general public meetings law.

**Stewart** commented further that the Lane County Board of Commissioners has been experiencing a situation where there have been some decisions made by commissioners which have bypassed the administrator. The commission gave authority to the administrator to run the county's organization and follow the laws, which is similar to **Hough**'s being director of LRAPA. **Stewart** said the commissioners have been told that, when commissioners choose to bypass the administrator, they become liable for something that they would not have been if they had allowed the process to go through the proper channels. He said he wanted to be sure that this board has that conversation with legal counsel, to see whether that same principle applies to the LRAPA board.

**Kirkpatrick** said she thought **Monk**'s concern regarding the four-to-three vote in July was that the board was just giving a directive to the director of the agency, to be open to ADR, and it was not a decision of the board. **Carpenter** said that would have been the case under a consensus; however, once it was moved and seconded, and a formal vote was taken, it became a formal board action. **Brotherton** agreed with **Carpenter**. She said it is the difference between four members of the board giving policy direction, and an action being taken by "the board." She said every board member has the right to voice their opinions, but the board can only take formal action if the majority of its members agree. She said it is either the voice of the board because five board members want it to be the voice of the board, or it is not the voice of the board because there are not five members who want it to be.

**Ortiz** said this conversation makes her believe that the Intergovernmental Agreement needs to be changed so that a majority of the quorum of board members present at a meeting should be able to pass a motion, so long as the issue has been properly noticed and is on the agenda. **Ortiz** said that, while she did not vote for the motion in July, she finds it interesting that the five-vote requirement was found after this particular vote was taken. **Carpenter** stated that this board is only obligated to provide “proper notice” for specific formal occasions, and that proper notice is when a motion and second are brought to the table. **Ortiz** disagreed, stating that she does not like to have things brought up at the last minute. She said she tries to earn the respect of her peers by letting them know, ahead of time, when she plans to bring a motion to the table. What she meant by “properly noticed” was that a board member who plans to bring a motion notifies the other board members prior to the meeting, such as by an e-mail, so that they will be aware that the motion is coming. **Ortiz** said the IGA is old, and she hopes the board will talk about it soon and make the necessary changes. She added that, while she has some concern about opening this up to discussion because there are probably some other things that people would like to change in the IGA, she believes that the requirement that a majority of the full board must vote affirmatively to pass a motion should be changed to require a majority of the members present at a meeting. **Fortune** pointed out that one issue with the motion regarding ADR was that it was not on the agenda and no one had been notified ahead of time that it was to be brought up. It just happened at the meeting, with no prior notice. **Ortiz** agreed with that.

**Fortune** asked **Brotherton** to explain the difference between a consensus (and who determines what a consensus is) and an action taken by this body as a board. **Brotherton** responded that, with the vote in July, there was a consensus among the majority of the members present at the meeting, to support the action. She gave an example of a meeting at which the director asks for a show of hands regarding interest in doing something. That generally does not take a majority because it is not a formal motion. Or perhaps the director will say, “I see enough people wanting information, here, about this, that I’ll provide it.” There is not a formal vote on it. She said that was her distinction between the two types of actions.

**Hough** said that, with different groups that he has participated in, consensus is absence of any opponent. If everyone is supportive or silent on the matter, that is viewed as consensus. But once a person opposes it, there is not consensus, and it may be appropriate to put the matter to a formal vote. **Brotherton** agreed with that, stating that if no one is really opposed to something, and enough people want it, you can proceed with it. But once there is a motion and a second, the rules kick in. **Brotherton** said until this question was raised, she never really looked at the section of the Attorney General’s Manual which deals with voting. She said the subject is complicated enough that the manual includes a chart to try to help people apply the rules to their particular situation.

For clarification, **Fortune** said his understanding of this conversation is that, if the chairman asks for consensus, that makes the issue go forward. And if someone opposes it, then you need to go into a formal motion and second, and a vote, to move something forward. **Brotherton** said she would think that formal motions are easier because it gives staff much clearer direction.

**Stewart** said he wished that this topic was being discussed in relation to something other than a specific permit that is currently being processed by the agency. He said the board is choosing to interject another process into the permitting process. **Stewart** said it concerns him that the agency has a formal, structured process, and board members are trying to do something different. If the permit is appealed, then we will find that we have a failed process because we didn’t adhere to what is in our rules and regulations. **Stewart** said

he wondered if the board could be liable for something such as some potential proceeds that were not realized by the company because of something the board did, which he considers to be illegal.

**Brotherton** responded that LRAPA is following the permitting process. Even if the vote had been sufficient to pass the ADR motion, EPA dictates whether ADR is used. Even if Hough had gone to EPA and said that a majority of the board wanted this proposed permit to go through EPA's ADR process, that would not have a specific impact on whether or not EPA decides to do the ADR process. She said if the motion had been to stop all action on the permit, she would be more concerned and would be looking at it differently. She said she had read the transcript of the July board meeting recording and noted that both **Carpenter** and **Ortiz** had raised the concerns about the fact that there is a permitting process going on and that the board is potentially a sitting appeal body. **Brotherton** said this is a procedural issue rather than a substantive issue of the permit.

**Hough** agreed with **Brotherton** but made one clarification. EPA recognizes that ADR is a voluntary process, and if there is a key stakeholder, or multiple stakeholders, that are not willing to participate in the process, that would probably affect EPA's willingness to help organize the effort.

**Carpenter** said he knows that ADR is a separate process, but the implication of this issue could be that some board members do not like the existing permitting process. If the permit were appealed, that would have to be explained. **Brotherton** added that this issue at the board level gets into general concerns about discussions occurring at the board level when they potentially sit as an appeal body for the permit.

**Ralston** said he understands that there may be situations that arise that cause a board member to miss a meeting, but it is unusual for two board members to be gone at the same time. He said he could not disagree more with **Ortiz** about changing the requirements in the IGA because, as was pointed out, the subject of ADR was brought up with no notice. If the IGA were changed as **Ortiz** suggests, an action could be taken without the majority of the board which adversely affects the entire county. He said he would not, under any circumstances, ever agree that the IGA needs to be changed. Decisions must be made by the majority of the entire board. If that means putting off a decision, or voting on it more than once, until more board members are present, that is the way it has to be. He added that he thinks the legislature would need to change that. **Carpenter** said perhaps the EQC would need to change it. **Carpenter** said he also would not be in favor of changing the IGA.

**Monk** said he had five questions. First, he asked **Dinteman** if the subject of the number of votes had ever come up in the past. **Dinteman** said she could not recall its ever having come up before. **Monk** then asked **Brotherton** if the IGA is equal to the statutory requirement, and **Brotherton** said she had looked at that but did not have a definitive answer. **Monk** then asked if EQC has a statutory voting requirement like Lane County and LRAPA have, and **Brotherton** said she is not aware of such a requirement. **Monk** said the reason he asked that was because the statutory language that governs LRAPA says that LRAPA will do this in the same way as DEQ. He said he wondered if some acts could be done without that majority. **Brotherton** said the reason she didn't check into that is because the IGA does have that provision. She said LRAPA would not have written an agreement that contradicts or is inconsistent with DEQ's requirements.

**Monk** said **Carpenter** had suggested that legally a vote of any nature would not have to be appropriately noticed in the agenda. He said he agrees with **Ortiz** and thinks it is just good policy for the board to notice things to one-another before bringing them to the table. **Monk** asked **Brotherton** if that is a legal requirement. **Brotherton** said the legal requirement, under public meetings law, is that the meeting be noticed

and that the notice include a list of the principal topics anticipated to be considered at the meeting. She said it should be specific enough to allow members of the public to recognize the matters in which they are interested. She added that the statutes also state that the requirement to list the subjects does not limit the ability of a governing body to consider additional subjects. **Brotherton** went on to say that LRAPA has on the agenda a policy to give the kind of courtesy that **Ortiz** referred to. State law allows the vote to occur, so it was not an illegal vote. But LRAPA has followed an internal practice not to act on matters brought up by the public on the same day they are introduced.

**Monk** quoted the piece in the agenda which states, "The board may not act at this time but may, if it deems necessary, place such items on a future agenda." He said what that says to him is that the board may act if it chooses to do so. He asked if "may not" meant "shall not" in **Brotherton's** estimation. **Brotherton** said the word "may" is not clear in this context.

**Monk's** last question dealt with the four-to-three vote at the July meeting and past votes. He said he had found several instances in minutes of past meetings when a majority of the full board did not support a motion, but the motion was considered passed. He asked what would need to be done about those old votes, in light of the fact that a motion is not passed unless it received affirmative votes of a majority of the full board. He asked if those votes can be legally challenged. **Carpenter** said they probably could not be challenged now. **Monk** asked if the board can just forget about all those old votes and just go forth from the present. He asked for **Brotherton's** legal opinion, off the cuff. **Hough** asked if **Brotherton** would like to research that and report back at a future meeting, and **Monk** said she should do that. **Brotherton** said she did not think there would be an answer to that question because we know what the answer is today. She said **Carpenter** had stated at the beginning of today's meeting that a motion would not be deemed passed, for the duration of his term as chair, unless it had received five votes. She said she did not believe he could have said the opposite and had it be legally defensible. She would say LRAPA does not need to do anything about those past actions, but if someone were to challenge one of those, it would be in a tougher defensibility position.

**Carpenter** said he and **Brotherton** might have a difference of opinion regarding what effect the state statute has on whether or not LRAPA could make rules that would be contrary to the state statute. He said **Brotherton** thinks that LRAPA possibly can, and the question is, is that state statute discretionary, and only acting as a floor if you have nothing? Or is that statute regulatory for state agencies, and a state agency cannot adopt voting mechanisms other than those in the state statute. **Brotherton** said that, because the state statute and LRAPA's IGA were the same on that point, she had not had to sort that out in her prior analysis. But she said she had gotten the same answer looking at it from the state statute and from the IGA. **Carpenter** noted that **Brotherton** did not think she knew the answer to the question; but he is a little more affirmative that there are certain things that state agencies cannot do because they are against state statute. **Brotherton** said it is not clear in the statute, and that is where the question lies. **Carpenter** asked if it is just the attorney generals' opinions regarding the statutory language that set the majority at five members of the board. **Brotherton** said ORS 174.130 says, "Any authority conferred upon law by three or more persons may be exercised by a majority of them, unless expressly provided otherwise." The attorney general opinions have always said that the statute requires that the majority of a board, commission, or council to concur in order to make a decision. And then it goes on to say that legislators were expressly asked to clarify whether they intended that interpretation. It says, "In 1983, the Attorney General directed legislators' attention to these opinions, interpreting the statute, and asked if it might be amended, to basically make a more efficient decision-making process, because it's difficult to get that group of people there." And it says it has not been amended. So this suggests that the legislature is satisfied with those attorney general interpretations. **Ralston**

said that was why he said the Legislature would have to change LRAPA's IGA. He said it is out of LRAPA's hands, and it would take years to garner enough support through the legislature to actually change it.

**Brotherton** said if it becomes the will of the board to want to explore changing this agreement to provide for a different voting number to require only a majority of the members present, she is not as confident as **Carpenter** that the IGA could be amended to do what **Ortiz** stated.

**Fortune** went back to the subject of the agenda wording of "may" versus "shall" and said to him that meant that the board cannot act at this time but may put the item on a future agenda. He said to him it does not give the board a choice. **Brotherton** said if she were to follow on what that meant, she would say they should not act. She added that, even if it said "shall" it would not have made the vote illegal. It would only have been inconsistent with the LRAPA board's internal practice. **Fortune** asked if it would be permissible to have something in the agenda stating that the board shall not act at this point in time, and then if someone puts a motion on the table, for the chairman to say it is out of order. **Brotherton** said that could certainly be done. **Carpenter** disagreed, stating that it could only be done if it were in the rules and regulations. **Brotherton** said it is just a practice and that a good example of that is the three minutes for public participation. If someone talks for five, they haven't violated public meetings law. The board simply lacks some of the elements of control. In the instance of the July action, it prevented people from being prepared to participate and comment.

**Ralston** said, for him, it seems that taking action on something that brought up with no notice, no opportunity for the board to prepare, and no opportunity for public input, is not following the board's own policy. It seems to be doing just the opposite of what board members have said they want to do. It leads to the public perception that this is another organization that does what it wants to do, when it wants to do it.

**Carpenter** said it might have been that **Johnson** had this thought in mind earlier, and it just coincided with the Oregon Toxics Alliance comment at the July meeting. He said the question is, does the language in the agenda bar a board member from bringing up a motion and a discussion, that they may have wanted to have all along, because someone in the public raised it during the public participation item. **Carpenter** said there should be professional courtesy among board members, but **Johnson** saw it as a matter of expediency because there was some urgency to taking action right away. No one knew that **Ralston** and **Stewart** would not be at the July board meeting. He said the board is allowed to conduct any business that is believed necessary on behalf of the agency, during its monthly meetings. **Carpenter** added that he thought the action was expedient, given that the board was not going to meet again for two months. He added that New Business is intended for board members to bring up items in which they have an interest, so that the rest of the board is not blindsided by having something introduced and not having time to think about it before being asked to take action on it.

**Monk** said that, in his opinion, when a legal opinion is brought to the board, it is just an opinion. He said if the IGA had had something different from ORS 174.130, he believes the IGA would have trumped the statute, and the attorney general opinions would have had no effect on the LRAPA board because the IGA spoke to the issue. He said the board would be talking about a legal opinion in the executive session at the end of today's meeting, and he hoped the board recognized that it is just an opinion. If, in your mind, it is a good opinion, and it makes sense for you, then so be it. But if it is not, it is important to hold your reservations, ask more questions, and ask for another legal opinion. **Brotherton** responded that, unless something is black

and white, the board is asking her what is the most legally defensible position on a given issue. And she will give the board her legal opinion.

On another subject, **Carpenter** asked if there is a distinction when a member of the board attends the meeting by telephone, whether that person is in Oregon or out of the state. **Brotherton** said the person is simply attending the meeting via phone, and she has never seen any challenge to that, regardless of where the person is, physically. That is the only manner in which the person is able to attend the meeting when they are out of the state. **Fortune** presented the scenario of having a quorum, but two people walk out of the room, creating a situation where there is no longer a quorum. He asked how to address that situation when someone is participating by telephone, or by computer. It is assumed that the person is on the other end of the line, listening to the conversation; however, how do you know that person is actually present? He wondered whether Roberts Rules is now addressing the issue. **Brotherton** said she is sure it has come up, but she has never been confronted with this question. She said, if the person on the telephone is needed to have a quorum, her running assumption would be that the person is there and engaged. She said she does not know how to guard against that, short of constantly asking if the person is still there. **Kirkpatrick** said you would find out if the person is there when there is a vote. **Ralston** said he has been in that situation as a councilor, when his presence was needed for a vote and he had to call in and participate by telephone.

10. NEW BUSINESS:

Forming a Subcommittee to Look at the Lack of Bylaws. **Monk** said he wanted to form a subcommittee to look at the lack of bylaws and the question of whether the IGA could be updated. He said the IGA is a 40-year-old document, and he does not know whether it has ever been updated. **Stewart** said it was updated in 1992. **Monk** said the subcommittee should talk to the Lane County Board of Commissioners, as well as the city councils, to see if the IGA should be updated to provide the ability to distinguish between the types of actions the board wishes to take and, perhaps, have different requirements for the different types of actions. Some could be taken without a majority of the full board.

*[Johnson re-connected to the meeting, by telephone, at this time.]*

**Ortiz** said she would expect to put this on a future agenda for discussion. She said the language of the current agreement should be compared with language in the city and county charters, to see how they compare. Then, if it seems necessary, a subcommittee could work on proposing revisions. **Ortiz** added that she would like people at the city of Eugene to look at it and see if there is anything that does not mesh. **Brotherton** said she would look at the current agreement, as well. **Monk** asked if this subject had been properly noticed so that the subject can be put on the October agenda for discussion.

**Carpenter** reminded the board members that all of the intergovernmental partners would need to approve whatever changes board member might want to make.

**Carpenter** said another matter the board should talk about is the discrepancy between his and **Brotherton's** opinions as to whether the board has authority to change its voting requirements.

11. EXECUTIVE SESSION (ORS 192-660(2)(f) [*Consideration of records that are exempt by law from public inspection*]): **Carpenter** announced that the open session was adjourned and that the board would go into executive session under ORS 192-660(2)(f) to consider records that are exempt by law from public inspection.

He said board members, the director and the finance manager would stay for that meeting, and all other staff members and members of the audience were asked to leave. The open session would not reconvene today. He said any representatives of the news media could attend the executive session but could not report on any of the deliberations or anything other than the general topic as announced previously.

12. ADJOURNMENT: The public meeting adjourned at 2:45 p.m. when the board went into executive session, and the board did not reconvene the open session following the executive session. The next regular meeting of the LRAPA Board of Directors is scheduled for Tuesday, October 13, 2009, in the LRAPA meeting room at 1010 Main Street in Springfield, Oregon, at 12:15 p.m.

Respectfully submitted,

**Merrie Dinteman**  
Recording Secretary