

**MINUTES**  
LANE REGIONAL AIR PROTECTION AGENCY  
BOARD OF DIRECTORS MEETING  
TUESDAY–OCTOBER 13, 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; Kit Kirkpatrick–Eugene; David Monk–Eugene; Andrea Ortiz–Eugene; Dave Ralston–Springfield; Faye Stewart–Lane County (via phone)  
(ABSENT: None)
- Staff: Merlyn Hough–Director; Merrie Dinteman; Tom Freeman; Max Hueftle; Sandra Lopez; Sally Markos; Nasser Mirhosseyni
- Other: Earl Koenig, Chair, Amy Peccia, Vice-chair, and Russ Ayers–LRAPA Advisory Committee; Kathryn Brotherton and Pete Shepherd–LRAPA Legal Counsel; Jim Daniels–Rosboro Lumber

1. OPENING: **Carpenter** called the meeting to order at 12:15 p.m.
2. PUBLIC PARTICIPATION: None
3. REAPPOINTMENT OF BILL CARPENTER TO AT-LARGE, SPRINGFIELD, BOARD POSITION: Carpenter said he had submitted a new application for reappointment as the at-large member from Springfield, adding that his term had expired in July. Carpenter said it was up to the board to decide whether they wanted to reappoint him at this time or to advertise the position and solicit new applications.

MOTION ONE: Ralston MOVED reappointment of Carpenter to a new two-year term as the at-large member from Springfield. Fortune SECONDED THE MOTION. Carpenter reminded the board that neither he nor Forge could vote on this appointment because at-large members may not vote on at-large appointments.

Discussion of Motion One. Monk asked if the at-large members could not vote on a motion for appointment, or could not vote on whether the position should be opened to new applications. He also asked if the vote in this instance would still require five affirmatives in order to pass, given that only seven of the nine members could vote.

Brotherton said the motion would need five votes to pass because the board, for purposes of voting, is still nine members, even though two cannot vote. She said this question has come up in different contexts and has been answered enough times to be definitive. The attorney general opinions on this point are very clear, that the membership is still nine, even if there were positions vacant, and the number needed to pass a motion is still five.

Monk said the city of Eugene’s long-standing policy is that its citizen appointees to boards serve only two terms. Monk said that, given that this is the end of Carpenter’s second term on the board, it should be opened to new applicants to see what other Springfield residents may be interested in serving on the LRAPA Board of Directors. He said it would provide an opportunity for new faces and new opinions. Based on those comments, Monk said he would not support the motion to reappoint at this time.

Johnson said the report in the agenda packet referred to this position as the “Springfield board position,” and he believes it is an at-large position rather than a Springfield position. Carpenter agreed that it is an at-large position. Staff member Dinteman explained that the board, at the time Carpenter was first appointed, had decided the position should represent Springfield. The current board would need to discuss the matter if members do not want to continue that preference. Carpenter said he believed the rationale was that Springfield’s population was growing, and it was anticipated that the next board member appointed by one of the governmental partners would be from Springfield. Ortiz said she liked the idea of the board discussing whether preference for this position should be given to a specific jurisdiction, adding that she supported having another Springfield representative. She did favor, however, opening the position up to new applicants to see who might apply.

VOTE ON MOTION ONE: THREE (Fortune/Ralston/Stewart) IN FAVOR and FOUR (Johnson/Kirkpatrick/Monk/Ortiz) OPPOSED. THE MOTION FAILED.

MOTION TWO: Monk MOVED that the position be opened up and staff directed to advertise the position, recruiting applicants who would compete with Carpenter for the appointment. Ortiz SECONDED THE MOTION.

Discussion of Motion Two. Carpenter said he believed that all nine members would be eligible to vote on this motion, and Brotherton agreed. Monk noted that this board is not bound by the previous board’s decision to give preference to a Springfield resident; however he was supportive of giving preference to a resident of Springfield, and he wanted to be sure that all board members agreed to that before voting on his motion.

The population of Springfield has to hit 60,000 before the Springfield City Council can appoint a second person to represent Springfield on the LRAPA board. It was estimated by those present that the current population is somewhere between 58,000 and 60,000.

VOTE ON MOTION TWO: SEVEN (Carpenter/Forge/Fortune/Johnson/Kirkpatrick/Monk/Ortiz) IN FAVOR and TWO (Ralston/Stewart) OPPOSED. THE MOTION PASSED.

Carpenter then asked what his status is, given the fact that he was not reappointed. He asked if Fortune should take over as chair, or if Carpenter is an ad-hoc member until he is reappointed or a replacement is appointed. Brotherton said the position is now vacant by expiration. Carpenter asked if the board could, by motion, allow him to participate for another month, pending review of other applications.

Monk said he believes that, in the past, there have been times when the board has not acted on expired terms until a month or two after the expiration date, and that member has continued on the board. He suggested that Fortune should take over as chair but that Carpenter continue to be a member of the board until the at-large position changes hands. Johnson added that Carpenter had participated in votes in meetings beyond the expiration of his term. Hough noted that Carpenter’s original two-year appointment was in August of 2005, and he was reappointed a month early, in July of 2007. Carpenter agreed that his appointment was likely still effective for the July meeting but not for the September meeting.

Stewart said one of the reasons he did not support the motion was because he was trying to be mindful of the fact that Carpenter is chair at this time. He said he felt an obligation for Carpenter to fill his term as chair until December.

MOTION THREE. Stewart MOVED to extend Carpenter's current term until December 31, allowing him to fulfill his obligation as chair of the board. Ralston SECONDED THE MOTION.

Discussion of Motion Three. Ortiz said she did not know what the appointment anniversary cycle is for this position, and she asked if the motion would detract at all from the two-year cycle for the position. Carpenter said he had looked at the rules and that it did not specify anything except that it is a two-year appointment. He said he did not know if there is supposed to be a specific anniversary date for the at-large appointments. Brotherton said the two-year term requirement is also in the statutes (ORS 468.A).

Monk said it made sense to him, for Carpenter to remain as chair until the end of the year, with the idea that the applications will be reviewed and an appointment made at the January meeting.

Brotherton looked at the agency's Intergovernmental Agreement (IGA) and said it states that the at-large appointments should be made in February and expire in January.

Monk said his recollection of why Carpenter's term has had a different anniversary date was because the Eugene mayor noted that Eugene's population warranted another member on the board and the acting director at the time sought a legal opinion which said the board should go to nine members instead of the seven members that it had been for a number of years. The board went to nine members, and Carpenter was appointed to the second at-large position. Ralston said his recollection was that Carpenter was not appointed on the right time schedule because no one applied to the first advertisement for applicants, and because it was a new position. He said Carpenter should have been reappointed a few months later, in February of the following year, to bring the position back to its correct appointment schedule.

Kirkpatrick asked if, when Carpenter was elected to the office of chair, there was a specific time period attached to the office. Carpenter said the board chair serves for a year. Brotherton also said the IGA states that the length of terms for officers is one year, and the office should rotate on January 31 of each year. She added that Stewart's motion would provide the opportunity to get terms back on schedule.

Monk said he thought the offices rotated at the January meetings. He suggested that if the offices should rotate on January 31, Fortune could come in as chair at the February meeting. Applications for the at-large position could be reviewed, and the appointment made at the January meeting. Carpenter would either come back in February as a board member, or someone else would begin serving in that at-large position in February.

MONK RESTATED STEWART'S MOTION: That Carpenter continue as chair until January 31; and that the board go through the application process with the intent to make an appointment at the January board meeting. He asked if Stewart agreed with that, and Stewart said he did.

VOTE ON MOTION THREE: THE MOTION PASSED BY UNANIMOUS VOTE.

4. CONSENT CALENDAR:

A. Approval of Minutes of September 8, 2009 Board Meeting.

**MOTION: Fortune MOVED approval of the minutes of the September 8, 2009 board meeting. Ralston SECONDED THE MOTION.**

Discussion of Motion. Monk noted a correction on page 7 under, in the vote under item B. The minutes state that the motion passed by a vote of six in favor, one opposed and one abstention; however, there are seven names listed as voting in favor. He asked that the minutes be changed to state that the vote was seven in favor, one opposed and one abstention.

**VOTE: The board voted UNANIMOUSLY to approve the minutes of the September 8, 2009 board meeting, with the correction indicated by Monk.**

B. Approval of Expense Reports Through August 31, 2009.

MOTION: Fortune MOVED approval of the expense reports through August 31, 2009. Ralston SECONDED THE MOTION.

There was no discussion of the motion.

VOTE ON MOTION: The MOTION PASSED BY A VOTE OF 7 IN FAVOR (Carpenter/Forge/Fortune/Kirkpatrick/Ortiz/Ralston/Stewart) AND 2 ABSTENTIONS (Johnson/Monk).

5. DIRECTOR'S REPORT: The board discussed the following topics:

A. Change of Legal Counsel. Hough announced that Kathryn Brotherton would be leaving Harrang/Long to work with Glenn Klein as legal counsel for the city of Eugene. Brotherton introduced Pete Shepherd, who will be taking over as LRAPA legal counsel when she leaves at the end of October.

Shepherd said he is very pleased to be serving as LRAPA's legal counsel. He said he joined Harrang/Long after 26 years with the Oregon Department of Justice, the last eight of them as the Deputy Attorney General, which is the number two position in that structure. Before spending those eight years sharing responsibilities for supervising the operations of the Department of Justice, he had a variety of assignments within the department. Shepherd briefly described some of his experience, to illustrate to the board how he might be able to help them with their work.

- Helped draft the proposals that ultimately formed the basis for Oregon's current environmental crimes statutes.
- Worked as then-Attorney General Kulongoski's designee on the first task force assigned to work with the ODEQ and federal agencies on the enforcement of those new state statutes.
- As Deputy Attorney General, supervised lawyers and others in the Department of Justice who were advising both the Oregon Department of Environmental Quality and the Oregon Environmental Quality Commission, and other state agencies that had environmental mandates as to their responsibilities, both in terms of potential criminal enforcement, civil enforcement and, probably most pertinent to LRAPA's operations, the administrative enforcement of Oregon statutes under which they operate.
- As a prosecutor in the Marion County DA's office, and in the Organized Crime Unit of the Department of Justice, part of his responsibilities in both positions included prosecuting public corruption cases (cases of official misconduct by public employees).

- As Deputy Attorney General, advised state agency heads as to their agencies' responsibilities under the Ethics Laws. Shepherd said he was looking forward to helping with the discussion of aspects of the ethics laws later on today's agenda.
- Has experience working with multi-jurisdictional agencies such as inter-agency narcotics task forces which have designees from many different jurisdictions within their area of operation. From that experience, Shepherd said he knows the nature of multi-jurisdictional agencies creates some interesting dynamics and challenging issues, as well as some legal issues and policy issues for the agency. He said he is hopeful that his experience will be helpful in working through the kinds of unique issues that the LRAPA board may face as a multi-jurisdictional agency.
- Regarding public requests for records, Shepherd said if a member of the public requests a record, and the public agency decided to deny that record, the Attorney General's office performs a quasi-judicial function to rule on that petition and determine whether the agency will be compelled to disclose the record.
- ORS 183, the Administrative Procedures Act, which governs LRAPA's operations, is one of the core operating statutes that governs the operations of the state agencies that are directly the clients of the Attorney General's office. The Attorney General is the lawyer for every state agency, without exception. If the lawyers for whom Shepherd had supervisory responsibility could not resolve Administrative Procedures Act issues, those issues would end up on Shepherd's desk and on the Attorney General's desk, hopefully for resolution. Shepherd said he would hope that LRAPA would not have any such issues that would rise to that level; however, if such issues arise, he will be happy to work with the agency to resolve them.
- Public meetings law is one that Shepherd worked with as Deputy Attorney General. He said state agencies have run into exactly the same issue the LRAPA board has had, regarding the number of votes necessary to pass an action of the board.

Shepherd said he never dealt with LRAPA issues directly, as Deputy, but he has read LRAPA's statutes and rules and IGA, in order to get a little background and put the agency's operations into context. He said he knows that Brotherton is very familiar with the issues that have confronted the board during her years providing legal counsel to the agency. He will take advantage of her presence for as long as he can, to gain as deep an understanding as possible of those issues, and will form his own judgements about those issues.

Brotherton said she has enjoyed her time working with LRAPA. She will begin working with the city the first part of December. Hough told Brotherton that LRAPA has appreciated her help, both with contested cases and, more recently, as general counsel to the agency. He wished her well.

- B. Operating Permit Issued to Seneca Sustainable Energy. Hough announced that the permit was issued to Seneca Sustainable Energy on Friday, October 9. He said it had been requested that this subject be placed on a future board agenda as an informational item, at the November meeting. Hough said the source has 20 days following issuance of the permit in which to appeal the permit if it is not satisfied with what was issued. If Seneca does not appeal it within the allotted period, there will no longer be the potential for the board to have to serve as appeals board on that case. The date of the November meeting is beyond that 20-day period; however, the November agenda is stacking up to be quite full.

Hough said if the board is interested, staff can present that as an informational item. He said it would be very illustrative of things like how BACT determinations are made. It would be useful to help the board understand some of the inner workings of how permit processing is done and how staff addressed the three-hundred-some commenters that participated. He said there was very, very good, extensive public involvement, which was very gratifying.

Monk suggested that, if there is no time-sensitive nature to this, the informational item should be pushed to December instead of trying to do it in November. He also asked that staff share the permit with board members and that those board members who wish to ask questions can do so. Then, when the item is presented at a meeting, board members could flag some specific issues that some of them would like to have addressed. Hough said staff is in the process of posting the permit on the agency's website, including the response to comments document. He said it is much more instructive to look at them together, because the response to comments highlights where changes were made to the final permit. Hough said he will send out an e-mail to the board with links to both of those documents, when they are posted. Hough asked Lopez when those documents might be available to send to interested board members as a pdf file, and she responded that they would be available in a day or two.

Ortiz asked if Hough thought Seneca got the permit they wanted, and Lopez said she would say no, they did not. Hough said there were enough changes made to the draft that it is certainly a possibility that Seneca might appeal the permit. Staff will know if it is to be appealed by October 29. Lopez said staff does not anticipate an appeal, but Seneca is looking at the permit now.

Ortiz said her understanding was that Seneca is the only one that can appeal the permit to LRAPA; and Lopez said, according to LRAPA's rules that is the case. Ortiz said no outside entity can appeal the permit to LRAPA, and Carpenter said that is accurate. Others would need to make their appeals to the circuit court, and the LRAPA board would not be a decision-maker in that. Ortiz said she just wanted to clarify that. She said she does not mind waiting a while to have the information presented to the board; but, even though the board cannot change the outcome of the permit issuance process, she thinks it is important for the board to discuss the process and the resultant permit, and she wants to make sure it does not get dropped.

- C. Air & Waste Management Association (AWMA). Hough said he wanted to bring to the board's attention the fact that he has been asked to be on the ballot for President-Elect of AWMA. He said he was asked to do this three years ago, because that is the cycle for the government sector within the organization. He was new as LRAPA director at the time, and the agency had a full plate of things to try to catch up on, and he declined the invitation at that time. Hough said it is quite an honor to be asked, and he did not want to make a quick decision about it without talking to the board first, so that they would know it is something he is currently pondering. He said he needed to let AWMA know, one way or the other, by the end of October.

Hough said AWMA is probably the largest organization of its type. It is international, and there are several thousand members. It is considered a neutral forum involving not just regulators, but also the regulated community, consulting community, and academics. It used to be called the Air Pollution Control Association but was redesignated in the early 90s because a lot of members were also involved in hazardous waste management and air toxics issues.

If he were elected, Hough said, it would be a three-year commitment (president-elect, president, and immediate past-president), with the second year being the biggest issue because it can take up a third of

the president's time because of travel to section and chapter activities, and representing the association at various sites.

Kirkpatrick asked Hough how he would propose to do that in addition to all the work of directing LRAPA. Hough said the big year would be 2012, which means that there is time to plan. Hough said if he were to place his name on the ballot, and then be elected, there would be time for a number of options he has thought about but not yet spoken about with the individuals who would be involved. He said he also has some unpredictable family issues in the next few years, which figure into his decision.

Ortiz said she supports Hough in putting his hat into the ring, and she thinks that kind of involvement is always good and that Hough is obviously seen in the field as being a good person to serve in this capacity. She said she has a concern about 2012 and acknowledged Hough's statement that he has a plan for handling the workload; however, she asked who would be expected to pay for all the travel involved. Hough said AWMA would cover some of the travel, and any sections or chapters which request the president to speak at a event would pay that travel expense. He said there is an expectation that members arrange to meet their own travel costs to attend the annual meeting, which he has done when he has attended those meetings. If he were elected, there would be an expectation that he would commit to attending the annual meetings during those three years.

Ortiz asked if Hough would go to half-time as LRAPA director if he were to be elected to this office, and have someone else work for him half-time. She said she does not want to deter him from doing this but does not feel that the agency should cover the costs of his participation.

Hough said he could only work a 40-hour week during that period of time, and it would take away his flexibility. If he could not work 40 hours, he would expect to get paid for the portion of a 40-hour week that he was able to work, and make some kind of arrangements for some kind of help, or at least an unfilled gap to save money.

Monk said it is an honor to be asked to serve as president of such an organization; however, he does not think that it would be a good thing for LRAPA, for Hough to do that. Monk said there is a lot of work that has been identified, just in terms of Hough's management of the agency and personnel; and he thinks that suggests that Hough should be here doing that job, rather than participating at a high level in AWMA. Monk said it is clearly Hough's decision whether or not to accept the nomination; however, he would suggest that Hough not accept it because of the time commitment and his focus being elsewhere a good deal of the time. He said he just does not think it is good for LRAPA for the director to be participating at that level.

Johnson said he agreed with Monk. In the event that Hough were elected, and were to delegate some of his duties and responsibilities, he wondered how that would work. He said that since the board hires the director and directs his work, and the director is accountable to the board, having Hough delegate some of his duties to someone else seems like a bit of a disconnect.

Hough said if he accepts the nomination, and if he is elected, he would put together a detailed plan for 2012 and would expect to outline his proposal to the board for their approval.

Forge said he would think this would be an opportunity for a lot of knowledge and information that would be brought back to the agency, and he was curious as to how long Hough planned to keep working. Hough said he does not plan to retire for eight more years. Hough said there are benefits to

servicing as president of AWMA, such as the prestige and honor, both to him and to the agency. There is the opportunity for more influence and the opportunity of the learning experience, the networking and connections for the future; however, fulfillment of the responsibility requires a lot of work and time.

Carpenter said that was the comment he was planning to make. This isn't a one-way street where everybody just gets Hough's expertise. Hough also would get a lot of expertise with communications and contacts with other people, in person. Another point is that, with cell phones, e-mail and other communications what they are today, Hough would never really be out of contact with the agency. Carpenter also pointed out that Hough earns vacation time each year. Hough agreed, stating that he has been accruing more vacation time than he has been taking. Carpenter added that people do go on vacation, and the doors don't get locked and everybody else goes home during that time. He said he envisions this as a series of a week a month, or even three days a month, that Hough might be out of the office; however, just being out of the office does not mean that you're not doing the job. Carpenter told Hough he should evaluate it from his own perspective and make the choice he wants. He said he appreciated Hough's thinking about bringing the board a strategy plan of how it might work, in the event that he is elected.

- D. Complaints. Kirkpatrick referred to page 1 of the director's report, stating that she noticed that almost every month there are odor complaints around Rexius. Lane Forest Products is in the same business, but she never notices that facility on the list for odor complaints. She asked if Rexius has a lot of close neighbors and Lane Forest Products does not, or if Lane Forest Products just does a better job than Rexius does. Hough said Rexius is closer to neighbors, and there is more potential for land use conflicts where Rexius is located. He said Rexius has been in its location since the 1940s, and that they have explored relocating further outside of town but have encountered problems with that. Hough said DEQ permits composting facilities, statewide, and they consider what Rexius does to be exemplary in composting operations. However, because of those land use conflicts, LRAPA does get more odor complaints for them, and it means that LRAPA gives them more attention, to make sure they're doing everything possible, at all times.
  
- E. Air Quality Index Chart. Ralston said he was in the Tumblebug wildfire for twelve out of fifteen days while he was bow hunting. He was forcibly evacuated twice due to the smoke. He said he knew how much smoke there was up there, and yet he did not see much indication on the Air Quality Index chart for Oakridge that there was smoke in the area. He said he would have expected to see high levels from mid-September on, and for the levels to far exceed the standard.

Fortune said Oakridge did not get inundated with smoke until the wind started blowing from the southeast. Prior to that point, all the smoke was carried over to the northeast, toward where Ralston was hunting. Fortune commented, further, that when the east winds came up, Eugene got covered with smoke from that fire, as well. There were two or three days when the wind blew the smoke into Oakridge and, when the winds changed direction, it was carried out of town.

Ralston said in January and February there were a number of high days. He said it would be good to have an explanation in the report of an event that triggers levels that rise like that, rather than seeing the high levels and just assuming that someone is burning a lot of wood. He said he would like an explanation of what causes the spikes, to gain a better perspective of how serious the problem is in Oakridge. Hough said that when LRAPA's data gets reported into the state and federal data systems, those events do get flagged as exceptional events, due to wildfire impacts or whatever the cause. Hough explained further that the data in the graphs are kept as current as possible, resulting in the graphs having

more current information than what is in the text of the director's report. The text will catch up with the graphic information at the next report.

- F. Enforcement. Monk pointed out that Mr. Burk in Eugene violated the rules and was assessed a civil penalty. There was no response from Mr. Burk, and then he did the same thing two months later. He asked if putting a lien on the property is the extent of the action the agency can take in this kind of situation. Hough said he did not recall the specific details of this case; however, filing a lien on the property would be the agency's standard process.
- G. Cascade Sierra Solutions. Monk said the board has talked a number of times about the fact that LRAPA helped finance the startup of Cascade Sierra Solutions (CSS). Monk said his recollection was that the consensus of the board was that LRAPA be reimbursed for those costs. He said he has asked for an accounting of that and has never seen it. Monk said staff promised during the budget process in '08 to produce that accounting before '09. He said it is his understanding that there has been some trading going back and forth between LRAPA and CSS, and he does not believe that is staff's decision to make, given that the board clearly wanted the agency to be reimbursed.

MOTION: Monk MOVED to direct staff, by the end of 2009, to put together an accounting of the contribution that LRAPA made to starting CSS, and the manner in which that money is being reimbursed. Ortiz SECONDED the MOTION.

Discussion of Motion. Hough said his recollection of the details of that are different, as far as consensus level or promises made to the board. He said staff has had this on its list of things to do, but it has been a very low priority because of other things the board has requested which have taken higher priority. Hough said the money that was expended in those years was within the budget, and the amount was small compared to what other participating air agencies have contributed to get CSS started. Hough said it is very time-consuming to go through and separate out precisely how much of it is CSS-related, vs. how much of it is generally Everybody Wins, the next phase, preparing for that phase, and deciding whether it stayed internal or went external. In addition, many of the dollars expended were eligible for tax credit reimbursement, and LRAPA has already been reimbursed through the BETC program. Hough said the dollar amount to pay for a showcase and headquarters in Coburg are extremely small--in the \$20,000 to \$50,000 range. In contrast, the Sacramento air agency contributed \$200,000 to get a center started in the Sacramento area. He said that, even though CSS has been remarkably successful in getting resources, they are in a tight month-to-month cashflow situation, because CSS is a startup business. Hough said he knows that because, as a CSS board member, he participates in their monthly board meetings. He acknowledged that it has been a long time since Monk requested the information; however, staff has had projects in response to board interest on a variety of subjects, and they have considered those more pressing, and have worked to get the board good answers on those issues, rather than spending the time on the CSS issue.

Mirhosseyeni said the majority of the direct costs paid by LRAPA have been reimbursed to the agency. For instance, when CSS purchased the trailer which they used in Coburg, that amount was reimbursed directly to LRAPA. The only expenses which are in question are those that we considered joint operations, such as when Banks traveled to receive an award which was jointly given to LRAPA and CSS. The majority of the direct expenses were reimbursed to LRAPA, and that information is available.

Johnson said an accounting of all the director and indirect expenses is exactly what he wants to see. He said that his recollection is that when Banks came to the board asking for board concurrence in

participating in the startup of CSS, concurrence was given on the condition that all expenses be fully reimbursed to LRAPA. Staff agreed, at the time, that all of those expenses would be reimbursed, and that has not occurred. Johnson also disagreed with Hough about LRAPA being just one of many players, because at the time this was being developed, it was Banks's enterprise that she was creating, from her position as the accountant at this agency. He said LRAPA's connection to the CSS enterprise is quite unique, and it is important that the board see a full accounting of how LRAPA's support for developing that enterprise has come back.

Monk also brought up time that was billed to Harrang/Long during the development of CSS, as well as CSS website development costs. He said to a multi-million-dollar budget such as Sacramento, the cost is small; however, to an agency the size of LRAPA, it is tens of thousands of dollars of public funds that the board wants to see accounted for.

Hough explained that the legal advice sought from Harrang/Long was when LRAPA was trying to determine whether to form a separate non-profit under LRAPA or to send it off as its own separate non-profit. That is where it becomes difficult to separate costs, to determine how much of the expense is for a decision that LRAPA needed to have in order to make a wise choice on the matter, and how much of that was foundational as a CSS-related cost. He added that all of those things were done within the budget of the Everybody Wins program.

VOTE ON MOTION: The MOTION PASSED, by a vote of 7 (Forge/Johnson/Kirkpatrick/Monk/Ortiz/Ralston/Stewart) IN FAVOR AND 2 (Carpenter/Fortune) OPPOSED.

6. ADVISORY COMMITTEE:

Title 44. Committee Chair Koenig reported that at their last meeting, the committee continued its review of the area source NESHAP rules in Title 44, focusing on underground tanks at gasoline dispensing facilities. He said Hough estimated that perhaps 20 percent of those tanks do not yet have functioning Stage I vapor recovery equipment to reduce fugitive emissions while the tanker truck is filling the tank. For Stage II, recovery of emissions from the pump to the vehicle, Hough had informed the committee that the newer vehicles have on-board equipment to recover those emissions; and in time that will be a minor consideration. The committee will continue its review of Title 44 and make a recommendation to the board at the next meeting.

Fortune referred to the notes from the last committee meeting, and a statement from one of the members that the federal government required upgrades on all tanks in Oregon between 1988 and 1998. He asked why, ten years later, they aren't all upgraded. Hough responded that, during the decade between 1988 and 1998, the federal emphasis, nationwide, was on protecting groundwater and soil contamination around tanks. The tanks were upgraded at that time for things like preventing overfilling, for corrosion protection. While those upgrades were taking place, many people anticipated the potential for a national requirement for Stage I vapor recovery, and so most tanks have those fittings in place. Those upgrades were eligible for a pollution control tax credit.

Monk said he served on the advisory committee for DEQ when they developed the state's gasoline dispensing facilities rules. He said DEQ's first proposal had 20,000 gallons as the minimum throughput on affected facilities; however, after talking with industry representatives, DEQ came back with a 40,000 gallon minimum throughput. Monk suggested that the committee look at the tanks which have not been upgraded, to

determine if they are just the smaller tanks. He said it doesn't cost anyone any money to use the equipment, and it seems to him that any facility that has upgraded tanks should be using that equipment, no matter what the size of the tank. Monk added that, as the rule is revised, it would be good to bring that into the discussion, just to see what the situation is with underground fuel tanks in this area.

Koenig asked Hough if there is an ongoing survey of tanks being done. Lopez said staff has surveyed a lot of them. There are some larger tanks that don't have the balance system installed, and a lot of smaller ones without the submerge/fill equipment. She added that some facilities are starting to remove the gasoline and not use the tanks for storage any more. Lopez also indicated that the new requirements may be an issue at some above-ground storage tank facilities.

Title 15. The committee started its review of Title 15, enforcement rules, for obsolete language and other considerations and will get its recommendations to the board when that review is complete. Koenig said the committee has discussed the possibility of charging interest for late payment of civil penalties and is considering the percentage that might be appropriate for that. Consensus at the last meeting was that a 20 percent late fee would encourage people to pay those penalties quickly. Hough added that the continuing work the committee is doing on Title 15 at its next meetings concerns a list of changes which have been suggested by the board. The committee will bring to the board any recommendations on those possible changes. That work is separate from the civil penalty matrix changes which are on the board's November agenda for public hearing.

Air Monitoring. Ralston noted that Maurie Denner had asked, during the committee's round-table discussion, if wildfire smoke monitored in Oakridge would be "zeroed out" of yearly results, and those dates could be flagged as "extraordinary events." Ralston said that was what he was talking about earlier in the meeting.

7. EXECUTIVE SESSION: The board then went into executive session, under ORS 162.660(2)(f) consideration, of records that are exempt by law from public inspection. At 3:22 p.m., the open session reconvened.

MOTION: Monk MOVED to direct staff to develop a description of Airmetrics, along the lines that legal counsel suggested in number 2 in her memo, so that the Ethics Commission would have a reasonably accurate representation of how staff that are involved in Airmetrics are overseen, and so that Monk's questions about the positions that Jerry Boyum holds are well illustrated. The essence of the question is: is it ethical for Boyum to be in those multiple positions?

Carpenter reworded the motion: to direct staff to develop the factual material and have it reviewed by counsel, then seek an ethics opinion from the Oregon Ethics Commission, on the employment and procurement practice, as to the Airmetrics operation.

Brotherton said she would need specificity as to whether the request would be for a formal or informal review by the Ethics Commission. Monk said it should be formal.

Monk then added to his motion that the board have the opportunity to review the document prior to its being submitted to the Ethics Commission. He said the board would not alter the document, but would review it prior to its submittal. The purpose of the board's review was so that he could be sure, as the principal party to this, that he is satisfied that the right question is being asked.

Brotherton then rephrased the motion for clarification:

RESTATED MOTION: Monk MOVED to direct staff to draft a memorandum, in accordance with the description in Brotherton's legal opinion, to the board, for submission seeking a formal ethics opinion, from the Oregon Ethics Commission, that is reviewed by the board prior to submission. Monk said that was accurate. Forge SECONDED THE MOTION.

VOTE ON MOTION: THE MOTION PASSED BY A VOTE ON 7 TO 0, WITH TWO MEMBERS (Kirkpatrick/Stewart) NOT PRESENT AT THE TIME OF THE VOTE.

8. TITLE 15, ENFORCEMENT RULES, PROPOSED AMENDMENTS (CIVIL PENALTY MATRICES)–BOARD QUESTIONS PRIOR TO NOVEMBER PUBLIC HEARING: Carpenter stated that board members were to have reviewed the draft rule amendments and bring any questions they may have to this meeting for discussion. Carpenter said there would be a motion to recommend the proposed rules out for public hearing.

MOTION: Monk MOVED to recommend the rules out for public hearing. Ortiz SECONDED THE MOTION.

Discussion of Motion. Carpenter had some questions regarding the draft proposal. The first was on page 25.31 where it appeared that all violations of Hazardous Air Pollutants were removed, and he did not see that it was put back elsewhere in the rule. He asked how those violations were to be addressed in the new proposed rules. There was some confusion because the draft rule was not provided in this agenda packet for this month and staff did not have copies of the draft. Tom Freeman, who wrote the proposed amendments, left to get a copy.

Carpenter asked why "Hazardous Waste" is not defined in the rule. Hough responded that many of the definitions for LRAPA's rules are contained in Title 12, Definitions, and that might be where that definition is located. Carpenter said he had not checked Title 12, but he thinks there should be a definition.

Carpenter said he had noted some redundant language between two different classifications on penalties. He also noted that in one of the matrices there was a violation for burning 15 tires or more which included an exemption if it was being done by a residential owner/occupant. He said he did not see how it should matter who is doing the burning. If someone is burning 15 or tires more, anywhere, that should be a violation. Lopez explained that the matrix Carpenter was looking at provides a higher base penalty amount and is intended for use with violations by large industrial sources. There is another matrix which provides a lower base penalty for the same offense by a residential owner/occupant.

Carpenter said the rule is not clear, as written, and he wanted to see it changed unless LRAPA is bound by state statute to adopt the state's rules, verbatim. Brotherton said LRAPA is bound by statute to adopt the civil penalty matrix just as EQC adopted it. Carpenter said he wanted someone to confirm that what was in the LRAPA rule draft is actually in the state's rules.

Given the problems pointed out with the draft rule, Monk RESCINDED HIS MOTION. Ortiz RESCINDED HER SECOND. Staff pointed out that the board had, at its September meeting, voted to authorize public hearing on these amendments. It had already been advertised and is on the November 10 meeting agenda. The purpose of having it on this agenda was so that board members could ask questions prior to the hearing.

Hough said staff would contact DEQ and find out, even if LRAPA is locked into the same wording, why the state rule is worded the way it is. Staff will also check for the redundancies pointed out by Carpenter. If necessary, a revised version of the draft will be available for the November meeting.

9. LEGAL FRAMEWORK FOR LOCAL GOVERNMENTS, PART 2 OF 3: Brotherton spoke of the distinctions between quasi-judicial and administrative actions that would typically come before the board. Administrative, or legislative, matters are such things as policy direction to staff or amending rules to address things that the board does not think are addressed in the rules. Because of the nature of what LRAPA is, the agency does not have discretion to adopt something different from the state's rules, in some instances. She said the civil penalty matrices are a good example of that. LRAPA is bound by statute to have those matrices in place and also bound to have exactly the same matrices as the state has adopted.

The other role of the board is quasi-judicial, meaning when the board sits as the "judge" for hearings on appeal of enforcement actions. The respondent appeals the action to a hearing official and, if the opinion of the official is not satisfactory to the respondent, they appeal that decision to the board. The board's role in a contested case hearing is to affirm or modify the hearings official's opinion, and that decision must be based on the record that was created at the hearing before the hearings official. Brotherton said the two most important requirements for serving in that quasi-judicial role is that board members must declare ex-parte contacts and also declare biasness.

LRAPA's rules for declaration of ex-parte contacts are very clear. If a respondent appeals an enforcement action to a hearing official, and the hearings official conducts a hearing, the hearing is recorded, and there is a transcript of the recording. There are exhibits and evidence put into the record of that hearing. If the respondent then appeals the hearings official's decision to the board, the board's deliberations and decision must be bound by the confines of that record. If the respondent contacts a board member to tell you about it, from their side, and explain how they feel they were wronged, that is an ex-parte contact, or a contact outside the record. Two things must be addressed following such contacts. First, the decision-making of the board, based on LRAPA's rules, has to be based on the record of the appeal, and now you have an ex-parte contact outside the confines of the appeals process. Ex-parte contact does not, in itself, disqualify the person from participating. The person needs to publicly announce what the ex-parte contact was, describe it, and state whether or not it has impaired your ability to act impartially. If you are impaired from acting impartially, you must abstain from any vote on the matter. You may still participate if you disclose the contact and give the other party a chance to rebut the information you received through the ex-parte contact. Brotherton said this is why legal counsel advises public officials that is in their best interests to limit ex-parte comments they receive. It does not automatically prohibit you from acting in the matter, but it does put the onus on you, during that quasi-judicial proceeding, to get the ex-parte contacts out there, describe them, and give the other party an opportunity to rebut. Brotherton stressed that, when the board makes a decision on an appeal of a hearings official's decision, the decision needs to be based on the record of that hearing before the hearings official. If individual board members received new information, that information would need to be provided to all board members and to the other party. Ralston added that if you have ex-parte contact and don't announce it, and the injured party finds out about the contact, he can appeal the board's decision and have it overturned by someone else.

Johnson said in the time he's been on this board, the board has had one quasi-judicial proceeding. He said he has been struggling with the fact that the board has been warned repeatedly not to talk about permitting or about monitoring of this particular facility, because you might have to act in a quasi-judicial role if the facility appeals the permit. Johnson said that seems to get in the way of the board's conversations, publicly,

about what is the policy of this agency, with regard to how the staff uses its discretion in processing permits. Johnson said it is his understanding that staff has a lot of discretion when reviewing applications and it is technical and sometimes called “engineering judgement.” If the public were to appeal the permit, the public would go to the court, and the court would apply the principles of deference, generally, and defer to the agency’s use its discretion. Johnson said putting too much emphasis on caution regarding the board’s possible quasi-judicial role limits the board’s policy-setting activities and capabilities. He asked Brotherton to comment on that.

Brotherton repeated that the board has two roles. If you’re talking, generally, about the type of discretion used for permits, that’s policy, or administrative. If you were talking about the permit to a specific facility, and that permit were potentially appealed to the board, that is where there is potential for someone to declare bias or ex-parte contact. So it is in the board’s discussions of the permit for a specific facility that the board heard cautions from legal counsel. If the board is just talking generally about permitting, there are not the same concerns, unless it is so obviously a ruse that the permittee’s attorney points it out. Brotherton said the board can have policy discussions but just cannot focus on a specific permit that has the ability to cause problems for the agency.

Johnson said such discussions might lead to a situation where a board member would have to declare information, and other board members could say they don’t want the board member to participate because of perceived bias. Brotherton said biasness is one consideration, but the ex-parte contacts would be the bigger problem. She used an example of someone providing documents to a board member, and the board member would need to announce that the documents had been received. The documents would need to be made public, and the other party would need to be given the chance to rebut. Johnson said if the board were discussing policy and said, for instance, that a particular facility has this, this, and this, and then the board later gets into the quasi-judicial role with that facility, the board members would announce that they had previously made those remarks. Brotherton said that would not be ex-parte but would lead to potential bias. She said ex-parte is information that is brought to you, or conversations that you’ve had, or information that you went out and sought. If a board member gathered information outside the record, that person would need to announce that they wanted to do some research and figure out x, y and z, and make public all the information they had gathered.

Brotherton said if a board member is sitting in a quasi-judicial capacity, they would have to make a declaration of biasness if they had one, and they could not participate. Bias, by its nature, means that you are not going to be impartial. With legislative, or administrative, actions, there is typically an expectation—especially with an elected official—that there will be some biasness. They were elected to office to make decisions in a particular way. With quasi-judicial actions, biasness can be accused, and cautions from legal counsel are an attempt to help understand how things could be perceived and the accusations that could be made. People do not usually declare a bias as is done with ex-parte contacts. Bias usually is brought out by someone who says they heard the person say something, or they read something from the person that leads them to believe the person is biased.

Monk asked, if a board member were accused of bias, what would be the process by which that determination is made. Brotherton said it would be the board member, personally. If someone were to accuse a board member of bias regarding x, y and z, and the board member said there is no bias and that they will participate, the person could appeal the decision.

Brotherton then spoke briefly about conflicts of interest. She said the definition of conflict of interest exists whether it is legislative or quasi-judicial, and there are two types—actual and potential. Actual conflict of interest is that the decision you are making or recommending would have a financial (pecuniary) benefit or detriment to you, your family or your business. Potential is that it could have that effect. If an actual conflict of interest exists, the person would declare it publicly and would not participate in the discussion. Just abstaining from a vote is not enough. If a potential conflict of interest exists, the person would declare it, but they could still participate. Brotherton said there are exceptions to the conflict of interest rule, such as if you have an actual conflict of interest but your vote is needed in order to have a vote by the board. In that case, the person may not participate in the discussion but may cast a vote. Another exception is called the class exception, where if you were voting to impose a tax which would be to your financial detriment, but it is to everyone's financial detriment, you could vote. Brotherton stressed that declarations of conflict of interest must be made every time the situation comes up, and it must be in the record. If you make a declaration, and then the same thing comes up a few months later, you cannot just sit there while the discussion is going on. You must declare it again.

10. NEW BUSINESS:

- A. Air Toxics Monitoring. Monk quoted from the previous month's minutes, where Hough said that EPA guidance is very prescriptive regarding how monitoring sites are sited. This was in the context of monitoring for carbon monoxide. Monk quoted again, "that is very different from trying to assess community risks, 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." He said the science is not there to do that, and we cannot understand the impacts on anybody from this mixture of multiple constituents. Monk suggested that the board have a discussion about what the agency is trying to accomplish with the funding that is being spend for air toxics monitoring. He said LRAPA should be trying to determine whether, in fact, there are populations that are at risk, and the testing would demonstrate that they are being exposed at levels which federal standards say are unsafe. Then the question would be, what can LRAPA do about it.

Hough explained that what he was describing in that conversation was the contrast with hot-spot, roadway monitoring where you are looking for a specific pollutant. Monk said that is what he thinks LRAPA should be doing with air toxics monitoring. Hough responded that, when you're looking at an air toxics monitoring site, you're looking at many analytes. He said the discussion last month was intended to try to put roadway, hot-spot, pollutant-specific monitoring into perspective with area-wide air toxics monitoring where you're looking at overlap of mobile sources, area sources, and industrial sources and also looking at a lot of different analytes. He said the object is to try to find an area that is a relatively high-risk area, because if you only have resources for a single monitor, or for two monitors, in an area, you need to be sure you get something that is closer to the highest-risk area as opposed to roadside monitoring for a particular pollutant at a specific location.

Monk said he would argue that the Amazon site is not the highest risk area, and Hough said that is why the board is having this conversation—to try to locate a second monitor. Hough said there is good rationale for why the current air toxics monitor is located at Amazon. There is an opportunity to have a second location, for comparison, and staff wants to be sure that they can be reasonably confident that it is in an area that has that overlapping combination of different categories of air pollution emissions..

Johnson said the missing piece in this discussion is an inventory of toxics, an assessment of what is out there. He said the argument is about where to locate a monitor when the agency doesn't even have a profile of where the sources of potential toxic emissions are.

- B. Seneca Sustainable Energy Permit. Johnson said he wanted staff to provide the board with a rundown of the recently issued permit, specifically of how engineering judgement and staff discretion is applied during the permitting process and how that relates to the board's policy-setting function, so that the board knows where it can set pollution control policies for Lane County. Carpenter asked Johnson what kind of permits he was talking about, and Johnson said he was talking about construction permits, primarily, and Title V permits.

Johnson said construction permitting is where the control requirements and the applicable requirements are established, and then operating permits, the monitoring and record-keeping requirements are established, or can be created. In both of those situations, staff applies discretion in determining what monitoring frequency, and in determining what is the appropriate cost of control threshold, where they say this is too costly for this control, or this control is cost/effective. Johnson said he wants staff to get everyone on the same page so that board members will know how policy discussion can go so that the board can inform staff if they want to make cutoffs at particular levels. He said the public comes to board members and says LRAPA is not being stringent enough, and Hough tells the board he has no discretion and has to follow the rules. Johnson wants to know where staff has discretion and where it does not and how the board can set policy so that everyone is on the same page when the public comes to board members and complains that LRAPA is not being stringent enough or is being too stringent.

Hough suggested that staff distribute the response to comments document for the Seneca permit, which contains some very good examples of how staff works through things like BACT analysis and other issues. That could be on the December agenda, as was discussed earlier. In preparation for that, if board members have specific questions, staff can try to answer those as part of the information item regarding the Seneca permit, at the December meeting. Hough said he didn't see any reason to wait until December and, in the meantime, he encouraged board members to go through the response to comments document. He said it illustrates how the agency uses its "discretion" through a systematic process of how those decisions are made, and that will become clearer to board members as they look at those responses.

11. ADJOURNMENT: The meeting adjourned at 3:30 p.m. The next regular meeting is scheduled for Tuesday, November 10, 2009, 12:15 p.m. in the meeting room at the LRAPA offices, 1010 Main Street, Springfield, Oregon.

Respectfully submitted,

**Merrie Dinteman**  
Recording Secretary