

Executive Order No. 4
Sustainability and Green Procurement Advisory Council

Meeting Minutes

NYS Department of Environmental Conservation
625 Broadway, Albany NY
Room 129A
May 19, 2009
10:00 a.m. – 1:00 p.m.

Participating: Walter Simpson, Chair; Roger Cook; Karen Miller; Eileen Millett, Anne Rabe; Steve Rosario, Patricia Wood. Absent: Scot Case (proxy provided to the Chair); William Davies; Tyler Elm; Roshan Jachuck. Also attending were alternates for Karen Miller and Steve Rosario, respectively: Laura Weinberg and William Wolfram; designees of the Interagency Committee on Sustainability and Green Procurement Co-chairs, Office of General Services (OGS) Commissioner John Egan and Department of Environmental Conservation (DEC) Commissioner Pete Grannis, respectively: Howard Zwickel and Beth Meer; Reporting Subcommittee Chair Debbie Jackson from DEC; Training Subcommittee Chair Kathy Macri from the Environmental Facilities Corporation (EFC); Sustainability Subcommittee Chair Jodi Smits-Anderson from the Dormitory Authority of the State of New York (DASNY); and other representatives from OGS and DEC.

Welcome and Adoption of Minutes

The meeting began with a welcome from Chair Walter Simpson. The minutes from the January 30, 2009 meeting of the Council were approved with minor edits.

An update on Executive Order Number 4 (EO 4) activities was provided by Jaime Roth, from OGS, for the Procurement Subcommittee; Kathy Macri for the Training Subcommittee; Debbie Jackson for the Reporting Subcommittee; and Beth Meer for the Sustainability Subcommittee. Anne Rabe requested a list of green specifications under development and their status – eg. finalized by the Interagency Committee, tentatively adopted by the Committee, and pending. Jaime agreed to provide such a list to the Advisory Council.

Update on EO 4 Activities

Highlights from the updates include (updated to the end of May, 2009):

- Nineteen green specifications have received final approval from the Interagency Committee; one has received tentative approval; and 16 are still pending, including 12 specs that are close to being finalized by the Procurement Subcommittee for review by the Interagency Committee and four that may be put off until next year.
- The Training and Reporting Subcommittees provided a webcast for 50-60 agency staff on reporting and waste audits in March 2009, and two separate presentations on EO 4 were made to approximately 400 attendees of the OGS Procurement Forum in May 2009.

- OGS has done an “outstanding job” translating the Reporting Subcommittee’s reporting form into a flexible and user friendly on-line reporting system; the Subcommittee’s recommendations for a solid waste reduction goal of 10% per year per agency and a paper use reduction goal of 10% per year per agency were adopted by the Interagency Committee in May 2009 and have been posted on OGS’ EO 4 website.
- A website exclusively for the use of Sustainability Coordinators has been established by OGS, and sustainability plans are being shared on the site; a weekly bulletin with sustainability tips is being sent by the Sustainability Subcommittee to all coordinators; and DASNY has created a Guide to Green Meetings and posted it on the internal website.

Walter Simpson asked a question regarding enforcement of agency progress on the development of sustainability plans, green procurement and reporting. Debbie Jackson and Kathy Macri responded that the emphasis will be on training, tracking progress, and offering assistance to any agency that appears to be struggling. Eileen Millett commented that friendly competition is a useful human trait to harness, and that ways of fostering it should be explored, such as interim reporting and publications highlighting progress. It was suggested that perhaps the Advisory Council could consider providing Annual Awards to exemplary agencies.

Approval of Guidelines for the Drafting and Adoption of Recommendations

The draft guidelines developed at January’s meeting were discussed. The majority was corrected to number six members, and it was clarified that a majority of the *whole*, not a quorum, will carry a vote. The use of proxies was discussed at some length. Steve Rosario and Eileen Millet expressed concern that members should be present in person as much as possible or send a live representative who can participate in Council discussions and then, if necessary, vote. Others, including Anne Rabe and Patti Wood, expressed their agreement with such a concern but also thought that the ability to vote by paper proxy was important if a member simply could not participate in a meeting. Steve also stated that members should be able to designate more than one person as a proxy for different meetings.

By consensus, the Council resolved to accept both paper and live proxies, but no more than twice a year, and clarified that proxies will not count towards a quorum. The designation of more than one individual as a proxy for different meetings was also accepted, and the guidelines edited accordingly.

Open Meetings

Steve Rosario sent an email prior to the meeting requesting that meetings be open to the public. The Council discussed the issue. Howard Zwickel, General Counsel for OGS as well as Commissioner Egan’s designee to the EO 4 Interagency Committee, presented his legal analysis that the open meetings law does not apply to advisory councils created by executive order, so that the Council is free to decide if their meetings will be open or closed. Walter Simpson expressed his belief that the meetings should be open to the public, and all concurred. Walter asked that a discussion of the nuances of public attendance be deferred until the next meeting, when issues such as the acceptance of comments from the audience, or directing questions to the audience, could be addressed and resolved. He offered to provide a draft of guidelines for open meetings to the Council for review prior to the next meeting. In the interim, the Council decided that the next meeting of the Council would be open to the public but that visitors in attendance would only be able to witness the meeting and not participate.

Review of Criteria for the Selection of Priority Products

The Council discussed a new draft of the criteria for selection of priority categories of commodities, services and technology and individual commodities, services and technology within categories. The

criteria were redrafted by agency staff in response to comments received at the Council's January 2009 meeting. Anne Rabe expressed concern that the list of criteria as presented still fails to capture the overarching goal of environmental and public health protection established by the EO. Beth Meer from DEC offered to work with Anne to wordsmith the language to address Anne's concern.

Discussion of a Proposed Recommendation Regarding the Creation of a "Chemicals to Avoid" List

The bulk of the Council meeting was spent discussing a proposed recommendation regarding a "Chemicals to Avoid" list. The proposal was submitted to the Council by four members of the Council, Roger Cook, Karen Miller, Anne Rabe and Patti Wood. As drafted, the proposal recommends that the EO 4 Interagency Committee adopt a Priority Chemicals Avoidance list of approximately 94 substances including those found on two government lists (EPA's Waste Minimization Priority List and the National Toxicology Program's list of "known" and "reasonably anticipated to be" human carcinogens), plus polybrominated diphenylethers (PBDES), bisphenol A (BPA), and perfluorinated compounds.

The first issue addressed by the Council was the appropriateness of discussing a recommendation of this kind. Steve Rosario stated that if the goal of the discussion is to come to a consensus or vote, then he could not participate. He stated that the Council does not have the expertise to discuss or decide this issue. It is way too complex. He also stated that providing such a list is useless. Each list referenced in the recommendation was created for a different purpose and is not easily adopted to green procurement. He stated that if the Council wants to look at chemicals in products, the New York State Chemical Alliance is willing to discuss how to address them in categories of products, but not as part of a generic list of chemicals to avoid. He asked why flame retardants are included on the list since there is already a separate advisory committee working on flame retardants pursuant to a statutory mandate in the public health law.

Anne Rabe commented that Steve's refusal to discuss the issue because he is concerned that he will be outvoted is not constructive. She refused to agree to giving up the right to call a vote on this matter during this meeting.

William Wolfram, one of Steve Rosario's proxies, expressed a basic concern about the list. He holds a Ph.D. in Chemistry and has worked in the chemical industry for 30 years. He wondered whether the list would actually be useful to OGS. He stated that no one is arguing whether there are chemicals out there that are persistent bioaccumulative toxins and carcinogens. It is not the list that the chemical industry has issue with, but how it will be used.

Anne Rabe noted that Alicia Culver, a procurement expert and consultant from California, had created a spreadsheet identifying priority toxic chemicals found in specific products. She also stated that a more limited reference list of priority chemicals, such as the list of approximately 94 substances proposed, would be easier to work with than the entirety of all "toxic substances" currently referenced in the EO.

Jodi Smits-Anderson stated that the proposed list would raise awareness. It would help the public and potential vendors be aware of priority toxic substances identified by the Advisory Council and Interagency Committee. She stated that in her view, advancing a chemical to avoid list to serve that purpose was consistent with the role of the Advisory Council. It would focus public attention and help industry become more savvy about green products.

William Wolfram commented that all NICAD batteries, such as those used in the Toyota Prius, contain cadmium, a substance contained on the proposed list. Yet a hybrid car is considered green. Lithium iron batteries are extremely expensive and not a viable substitute for NICAD batteries at this time.

Karen Miller stated that EO 4 and the Advisory Council were created in order to incentivize and encourage the market to go green. Greater public awareness would further that goal.

Laura Weinberg, one of Karen Miller's proxies, commented that the whole green movement is evolving. The new Pollution Prevention Institute is looking for safer alternatives. In drafting the list, the proponents narrowed the scope to a list that was focused and solid, where experts have already weighed in.

Patti Wood stated that the issue of priority toxic chemicals is crucial to address if the Advisory Council is going to accomplish something important for the state. Children are the canaries in the coal mine today. Patti's organization, Grassroots Environmental Education, where she serves as Executive Director, is a science driven organization with many academics and published scientists on its board. Lots of good science points to the fact that we have to reduce chemicals in the environment.

Jodi Smits-Anderson commented that chemicals should at least be treated the same as cost – i.e. that information should be provided to agencies regarding the types of chemicals to avoid in purchasing. It is an encouragement not a mandate, and avoidance not a ban.

Steve Rosario responded that people employed by the chemical industry have children and grandchildren too, and that the chemical industry has one of the highest safety records of any industry. In his opinion, government is limited in its ability to move markets. For example, government has been trying to wean us off petroleum for some time, but a spike in price did more than all government efforts combined to achieve that end. After the federal government, the chemical industry spends the most on research and development. The industry hears what the market is saying and understands it better than government. Chemical products have been targeted because it is easy to scare people with complicated chemical names and the public is not well educated in math and science.

Steve stated that the arguments he is hearing now he has heard for many years, and that bringing children in makes it politically volatile. He asked, "What do 'safer' alternatives mean? Twenty-five percent safer? Fifty percent safer?" He acknowledged that there are certain chemicals we can agree on – yes they should be included on these lists. Others, the chemical industry will fight about. The industry has become a big bull's eye.

Anne Rabe noted that many big retailers, including Wal-Mart and Sears, have created chemicals to avoid lists that they share with their suppliers. Other jurisdictions, like the European Union, Washington State and Maine either have or are developing chemicals to avoid lists. She emphasized that the proponents of the draft recommendation moved from a list of over 1000 chemicals to the short list proposed today because it is more focused and easier to use. For each of these 94 or so chemicals, there is a huge weight of evidence that they are bad actors.

William Wolfram responded that there are only a couple of chemicals on the proposed list that the chemical industry has issues with. Some chemicals they disagree with. The industry is not questioning the validity of the list, only how it will be used.

Beth Meer responded that the list would be used as a broad reference list, and that more specific lists of chemicals to avoid in specific products, drawn in part from the list, would be created as part of the development of individual product specifications. Agencies would not be charged with having to figure out for themselves which chemicals are present in which products on a product by product basis. That would be too cumbersome. The list would serve both as an important policy statement and as a focused, useful tool for the development of individual product specs.

Carla Chiaro, Deputy Commissioner for Information Technology and Procurement Services with OGS, agreed with Beth's statement.

Howard Zwickel added to Beth's description by noting that the Interagency Committee often struggles with the issue of expertise, turning to DEC or DOH to find out about chemicals, for example. The deliberations associated with spec development are complex and take many issues into consideration, including the availability of green alternatives at a competitive cost.

Amy Shoch, Senior Vice President for Manufacturing, Environmental and Small Business Programs with Empire State Development (ESD), stated that ESD's job is market development. The Environmental Services Unit is interested in helping companies reduce chemical use and potential hazards throughout a product's life cycle, including chemicals used in the manufacturing process, chemicals contained in products, and chemicals released during disposal. She expressed a need for guidance on how agencies can best assess the wisest choice.

Roger Cook stated that the Western New York Council on Occupational Safety and Health (WNYCOSH), of which he is Executive Director, has received a pollution prevention grant from Amy Shoch's program to work with Niagara Falls and local school districts on procurement. Nellie Brown, a chemist on his staff working with the project, thinks that the proposed list of chemicals to avoid would provide a useful, practical guideline for training and education of procurement personnel. She wishes there was a list of potential endocrine disruptors that could be referenced.

Eileen Millet asked if the Interagency Committee would be bound by our recommendation. Howard Zwickel and Beth Meer answered "no."

Steve Rosario stated that innovation and entrepreneurship is about moving markets, and that the chemical industry listens to its customers. In terms of the proposed list, Steve commented that the National Toxicology Program lists and EPA's PBT list have been around for a long time, but things haven't changed because while a lot of chemicals are hazardous, exposure is different. He expressed concern that the list will not be helpful to OGS, that the list alone is not enough without fleshing it out more.

Walter Simpson called for a vote on the concept of whether the Advisory Council can and should recommend a list of chemicals to avoid (apart from specific language and which chemicals will be recommended for avoidance). Steve Rosario stated that he would have to object, that the chemical industry does not want to pick winners and losers. He commented that he likes his job, and his superiors would not support the creation of such a list. Eileen Millett stated that she supported the idea of recommending a list. Roger Cook, Karen Miller, Anne Rabe, Patti Wood and Walter Simpson also voted in the affirmative. The resolution, establishing conceptual support for the recommendation of a list of chemicals to avoid, was passed.

Walter Simpson asked "What are the problems and controversies associated with creating such a list?"

William Wolfram responded that one particular problem is polymers. Many are used frequently in our everyday lives. Polyethylene is a long carbon chain. One of the base chemicals used to create it is ethylene, which is dangerous, but polyethylene is not. Another example is polycarbonate eye glasses. Bisphenol A (BPA) is a major constituent in all polycarbonate lenses. Whether or not BPA, a monomer, should be listed as a priority chemical has sparked sharp debate. The European Union has not banned it, while California has. But was that ban political or based on science?

William went on to state that the chemical industry does not support the inclusion of BPA on this list of chemicals to avoid without a disclaimer. Listing BPA as a bad chemical, with no reference point

(acceptable concentration level) cannot be supported. There are applications for all the chemicals on the lists. Another example is polyvinyl chloride (PVC). PVC has many good end uses, for example PVC water pipes – no one is getting cancer from those. He stated that the list needs to be more specific in terms of limits and allowable concentrations.

Jodi Smits-Anderson stated that the U.S. Green Building Council decided that they could not ban PVC because they couldn't come up with safer alternatives. But they did say that where PVC can be avoided, especially in floor coverings and sidings, then a non-PVC alternative should be explored. She commented that we want people to be aware of where chemicals may be present in products so that they can make informed choices.

Steve Rosario stated that recommendations could be provided by the chemical industry on a lot of chemicals, but that on others, the industry can't comment because we don't know enough. Awareness is not everything. This list, if created, will be shopped around and mischaracterized as a ban. He urged the Council to be honest about how information is used.

Patti Wood suggested taking a vote on the NTP and PBT lists, and getting more specific about particular uses of the other three chemicals. For example, BPA could be listed as a hazard in sippy cups, cans and dental sealant, where the potential for human exposure is high, and less hazardous in building materials.

Steve responded that we don't have the expertise to pick and choose when BPA is good or bad. Chemicals on the NTP list that raise concerns include PVC and beryllium.

Anne Rabe stated that we have to trust our federal epidemiologists on the creation of these lists. The EPA PBT list, for example, was created for states to act. Anne stated that she would be happy to provide more information, but does not want to cherry pick chemicals off the list.

Walter Simpson called for a straw vote on the proposed recommendation regarding a Chemical Avoidance list, including the list of specific chemicals to avoid. Roger Cook, Karen Miller, Patti Wood and Anne Rabe voted in the affirmative. Steve Rosario stated that the issue was being rammed through without public review; that to spend one and one half hours discussing a complex subject is a sham; and that a full discussion had not been held. He then left the meeting without voting. Eileen Millett stated that she was not prepared to vote today. She expressed a desire to be more educated about the lists and what industry has done.

Walter stated that he would like to have further discussions with Eileen regarding her concerns, especially about how the list would be applied in practice, but that he also believed that a formal vote should be taken on the recommendation at today's meeting. He asked the Council to accept the straw vote as a formal vote on the concept and content of the recommendation, including the list of specific chemicals to avoid, but recommended that the Council be open to edits of language on the issue of how the list would be applied in the development of green specifications. Howard Zwickel from OGS stated that OGS staff had comments on the language of the recommendation and would like the opportunity to suggest edits. The Council agreed to consider edits to language that did not alter the substance of the recommendation. Walter then voted in the affirmative for himself and for Scot Case, who had designated Walter as his proxy prior to the meeting.

The Council accepted the straw vote as a formal vote on the concept and content of the recommendation, including the list of specific chemicals to avoid, with the understanding that edits that did not alter the substance of the recommendation would be considered. The recommendation was approved with Simpson, Case, Cook, Miller, Rabe, and Wood voting in the affirmative and Millett abstaining.

The Council agreed that after edits were made, a new draft of the recommendation would be distributed to the Council prior to the next Council meeting to see if any member wished to change his or her vote or vote for the first time if he or she had not already voted. In addition, any information or caveats submitted by Council members regarding the applicability of chemicals on the list to specific products would be forwarded to the Interagency Committee along with any dissenting opinions to the recommendation.