

INDEX

March 23, 2009

<u>Item #</u>	<u>Page #</u>
1. WP 0, IBI 2, Temporary OAR 629-041-0100.	1
** Work Plan 0, IBI 9, Executive Session [ORS 192.660(2)(h)	5
1. WP 0, IBI 2, Temporary OAR 629-041-0100 reconvened.....	5

Attachments below are available on the web @ <http://oregon.gov/ODF/Board>

1. Public Comments – Montero, Agenda Item 1
2. Public Comments – Jacoby, Agenda Item 1

OREGON STATE BOARD OF FORESTRY

March 23, 2009 Minutes

In accordance with the provisions of ORS 526.016, a meeting of the Oregon Board of Forestry was held via telephone conference call on March 23, 2009 at the State Forester's Headquarters, 2600 State Street, Salem, Oregon.

Chair Blackwell called the public meeting to order at 10:05 a.m.

Board Members Present:

John Blackwell, Chair Larry Giustina
Steve Wilson Jennifer Phillippi [joined at 10:40]
Bill Hutchison

Absent:

Peter Hayes
Cal Mukumoto

Others present:

Delfino Alys, C & H Contractors
Mike Dykzeul, Oregon Forest Industries Council
Robert Gardner, C & H. Reforesters, Inc.
Kevin Jacoby, Paul R. J. Connolly
Alice Montero, Sunrise
Deboah Miley, NWSA
Jeronimo Montero, Sunrise
Dillon Sanders, Inbound. LLC
L. Rocha, MQ Fran Co.
O. Toms, Toms Contracting
Jose, Rincon, North Reforestation
Michele Logan, Department of Justice
Bill Nessly, Department of Justice
Marvin Brown, State Forester
Gayle Birch, Board Support
Dan Postrel, Agency Affairs
Mary Schmelz, Agency Affairs
Paul Bell, Chief, Protection Div.
Travis Medema, Deputy Chief

Consent Agenda: The consent agenda was approved in one block, A through D.

1. ADMINISTRATIVE WORK PLAN 0, IBI 2 – GOVERNANCE

Temporary Amendment to OAR 629-041-0100

Paul Bell, Chief, Fire Protection Division began the staff's presentation, noting the purpose of the conference call meeting was to receive Board approval to temporarily amend OAR 629-041-0100, and to direct the State Forester to begin permanent rulemaking procedures to replace the temporary OAR with a similar permanent OAR.

Travis Medema, Deputy Chief, Fire Protection Division stated the adoption of the temporary OAR would assist the Department in its ability to procure fire fighting resources such as air tankers, helicopters and crews. The Department has numerous different authorities to contract resources: Department of Administrative Services (DAS) model rules; internal procurement rules; and, emergency procurements. When DAS

model rules are not used for procurements, and there is not an emergency procurement, the default program OAR are used. The Department recommends the Board adopt the Attorney General's model rules as the default rules, amending OAR 629-041-0100. Adoption of the model rules, would provide greater efficiencies and alignment with the Department of Justice personnel that assist in procurements. The model rules are more robust, and would provide a platform for procurements. The temporary amendment would apply to solicitations after February 1, 2009, and become effective upon filing with the Secretary of State.

Steve Wilson made a motion to adopt the temporary OAR and begin permanent rulemaking; the motion was seconded by Larry Giustina. Chair Blackwell called for Board member questions of staff.

Travis Medema responded to Mr. Giustina's question about contracting authority, stating that ORS 477 contracting authority was set into place 8 years ago, and were developed to deal with contracts and agreements with the Douglas, Coos and Walker Range Fire Protection Associations. The contracting authority under ORS 477 was not as robust as the Attorney General's model rules. The Department is seeking to adopt the model rules for other contracting outside of the work with the Associations.

Bill Nessly, DoJ addressed Chair Blackwell's question, stating that in 2005, the Department was under the supervisory contracting umbrella of DAS, which raised an ambiguity that was examined by legal counsel. It was determined that the Department could exercise its own authority. Adopting the temporary OAR that amended OAR 629-041-0100 would satisfy the requirement in ORS 477 that contracts must be negotiated in accordance with procedures specified by rules of the Board of Forestry.

Michele Logan responded to Mr. Giustina's question noting that the Temporary OAR would become effective upon filing with the Secretary of State, and would apply retroactively to solicitations after February 1, 2009. She assured the Board there was legal jurisdiction.

Following clarifications by staff, Chair Blackwell called for public comments.

Alice Montero, Sunrise Reforestation, stated her company was one of the affected contractors that were not allowed to work under the 2007-08 crew contracting agreement. She noted that poor management policies led to a failure on the part of the Department's Fire Protection Unit to act in the best interest of the taxpayer, the landowners or contracting community. She added that communications with private businesses were selective and unbalanced, giving advantages to certain private businesses while excluding others from the process. Ms. Montero also stated there was a failure to look at the true costs of the process, and a failure to manage a fair and legal system to control costs and increase efficiencies. Adopting rules on a temporary basis was unfair, as contractor's were in the middle of the process and have submitted the Request for Proposal for this year's fire season. She urged the Board to determine if there was an overwhelming need for a special process for contracting those services. She agreed to provide additional information to the Board. (Written Comments - Attachment 1).

Kevin Jacoby, Paul R. J. Connolly Law Office, clarified that the current solicitation that would be affected by this amendment, had already closed. The affected

contractors had already submitted final offers. There was no indication that the process would be subject to anything other than DAS rules, specifically, no reference to ORS 477.406, the independent contracting authority. Without rules, the Department's only contracting authority came from DAS's delegation. The fundamental issue of fairness was the second issue – changing the rules after the process had begun. There was no opportunity for affected contractors to amend their objections to the RFP. Adoption of the Temporary OAR would moot the objections based upon DAS OAR, without corresponding opportunities to object based upon the new, Temporary OAR. If adopted, he urged the Board to not allow a retrospective application to the current procurement. He added the Department's Statement of Need and Justification did not meet the level necessary to justify a Temporary Rule. (Attachment 2)

Bill Hutchison asked if litigation was pending. Mr. Jacoby stated there was litigation pending regarding previous contracting practices. There was also litigation over the current RFP, filed on behalf of three contractors.

Paul Bell, responding to Chair Blackwell's question, stated there were 68 contractors that have submitted proposals.

Michele Logan, DoJ, responded to certain public comments. Adoption of the Temporary OAR was specifically intended to alleviate confusion. The Attorney General's model rules were standardized, and substantially similar to the previously used DAS rules. The use of the Attorney General's model rules would not substantially change the game for proposers in any meaningful way. Moreover, OAR ch. 137, which contains the Attorney General's model rules, was specifically referenced in the request from proposers. The solicitation document gave proposers the notice that the Department intended to apply the Attorney General's model rules. Proposers had the opportunity to request change to the solicitation document and to protest the solicitation document. She pointed out that the opportunity provided under the DAS rules to object to the solicitation process, to the notice of intent to award, etc., was the same under the Attorney General's model rules. Bill Nessly added that adopting the OAR with a retrospective effect was permissible.

Kevin Jacoby agreed that there was reference to OAR ch. 137 in the RFP, but there was no reference to the independent authority under ORS 477. Without reference to the independent authority, there was no basis to go to the model rules. Contractors should have the opportunity to raise objections under the new rules. He did not believe that the retroactive effect would be legally permissible. Bill Nessly respectfully disagreed.

Bill Hutchison expressed concern about current and possible litigation. He asked if the Board should consider holding an Executive Session pursuant to ORS 192.660(2)(h) to consult with legal counsel. Ms. Logan stated that as long as the meeting was noticed, there was authority to hold an Executive Session during the conference call meeting. Mr. Nessly added that if the Board wanted advice and discussion regarding pending litigation, he recommended an Executive Session.

Upon legal counsel's advice that it was proper, Chair Blackwell temporarily adjourned the public meeting to enter Executive Session. He added that the Board would reconvene in public session to take action on the staff recommendation.

** EXECUTIVE SESSION – ADMINISTRATIVE WORK PLAN 0, IBI 9

Pursuant to ORS 192.660(2)(h), the Board met in closed Executive Session and consulted with legal counsel regarding litigation or litigation likely to be filed. The session began at 10:43 a.m., and concluded at 10:58 p.m. No decisions were made in the Executive Session.

1. ADMINISTRATIVE WORK PLAN 0, IBI 2 – GOVERNANCE

Temporary Amendment to OAR 629-041-0100 [continued]

Following the Executive Session, the Board reconvened the public meeting at 11:00 a.m.


Chair Blackwell asked if there were Board member objections to staff's recommendation. There being no objection, Chair Blackwell ordered:

The Board directs the amendment of OAR 629-041-0100 by Temporary Rule, effective upon filing with the Secretary of State.

The State Forester is directed to begin the permanent rulemaking process to similarly amend OAR 629-041-0100.

There being no further business before the Board, Chair Blackwell adjourned the public meeting at 11:02 p.m.

Respectfully submitted,


Maryin Brown, State Forester and
Secretary to the Board

GB

