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REPORT FROM OFFICER

DATE: September 17, 2007
TO: Mayor and City Council
FROM: Steve Johnson, City Attorney
SUBJECT: Ocean Protein, Fish Meal Plant

The City has received comments from concerned citizens that the City should institute legal action to “shut down” the Ocean Protein fish meal plant, due to periodic but persistent problems with odors emanating from the plant. Some citizens have complained that the City should do more about this issue.

In reality, an agency known as the Olympic Region Clean Air Authority (ORCAA) has jurisdiction over violations of Washington State air pollution violations, such as have occurred at the fish meal plant. The Washington Clean Air Act (RCW Chapter 70.94) authorizes Counties to form a “multicounty air pollution control authority” to “carry out the duties and exercise the powers” provided in the act. Several years ago, Grays Harbor County decided to join the multicounty authority which became ORCAA along with Thurston, Mason, and other counties.

Before Ocean Protein began operating the fish meal plant, it was required to obtain a permit from ORCAA, following public hearings. After conducting the required public hearings, ORCAA issued Ocean Protein the proper air pollution control permit, with the expectation that Ocean Protein would be able to control the emission of odors when it began to operate the fish meal plant. Unfortunately, that proved not to be case. After ORCAA received numerous complaints, conducted numerous site visits, and gave Ocean Protein a reasonable time to remedy the problem, the odor problems persisted. Consequently ORCAA, which had jurisdiction to enforce the provisions of the Washington State Clean Air Act – not the City of Hoquiam – filed an action in Grays Harbor Superior Court.

ORCAA and Ocean Protein eventually reached a settlement, and an Agreed Order was proposed and ultimately signed by Grays Harbor Superior Court Judge Mark McCauley. Ocean Protein continued to work on the problem and invested a large amount of its money trying to come up with a solution. However, it was unable to completely do so, and ORCAA therefore went back before the Court to seek an Order enforcing the provisions of the Agreed Order. On July 14, 2006, Judge McCauley ruled that Ocean Protein had indeed violated the Clean Air Act and the provisions of the Agreed Order, and he therefore issued an order temporarily shutting down the fish meal plant until further corrective measures were taken. In this legal process, Ocean Protein also received very large fines (totaling several hundred thousand dollars).

Since that time, Ocean Protein has continued to work to fix the odor problem, and ORCAA has continued to monitor the fish meal plant. In the meantime, the Grays Harbor Superior Court case initiated by ORCAA remains active. ORCAA has the ability to take this matter back before the Court at any time, and indeed, it has threatened to do so in the past few weeks. However, on September 12, 2007, Richard Stedman, the Executive Director of ORCAA, announced that ORCAA had decided not to take Ocean Protein back before the Court to enforce the provisions of the Agreed Order, because “it seems that [Ocean Protein] made corrections that have worked.” Hopefully, this will prove to be true.

The City of Hoquiam has not taken the drastic and expensive step of initiating a lawsuit against Ocean Protein under RCW Chapter 7.48 (Public Nuisances),¹ primarily because it would be redundant. ORCAA has already taken Ocean Protein to Court and obtained a court order requiring Ocean Protein to cease the unreasonable emission of odors, and providing for serious consequences if it does not. The City would not be able to obtain a different or better judicial result than ORCAA has already accomplished. In all probability, the Superior Court would simply consolidate any new lawsuit with ORCAA’s case, rather than repeat the same litigation. It is highly doubtful that any action brought by the City would result in the shutting down of the fish meal plant – a result not obtained by ORCAA – based upon the evidence thus far. Furthermore, any of the property owners who feel that they have been damaged by Ocean Protein have the option of initiating a lawsuit under RCW Chapter 7.48 on their own, or in conjunction with other property owners.

Neither the City Attorney nor the Mayor has the legal authority to initiate a lawsuit against Ocean Protein without City Council approval. RCW 35A.12.100 provides in pertinent part: [The Mayor] . . . “may cause any legal proceedings to be instituted and prosecuted in the name of the city, *subject to approval* by majority vote of all members of the council.” Such a lawsuit, even if successful, would be very expensive in both time and money. If the City were not to prevail, the City could be liable to Ocean Protein for large damages for litigation costs, loss of income, etc. Before any such legal action is considered, I would strongly advise that the matter be discussed in executive session so that the City Council can be apprized of all of the potential ramifications.

It has also been suggested that the City should issue citations under Hoquiam Municipal Code provisions dealing with nuisances. However, the maximum fines allowed to be imposed for violations of the Hoquiam Municipal Code (\$250 to \$1,000) are minuscule in comparison to the fines already levied against Ocean Protein by the Superior Court. The nuisance abatement sections of the Hoquiam Municipal Code were not intended to deal with a situation such as we have experienced with the fish meal plant, which involves air pollution.

Rather than initiating new litigation against Ocean Protein, the City has offered to assist ORCAA by helping to monitor the fish meal plant for air pollution violations. To that end, ORCAA has begun training several City of Hoquiam employees in the proper method of responding to odor complaints. This should help ORCAA improve the response time to any future complaints. Staff feels that the appropriate course of action is to encourage and urge ORCAA to continue its efforts to enforce the Agree Order, and to assist ORCAA in its efforts to respond to odor complaints.

¹ RCW 7.48.010 provides that “whatever is injurious to health or indecent or offensive to the senses . . . so as to essentially interfere with the comfortable enjoyment of the (sic) life and property, is a nuisance and the subject of an action for damages and other and further relief.” RCW 7.48.020 provides that: “Such action may be brought by any person whose property is, or whose patrons or employees are, injuriously affected or whose personal enjoyment is lessened by the nuisance. If judgment be given for the plaintiff in such action, he or she may, in addition to the execution to enforce the same, on motion, have an order allowing a warrant to issue to the sheriff to abate and to deter or prevent the resumption of such nuisance.”

In the future, as in the past, staff also encourages citizens who feel that they are currently being subjected to unreasonable odors by the fish meal plant to contact ORCAA directly to register a complaint on the record, at 1-800-422-5623.