

MEMORANDUM

Date: July 24, 2017
To: Chehalis Basin Board
From: Chrissy Bailey, Project Manager, Department of Ecology
Re: Follow up to July 7 meeting regarding Board responsibilities and procedures/decision making (August 3, 2017 Board meeting)

Introduction

At the July 7th meeting of the Chehalis Basin Board (Board), Assistant Attorney Generals (AAGs) from the Ecology Division provided training to the Board regarding their responsibilities under the Public Records Act (PRA) and Open Public Meetings Act (OPMA). Four questions were raised at the meeting that the AAGs agreed to research further and provide answers to, and one additional question related to PRA and the OPMA was received shortly after the meeting. The purpose of Part I of this memo is to provide answers from the Ecology AAGs to the additional questions raised during and following the July 7, 2017 Chehalis Basin Board meeting related to the Public Records Act and Open Public Meetings Act.

The Board also considered at its July 7th meeting a draft Board Member Handbook, which outlines various Board procedures, including those related to decision making. Part II of this memo outlines recommended changes to the Draft Chehalis Basin Board Member Handbook since the July 7th meeting. The majority of changes are in response to the Board's decision regarding operating procedures; remaining changes are relatively minor and for purposes of clarification and to address formatting issues.

Part I – Follow up related to PRA and OPMA training

The Ecology AAGs have provided answers to the following questions raised by the Board and following the Board meeting. Questions are listed first, followed by the answer. Answers are in *italics*.

1. Under the Open Public Meetings Act, individual members of the Board may be deemed personally liable and incur civil penalties for knowing violations of the OPMA. Would the AG represent individual members of the Board in such a lawsuit?

While the analysis will depend upon the facts of each case, it is extremely unlikely the AG would represent individual members of the Board in this type of lawsuit.

2. If tribal Board appointees provide a written report of the meeting to their respective Tribes, would this written report constitute a public record? Will they be required to submit this written report to Ecology when a public record request comes in?

We recommend that the tribal representatives convey the updates verbally. The written report of the meeting to the respective Tribes would most likely constitute a public record, subject to

disclosure under the Public Records Act. RCW 42.56.010(3) defines "Public record" as "...any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics..."

Whether or not the report constitutes a "public record" will depend upon the contents of the report, and upon how the information is used. For example, if the report contains information "relating to the conduct of government" and is then used in a decision-making process, it would be a public record, subject to disclosure under the Public Records Act. RCW 42.56. The analysis for "use" is whether there is a "nexus between the information in the record and the agency's decision-making process." Concerned Ratepayers Association v. Public Utilities District No. 1, 138 Wash.2d 950 (1999).

3. Which, if any, of the Board members may designate an alternate to be present at and/or vote at a Board meeting?

Based upon the language of RCW 43.21A.731(2)(b), it seems the ex officio non-voting members are the only individuals who "may designate a representative of their respective agencies to serve on the board in their behalf." This same provision for designation of representatives, including the manner of designation, does not appear in the statute relative to the seven voting members. See RCW 43.21A.731(2)(a).

The relevant provision states, "The governor shall invite the Confederated Tribes of the Chehalis Tribes of the Chehalis Reservation and the Quinault Indian Nation to each designate a voting member of the board . . ." (Emphasis added). The statute notes the voting members of the board, including tribal representatives, "must be appointed for terms of four years . . ." per RCW 43.21A.731(2)(a), and does not offer language contemplating designation of an alternate for any voting member of the board.

4. General topic for later discussion: more clarity regarding the different roles, actions, discussions, etc. which are permitted when a Board member is acting/discussing Chehalis Basin outside of his/her official capacity as a Board member.

This will require a case-by-case analysis. One key question regarding each action will be: was the Board member acting or communicating (i.e. with a legislator) to influence action, inform, sway, or convince the action or inaction of that person toward some result that could impact the work of the Chehalis Board? If so, the Board member is probably acting in his or her official capacity as a Board member, rather than in his or her other professional role.

5. Can we provide consultants working on elements of the Chehalis Basin Strategy more specific guidance about whether and how the Public Records Act applies to them? For example, what to keep and how long to keep it.

Consultants working on a state-led process or project will be required to comply with the Public Records Act, RCW 42.56. It may be a good idea to enter into an agency agreement with the consultants to clearly establish who will store the public records, who will respond to any public records requests, etc. The consultants may wish to designate one employee to manage the records, such that this person will be the "central repository" for all public records relative to the state-led

process or project. The consultants will ultimately have the same retention requirements as public employees relative to any work performed on this state-led process or project.

Retention requirements will vary based upon the contents of the record. The retention requirement for consultants will mirror the applicable requirement for public employees. Each agency is entitled to develop its own retention schedule and have it approved by the Secretary of State. The Secretary of State also develops a statewide schedule, which applies to all agencies. Ecology's Jason Howell is currently working to determine whether new retention schedules will be developed, which would be specific to the work of the Office of Chehalis Basin, or whether OCB can simply rely upon existing retention schedules.

While the default retention requirement under state law is six years, the agency's unique retention requirement differs based upon the contents of each record. For example, please note the various retention requirements on pages 27-32, as a sampling:

[https://www.sos.wa.gov/_assets/archives/RecordsManagement/Department-of-Ecology-Records-Retention-Schedule-v.1.3-\(December-2016\).pdf](https://www.sos.wa.gov/_assets/archives/RecordsManagement/Department-of-Ecology-Records-Retention-Schedule-v.1.3-(December-2016).pdf)

Part II – Board Member Handbook Revisions

The Board Member Handbook (Handbook) is in the process of being reformatted. Page numbers may change, so for ease of reference the changes to the Handbook noted below correspond to the page numbers in the version of the Handbook provided to Board members at the July 7th Board meeting (6/28/17 draft version).

- Page 4 – Key Contact Information: Ex-officio Board members will continue to use their respective agency-issued email addresses. They will not be provided Ecology email addresses. The word “tentative” has been struck from the Ex-officio Board Member contact information table.
- Page 5 – Organizational Chart: Ecology's Communications Coordinator has been added to the OCB Organization Chart, with connections to the OCB Director and the SEA Program Manager.
- Page 9 – Board Operating Procedures (decision making): The following language is proposed to capture the Board's decision to employ consensus decision making, with an option for voting members to vote if consensus cannot be reached. Changes are in ~~striketrough~~ underline format.

Board Operating Procedures

~~Note: The Board has not yet adopted operating procedures. This is a place-holder draft with two options: Consensus and Voting. The Consensus option is based on procedures of the former Governor's Chehalis Basin Work Group. The Voting option is derived from the SRFB Manual.~~

Option 1: Consensus Decision-making

Board decisions and recommendations will be consensus-based, with the option for voting members to vote if consensus cannot be reached.

Definition of consensus: The Board operates under the following definition of consensus:

The group will have reached consensus on an issue when it agrees upon a single alternative and each participant can say:

- I believe that other participants understand my point of view.
- I believe I understand other participants' points of view.
- Whether or not I prefer this alternative, I support it because it was arrived at openly and fairly, based on good information, and it is the best decision for us at this time.

Conveying consensus: This consensus can be conveyed via a thumbs up (I fully support this option); thumbs sideways (I can live with this option for the good of the group and the process); or thumbs down (I cannot live with this option).

The position of ex officio members will be solicited. However, ex officio members cannot block consensus if there is unanimous consent by the voting members.

If anyone is thumbs down, the group will seek solutions that allow those thumbs to move to up or sideways.

Registering concerns: When a call to make a decision on an issue is made, a member displaying a sideways thumb may request their reservation be recorded in the decision that is conveyed to others. ~~choose one of the following:~~

~~**Declare reservations:** Board members who are willing to let a proposal achieve consensus but desire to register their concerns with the group may choose "declare reservations."~~ If there are significant reservations about a motion, the Board may choose to modify or re-word the proposal.

~~**Stand aside:** A "stand aside" may be registered by a Board members who has a serious personal disagreement with a proposal, but is willing to let a motion achieve consensus. Although stand asides do not halt a decision, it is often regarded as a strong indication of concerns. Concerns of group members standing aside may be addressed by modifications to the proposal. Stand asides may also be registered by members who feel they are incapable of adequately understanding or participating in the proposal or decision, or members that wish to recuse themselves from the decision, may choose to 'stand aside'. Stand asides do not halt a decision.~~

Process if consensus is not present: If there are instances where consensus cannot be reached, the seven appointed members, including the Chair, may take a vote. Ex officio members participate in discussion of issues and proposed actions, but do not have voting authority.

A motion proposes that the board take certain action on a matter.

A member may initiate a vote when consensus cannot be reached by saying, "I move" and then state specifically what action you are proposing. You can second the motion by saying "second." The names of the person making the motion and seconding the motion are recorded in the minutes. A majority vote of the voting members present is required for a motion to be adopted.

The outcome of the vote, as well as the pros and cons of the different alternatives for which consensus could not be reached, will be presented in a succinct report included in the minutes of the meeting summary. ~~Additional work may be pursued toward crafting a solution that results in consensus of the voting members.~~

Option 2: Voting Process for Decision-Making

The seven appointed members, including the chair, are the voting members. Ex officio members participate in discussion of issues and proposed actions, but do not have voting authority.

A motion proposes that the board take certain action on a matter. Motions are made to handle routine business and to conduct meetings. Robert's Rules of Order are used to define voting procedures.

The correct way to make the motion is to say, "I move" and then state specifically what action you are proposing. You can second the motion by saying "second." The names of the person making the motion and seconding the motion are recorded in the minutes.

A majority vote of the voting members present is required for a motion to be adopted.

Operating Procedures applicable to either Option

Quorum

A quorum is five voting members, with a preference that at least two of the ex officio agency members other than Ecology also be present. At the outset of each meeting, the chair will call the meeting to order and call the roll to establish a quorum.

Discussion Guidelines for Board Meetings

Be Respectful

- Respect time constraints.
- Keep comments brief so everyone gets a chance to share their thoughts.
- Foster open and broad communication, say "ouch" when it hurts.
- Hear and respect all opinions.
- Acknowledge that all participants bring with them legitimate purposes, goals, concerns, and interests whether or not you agree with them.

Be Constructive

- Seek creative solutions that address everyone's needs.
- Be willing to give and to get.
- State concerns and interests clearly, listen carefully to and assume the best in others, ask questions (to clarify and educate) rather than make assumptions or make rhetorical statements (no "leaping").

Be Productive

- Prepare for meetings, do your "homework".
- Attend meetings, arrive on time, and participate until the conclusion of the meeting.
- Bring a sense of humor and have fun.

Opportunity for Public Comment

Opportunity for public comment will be provided at each meeting. At minimum, opportunity for public comment will be provided prior to the conclusion of the meeting. If Board action is proposed on an issue of significant public interest, public comment may be solicited following during initial Board

discussion of the topic, or a special public hearing may be held. The format for public comment will be at the discretion of the Chair.

- Page 11 – Board Operating Procedures (meetings): language has been changed to reflect the Board’s decision to hold monthly meetings on the first Thursday of each month.
- Page 14 – Key Laws and Rules (ethics and appearance of fairness): The last sentence in this paragraph has been corrected to align with RCW 43.21A.731 (2) (a). The words “or regulatory” have been struck.

The Board will be asked to adopt the revised Handbook, reflecting the changes outlined above, at its August 3rd meeting. Copies of the revised Handbook will be distributed to Board members following adoption.

DRAFT