DEPARTMENT OF JUSTICE
INTEROFFICE MEMO

DATE: August 20, 2007

TO: Tom Byler, OWEB

FROM: Jas. Jeffrey Adams

SUBJECT: Whether Oregon watershed councils are subject to the Oregon Public Meetings Law

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Question Presented

Are Oregon watershed councils subject to the Oregon Public Meetings Law?

Short Answer

Although the question is not free from doubt, we predict that more likely than not a court would consider watershed councils to be subject to the Public Meetings Law.

Discussion

1. Watershed councils are voluntary local organizations "designated" by local government to promote watershed protection, restoration and enhancement within a watershed.

A watershed council is defined in ORS 541.351 as a "voluntary local organization, *designated* by a local government group convened by a county governing body, to address the goal of sustaining natural resource and watershed protection, restoration and enhancement within a watershed." (Emphasis added) ORS 541.388(1) adds the following provision: "Local government groups are

encouraged to form voluntary local watershed councils ***. The Oregon Watershed Enhancement Board (OWEB) may work cooperatively with any local watershed council that may be formed."

The composition of watershed councils must include a majority of local residents, including local officials. ORS 541.388(2). A watershed council "may be a new or existing organization as long as the council represents a balance of interested and affected persons within the watershed and assures a high level of citizen involvement in the development and implementation of a watershed action program." ORS 541.388(2).

ORS 541.384(1) authorizes OWEB's watershed management program, which "relies" on the establishment of voluntary local watershed councils and also provides for the development by local partnerships of "local plans that may include but are not limited to the assessment of the watershed condition, the creation of a watershed action plan and a strategy for implementing the action plan." ORS 541.399(2)(c) also recognizes that watershed councils may develop and implement local watershed enhancement plans. The Oregon Plan, a comprehensive program for the protection and recovery of species and for the restoration of watersheds in Oregon, includes voluntary activities undertaken by watershed councils. ORS 541.405(3)(d). ORS 541.405(6) declares that the Oregon Plan "shall rely on watershed councils and soil and water conservation districts, *which are directed to cooperate in the development of local watershed plans that assess watershed conditions and create watershed action plans and*

strategies for the implementation of the local watershed action plans." (Emphasis added). Hence, watershed councils play a statutorily-recognized role, not only in OWEB's watershed management program but also within the structure of the Oregon Plan as it relates to watershed restoration.

A watershed council may apply for a grant for watershed council support if it meets a certain set of criteria set forth in OAR 695-040-0030. Those criteria include whether the council serves a unique geographic area, whether the council membership reflects a balance of interests or is actively seeking a balance of interests as defined in ORS 541.388(2), and whether the council (if created after September 9, 1995) has been designated by a local government. We understand from information supplied by OWEB that there are approximately 90 watershed councils in Oregon, about 60 of which receive council support grants from OWEB. For most of those 60 councils, OWEB support constitutes the majority of their funding.

Decisions and action plans formed by a watershed council are sometimes forwarded in the form of recommendations to a local government body, but no statute or regulation requires or authorizes such advisory recommendations. Further, no decisions binding on other governmental entities are made by a watershed council. Hence, although a watershed council may choose to make advisory recommendations to a public body, it is not required to do so by law. In that respect, a watershed council appears to be no different than any nonprofit or private entity that urges governmental bodies to adopt recommendations.

2. The Oregon Public Meetings Law applies to meetings of the "governing body" of a "public body."

Meetings of a governing body of a public body are open to the public, and all persons are permitted to attend any meeting. ORS 192.630. "Meeting" is defined in ORS 192.610(5) to include meetings at which a quorum is required in order to make or deliberate on a decision.[1] The policy underlying the Public Meetings Law favors openness. Att'y General's Public Records and Public Meetings Manual ("Manual") at 108 (*citing Oregonian Publishing v. Bd. of Parole*, 95 Or App 501, 769 P2d 795 (1989)).

"Public body" is defined for purposes of the Public Meetings Law as follows:

> "Public body" means the state, any regional council, county, city or district, or any municipal or public corporation, or any board, department, commission, council, bureau, committee or subcommittee or advisory group or any other agency thereof.

ORS 192.610(4).

A public body that has authority to make recommendations to a public body on policy or administration is defined as a "governing body." ORS 192.610(3) provides: "'Governing body' means the members of any public body which consists of two or more members, with the authority to make decisions for or

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[1] "Meeting" is defined by ORS 196.610(5) as follows:

> "Meeting" means the convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter. "Meeting" does not include any on-site inspection of any project or program. "Meeting" also does not include the attendance of members of a governing body at any national, regional or state association to which the public body or the members belong.

recommendations to a public body on policy or administration." *See also* Manual at 109. Hence, a body that is a governing body because of its authority to make decisions for a public body (including itself) is subject to the Public Meetings Law.

The Attorney General has interpreted the definition of a "public body" in the Public Meetings Law to require that the public body have been created by or pursuant to the state constitution, a statute, administrative rule, order, intergovernmental agreement, bylaw or other official act. Manual at 109, *citing* Letter of Advice dated May 29, 1986, to Representative Larry Hill and William L. Miles, Director, Audits Division (OP-5885, OP-5896).

Private entities are generally not covered by the Public Meetings Law. Whether a private entity becomes subject to the meetings law by virtue of assuming public functions is an unsettled area of the law. A private entity does not become subject to the meetings law merely because it receives public funds, contracts with governmental bodies or performs public services. Manual at 111.

An example given by the Public Meetings Manual of a private entity that is subject to public meetings requirements is a "local alcoholism planning committee." Manual at 112. Under ORS 430.342, an already existing body may be "designated" by a county governing body as the "local alcoholism planning committee" and given certain advisory functions for local government. Such an entity is therefore subject to the Public Meetings Law, the rationale being that such a committee has been authorized by law to perform advisory functions for a

governing body, e.g., the committee contracts with the county to provide alcoholism-related services to the county. Manual at 112.

The Oregon Supreme Court has developed a list of several factors to consider in applying a functional approach to determine whether a private entity is subject to the Public Records Law. *Marks v. McKenzie High Schl. Fact-Finding Team*, 319 Or 451, 878 P2d 417 (1994) (*Marks*). The Manual notes that although the definition of public body in the Public Records Law is different than the definition used in the Public Meetings Law, the Oregon Supreme Court's decision in *Marks* may bear on whether public meetings requirements are applicable to private entities that contract with, or perform services at the request of, public bodies. Manual at 112.

3. We predict that a court more likely than not would consider watershed councils to be subject to the Public Meetings Law.

a. The statutory definition does not definitively resolve whether watershed councils are subject to the Public Meetings Law.

ORS 192.610(4) lists several entities as being a "public body" for purposes of the Public Meetings Law. One can readily determine that a watershed council is not the state, a county, a city, a district, a municipal or public corporation, a board, department, a commission, or a bureau. A watershed council might be considered an "advisory group," but no statute or regulation explicitly requires or even authorizes watershed councils to make advisory recommendations to other governmental entities.

A watershed council arguably could be characterized as a "regional council," given that its geographic scope is defined by a particular watershed or groups of watersheds, or, more simply, as a "council" or a "committee." The Attorney General, however, has interpreted the definition of "public body" in the Public Meetings Law to require that the entity have been "created by or pursuant to" the state constitution, a statute, administrative rule, order, intergovernmental agreement, bylaw or other official act. Manual at 109.

Whether watershed councils are "created pursuant to" statute or by some official governmental act is not entirely clear. A group interested in watershed issues may be a voluntary organization, association or non-profit corporation, but it does not become an official watershed council until it is "designated" as such by local government. ORS 541.355(12) defines a watershed council as follows:

> (15) "Watershed council" means a voluntary local organization, *designated by a local government group convened by a county governing body*, to address the goal of sustaining natural resource and watershed protection, restoration and enhancement within a watershed. [Emphasis added].

A watershed council formed after September 9, 1995 is not eligible for OWEB's financial council support unless and until the entity has been "designated" by local government. OAR 695-40-0030. Hence, the designation of a watershed council by local government is a prerequisite for funding by OWEB. The "designation" requirement for a watershed council to become an officially recognized watershed council eligible to receive public funding is perhaps analogous to the

"designation" of an already existing group by local government as a "local alcoholism planning committee" under ORS 430.342.

The statutory indication that watershed councils are "designated" by local government may not be the same thing as having been "created" by statute or governmental act. It could be that a court would find that watershed councils are not necessarily "created" by statute or other governmental act, but are merely recognized as such when "designated" by local government. Hence, the statutory definition of "public body" in the Public Meetings Law does not appear definitively to resolve whether a watershed council is subject to the Public Meetings Law.

b. The *Marks* factors are applicable by analogy.

As noted, in *Marks*, the Oregon Supreme Court applied a functional analysis to resolve whether an entity with mixed private and public attributes is subject to the requirements of the Public Records Law. In *Marks*, the local school district board asked a private, nonprofit corporation (Confederation of Oregon Schoool Administrators or COSA) to appoint a "fact-finding team" to investigate concerns about a local high school. COSA appointed three of its members to the team. The team's charge was to investigate certain aspects of the high school's operation, prepare a report and make recommendations deemed appropriate. 319 Or at 453.

The Oregon Supreme court in *Marks* identified six factors to help determine whether a private entity is the functional equivalent of a public body for

the purposes of public records: (1) the entity's origin; (2) the nature of the function assigned to and performed by the entity; (3) the scope of the authority granted to and exercised by the entity; (4) the nature and level of government financial involvement with the entity; (5) the nature and scope of government control over the entity's operation; and (6) the status of the entity's officers and employees. *Id.* at 464-465.

In its functional approach, the Oregon Supreme Court found that the team was not subject to the Public Records Law, because, although the team had been created by government, and its duties were ones traditionally associated with government, the team did not have authority to *bind* the school board, the team did not receive public money, and the district did not exercise any control over the team. *Id*.

Because *Marks* is a public records case, it is applicable only by analogy to the Public Meetings Law. And in one key respect, the analogy breaks down. The *Marks* factor of authority to make binding recommendations to government is inapplicable in the context of public meetings, because an "advisory group" can be a public body for purposes of the Public Meetings Law. Hence, this *Marks* factor requires adjustment in the context of the Public Meetings Law to "legal authority to make *advisory* recommendations to government."

When the six *Marks* factors, as adjusted, are analyzed with respect to watershed councils, the factors are split between those that favor deeming watershed councils to be subject to the Public Meetings Law and those that do not.

On balance, however, we predict that a court applying the *Marks* factors by analogy would, more likely than not, conclude that watershed councils are subject to the Public Meetings Law.

(1) The entity's origin: Was it created by government or was it created independently?

In *Marks*, the court deemed the investigatory team to have been created by a government body, even though its members actually had been appointed by a nonprofit organization, because the nonprofit group acted at the behest of the school board, which was "ultimately responsible" for the team's existence. 319 Or at 464. Hence, even a somewhat attenuated relationship to governmental origin sufficed in *Marks* to count this factor as favoring the applicability of the Public Records Act.

A group interested in watershed issues appears to become an official watershed council when it is "designated" by local government. ORS 541.351(12) defines a watershed council as follows:

> (15) "Watershed council" means a voluntary local organization, *designated by a local government group convened by a county governing body*, to address the goal of sustaining natural resource and watershed protection, restoration and enhancement within a watershed. [Emphasis added].

Unless a watershed council (if created after September 9, 1995) has been "designated" by local government, it is not eligible for watershed council support grants. OAR 695-040-0030. ORS 541.388 also states that "[l]ocal government groups are encouraged to form voluntary local watershed councils," and ORS 541.384(3) gives the elected officials representing local government groups within

a proposed watershed council area the option of participating in the formation of the watershed council, including the appropriate method for appointing members to the watershed council. Local governments thus have a role in the formation and recognition of watershed councils, which in turn is integral to their ability to be funded through OWEB and become part of OWEB's watershed management plan and part of the Oregon Plan for watershed restoration.

We conclude that a court would likely rule that a watershed council has its *official* origin as a watershed council through a governmental act of designation. Hence, this factor likely favors considering watershed councils to be subject to the Public Meetings Law.

(2) The nature of the functions assigned and performed by the entity – are the functions traditionally performed by government or are they commonly performed by a private entity?

In *Marks*, the court determined that the function to be performed by the team – the investigation of the school's administration – was related to the operation of the school and was a function traditionally associated with government. 319 Or at 464. The court said: "The investigatory function to be performed by defendant was sufficiently related to the statutory duties of the school board to weigh in favor of finding that defendant is a 'public body.'" 319 Or at 464.

The statutory system indicates that watershed councils have a statutorily-defined role in watershed management in Oregon. ORS 541.384(1) provides that OWEB's watershed management program "*relies* on the establishment of

voluntary local watershed councils." (Emphasis added). ORS 541.405(6) similarly states that the Oregon Plan relies on watershed councils to develop local watershed plans that assess watershed conditions and create watershed action plans and strategies for implementation of the local watershed action plans. ORS 541.399(2)(c) provides that OWEB may give grants for "the implementation of watershed enhancement plans developed by watershed councils." As noted *ante*, only watershed councils designated by local government (if formed after 1995) are eligible to receive council support grants from OWEB. OAR 695-40-0030.

The foregoing are statutory indications that officially designated watershed councils perform a planning function, both in developing watershed plans and in implementing them, within a defined geographic area (the watershed). Like the investigatory function involved in *Marks*, such a planning function is one traditionally associated with government. This *Marks* factor likely weighs in favor of considering a watershed council to be subject to the Public Meetings Law.

(3) The scope of the authority granted to and exercised by the entity – does it have authority to make binding governmental decisions or is it limited to making nonbinding recommendations?

This *Marks* factor, turning on whether the entity's recommendation to another public body is "binding," is applicable to the Public Records Law but does not correspond to the Public Meetings Law. That is because ORS 192.610(4), by including advisory group" in the list of what entities are public bodies for purpose of the Public Meetings Law, does not require that recommendations made to other public bodies be *binding* in order for the Public Meetings Law to apply. Rather,

the recommendation may simply be "advisory." Hence, this *Marks* factor requires some adjustment for use in the context of the Public Meetings Law.

Because any private entity, such as a nonprofit group or corporation, is free to make nonbinding or advisory recommendations to governmental entities on matters of policy and administration, without being considered to be a "public body," there must necessarily be a distinction between such private entities and those that qualify as "advisory groups" for purposes of the Public Meetings Law. The definition of "governing body" in ORS 192.610(3) states: "'Governing body' means the members of any public body which consists of two or more members, with the *authority* to make decisions for or recommendations to a public body on policy or administration." (Emphasis added). The key element is "authority."

The salient distinction is thus whether there is some source of governmental law, including statutes, regulations, ordinances, or governmental orders that officially delegate governmental functions, that confers the authority on the entity in question to make even advisory recommendations to a public body. If such a source of authority exists, this factor likely weighs in favor of deeming the entity to be subject to the Public Meetings Law, and *vice versa*.

A watershed council does not have explicit statutory authority to make even advisory recommendations to a public body. Although ORS 541.388 provides that, where there is more than one watershed council in a county, each watershed council must "periodically report the activities of the council to the county

governing body," periodic reporting is not the same thing as making even advisory recommendations.

Further, OWEB is encouraged by statute to work with the watershed councils but is not required to do so. OWEB "relies" on the work of watershed councils, but that does not mean that in so doing OWEB is accepting advisory recommendations. Rather, the function of watershed councils appears to be to provide watershed protection through watershed plans and projects that are funded by OWEB, but it cannot be said that watershed councils make even advisory recommendations for action to OWEB, other than to urge OWEB to grant funds, which is no different than for any other grant applicant, public or private.

OWEB is perhaps unique among state agencies in that its primary function is to bestow grant funds on recipients, which include many nonprofit entities and a variety of types of organizations, including watershed councils. OWEB is constrained by law from engaging in regulation. *See* ORS 541.371(1)(f) (OWEB "may not have regulatory or enforcement authority" except for fiscal responsibilities). Hence, it is not surprising that watershed councils or other grant applicants and recipients do not make advisory recommendations to a non-regulatory agency. In short, the statutory role of OWEB is to fund watershed restoration by other entities, not to itself engage in watershed restoration on the basis of advisory recommendations.

Therefore, this *Marks* factor, after the element of "binding" recommendation has been adjusted to "advisory" recommendation, likely weighs against considering watershed councils to be subject to the Public Meetings Law.

(4) The nature and level of governmental financial and non-financial support.

The nature and level of governmental financial and non-financial support may vary depending on the watershed council, but we understand that as a factual matter, most watershed councils receive a majority of their funding from OWEB grants. Further, through the Oregon Department of Administrative Services, watershed councils can be offered liability insurance "as part of the insurance provided to the Oregon Watershed Enhancement Board," and if so, OWEB must pay the insurance assessments for the watershed councils. ORS 541.388(4).

Therefore, this *Marks* factor weighs in favor of considering watershed councils to be subject to the Public Meetings Law.

(5) The scope of governmental control over the entity.

Oregon statutes do not explicitly authorize governmental control over watershed councils. OWEB is authorized by ORS 541.388(1) to "work cooperatively with any local watershed council that may be formed," but that is not the same thing as control by OWEB over the watershed council. Where there is more than one watershed council in a county, ORS 541.388 provides that each watershed council must "periodically report the activities of the council to the county governing body." That implies that the county might provide some

oversight as between competing watershed councils, but the statute does not explicitly provide for such oversight. Hence, although local government may be involved in the formation of watershed councils, and must "designate" watershed councils, local governments do not oversee or control the ongoing work of the councils. And despite OWEB's role in funding and supporting the work of watershed councils, OWEB does not literally control what they do.

This *Marks* factor likely weighs against considering watershed councils to be subject to the Public Meetings Law.

(6) The status of the entity's officers and employees – are they government officials or government employees?

The final *Marks* factor – the status of the entity's employees – is only summarily addressed in the *Marks* opinion. If there were a statutory or other indication in a source of law that specified the status of an entity's employees as public or private, that presumably could be taken into account under this *Marks* factor. But in the absence of any such indication, the status of the entity's employees would likely be determined by the status of the entity itself. Hence, at least in the absence of specific direction in statute or otherwise, this factor appears to beg the question by substituting the status of the entity's employees for the status of the entity itself.

In the context of watershed councils, there does not appear to be a statutory or other specific provision determining whether the status of watershed council officers or employees is public or private. ORS 541.388 requires that a watershed

council consist of a majority of local residents. The statute also provides that a local watershed council may include "representatives of local government, representatives of nongovernment organizations and private citizens." Hence, although the composition of a watershed council might include some employees of other governmental entities, it is essentially a mix of private and public representatives.

Therefore, this *Marks* factor would likely be counted as neutral on the issue of whether watershed councils are subject to the Public Meetings Law.

c. The *Marks* factors tend to support considering watershed councils to be subject to the Public Meetings Law.

It appears that the six *Marks* factors are split between those factors favoring the conclusion that a watershed council is a "public body" and those factors disfavoring such a conclusion. Three factors – governmental origin, nature of the entity's functions, and governmental financial support – tend to favor deeming watershed councils to be subject to the Public Meetings Law. Two factors – legal authorization to make binding or advisory recommendations to other public bodies and extent of control and oversight by other public bodies – weigh against watershed councils being considered to be subject to the Public Meetings Law. One factor – the status of the entity's employees – is counted as neutral in this context.

The Oregon Supreme Court noted in *Marks* that the various factors were not intended to be exclusive, and any factor bearing on the character of the entity

and the entity's relationship with government may be relevant in determining whether that entity is a "public body" subject to the Public Records Law. *Marks* 319 Or at 464. In the context of watershed councils, we reiterate that the policy underlying the Public Meetings Law favors openness. Manual at 108. Even in the event of a dead-even tie among the six *Marks* factors, the policy favoring openness could tip the balance toward watershed councils being considered to be subject to the Public Meetings Law.

The task of a court of law presented with this question would be one of determining where to place watershed councils on the hypothetical continuum from purely private entities to purely governmental entities. The difficulty is that watershed councils are an example of a new breed of private-public partnerships that have sprung up since the passage of Measure 66 to promote watershed protection efforts. The challenge is to fit the statutory definitions and criteria like the *Marks* factors to this relatively new type of organization, which has attributes both of a private non-profit entity and of a governmental entity.

Taking all the foregoing considerations into account, we are of the view that a court would more likely than not conclude that, because watershed councils are designated by local government, have a statutorily-recognized planning function in watershed management within Oregon, and receive significant public funding, those considerations are sufficient to bring them within the ambit of the Public Meetings Law. Because no court has yet ruled on this issue, however, the

question is not free from doubt. Hence, the prudent course of action for watershed councils would be to proceed as if the Public Meetings Law applied to them.

Apart from the administrative tasks associated with providing public notice of meetings, there are some obvious advantages in having watershed councils open their meetings to the public. In so doing, watershed councils avoid the risk of allegations that they are conducting their affairs in secret. Further, the accountability of watershed councils for the public funding they receive is enhanced by making their decision process more transparent and open to the public.

We further note that, as the Manual observes, "a public agency may have power by rule or contract to require private bodies that contract with government to open their pertinent meetings to the public." Manual at 112. That is certainly true of OWEB, which could make a condition of its council support grants that watershed councils must provide public notice and open their meetings to the public. Hence, even if a court were to conclude that watershed councils were not required as a matter of law to comply with the Public Meetings Law, OWEB, through its grant agreements, could require that watershed councils open their meetings to the public. That would constitute a purely contractual form of control, because as noted *ante*, OWEB does not have the regulatory authority to directly control local watershed councils, other than through requiring grant conditions.

Finally, we emphasize that this analysis does not presume that watershed councils are public bodies for any purpose other than being deemed to be subject

to the Public Meetings Law. One of the features of watershed councils that many have found attractive is that watershed councils are not traditional governmental entities, but rather are locally-formed entities including public representatives and private citizens that help form new partnerships to effectuate watershed restoration. Hence, we do not mean to imply in this analysis that watershed councils are governmental or even quasi-governmental entities. Rather, we simply predict that, using a functional approach like that employed by the Oregon Supreme Court in the *Marks* case, a court more likely than not would conclude that watershed councils are subject to the Public Meetings Law.