

**Columbia River Gorge Commission
Rules Committee
Sec. 5(b) Rules Update Discussion**

High-Level Principles	Review Discussion at:
The states’ laws on the subjects in sec. 5(b) of the National Scenic Area Act do not directly apply to the Gorge Commission.	Oct. 8, 2024, Staff Report at page 3 Report in Support of Rules at page 3 (Wash. AGO letter); pages 3–4
Neither the Act nor court decisions provide principled bases to determine whether one state’s statutory provisions are more restrictive than the other state’s statutory provisions.	Oct. 8, 2024, Staff Report at page 3 Report in Support of Rules at page 3 (Wash. AGO letter); pages 6–7 (draft interpretation of “more restrictive)
The Commission’s rules are “for the conduct of [the Gorge Commission’s] business.”	Oct. 8, 2024, Staff Report at page 3 Report in Support of Rules at page 4 (<i>Handy</i> case); page 5 (Or. DOJ letter)
The enforcement and remedies provisions in the states’ laws conflict with the enforcement provisions of the National Scenic Area Act and thus are not included in the rules.	Oct. 8, 2024, Staff Report at page 3 Report in Support of Rules at page 7 (discussion of state enforcement provisions)

Most significant differences between Oregon and Washington laws	Rule Sections			
	Open Meetings 350-011-	Public Records 350-012-	Conflicts of Interest 350-014-	Admin. Procedure 350-016-
Form of meetings: ORS 192.670 permits remote-only meetings but they must be hybrid; RCW 42.30.230 only allows remote meetings without a physical location in the event of an emergency.				
Executive Session topics and Public Record exemptions (Should we hold executive sessions and exempt records from disclosure when either state allows or only when both states allow)				
Ex parte communication: Washington laws differ on whether a pre-proceeding ex parte communication must be disclosed. Oregon law does not require disclosure of pre-proceeding ex parte communications.			0140	0140(4)
<p>350-014-0140 is a cross-reference to 350-016-0140(4).</p> <p>RCW 34.05.455(4) (a part of the Washington APA) suggests disclosure is required for pre-proceeding ex parte communications and RCW 42.36.060 (a part of the Washington Appearance of Fairness doctrine) only requires disclosure for communications after a proceeding has started.</p> <p>The Washington APA only applies to Washington state agencies and the Appearance of Fairness doctrine only applies to Washington local governments, so this is not a conflict for Washington state agencies or local governments. This is a conflict for the Gorge Commission because the Act requires the Commission to have rules consistent with the more restrictive of the states' laws on administrative procedure (i.e., the APA) and appearance of fairness. The conflict is whether gorge commissioners must disclose only communications occurring after a</p>				

proceeding has started at the Gorge Commission (*i.e.*, after an appeal is filed, or an enforcement action is started, etc.) or communications that occurred before a proceeding has started. Oregon law only prohibits ex parte communications (and thus requires disclosure of inadvertent communications) only after a proceeding has started; however, there is case law establishing that prior communications can cause impermissible bias.

The draft rule specifies that the disclosure requirement extends to ex parte communications before a proceeding has started at the Gorge Commission. This seems like the more restrictive provision because it results in more transparency. But this approach comes with the complexity of commissioners not knowing which communications to document in case a later disclosure is needed.

Factors for Rule Changes	Rule Sections			
	Open Meetings 350-011-	Public Records 350-012-	Conflicts of Interest 350-014-	Admin. Procedure 350-016-
The Gorge Commission may only adopt rules “for the conduct of [the Gorge Commission’s] business.”			0020(2) 0130(2)	
<p>350-014-0020(2) defines the scope of division 14. This provision is adapted from ORS 244.390(3), which is within the statutory series applicable to the Oregon Government Ethics Commission, but refers to the scope of “this chapter,” meaning that it applies generally and not just to the Oregon Government Ethics Commission. None of the other statutes applicable to the Oregon Government Ethics Commission are included in the Commission’s rules because they do not relate to the Gorge Commission’s business.</p> <p>350-014-0130(2) specifies a remedy that a court may apply if a commissioner does not disclose a conflict of interest. This administrative rule section cannot govern the courts, and the National Scenic Area Act provides the only manner for enforcement of the Gorge Commission’s rules. The draft rules do not show this in strikeout text, and the attorneys general did not comment on this section. This section needs to be revised in conjunction with similar remedy provisions for all divisions of the Gorge Commission’s rules, and I recommend we come back to this after discussing divisions 11 and 12, where the judicial remedies in the states’ statutes are more pronounced.</p>				
The Gorge Commission cannot use a state statutory provision that conflicts with the National Scenic Area Act.			0120(1)(b) 0130(2) 0140	
<p>350-014-0120(b)(B) authorizes the rule of necessity when needed to satisfy the quorum requirement in the National Scenic Area Act. The rule of necessity allows a conflicted member of the commission to vote if necessary to make a decision. Draft rule 350-016-0100(3) codifies the rule of necessity for the Gorge Commission. The rule of necessity exists in both Oregon and Washington law but is not part of the ORS or RCW for state officers. The theory behind the rule of necessity is that it is better to have a decision that may be tainted by a disclosed conflict than no decision at all. Having a decision allows parties to move on or to challenge the Gorge Commission’s decision. Using the rule of necessity is a rare occurrence for any entity and is highly unlikely for the Gorge Commission because six voting commissioners would need to be conflicted. That has never happened since the Gorge Commission’s inception in 1987. But this is an important safeguard.</p> <p>350-014-0130(2) – see discussion above in this table.</p> <p>350-014-0140 – see discussion above in the second table.</p>				

Choice between Oregon and Washington law where one is not more restrictive than the other			0010(8) 0100	
350-014-0100 Gifts. Both states define “gift” similarly and both have long lists of exclusions in the definition. ORS 244.020(7) defines gift, including a long list of items that do not constitute a gift, and ORS 244.040(2)(g) prohibits gifts not excluded in the definition of “gift.” RCW 42.52.140 prohibits gifts and RCW 42.52.150 defines gift, including a long list of items that do not constitute a gift, prohibits accepting gifts, and contains another long list of items that presumably would not influence a public official. There are many overlaps in the states’ lists. The draft rules use Oregon law because Washington law allows giving items with a cumulative value up to \$100 whereas Oregon law allows only gifts up to \$50. Although Washington’s list is more specific, the use of Oregon law ensures congruity between value and definition of gift.				
Adapting state law to apply to the Gorge Commission				
All the Gorge Commission’s rules adapt the states’ laws to some extent, even if just changing a word, like “state” to “Gorge Commission.”				
Choice to use state law requirements that are not required			None	
Using both states’ laws rather than adapting one state’s law			0120	
350-014-0120 – see discussion below in this table.				
Blending the states’ laws (significant examples)			0060	
350-014-0060 prohibits unauthorized disclosure of confidential information. This rule adapts RCW 42.52.050 but also makes the prohibitions in that statute applicable to former public officials as provided in ORS 244.040(4) and (5).				
Whether a statute in one state or silence in the other state is more restrictive			0120 0130	
350-014-0120 distinguishes between potential conflicts of interest and actual conflicts of interest. This is a distinction in Oregon law. In Oregon, potential conflicts are waivable; actual conflicts are not waivable. Washington law does not make this distinction. Washington’s laws prohibit an interest that conflicts with official duties (RCW 42.52.020, captured in 350-014-0030) and are specific in what is permitted and what is not. Those specifics are captured in the				

<p>draft rules for financial interests, assisting in transactions, compensation for outside activities, honoraria, gifts, etc., so the draft rules use both the Washington and Oregon approaches.</p> <p>350-014-0130 requires recording disclosures of conflicts in meeting minutes. This comes from ORS 244.130. Washington does not have this requirement in RCW 42.52 but does for municipal officers in RCW 42.23. The Gorge Commission is not a municipal entity and county appointees are not municipal officers as defined in RCW 42.23.020. Recording disclosures in meeting minutes is a form of transparency and is thus the more restrictive practice.</p>				
Where one state’s law permits but the other state’s law prohibits			None	
Best practice from a reference, treatise, or other source outside of the states’ statutes			0120(1)(b)	
<p>350-014-0120(1)(b)(B) prohibits a commissioner who is participating under the rule of necessity from participating in the vote, except to vote. Washington law, RCW 42.36.090, allows full participation, but Oregon’s Land Use Board of Appeals has reasoned that participation in deliberations is not necessary, only the vote is necessary. <i>Wal-Mart Stores, Inc. v. City of Hood River</i>, 67 Or LUBA 332 (2013).</p>				

Other Discussion	Rule Sections			
	Open Meetings 350-011-	Public Records 350-012-	Conflicts of Interest 350-014-	Admin. Procedure 350-016-
<p>Training Requirements: ORS 192.700 and RCW 42.30.205 require training on state open public meetings laws.</p> <p>RCW 42.56.150 requires training on state public records laws. Oregon does not have a mandatory training requirement.</p> <p>Neither state requires mandatory training for conflicts of interest or for administrative procedure, and Washington does not require training for appearance of fairness</p>			Add new rule?	
<p>We can use and adapt written training from the states; we can request state trainers to do training and adapt their standard materials to our rules; or we can create our own training. Staff orientations for new commissioners may also satisfy or partially satisfy these requirements.</p> <p>We would need to create and conduct our own training for appearance of fairness and administrative procedure.</p>				