



MEMORANDUM

October 8, 2024

TO: Gorge Commissioners

FROM: Jeff Litwak, Counsel

SUBJECT: Staff Report for Orientation to the Gorge Commission's Rules and Discussion of Rules Update Project

Actions Requested

(1) Legal counsel will provide an orientation for commissioners to learn about the Gorge Commission's authority for rulemaking, requirements for the Gorge Commission's rules, and staff's current work updating four divisions of the Gorge Commission's rules: open public meetings, public records disclosure, conflicts of interest, and administrative procedure.

(2) After the orientation, staff will ask the Gorge Commission to authorize staff to continue working on the rules update project and proceed with rulemaking when proposed rules are ready.

Important: "Works in progress" updates to the four rule divisions are attached to this memorandum to show the scope of the rules update project and because we will use a few examples from them during the orientation. This orientation is not a public hearing on proposed rules. Staff has not filed any rulemaking notices or text with the Oregon Secretary of State or the Washington Code Reviser. The content of these works in progress are constantly changing as staff works on them. The Gorge Commission will hold a public hearing on the rules after staff files notices of proposed rulemaking with the states.

Attachments to this staff report

There are two attachments to this staff report. Please **read** the first 10 pages of the report in support of the rules. Please **skim** the explanations of the rules in the rules report and the rules that staff is working on. These are not complete, so we will not discuss them. The attachments are separate so you can easily view the rules and explanations at the same time on your screen.

Report in Support of Divisions 11, 12, 13, 14, 15, 16 (for 20241008 GC Mtg). This attachment is a report that explains the Gorge Commission's rules and has sections for each rule division

with explanations of each rule section. Each division is bookmarked. You may open the navigation pane on your .pdf reader to quickly scroll between the divisions.

Work-in-Progress Updates to Divisions 11, 12, 14, 16 (for 20241008 GC Mtg). This attachment contains all four rule divisions that staff is working on. Each division and each rule within each division is bookmarked for you to quickly scroll through the entire document. Staff is not updating divisions 13 and 15 (financial disclosure and public contracts) and will explain why during the orientation.

Background and Next Steps

At the Gorge Commission's February 2024 meeting, staff stated that it was beginning a comprehensive review and overhaul of the Gorge Commission's administrative rules. Commissioners did not have any questions or comments at that time. Over the past several months, staff has worked on updating the rules and explanations of each rule section to accompany your consideration of the rules. The updates will be significant enough that staff believes the Gorge Commission will benefit from a general orientation before having to consider proposed rules. Over the summer, staff asked the Oregon Department of Justice and Washington Attorney General to review the draft rules and explanations. They are still doing their reviews.

If the Gorge Commission authorizes staff to proceed with the rules update project, staff will continue to work on the drafts, incorporate the states' reviews, file the required notices of proposed rulemaking with the states, put the proposed rules on the Gorge Commission's website, and schedule a public hearing on the proposed rules at one of your regular meetings.

This rules update project does not require the counties to take any action to amend their National Scenic Area ordinances.

Legal Requirements for Gorge Commission Administrative Rules

The Gorge Commission must enact administrative rules to implement the National Scenic Area Act and Columbia River Gorge Compact. The requirement (and thus authority) comes from two statutory provisions, one in the National Scenic Area Act and the other in the Gorge Compact.

Requirement in the National Scenic Area Act:

Section 5(b) of the National Scenic Area Act (16 U.S.C. § 544c(b)) requires:

For the purposes of providing a uniform system of laws, which, in addition to [the National Scenic Area Act], are applicable to the Commission, the Commission shall adopt regulations relating to administrative procedure, the making of contracts, conflicts-of-interest, financial disclosure, open meetings of the Commission, advisory committees, and disclosure of information consistent with the more restrictive statutory provisions of either State.

The following are the Gorge Commission's rules on these subjects specified in the Act.

Division 11 – Open Meetings
Division 12 – Public Records
Division 13 – Financial Disclosure

Division 14 – Conflicts of Interest
Division 15 – Public Contracts
Division 16 – Administrative Procedure

There are five important things to note about section 5(b) of the National Scenic Area Act.

First, the states' laws do not directly apply to the Gorge Commission. Several letters from the Oregon Department of Justice and Washington Attorney General's Office between 1991 and 2000 expressed this opinion and in 2023, two court decisions, one from a federal court and the other from a Washington state superior court, concluded that the states' laws do not directly apply to the Gorge Commission. The reference to the states' statutory provisions is direction for the content of the Gorge Commission's rules, not direction for the states' laws to apply directly to the Gorge Commission.

Second, there are certain provisions in the states' laws that the Gorge Commission cannot include in its rules because those state provisions conflict with the National Scenic Area Act. For example, the enforcement provisions of the states' laws provide for remedies that the National Scenic Area Act does not. Several court decisions have held that the National Scenic Area Act provides the exclusive claims and remedies against the Gorge Commission. These decisions date back to the early 1990s, and the cases concluding in 2023 cited and followed this prior case law.

Third, the Gorge Commission must adopt rules on the subjects in section 544b(c) that "are applicable to the Commission." A 1991 court decision (explained in the attached report) expressed this, and a 1991 letter from the Oregon Department of Justice to Governor Roberts explained "the terms in [section] 5(b) relate to how the commission will conduct its business." This is important because some provisions in the states' laws on those subjects govern the business of other agencies, the legislature, and courts; those provisions relating to other entities are beyond the Gorge Commission's rulemaking authority and thus cannot be part of the Gorge Commission's rules.

Fourth, no court decision has explained any principled basis to determine whether one state's statutory provisions are more restrictive than the other state's statutory provisions. The Washington Attorney General's office observed this in a letter in 2000 to a legislator who had asked whether the Gorge Commission must comply with the Washington Public Records Act or the federal Freedom of Information Act (the letter concluded the Gorge Commission did not). Staff also observes that before this rules project, no Attorney General opinion or letter, Gorge Commission rulemaking notice, internal memorandum, or minutes of Commission meetings, or other writing explained any principled basis either.

Fifth, neither state's statutes require the use of advisory committees or contain requirements when their state agencies use advisory committees, like the Federal Advisory Committee Act (FACA) for the federal government. The states' open public meetings laws may apply to advisory committees depending on the composition of and subject matter for a particular advisory committee. The Gorge Commission has never enacted a separate advisory committees rule, but the Gorge Commission's open public meetings rules cover advisory committees. The drafters of the National Scenic Area Act most likely borrowed this list of rule subjects from the statutes authorizing the Northwest Power and Conservation Council (another interstate compact agency) which require that Council to use the federal laws for those subjects that are applicable to BPA and FERC as appropriate.

Requirement in the Columbia River Gorge Compact:

Article I.g of the Columbia River Gorge Compact (ORS 196.150; RCW 43.97.015) requires:

The commission shall adopt bylaws, rules, and regulations for the conduct of its business, and shall have the power to amend and rescind these bylaws, rules and regulations. The commission shall publish its bylaws, rules and regulations in convenient form and shall file a copy thereof and of any amendment thereto, with the appropriate agency or officer in each of the party states.

This provision applies to all the Gorge Commission's rules, even those that the National Scenic Area Act requires. The Gorge Commission rules adopted solely pursuant to this authority in the Gorge Compact (and not the requirement in the National Scenic Area Act to be consistent with the more restrictive statutory provisions of either state) are:

Division 10 – Legal Descriptions

Division 30 – Enforcement

Division 40 – Urban Area Boundaries

Division 50 – Plan Amendments

Division 60 – Appeals from County Ordinances

Division 70 – Appeals from Decisions under Gorge Commission Ordinances

Division 82 – Land Use Ordinance

Division 120 – Economic Development Certification Process

Planned Schedule

Staff has planned this rules update project to occur in two phases:

Phase 1. Review and update the rules required by section 5(b) of the National Scenic Area Act (divisions 11, 12, 13, 14, 15, and 16) and conform those rules to uniform outlining and terminology.

Phase 1 is largely technical legal work and thus staff did not use an advisory committee to produce the drafts for this orientation. Staff asked the states' Attorney General offices to review the works in progress and they are still doing so.

If the Gorge Commission authorizes staff to proceed with phase 1, staff will work to complete the proposed rules and file notices of proposed rulemaking with the states with a goal (not a firm commitment) to schedule a public hearing at the Gorge Commission's January or February 2025 meeting.

Phase 2. Conform divisions 10, 30, 40, 50, 82, and 120 to uniform form and style and update cross references to revised rule numbers in the phase 1 updates. Review and update the appeal rules (divisions 60 and 70); incorporate 2025 legislative changes into 350-11, 12, 14, and 16 (if any).

Phase 2 involves technical editing work to several rules for which an advisory committee will not be necessary. However, reviewing and updating the appeal rules (divisions 60 and 70) will benefit from review and comment from attorneys who have represented appellants, intervenors, and counties who have been involved in recent appeals. In the past, staff asked such attorneys for ideas

to improve the appeal rules, to review draft work, and to help create rule text, and staff will do so again in this phase.

Staff will work on phase 2 with a goal (again, not a firm commitment) to present draft rules at the July 2025 Gorge Commission meeting and if so, staff could complete proposed rules and file notices of proposed rulemaking with the states in time for a public hearing at the Gorge Commission's October or November 2025 meeting.

Staff does not intend this rules update project to make substantive changes to divisions 10, 30, 40, 50, 82 or 120.

Form and style of the Gorge Commission's administrative rules

The two states have different form and style for their own administrative rules. The Gorge Commission's current works in progress use Oregon's form and style. This is legacy because the Oregon Department of Justice drafted the first set of Gorge Commission rules. However, over the years, the rules have not continued to consistently use the outlining and terminology required for Oregon administrative rules and some parts of the rules do not seem to follow either state's form and style. This rules update project will result in Oregon form and style in all rules. Staff is also using Oregon form and style because the Oregon Secretary of State publishes the Gorge Commission's rules in the Oregon Administrative Rules compilation and requires Oregon form and style when doing so. In the past, where the Gorge Commission did not use Oregon form and style, the Oregon Secretary of State's office unilaterally changed the rule text and outlining after the Gorge Commission adopted the rules and filed them in both states. Finally, the Gorge Commission must use Oregon's online rulemaking application to prepare draft rules and file notices. That application does not allow the Gorge Commission to deviate from Oregon form and style, and if we could slip any deviations past the electronic system, a human reviewer would catch them and return the draft rules for correction. The Washington Code Reviser does not include the Gorge Commission's rules in the Washington Administrative Code compilation and does not have an online rulemaking application for agencies to use, and the Code Reviser allows the Gorge Commission to use Oregon form and style.

An important part of form and style is the outlining and terminology used to delineate and describe the distinct parts of a rule. Oregon's outlining and terminology are:

- xxx-xxx-xxxx Chapter-Division-Rule
- (1) Section
- (a) Subsection
- (A) Paragraph
- (i) Subparagraph

Using a uniform form and style is important because it makes references to our rules in staff reports, legal briefs, and other writings, and cross references within our rules (from one rule to another rule or part of a rule) clear and unambiguous.

The Oregon Attorney General publishes an Administrative Law Manual for writing rules; the Oregon Legislative Counsel publishes a Bill Drafting Guide for writing statutes; and the Oregon Appellate Courts publish a Style Guide for writing appellate court decisions. Each of these are tools that staff has used for grammar, style, and other textual conventions for the Gorge Commission's rules. Staff is using these tools in the order listed above. Thus, staff starts with the Administrative Law Manual.

If that manual does not specify a style, then staff is using the Bill Drafting Guide next, etc. Where none of these sources specifies style or grammar, staff is using the Chicago Manual of Style, which the Appellate Court Style Guide recommends. For example, the Administrative Law Manual does not specify how to introduce an open list of items, but the Bill Drafting Guide notes that “including” and “including but not limited to” mean the same and uses the simpler term, “including;” thus staff is using the simpler term “including” in updating the rules.

Staff is also considering Oregon Land Use Board of Appeals and Oregon appellate court decisions that contain style and grammar lessons—for example, an Oregon appellate court decision explained that the term “and/or” is inherently ambiguous and should be avoided. The style and grammar elements of these LUBA and appellate court decisions are not typically part of the indexing of those cases, so they are hard to find and thus staff is principally relying on the style manuals.

Explanations of Gorge Commission Rules

For the rules required in the National Scenic Area Act, staff will recommend the Gorge Commission approve a report (when adopting the rules, not now) that explains the authority and context for the rules overall and for each division, including the Gorge Commission’s understanding of what “the more restrictive statutory provisions of either state” means and a section-by-section analysis of which state’s statutory provisions the Gorge Commission adapted and blended into its rules. The current draft report, which is still in progress, is one of the two attachments to this staff report.

This report will be part of the rulemaking record and will assist the Gorge Commission and staff in the future to interpret the rules, and to review legislative changes each year to determine whether the Gorge Commission needs to update its rules to remain consistent with “the more restrictive statutory provisions of either state.”

The Gorge Commission has not produced such a report in the past. Staff intends to keep this report updated and if necessary, will ask the Gorge Commission to adopt a revised report when adopting rule amendments in the future.

What does “the more restrictive statutory provisions of either state” mean?

As noted above, there is no guidance in the National Scenic Area Act or other source about how to determine which state’s statutory provisions are “the more restrictive statutory provisions of either state.” Staff’s review of the current Commission rules suggests several indicia. The in-progress report accompanying the in-progress rule updates gives principled bases for identifying, blending, and applying “the more restrictive statutory provision of either state” based on these indicia and the current sense of staff and the states’ attorneys. The bases in the in-progress report attached to this staff report is still in progress and not final.

Developing the Substantive Content of the Rules

In developing the substantive content of the rules, staff principally used the two states’ statutory laws as the National Scenic Area specifies. Staff also and reviewed, considered, and adapted guidance from many other sources, including:

- Model administrative procedure rules in both states
- Court decisions from Oregon and Washington state courts
- Oregon Land Use Board of Appeals administrative rules

- Oregon Attorney General’s Administrative Law Manual
- Oregon Attorney General Public Records and Open Meetings Manual
- Oregon Association of Counties and League of Oregon cities’ various publications
- Washington Department of Ecology administrative rules
- Washington State Bar Association and WSBA Administrative Law Section’s Administrative Law Practice Manual
- Washington State Bar Association Public Records and Open Public Meetings Deskbook
- Washington Municipal Research and Service Center’s various publications

Again, attorneys in the Oregon Department of Justice and Washington Attorney General’s office are also reviewing and providing advice, comments, and edits for staff to consider and incorporate.

Examples of identifying, blending, and applying “the more restrictive statutory provisions of either State.”

Below are two examples of the complexity of the task of identifying, adapting, blending, and applying “the more restrictive statutory provisions of either state.” The in-progress report attached to this staff report discusses these and more situations in each rule.

A “meeting” under open meetings rules:

Commission Rule 350-011-0010. This is an example of the complexity of blending the states laws where each state’s law has elements that are “more restrictive” than the other.

Washington law and Oregon law differ in the terminology and the scope of activities that constitute a meeting in their respective open meetings law. A meeting in Washington law is subject to open meeting requirements when an agency is taking an “action” and a meeting in Oregon law is subject to open meeting requirements when a quorum is necessary for the agency to “deliberate” or make a “decision.” Washington’s definition of the term “action” includes the elements of Oregon’s terms “deliberate” and “decision,” but Washington’s definition of “action” also includes “receipt of public testimony” and other elements not included in Oregon’s law. Washington law does not define “deliberation,” but Oregon law does. The current draft uses the Oregon definition of meeting, except that it uses Washington’s term, “action” in that definition, not Oregon’s terms, to ensure that our open meetings rules capture all the elements of both Oregon and Washington law and includes a definition of deliberation and the current draft rule includes Oregon’s definition of “deliberation.”

The current draft also replaces the term “final action” in Washington’s definition of “action” with Oregon’s term, “decision” and includes Oregon’s definition of “decision” because other Oregon statutory provisions that are adapted into the Gorge Commission’s rules apply specifically to “decisions.” Staff also replaced the term “final action” with “decision” in multiple other rules that are principally adapted from Washington statutory provisions for consistency and to capture the elements of both Oregon and Washington law.

Time to acknowledge and respond to a records request:

This is an example of how neither of the states’ different laws are necessarily “more restrictive” than the other. The statutory provisions for this example are:

RCW 42.56.520(1) requires that agencies respond within five business days by providing the requested records or acknowledging receipt and providing an estimate of time to provide the records.

ORS 192.324(1) and 192.329(5) require only acknowledging the request within five business days and then within 15 business days, providing the records or an estimate of time to provide the records. The Oregon Attorney General Public Records Manual explains the 15 business days rule as follows:

The law establishes a baseline expectation that public bodies will complete their responses no later than 15 business days after receiving the request. However, a public body must still complete its response as soon as practicable and without unreasonable delay. That is, requesters who have made particularly straightforward requests can appeal a public body's inaction even before 15 business days have elapsed. A public body unable to meet the 15 business-day deadline must notify the requester in writing that the request is still being processed and provide the requester with a reasonable estimated date of completion.

Both laws require acknowledging a request within five business days. The difference between these laws is that Washington requires providing records within that five-day period if possible or providing an estimate to produce records but does not contain the 15-day baseline expectation in Oregon law for providing records. The Oregon Attorney General used the term, "baseline expectation;" this term is not in the statutes. The states' laws are simply different, and neither is "more restrictive;" that is, one state's law would not consistently result in a shorter response time for all or most requests. Washington's five-day rule may result in fulfilling some requests sooner, but not necessarily within 15 days, whereas Oregon's 15-day rule would probably result in fulfilling more requests within 15 days, but longer than 5 days.

The Gorge Commission's current rules use the Washington approach of a shorter time to acknowledge a request and produce the records or an estimate of time to produce records and staff is not considering changing this.

If these examples sound confusing, they should. Blending two states' laws into a single cohesive administrative rule is confusing and exacting work. This is one of the reasons that staff is working with the states' attorneys. The collective work of staff and the states' attorneys should ensure these rules comply with the National Scenic Area Act's requirement that the rules are "consistent with the more restrictive statutory provisions of either State."