



# Oregon

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## Oregon Watershed Enhancement Board

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### MEMORANDUM

**TO:** Dan Heagerty and Jane O’Keeffe, Co-Chairs  
Oregon Watershed Enhancement Board

**FROM:** Tom Byler, Executive Director

**SUBJECT:** **Overview of Mid-Coast Watersheds Council Investigation Report**

#### **I. Introduction and Background**

At the May 15-16, 2007, OWEB Board meeting, Cindy Ashy, a citizen from Newport, testified during the two public comment periods about the Mid-Coast Watersheds Council (MCWC). In her testimony Ms. Ashy made a number of allegations about the MCWC and its watershed council support grant application. The Co-Chairs committed OWEB to look into the issues raised in her testimony. The Co-Chairs tasked the Executive Director with conducting an investigation.

This memo describes the general methods used for the investigation, identifies the fundamental issues determined to be relevant to the agency, and sets out the key recommendations related to those issues. Attachment A provides a summary list of the allegations investigated and the related findings. Attachment B contains the full, detailed report of the allegations, staff findings and recommendations, and the analysis associated with each issue.

#### **II. Methodology**

At the outset, there are two important points to emphasize that guided the direction of the investigation. First, Oregon statutes do not explicitly authorize governmental control over watershed councils. Clearly, OWEB has a statutorily identified role in funding and supporting the work of watershed councils. Our interest is to ensure our grant investments and grant-related processes are sound and lawful. Beyond grant agreement requirements, OWEB does not have authority to control what watershed councils can or cannot do.

Second, staff focused the investigation only on the allegations we determined to be pertinent to OWEB’s programs and policies. Over the course of the investigation there were numerous issues raised relating to a pending legal matter between Ms. Ashy and the MCWC. After consulting with the co-chairs on this matter, we determined it was not appropriate for the investigation to examine those issues. The ongoing legal issues between the MCWC and Ms. Ashy are a matter of local dispute between the council and an individual. Those issues, while they may be important to Ms. Ashy and to the MCWC, are not a subject of OWEB’s investigation and are therefore not addressed in this report.

OWEB's investigation examined issues of concern about the MCWC raised by local citizens and watershed council stakeholders. Staff interviewed local community leaders, citizens, and others familiar with the MCWC. Staff also interviewed Sam Adams, MCWC Chair, and Wayne Hoffman, MCWC coordinator. The temporal scope of the investigation was not limited to recent events. The issues raised by those interviewed were examined further if the issues were relevant to OWEB's policies and programs. Staff looked into the allegations by examining statutes and administrative rules, OWEB processes and procedures, grant files, and related written documents.

### **III. Fundamental Issues**

On the basis of the interviews and information provided to OWEB by interested persons, staff identified 15 core allegations. These allegations and our related findings are briefly set out in Attachment A and discussed in detail in Attachment B. For purposes of this report overview, staff organized the allegations into three fundamental issue areas: (1) grant evaluation and management; (2) legal; and (3) watershed council process issues. This section briefly describes those issue areas and associated staff recommendations.

#### **A. Grant Evaluation and Management Issues**

The allegations involving OWEB grant evaluation and management issues relate to grant program policies and priorities, grant review processes, watershed council support rules and criteria, and grant oversight. Allegations 1-7 relate to this issue area.

##### **1. Findings**

OWEB staff are generally satisfied with its grant evaluation and management rules and processes. OWEB staff found no conclusive evidence to support the allegations pertaining to the MCWC or OWEB in this issue area. There are, however, OWEB policy issues that may warrant further consideration and discussion by staff and Board members.

##### **2. Recommendations**

OWEB staff should review the umbrella watershed council policies and rules, and evaluate council support application requirements to ensure that OWEB is receiving the necessary documentation. Staff review and recommendations on this matter will be presented to the board at a future board meeting.

#### **B. Legal Issues**

Some allegations raised questions about MCWC fiscal management, watershed council bid and contract requirements, and the statutory requirements of watershed councils. Allegations 8-12 relate to this issue area. The investigation has touched on nearly all of the statutory and operational issues of watershed councils, from how they are formed to how they implement projects with funding from OWEB.

##### **1. Findings**

OWEB staff found no conclusive evidence to support the claims of improper actions by the Mid-Coast Watersheds Council in this issue area. However, due to the potential for damaging public perceptions associated with some of those allegations, staff urges the MCWC to take action to demonstrate its good faith and proper business practices by initiating a full, independent external audit.

## **2. Recommendations**

- a. OWEB recommends the MCWC conduct a full external audit that, at a minimum, focuses on its policies and procedures related to the selection and use of contractors.
- b. OWEB should explore opportunities to provide watershed councils training on contracting and public meetings law.
- c. OWEB should strengthen its communications and relationships with local government regarding watershed council formation, functions, and responsibilities.

## **C. Watershed Council Process Issues**

The allegations involving watershed council processes in general, and those of the MCWC specifically, include how the MCWC involves and interacts with interested citizens, makes decisions, provides information, and works with agencies and programs. Allegations 13-15 relate to this issue area.

### **1. Findings**

There are mixed opinions in the watershed community regarding the MCWC with respect to its processes and interactions with people at its meetings. Many people view the MCWC in a positive light; some view the council negatively. The opinions vary to the point that staff wonder whether it is possible to clearly determine the “reality” of the situation. What we do know, is that this situation is unique, and not typical of watershed councils in other parts of the state. Whatever the reality in the Midcoast area, the fact that there are such divergent and passionate opinions about the MCWC is of concern to OWEB.

Public participation and citizen involvement is critical for the long-term success of watershed councils. Ideally, watershed councils should serve as an open forum for citizen dialogue about local watershed issues. Watershed councils should also strive to act as a constructive catalyst to create and maintain diverse community partnerships.

At the same time, OWEB recognizes that it is in a watershed council’s interest to be able to make decisions and take actions without being unreasonably delayed or undermined by one or more persons in their area who may have different opinions or agendas. Serving as a forum for diverse community opinion and producing on-the-ground results can be a difficult balancing act for any watershed council. The MCWC is currently struggling with a very challenging situation. The following recommendations are made with the intent of helping the MCWC and other councils to be strong and effective organizations within their communities:

### **2. Recommendations**

- a. OWEB should better identify its expectations for watershed councils, especially its expectations for citizen and landowner involvement.
- b. OWEB strongly encourages the MCWC to identify and implement ways to improve relationships and communications between watershed councils in the Midcoast area.

- c. OWEB strongly encourages the MCWC to identify and implement ways of involving citizens who may have different viewpoints, without sacrificing the council's core mission.
- d. OWEB should consider offering funding to provide mediation or other forms of assistance to help the MCWC strengthen its community relationships.

#### **IV. Summary of Recommendations**

On the basis of the issues investigated, OWEB staff found no conclusive evidence to support the allegations made against the Mid-Coast Watersheds Councils.

The investigation has identified a number of areas that may merit further consideration by OWEB. These include:

1. OWEB should review policies and rules applicable to umbrella watershed councils, and evaluate council support application requirements to ensure that OWEB is receiving the necessary documentation.
2. OWEB should explore opportunities to provide training to watershed councils on contracting and public meetings law.
3. OWEB should strengthen its communications and relationships with local government regarding watershed council formation, functions, and responsibilities.
4. OWEB should better identify its expectations for watershed councils, especially its expectations for citizen and landowner involvement.
5. OWEB should consider offering funding to provide mediation or other forms of assistance to help the MCWC strengthen its community relationships.

The investigation also identified opportunities for the MCWC to take steps to improve its situation. These include:

1. OWEB strongly encourages the MCWC conduct a full external audit that, at minimum, focuses on its policies and procedures related to the selection and use of contractors.
2. OWEB strongly encourages the MCWC to identify and implement ways to improve relationships and communications between watershed councils in the Midcoast area.
3. OWEB strongly encourages the MCWC to identify and implement ways to more successfully engage and involve citizens who may have different viewpoints, without sacrificing the council's core mission.

#### **Attachments**

- A. Summary of Allegations and Findings
- B. Allegations and Findings Detail Report

**Summary of the Allegations and Findings  
Mid-Coast Watersheds Council Investigation  
August 30, 2007**

**GRANT EVALUATION AND MANAGEMENT ISSUES**

**Allegation #1:** The Mid-Coast Watersheds Council (MCWC) claims umbrella status in its 2007-2009 Council Support application, which is not accurate because its relationship with the Salmon-Drift and Beaver Creek councils are not finalized and the Yaquina watershed group isn't functioning well.

**Findings:** The Mid-Coast Watersheds Council qualifies as an umbrella watershed council for the 2007-2009 biennium.

**Allegation #2:** MCWC may not have qualified for umbrella status for the entire 2005-2007 biennium, due to the Alsea group split off and because the Yaquina group has been disbanded until recently.

**Findings:** OWEB has no formal policy to address the situation where an umbrella council experiences this type of change. Under the circumstances, we find no wrongdoing on the part of the MCWC.

**Allegation #3:** The merit category ranking of "Excellent" for the MCWC was because of an "incestuous review process" where the two Region 1 reviewers had "significant conflicts of interest" because of membership in the MCWC or one of its sub-basin planning groups.

**Findings:** The record does not support claims that the presence of a reviewer with ties to the MCWC increased the consensus score and merit ranking for the MCWC's council support grant. The OWEB review process for the Mid-Coast council support application was fair and impartial. The consensus scoring process did not allow one reviewer's opinions either for or against an applicant to distort the final score.

**Allegation #4:** The watershed council support process merit category ranking of "Excellent" for the MCWC is unsupported because the MCWC does not meet the criteria in several categories.

**Findings:** Two consensus scores were increased by OWEB staff in the council support recommendation process. One adjustment was for accomplishments. OWEB staff support this adjustment as justified by the strong track record of restoration accomplishments of the MCWC. This adjustment, along with the other merit category scores, are supported in substance and process and are therefore sufficient for the MCWC to receive an "Excellent" ranking.

**Allegation #5:** Watershed councils receive large sums of public money with little oversight from OWEB.

**Findings:** Oregon statutes do not expressly authorize OWEB to exert regulatory control over watershed councils. OWEB does have a funding relationship with councils through the agency grant program. OWEB has strong accountability provisions (fiscal accounting and reporting requirements) for its grant recipients, regardless of whether they are a watershed council or other eligible entity that receives OWEB grant funds.

**Allegation #6:** The MCWC may have made misrepresentations in grant applications and used OWEB funds for purposes not listed in the original grant application.

**Findings:** There is no indication that the MCWC has intentionally misrepresented proposed activities, budgets or timelines in its grant applications, nor is there any evidence that funds have been used for purposes not originally specified in its grant proposals. Staff review of a sample of grants show that the MCWC has a strong track record for meeting objectives of grant applications and for carrying out projects at or under budget.

**Allegation #7:** OWEB actions, including the umbrella watershed council status for the MCWC and OWEB's insistence that the MCWC be the grantee on a U.S. Fish and Wildlife Service (USFWS) grant, have given all the funding and power to the MCWC, which has contributed to its current problems.

**Findings:** The MCWC is currently the only watershed council in the Midcoast area eligible for council support funding based on statutory (ORS 541.351 and 541.388) and administrative rule (OAR 695-040-0030) requirements.

## **LEGAL ISSUES**

**Allegation #8:** Watershed councils receive public funding and should be required to follow the Public Meetings Law. The MCWC has claimed to be a private corporation that can limit participation.

**Findings:** A private body is not subject to the Public Meetings Law merely because it receives public funds, contracts with governmental bodies, or performs public services. The legal question is not free from doubt, but the Attorney General's office has advised that a court would likely find that watershed councils are subject to the Public Meetings Law. Public participation in watershed councils may or may not increase as a result of following the meetings law, which requires that meetings be open to the public but does not mandate public participation *per se*.

**Allegation #9:** Watershed councils are not required to put contracts out for bid, but should be if the project is funded by OWEB. The MCWC doesn't put contracts out for bid and has developed improper relationships with its contractors that may have resulted in mismanagement of grant funds.

**Findings:** Oregon statutes do not require watershed councils to follow public contracting law, but do specify requirements for transactions between board members of a non-profit corporation and the non-profit. Watershed councils organized as non-profit corporations may enter into contracts to implement projects without engaging in the competitive bidding process. The MCWC has contracting processes and procedures for this purpose. The MCWC does conduct transactions with members of its board in grants funded by OWEB. However, we found no evidence that the MCWC has mismanaged grant funds.

**Allegation #10:** The Drift Creek project grant (#205-159) was improperly transferred from Lincoln Soil and Water Conservation District (SWCD) to MCWC to guarantee project management for Steve Trask of Bio-Surveys.

**Findings:** The Drift Creek project grant (#205-159) was not improperly transferred from the Lincoln SWCD to the MCWC. OWEB statutes and administrative rules do not address the transfer of a Grantee's responsibility before the signing of a grant agreement.

**Allegation #11:** Watershed councils who incorporate after local recognition should be reviewed by local government and re-recognized, or they should be required to have a regular local review, for example every two years.

**Findings:** Watershed councils are "formed" and "designated" by local government. Oregon statutes offer no guidance to local governments on whether re-recognition is required after a watershed council changes its organizational status.

**Allegation #12:** OWEB is liable for the actions of MCWC coordinator and MCWC Board.

**Findings:** Oregon statutes do not explicitly authorize governmental control over watershed councils. Despite OWEB's role in funding and supporting the work of watershed councils, OWEB does not literally control what they do. Therefore, OWEB is not liable for the actions of watershed councils, including the MCWC.

## WATERSHED COUNCIL PROCESS ISSUES

**Allegation #13:** The MCWC discourages public participation, MCWC board members yell or threaten citizens in meetings, and citizens feel that they are not treated with respect if they have a different viewpoint.

**Findings:** There is no local consensus in the watershed community about whether the MCWC discourages public participation. There are widely-divergent opinions, some strongly-held. The mixed opinions suggest the MCWC may benefit by working to improve in this area.

**Allegation #14:** All councils who receive public money from OWEB should be required to admit all interested persons to all of their meetings and otherwise allow full participation

**Findings:** Oregon statutes do not require watershed councils to involve all citizens. A watershed council is required to involve representatives of the watershed's interests. Oregon statutes specify that OWEB evaluates council requests on whether the organization reflects the interests of the watershed and has the potential to protect and enhance the quality of the watershed in question.

**Allegation #15:** The MCWC hasn't fulfilled its grant requirement to offer the county commission the opportunity for an annual briefing at a public meeting on the council's ongoing activities, projects, community involvement efforts and work plan priorities for the coming year.

**Findings:** It appears that the MCWC has fulfilled its grant requirement for the 2005-2007 watershed council support grant that it offer the county commission the opportunity for an annual briefing.

**Allegations and Findings Detail Report  
Mid-Coast Watersheds Council Investigation  
August 30, 2007**

**GRANT EVALUATION AND MANAGEMENT ISSUES**

**Allegation #1:**        **The Mid-Coast Watersheds Council (MCWC) claims umbrella status in its 2007-2009 Council Support application, which is not accurate because its relationship with the Salmon-Drift and Beaver Creek councils are not finalized and the Yaquina watershed group isn't functioning well.**

**A. Findings**

The Mid-Coast Watersheds Council qualifies as an umbrella watershed council for the 2007-2009 biennium.

**B. Investigation and Analysis**

Watershed councils that qualify as umbrella councils have received additional funds through the watershed councils support grant process. OWEB administrative rules set out the criteria for a watershed council to achieve umbrella status (OAR 695-040-0020). To determine the umbrella status of the MCWC, staff looked for information that the MCWC supports now or plans to support the sub-basin planning groups, that the sub-basin groups are or will be represented on the coordinating council (i.e. the MCWC), and that the sub-basin groups and MCWC will participate in a shared staff arrangement during the 2007-2009 biennium. The most recent council support application form did not ask for this information. To look into this first allegation, staff requested correspondence from each of the MCWC sub-basin planning groups listed in the MCWC council support application confirming the umbrella watershed council relationship.

Staff received a letter from the Siletz Watershed Council (SWC) on July 3, 2007. Jan Christensen, on behalf of the Siletz, confirmed that the SWC and the MCWC have a shared staffing arrangement, the MCWC provides support to the SWC (since 1999), and the SWC has a seat on the MCWC. Paul Katen, Board President for the Salmon Drift Watershed Council (SDWC), submitted an email to OWEB on July 12, 2007, stating that they are preparing an MOU between the two councils governing the relationship between them, the SDWC will have a seat on the MCWC board, and that the SDWC agreed to be part of the MCWC's 2007-2009 application.

The MCWC asked the Yaquina watershed group to send similar information, but staff turnover in June and August has delayed a response. Instead the MCWC executive committee has affirmed, in an August 30, 2007 email, that the MCWC will provide support to the Yaquina group, the Yaquina group will have a representative on the MCWC Board, and the MCWC and the Yaquina group have a shared staff arrangement.

No documentation was submitted by the Beaver Creek group, which was listed in the MCWC's application. In an August 1, 2007 interview with Wayne Hoffman, MCWC coordinator, he indicated that while there had been some initial discussion with the group, he wasn't sure where they were going or if a relationship would work out.

**Allegation #2: MCWC may not have qualified for umbrella status for the entire 2005-2007 biennium, due to the Alsea group split off and because the Yaquina group has been disbanded until recently.**

**A. Findings**

OWEB has no formal policy to address the situation where an umbrella council experiences this type of change. Under the circumstances, we find no wrongdoing on the part of the MCWC.

**B. Investigation and Analysis**

In the 2005-2007 biennium, the MCWC, through its umbrella watershed council support grant, provided support for three watershed groups (Yaquina, Siletz, and Alsea). During the biennium, the Alsea Watershed Council separated from the umbrella of the MCWC, but still received support funding from the MCWC. To examine this allegation, staff examined the MCWC's 2005-2007 Council Support file, including the grant application, grant agreement, payment invoices, and correspondence. Specifically staff were looking for correspondence and invoice information related to payments the MCWC sub-basin planning groups.

An examination of the file revealed a December 2005 letter from the Alsea Watershed Council notifying OWEB that it had separated from the umbrella of the MCWC with the intent of it becoming an independent council to "better represent the local people and communities." The letter also states that it understands that the MCWC will continue to pay its coordinator \$375/month for the remainder of the biennium, in part due to a precedent established when the Salmon-Drift WC split from the MCWC in a previous biennium. The file also contains invoices for the Siletz and Yaquina basins' planning support for the biennium.

OWEB has no formal policy guidance to address the situation where a council falls apart during the grant period, a council under an umbrella disbands or becomes inactive for a period of time, or part of the umbrella organization stops functioning. In this case, OWEB regional and Salem staff were aware of the situation and worked with the MCWC to honor the original intent of the grant and continue funding commitments to the sub-basin planning groups identified in the application. Staff believe this arrangement was appropriate for the situation. However, this is a policy issue that may warrant further discussion and possible additional guidance in administrative rule.

**Allegation #3: The merit category ranking of "Excellent" for the MCWC was because of an "incestuous review process" where the two Region 1 reviewers had "significant conflicts of interest" because of membership in the MCWC or one of its sub-basin planning groups.**

**A. Findings**

The record does not support claims that the presence of a reviewer with ties to the MCWC increased the consensus score and merit ranking for the MCWC’s council support grant. The OWEB review process for the Mid-Coast council support application was fair and impartial. The consensus scoring process did not allow one reviewer’s opinions either for or against an applicant to distort the final score.

**B. Investigation and Analysis**

To conduct an effective merit evaluation of councils support applications, OWEB seeks reviewers familiar with the operations of watershed councils and the factors that make councils successful. It is not unusual to find that those who are most familiar with watershed councils are current or former council members or technical advisors to a local watershed council. To address the appearance of potential conflicts of interest in forming review teams, staff asked each potential reviewer about the nature of his or her relationship with councils to determine whether he or she would be objective, fair and impartial.

For the review of 2007-2009 Watershed Council Support grant applications, there were two teams formed from the Council Support Advisory Committee (CSAC). The role of the CSAC was to assist OWEB staff in reviewing applications and developing “consensus scores” for each application. After pre-scoring the applications, the CSAC met for facilitated “consensus scoring sessions.” At the sessions, each CSAC team discussed the applications it reviewed and sought clarification from OWEB staff. The results were consensus scores for each application. Team members did not need to abstain, because they did not vote on applications or scores. OWEB’s lead staff person on the council support review process stated that team members frequently identified their relationships with applicants during the discussion.

Each CSAC team was comprised of one person from each of OWEB’s regions and four “statewide” representatives. The MCWC application was reviewed by Team 1 of the CSAC. Only one reviewer from Region 1 was on that team (see the table below). That person, Debbie Pickering from The Nature Conservancy was also selected because of her experience as a member of the Region 1 Regional Review Team, which reviews restoration, acquisition, and other non-capital grant applications submitted in the North Coast. Ms. Pickering is a member of the Salmon-Drift Creek Group, which is sub-basin planning group for the MCWC. The other Region 1 reviewer was part of the second CSAC team, which did not review the MCWC application.

**Team 1**

Debbie Pickering	OWEB Region 1	The Nature Conservancy
Brian Barr	OWEB Region 2	National Center for Conservation, Science & Policy
Ed Emrich	OWEB Region 3	City of Salem/Public Works
John Merwin	OWEB Region 4	Upper Chewaucan WSC
Tom Straughan	OWEB Region 5	Oregon Department of Agriculture
Mike Powers	Statewide	Oregon Department of Agriculture
Dave Ross	Statewide	US Fish/Wildlife Service
Jason Dedrick	Statewide	City of Eugene/Planning
Mitch Wolgamott	Statewide	DEQ/Pendleton

Staff examined the MCWC pre-scoring sheets filled out by Team 1 and found that for the majority of the criteria questions, Ms. Pickering’s pre-score was the same or lower than the majority of the Team. She had a higher pre-score than the majority on only two criteria questions. One question was aggregated for the consensus score and her total did not exceed the consensus, and her pre-score on the second criteria was lower than the consensus score. Staff do not recall whether Ms. Pickering identified her relationship to the MCWC during the CSAC meeting.

It is important to note that OWEB’s review team members do not approve funding for grants. They do provide advice to staff on the relative merit of grant applications. In any event, it does not appear factually that Ms. Pickering unduly influenced the ranking in question.

**Allegation #4:           The watershed council support process merit category ranking of “Excellent” for the MCWC is unsupported because the MCWC does not meet the criteria in several categories.**

**A. Findings**

Two consensus scores were increased by OWEB staff in the council support recommendation process. One adjustment was for accomplishments. OWEB staff support this adjustment as justified by the strong track record of restoration accomplishments of the MCWC. This adjustment, along with the other merit category scores, are supported in substance and process and are therefore sufficient for the MCWC to receive an “Excellent” ranking.

**B. Investigation and Analysis**

The Council Support Advisory Committee’s (CSAC) role was to assist OWEB in reviewing applications and developing “consensus scores” for each application. The CSAC made recommendations to staff, which then evaluated the outcomes and ground-truthed the results in developing a final recommendation to the Board. Staff reviewed the pre-scores and consensus scores and notes from the evaluation process to determine whether the ranking was supported.

The CSAC scores for the MCWC were adjusted in the staff recommendation process. The MCWC scores for Criteria #1, *Organizational Make-up and Citizen Involvement*, and Criteria #8, *Accomplishments*, were both adjusted up based on staff knowledge and experience. Staff adjustments in the council support process were not uncommon. Over half of the 60 council support grant applications received staff adjustments for scoring consistency or staff ground-truthing.

The justification for adjusting the score for Criteria #1 upward from a “5” to a “6” was the perceived strong meeting attendance for the MCWC and its landowner involvement through the sub-basin planning groups (the CSAC had unresolved questions about the level of landowner participation). This investigation has identified concerns about the level of landowner and citizen participation and involvement in the MCWC that suggest that the original consensus score may have been most appropriate. The justification for adjusting the score for Criteria #8 upward from a “4” to a “5” was the strong record of restoration project implementation by the MCWC that has been both strategic and focused on limiting factors.

There is no indication that the accomplishment record of the MCWC is without merit. Staff support that score adjustment.

Regardless of whether the score for Criteria #1 is adjusted down to the level recommended by the CSAC team, staff conclude the other merit category scores, including the adjusted Criteria #8, are supported in substance and process and are therefore sufficient to maintain an “Excellent” ranking for the MCWC.

**Allegation #5: Watershed councils receive large sums of public money with little oversight from OWEB.**

**A. Findings**

Oregon statutes do not expressly authorize OWEB to exert regulatory control over watershed councils. OWEB does have a funding relationship with councils through the agency grant program. OWEB has strong accountability provisions (fiscal accounting and reporting requirements) for its grant recipients, regardless of whether they are a watershed council or other eligible entity that receives OWEB grant funds.

**B. Investigation and Analysis**

This issue involves the relationship between watershed councils and OWEB. Staff examined the statutory relationship between OWEB and watershed councils, and OWEB’s grant policies and procedures to address the question of whether watershed councils are subject to sufficient oversight by OWEB.

In general, OWEB may provide grants and other assistance to watershed councils, but it does not form councils and its prioritization policies should not discourage the formation of councils. The table below outlines the statutory references to the relationship between OWEB and watershed councils.

<b>ORS</b>	<b>Statutory language related to OWEB and Watershed Councils</b>
541.370(1)(e)	OWEB may “grant funds for the support of watershed councils in assessing watershed conditions, developing action plans, implementing projects and monitoring results and for the implementation of...projects”
541.371(1)(a)	OWEB “shall establish a framework for locally based integrated watershed planning and management process designed to assist watershed councils”
541.371(2)(a)	OWEB “may allocate funds to be used for staff for...watershed councils.”
541.375	Watershed councils are eligible entities for OWEB grants
541.384(2)	Designation of high priority watersheds by OWEB is not intended to “discourage or prohibit the formation and function of voluntary watershed councils”
541.388(1)	OWEB “may work cooperatively with any local watershed council that may be formed.” Requests for “state assistance shall be evaluated on the basis of whether the requesting organization reflects the interests of the affected watershed and the potential to protect and enhance the quality of the watershed.”
541.388(4)	DAS liability insurance for watershed councils as part of the insurance provided to OWEB. OWEB establishes “guidelines for liability coverage and limits of coverage” and pays the premium.

OWEB has no statutory or rule-based regulatory authority to control the actions of watershed councils. As a grant funding agency, OWEB is responsible for ensuring its grant funds are

used appropriately. OWEB provides oversight of watershed councils only to the extent that they are the recipient of many types of grants, including watershed council support grants. The analysis of OWEB's grant and fiscal management oversight procedures is described in the sections below.

### **1. Watershed Council Support Grant Oversight**

In 2001, OWEB was given a budget note from the 2001 Legislature requiring that funding be based on performance and accomplishments and include "mechanisms ensuring accountability for public funds received." As a result, OWEB revised its administrative rules, watershed council support grant process, and watershed council support grant agreements to provide funding based on performance and accomplishments and to strengthen watershed council accountability processes. More information on the merit-based evaluation process was presented in the May 2007 Board meeting staff report ([www.oregon.gov/OWEB/docs/board/2007-05/ItemE\\_CouncilSupport.pdf](http://www.oregon.gov/OWEB/docs/board/2007-05/ItemE_CouncilSupport.pdf)).

For the 2007-2009 council support grants, some supporting materials like council member lists, bylaws, and local letters were not requested, in an effort to streamline the grant application. The questions raised regarding the MCWC have shown how those materials are important to the evaluation process. There is no evidence, however, to suggest that the evaluation criteria and process currently used is flawed.

Grant agreement conditions for watershed council support (2005-2007 and 2007-2009 biennia) require that the council:

- a. Complete a self-evaluation at least once a biennium for each watershed council receiving support;
- b. Offer each county commission in its area the opportunity for an annual briefing at a public meeting on the council's ongoing activities, projects, community involvement efforts, and work plan priorities for the coming year;
- c. Inform the Board's Project Manager of any address changes;
- d. Submit verifiable receipts and other accounting records to document expenditure of grant fund installments, and to account for all other funding, in-kind contributions and donations in the project completion report;
- e. Obtain insurance or bonding providing coverage for financial decisions and actions as identified by OWEB if the Grantee is its own fiscal agent, or if the Grantee's fiscal agent does not have such insurance or bonding; and,
- f. Develop and maintain a work plan.

In addition, by August 30 after the close of the grant, councils must submit a final grant report including documentation of actual project costs and non-OWEB match and council activities supported by the grant.

### **2. General Oversight**

OWEB is organized around geographic regions for many reasons. A key reason is to have staff work with local watershed stakeholders and grant recipients, including watershed councils and soil and water conservation districts, to manage OWEB's grant

program in that region. OWEB regional staff attend council meetings, project tours, and other functions, and as a result they learn of local watershed efforts first hand, not just through grant applications. OWEB regional staff assist local stakeholders with organizational issues, potential projects, and other issues such as training.

Outside of the Willamette Basin, OWEB has had the same regional representatives since its inception in 1999. Staff have been able to both develop relationships with OWEB's key restoration partners in each region – to the benefit of both OWEB and those local organizations – and track the history of watershed restoration efforts in their respective regions.

### **3. Grant Award Oversight**

OWEB grant applications are reviewed by appropriate technical teams, which evaluate the assertions in each application. More specifically, they evaluate whether the proposed project will address a root cause rather than a symptom of watershed function, and whether the budget is appropriate to implement the stated goals and objectives of the project, including the cost of items such as personnel and supplies.

Applicants are required to sign a grant agreement for any OWEB approved grant. The grant agreement is the contract between the grant recipient and OWEB. It specifies funding conditions, contract terms, project budget expense categories, project completion requirements, and project implementation requirements. For restoration grants, the grantee must notify the Board when final project designs are developed, construction is scheduled, and if any change or modification of the project is proposed. No funding is released until the grantee submits written evidence that all applicable permits and licenses have either been obtained or are not needed.

On all grants, the grant agreement contains a provision that the final 10 percent of the grant is paid only upon receipt and approval of a project completion report. The project completion report includes a narrative description of the project, documentation that the project complies with the Oregon Aquatic Habitat Restoration and Enhancement Guide, photos of the project before and after project completion, a final accounting of all project expenditures, and submission of the Oregon Plan Watershed Restoration Reporting Form for restoration projects. The grant agreement template is reviewed periodically by OWEB's counsel at the Oregon Department of Justice.

### **4. Fiscal Oversight**

On all grants, OWEB has defined payment procedures to ensure that all payments are supported by receipts and consistent with the conditions of each award. First, OWEB fiscal staff review all receipts submitted in support of a payment request. OWEB will advance a grantee up to 90 percent of its award, but all advances over \$100,000 or over 80 percent of the award must include written justification. OWEB rules require all funding advances to be accounted for within 120 days (OAR 695-005-0060(7)). Under the rule, a grantee has 120 days to submit invoices on the advance, seek and receive approval for an extension of time, or return unexpended advance funds to OWEB. Additional funds are not released by OWEB until receipts for previous fund releases are submitted. Grantees who have not responded to OWEB's 120 day outstanding advances letter, and who fail to respond to OWEB's subsequent outstanding advance and cut-off

letter notices within the time frames provided will be placed on reimbursement-only status for 12 months.

Council support grants are disbursed slightly differently than other grant types, because awards are made for the two-year biennium and funds are available to OWEB on a quarterly basis. Councils may request quarterly advances, but future advances are not made until receipts have been submitted. OWEB also requires a Payroll/Benefits Tracking Form and Expense Tracking Spreadsheet to track coordinator salary and benefits expenses from OWEB grants and other sources, and other expenditures. Like all grants, the final 10 percent is held until the final report is submitted (as described above).

OWEB takes its role as the steward of grants awarded with Measure 66 funds and federal funds very seriously. The requirements, processes and protocols associated with OWEB grants are designed to protect OWEB investments. OWEB will continue to monitor watershed council progress through its regional staff, grant reporting requirements, and biennial council support evaluation process.

**Allegation #6:           The MCWC may have made misrepresentations in grant applications and used OWEB funds for purposes not listed in the original grant application.**

**A. Findings**

There is no indication that the MCWC has intentionally misrepresented proposed activities, budgets or timelines in its grant applications, nor is there any evidence that funds have been used for purposes not originally specified in its grant proposals. Staff review of a sample of grants show that the MCWC has a strong track record for meeting objectives of grant applications and for carrying out projects at or under budget.

**B. Investigation and Analysis**

This claim is difficult to evaluate, because there are several reasons that explain why what is proposed in a grant application may not be exactly what is implemented with OWEB funding. First, grant applications are submitted to OWEB at least 21 weeks before a Board decision. During that time details of the project may reasonably change (e.g., landowners may change, anticipated commitments may fall through, partners may develop conflicts, or other funding sources may become available). Second, OWEB staff and regional review teams conduct site visits during the evaluation period in which they may make suggestions to the applicant that lead to changes on what is funded or implemented. Third, OWEB's regional review teams may recommend budget reductions or other specific changes to projects as grant award conditions, which then require that applicants implement something different than what they proposed in their original application.

For the reasons stated above, changes to an application before the grant award is not unusual or inappropriate. More at issue for OWEB is whether the terms of a grant agreement are complied with. The analysis below focuses on both situations.

The MCWC has received approximately 130 grants from OWEB and GWEB. To investigate this issue, staff examined both a randomly selected 10 percent sample of the MCWC's grants

and any specific grant with alleged problems. The table below lists the files examined by staff.

<b>Project #</b>	<b>Project Type</b>	<b>Project Name</b>
03-02-013	Restoration	Crook Creek (Small Grant)
098-069	Assessment	Rock Creek Watershed Assessment
098-099	Restoration	N. Fork Yachats Habitat Restoration Project
098-361	Restoration	Finster's Culvert Replacement
099-433	Assessment	Mid-Coast Rapid Bioassessment Project
200-026	Monitoring	Juvenile Salmonid Winter Dist
201-010	Council Support	Mid-Coast Watersheds Council Support
201-431	Restoration	Beaver Creek Farm Corporation Marsh Restoration
201-563	Education	Mid-Coast WS Council Education Program
201-578	Restoration	Alesea Culvert Replacement Project
203-121	Restoration	Riparian Restoration Project-Yachats & Beaver Cr
204-525	Education	Board Match to Dirks-Edmunds Bequest
206-1013	Assessment	Workforce Beaver Pond Inventory (Fishing Emergency Grant)
98-096*	Restoration	Private Options for Conservation Easements in the Mid-Coast.
205-159*	Restoration	Drift Creek Restoration: Unger Ranch

*\*Not part of the random sample. These grants were part of specific Public Records Requests and were examined for similar issues.*

Each OWEB grant application includes a Legal Requirements Form. On the form, applicants certify that (1) if this proposal is funded, they will sign a Grant Agreement containing the terms and conditions upon which funds will be released and submit a report at the completion of the project, and (2) they are “familiar with the information contained in this application, and to the best of my knowledge and belief, this information is true, complete, and accurate.” Every funded application must include a signed Legal Requirements Form. All of the above listed MCWC grant files examined by staff have a signed form (or in the case of the Small Grant project, the application form signature line includes certifying that the application is true).

Most of the 13 randomly sampled grant files examined were implemented as proposed with only minor changes, such as extending the grant agreement expiration dates (six grants) or spending less money than the grant award (six grants). An evaluation of the receipts and invoice tracking forms (all previously reviewed and approved by OWEB regional and fiscal staff) did not identify any requests to use funds for purposes not originally specified in the grant proposal.

Only one grant, #98-096, Private Options for Conservation Easements, had significant delays and changes to what was originally proposed. The project was intended to develop and record conservation easements on private land with up to 10 landowners. The reasons for delay were that the MCWC and its partner, the Central Coast Land Conservancy, were inexperienced with conservation easements and implementing easements required more time than anticipated to negotiate and process. These are valid reasons--conservation easements are not an easy-to-use watershed restoration tool, largely because they involve land transactions that are permanent in nature. In addition, this project was awarded by the GWEB, at a time when there was less experience and policy guidance for such grants. OWEB now has explicit statutes and administrative rules governing the evaluation and

implementation of these types of projects. However, even with the delay and implementation difficulties, the project resulted in three recorded conservation easements on nearly 60 acres obtained at a cost of only \$48,000.

Staff also reviewed the MCWC council support application for the 2007-2009 biennium to follow up on allegations that it contained misrepresentations. Staff review identified no evidence of factual misrepresentation.

**Allegation #7: OWEB actions, including the umbrella watershed council status for the MCWC and OWEB's insistence that the MCWC be the grantee on a U.S. Fish and Wildlife Service (USFWS) grant, have given all the funding and power to the MCWC, which has contributed to its current problems.**

#### **A. Findings**

The MCWC is currently the only watershed council in the Mid-Coast area eligible for council support funding based on statutory (ORS 541.351 and 541.388) and administrative rule (OAR 695-040-0030) requirements.

#### **B. Investigation and Analysis**

This allegation involves three issues: (1) OWEB's rules and policies related to "umbrella" status; (2) OWEB's relationship with the MCWC and other watershed groups in applying for four federal USFWS grants in 2007; and (3) the relationship between the MCWC and other watershed councils or groups in its area.

##### **1. Umbrella Watershed Councils**

For the first issue, staff looked at OWEB's administrative rules, the origin of the umbrella policy, and history of implementation. Watershed councils are not formed or recognized by OWEB, yet OWEB may provide funding to those that have formed and that represent the watershed's interests, under ORS 541.388. In OAR 695-040-0020(4) "Umbrella Watershed Council" is a watershed organization that provides support to and coordination for at least three watershed groups or councils, and has a coordinating council, shared staff and a single Watershed Council Support grant (or provides service to a watershed area containing three or more 4th field hydrologic units). In OAR 695-040-0060(4)(b), individual council support grant funding levels are based in part on whether the applicant is an umbrella watershed council.

This language was included for the first time in administrative rules developed and adopted by the OWEB Board in 2004. The concept was not new: OWEB had been aware that a few watershed councils had organized around and were operating as umbrella organizations long before the concept was written into administrative rule. For example, the MCWC's 2001-2003 council support application, submitted in December of 2000, states that the basin planning teams are "local groups in the major basins of the Mid-Coast region operating under the umbrella of the Mid-Coast Watersheds Council." Representatives from the MCWC were members of the 2002 and 2003 rules development processes and may have introduced the concept into discussions about how to develop a merit-based council support criteria and evaluation process that also recognized the organizational structure and funding differences in local watershed councils.

OWEB's intent in its administrative rule language was to be able to award funding to a variety of watershed councils that vary in mission and organization. Staff set the stage for this in its April 2003 Board meeting staff report on watershed council support by recognizing that "council situations and requests are different; applicants serving multiple councils or larger areas may request, and may deserve, more funding than a single watershed council serving a smaller geographic area." (Page 6, Section III.A.) The January 2004 staff report on council support rules suggested that umbrella watershed councils were designed to recognize and honor diverse local council arrangements and to be able to provide effective fund resources in a limited funding environment.

## **2. USFWS Grant Applications**

Staff looked at the record for recent development of four grant applications to the U.S. Fish and Wildlife Service (USFWS). Only state agencies may apply to the USFWS National Coastal Wetlands Conservation Grant Program. Applicants compete on a national scale. In February of 2007, the USFWS notified states of the opportunity to request proposals this year. In consultation with local partners, OWEB submitted four applications in June of 2007. Final decisions on the applications are expected at the end of the calendar year.

One application was for projects in the Salmon River watershed. One of these activities in this application was applied for previously and is part of an ongoing, long-term planning effort with the U.S. Forest Service (USFS). The Governor's Office asked state agencies for assistance with the plan and OWEB offered to apply for the USFWS grant. The MCWC has been identified as the potential sub-grantee for this grant, because of its capacity and experience in administering OWEB funds and implementing projects.

A second application was submitted for restoration work in Lint Slough in the Alsea watershed. The MCWC previously applied for and received OWEB funding for the first phase of work (grant 206-169). The Oregon Department of Fish and Wildlife is a key partner in the project. It has been suggested that the Alsea Watershed Council should be the sub-grantee for this application, since Lint Slough is within the Alsea watershed. OWEB staff recommended the MCWC as the likely sub-grantee for this application due to its strong capacity to implement projects generally, and specific experience with the first phase of this project.

The other two applications were submitted for land acquisition projects in the Yaquina and Alsea watersheds. The Wetlands Conservancy, which OWEB has previously partnered with to implement land acquisition projects in the Yaquina estuary, is likely to be the sub-grantee for these grants.

## **3. MCWC's relationship with other councils in area**

As stated above, the MCWC has operated as an umbrella council since 2001; it had also been developing basin planning teams as part of its "2-tiered approach" since 1999. In recent years, as discussed in Allegations #1 and #2, there have been changes in the sub-groups associated with the MCWC. While there are likely many reasons for the changes, some interviewees claim that the turnover of sub-groups is in part due to what has been described as intense and intimidating behavior by the MCWC.

It is important to note that the only council to which OWEB can provide watershed council support grants in the Mid-Coast area is the MCWC. This is because it has the requisite designation and recognition by a local government entity for this area. OWEB's rules prohibit the agency from providing council support funding to more than one council serving the same area.

Successful watershed councils can bring significant grant funding into their areas. Ideally, this situation creates "win-win" ecological, economic and social benefits for the communities within the watershed. OWEB has long emphasized the need for watershed councils to implement restoration projects. The MCWC has excelled in that regard. Through successful grant applications, the MCWC brings significant restoration funds into the community. Because of its umbrella status and strong record of successfully applying for and implementing grants, the MCWC has considerable local influence regarding cooperative conservation efforts.

In interviews with local citizens and representatives of the MCWC, it is clear that there are differences in philosophy and goals between members of the MCWC and members of some of the other watershed councils or basin planning teams in this area. Those differences have created conflicts between individuals involved in the organizations and have led to divisions between the MCWC and the Salmon-Drift Watershed Council and the Alsea Watershed Council. It is worth noting that it appears that the MCWC and the Salmon-Drift WC are progressing on mending their relationship and building a better working relationship.

The role of the MCWC in the Mid-Coast area is problematic for councils in the area that don't want to be under the MCWC umbrella, because they will not otherwise qualify for any OWEB council support capacity funding. Under the current law, the umbrella arrangement is the only way OWEB may provide council support funding to these other groups.

At the same time, it is also in OWEB's long term interest to have umbrella watershed councils have strong partnership records. OWEB does not have authority to control the actions of umbrella watershed councils in this regard. However, we do strongly encourage the MCWC to endeavor to improve its relations with its current and former sub-group councils.

## **LEGAL ISSUES**

**Allegation #8: Watershed councils receive public funding and should be required to follow the Public Meetings Law. The MCWC has claimed to be a private corporation that can limit participation.**

### **A. Findings**

A private body is not subject to the Public Meetings Law merely because it receives public funds, contracts with governmental bodies, or performs public services. The legal question is not free from doubt, but the Attorney General's office has advised that a court would likely find that watershed councils are subject to the Public Meetings Law. Public participation in watershed councils may or may not increase as a result of following the meetings law, which requires that meetings be open to the public but does not mandate public participation *per se*.

## **B. Investigation and Analysis**

### **1. Public Meetings Law**

One issue is whether watershed councils that receive public funding are public bodies subject to the Public Meetings Law. This question first arose after adoption of enabling legislation authorizing watershed councils in the late 1990s. GWEB requested Attorney General (AG) advice on the issue. In a letter dated April 6, 1998, the AG concluded, after reviewing the statutes then in place, that it was unlikely that a watershed council would be legally required to comply with the Oregon Public Meetings Law. Watershed councils could voluntarily choose to follow the open meetings requirements. The analysis took into account by analogy six factors the Oregon Supreme Court had developed for determining whether a private body is covered by the Public Records Act. Those analogous factors include the entity's origin, the nature of the functions assigned and performed by the entity (are they traditionally preformed by government or private entities), the scope of the authority granted to and exercised by the entity (does it have authority to make binding decisions for the government), the nature of financial and non-financial support, the scope of government control over the entity, and the status of the entity's officers and employees (are they public employees). GWEB and OWEB have shared this advice with watershed councils.

The statutes related to watershed councils changed in 1999, and state funding of watershed councils has evolved significantly since 1998. Thus, OWEB has asked the AG for updated advice on the question of whether watershed councils would likely be considered to be subject to the Public Meetings Law. The AG has noted that watershed councils exist officially only after being "designated" by local government, they receive mostly public funding, and, perhaps most important, they currently have a statutorily-defined planning function in watershed management under the Oregon Plan. The AG has concluded that while the legal question is not entirely free from doubt, a court would more likely than not rule that watershed councils, are subject to the Public Meetings Law, even though OWEB does not directly control watershed councils, and even though watershed councils are not statutorily authorized to make even advisory recommendations to local government or to OWEB.

It should be noted that the Public Meetings Law is a public attendance law, not a public participation law. The right of public attendance guaranteed by the Public Meetings Law does not include the right to participate by public testimony or comment (Attorney General's Public Records and Meetings Manual, page 125) (AG Manual). The AG Manual also states that in the absence of other statutes, rules or bylaws, a governing body may conduct a meeting without any public participation.

### **2. Organizational Structure and Public Participation**

A second issue is how watershed councils are organized and the impact of that organizational form on public participation. Oregon statutes do not give any guidance regarding the organizational structure of a watershed council.

The statute authorizing watershed councils is clear that watershed councils consist of a majority of local residents, represent a balance of interested and affected persons within

the watershed, and assure a high level of citizen involvement in the development and implementation of their program (ORS 541.388). The statutes do not require that watershed councils involve all citizens in its watershed, or that OWEB must require councils to involve everyone in their business affairs in order to receive funding.

The options for how councils may structure their organization to receive grants and hire or contract for staff are limited. A watershed council may align itself with a local government, soil and water conservation district, or other legal entity to act as fiscal agent and employer of the council's staff. Or, a council may choose to become a non-profit organization with its own federal tax-exempt status. Since 1998, many watershed councils have become independent non-profit organizations with the ability to directly hire staff, manage funds, and implement projects. The MCWC is one of those watershed councils.

Before the updated AG advice, the MCWC and other councils organized as non-profits operated with the understanding that they were likely not subject to the Public Meeting Law. Despite that understanding, most watershed councils have encouraged public participation and have opened their meetings to the public, because they operate by consensus for the explicit purpose of engaging key stakeholders and developing and implementing common solutions.

Watershed councils are unique public-private partnerships that are able to involve state, federal and local officials in the council's decision-making body or committees. One challenge to consensus decision-making is that any council member may block decisions, progress, or projects. Councils work through those disagreements to find common ground, but as a last resort when it becomes clear that a stakeholder or member's intent is only to block progress, some watershed council bylaws were changed to include provisions to be able to dismiss or exclude a specific member. Councils are aware that using the provision to be able to move programs or projects forward carries risks to its community building and citizen involvement goals.

Another ambiguity of watershed council statutes involves the question of who qualifies as a member. By statute (ORS 541.388), a council "shall consist of a majority of local residents" and "may include representatives of local government, representatives of nongovernmental organizations and private citizens." For some watershed councils, members are the formal representatives of the watershed's interests and interested citizens have no official role. For others, including many of the non-profit councils like the MCWC, membership is open to all watershed residents or interested persons, while a separate board of directors meets the statutory requirement. In the latter structure, the public has an official role in the organization and may obtain voting rights or other responsibilities. Greater public attendance through the Public Meetings Law does not necessarily result in more opportunities for the public to directly participate as council members in the programs and projects of the council.

**Allegation #9: Watershed councils are not required to put contracts out for bid, but should be if the project is funded by OWEB. The MCWC doesn't put contracts out for bid and has developed improper relationships with its contractors that may have resulted in mismanagement of grant funds.**

### **A. Findings**

Oregon statutes do not require watershed councils to follow public contracting law, but do specify requirements for transactions between board members of a non-profit corporation and the non-profit. Watershed councils organized as non-profit corporations may enter into contracts to implement projects without engaging in the competitive bidding process. The MCWC has contracting processes and procedures for this purpose. The MCWC does conduct transactions with members of its board in grants funded by OWEB. However, we found no evidence that the MCWC has mismanaged grant funds.

### **B. Investigation and Analysis**

This issue involves three aspects: (1) Statutes relating to OWEB's oversight of its grants; (2) watershed council contracting requirements; and (3) watershed council contracting processes and procedures. To examine this allegation, OWEB staff looked at statutes related to the contract requirements of watershed councils and Oregon non-profit organizations, examined a sample of MCWC grants, and interviewed the MCWC about its contracting policies and procedures. Three specific vendors or contractors were alleged to have improper relationships with the MCWC: Bio-Surveys (Steve Trask), Fran Recht, and Rennie Ferris (the latter two are members of the MCWC's board of directors).

In Allegation #5, OWEB described its oversight and accountability requirements for its grant recipients. In Allegation #6, OWEB found that there was no evidence that the MCWC had used funds for purposes not listed in the original grant application.

#### **1. Oregon Statutes and OWEB Oversight**

Oregon statutes related to OWEB and watershed councils do not prescribe how grant recipients enter into contracts to implement projects funded by OWEB. OWEB's administrative rules also do not address this issue other than providing that the "Grantee will account for funds distributed by the Board" (OAR 695-005-0050(10)). Findings related to OWEB's oversight of its grantees are described above in Allegation #5.

OWEB has no statutory or legal requirement to require a grantee to put contracts out for a bid. OWEB does require all grantees to follow all laws associated with the activities undertaken to implement the grant.

#### **2. MCWC Contracting Requirements**

Oregon statutes related to non-profit corporations give them the flexibility to enter into contracts and conduct business in a legal manner consistent with the organization's articles of incorporation (ORS 65.077(7)). The MCWC is a non-profit corporation and is therefore not required by statute to put contracts out for bid. Oregon statutes also address the issue of conflict of interest by directors of non-profit corporations. In ORS 65.361, a conflict of interest transaction is defined as a "transaction with the corporation in which a director of the corporation has a direct or indirect interest." ORS 65.361 also states that a

transaction involving a conflict of interest may be approved by a majority vote of the board of directors or its committee if the interest is known to those voting.

### **3. MCWC Contracting Processes and Procedures**

In interviews with Wayne Hoffman, coordinator, and Sam Adams, chair, of the MCWC, OWEB staff asked for more information about the MCWC's contracting procedures and process. The MCWC's contracting process has two variations that depend in part on how its project proposals are written.

In the first, the MCWC advertises for bids for the work and chooses contractors based on price and value (such as past performance, responsiveness, experience, or local preference) – although value does not trump price. The bid process has in the past few years required participation in a field walk-through so that potential bidders can see the project and know all the technical details.

In the other variation, the project proposal names a specific contractor, who is then awarded the work if the proposal is funded. The trigger for this variation is where the contractor has been instrumental in developing a project proposal through the MCWC's limiting factors analysis (Rapid Bioassessment), in which the contractor participated in a competitive bid process. This has been used with one contractor, Bio-Surveys (Steve Trask), where the MCWC has a good, tested procedure for identifying, developing and implementing projects.

The examination of a random sample of MCWC grants included the original grant for the MCWC's Rapid Bioassessment Project in which Bio-Surveys was first contracted to conduct these analyses. In addition to this grant, three others involved Bio-Surveys or Steve Trask as project manager for the Grantee. Three of the four grants are complete. One was under budget and another accomplished more work than was proposed in the application. In the one project where Mr. Trask was paid to manage the project to completion, his fee was only \$3,500 of a \$52,000 OWEB grant (\$103,000 total project cost).

This allegation also involves two MCWC board members. Ferris Landscaping provided plants, trees or willows for three of the grants examined in the random sample for fees of \$80, \$327, and \$633. Ms. Recht was not listed as a project manager in any of the grants sampled, but was involved in #98-096, Private Options for Conservation Easements. The grant did not include project management payments. Payments were made to the Central Coast Land Conservancy (CCLC) for monitoring and maintenance of the properties under conservation easement. Ms. Recht is secretary of the CCLC, which is a volunteer position for an all-volunteer board. She submitted the annual monitoring reports to OWEB for this project.

In the MCWC's bylaws adopted June 7, 2007, approval of contracts is not explicitly identified as a responsibility for the MCWC Board or its committees. The MCWC Chairperson is identified as having the responsibility to "sign contracts and proposals on behalf of the Council." It isn't clear that the transactions involving members of the Board were approved by the Board or its delegated committee. This may be one area in which the MCWC should consider improvements to clarify its procedures.

**Allegation #10: The Drift Creek project grant (#205-159) was improperly transferred from Lincoln Soil and Water Conservation District (SWCD) to MCWC to guarantee project management for Steve Trask of Bio-Surveys.**

**A. Findings**

The Drift Creek project grant (#205-159) was not improperly transferred from the Lincoln SWCD to the MCWC. OWEB statutes and administrative rules do not address the transfer of a Grantee's responsibility before the signing of a grant agreement.

**B. Investigation and Analysis**

The Lincoln Soil and Water Conservation District submitted a grant application to OWEB for the Drift Creek Restoration project in October of 2004. The application proposed implementing a project to fence and plant both sides of 5.6 miles of lower Drift Creek in the Alsea River basin. The bulk of the requested OWEB funds were budgeted for fence material and labor. Steve Trask was listed on the application as the Technical Contact. The original application budget included \$9,000 for a project manager who would also inspect the work of other contractors. The North Coast Regional Review Team (RRT) recommended the project for funding as its highest priority, with the condition that the application provide additional detail on proposed culvert replacements and investigate the use of tree protection devices for the plantings. The Board awarded \$122,690 in funding for the project on March 21, 2005.

On March 9, 2006, OWEB received a letter from the Lincoln SWCD requesting that the grant administration for this project be transferred to the MCWC, which would complete the project as proposed. A grant agreement for the project had not been finalized between Lincoln SWCD and OWEB by that time. The letter is in the file as an attachment to an OWEB rule waiver with an effective date of March 27, 2006. The waiver was required for the grant to continue. Under OAR 695-005-0050(1), funding is terminated if a grant agreement has not been fully executed within one year of Board approval. The delay in executing the grant agreement was due to the ongoing negotiations between the landowner and the USDA regarding the landowner's participation in the Conservation Reserve Enhancement Program (CREP). Until that was final (in March of 2006), the amount and distribution of OWEB funds to implement the grant could not be determined.

Reasons for the transfer are not identified in the letter from the Lincoln SWCD, but are included in the rule waiver. The rule waiver identifies that during the same time period, the Lincoln SWCD encountered "contractual difficulties" that could be resolved if the grant were transferred to the MCWC, and the project manager had identified project cost savings while still accomplishing the proposed outcomes. The MCWC submitted a revised application and budget for \$121,930 that included \$10,500 for project management.

Because of high ranking of the application by the RRT, the project's relationship with CREP, and contribution to other watershed work, staff determined that a waiver of the rules and change of grantee was justified.

OWEB's statutes do not limit this type of transfer. ORS 541.371(2)(b) states that the Board may award funds for a specific project or program application, and under ORS 541.375, both watershed councils and SWCDs are eligible to apply for OWEB grants. OWEB's

administrative rules also do not address the situation where a Grantee asks for its grant to be transferred to another entity before executing a grant agreement. If a grant agreement had been executed between OWEB and the Lincoln SWCD, provisions in OWEB's contract would have allowed assignment of the contract with OWEB's approval. The one aspect of the project affected by rule was the failure on the part of the parties to execute a grant agreement within one year of the Board approval of the grant. However, neither that failure nor the request to transfer the grant award constituted an improper or illegal action on the part of the MCWC.

While not directly pertinent to OWEB's interest, part of the allegation is that this "improper" transfer was motivated because of contracting law that soil and water conservation districts are required to follow. In 2005, changes to the Public Contracting Code went into effect that required soil and water conservation districts to adopt rules for contracting. The Lincoln SWCD rules adopted on January 12, 2006, related to personal services contracts allow contracts, totaling \$10,000 or less to be awarded by direct appointment and approved by the District Contract Officer. Personal services contracts totaling more than \$10,000, but less than \$150,000, may be awarded after obtaining at least three informal quotes.

Finally, while this grant involves \$10,500 in project management that was not subject to a bid process, the bulk of the project budget is for a fencing contract (\$41,184) that was subject to a publicly noticed bid process. That is consistent with the contract processes and provisions of the MCWC described in Allegation #9.

**Allegation #11: Watershed councils who incorporate after local recognition should be reviewed by local government and re-recognized, or they should be required to have a regular local review, for example every two years.**

#### **A. Findings**

Watershed councils are "formed" and "designated" by local government. Oregon statutes offer no guidance to local governments on whether re-recognition is required after a watershed council changes its organizational status.

#### **B. Investigation**

The first part of this allegation asks whether councils that incorporate as non-profit organizations after they are designated by a local government should seek recognition again given their new organizational status. Oregon statutes state what is required in the formation and recognition of watershed council by local government. A key statute states that a watershed council is a "voluntary local organization, designated by a local government group convened by a county governing body." (ORS 541.351(15)) Statutes offer no direct guidance on whether re-recognition is necessary if a council changes its organizational status. OWEB considers the initial local government formation as the recognition necessary for OWEB to provide assistance to watershed councils under ORS 541.388(1).

OWEB honors a watershed council's discretion in determining how best to organize itself. Assuming a council does not change its essential mission upon incorporation as a non-profit organization, it is unclear why re-recognition from a local government would be necessary. From an OWEB perspective, lack of re-recognition does not disqualify councils from receiving OWEB funding support. That said, there is nothing prohibiting a local government

from choosing to require re-recognition for a council that changes its legal organizational structure. That is a decision for the local government entity.

The second part of the allegation suggests that councils should be required to have regular local review. Oregon statutes do not require periodic review of council activities by local governments. Statutes give local government groups wide discretion on whether they involve themselves in the formation of a watershed council and their ongoing level of involvement with a local council. See ORS 541.384(3) and ORS 541.388.

Local government groups responsible for designating a watershed council in their areas *could* periodically review member representation on the council. This review, again, is not required. Instead, the statutes focus on giving local governments broad latitude to determine the level of their involvement with councils.

In watershed council support grant agreements, OWEB requires councils to *offer* an annual report to local government (see Allegation #15). This requirement was designed in part to encourage councils to pursue periodic communication with local governments while at the same time recognizing that it is up to the local government itself to determine its level of involvement with a council.

**Allegation #12: OWEB is liable for the actions of MCWC coordinator and MCWC Board.**

**A. Findings**

Oregon statutes do not explicitly authorize governmental control over watershed councils. Despite OWEB's role in funding and supporting the work of watershed councils, OWEB does not literally control what they do. Therefore, OWEB is not liable for the actions of watershed councils, including the MCWC.

**B. Investigation**

This issue involves the legal relationship between OWEB and watershed councils. OWEB, through its actions as a granting agency, is not liable for the MCWC actions. Watershed councils are not a subdivision of OWEB. OWEB is authorized by ORS 541.388(1) to "work cooperatively with any local watershed council that may be formed," but that statute does not mean that OWEB has regulatory control over the operations of a watershed council.

In ORS 541.371(1)(f), OWEB is prohibited from having regulatory or enforcement authority except for its grant fiscal responsibilities. OWEB's grant agreement includes standard indemnity language: "The Grantee will save and hold harmless the State of Oregon and the Board, its officers, agents, employees and members, from all claims, suits, or actions of whatsoever nature resulting from, or arising out of, the activities of the Grantee, its agents or employees under this agreement." The grant agreement language illustrates the nature of the relationship between OWEB and watershed councils: watershed councils, as OWEB grantees, are responsible for their own actions. OWEB's fiscal interest is to ensure that its grant funds are used appropriately.

Pursuant to ORS 541.388(4) the State of Oregon may provide liability insurance for watershed councils as part of the insurance provided to OWEB. This insurance pays "those

sums that the covered person becomes legally obligated to pay as damages under the laws of any jurisdiction including the State of Oregon because of personal injury, bodily injury, or property damage.” (Watershed Council Self Insurance Certificate - [www.oregon.gov/OWEB/WSHEDS/wshed\\_council\\_forms.shtml](http://www.oregon.gov/OWEB/WSHEDS/wshed_council_forms.shtml)) This insurance is provided directly to watershed councils by the Department of Administrative Services (DAS) Risk Management. OWEB must pay the premiums, but that also does not mean that OWEB is liable for the actions of watershed councils.

## **WATERSHED COUNCIL PROCESS ISSUES**

**Allegation #13:      The MCWC discourages public participation, MCWC board members yell or threaten citizens in meetings, and citizens feel that they are not treated with respect if they have a different viewpoint.**

### **A. Findings**

There is no local consensus in the watershed community about whether the MCWC discourages public participation. There are widely-divergent opinions, some strongly held. The mixed opinions suggest the MCWC may benefit by working to improve in this area.

### **B. Investigation and Analysis**

To investigate this allegation, the OWEB Executive Director talked to numerous local leaders, stakeholders, and citizens familiar with the MCWC. These persons include:

Sam Adams, Chair, MCWC  
Cindy Ashy, citizen  
Gary Blanchard, Chief Forester, Starker Forests  
Jeff Feldner, OSU Extension Sea Grant  
Wayne Geisey, citizen  
Bill Hall, Lincoln County Commissioner  
Wayne Hoffman, MCWC Coordinator  
Eddie Huckins, citizen, former Lincoln SWCD  
Linda Johnston, citizen, former Alsea WC staff  
Andy Kittel, citizen  
Parker Ogburn, OSU Extension – Lincoln County, Siletz Sub-basin staff person  
Dr. Frank Pisciotta, citizen  
Maggie Rivers, Port of Waldport  
Terry Thompson, Lincoln County Commissioner

On the basis of local interviews, there are a wide range of views concerning the MCWC’s interactions with the public. Some people indicated that good partnerships and projects are resulting from the MCWC, the council is well regarded, and it has established good relationships and partnerships in the watershed. Some interviewees had only good things to say about the council. Others criticized the way MCWC meetings are conducted, calling them intense, uncomfortable, intimidating, stressful, and attended only by agency people. Others had mixed comments about the MCWC, commending them for their work, but expressing concern that they could do better at involving citizens and communicating with other groups.

The MCWC Board has a focused agenda and is working diligently to accomplish its goals. Keeping focused on an organization's mission may sometimes make it challenging to address differing viewpoints, perspectives, and ideas. Philosophical differences and interpersonal conflicts between the MCWC and other watershed groups and citizens have occurred, and it is not clear that the MCWC has handled these situations as well as it could.

OWEB expects all watershed councils to conduct their meetings in a professional and respectful manner. Ideally, council meetings should be conducted in a manner that fosters and builds partnerships and broadens community awareness of and interest in watershed health. Councils also need to be able to run their meetings productively. Finding the appropriate balance between respectfully listening and responding to citizen and community opinions and ideas, while continuing to implement a focused and strategic work plan to carry out the council's mission, is critically important. It may be more difficult at times to find that balance than it may first appear. OWEB expects watershed councils to continue to strive to maintain that balance.

**Allegation #14: All councils who receive public money from OWEB should be required to admit all interested persons to all of their meetings and otherwise allow full participation**

**A. Findings**

Oregon statutes do not require watershed councils to involve all citizens. A watershed council is required to involve representatives of the watershed's interests. Oregon statutes specify that OWEB evaluates council requests on whether the organization reflects the interests of the watershed and has the potential to protect and enhance the quality of the watershed in question.

**B. Investigation and Analysis**

This issue involves Oregon statutes related to watershed councils and their receipt of public money, and whether the MCWC is satisfying those statutes. Related requests have asked OWEB to require the MCWC to open its affairs, including participation in all meetings and receipt of all emails, to the general public and to Ms. Ashy specifically. Other claims have suggested that the MCWC is not meeting the statutory intent that a watershed council "assures a high level of citizen involvement."

ORS 541.388(1) states: "The Oregon Watershed Enhancement Board may work cooperatively with any local watershed council that may be formed. Requests from local watershed councils for state assistance shall be evaluated on the basis of whether the requesting organization reflects the interests of the affected watershed and the potential to protect and enhance the quality of the watershed in question." ORS 541.388(2) states that "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.*" (Emphasis added).

Oregon's statutes do not require watershed councils to represent all citizens, but rather they must represent a balance of the interests in the watershed. Similarly, Oregon statutes do not require 100 percent citizen participation for OWEB to provide funding for watershed council

operations, although ORS 541.388(2) provides that watershed councils must assure a “high level of citizen involvement” in developing and implementing a watershed action program.

OWEB does evaluate whether a council involves the key interests in the watershed. As described in Allegation #4 above, one of OWEB’s evaluation criteria for the 2007-2009 council support grants was “Organizational Make-up and Citizen Involvement,” which looked at assessed how well the council membership reflected the land use, ownership and issues of the watershed, whether the council had effective processes in place to maintain and enhance citizen involvement, and if there was a significant level of citizen involvement in council activities.

The MCWC has members beyond the statutorily required stakeholder, or watershed interest, body. Under Oregon statute, a non-profit corporation is not even required to have members (ORS 65.137). The MCWC bylaws state that membership is open to all interested persons who support the purpose and goals of the council. Members are eligible to vote for at-large board members at its annual meeting, or may vote in committees unless it is an issue reserved for the board. The bylaws identify that members “shall be” notified of meetings in advance.

The MCWC bylaws also identify provisions for the termination of membership. By statute, membership in a nonprofit corporation may be terminated only through a fair and reasonable process. ORS 65.167 The MCWC has such a process. Whether the MCWC follows its bylaws, or makes changes to its bylaw provisions, is primarily a matter for the council and its members.

**Allegation #15:       The MCWC hasn’t fulfilled its grant requirement to offer the county commission the opportunity for an annual briefing at a public meeting on the council’s ongoing activities, projects, community involvement efforts and work plan priorities for the coming year.**

**A. Findings**

It appears that the MCWC has fulfilled its grant requirement for the 2005-2007 watershed council support grant that it offer the county commission the opportunity for an annual briefing.

**B. Investigation and Analysis**

ORS 541.388(3) requires 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. It is also a condition of OWEB’s council support grant for the MCWC that the watershed council offer the county commission an annual briefing.

OWEB relies on watershed councils to report on fulfillment of this condition of their council support award in the final report of the watershed council. For the 2005-2007 biennium, the council support final report is due August, 30, 2007, so staff cannot rely upon that document to know if this requirement has been fulfilled in the case of MCWC.

In the past few weeks, however, OWEB staff have received numerous emails that verify that the MCWC briefed the Lincoln County Commissioners on July 18, 2007. The MCWC has also reported to staff that attorney Diane Henkels gave a presentation in March of 2006 to the

county commission on behalf of the council. On the basis of that information, it appears that the MCWC has fulfilled its grant condition in that respect.