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MEMORANDUM

DATE: May 15, 2009

TO: Michael Grayum, Puget Sound Partnership

FROM: Laura Watson, Assistant Attorney General

SUBJECT: **Partnership's Authority to Implement Various Options for a Monitoring Program**

Thank you for your request for Attorney General Services. In analyzing your question, I reviewed the December 10, 2008, report by the Puget Sound Monitoring Consortium. I also looked at Chapter 90.71 RCW and House Bill (HB) 1997. Last, I looked at case law that generally addresses the scope of an agency's authority. My analysis of the various options is set forth below.

I. BACKGROUND

The Puget Sound Monitoring Consortium (Consortium) was formed to look at options for establishing an effective and coordinated monitoring program for Puget Sound. The Consortium considered various governance models for such a program. Ultimately, the Consortium recommended that that Partnership select one of two models: (1) a state agency-based program at the Partnership; or (2) a program at a new, independent, private institute.

Under the first model, Partnership staff would be responsible for coordinating research, monitoring, and assessment, including the use of existing data from other state agencies. The work would be done under the direction of the Science Panel. Under the second model, a newly formed non-profit institute would perform these functions. Its work would be informed by the Science Panel through the Panel's strategic science plan and biennial science work plan.

In addition to these two models, this memo also analyzes the legal viability of two other models: (1) housing the monitoring program within the Puget Sound Foundation; or (2) contracting with an existing non-profit entity to perform the work.

II. ISSUE AND SHORT ANSWER

Which of the various governance models can be established under the Partnership's existing legal authority? The Partnership currently has statutory authority to house the monitoring program within its agency as well as contract with an existing non-profit entity to perform the work. The Partnership potentially has authority to house the work within the Puget Sound Foundation, but this authority is not as clearly established. The Partnership does not appear to have authority to create an entirely new non-profit entity to perform this work. Thus, if the Partnership wanted to pursue that option, it is best accomplished through statutory amendment.

III. ANALYSIS

An administrative agency's authority is limited to the authorities granted by statute or necessarily implied. *Human Rights Comm'n ex rel. Spangenberg v. Cheney School Dist. 30*, 97 Wn.2d 118, 127, 641 P.2d 163 (1982). The statutory interpretation of an agency charged with implementing a statute is given great deference if the statute is ambiguous. *Waste Management Seattle, Inc. v. Util. & Transp. Comm'n*, 123 Wn.2d 621, 628, 869 P.2d 1034 (1994). However, an agency is not given deference in its interpretation of a non-ambiguous statute. *Id.* An agency may also "fill in the gaps" of a statute through its statutory interpretation as long as the agency's interpretation does not, in effect, "amend" the statute. *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 448, 536 P.2d 157 (1975).

It is within this general framework that each of the four options is analyzed below:

A. Establishing the Monitoring Program Within the Partnership

Chapter 90.71 RCW discusses the development and coordination of a monitoring program but does not specify who will be responsible for actually implementing the program. Specifically, RCW 90.71.060 states that the Science Panel, with approval of the Council, "shall *guide* the implementation and coordination of a Puget Sound assessment and monitoring program." (Emphasis added.) Furthermore, the Panel is directed to assist the Partnership in developing a strategic science program that "addresses monitoring, modeling, data management, and research." RCW 90.71.280(1)(b)(i).

RCW 90.71.290 directs the Panel to develop a strategic science program that *may include* continuation of the Puget Sound assessment and monitoring program as well as "other monitoring or modeling programs deemed appropriate by the executive director." The strategic science program may also include development of a monitoring program for inclusion in the action agenda. Last, Section 2 of HB 1977, which amends RCW 90.71.280, requires the Panel to "develop and implement a process for peer review of monitoring, research, and modeling conducted as part of the strategic science program."

The statute makes it clear that the Science Panel has an integral role to play in the development and guidance of the monitoring program as well as peer review of monitoring results. However, the statute is silent on who is responsible for actually implementing and administering the program. This silence creates a "gap" that the Partnership may fill through its interpretation of the statute as long as that interpretation does not conflict with the statute.

RCW 90.71.240 gives the executive director broad authority to perform the functions of the Partnership. Specifically, that provision states that the Partnership "shall be administered by an executive director" and that "the executive director shall have complete charge of and supervisory powers over the partnership, subject to the guidance from the council." RCW 90.71.240(1) and (3). Further, the executive director employs a staff to assist with these functions. RCW 90.71.240(4).

In light of the broad authority granted to the executive director and the requirement that the Partnership develop and implement a monitoring program, the statute can be reasonably interpreted as providing the authority to house the monitoring program within the agency itself. Such an interpretation does not conflict with the statute and, instead, is consistent with the broad authority of RCW 90.71.240.

Although the monitoring program can be housed within the agency, the Leadership Council should ultimately make the decision about where to place the program since the executive director carries out his duties "subject to the guidance [of] the council." RCW 90.71.240(3). Also, the Council provides leadership and has responsibility for the functions of the Partnership. RCW 90.71.230(1). Choosing where to house the program is the type of decision typically made by the Council pursuant to its statutory responsibilities.

B. Establishing the Program Within the Puget Sound Foundation

RCW 90.71.240(5) authorizes the executive director to create a non-profit entity to assist Puget Sound recovery efforts by "(a) Raising money and other resources through charitable giving, donations, and other appropriate mechanisms; (b) Engaging and educating the public regarding Puget Sound's health, including efforts and opportunities to restore Puget Sound ecosystems; and (c) Performing other similar activities as directed by the partnership." The executive director has exercised this authority by creating the Puget Sound Foundation.

The statute authorizes the non-profit entity to perform the two specific functions of raising money and engaging and educating the public. The statute then authorizes the entity to perform "other similar activities" as directed by the Partnership. The phrase "other similar activities" is ambiguous because it does not provide guidance on what constitutes an activity that is "similar" to the first two listed activities. In light of this ambiguity, the Partnership has discretion in how to interpret the statute. However, its interpretation must not conflict with the statute.

In order to place the monitoring program within the Foundation, one would have to conclude that monitoring is similar to the other functions that the Foundation can perform. Under a restrictive interpretation of the statute, monitoring might not be seen as "similar" to the other functions of the Foundation because it is a science-based function whereas the other functions are aimed at public education and fundraising. Under a less restrictive interpretation, one could argue that monitoring is linked to the public education component because having accurate monitoring results is critical to adequately informing the public of the current risks to Puget Sound.

When interpreting this ambiguous statute, the Partnership could reasonably take the position that it has authority to house its monitoring program within the Foundation. This position would be stronger if the statute provided specific authority for the Foundation to perform this function or if the duties of the Foundation were not limited to activities "similar" to the listed activities. However, even as currently drafted, the statute provides a basis for asserting that the Partnership has authority to house the program within the Foundation.[1]

C. Creating a New Non-Profit Entity for the Monitoring Program

As noted above, agencies have only those authorities statutorily granted or necessarily implied from their statutory grants of authority. RCW 90.71.240(5) provides authority for the creation of a single non-profit entity to perform certain functions. It does not provide authority for the creation of multiple non-profit entities to perform an array of functions.

Interpreting the statute as authorizing the creation of a second, non-profit entity to perform monitoring functions would be a strained interpretation. It would be difficult to credibly defend the position that the authority to create a second non-profit entity is "necessarily implied" from the authority to create the first entity or the authority to implement a monitoring program. To the contrary, by authorizing only the creation of one entity to perform certain functions, it can be reasonably implied that the Legislature did not intend to authorize the creation of multiple entities. Under a common rule of statutory construction, "to express one thing in a statute implies the exclusion of the other. Omissions are deemed to be exclusions." *See, e.g.*, *In re Detention of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002).

Because the legal authority for this option is shaky, the safest course of action would be to get specific statutory authority to implement this option. Of course, the drawback of getting statutory authority is that the Partnership will have to wait until the next legislative session to seek the authority. However, if the Council prefers this option for the governance structure, I am

[1] When a non-governmental agency performs governmental functions, public records requirements and other state law requirements may apply to the work of the non-governmental agency. This memo does not attempt to analyze the extent to which such laws may apply, but it is raised here as an additional item to consider in making the decision about where to house the program.

happy to work with you and other Partnership staff on legislation that would more clearly provide the needed authority.

D. Contracting with an Existent Non-Profit Entity to Perform the Work

RCW 90.71.230(1)(d) gives the Council authority to contract with "individuals, corporations, or research institutions to effectuate the purposes of this chapter." The Council is also authorized to contract with members of the Science Panel, "based upon the availability of funds." RCW 90.71.270(7).

Development and implementation of a monitoring program is one of the purposes of Chapter 90.71 RCW. Since the Council may contract with corporations or research institutions "to effectuate the purposes" of the chapter, there is statutory authority for the Partnership to contract with an existing non-profit entity to implement the monitoring program. As noted above, the monitoring work does need to be performed under the guidance of the Science Panel. Thus, any contract with an outside entity would need to ensure that the work of the entity will be guided by the Panel as required by statute.

IV. CONCLUSION

For the reasons stated above, the first and fourth options are the most clearly supported by the Partnership's existing statutory authority. The second option is also reasonably supported by existing authority. The Partnership does not have clear authority to implement the third option. Therefore, the more legally viable courses of action include implementing one of the other options or seeking statutory authority for the third option.

If you have questions about this analysis or want to talk through any of the options in greater detail, please feel free to contact me at 360-586-4614.

LJW:tmr