Drinking Water Board Training Packet

November 5, 2019

Agenda

State of Utah

GARY R. HERBERT
Governor

SPENCER J. COX
Lieutenant Governor

Department of
Environmental Quality

L. Scott Baird
Executive Director

DIVISION OF DRINKING WATER
Marie E. Owens, P.E.
Director

Drinking Water Board
Roger Fridal, Acting Chair
Kristi Bell
Scott Morrison
Jeff Coombs
David O. Pitcher
Eric Franson, P.E.
Barbara Gardner
Blake Tullis, Ph.D.
L. Scott Baird
Marie E. Owens, P.E.
Executive Secretary

DRINKING WATER BOARD TRAINING

November 5, 2019 – 12:30 PM
Department of Environmental Quality
Multi Agency State Office Building
DEQ Board Room
195 N 1950 W
Salt Lake City, Utah 84116

Marie Owens' Cell Phone #: (801) 505-1973

1. Call to Order
2. Roll Call – Marie Owens
3. Ethics Training – Craig Anderson
4. Adjourn

Agenda Item 3

Drinking Water Board

Open Meetings, Conflicts, Ethics & Records

Craig W. Anderson
Assistant Attorney General
November 5, 2019

Board Functions & Duties

- Organization and function of Boards
  - Management v. Policy & Rule Making
  - Membership and interests represented
- Three basic duties of Board members
  - Duty of care
    - Attend board meetings
    - Prepare and participate
  - Duty of Loyalty
    - Disclose conflicts of interest
    - Follow the process in R305-9 to resolve any conflicts
  - Duty of Obedience
    - Act in accordance with Board's responsibilities – UCA § 19-4-103(2)

Roles of Board & Division

- Senate Bill 21 Board Revisions (2012)
- UCA § 19-4-103 Meetings
  - *UAC R305-8 attendance standards*
  - *UAC R25-5-5 per diem - government*
- UCA § 19-4-104 Powers
  - Adoption of rules, standards & variances
  - Protection of watersheds and water resources
- UCA § 19-4-106 Director
  - Functions
    - Executive secretary to Board
    - Technical support staff
    - Development of rules and standards
    - Implementation & enforcement of rules and standards
- UCA § 73-10c-4.2 financial assistance
  - Drinking water project loan fund review

Role of AGO

- "In House Counsel"
  - Multiple roles
    - Attorney, advisor, negotiator
- DEQ is agency "Client"
  - RPC 1.13 Organization as client
  - UCA 19-1-204
- No individual attorney-client relationship
  - Employees
  - Individual Board Members

Board Rulemaking

- Quasi Legislative Function
  - UCA §§ 63G-3-101 *et seq*.
- Proposed Rule
  - Initiated by the staff, or "interested person"
  - Considered by the Board and approved for public comment
  - Published in the State Bulletin
- 30 day (or more) public comment period
  - Public hearing may be mandatory or discretionary
- Staff reviews comments, may suggest rule changes
- Board discussion and action on rule
- Final rule published with an effective date

Open Public Meetings

- UCA, Title 52, Chapter 4 - Open Meetings Act
- "…the legislature finds and declares that the state, its agencies and political subdivisions, exist to aid in the conduct of the *people's* business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly."

Open Meetings Act

- All Board business is conducted in an open public meeting
  - Meetings may be closed in limited circumstances
- An agenda must be posted at least 24 hours before a meeting, stating date, time and place of the meeting
- A "Meeting" is a convening of a quorum of the Board, including electronic meetings, workshops and executive sessions, for matters over which the Board has jurisdiction or advisory power.
- The Act does not apply to chance meetings

Open Meetings Act

- Senate Bill 77 "Availability of Government Information"
  - "State Public Body"
  - Audio recording – posted to Utah Public Notice Website within **3** days of meeting - § 63F-1-701
  - "Pending" minutes – available to public within **30** days after meeting - § 52-4-203(4)(a)(iii)
  - "Approved" minutes – posted to Utah Public Notice Website within **3** days of approval - § 52-4-203(4)(a)(i)
  - "Pending" and "Approved" minutes and audio recording *are* public records under GRAMA

Open Meetings Act

- Penalties & Remedies
  - UCA §52-4-303 action in violation
    - may be *set aside* on judicial review
    - costs and attorneys fees
  - UCA §52-4-304 release of minutes or record of a *closed* meeting.
  - UCA §52-4-305 criminal penalties for *knowing or intentional* violation.

Conflicts of Interest

- Boards are comprised of members who, by statute, are representatives of various interests and groups
  - Statutory Board selection criteria implicitly recognize a Member's interest may be impacted by Board action.
- Board Members are Subject to the *Utah Public Officers' and Employees' Ethics Act (Ethics Act)*
- UCA Title 67 Chapter 16
- UCA §19-1-201(1)(d)(i)(B) DEQ shall adopt rules regarding conflicts of interest.
- Failure to comply may jeopardize Board action

The Ethics Act

- Disclosure required when a Board member has a *substantial interest* in a business regulated by DEQ
  - Disclose position held and precise nature and value of the interest (n/a if the value is less than $2,000).
    - Update if there is a significant change in position or value
    - Disclosure forms available from Attorney General's Office.
  - A "substantial interest" is:
    - Ownership (legal or equitable) of at least:
      - 10% of the outstanding capital stock of a corporation, or
      - 10% Interest in any other business entity
    - By an individual, individual's spouse or minor children

Ethics Act - Prohibitions

- The Board should be familiar with the prohibitions in the following sections of the ethics act:
- § 67-16-4 Improperly *disclosing* or *using* controlled information; *using* position to secure privileges
- § 67-16-5 Accepting gift, compensation or loan
- § 67-16-5.3 & 5.6 Requiring or offering donation, payment or service to agency in *exchange* for approval
- § 67-16-6 Receiving compensation for *assistance* in transaction involving agency

Identifying Conflicts

- It is incumbent on each Board member to disclose whether he or she may have a conflict of interest
- The Department has developed rules addressing conflicts of interest – R305-9
- R305-9-102 Disclosure of Interest Statements
- R305-9-103 Actual Conflict - Recusal
  - *Shall* be recused from voting
  - *May* be recused from participating in discussion
- R305-9-104 Potential Conflict
  - Ethics Act prohibitions, or
  - Due process

Conflict Procedures

- Call to Order.
- Recognition of Scott T. Anderson.
- Public Comments.
- Declarations of Conflict of Interest.
- Approval of Meeting Minutes for the November 8, 2018 Board Meeting (Board Action Item).
- Underground Storage Tanks Update.

- Administrative Rules.
  - Approval of final adoption to Hazardous Waste Rules UAC R315-273, Standards for Universal Waste Management (Board Action Item).
  - Approval of final adoption to Radiation Control Rules UAC R313-28-31, Use of X-Rays in the Healing Arts, General and Administrative Requirements (Board Action Item).
- Approval of Mammography Imaging Medical Physicists (MIMP) in accordance with UCA 19-6-104(2)(b) (Board Action Item).
- Low-Level Radioactive Waste Section.
  - EnergySolutions' request for a site-specific treatment variance from the Utah Hazardous Waste Management Rules. EnergySolutions seeks authorization to receive Cemented Uranium Extraction Process Residues for disposal (Board Action Item).
- Other Business.
  - Misc. Information Items
  - Scheduling of next Board meeting.
- Adjourn.

Conflict Procedures

- R305-9-105 Potential Conflict
  - Board member may recuse himself/herself from discussion and vote, or
  - Disclose the potential conflict and seek a determination by the Board about how to proceed.
- R305-9-106 Decision of the Board
  - Nature of the matter before the board
  - Nature of the potential conflict
  - Intent that the board reflect balanced viewpoints
  - Recuse from voting *or* recuse from discussion
- Consequences of a failure to comply
  - May void action taken by the Board

Records

- Government Records Access Management Act
  - UCA Title 63G Chapter 2
- All government "records" are generally open and available to the public with limited exceptions.
  - What is a record?
    - Documents, classification, retention
    - S.B. 77 "Public Information" notices, minutes & recordings
- CAUTION!
  - Texts
  - Email

Records Procedures

- Procedure
  - Written request, time for response
  - Appeals
- DEQ has adopted UAC R305-1 implementing the records access and management provisions of GRAMA.
- Each Division in DEQ has a designated records officer responsible for responding to records requests and any appeals.
- Penalties & Remedies
  - UCA §63G-2-802 - injunctive relief, costs & attorneys fees
  - UCA §63G-2-801 - Criminal penalties for *knowing or intentional* acts
  - Litigation Hold

Adjudicative Process

- UCA §19-1-301.5 Permit Review Proceedings
  - ALJ review of agency permit order & administrative record
  - "Recommended" Decision
  - UAC R305-7 – rules governing review process (amended)
  - Executive Director – "final" decision
  - Appeals – Utah Court of Appeals
- 2015 Amendments
  - Petition for review
  - Special adjudicative proceeding
  - Standard of review

Adjudicative Process

- UCA § 19-1-301 "Other" Proceedings
  - Request for Agency Action
  - Appointment of ALJ
  - Record review UAC R305-7
  - ALJ Recommended decision
  - Executive Director "Final Decision
  - Appeal – Utah Court of Appeals

Questions

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