

**Agency:** 468 Environmental & Land Use Hearings  
**Decision Package Code/Title:** 9T Transfers  
**Budget Period:** 2015-17  
**Budget Level:** M2 - Inflation and Other Rate Changes

### Recommendation Summary Text:

This decision package would equalize spending authority for each fiscal year of the biennium in order to improve the ability of the agency to manage spending across the biennium.

### Fiscal Detail

	<u>FY 2016</u>	<u>FY 2017</u>	<u>Total</u>
<b>Operating Expenditures</b>			
001-1 General Fund - Basic Account-State	(16,000)	16,000	0
<b>Total Cost</b>	<b>(16,000)</b>	<b>16,000</b>	

### Package Description:

Central service cost adjustments and reductions over the last several biennia have resulted in the Environmental and Land Use Hearings Office (ELUHO) having unbalanced spending authority over the two fiscal years of the biennium. This decision package would equalize spending authority/funding across the fiscal years, thereby improving the ability of the agency to manage spending in each fiscal year, and across the biennium.

### Narrative Justification and Impact Statement

#### *What specific performance outcomes does the agency expect?*

This decision package does not implicate agency performance outcomes.

### Performance Measure Detail

Activity:

Incremental Changes

No measures submitted for package

***Is this decision package essential to implement a strategy identified in the agency's strategic plan?***

This decision package does not directly implicate the agency's strategic plan, but allows the agency to have predictable spending in each year of the biennium. In a general sense, this will assist the agency in carrying out strategic objectives.

***Does this DP provide essential support to one or more of the Governor's Results Washington priorities?***

No.

***What are the other important connections or impacts related to this proposal?***

None identified.

***What alternatives were explored by the agency, and why was this alternative chosen?***

There are no other alternatives other than to allow the unequal funding situation to continue.

***What are the consequences of adopting or not adopting this package?***

If not adopted, the agency's spending plan across the biennium will be required to consider the lower funding available the second year of the biennium, curtailing some decisions that would require funding or expenditure across the entire biennium. If adopted, the agency will have predictable, equivalent spending authority, and capacity to make decisions that require expenditure of funds across the fiscal years.

***What is the relationship, if any, to the state's capital budget?***

None.

***What changes would be required to existing statutes, rules, or contracts, in order to implement the change?***

None.

***Expenditure and revenue calculations and assumptions***

The carry forward level spending authority for the 2015-2017 Biennium shows fiscal year 2016 with \$2,229,000 and fiscal year 2017 with \$2,198,000. A difference of \$31,000. This package would move \$16,000, approximately half that amount, to the second fiscal year of the biennium.

***Which costs and functions are one-time? Which are ongoing? What are the budget impacts in future biennia?***

This would be a permanent technical correction.

<b><u>Object Detail</u></b>	<b><u>FY 2016</u></b>	<b><u>FY 2017</u></b>	<b><u>Total</u></b>
E Goods\Other Services	(16,000)	16,000	0

**Agency:** 468 Environmental & Land Use Hearings  
**Decision Package Code/Title:** M0 Reduce GMHB to 6 Members  
**Budget Period:** 2015-17  
**Budget Level:** PL - Performance Level

**Recommendation Summary Text:**

This decision package describes one of four areas of reduction identified by the Environmental and Land Use Hearings Office (ELUHO) to re-base its budget to a level below Maintenance Level and to prioritize budget reductions equal to 15 percent. This decision package proposes a higher priority reduction in ELUHO's appropriation equal to the salary and benefits of the seventh (7th) member of the seven-member Growth Management Hearings Board (GMHB). (\$242,306). In the current biennium, this amount was appropriated, but not allotted to the agency, as the Governor did not appoint to the vacant position, given reduced and deferred workload on the Board.

**Fiscal Detail**

<b>Operating Expenditures</b>	<b><u>FY 2016</u></b>	<b><u>FY 2017</u></b>	<b><u>Total</u></b>
001-1 General Fund - Basic Account-State	(121,153)	(121,153)	(242,306)
<b>Total Cost</b>	<b>(121,153)</b>	<b>(121,153)</b>	<b>(242,306)</b>
<b>Staffing</b>	<b><u>FY 2016</u></b>	<b><u>FY 2017</u></b>	<b><u>Annual Average</u></b>
FTEs	-1.0	-1.0	-1.0

**Package Description:**

This decision package (one of four) reduces ELUHO's appropriation for the 2015-17 biennium by \$242,306 to address a portion of budget reductions equal to 15% of its General Fund maintenance level budget. The proposed reduction would come from salaries and benefits appropriated, but not currently allotted, to the agency to support a seventh (7th) Board Member on the Growth Management Hearings Board (GMHB).

On July 1, 2011 ELUHO became the umbrella agency that administers three quasi-judicial boards: The Growth Management Hearings Board (land use adjudication program), and the Pollution Control Hearings Board and the Shorelines Hearings Board (environmental adjudication program). ELUHO receives a single appropriation, which it then allots to the land use and environmental adjudication programs, retaining the remainder of appropriated funds in a third, central program which provides fiscal management across the agency and funds common support functions.

By statute, the GMHB consists of seven members, appointed by the Governor, residing in specified areas of the State. RCW 36.70A.250. The Governor may reduce the board to six members if warranted by the board's caseload. RCW 36.70A.252. Since May 2011, the GMHB has functioned as a six member Board, and the Governor has chosen to not appoint the seventh member of the GMHB, based on declining workload. In the current biennium, OFM placed the appropriated monies that support the seventh GMHB position in unallotted status. This decision package proposes a permanent reduction in funding for the GMHB, effectively making the Board a six-member Board, and requiring a supplemental appropriation should the Governor determine a 7th member should be appointed to the GMHB.

The reduction of the funding for the seventh GMHB position will curtail the Governor's ability to make any desired appointment to the Board in the absence of a supplemental appropriation. In the absence of funding for this position, the GMHB will have limited ability

to respond to expected increases in workload and have less flexibility to carry out its mission.

The reduction in funding to support this Governor-appointed position, although unfilled for several years, will be in addition to substantial organizational and staffing changes completed by the GMHB since 2010. Through a combination of prior budget reductions and legislation in 2010, the existing three separate, regionally-based GMHBs became one Board with seven members, rather than three Boards with nine members. Over the next year, the Board closed two offices (Seattle and Yakima), and eliminated support staff positions. Board members were then required to work from their home offices. In 2011 the Board was brought under the administrative umbrella of ELUHO and the Olympia office co-located with the other Boards of ELUHO. Subsequently, in order to meet further budget reductions required for the '11-'13 biennial budget, the GMHB eliminated its sole staff attorney position, with resultant loss of support to Board members (particularly non-attorney Board members). In March 2011, the seventh position on the GMHB became vacant, and at that time, the Governor did not appoint a replacement, in consideration of declining workload on the Board. The seventh position has remained vacant since that time. Thus, over a four to five year period, the GMHB has taken substantial reductions in both FTEs and funding to accomplish its mission.

By statute, the GMHB resolves cases filed with the Board through regional panels, the composition of which is prescribed in the Growth Management Act (GMA). The GMHB is designed to reflect the state's regional differences and give consideration to local circumstances. The reduction in members on the GMHB since 2010, and as proposed in this decision package, will further reduce the flexibility of the Board in composing balanced panels, as required by statute, and holding hearings regionally. Accommodating these regional interests is a key Board objective [Strategic Plan, Objective 1.6, with Targets: 90% of cases with two "region of origin" Board members assigned, and 90% of substantive hearings held in region of case origin].

A reduction in funding equal to the salary and benefits of the 7th GMHB member is based on the assumption that GMHB caseloads remain relatively steady or decline from the levels the Board has experienced in the previous five years, as current caseloads are well-managed by the 6-member Board, and the 6-member Board has capacity to take on some additional workload. Should caseloads increase, as the Board anticipates, it may be necessary to request a supplemental appropriation and submit a decision package to reestablish funding for the 7th position. As with most adjudicative bodies, the workload of the GMHB fluctuates over time, and this decision package reduces the Board's long-term flexibility to respond to such fluctuating caseloads. This decision package assumes a continuation of lower, or only slightly increased caseloads, based on the last five years of caseload data, which is as follows:

Actual	Petitions for Review	Cases (after consolidation)
2010	50	33
2011	26	21
2012	30	24
2013	43	29

However, the lower caseload is the result, in large part, of legislative deferral of deadlines for local governments to update their comprehensive plans (RCW 36.70A.130(5), together with Ecology's extension of deadlines for local governments to update their shoreline master programs. Comprehensive plan updates are now statutorily set for June 30, 2015 to June 30, 2018. Appeals from those updates, as projected in the the GMHB Efficiency and Restructuring Study (Triangle Report, 2009), must now be projected to increase the Board's caseloads in 2015 to 2019.

Year	Jurisdictions with Updates Due	Projected Petitions
2015	79	41
2016	45	65
2017	62	46
2018	50	51
2019		41

The ELUHO contact for this request is Kathy Mix, Executive Director, (360) 664-9178.

### **Narrative Justification and Impact Statement**

#### ***What specific performance outcomes does the agency expect?***

Assuming caseloads remain steady or increase slightly, the GMHB expects to continue to meet the relevant performance measure for

"Percent of final decisions and compliance orders issued within statutory deadlines." The target for this measure is 100%, and since the 2009-11 biennium, the GMHB has consistently met this measure, issuing all final decisions within the 180-day and all compliance orders within the 45-day statutory deadlines. The Board has done so with only 6 full time members on the Board; however, there may be loss of quality and clarity of final decisions if caseloads increase in any significant way.

### **Performance Measure Detail**

#### **Activity:**

No measures submitted for package

#### **Incremental Changes**

#### ***Is this decision package essential to implement a strategy identified in the agency's strategic plan?***

This decision package is necessary to implement OFM's directive to re-base state program budgets to a level below Maintenance level.

Loss of funding for a 7th GMHB position will be contrary to implementation of strategies in the GMHB strategic plan. In addition to the bottom-line performance measure of rendering timely decisions, the GMHB has adopted strategies to assure accommodation of regional differences, provision of an accessible and efficient appeals process, and LEAN operations. This decision package will reduce the Board's flexibility to meet these objectives.

The GMHB strategic plan requires recognition of regional differences through assigning case panels with two regional Board members and a regional presiding officer and holding substantive hearings in the locale of origin. (Objective 1.6) Loss of a 7th Board member reduces the GMHB's flexibility to meet these targets.

GMHB strategies for provision of an accessible adjudicatory process include maintaining a user-friendly website (Objective 2.1), a practice handbook (Objective 2.2) and a case digest (Objective 2.4). Rules of procedure are reviewed biennially and revised as needed. (Objective 1.3) Input from stakeholders is solicited at an annual Board meeting and by a biennial survey. (Objective 2.2, Target 2; Overall target for Goals 1 and 2). Board members make presentations to quarterly regional planner forums and occasional CLEs. (Objective 2.3) These strategies are tasks undertaken by Board members themselves (except web-site maintenance), and will be more effectively implemented if funding for Board members is not reduced. Even the LEAN operations strategy assumes Board member time to develop data collection and reporting procedures. (Objective 5.1)

#### ***Does this DP provide essential support to one or more of the Governor's Results Washington priorities?***

The Growth Management Hearings Board provides the unique process by which city and county governments are required to implement many of the priorities of Results Washington Goal 3: Sustainable Energy and a Clean Environment. The GMHB regional panels hear appeals related to local government comprehensive plans, development regulations, and shoreline master programs and make legal decisions which enforce the Growth Management Act and the Shoreline Management Act. The GMHB leverages citizen and community efforts in support of Goal 3 priorities by providing an approachable, affordable forum for resolving local environmental and growth management conflicts. This enables citizen and stakeholder groups to efficiently ensure compliance with the GMA and implement Goal 3, without needing a fleet of state regulators or burdening the superior courts. At the same time, the expertise of the GMHB members insures local government efforts are aided and respected. This adjudication is essential to implementing Goal 3 at the local level. The specific aspect of Goal 3 of the Results Washington effort supported by a full and well-functioning GMHB are set out in the decision package which seeks to buy back funding for the 7th position.

#### ***What are the other important connections or impacts related to this proposal?***

Given the politically-charged climate of growth management in this state, any decision on funding reductions for the GMHB should be vetted through a thorough stakeholder process, as numerous interests are at stake.

Any decision on the funding level for the GMHB should consider the resources necessary to address the complexity and significance of the matters likely to lie ahead for this Board. City and county comprehensive plan updates, originally scheduled with deadlines from 2010-2014, have been legislatively rescheduled for 2015-2018. RCW 36.70A.130(5). These updates of necessity will address important and politically sensitive issues such as urban growth area boundaries, greenhouse gas reduction strategies, development on landslide-prone or flood-prone lands, rural water and septic services, conservation of agricultural land, and the conflict between development pressures and habitat for fish and wildlife.

*Shoreline Master Program Updates.* In addition to comprehensive plan updates, cities and counties are mandated to update their Shoreline Master Programs. Approximately 105 of 260 updates have been completed. The remainder were to have been finished in 2014, but (per telephone with Ecology's Tim Gates) are on track to be completed over the next three years. Appeals to the GMHB have generated complex cases: a current County SMP update is being challenged by three parties raising over 250 legal issues, demonstrating how contentious protection of Washington shores can become.

*Critical Areas Ordinances.* The comprehensive plan updates for all cities and counties with deadlines in the next two biennia require critical areas ordinances to be reviewed as well. Ecology has issued an Update on Wetland Buffers: The State of the Science, which will intensify debate around these issues. The intensity and scientific technicality of challenges to critical areas ordinances is demonstrated by a pending case: San Juan County's process to enact a critical areas ordinance began in 2006 and was not completed until 2013. Appeals to the GMHB involved five petitioners and an intervenor, representing the full range of interests and raising over 100 legal issues.

*Water Resources.* Population growth, economic development, the need for clean and adequate water supplies for drinking water, commercial use, agriculture and to sustain fish and the natural environment present cities and counties with difficult water resource planning decisions. The GMA and SMA contain provisions requiring the GMHB to rule on difficult questions with far-reaching impacts for water supply and water quality. Timely, well-reasoned and legally-sound GMHB rulings are key first steps to negotiated settlements with state agencies or appellate resolution in counties on both sides of the Cascades (Whatcom, San Juan, Kittitas, Spokane).

*Floods and Landslides.* New FEMA flood mapping and a 2010 legislative amendment to the GMA restricting urban growth expansion in the floodplains have yet to be fully incorporated in city and county land use plans and regulations. RCW 36.70A.110(8). The March, 2014 Oso landslide heightens the imperative for planning that acknowledges geologic hazard areas and limits development. Regulations of such lands are politically charged and generate contentious and often highly-technical appeals.

#### ***What alternatives were explored by the agency, and why was this alternative chosen?***

ELUHO has considered a number of alternatives in the effort to identify budget reduction options equivalent to 15% of its operating budget. These options include:

- 1) Elimination of either or both the quasi-judicial adjudicatory boards that address appeals of land use and environmental decisions in this state (GMHB and/or PCHB/SHB). This option considered elimination of the Boards in favor of direct appeals to Superior Court. Based on past fiscal notes attendant to legislation that proposed such an alternative to the GMHB, the cost of this option is prohibitive, as it results in a much higher cost than the cost of the current administrative process. Litigants would be faced with longer appeal times at a much greater cost to the state and the parties. Notably, the GMA has from the outset contained a provision allowing the litigants by consent to take a case directly to superior court upon the filing of a petition for review. RCW 36.70A.295. To date, no GMA case has been removed to court under this provision, litigants clearly preferring the GMHB process.
- 2) A change in the composition and size of the GMHB. This option considered possible further reductions in the size, political and regional make-up of the GMHB. Because of the politically sensitive nature of all issues involving the Growth Management Act in his state, this option is not feasible in the absence of a well-developed stakeholder process, with a resulting consensus as to how a newly constituted GMHB would function and handle expected caseloads going forward. Legislation may be required if the composition or regional make-up of the GMHB were to be changed in any significant way. This would likely be a controversial and difficult legislative undertaking. Further, any budgetary savings are speculative, as a reduced Board would presumably need the assistance of a staff attorney or hearing examiners.
- 3) Legislation to provide ELUHO Boards the authority to appoint pro tem judges or Board members. Currently, none of the Boards within ELUHO have clear authority to appoint or hire qualified individuals to act as Board members on a temporary or pro tem basis. Such authority could allow the Board the opportunity to handle spikes in caseload through temporary appointments, rather than full time positions. While a viable option, the agency would need adequate funding to pay for the services of these pro tem appointees. Current funding levels, and expected reductions make this option less viable.
- 4) Further reductions in Goods and Services and Travel expenditures. ELUHO has considered and rejected further reductions in these supporting cost objects beyond those offered in related decision packages, as risking over-expenditure and as contrary to the mission of the agency and the Boards it supports. Because the GMHB Board members are home based, travel is essential to attend hearings. The PCHB and SHB also travel to attend hearings under certain circumstances (shoreline or water rights cases in the locale). It is not feasible to further reduce lease and rent costs, as ELUHO only recently relocated to a new facility that meets the functional needs of the Boards (hearing and mediation rooms available), pays a reasonably low market rate, and would, within an unreasonably short period of time, pay another substantial sum (unbudgeted) to relocate to less than adequate space.

This alternative, in combination with three other decision packages, was chosen as an option that could allow the GMHB to continue to address current workload demand without unduly impairing the quality of work, assuming caseloads stay even or decline over time.

***What are the consequences of adopting or not adopting this package?***

This decision package proposes a reduction in funding, not an increase.

Loss of funding for a 7th GMHB member is inconsistent with the legislative restructuring of the Board in 2010, threatens the continuation of the regional panel adjudicative structure approved in that legislation, and limits the capacity for the Board to absorb projected caseload increases.

However, if this rebasing/reduction package is adopted, the Governor still has the option of requesting a supplemental appropriation for appointment of a 7th Board member if warranted by increased caseload. Such an option should recognize that the makeup of the GMHB has always been politically sensitive. The Governor should not have to go through the supplemental appropriation process in order to increase the Board's capacity to handle workload that is foreseeable, given the 2015-2018 legislatively-scheduled updates.

***What is the relationship, if any, to the state's capital budget?***

None.

***What changes would be required to existing statutes, rules, or contracts, in order to implement the change?***

None.

***Expenditure and revenue calculations and assumptions***

It is assumed the cost of the vacant GMHB position is the same as the current board members which is a salary of \$95,376 and benefits of \$25,777 per fiscal year.

***Which costs and functions are one-time? Which are ongoing? What are the budget impacts in future biennia?***

It is assumed that in order to restore the funding for this Board position, the agency would seek a supplemental or new appropriation, with the concurrence of the Governor's Office.

<b><u>Object Detail</u></b>	<b><u>FY 2016</u></b>	<b><u>FY 2017</u></b>	<b><u>Total</u></b>
A Salaries And Wages	(95,376)	(95,376)	(190,752)
B Employee Benefits	(25,777)	(25,777)	(51,554)
<b>Total Objects</b>	<b>(121,153)</b>	<b>(121,153)</b>	<b>(242,306)</b>

**Agency:** 468 Environmental & Land Use Hearings  
**Decision Package Code/Title:** M5 Rebase ELUHO Central Support Costs  
**Budget Period:** 2015-17  
**Budget Level:** PL - Performance Level

**Recommendation Summary Text:**

This decision package describes one of four areas of reduction identified by the Environmental and Land Use Hearings Office (ELUHO) to re-base its budget below Maintenance Level and prioritize reductions equal to 15%. This decision package proposes a reduction in ELUHO's appropriation in the amount of \$176,706, to be taken in Goods and Other Services, Travel, Capital Outlays, and Salaries and Benefits for administrative staff that support the three Boards of ELUHO. This reduction will result in a severe restraint in agency spending and travel for hearings, and part-time employment for two essential support personnel for the Boards.

**Fiscal Detail**

<b>Operating Expenditures</b>	<b><u>FY 2016</u></b>	<b><u>FY 2017</u></b>	<b><u>Total</u></b>
001-1 General Fund - Basic Account-State	(88,353)	(88,353)	(176,706)
<b>Total Cost</b>	<b>(88,353)</b>	<b>(88,353)</b>	<b>(176,706)</b>
<b>Staffing</b>	<b><u>FY 2016</u></b>	<b><u>FY 2017</u></b>	<b><u>Annual Average</u></b>
FTEs	-.9	-.9	-.9

**Package Description:**

This decision package (one of four from ELUHO) reduces ELUHO's appropriation for the 2015-17 biennium by \$176,706 (\$88,353 per fy) to address a portion of budget reductions equal to 15% of its General Fund maintenance level budget. The proposed reduction would come from Goods and Other Services, Travel, Capital Outlays, and Salaries and Benefits. These reductions will be from ELUHO's central program that provides centralized administrative support staff and other agency-wide services to the three Boards that constitute ELUHO.

On July 1, 2011 ELUHO became the umbrella agency that administers three quasi-judicial boards. These boards include the Pollution Control Hearings Board and the Shorelines Hearings Board (environmental adjudication program), and the Growth Management Hearings Board (GMHB) (land use adjudication program). ELUHO receives a single appropriation, which it then allots to two programs, the environmental and land use adjudication programs, retaining the remainder of appropriated funds in a third, central program which provides fiscal management across the agency and funds common support functions.

In 2011, shortly after ELUHO was created, the environmental Boards and the Olympia-based staff of the GMHB co-located, and ultimately reduced the support staff functions and lease arrangements that had previously been in place, for further cost savings. This co-location, combined with the previous effort of the three GMHBs to reduce in size from three separate Boards (9 Members) to one seven-member Board that operates largely from home-based offices, allowed for a new administrative staffing model, designed as the minimum necessary to support the three Boards.

ELUHO proposes to further reduce central across-agency program expenditures in various Goods and Other Services cost objects for a total of \$79,000 (\$39,500 per fy) for the 2015-2017 biennium. These reductions are based on review of expenditures during the 2013-15 biennium. Reductions would be as follows:

- Goods and Other Services by \$43,500 (\$21,750 per fy). Reductions would be in multiple cost objects, including supplies, printing, employee development and training, subscriptions, and other contractual services.

- Travel costs by \$27,500 (\$13,750 per fy), imposing significant reductions in travel on the various Boards.
- Noncapitalized Asset expenditures by \$8000 (\$4,000 per fy).

In addition, ELUHO proposes to further reduce Salaries and Benefits that fund the administrative support personnel that serve all the Boards of ELUHO. This will lower expenditures in the amount of \$97,444 706 (\$48,853 per fy). These reductions would be as follows:

- Reduce Administrative Manager position to 80% (\$15,133 per fy)
- Reduce Legal Assistant for Case Management position to 80% (\$10,548 per fy)
- Eliminate a half-time clerical position, used to address peaks in workload (\$23,172 per fy)

The options to meet a 15% budget reduction across ELUHO are limited. This option reduces nearly all discretionary cost objects that fund the day-to-day operations of the three Boards, including the support personnel that are necessary for the Boards to carry out their statutory responsibilities to render timely decisions on environmental and land use disputes.

*Goods and Services Cost Object Reductions:* ELUHO has under-expended several discretionary cost objects in the Goods and Other Services category in recent biennia. A small reduction in identified cost objects can be tolerated by the agency, although not in the full amount offered in this decision package. Cost object ER (Other Contractual Services) funds the agency's contract for court reporting services. Through this contract, the Boards create the statutorily required written record of the evidentiary hearing for review on appeal, in the event there is a further appeal of a case before the Board. As a result, the agency needs sufficient flexibility of funding to address changed expenditures driven by the number of cases that go to hearing, and the length of hearing. This number can vary significantly from fiscal year to fiscal year. The same is true of Attorney General Services (EM), and ELUHO has not offered further cuts from that cost object. Other reductions will limit needed employee training and development funds (Object EG), needed subscriptions for legal periodicals for Board member and judges (Object EJ), and basic supplies and printing costs (Objects EA and EF). These are poor choices for reduction, offer little savings, and place the agency at risk of being unable to carry out basic functions. However, ELUHO has few, if any, other options, other than as discussed in related decision packages.

*Travel:* ELUHO has under-expended the funds allotted for travel in recent biennia. A small reduction in various travel cost objects can be tolerated by the agency. However, the three Boards of ELUHO (PCHB, SHB, and GMHB) are expected to travel to the locale of appeals before them, at least to some extent.

The SHB travels to the site of shoreline appeals and routinely conducts a site visit to aid in the decision making. The SHB is also comprised by law, with appointees who are the representatives of the Counties, Cities and DNR. These Board Members must travel to attend hearings, which are usually multi-day matters at various sites around the state. Even if the hearings were held in Olympia, these outside Board Members would incur travel costs. ELUHO must have adequate funding to reimburse outside Board Members for the costs of attending hearings.

The PCHB routinely travels to Eastern Washington when all witnesses are from that area, in order to save litigants/parties the cost of travel to Olympia. Contentious water rights cases from Eastern Washington are routinely held in that area, an effort acknowledged and appreciated by the parties to those disputes.

Because GMHB Board members work from home offices, all panelists in a case must travel to in-person hearings, which are held in the locale of the appeal. The GMHB has reduced travel by holding prehearing conferences and some hearings on motions or compliance hearings telephonically. However, given the statutory emphasis on recognition of regional differences and local circumstances, the hearing on the merits will continue to require Board member travel, with at least one panelist traveling across the state in each case. Additionally, effective decision-making requires occasional in-person meetings of the Board or panel for case consultation.

*Salaries and Benefits:* Shortly after July 2011 when ELUHO became the administrative umbrella for the three adjudicatory Boards, the agency completed co-location of Olympia functions, and merged the support staff of the environmental boards with that of the GMHB. With this merger, ELUHO finalized a staffing model for the three Boards that relies on four essential administrative support functions, (and one half-time position available for peaks in the workload). This staffing model is a significant reduction from the staffing support that existed when the agencies were separate, and the GMHB consisted of three independent Boards in three locations around the state, each with its own support personnel (prior to 2010). The four remaining positions include an Administrative Manager, a Legal Assistant for Case Management, an Administrative Assistant and an Office Assistant. These four positions manage a huge volume of legal pleadings, scheduling, interaction with lawyers and parties, assistance to pro se parties, proofreading of orders, initial processing of new appeals, assistance to Board members, data collection, respond to public records requests, interact with members of the public seeking information concerning the Boards and their decisions, website updates, fiscal management, and processing of the day to day work of the Boards and the eleven (11) professional Board members and Judges that do the substantive work of the Boards.

Reduction of the time of two of these four positions to 80% will slow the work of the Boards, delaying issuance of final orders, scheduling of cases, and related work of the Boards. The Legal Assistant for Case Management is a central and critical position for the output of all the Boards. This position edits all final orders, handles scheduling for 11 individual Board Members or Judges, prepares routine legal documents and orders, and maintains a constantly changing calendar of hearings. Reduction of the time of this position will slow the work of all three Boards of ELUHO. Moreover, with the anticipated retirement of the current individual in this position, it is expected that the agency may have to increase the salary for the position in order to attract qualified candidates with requisite legal secretarial or paralegal training.

The Administrative Manager works with the ELUHO Director on all matters related to administration of a small agency. Since the Director is appointed from among the Board Members, the Director also carries a full caseload of the substantive work of the Board. Thus, the Director relies heavily on, and must delegate many tasks to the Administrative Manager. Reducing this position to 80% will negatively affect the day-to-day administration of ELUHO, as less experienced staff will receive less supervision, fiscal and administrative matters will be delayed in resolution, and there will be no resource to provide back-up services in instances of peak workloads, vacations, illness and the like.

Loss of funding for a part-time clerical position will eliminate the capacity of the agency to respond to fluctuations in work load, often caused by large record appeals to the Superior Court, or high volumes of pre-hearing motions being filed by the parties.

In short, with the streamlining and co-location the ELUHO Boards have undertaken since 2010, they are now functioning at the minimal effective support staff level. Further reductions will impair the ability of the agency to function in a timely and professional manner, lead to turnover, and impede the ability of the Boards to carry out basic statutory functions.

The ELUHO contact for this request is Kathy Mix, Executive Director, (360) 664-9178.

## **Narrative Justification and Impact Statement**

### ***What specific performance outcomes does the agency expect?***

The PCHB/SHB have several performance measures that will be negatively affected by this proposed reduction of administrative staff and other supporting funds, as follows:

- "Number of months for the PCHB to issue decisions after completion of dispositive motions, or hearing and closure of the record." The target is 3 months. Loss of staff time will result in longer decision processing times.
- "Number of months from appeal filing to final resolution of contested Shoreline Hearings Board cases, unless waived by the parties." The target is 6 months, reflecting the requirement of the Shoreline Management Act to decide cases within 180 days of the filing of the appeal. Loss of staff time will result in longer decision processing times for non-SMA appeals.
- "Percentage of appeals that settle before hearing by the Environmental Hearings Office." The target is 90%. The loss of the mediation program, and procedural assistance to parties, as well as staff time devoted to preliminary case matters where settlement is strongly encouraged, may result in fewer case settlements.

The GMHB has performance measures that will be negatively affected by the proposed reduction of administrative staff and other supporting funds, as follows:

- "Percent of final decisions and compliance orders issued within statutory deadlines." The target for this measure is 100% of final decisions and 90% of compliance orders, and since the 2009-2011 biennium, the GMHB has consistently met this measure, issuing all final decisions within the 180-day deadline and over 90 % of compliance orders within the 45-day deadline. Loss of staff time will result in longer decision processing times.
- "Encourage settlement of challenges to the Growth Management Act." The target is dismissal before hearing of 50% of cases where settlement extension is requested. The loss of staff time devoted to procedural assistance to parties may result in fewer case settlements.

The Legal Assistant for Case Management, backed up by the Administrative Manager, is directly responsible for multiple tasks related to the following:

- Initial processing, contact with the parties and scheduling and rescheduling of approximately 200 PCHB/SHB appeals per year.
- Preparation and editing of nearly 450 substantive and procedural orders of the PCHB, SHB, and GMHB, with the necessary transmittal documents to the parties.
- Support to 9 individual Board Members and 2 AAJs.

Reduction of funding for these positions will limit the Board's ability to meet the performance measures related to timely issuance of

opinions, as the administrative support personnel perform essential tasks preliminary to final opinion issuance and, therefore, sufficient support personnel are necessary to meeting the measure.

## **Performance Measure Detail**

### **Activity:**

No measures submitted for package

### **Incremental Changes**

### ***Is this decision package essential to implement a strategy identified in the agency's strategic plan?***

This decision package is necessary to implement OFM's directive to re-base state program budgets to a level below Maintenance level.

The proposed reduction is at odds with the PCHB/SHB strategic plan, which includes the mission of 1) conducting fair and impartial hearings and timely issuance of clear and well-reasoned decisions, 2) providing expeditious and efficient resolution of environmental appeals through hearings and alternative dispute resolution processes, 3) fostering a consistent statewide interpretation of Washington's environmental laws, and 4) ensuring enhanced and equal access to justice by assisting parties in understanding the hearing process to ensure meaningful opportunity to be heard.

The reduction of support staff time, as well as certain travel and goods and services funding will negatively affect many of the specific Goals and Objectives of the Strategic Plan, including 1) efforts to promote mediation and offer procedural assistance, 2) the conduct of hearings outside the Olympia area, 3) improvement of the appeals process through involvement with stakeholders, the Bar Association, and CLE presentations, and 4) legislative and rule-based actions to clarify, simplify and expedite appeals process, among other items.

The proposed reductions also impair implementation of the GMHB Strategic Plan. Reduction of support staff time will negatively affect a number of GMHB Goals and Objectives, including 1) ensuring timely issuance of orders, 2) maintaining a website with key current case and calendar information, 3) maintaining the Board's digest of decisions and client handbook, 4) conducting a biennial survey of clients as part of our LEAN strategy, and 5) ensuring an accessible system for parties to seek resolution under the statute. Reduction of travel funding will curtail GMHB strategic goals to 1) conduct key hearings in person rather than telephonically, 2) hold 90% of substantive hearings in the region of origin, 3) conduct an in-person Board meeting biannually, and 4) improve compliance with GMA, SMA and SEPA through presentations at regional planners' forums and CLEs. Reducing funding for employee development and training (Object EG) limits GMHB goals of 1) providing and supporting on-going professional development of Board members and 2) ensuring support staff are cross-trained to provide flexibility in office functions.

### ***Does this DP provide essential support to one or more of the Governor's Results Washington priorities?***

This decision package is responsive to the Governor's direction that state agencies adapt to potential changes in fiscal conditions and re-base their budgets to a level below Maintenance Level.

Any decision on the funding level for the ELUHO must consider the resources necessary to address the complex matters that likely lie ahead for the adjudicatory Boards that sit within the agency, and how such reduction will undercut essential support to the Governor's Results Washington priorities. The type of cases likely to come before the PCHB/SHB, and the GMHB in the next 2-5 years points out why essential administrative funding and support personnel, along with adequate staffing for the Boards (Appeals Judges) is necessary from a qualitative point of view. The administrative support personnel are essential to the production of decisions, management of schedules and the parties, and the work of the Boards on these important issues simply cannot be accomplished without them. The cases will be complex, controversial, of first impression in this state, and related directly to the Governor's goals, as set out in the Results Washington effort. Costs associated with hearings on these issues may be substantial, both in terms of travel, court reporters, and other services. Note: While this decision package focuses on the direct relationship between the Board's work and Goal 3 of Results Washington (Sustainable energy and A Clean Environment), the Board's work also supports aspects of Goal 2 of Results Washington (Prosperous Economy). Here is a list of likely significant appeals or areas of appeal before the PCHB/SHB and GMHB in the next several years:

### **PCHB/SHB-Upcoming cases and relationship to RESULTS WA**

1. Coal export project proposals. Two proposed coal export terminals are undergoing environmental review, one at the Port of Longview (Millennium Bulk Terminals Longview), and one at Cherry Point in Whatcom County (Gateway Pacific Terminal). These proposals are in different phases of environmental review. Any permits that may be issued after the review will be appealable to either the PCHB or SHB, or both, depending on the type of permit issued. These will be complex, highly contested appeals, on extremely controversial projects. There may be multiple decisions from local government and Ecology under appeal, such as shoreline permits

and §401 water quality certifications. These appeals implicate the Governor's priority for Sustainable and Clean Energy.

- See generally, Results WA, Goal 3, Sustainable and Clean Energy, Healthy Fish and Wildlife, and a Clean and Restored Environment, and Goal 2, Prosperous economy.

2. Westway and Imperium bulk liquid storage facility expansions at the Port of Grays Harbor in Hoquiam (crude oil). Based on a December 2013 decision from the Shorelines Hearings Board, these projects are in the process of a SEPA environmental review. Scoping occurred in April and May 2014 (Ecology website), and the process has now moved to preparation of a draft Environmental Impact Statement (EIS). The Board expects further appeals related to permitting of these expanded facilities along Gray Harbor, once the EIS process is complete. While no final date is available, the EIS is likely to be completed in the next biennium. These are complex, controversial projects, and will generate significant legal issues on appeal. These appeals implicate the Governor's Results Washington priorities.
  - See generally, Results WA, Goal 3, Sustainable and Clean Energy, Healthy Fish and Wildlife, and a Clean and Restored Environment, and Goal 2, Prosperous Economy.
3. Water Rights cases. The PCHB handles a steady volume of complex and routine water rights cases. For the current biennium, the Department of Ecology was required, by budget proviso language, to issue 500 water rights decisions in the first fiscal year of each biennium and the agency expects to issue an equivalent number of permits the second fiscal year as well. Ecology anticipates that a similar proviso will be contained in the upcoming budget. It is likely there will be an increasing number of appeals to the PCHB of these water rights decisions. Population growth, economic development, the need for clean, adequate water supplies for drinking water, commercial and agricultural uses, and to sustain fish and the natural environment will continue to present Ecology with difficult water resource decisions, and those will be appealed to the PCHB. Examples of issues presented in recent cases include: 1) Modification of instream flows on the Columbia River, and use of "out-of-kind" mitigation, 2) use of statutory exemptions to deplete instream flows on the Nisqually and Deschutes Rivers, 3) application of the municipal water rights law, 4) use of mitigation for water depletion, 5) dam-related water rights. These cases directly implicate aspects of Goal 3, Results Washington.
  - Goal 3, Outcome Measure 2.2 (Increase the percentage of ESA-listed salmon and steelhead populations at healthy, sustainable levels...);
  - Goal 3, Outcome Measure 3.2 (Increase the percentage of rivers meeting good water quality...).
4. Renewal of National Pollutant Discharge Elimination System (NPDES) General Permits. Ecology renews NPDES General Permits on a rolling basis. These permit appeals are a major workload driver for the PCHB. Expected permit renewals or modifications include the Industrial Stormwater, Municipal Stormwater, and Construction Stormwater permits, among several others. Attachment B to this decision Package is list of General Permits that will be issued in the next biennium and are subject to potential appeal to the PCHB. These permits are complex, and have generated a continuing set of appeals to the PCHB over the last 10 years, as Ecology reissues the permits. For example, the Industrial Stormwater General Permit (ISGP) covers over 1,200 Industrial facilities operating in the State. The last appeal raised over 75 legal issues, generated multiple rounds of summary judgment motions and a several week long hearings. The permit expires on January 1, 2015 and Ecology plans to issue a new ISGP in late 2014, with an effective date of January 1, 2015. These permits, which set water quality discharge standards for multiple sectors, directly affect the Governor's Results Washington Goal 3, Outcomes and Leading Indicators.
  - Goal 3, Healthy Fish and Wildlife, subtopic Pacific Salmon, Outcome Indicator 2.2 (Increase the percentage of ESA-Listed salmon and steelhead populations at healthy, sustainable levels...), and Leading Indicator 2.2.a (Demonstrate increasing trend in Puget Sound Chinook populations...).
  - Goal 3, Clean and Restored Environment, subtopic Clean, Cool Water, Outcome Measure 3.2 (Increase the percentage of rivers meeting good water quality), and Leading Indicator 3.2.a. (Increase the number of projects that provide stormwater treatment or infiltration...).
5. Challenges to permit terms that include or implicate Ecology's new water quality standards that address human health criteria based on fish consumption rate. While the expected new fish consumption rule cannot be directly challenged before the PCHB, the rule will require implementation of new, more rigorous water quality standards, which will be incorporated into NPDES discharge permits. Such permits can be appealed to the PCHB. Ecology expects to adopt the final rule after the 2015 Legislative Session. The PCHB would expect to see appeals of NPDES permits incorporating the new water quality standards, or requirements to reduce toxic discharges, during the 2015-17 biennium and going forward. These will be complex appeals that implicate Results Washington Goals related to Sustainable Energy and a Clean Environment.
  - Goal 3, Healthy Fish and Wildlife, subtopic Pacific Salmon, Outcome Indicator 2.2 (Increase the percentage of ESA-Listed salmon and steelhead populations at healthy, sustainable levels...), and Leading Indicator 2.2.a (Demonstrate increasing trend in Puget Sound Chinook populations...).
6. Aquaculture. The Shorelines Hearings Board has had multiple appeals related to expansion of the commercial aquaculture industry in Washington (the culture or farming of fish, shellfish, or other aquatic plants and animals). Many of these cases have related shoreline permits issued for geoduck or mussel farms. These appeals have raised multiple water quality and shoreline use issues,

resulting in multi-day hearings. The Board expects that the continued expansion of the aquaculture industry will result in further appeals. Expansion of the shellfish industry in Washington is addressed directly in Goal 3 of the Results Washington effort.

- Goal 3, Healthy Fish and Wildlife, subtopic Shellfish, Outcome Measure 2.1 (Increase improved shellfish classification acreage in Puget Sound, and Leading Indicator-2.1.b. (Increase number of implemented agricultural BMPs to improve quality in shellfish growing areas....).
- Goal 2, Prosperous Economy.

7. Hanford. The PCHB has seen a number of appeals over the last several years related to Ecology's enforcement of environmental laws on the Hanford Nuclear Reservation. These have been actions directed at both the U.S. Department of Energy, as well as contractors at the site. One case is currently pending before the Board, and is set for a three week hearing in the fall of 2014.

- Goal 3, Clean and Restored Environment, subtopic Healthy Lands.

8. Air permits and enforcement. The PCHB has a steady load of appeals related to enforcement of the State's air quality laws. Some cases relate to emission standards for large industrial facilities, such as expanded data centers located in Quincy (Microsoft, Yahoo!, Intergate), or large composting facilities in Western WA (Cedar Grove). Others relate to new facilities or the burning of biofuels, and related emissions. There is also a steady load of appeals of smaller enforcement actions taken by local air agencies and Ecology. These cases directly address appropriate air emission standards, addressed in Goal 3, Results Washington.

- Goal 3, Clean and Restored Environment, subtopic Healthy Air, Outcome Measure 3.3 (Increase percent of population living where air quality meets federal standards...).

9. Shoreline Development: The SHB has a steady load of appeals related to development along the state's shorelines. These cases can range from individual dock or bulkhead developments, to large commercial, industrial or municipal development and redevelopment. The appeals routinely raise issues related to habitat protection, loss of eelgrass, cumulative impacts of development, salmon and other aquatic organism protection, public access and recreational use of shorelines, and private property interests, among many others. These cases are time sensitive, and the Board is required to issue decisions within 180 days of the date of appeal. Many aspects of Goal 3 of the Results Washington effort are addressed through these decisions.

- Goal 3, Working and Natural Lands, subtopic Habitat Protection, Outcome Indicator 4.3(Reduce rate of loss of priority habitats...), and Leading Indicators 4.3.c; 4.3.e, 4.3.f (conversion of marine and freshwater riparian habitat in Puget Sound; increase eelgrass beds in Puget Sound, and increase the acreage of Puget Sound estuaries restored, respectively), and
- Goal 3, Healthy Fish and Wildlife, subtopic Shellfish, Outcome Measure 2.1 (Increase improved shellfish classification acreage in Puget Sound, and Leading Indicator-Increase number of implemented agricultural BMPs to improve quality in shellfish growing areas....), and
- Goal 3, Working and Natural Lands, subtopic Outdoor Recreation, Outcome Measure 4.2. (Increase participation in outdoor experiences on state public recreation lands and waters...)
- Goal 2, Prosperous Economy.

10. Forest Practices: The PCHB will continue to see appeals of various forest practice applications and actions by DNR.

- See generally, Results WA, Goal 3, Working and Natural Lands, subtopic Forest and Farmlands, and related Leading Indicators. (reduce loss of designated forests of long-term commercial significance).

#### GMHB-Upcoming areas of appeal and relationship to RESULTS WA

The Growth Management Hearings Board provides the process by which city and county governments are required to implement many of the priorities of Results Washington Goal 3: Sustainable Energy and a Clean Environment. The GMHB regional panels hear appeals related to local government comprehensive plans, development regulations, and shoreline master programs and make legal decisions which enforce the Growth Management Act and the Shoreline Management Act. This adjudication is essential to implementing Goal 3 and its specific targets at the local level. GMHB rulings support all four of the Goal 3 topics, as follows.

1. Sustainable and Clean Energy: The GMHB supports the goal of reducing transportation-related greenhouse gas emissions by ensuring local land use plans reduce sprawl and ensure compact urban development, allowing transit-friendly urban densities, as required by RCW 36.70A.020(1),(2), (3). (Target 3.1.1) The Board adjudicates appeals challenging a local government's compliance with these GMA standards.
2. Healthy Fish and Wildlife: GMHB adjudication applies a requirement for each city and county to adopt critical areas ordinances based on best available science. RCW 36.70A.060, .172. The environmental protections provided by these ordinances may clash with property owners' expectations and are often politically contentious, as well as scientifically technical. GMHB decisions ensure local land use provisions are protective of threatened or endangered species, including state listed species. (Target 3.2.3) Board rulings make sure development along riparian corridors, marine shorelines, and wetlands is limited in order to protect anadromous fish and other

aquatic resources. RCW 36.70A.172. (Target 3.2.2) Recent GMHB cases have contributed to protection of water quality through decisions addressing septic system standards under GMA and SMA. (Target 3.2.1(a)).

3. Clean and Restored Environment. The goal of keeping land, water and air clean is supported by GMHB decisions which apply GMA requirements to protect water quality, especially in Puget Sound, and apply SMA requirements for "no net loss" of shoreline ecological functions. To protect the land, urban development is directed to locations within urban areas; expansion to "greenfields" is discouraged/denied. (Target 3.3.1) To protect water, local governments must use best available science to protect wetlands, critical aquifer recharge areas, streams, and river and channel migration zones. (Target 3.3.2) The Board reviews the city or county record, when challenged, and has the authority to invalidate local ordinances that would frustrate the goals of the GMA or SMA.
4. Working and Natural Lands. Under RCW 36.70A.060, local governments must identify and conserve farm land and forests of long-term commercial significance. (Target 3.4.1(a) (c)). GMHB decisions across the state have been vitally important in reducing conversion of agricultural land, in particular. Protection of priority habits for fish and wildlife is also enforced through the Board's adjudication of compliance with the GMA and SMA mandates to identify and protect marine and freshwater riparian habitats, especially in Puget Sound. (Target 3.4.3(a)(c)(e)(f)). Numerous Board decisions also support planning for open space and trails, under GMA or SMA provisions. (Target 3.4.2).

***What are the other important connections or impacts related to this proposal?***

Appeals are filed with the PCHB and SHB from decisions by the Departments of Ecology, Fish and Wildlife, Natural Resources, all air authorities, and local governments (and a few miscellaneous other agencies). Parties to these appeals include the following, in addition to the state agencies and local governments: Individual citizens, environmental organizations (both local and national), non-profit groups, individual businesses (from small independently owned businesses to large ones such as Boeing or BNSF), business associations, Tribes, neighborhood associations, consortium or broader-based trade or interest groups, such as Association of Washington Business, Washington Environmental Council, Associated General Contractors, BIAW, Farm Bureau. The GMHB has a similar list of stakeholder groups and interested parties, including Futurewise, citizens, and local governments. These entities and individuals are directly affected by the funding level of the Boards, and any delays in the processing of cases and decisions by the Boards.

***What alternatives were explored by the agency, and why was this alternative chosen?***

ELUHO has considered a number of alternatives in the effort to identify budget reduction options equivalent to 15% of its operating budget. These options include:

- 1) Elimination of either or both the quasi-judicial adjudicatory boards that address appeals of land use and environmental decisions in this state (GMHB and/or PCHB/SHB). This option considered elimination of the Boards in favor of direct appeals to Superior Court. Based on past fiscal notes attendant to legislation that proposed such an alternative to the GMHB, the cost of this option is prohibitive, as it results in a much higher cost than the cost of the current administrative process. Litigants would be faced with longer appeal times at a much greater cost to the state and the parties.
- 2) Eliminate statutory deadlines for issuance of decisions. This option has been discussed, but would require amendment of the APA, the Growth Management Act, and the Shoreline Management Act, or potentially, a separate amendment of Ch. 43.21B RCW to exempt the PCHB from the APA decision deadlines. The Boards would expect any such change in statutory deadlines for issuing decisions to be controversial, as those deadlines exist in order to avoid the very delays discussed above.
- 3) A change in the composition and size of the GMHB. This option considered possible further reductions in the size, political and regional make-up of the GMHB. Because of the politically sensitive nature of all issues involving the Growth Management Act in this state, this option is not feasible in the absence of a well-developed stakeholder process, with a resulting consensus as to how a newly constituted GMHB would function and handle expected caseloads going forward. Legislation may be required if the composition or regional make-up of the GMHB were to be changed in any significant way. This would likely be a controversial and difficult legislative undertaking.
- 4) Legislation to provide ELUHO Boards the authority to appoint pro tem judges or Board members. Currently, none of the Boards within ELUHO have clear authority to appoint or hire qualified individuals to act as Board members on a temporary or pro tem basis. Such authority could allow the Board the opportunity to handle spikes in caseload through temporary appointments, rather than full time positions. While a viable option, the agency would need adequate funding to pay for the services of these pro tem appointees. Current funding levels, and expected reductions make this option less viable.
- 5) Further reductions in Goods and Services and Travel expenditures. ELUHO has considered and rejected further reductions in these supporting cost objects beyond those offered in its decision packages, as risking over-expenditure and as contrary to the mission of the agency and the Boards it supports. Because the GMHB is regionally based, some travel is essential to attend hearings. The PCHB and SHB also travel to attend hearings under certain circumstances (shoreline or water rights cases in the locale). It is not feasible to further reduce lease and rent costs, as ELUHO only recently relocated to a new facility that meets the functional needs of

the Boards (hearing and mediation rooms available), pays a reasonably low market rate, and would, within an unreasonably short period of time, pay another substantial sum (unbudgeted) to relocate.

***What are the consequences of adopting or not adopting this package?***

This decision package proposes a reduction in funding, not an increase.

The consequences of reducing funding for essential support staff and cross-agency discretionary cost items include:

1. Slowed time for issuance of decisions.
2. Lack of adequate capacity to handle administration of a small agency comprised of several Boards, and Governor-appointed Board Members.
3. Lack of adequate funding to sustain basic requirements of Board decision-making, such as travel, necessary legal research tools, contractual services such as court reporters, needed Attorney General services.
4. Disappointed constituent groups who expect Board presence in local areas for hearings, and timely decisions so projects may proceed.
5. Poor quality in the finished product of the Boards, due to inadequate staff to review, edit and complete tasks.
6. Recruitment and retention problems, due to part-time nature of support jobs, and need for Board members to take on tasks of clerical positions.
7. Risk that funding will be inadequate for fluctuating costs related to court reporters, Attorney General Services, and required travel of outside or regionally-based Board Members.

***What is the relationship, if any, to the state's capital budget?***

None.

***What changes would be required to existing statutes, rules, or contracts, in order to implement the change?***

None.

***Expenditure and revenue calculations and assumptions***

Assumptions include:

Goods and Services reductions totaling \$21,750 per fiscal year in various discretionary cost objects including supplies, printing, employee development and training, subscriptions, and other contractual services.

A reduction in Travel costs of \$13,750 per fiscal year.

A reduction in Capital Outlays of \$4,000 per fiscal year.

<b>Position</b>	<b>Current Salary</b>	<b>Proposed Reduction</b>	<b>Salary (A) Reduction</b>	<b>Benefits (B) Reduction</b>	<b>Total A &amp; B Reduction Per Fiscal Year</b>	<b>FTE</b>
Administrative Manager	\$64,440	-20%	(\$12,888)	(\$2,245)	(\$15,133)	-.2
Legal Assistant for Case Management	\$44,820	-20%	(\$8,864)	(\$1,584)	(\$10,548)	-.2
Half-time Clerical	\$11,850	-100%	(\$11,850)	(\$11,322)	(\$23,172)	-.5

***Which costs and functions are one-time? Which are ongoing? What are the budget impacts in future biennia?***

The Goods and Services and salary and benefit reductions to the ELUHO budget are ongoing, and would reduce appropriations to the agency in subsequent biennia.

<u>Object Detail</u>	<u>FY 2016</u>	<u>FY 2017</u>	<u>Total</u>
A Salaries And Wages	(33,702)	(33,702)	(67,404)
B Employee Benefits	(15,151)	(15,151)	(30,302)
E Goods\Other Services	(21,750)	(21,750)	(43,500)
G Travel	(13,750)	(13,750)	(27,500)
J Capital Outlays	(4,000)	(4,000)	(8,000)
<b>Total Objects</b>	<b>(88,353)</b>	<b>(88,353)</b>	<b>(176,706)</b>

**Agency:** 468 Environmental & Land Use Hearings  
**Decision Package Code/Title:** M7 Appoint Part-time GMHB Member/Furloughs  
**Budget Period:** 2015-17  
**Budget Level:** PL - Performance Level

**Recommendation Summary Text:**

This decision package describes one of four areas identified by the Environmental and Land Use Hearings Office (ELUHO) to re-base its budget to a level below Maintenance Level and to prioritize budget reductions equal to 15 percent. This decision package reduces the land use adjudication program (Growth Management Hearings Board) of ELUHO by \$117,589. This package reduces funding for the sixth (6th) member of the GMHB to half-time in the second year of the biennium (\$55,896) (through attrition), and achieves an equivalent reduction in the first year of the biennium by imposing a two-day-per-month furlough on GMHB members (\$61,693).

**Fiscal Detail**

<b>Operating Expenditures</b>	<b><u>FY 2016</u></b>	<b><u>FY 2017</u></b>	<b><u>Total</u></b>
001-1 General Fund - Basic Account-State	(61,693)	(55,896)	(117,589)
<b>Total Cost</b>	<b>(61,693)</b>	<b>(55,896)</b>	<b>(117,589)</b>
<b>Staffing</b>	<b><u>FY 2016</u></b>	<b><u>FY 2017</u></b>	<b><u>Annual Average</u></b>
FTEs	-.5	-.5	-.5

**Package Description:**

This decision package (one of four) reduces ELUHO's appropriation for the 2015-17 biennium by \$117,589 to address a portion of budget reductions equal to 15% of its General Fund maintenance level budget. The decision package assumes a reduction in ELUHO's appropriation level equal to approximately 7.5% of the funds allotted to the land use adjudication program of ELUHO, one of three programs in the agency. The land use program supports the Growth Management Hearings Board (GMHB). The proposed reduction would come from salaries and benefits appropriated to the agency to support six full-time members of the GMHB. The reduction would result in loss of full-time funding for the sixth Board member and re-basing that position at half-time. If implemented by attrition, in the second year of the biennium a retiring Board member's position would be filled at only half time, for savings in the amount of \$55,896. In the first year of the biennium, equivalent savings would be provided through two-day-per-month furloughs taken by each of the six GMHB members for that year (\$61,693).

By statute, the GMHB consists of seven members, appointed by the Governor, residing in specified areas of the state. RCW 36.70A.250. The Governor may reduce the Board to six members if warranted by the Board's caseload. RCW 36.70A.252. Since May 2011, the GMHB has functioned as a six member Board, and the Governor has not appointed the seventh member. ELUHO has submitted a companion decision package cutting funding for the seventh GMHB member. This present decision package cuts an additional half-time member position in the second year of the biennium and reduces the working time of all Board members in the first year. This decision package assumes that the Governor has the authority to appoint a part-time position to the Board, and that further statutory changes are not necessary to implement the proposal.

The GMHB adjudicates appeals of local jurisdiction land use legislation. Each Board member presides over a set of cases, managing all aspects of conferences, board consultations, hearings, and writing all opinions and orders. No staff attorneys or other adjudicative staff support the GMHB. Board members work from their homes located throughout the state and hear cases in multiple locations. Appeals are heard and decided by panels of three Board members, and each member serves on case panels across the state. Reducing each Board member's working time in the first year significantly reduces the GMHB flexibility to respond to caseload fluctuation, provide regionally-responsive case resolution, and ensure timely and thorough written orders. Cutting a sixth position to half time in

the second year of the biennium and thereafter reduces the Board's ability to meet caseloads associated with legislatively-required local comprehensive plan updates in 2015 through 2019.

The Growth Management Hearings Board is an independent quasi-judicial adjudication board within ELUHO. The GMHB hears appeals of city and county comprehensive plans, development regulations and shoreline master programs. The Board conducts hearings, evaluates factual and scientific evidence, and produces written legal decisions that interpret and apply the Growth Management Act and the Shoreline Management Act. The GMHB provides independent review of city and county actions in an expedited, cost-effective and regionally-sensitive process.

The options to meet a 15% budget reduction across ELUHO are limited. The agency is largely composed of statutorily established Boards, with governor-appointed Board members. The majority of the agency budget is dedicated to salary and benefits for board members and limited support personnel. The proposal to further reduce funding that supports a 6th full-time GMHB member position is the only option remaining short of eliminating the Board itself. This option is offered despite prior budget reductions and legislative action reducing the GMHB from 9 to 7 members in 2010 and a separate 2015-17 decision package that would result in a loss of funding for the 7th GMHB position.

This decision package permanently reduces the GMHB to 5.5 members, most of whom work from their homes (there is one Olympia office-based position). This is a substantial further reduction of the GMHB, which less than 5 years ago consisted of 9 full-time members served by 5 office staff and a staff attorney working out of three regional offices. Through a combination of prior budget reductions and legislation in 2010, the former three separate, regionally-based, three-member GMHBs became one board with seven members. The Board closed two offices (Seattle and Yakima), and eliminated support staff positions including the staff attorney who had provided critical back-up to non-attorney Board members. In 2011, the GMHB was brought under the administrative umbrella of ELUHO, and in early 2012, the Olympia office of the GMHB co-located with the other Boards of ELUHO, for further savings in space and support staff costs. The seventh position on the GMHB became vacant March 2011, and the Governor has not appointed a replacement in view of legislatively-postponed caseload.

The GMHB resolves land use disputes in which citizens challenge the legislative actions of cities and counties under the Growth Management Act (GMA), Shoreline Management Act (SMA) and SEPA. The GMHB caseload reflects city and county planning cycles. Statutory deadlines require local jurisdictions to review and update their land use plans and regulations and their shoreline master programs periodically. These updates generate surges of appeals. For example, the previous round of required comprehensive plan updates for just three counties and their cities (King, Pierce, and Snohomish) resulted in 49 cases filed with the Central Puget Sound GMHB in 2005, the year following the update deadlines.

In the last five years, the GMHB workload has been reduced, with fewer appeals filed. The GMHB's recent caseload reduction results, in large part, from legislative action in 2010 which rescheduled the deadlines for cities and counties to update their comprehensive plans from 2011-2014 to 2015-2019. This legislative deferral of deadlines for local government plan updates (RCW 36.70A.130(5)), together with Ecology's extension of deadlines for local governments to update their shoreline master programs, shifted the GMHB workload forward. The GMHB new caseload in 2010-2014 dropped to 20 to 30 petitions per year. The following chart demonstrates this decline. The GMHB has operated effectively as a six-person board since May 2011 with the reduced caseload.

This decision package, which further reduces the size of the GMHB, assumes a continuation of lower caseloads, based on the last five years of caseload data, which is as follows:

Actual	Petitions for Review	Cases (after consolidation)
2010	50	33
2011	26	21
2012	30	24
2013	43	29

However, comprehensive plan updates are now statutorily set for June 30, 2015 to June 30, 2019. The lowest likely caseload from this next planning cycle was projected in the GMHB Efficiency and Restructuring Study (Triangle Report, 2009) as 40 to 65 petitions per year anticipated in 2011-2014. The Triangle-projected caseload must now be moved forward to 2015- 2019 (appeals must be filed 60-days after adoption of the update). The second chart presents the projected workload, based on the changed planning cycle for local governments.

Year	Jurisdictions with Updates Due	Projected Petitions
2015	79	41
2016	45	65
2017	62	46

Thus for future staffing, the GMHB must assume an increase in workload, driven by the comprehensive plan updates. As long as the GMHB remains a 6-member Board, there is adequate capacity on the Board in its current configuration to take on some additional work. However, further reduction of the Board to 5.5 is ill-advised in light of the projected workload. The GMHB assumes that a reduction to 5.5 Board members, if the caseload projections are as projected, will negatively impact the quality and timeliness of GMHB decisions going forward.

When new petitions are filed, a GMHB Board member is assigned as presiding officer and a three-member panel is created. By statute, the makeup of the panel must meet requirements for regionalism, one attorney and one former local elected official, and partisan balance. RCW 36.70A.260. Each GMHB member presides over a share of cases. The presiding officer conducts conferences and hearings by telephone and in person, prepares and issues all procedural orders, convenes panel consultations pre- and post-hearing, and writes decisions on motions, the final order, compliance, and remand, including findings of fact and conclusions of law. Each Board member serves on multiple panels, involving cross-state travel for hearings on the merits. The burden of legal analysis falls on attorney Board members for not only their own cases but for written decisions of non-lawyer Board members whose work needs review.

The GMHB faces additional logistical and efficiency challenges from its work-from-home structure. While the ELUHO office in Olympia provides administrative support, GMHB members must manage office equipment, files, correspondence, and telecommunications functions from remote locations while making decisions that require, for highest quality, on-site hearings and intensive ongoing panel deliberations. GMHB Board members also carry out other duties, such as rule making, digesting decisions for the website, training local planners through quarterly Department of Commerce conferences, maintaining a practice handbook for litigants, and offering mediation services.

The further reduction of Board time through furloughs in the first year will compound the challenges faced by the Board in comprising panels that meet statutory requirements, and in issuing decisions timely. Furloughs of working Board Members will substantially reduce time available for scheduling hearings, case conferences, and writing and review of decisions. It will impede the work of the Board, and over the course of a year, have a substantial negative effect on quality and timeliness of decisions.

Both the proposed furlough in the first year of the biennium and half-time appointment of the 6th member in the second year will have impacts that go to the very purposes for which the GMHB exists. Those purposes are timely, affordable and accessible review of land use disputes, in recognition of the state's regional differences. The proposed furloughs and reduction in Board member time will have incremental and fundamental impacts to the mission of the GMHB as follows:

*Loss of timely decision-making.* Local governments, private citizens, the environmental and business communities and others will experience longer times for decisions from the GMHB, as Board members will be required to handle the additional caseload from appeals of updates to comprehensive plan, critical areas ordinances, and shoreline master programs with fewer or more-time-limited Board members. Longer decision times are contrary to the mandate of the GMA, which requires a final decision within 180 days of petition filing and a compliance order within 45 days of a hearing. RCW 36.70A.300(2); .330(2). The GMHB will continue to prioritize the 180-day statutory deadline for final decisions, but other types of decisions (reconsideration, compliance, dispositive motions) are likely to slide.

*Loss of clarity and quality in final decisions.* With inadequate Board members to issue written decisions, the Board may be forced to turn to shorter, summary decisions or orders without adequate and complete analysis. This might result in a higher rate of reversals in court upon appeal, again vitiating the purpose of timely, authoritative determinations of land use disputes. The ability to produce thorough and thoughtful written decisions is at the core of the GMHB adjudicatory function. The Ninth District Court of Appeals explained how the statutory provisions render the Board members' role as "functionally comparable" to that of a judge: an adversarial proceeding, a decision-maker insulated from political influence, a decision based on evidence submitted by the parties, and a decision provided to all the parties on all the issues of fact and law. *Buckles, et al., v King County*, 191 F.3d 1127, 1134 (1999).

*Loss of regional balance.* Because the GMHB uniquely rules on local legislative adoption of land use plans and policies, Board composition has been carefully crafted by the legislature to ensure regional balance and political credibility. Reducing the three prior boards to a single 7-member GMHB resulted from an intensive stakeholder process that identified regional balance as a continuing requirement. Triangle reported (p. 28): "Any [restructuring] option that does not preserve this regional representation is likely to face significant opposition." Reducing the GMHB further to 5.5 members will result in frequent inability to form case panels with the legislatively mandated regional representation. The Triangle Report (p. 24) reflected the opinion that a five-member board "would not be adequate to either handle the workload or preserve regional representation and a balance in the other membership criteria." Such conclusions should be revisited through a credible stakeholder process, rather than imposed in a budget cutting exercise.

Loss of certainty and finality in land use regulation. Certainty and predictability are lodestar principles of Washington land use law. *Thurston County v WWGMHB*, 164 Wn.2d 329, 345 (2008). Citizens, businesses, and local governments rely on the GMHB to provide timely resolution of challenges to local comprehensive plans, regulations, and shoreline master programs. Further reducing the GMHB will likely mean delays in arriving at final determinations of GMA and SMS compliance, causing delays to local jurisdictions seeking planning and regulatory certainty, delays to the development community, and deferrals of needed environmental protections.

Vesting of non-compliant development. Because city and county land use plans and regulations are presumed valid upon adoption, non-compliant projects may vest and be permitted before the GMHB completes its review of a challenged enactment. Thus, delays and less-thorough Board decisions may allow urban sprawl, loss of agricultural land, and development that contravenes the GMA. Even the six month final order deadline is not always short enough to prevent vesting of aggressive projects. In *Town of Woodway v Snohomish County*, 180 Wn.2d 165 (2014), permits for a massive new urban center vested before the Board even held the hearing on the merits. Further adjudicatory delay would render the statute toothless.

Negative impacts to natural resources and the environment. The GMA and SMA require local jurisdictions to adopt regulations conserving farm and forest lands, protecting environmentally critical areas, and planning wise use of shorelines. Resources are degraded or lost while disputes concerning such regulations go unresolved or if the quality of decisions is compromised.

The ELUHO contact for this request is Kathy Mix, Executive Director, (360) 664-9178.

## **Narrative Justification and Impact Statement**

### ***What specific performance outcomes does the agency expect?***

Assuming the current caseload remains steady, the GMHB expects to continue to meet the relevant performance measure for "Percent of final decisions and compliance orders issued within statutory deadlines." The target for this measure is 100% of final decisions and 90% of compliance orders, and since the 2009-2011 biennium, the GMHB has consistently met this measure, issuing all final decisions within the 180-day deadline and over 90 % of compliance orders within the 45-day deadline. The Board has done so with only six full time members.

However, with only 5.5 Board members or with Board members on furlough, and in light of anticipated caseload increase due to city and county updates in 2015-19, ability to meet this performance measure is at risk. The Board's statutory authority does not provide for extension of the 180-day final decision deadline based on Board member unavailability.

### **Performance Measure Detail**

#### **Activity:**

No measures submitted for package

#### **Incremental Changes**

### ***Is this decision package essential to implement a strategy identified in the agency's strategic plan?***

This decision package is necessary to implement OFM's directive to re-base state program budgets to a level below Maintenance Level. It is contrary to the agency's strategic plan in several ways, outlined in the decision package which seeks to restore funding.

### ***Does this DP provide essential support to one or more of the Governor's Results Washington priorities?***

The Growth Management Hearings Board provides the process by which city and county governments are required to implement many of the priorities of Results Washington Goal 3: Sustainable Energy and a Clean Environment. The GMHB regional panels hear appeals related to local government comprehensive plans, development regulations, and shoreline master programs and make legal decisions which enforce the Growth Management Act and the Shoreline Management Act. This adjudication is essential to implementing Goal 3 at the local level. GMHB rulings support all four of the Goal 3 topics, as follows:

**Sustainable and Clean Energy:** The GMHB supports the goal of reducing transportation-related greenhouse gas emissions by ensuring local land use plans reduce sprawl and ensure compact urban development, allowing transit-friendly urban densities, as required by RCW 36.70A.020(1),(2), (3). (Target 3.1.1) The Board adjudicates appeals challenging a local government's compliance with these GMA standards.

Healthy Fish and Wildlife: GMHB adjudication applies a requirement for each city and county to adopt critical areas ordinances based on best available science. RCW 36.70A.060, .172. The environmental protections provided by these ordinances may clash with property owners' expectations and are often highly contentious. GMHB decisions ensure local land use provisions are protective of threatened or endangered species, including state listed species. (Target 3.2.3) Board rulings make sure development along riparian corridors, marine shorelines, and wetlands is limited in order to protect anadromous fish and other aquatic resources. RCW 36.70A.172. (Target 3.2.2) Recent GMHB cases have contributed to protection of water quality by orders addressing septic system standards under GMA and SMA. (Target 3.2.1(a))

Clean and Restored Environment. The goal of keeping land, water and air clean is supported by GMHB decisions which apply GMA requirements to protect water quality, especially in Puget Sound, and apply SMA requirements for "no net loss" of shoreline ecological functions. To protect the land, urban development is directed to locations within urban areas; expansion to "greenfields" is discouraged/denied. (Target 3.3.1) To protect water, local governments must use best available science to protect wetlands, critical aquifer recharge areas, streams, river and channel migration zones. (Target 3.3.2) The Board reviews the city or county record, when challenged, and has the authority to invalidate local ordinances that would frustrate the goals of the GMA or SMA.

Working and Natural Lands. Under RCW 36.70A.060, local governments must identify and conserve farm land and forests of long-term commercial significance. (Target 3.4.1(a) (c)). GMHB decisions across the state have been vitally important in reducing conversion of agricultural land, in particular. Protection of priority habitats for fish and wildlife is also enforced through the Board's adjudication of compliance with the GMA and SMA mandates to identify and protect marine and freshwater riparian habitats, especially in Puget Sound. (Target 3.4.3(a)(c)(e)(f)). Numerous Board decisions also support planning for open space and trails, under GMA or SMA provisions. (Target 3.4.2).

***What are the other important connections or impacts related to this proposal?***

Any decision on the funding level for the GMHB should consider the resources necessary to address the complexity and significance of the matters likely to lie ahead for this Board. City and county comprehensive plan updates, originally scheduled with deadlines from 2010-2014, have been legislatively rescheduled for 2015-2019. RCW 36.70A.130(5). These updates of necessity will address important and politically sensitive issues such as urban growth area boundaries, greenhouse gas reduction strategies, development on landslide-prone or flood-prone lands, rural water and septic services, conservation of agricultural land, and the conflict between development pressures and habitat for fish and wildlife.

*Shoreline Master Program updates.* In addition to comprehensive plan updates, cities and counties are mandated to update their Shoreline Master Programs. Approximately 102 of 281 updates have been completed. The remainder were to have been finished in 2014, but (per telephone with Ecology's Tim Gates) are on track to be completed over the next three years. Appeals to the GMHB have generated less than a dozen cases so far, but a current County SMP update is being challenged by three parties raising over 250 legal issues, demonstrating how contentious and complex protection of Washington shores can become.

*Critical Areas Ordinances.* San Juan County's process to enact a critical areas ordinance began in 2006 and was not completed until 2013. Appeals to the GMHB involved five petitioners and an intervenor, representing the full range of interests and raising over 100 legal issues. The comprehensive plan updates for all cities and counties with deadlines in the next two biennia require critical areas ordinances to be reviewed as well. Ecology has issued an Update on Wetland Buffers: The State of the Science, which will intensify debate around these issues.

*Water Resources.* Population growth, economic development, the need for clean and adequate water supplies for drinking water, commercial use, agriculture and to sustain fish and the natural environment present cities and counties with difficult water resource planning decisions. The GMA and SMA contain provisions requiring the GMHB to rule on difficult questions with far-reaching impacts for water supply and water quality. Timely, well-reasoned and legally-sound GMHB rulings are key first steps to negotiated settlements with state agencies or appellate resolution in counties on both sides of the Cascades (Whatcom, San Juan, Kittitas, Spokane).

*Floods and Landslides.* New FEMA flood mapping and a 2010 legislative amendment to the GMA restricting urban growth expansion in the floodplains have yet to be fully incorporated in city and county land use plans and regulations. RCW 36.70A.110(8). The March, 2014 Oso landslide heightens the imperative for planning that acknowledges geologic hazard areas and limits development. Regulations of such lands are politically charged and generate contentious and often highly-technical appeals.

***What alternatives were explored by the agency, and why was this alternative chosen?***

ELUHO has considered a number of alternatives in the effort to identify budget reduction options equivalent to 15% of its operating budget. The option presented was chosen as it reflects current workload on the GMHB, and offers some flexibility, with the option to

seek supplemental appropriations, if workload increases. With specific reference to the land use adjudicatory program, these options include:

*Elimination of the GMHB that provides quasi-judicial adjudication of land use appeals in favor of direct appeals to Superior Court.* This option considered elimination of the GMHB in favor of appeals to Superior Court. Based on past fiscal notes attendant to legislation that proposed such an alternative to the GMHB, the cost of this option is prohibitive, as it results in a much higher cost to the state than the current administrative process. Litigants would be faced with longer appeal times and higher cost to the parties. Notably, the GMA has from the outset contained a provision allowing litigants by consent to remove any case directly to superior court within ten days of the filing of a petition for review. RCW 36.70A.295. To date, no GMA case has been removed to the court under this provision. Litigants clearly prefer the GMHB process.

*Further reduction in the composition and size of the GMHB.* This option considers possible further change in the size, political and regional make-up of the GMHB. Because of the politically sensitive nature of all issues involving the Growth Management Act in this state, this option is not feasible in the absence of a well-developed stakeholder process, with a resulting consensus as to how a newly constituted GMHB would function and handle expected caseloads going forward. Legislation would be required if the size, composition or regional make-up of the GMHB were to be changed in any significant way, and this would likely be a controversial and difficult legislative undertaking. Further, any budgetary savings are speculative, as a reduced Board would presumably need the assistance of staff attorney(s) or hearing examiners(s).

*Eliminate statutory deadlines for issuance of decisions.* This option has been discussed, but would require amendment of the Growth Management Act, which requires decisions to be issued within 180 days of filing of the appeal. The Board would expect any such change in statutory deadlines for issuing decisions to be controversial, as those deadlines exist in order to avoid the very delays discussed above.

*Use of Unallotted Funds (7th GMHB position).* ELUHO has received an appropriation for the 7th GMHB member position, but that position has been unfilled by the Governor since 2011. In the current biennium, OFM did not allot the funds (\$242,306) to the agency for this position, as the Governor did not intend to fill the position based on the declining workload on the GMHB. The agency considered, and rejected, the idea that the GMHB should take credit for all, or a portion of the unallotted funds as the way in which it would participate in the 15% budget reduction and effort to rebase this aspect of ELUHO's programs. This option was rejected in discussion with OFM, based on the need for each program within the agency to look at its currently funded business process and assess the resources actually needed to perform the workload. Allowing the GMHB to rely on unallotted funds would not only allow the GMHB to escape assessment of its current business practices and workload (which has declined considerably), but would unfairly require the other programs within ELUHO, including the central program that provides support to the GMHB, to unfairly shoulder the burden of the reductions and effort to rebase the agency budget.

*Legislation to provide ELUHO Boards the authority to appoint pro tem judges or Board members.* Currently, none of the Boards within ELUHO has statutory authority to appoint or hire qualified individuals to act as board members on a temporary or pro tem basis. Such authority could allow the Board the opportunity to handle spikes in caseload through temporary appointments, rather than full time positions. While a viable option, the agency would need adequate funding to pay for the services of these pro tem appointees. Current funding levels and expected reductions make this option less viable in the short term.

*Further reductions in Goods and Services and Travel expenditures.* ELUHO has considered and rejected further reductions in these supporting cost objects beyond those offered in related decision packages, as risking over-expenditure and as contrary to the mission of the agency and the Boards it supports. Because the GMHB is regionally based, Board members must travel to attend hearings. The PCHB and SHB also travel to attend hearings under certain circumstances (shoreline or water rights cases in the locale). It is not feasible to further reduce lease and rent costs, as ELUHO only recently relocated to a new facility that meets the functional needs of the Boards (hearing and mediation rooms available), pays a reasonably low market rate, and would, within an unreasonably short period of time, pay another substantial sum (unbudgeted) to relocate to less than adequate space.

### ***What are the consequences of adopting or not adopting this package?***

This decision package proposes a reduction in funding, not an increase.

Elimination of funding for six full-time GMHB members is inconsistent with the legislative restructuring of the Board in 2010 and may frustrate the regional panel adjudicative structure approved in that legislation. The makeup of the GMHB has always been politically sensitive. Any further change in Board numbers or composition should be taken only after a thoughtful stakeholder process.

**What is the relationship, if any, to the state's capital budget?**

None.

**What changes would be required to existing statutes, rules, or contracts, in order to implement the change?**

None.

**Expenditure and revenue calculations and assumptions**

*Furlough reduction:*

Board members currently make an annual salary of \$95,376. The average number of 8 hour work days per year is 261. \$95,376 divided by 261 = \$365/day. Six board members X two days/ month X 12 months X \$365/ day = \$52,621/ year. Related benefits are estimated at \$9,072. The total reduction for furloughs in fiscal year 2016 is estimated at \$61,693.

*Full-time to Half-time Board Member:*

Board members currently make an annual salary of \$95,376. Half the salary is \$47,688. The related benefits costs would be reduced by \$8,208. The total reduction in fiscal year 2017 is estimated at \$55,896.

**Which costs and functions are one-time? Which are ongoing? What are the budget impacts in future biennia?**

The GMHB Board member furloughs in the first year of the biennium are one-time. The reduction of one full-time Board member to half-time is permanent and reduces appropriations to the agency in subsequent biennia in an amount necessary to meet the 15% budget reduction. It is assumed that in order to restore full funding for a sixth full-time Board member, the agency would seek a supplemental or new appropriation, with the concurrence of the Governor's office.

<u>Object Detail</u>	<u>FY 2016</u>	<u>FY 2017</u>	<u>Total</u>
A Salaries And Wages	(52,621)	(47,688)	(100,309)
B Employee Benefits	(9,072)	(8,208)	(17,280)
<b>Total Objects</b>	<b>(61,693)</b>	<b>(55,896)</b>	<b>(117,589)</b>

**Agency:** 468 Environmental & Land Use Hearings  
**Decision Package Code/Title:** M9 Reduce Admin Appeals Judges Supporting PCHB/SHB  
**Budget Period:** 2015-17  
**Budget Level:** PL - Performance Level

**Recommendation Summary Text:**

This decision package describes one of four areas identified by the Environmental and Land Use Hearings Office (ELUHO) to re-base its budget to a level below Maintenance Level and and to prioritize reductions equal to 15%. This decision package reduces the environmental adjudication program (the Pollution Control and Shorelines Hearings Boards (PCHB and SHB)) of ELUHO by \$127,708.. This lowest priority reduction would result in loss of funding for the environmental boards to employ, on a full-time basis, two Administrative Appeals Judge positions that support and are essential to the effective operation of the PCHB and SHB.

**Fiscal Detail**

<b>Operating Expenditures</b>	<b><u>FY 2016</u></b>	<b><u>FY 2017</u></b>	<b><u>Total</u></b>
001-1 General Fund - Basic Account-State	(63,854)	(63,854)	(127,708)
<b>Total Cost</b>	<b>(63,854)</b>	<b>(63,854)</b>	<b>(127,708)</b>
<b>Staffing</b>	<b><u>FY 2016</u></b>	<b><u>FY 2017</u></b>	<b><u>Annual Average</u></b>
FTEs	-.6	-.6	-.6

**Package Description:**

This decision package (one of four from ELUHO) reduces ELUHO's appropriation for the 2015-17 biennium by \$127,708 to address a portion of budget reductions equal to 15% of its General Fund maintenance level budget. The proposed reduction would come from salaries and benefits appropriated to the agency for full-time Administrative Appeals Judges (AAJs or Judges) that support the PCHB and SHB. This decision package proposes a permanent reduction in funding for the environmental adjudication program of ELUHO, by reducing one Judge position to 80%, and a second to 60%.

On July 1, 2011 ELUHO became the umbrella agency that administers three quasi-judicial boards. These boards include the Pollution Control Hearings Board and the Shorelines Hearings Board (environmental adjudication program), and the Growth Management Hearings Board (GMHB) (land use adjudication program). ELUHO receives a single appropriation, which it then allots to the environmental and land use adjudication programs, retaining the remainder of appropriated funds in a third, central program which provides fiscal management across the agency and funds common support functions. The Judges are funded through the environmental adjudication program of ELUHO.

The PCHB and SHB rely on two Judges to assist in managing the volume of appeals before these two Boards. Every appeal filed with these two Boards is assigned a presiding officer, and these Judges independently preside over a portion of the caseload of appeals that are filed with the Boards. The Judges, who are experienced environmental lawyers, manage all case-related motions and pre-hearing matters for the cases to which they are assigned, and write final opinions for the Board's review and adoption. The Judges are also trained mediators, presiding over the PCHB and SHB mediation program established pursuant to RCW 43.21B.175.

The options to meet a 15% budget reduction across ELUHO are limited. The agency is largely composed of statutorily established Boards, with Governor-appointed Board members. The majority of the agency budget is dedicated to salary and benefits that support these Boards, and limited support personnel. The proposal to further reduce funding that supports Administrative Appeals Judges of the PCHB/SHB (along with the three other decision packages) is the only option remaining to the agency, short of elimination of the Board(s) itself. This option is offered despite steady caseloads of complex appeals, Legislative action over the last five years to

transfer new jurisdiction to the PCHB for certain types of appeals, and reductions the PCHB/SHB have taken over several years as a result of ongoing budget reduction strategies.

### **Constitutional and Statutory Basis for the Environmental Adjudication Boards**

Although ELUHO offers this reduction package, the consequences of accepting such a reduction will impair the ability of the environmental board to issue timely, well-reasoned decisions that will withstand scrutiny of the parties and appellate courts. Any decision to reduce the staffing of the PCHB/SHB below that necessary for timely and quality-based decision making must take into account the role of these Boards as adjudicative bodies.

Appeals are filed with the PCHB and SHB from decisions by the Departments of Ecology, Fish and Wildlife, Natural Resources, all air authorities, and local governments (and a few miscellaneous other agencies). The appeal rights provided to parties for various environmental and shoreline regulatory enforcement and permitting actions are grounded both in statute and the constitutional right to due process. If these boards did not exist, there would still be a constitutional right to review of actions taken by regulatory agencies. Such review would take place in the various Superior Courts around the State. The Legislature rejected the idea that environmental disputes should be subject to local litigation and appeal processes, choosing instead to establish environmental adjudicative boards, specifically the PCHB and SHB, as the due process forum for those affected by certain regulatory actions. These Boards are expected to render uniform, independent review of actions taken by various environmental and natural resource agencies, and to do so in a manner that is less formal, less costly, and more expeditious than the Superior Courts. The Supreme Court has recognized the desirability of this uniform administration of the state's environmental laws, and that the goal would be frustrated if the ultimate interpretation of such laws were vested in the various Superior Courts around the state. *State ex rel. Martin Marietta v. Ecology*, 84 Wn.2d 329 (1974).

### **Background on Workload of PCHB/SHB**

The workload of PCHB/SHB ("Board") is managed by the three full time Governor-appointed Board members and two AAJs who work with the Board. The duties of the AAJs are discussed further below. These three Board members and two judges handle a steady caseload that, over the last ten years has averaged approximately 200 new appeals per year. The workload of the PCHB was increased in 2010 when the Legislature eliminated the Forest Practices Appeals Board and Hydraulics Appeals Board, transferring those appeals to the PCHB. (SHB 2935). The PCHB was also given responsibility for appeals related to derelict vessels. The decision to absorb this new caseload into the PCHB was premised on maintaining adequate staffing in the amount of three AAJs to manage such new caseload. Through other budget reductions, however, ELUHO's appropriation for AAJs was reduced such that the PCHB and SHB now have only two AAJ positions to support the work of the Board.

In the past 10-15 years, litigation before the environmental Board has been much like litigation in any Superior Court of the State. It is marked by aggressive motion practice (summary judgment and motions to dismiss), which attempts to resolve all or portions of a case prior to hearing. After this motion practice, the Board often still must proceed to hearing on the remaining issues. This means multiple orders may be entered, particularly in the more complex cases, and the Presiding Judge or Board member must engage in multiple case management tasks. The Board needs at least 5 professional level staff to manage this caseload-3 full time Board members and 2 AAJs, as well as key support personnel.

### **Responsibilities of AAJs for PCHB/SHB**

The AAJs employed by the Board have the responsibility to carry out the fundamental day-to-day work of the PCHB and SHB. When new appeals are filed, an AAJ (or Board Member) is assigned as a Presiding Officer for the appeal. When an AAJ acts as the Presiding Officer, the AAJ is responsible for multiple steps in the litigation/appeal process, including:

- 1) all case management tasks (e.g. discovery, scheduling),
- 2) reviewing and conferring with the Board(s) on any pre-hearing dispositive motions (motions for summary judgment or to dismiss),
- 3) writing opinions for the Board on pre-hearing dispositive motions,
- 4) presiding over the hearing (make all evidentiary rulings and manage parties and time),
- 5) leading a discussion with the Board(s) post hearing to reach a decision, and
- 6) drafting the final decision, which includes findings of fact and conclusions of law, for the Board's review and adoption. Decisions typically range from 15-75 pages, depending on case complexity.

(Note: Board members also serve as a Presiding Officer over their own caseload, and are responsible for this same set of tasks). The AAJs are also well-trained mediators and when requested by the parties, preside over mediations that attempt to resolve appeals short of hearing. AAJs also carry out other duties for the Boards, such as rulemaking and training of new or outside Board members.

### **Board Workload and Impacts of Proposed Reduction**

*Attachment A* to this decision package shows the volume of appeals (past 10 years) and case management related tasks that are performed on an annual basis by the PCHB/SHB (past 3 years). The data indicates that the quality of opinions from the Boards results in few appeals to the Superior Courts/appellate courts, with most such appeals resulting in affirmance of the Board's decisions. This

data demonstrates the following points relevant to a decision to reduce staffing of the environmental adjudication program of ELUHO:

- New appeals have averaged nearly 200/year for longer than ten years, a steady caseload (a recent dip is attributable to the recession and downturn in projects, including shoreline projects).
- A considerable amount of the workload of the PCHB/SHB is devoted to case management tasks that include Board discussion, case conferences with the parties, and issuing orders that manage and dismiss appeals.
- Over the last three years the PCHB/SHB have consistently issued, on average, 76 substantive orders a year, on cases that include or affect complex water rights, Ecology general permits, forest practices, aquaculture, business and residential developments, air quality, water quality, and other matters.
- Few of the decisions of the PCHB/SHB are appealed further. Of those that are appealed, the Board is affirmed in most cases. See attached Appendix A, Appellate Court Review and Results.

The AAJs affected by this reduction, work as a team with the three Governor-appointed members of the PCHB/SHB to manage this caseload of appeals. The AAJs currently cover a portion of the caseload including pre-hearing motions and hearings that involve complex environmental litigation with statewide implications. The reduction in AAJs will have impacts that go to the very purposes for which the PCHB and SHB exist in the first instance. These purposes are timely and accessible review of environmental disputes; uniform, statewide application of environmental laws; and less costly resolution of environmental disputes (as compared to the cost of a Superior Court appeal). The further loss of this staffing resource to the Board will have incremental and fundamental impacts to the mission of the PCHB/SHB, as follows:

- Loss of timely decision-making. Private citizens, the environmental and business communities, Tribes, and local governments, among many others, will experience longer times for final decisions from the Board, as Board members would be required to handle higher Presiding Officer caseloads and less resources would be available to manage cases and issue decisions. Longer decision times will be contrary to the mandate of the Shoreline Management Act, Ch. 90.58 RCW which requires that the SHB issue a decision within 180 days of the appeal being filed with the Board. The Administrative Procedures Act requires the PCHB to issue a decision within 90 days of completion of dispositive motions or the hearing on an appeal. As discussed above, PCHB cases will be delayed to ensure that the 180-day time frame for shoreline appeals is met, which will make it more difficult to meet the PCHB performance measures which reflect these requirements.
- Delays in environmental review and project development schedules. Appeals will be scheduled out further on the Board's calendar because there will be fewer judges to preside over cases, resulting in delays to parties seeking resolution of disputes. This will mean delayed project development, delays to business, and delays in final environmental review of large and small projects. This equates to increased costs to parties, lost opportunities, lost jobs, and untimely consideration of environmental impacts. Currently, a new PCHB appeal is being scheduled out for hearing on the merits (sometimes, the parties seek a longer schedule) approximately 8-10 months after the appeal is filed. SHB appeals are on a much shorter schedule. Loss of a key resource will extend the time for hearings for PCHB cases, possibly by several months.
- Loss of clarity and quality in final decisions. With inadequate staff to issue written decisions, the Board will turn to shorter, summary decisions and orders, and at times will request the parties to prepare final decision documents. This could compromise the purpose of the Board to give uniform application of the law statewide, and challenge the Board's ability to comply with the Legislative directive that the Board "make findings of fact and prepare a written decision in each case decided by it." RCW 43.21B.100. The Board expects that such loss of quality may result in less success on appeal in Superior Court or the Appellate courts.
- Detrimental changes in practice and procedure before the Boards. The Board may be forced to adopt practices that will have a negative impact on the parties, such as holding no hearings outside of Olympia (including shoreline or water rights cases), curtailing pre-hearing practice, or holding only telephonic hearings in some cases. While the Board has already implemented some of these types of changes due to current budget constraints, more drastic limitations may be necessary, depending on workload.
- Termination of the mediation program. The AAJs are the central resource for the environmental mediation carried out by the PCHB/SHB. They are well-trained mediators, experienced in resolution of difficult environmental disputes. Because Board members sit on nearly every case, they cannot be involved in mediations. The AAJs are uniquely situated to offer a mediation setting where the parties can freely discuss the pros and cons of the case, without Board members hearing potentially prejudicial information. This mediation program would be curtailed, causing increased costs to the parties, who will either be forced to litigate the case, or seek private, for-cost mediation services.
- Difficulty in recruitment and retention. While some highly experienced environmental attorneys wish to work part-time, the pool of available talent at such reduced schedules is limited. Reduction of one AAJ position at the Board to 60% time will likely result in the departure of the existing staff, presenting the Board with a difficult recruitment problem. Additionally, imposing heavier workloads on Governor-appointed Board members and existing Judge staff will likely make it difficult, given current low salary levels for Board members (particularly those who are experienced environmental attorneys), to attract qualified candidates to serve as Board members.
- Loss of continuity and coverage at times of transition: AAJs offer a steady resource that can handle caseloads as Board members transition through appointments. They cover workload if there is a delay in a Gubernatorial appointment to the Board. In the event the Governor appoints non-lawyer members to the PCHB/SHB (by statute, only one member must be a lawyer), the AAJs can ensure final written products are correct legally, consistent with precedent, and that non-lawyer Board members are educated in legal principles.

The ELUHO contact for this request is Kathy Mix, Executive Director, (360) 664-9178.

**Narrative Justification and Impact Statement**

***What specific performance outcomes does the agency expect?***

The PCHB/SHB have several performance measures that will be negatively affected by the proposed reduction of AAJs , as follows:

- "Number of months for the PCHB to issue decisions after completion of dispositive motions, or hearing and closure of the record." The target is 3 months. Loss of AAJ time will result in either longer decision times or longer times to get to completion of motions or hearings.
- "Number of months from appeal filing to final resolution of contested Shoreline Hearings Board cases, unless waived by the parties." The target is 6 months, reflecting the requirement of the Shoreline Management Act to decide cases within 180 days of the filing of the appeal. Loss of AAJ time will result in longer decision times for non-SMA appeals.
- "Percentage of appeals that settle before hearing by the Environmental Hearings Office." The target is 90%. The loss of the mediation program, as well as AAJ time devoted to preliminary case matters where settlement is strongly encouraged, may result in fewer case settlements.

The conclusion that there will be longer decision times is explained by assessment of the average number of cases filed with the Boards per year, and how many cases each working Board Member and AAJ handles as a Presiding Judge/Board Member.

The Board receives approximately 200 appeals per year. Because Board Members (3) sit on the majority of appeals filed with the Boards (i.e. review all dispositive motions, sit in hearings, participate in the final decision), they have a somewhat lower number of cases on which they serve as Presiding. AAJs, on the other hand, do not sit on all cases, as they lack decision-making authority, and sit only on cases to which they are assigned as a Presiding Judge. Thus the AAJs handle a higher "assigned as Presiding" caseload than Board Members. An estimate of the average Presiding case assignments (based on 200 appeals filed per year) is as follows:

Board Member-----30 (x3)----- (90 Total)  
 AAJ-----55 (x2)----- (110 Total)

The proposed reduction of funding for AAJs by a total of 60%, will result in approximately 33 appeals filed with the Board in which the Presiding role will need to be absorbed into the workload of existing and remaining Board members and AAJs. These positions already perform at full capacity, and do not have additional time to take on new workload. The increased workload is equivalent to the yearly Presiding workload of one full-time Board Member. The results of this shift in workload will be as follows, in relation to the performance measures:

- Cases that must be decided within 180 days of the appeal (shoreline cases) will take priority over all PCHB cases, delaying scheduling and resolution of PCHB cases, many of which are of high importance to the State, the parties, and citizens. Many implicate outcomes under the Governor's Results WA effort.
- The Boards are currently (as of 8/14) scheduling cases out as far as 10 months (JUNE 2015), due to volume and expected hearing time needed for complex appeals. With less capacity to assign individuals as Presiding on cases, and more demand on remaining Judges and Board Members to write decisions and attend to all other case management tasks, this scheduling of cases will likely be extended several more months into the future.
- Additional workload spread over the remaining staff will result in longer times for issuance of decisions, and reduced quality. The Boards cannot currently quantify how long, or the effect on quality, reversals by the Superior Court, or other relevant considerations.
- The due process interest of the parties to speedy resolution of matters they have appealed will be impacted.

**Performance Measure Detail**

**Activity:**

No measures submitted for package

**Incremental Changes**

***Is this decision package essential to implement a strategy identified in the agency's strategic plan?***

This decision package is necessary to implement OFM's directive to re-base state program budgets to a level below Maintenance level.

The proposed reduction is at odds with the agency's strategic plan, which includes the mission of 1) conducting fair and impartial hearings and timely issuing clear and well-reasoned decisions, 2) providing expeditious and efficient resolution of environmental appeals through hearings and alternative dispute resolution processes, 3) fostering a consistent statewide interpretation of Washington's environmental laws, and 4) ensuring enhanced and equal access to justice by assisting parties in understanding the hearing process to ensure meaningful opportunity to be heard.

The reduction of AAJ time will negatively affect many of the specific Goals and Objectives of the Strategic Plan, including 1) efforts to promote mediation and offer procedural assistance, 2) the conduct of hearings outside the Olympia area, 3) improvement of the appeals process through involvement with stakeholders, the Bar Association, and CLE presentations, and 4) legislative and rule-based actions to clarify, simplify and expedite appeals process, among other items.

***Does this DP provide essential support to one or more of the Governor's Results Washington priorities?***

This decision package is responsive to the Governor's direction that state agencies adapt to potential changes in fiscal conditions and re-base their budgets to a level below Maintenance Level.

Any decision on the funding level for the PCHB and SHB should consider the resources necessary to address the complex matters that likely lie ahead for these adjudicatory Boards, and how such reduction will undercut essential support to the Governor's Results Washington priorities. The type of cases likely to come before the PCHB/SHB in the next 2-5 years points out why this staffing with a minimum of 5 full time professionals (3 Board members and 2 AAJs) and essential administrative support personnel, is necessary from a qualitative point of view. The cases will be complex, controversial, of first impression in this state, and related directly to the Governor's goals, as set out in the Results Washington effort. Note: While this decision package focuses on the direct relationship between the Board's work and Goal 3 of Results Washington (Sustainable energy and A Clean Environment), the Board's work also supports aspects of Goal 2 of Results Washington (Prosperous Economy). Here is a list of likely significant appeals or areas of appeal, in addition to the ongoing more routine caseload, before the PCHB/SHB in the next several years:

1. Coal export project proposals. Two proposed coal export terminals are undergoing environmental review, one at the Port of Longview (Millennium Bulk Terminals Longview), and one at Cherry Point in Whatcom County (Gateway Pacific Terminal). These proposals are in different phases of environmental review. Any permits that may be issued after the review will be appealable to either the PCHB or SHB, or both, depending on the type of permit issued. These will be complex, highly contested appeals, on extremely controversial projects. There may be multiple decisions from local government and Ecology under appeal, such as shoreline permits and §401 water quality certifications. These appeals implicate the Governor's priority for Sustainable and Clean Energy.
  - See generally, Results WA, Goal 3, Sustainable and Clean Energy, Healthy Fish and Wildlife, and a Clean and Restored Environment, and Goal 2, Prosperous economy.
2. Westway and Imperium bulk liquid storage facility expansions at the Port of Grays Harbor in Hoquiam (crude oil). Based on a December 2013 decision from the Shorelines Hearings Board, these projects are in the process of a SEPA environmental review. Scoping occurred in April and May 2014 (Ecology website), and the process has now moved to preparation of a draft Environmental Impact Statement (EIS). The Board expects further appeals related to permitting of these expanded facilities along Gray Harbor, once the EIS process is complete. While no final date is available, the EIS is likely to be completed in the next biennium. These are complex, controversial projects, and will generate significant legal issues on appeal. These appeals implicate the Governor's Results Washington priorities.
  - See generally, Results WA, Goal 3, Sustainable and Clean Energy, Healthy Fish and Wildlife, and a Clean and Restored Environment, and Goal 2, Prosperous Economy.
3. Water Rights cases. The PCHB handles a steady volume of complex and routine water rights cases. For the current biennium, the Department of Ecology was required, by budget proviso language, to issue 500 water rights decisions in the first fiscal year of each biennium and the agency expects to issue an equivalent number of permits the second fiscal year as well. Ecology anticipates that a similar proviso will be contained in the upcoming budget. It is likely there will be an increasing number of appeals to the PCHB of these water rights decisions. Population growth, economic development, the need for clean, adequate water supplies for drinking water, commercial and agricultural uses, and to sustain fish and the natural environment will continue to present Ecology with difficult water resource decisions, and those will be appealed to the PCHB. Examples of issues presented in recent cases include: 1) Modification of instream flows on the Columbia River, and use of "out-of-kind" mitigation, 2) use of statutory exemptions to deplete instream flows on the Nisqually and Deschutes Rivers, 3) application of the municipal water rights law, 4) use of mitigation for water depletion, 5) dam-related water rights. These cases directly implicate aspects of Goal 3, Results Washington.
  - Goal 3, Outcome Measure 2.2 (Increase the percentage of ESA-listed salmon and steelhead populations at healthy, sustainable levels...);
  - Goal 3, Outcome Measure 3.2 (Increase the percentage of rivers meeting good water quality...).

4. Renewal of National Pollutant Discharge Elimination System (NPDES) General Permits. Ecology renews NPDES General Permits on a rolling basis. These permit appeals are a major workload driver for the PCHB. Expected permit renewals or modifications include the Industrial Stormwater, Municipal Stormwater, and Construction Stormwater permits, among several others. **Attachment B** to this decision Package is list of General Permits that will be issued in the next biennium and are subject to potential appeal to the PCHB. These permits are complex, and have generated a continuing set of appeals to the PCHB over the last 10 years, as Ecology reissues the permits. For example, the Industrial Stormwater General Permit (ISGP) covers over 1,200 Industrial facilities operating in the State. The last appeal raised over 75 legal issues, generated multiple rounds of summary judgment motions and a several week long hearings. The permit expires on January 1, 2015 and Ecology plans to issue a new ISGP in late 2014, with an effective date of January 1, 2015. These permits, which set water quality discharge standards for multiple sectors, directly affect the Governor's Results Washington Goal 3, Outcomes and Leading Indicators.
  - Goal 3, Healthy Fish and Wildlife, subtopic Pacific Salmon, Outcome Indicator 2.2 (Increase the percentage of ESA-Listed salmon and steelhead populations at healthy, sustainable levels....), and Leading Indicator 2.2.a (Demonstrate increasing trend in Puget Sound Chinook populations....).
  - Goal 3, Clean and Restored Environment, subtopic Clean, Cool Water, Outcome Measure 3.2 (Increase the percentage of rivers meeting good water quality), and Leading Indicator 3.2.a. (Increase the number of projects that provide stormwater treatment or infiltration....).
5. Challenges to permit terms that include or implicate Ecology's new water quality standards that address human health criteria based on fish consumption rate. While the expected new fish consumption rule cannot be directly challenged before the PCHB, the rule will require implementation of new, more rigorous water quality standards, which will be incorporated into NPDES discharge permits. Such permits can be appealed to the PCHB. Ecology expects to adopt the final rule after the 2015 Legislative Session. The PCHB would expect to see appeals of NPDES permits incorporating the new water quality standards, or requirements to reduce toxic discharges, during the 2015-17 biennium and going forward. These will be complex appeals that implicate Results Washington Goals related to Sustainable Energy and a Clean Environment.
  - Goal 3, Healthy Fish and Wildlife, subtopic Pacific Salmon, Outcome Indicator 2.2 (Increase the percentage of ESA-Listed salmon and steelhead populations at healthy, sustainable levels....), and Leading Indicator 2.2.a (Demonstrate increasing trend in Puget Sound Chinook populations....).
6. Aquaculture. The Shorelines Hearings Board has had multiple appeals related to expansion of the commercial aquaculture industry in Washington (the culture or farming of fish, shellfish, or other aquatic plants and animals). Many of these cases have related shoreline permits issued for geoduck or mussel farms. These appeals have raised multiple water quality and shoreline use issues, resulting in multi-day hearings. The Board expects that the continued expansion of the aquaculture industry will result in further appeals. Expansion of the shellfish industry in Washington is addressed directly in Goal 3 of the Results Washington effort.
  - Goal 3, Healthy Fish and Wildlife, subtopic Shellfish, Outcome Measure 2.1 (Increase improved shellfish classification acreage in Puget Sound, and Leading Indicator-2.1.b. (Increase number of implemented agricultural BMPs to improve quality in shellfish growing areas....).
  - Goal 2, Prosperous Economy.
7. Hanford. The PCHB has seen a number of appeals over the last several years related to Ecology's enforcement of environmental laws on the Hanford Nuclear Reservation. These have been actions directed at both the U.S. Department of Energy, as well as contractors at the site. One case is currently pending before the Board, and is set for a three week hearing in the fall of 2014.
  - Goal 3, Clean and Restored Environment, subtopic Healthy Lands.
8. Air permits and enforcement. The PCHB has a steady load of appeals related to enforcement of the State's air quality laws. Some cases relate to emission standards for large industrial facilities, such as expanded data centers located in Quincy (Microsoft, Yahoo!, Intergate), or large composting facilities in Western WA (Cedar Grove). Others relate to new facilities or the burning of biofuels, and related emissions. There is also a steady load of appeals of smaller enforcement actions taken by local air agencies and Ecology. These cases directly address appropriate air emission standards, addressed in Goal 3, Results Washington.
  - Goal 3, Clean and Restored Environment, subtopic Healthy Air, Outcome Measure 3.3 (Increase percent of population living where air quality meets federal standards...).
9. Shoreline Development: The SHB has a steady load of appeals related to development along the state's shorelines. These cases can range from individual dock or bulkhead developments, to large commercial, industrial or municipal development and redevelopment. The appeals routinely raise issues related to habitat protection, loss of eelgrass, cumulative impacts of development, salmon and other aquatic organism protection, public access and recreational use of shorelines, and private property interests, among many others. These cases are time sensitive, and the Board is required to issue decisions within 180 days of the date of appeal. Many aspects of Goal 3 of the Results Washington effort are addressed through these decisions.
  - Goal 3, Working and Natural Lands, subtopic Habitat Protection, Outcome Indicator 4.3(Reduce rate of loss of priority habitats...), and Leading Indicators 4.3.c; 4.3.e, 4.3.f (conversion of marine and freshwater riparian habitat in Puget Sound;

- increase eelgrass beds in Puget Sound, and increase the acreage of Puget Sound estuaries restored, respectively), and
- Goal 3, Healthy Fish and Wildlife, subtopic Shellfish, Outcome Measure 2.1 (Increase improved shellfish classification acreage in Puget Sound, and Leading Indicator-Increase number of implemented agricultural BMPs to improve quality in shellfish growing areas...), and
- Goal 3, Working and Natural Lands, subtopic Outdoor Recreation, Outcome Measure 4.2. (Increase participation in outdoor experiences on state public recreation lands and waters...)
- Goal 2, Prosperous Economy.

10. Forest Practices: The PCHB will continue to see appeals of various forest practice applications and actions by DNR.

- See generally, Results WA, Goal 3, Working and Natural Lands, subtopic Forest and Farmlands, and related Leading Indicators. (reduce loss of designated forests of long-term commercial significance).

***What are the other important connections or impacts related to this proposal?***

Appeals are filed with the PCHB and SHB from decisions by the Departments of Ecology, Fish and Wildlife, Natural Resources, all air authorities, and local governments (and a few miscellaneous other agencies). Parties to these appeals include the following, in addition to the state agencies and local governments: Individual citizens, environmental organizations (both local and national), non-profit groups, individual businesses (from small independently owned businesses to large ones such as Boeing or BNSF), business associations, Tribes, neighborhood associations, consortium or broader-based trade or interest groups, such as Association of Washington Business, Washington Environmental Council, Associated General Contractors, BIAW, Farm Bureau. These entities and individuals are directly affected by the funding level of the Boards, and any delays in the processing of appeals and decisions by the Boards.

***What alternatives were explored by the agency, and why was this alternative chosen?***

ELUHO has considered a number of alternatives in the effort to identify budget reduction options equivalent to 15% of its operating budget. These options include:

- 1) Elimination of either or both the quasi-judicial adjudicatory boards that address appeals of land use and environmental decisions in this state (GMHB and/or PCHB/SHB). This option considered elimination of the Boards in favor of direct appeals to Superior Court. Based on past fiscal notes attendant to legislation that proposed such an alternative to the GMHB, the cost of this option is prohibitive, as it results in a much higher cost than the cost of the current administrative process. Litigants would be faced with longer appeal times at a much greater cost to the state and the parties.
- 2) Eliminate statutory deadlines for issuance of decisions. This option has been discussed, but would require amendment of both the APA, and the Shoreline Management Act, or potentially, a separate amendment of Ch. 43.21B RCW to exempt the PCHB from the APA decision deadlines. The Board would expect any such change in statutory deadlines for issuing decisions to be controversial, as those deadlines exist in order to avoid the very delays discussed above.
- 3) A change in the composition and size of the GMHB. This option considered possible further reductions in the size, and political and regional make-up of the GMHB. Because of the politically sensitive nature of all issues involving the Growth Management Act in this state, this option is not feasible in the absence of a well-developed stakeholder process, with a resulting consensus as to how a newly constituted GMHB would function and handle expected caseloads going forward. Legislation may be required if the composition or regional make-up of the GMHB were to be changed in any significant way. This would likely be a controversial and difficult legislative undertaking.
- 4) Legislation to provide ELUHO Boards the authority to appoint pro tem judges or Board members. Currently, none of the Boards within ELUHO have clear authority to appoint or hire qualified individuals to act as Board members on a temporary or pro tem basis. Such authority could allow the Board the opportunity to handle spikes in caseload through temporary appointments, rather than full time positions. While a viable option, the agency would need adequate funding to pay for the services of these pro tem appointees. Current funding levels, and expected reductions make this option less viable.
- 5) Further reductions in Goods and Services and Travel expenditures. ELUHO has considered and rejected further reductions in these supporting cost objects beyond those offered in related decision packages, as risking over-expenditure and as contrary to the mission of the agency and the Boards it supports. Because the GMHB is regionally based, some travel is essential to attend hearings. The PCHB and SHB also travel to attend hearings under certain circumstances (shoreline or water rights cases in the locale). It is not feasible to further reduce lease and rent costs, as ELUHO only recently relocated to a new facility that meets the functional needs of the Boards (hearing and mediation rooms available), pays a reasonably low market rate, and would, within an unreasonably short period of time, pay another substantial sum (unbudgeted) to relocate.

***What are the consequences of adopting or not adopting this package?***

This decision package proposes a reduction in funding, not an increase.

The consequences of not funding adequate Administrative Appeals Judges for the PCHB and SHB include:

1. Slowed time for issuance of decisions.
2. Reduced quality of case management and final decisions issued by the Boards.
3. Elimination of mediation services.
4. Disappointed constituent groups who expect Board presence in local areas for hearings, and timely and understandable decisions so projects may proceed.
5. Poor quality in the finished product of the Boards, due to inadequate staff to review, edit and complete tasks.
6. Recruitment and retention problems (both AAJs and Board Members), due to part-time nature of positions, and need for Board members to take on substantially higher caseloads.
7. Lack of adequate staff to handle the workload of appeals, particularly at times of transition or when there is a delay in an appointment to the Board.

***What is the relationship, if any, to the state's capital budget?***

None.

***What changes would be required to existing statutes, rules, or contracts, in order to implement the change?***

None.

***Expenditure and revenue calculations and assumptions***

Expenditure reductions are based on:

A 20% reduction for one current AAJ making a salary of \$92,328 per year plus benefits which are estimated at 17.3% of gross salary (Salary \$92,328 x 20% = \$18,466 , Benefits \$3,186).

A 40% reduction for one current AAJ making a salary of \$90,000 per year plus benefits estimated at 17.3% of gross salary (Salary \$90,000 x 40% = \$36,000, Benefits \$6,202).

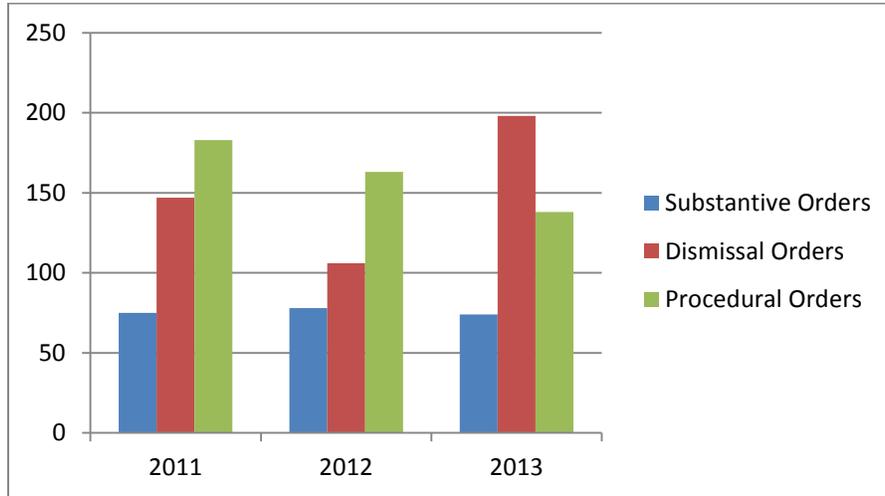
***Which costs and functions are one-time? Which are ongoing? What are the budget impacts in future biennia?***

The salary and benefit reduction to the ELUHO budget are ongoing, and would reduce appropriations to the agency in subsequent biennia.

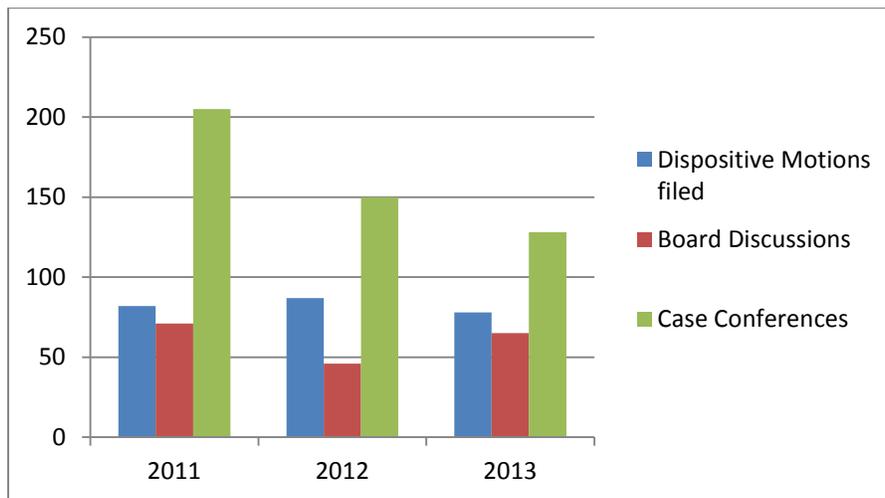
<b><u>Object Detail</u></b>	<b><u>FY 2016</u></b>	<b><u>FY 2017</u></b>	<b><u>Total</u></b>
A Salaries And Wages	(54,466)	(54,466)	(108,932)
B Employee Benefits	(9,388)	(9,388)	(18,776)
<b>Total Objects</b>	<b>(63,854)</b>	<b>(63,854)</b>	<b>(127,708)</b>

# PCHB/SHB WORKLOAD INDICATORS

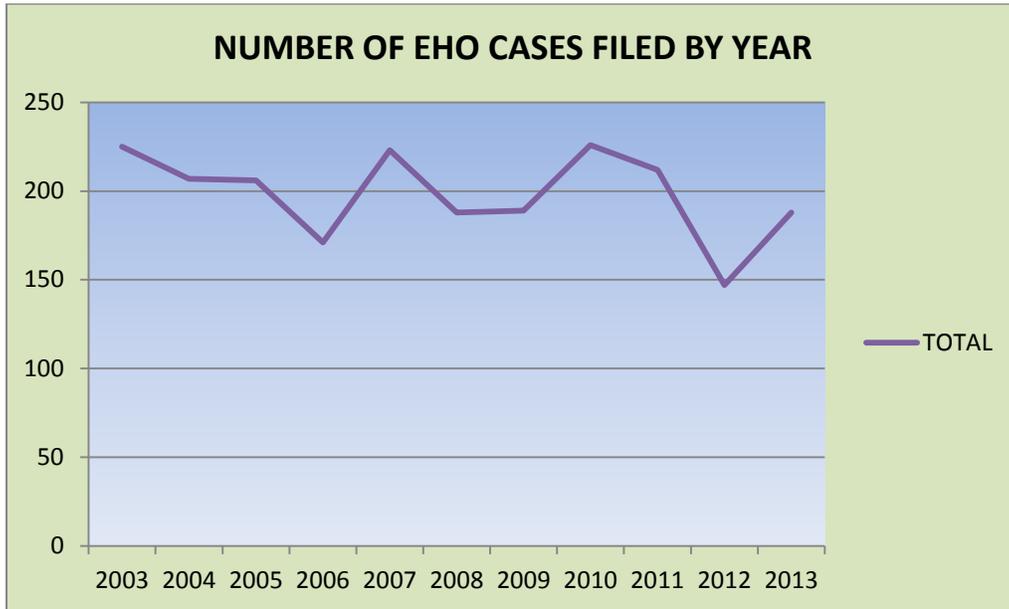
## 1. ORDERS ISSUED BY THE PCHB/SHB



## 2. DISPOSITIVE MOTIONS FILED; BOARD DELIBERATIONS; AND CASE STATUS CONFERENCES



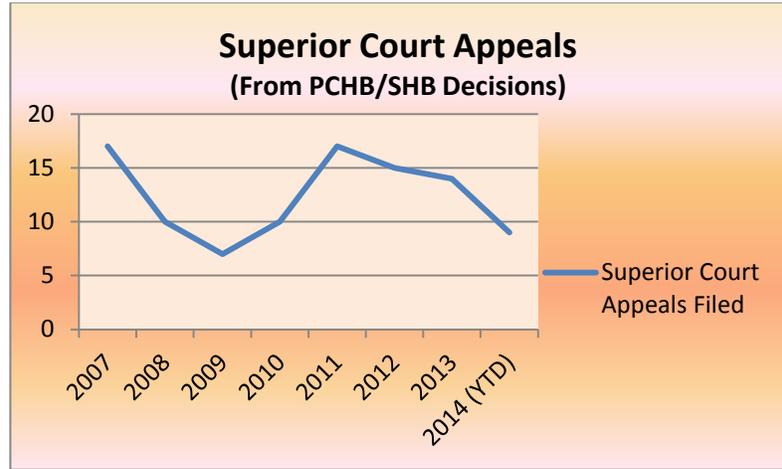
## PCHB/SHB WORKLOAD INDICATORS



Average number of cases per year = 198

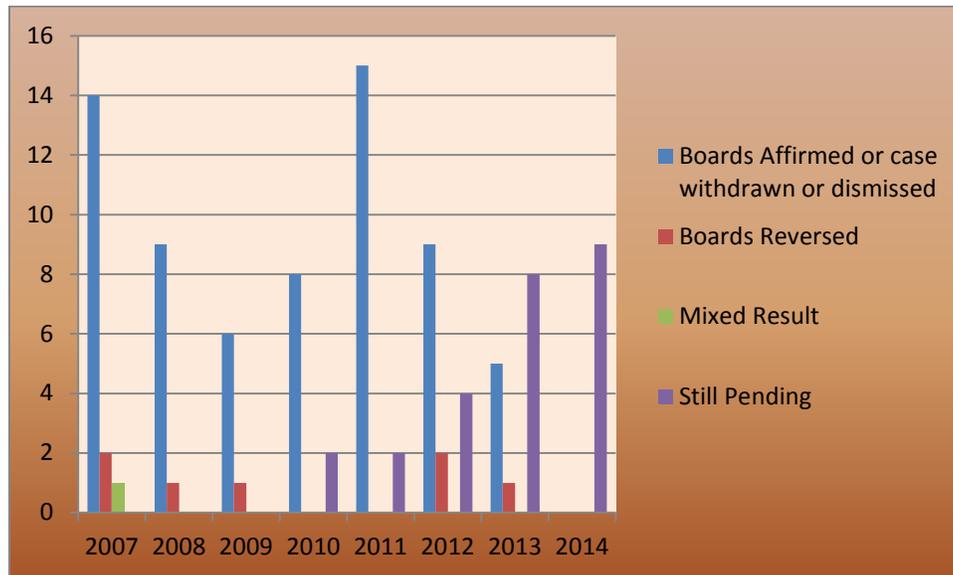
## APPEALS FROM PCHB-SHB CASES FILED TO COURT

<i>Superior Court Appeals Filed</i>	
Year	Filed
2007	17
2008	10
2009	7
2010	10
2011	17
2012	15
2013	14
2014 (YTD)*	9



\*Results as of 7/31/14

## OUTCOMES OF COURT APPEALS TAKEN FROM PCHB/SHB DECISIONS\*



\*Outcomes do not correlate with appeals filed in given year (time delays on appeal)

**PROJECTED APPEALS OF  
ECOLOGY GENERAL PERMITS (GP)\***

<b>TIMELINE</b>	<b>PERMIT</b>
May, 2014	Eelgrass GP (Pending)
<b>2015</b>	
January, 2015	Phase I/Phase II Municipal Stormwater - Modification
January, 2015	Rotenone IP (change to GP)
January, 2015	Industrial Stormwater GP
June, 2015	Burrowing Shrimp IP
October, 2015	Sand and Gravel GP
December, 2015	Winery GP
<b>2016</b>	
January, 2016	Concentrated Animal Feeding Operation (CAFO) GP
May, 2016	Boatyard GP
<b>2017</b>	
March, 2017	Eelgrass GP Modification
June, 2017	Irrigation GP
<b>2018</b>	
July, 2018	Phase I Municipal Stormwater
July, 2018	Phase II Municipal Stormwater

\*Timeline includes only those General Permits where Ecology assesses risk of appeal as moderate to high.

**Agency:** 468 Environmental & Land Use Hearings  
**Decision Package Code/Title:** N0 Restore Admin Appeals Judges  
**Budget Period:** 2015-17  
**Budget Level:** PL - Performance Level

**Recommendation Summary Text:**

This decision package requests a first and highest priority buyback of a reduction item and funding to restore reductions that were necessary to achieve the lower base budget, set out in the four decision packages from ELUHO. Specifically, the current decision package seeks to restore \$127,708 to ELUHO's environmental adjudication program in order to continue to employ, on a full-time basis, two Administrative Appeals Judges (AAJs or Judges) that support the Pollution Control and Shorelines Hearings Boards (PCHB and SHB, respectively).

**Fiscal Detail**

<b>Operating Expenditures</b>	<b><u>FY 2016</u></b>	<b><u>FY 2017</u></b>	<b><u>Total</u></b>
001-1 General Fund - Basic Account-State	63,854	63,854	127,708
<b>Total Cost</b>	<b>63,854</b>	<b>63,854</b>	<b>127,708</b>
<b>Staffing</b>	<b><u>FY 2016</u></b>	<b><u>FY 2017</u></b>	<b><u>Annual Average</u></b>
FTEs	.6	.6	.6

**Package Description:**

ELUHO proposed a decision package (one of four from ELUHO) that would reduce ELUHO's appropriation for the 2015-17 biennium by \$127,708 to address a portion of budget reductions equal to 15% of its General Fund maintenance level budget. The proposed reduction would come from salaries and benefits appropriated to the agency for full-time Administrative Appeals Judges (AAJs or Judges) that support the PCHB and SHB. The decision package proposed a permanent reduction in funding for the environmental adjudication program of ELUHO, by reducing one Judge position to 80%, and a second to 60%. ELUHO now proposes to restore such funding, as these positions need to be fully funded to support the core mission and responsibilities of the PCHB and SHB.

On July 1, 2011 ELUHO became the umbrella agency that administers three quasi-judicial boards. These boards include the Pollution Control Hearings Board and the Shorelines Hearings Board (environmental adjudication program), and the Growth Management Hearings Board (GMHB) (land use adjudication program). ELUHO receives a single appropriation, which it then allots to the environmental and land use adjudication programs, retaining the remainder of appropriated funds in a third, central program which provides fiscal management across the agency and funds common support functions. The Judges are funded through the environmental adjudication program of ELUHO.

The PCHB and SHB rely on two Judges to assist in managing the volume of appeals before these two Boards. Every appeal filed with these two Boards is assigned a presiding officer, and these Judges independently preside over a portion of the caseload of appeals that are filed with the Boards. The Judges, who are experienced environmental lawyers, manage all case-related motions and pre-hearing matters for the cases to which they are assigned, and write final opinions for the Board's review and adoption. The Judges are also trained mediators, presiding over the PCHB and SHB mediation program established pursuant to RCW 43.21B.175.

The agency is largely composed of statutorily established Boards, with Governor-appointed Board members. The majority of the agency budget is dedicated to salary and benefits that support these Boards, and limited support personnel. The proposal to further reduce funding that supports Administrative Appeals Judges of the PCHB/SHB (along with the three other decision packages) was one of only a few options available to ELUHO to meet a 15% budget reduction, short of elimination of the Board(s) itself. The option was

offered despite steady caseloads of complex appeals, Legislative action over the last five years to transfer new jurisdiction to the PCHB for certain types of appeals, and reductions the PCHB/SHB have taken over several years as a result of ongoing budget reduction strategies.

### **Constitutional and Statutory Basis for the Environmental Adjudication Boards**

Although ELUHO offered such a reduction option, it now requests restoration of the funding to support this vital function, as the consequences of accepting such a reduction will impair the ability of the environmental board to issue timely, well-reasoned decisions that will withstand scrutiny of the parties and appellate courts. Maintenance of funding for two full-time AAJs is essential for timely and quality-based decision making, and takes into account the role of these Boards as adjudicative bodies.

Appeals are filed with the PCHB and SHB from decisions by the Departments of Ecology, Fish and Wildlife, Natural Resources, all air authorities, and local governments (and a few miscellaneous other agencies). The appeal rights provided to parties for various environmental and shoreline regulatory enforcement and permitting actions are grounded both in statute and the constitutional right to due process. If these boards did not exist, there would still be a constitutional right to review of actions taken by regulatory agencies. Such review would take place in the various Superior Courts around the State. The Legislature rejected the idea that environmental disputes should be subject to local litigation and appeal processes, choosing instead to establish environmental adjudicative boards, specifically the PCHB and SHB, as the due process forum for those affected by certain regulatory actions. These Boards are expected to render uniform, independent review of actions taken by various environmental and natural resource agencies, and to do so in a manner that is less formal, less costly, and more expeditious than the Superior Courts. The Supreme Court has recognized the desirability of this uniform administration of the state's environmental laws, and that the goal would be frustrated if the ultimate interpretation of such laws were vested in the various Superior Courts around the state. *State ex rel. Martin Marietta v. Ecology*, 84 Wn.2d 329 (1974).

### **Background on Workload of PCHB/SHB**

The workload of PCHB/SHB ("Board") is managed by the three full time Governor-appointed Board members and two AAJs who work with the Board. The duties of the AAJs are discussed further below. These three Board members and two Judges handle a steady caseload that, over the last ten years has averaged approximately 200 new appeals per year. The workload of the PCHB was increased in 2010 when the Legislature eliminated the Forest Practices Appeals Board and Hydraulics Appeals Board, transferring those appeals to the PCHB. (SHB 2935). The PCHB was also given responsibility for appeals related to derelict vessels. The decision to absorb this new caseload into the PCHB was premised on maintaining adequate staffing in the amount of three AAJs to manage such new caseload. Through other budget reductions, however, ELUHO's appropriation for AAJs was reduced such that the PCHB and SHB now have only two AAJ positions to support the work of the Boards.

In the past 10-15 years, litigation in front of the environmental Board has been much like litigation in any Superior Court of the State. It is marked by aggressive motion practice (summary judgment and motions to dismiss), which attempts to resolve all or portions of a case prior to hearing. After this motion practice, the Board often still must proceed to hearing on remaining issues. This means multiple orders may be entered, particularly in the more complex cases, and the Presiding Judge or Board member must engage in multiple case management tasks. The Board needs at least 5 professional level staff to manage this caseload-3 full time Board members and 2 AAJs.

### **Responsibilities of AAJs for PCHB/SHB**

The AAJs employed by the Board have the responsibility to carry out the fundamental day-to-day work of the PCHB and SHB. When new appeals are filed, an AAJ (or Board Member) is assigned as a Presiding Officer for the appeal. When an AAJ acts as the Presiding Officer, the AAJ is responsible for multiple steps in the litigation/appeal process, including:

- 1) all case management tasks (e.g. discovery, scheduling),
- 2) reviewing and conferring with the Board(s) on any pre-hearing dispositive motions (motions for summary judgment or to dismiss),
- 3) writing opinions for the Board on pre-hearing dispositive motions,
- 4) presiding over the hearing (make all evidentiary rulings and manage parties and time),
- 5) leading a discussion with the Board(s) post hearing to reach a decision, and
- 6) drafting the final decision, which includes findings of fact and conclusions of law, for the Board's review and adoption. Decisions typically range from 15-75 pages, depending on case complexity.

(Note: Board members also serve as a Presiding Officer over their own caseload, and are responsible for this same set of tasks). The AAJs are also well-trained mediators and when requested by the parties, preside over mediations that attempt to resolve appeals short of hearing. AAJs also carry out other duties for the Boards, such as rulemaking and training of new or outside Board members.

## **Board Workload and Impacts of Proposed Reduction**

**Attachment A** to this decision package shows the volume of appeals and case management related tasks that are performed on an annual basis by the PCHB/SHB. The data indicates that the quality of opinions from the Boards results in few appeals, with most appeals resulting in affirmance of the Board's decisions. This data demonstrates the following points relevant to a decision to restore funding for the Judges of the environmental adjudication program of ELUHO:

- New appeals have averaged nearly 200/year for longer than ten years, a steady caseload (a recent dip is attributable to the recession and downturn in projects, including shoreline projects).
- A considerable amount of the workload of the PCHB/SHB is devoted to case management tasks that include Board discussion, case conferences with the parties, and issuing orders that manage and dismiss appeals.
- Over the last three years the PCHB/SHB have consistently issued, on average, 76 substantive orders a year, on cases that include or affect complex water rights, general permits, forest practices, aquaculture, business and residential developments, air quality, water quality, and other matters.
- Few of the decisions of the PCHB/SHB are appealed further. Of those that are appealed, the Board is affirmed in most cases. See attached Appendix A, Appellate Court Review and Results.

The AAJs affected by the proposed reduction work as a team with the three Governor-appointed members of the PCHB/SHB to manage this caseload of appeals. The AAJs currently cover a portion of the caseload including pre-hearing motions and hearings that involve complex environmental litigation with statewide implications. Restoration of funding for the AAJs will have impacts that go to the very purposes for which the PCHB and SHB exist in the first instance. These purposes are timely and accessible review of environmental disputes, uniform, statewide application of environmental laws, and less costly resolution of environmental disputes (as compared to the cost of a Superior Court appeal). Restoration of funding for this staffing resource to these Boards will offer fundamental support to the mission of the PCHB/SHB, as follows:

- Timely decision-making. Private citizens, the environmental and business communities, Tribes, and local governments, among many others, expect timely decision-making from these Boards. In the absence of a restoration of funding for AAJs, these litigants and interest groups will experience longer times for final decisions from the Boards, as Board members would be required to handle higher Presiding Officer caseloads and less resources would be available to manage cases and issue decisions. Use of AAJs as a full-time resource in support of the Boards ensures the Shoreline Hearings Board meets the mandate of the Shoreline Management Act, Ch. 90.58 RCW which requires that the SHB issue a decision within 180 days of the appeal being filed with the Board. Similarly, the AAJs ensure the PCHB complies with the Administrative Procedures Act, which requires the PCHB to issue a decision within 90 days of completion of dispositive motions or the hearing on an appeal. As discussed above, PCHB cases will be delayed to ensure that the 180 day timeframe for shoreline appeals is met, which will make it more difficult to meet the PCHB performance measures which reflect these requirements.
- Timely environmental review and project development schedules. With an adequate staffing level of AAJs to support Board workload, appeals will be scheduled on the Board's calendar in a timely fashion, giving the parties a reliable manner in which to factor in development, construction and environmental review schedules. This will avoid delayed project development, delays to business, and delays in final environmental review of large and small projects. Such delays equate to increased costs to parties, lost opportunities, lost jobs, and untimely consideration of environmental impacts. Currently, a new PCHB appeal is being scheduled out for hearing on the merits (sometimes, the parties seek a longer schedule) approximately 7-8 months after the appeal is filed. SHB appeals are on a much shorter schedule. Restoring funding for the AAJs will ensure the Board can maintain such a calendaring of appeals and issue decisions consistent with statutory mandates.
- Retain clarity and quality in final decisions. With adequate AAJ staff to issue written decisions, the Board will present well-reasoned, well-supported decisions to the parties. This will support the Board's basic mission to give uniform application of the law statewide, and honor the Legislative directive that the Board "make findings of fact and prepare a written decision in each case decided by it." RCW 43.21B.100. Retaining quality of decisions will continue to result in a low number of appeals to Superior Court or the Appellate courts and maintain the Board's success of its decisions being upheld on appeal.
- Practice and procedure before the Boards. Retention of funding for AAJs will assist the Board in avoiding practices that will have a negative impact on the parties, such as holding no hearings outside of Olympia (including shoreline or water rights cases), curtailing pre-hearing practice, holding only telephonic hearings in some cases. While the Board has already implemented some of these types of changes due to current budget constraints, retention of funding for the AAJs will make these procedures less likely.
- Continuation of the mediation program. The AAJs are the central resource for the very beneficial environmental mediation carried out by the PCHB/SHB. They are well-trained mediators, experienced in resolution of difficult environmental disputes. Because Board members sit on nearly every case, they cannot be involved in mediations. The AAJs are uniquely situated to offer a mediation setting where the parties can freely discuss the pros and cons of the case, without Board members hearing potentially prejudicial information. Restoration or continuation of funding for AAJs will allow the program to continue. In the absence of a mediation program, there will be increased costs to the parties, who will either be forced to litigate the case, or seek private, for-cost mediation services. Cases which should, and can settle or be resolved with appropriate assistance from a neutral Judge, will go to hearing.

- Assistance in recruitment and retention. Restoration of funding for the AAJs will avoid recruitment and retention problems, for both AAJs and for Governor-appointed Board Members. While some highly experienced environmental attorneys wish to work part-time, the pool of available talent at reduced schedules is limited. Reduction of one AAJ position at the Board to 60% time will likely result in the departure of the existing staff, presenting the Board with a difficult recruitment problem. Additionally, imposing heavier workloads on Governor-appointed Board members and existing Judge staff will likely make it difficult, given current low salary levels for Board members (particularly those who are experienced environmental attorneys), to attract qualified candidates to serve in those positions.
- Preserve continuity and coverage at times of transition: AAJs offer a steady resource that can handle caseloads as Board members transition through appointments. They cover workload if there is a delay in a Gubernatorial appointment to the Board. In the event the Governor appoints non-lawyer members to the PCHB/SHB (by statute, only one member must be a lawyer), the AAJs can ensure final written products are correct legally, consistent with precedent, and that non-lawyer Board members are educated in legal principles. For this reason, funding should be restored and maintained for this resource.

The ELUHO contact for this request is Kathy Mix, Executive Director, (360) 664-9178.

**Narrative Justification and Impact Statement**

***What specific performance outcomes does the agency expect?***

The PCHB/SHB have several performance measures that will be affected by this proposed the restoration of funding for AAJs, as follows:

- "Number of months for the PCHB to issue decisions after completion of dispositive motions, or hearing and closure of the record." The target is 3 months. Restoration of AAJ time will result in continued timely issuance of decisions, necessary to meet this performance measure.
- "Number of months from appeal filing to final resolution of contested Shoreline Hearings Board cases, unless waived by the parties." The target is 6 months, reflecting the requirement of the Shoreline Management Act to decide cases within 180 days of the filing of the appeal. Restoration of AAJ time will result in continued timely issuance of decisions, necessary to meet this performance measure.
- "Percentage of appeal that settle before hearing by the Environmental Hearings Office." The target is 90%. Restoration of funding will allow for continuation of the mediation program, and full efforts to move parties toward informal settlements in appeals. This will allow the PCHB/SHB to continue to meet this performance measure.

The conclusion that there will be longer decision times in the absence of full funding for AAJs for the PCHB/SHB is explained by assessment of the average number of cases filed with the Boards per year, and how many cases each working Board Member and AAJ handles as a Presiding Judge/Board Member.

The Board receives approximately 200 appeals per year. Because Board Members (3) sit on the majority of appeals filed with the Boards (i.e. review all dispositive motions, sit in hearings, participate in the final decision), they have a somewhat lower number of cases on which they serve as Presiding. AAJs, on the other hand, do not sit on all cases, as they lack decision-making authority, and sit only on cases to which they are assigned as a Presiding Judge. Thus the AAJs handle a higher "assigned as Presiding" caseload than Board Members. An estimate of the average Presiding case assignments (based on 200 appeals filed per year) is as follows:

Board Member-----30 (x3)----- (90 Total)  
 AAJ-----55 (x2)----- (110 Total)

This decision package to buy back funding for AAJs will avoid the following outcomes. The proposed reduction of funding for AAJs by a total of 60%, will result in approximately 33 appeals filed with the Board in which the Presiding role will need to be absorbed into the workload of existing and remaining Board members and AAJs. These positions already perform at full capacity, and do not have additional time to take on new workload. The increased workload is equivalent to the yearly Presiding workload of one full-time Board Member. The results of this shift in workload will be as follows, in relation to the performance measures:

- Cases that must be decided within 180 days of the appeal (shoreline cases) will take priority over all PCHB cases, delaying scheduling and resolution of PCHB cases, many of which are of high importance to the State, the parties, and citizens. Many implicate outcomes under the Governor's Results WA effort.
- The Boards are currently (as of 8/14) scheduling cases out as far as 10 months (JUNE 2015), due to volume and expected hearing time needed for complex appeals. With less capacity to assign individuals as Presiding on cases, and more demand on remaining Judges and Board Members to write decisions and attend to all other case management tasks, this scheduling of cases will likely be extended several more months into the future.
- Additional workload spread over the remaining staff will result in longer times for issuance of decisions, and reduced quality.

The Boards cannot currently quantify how long, or the effect on quality, reversals by the Superior Court, or other relevant considerations.

- The due process interest of the parties to speedy resolution of matters they have appealed will be impacted.

## **Performance Measure Detail**

### **Activity:**

No measures submitted for package

### **Incremental Changes**

### ***Is this decision package essential to implement a strategy identified in the agency's strategic plan?***

The agency's strategic plan includes the mission of 1) conducting fair and impartial hearings and timely issuing clear and well-reasoned decisions, 2) providing expeditious and efficient resolution of environmental appeals through hearings and alternative dispute resolution processes, 3) fostering a consistent statewide interpretation of Washington's environmental laws, and 4) ensuring enhanced and equal access to justice by assisting parties in understanding the hearing process to ensure meaningful opportunity to be heard. Restoration of funding for AAJs who support the Boards and preside over cases will allow the agency to meet these goals.

AAJs are also essential to meeting many of the specific Goals and Objectives of the Strategic Plan, including 1) efforts to promote mediation and offer procedural assistance, 2) the conduct of hearings outside the Olympia area, 3) improvement of the appeals process through involvement with stakeholders, the Bar Association, and CLE presentations, and 4) legislative and rule-based actions to clarify, simplify and expedite appeals process, among other items.

### ***Does this DP provide essential support to one or more of the Governor's Results Washington priorities?***

Any decision on the funding level for the PCHB and SHB should consider the resources necessary to address the complex matters that likely lie ahead for these adjudicatory Boards, and how the resources of the Boards will support the Governor's Results Washington priorities. The type of cases likely to come before the PCHB/SHB in the next 2-5 years points out why this staffing with a minimum of 5 full time professionals (3 lawyer Board members and 2 AAJs) and essential administrative support personnel, is necessary from a qualitative point of view. The cases will be complex, controversial, often of first impression in this state, and related directly to the Governor's goals, as set out in the Results Washington effort. Note: While this decision package focuses on the direct relationship between the Board's work and Goal 3 of Results Washington (Sustainable energy and A Clean Environment), the Board's work also supports aspects of Goal 2 of Results Washington (Prosperous Economy). Here is a list of likely significant appeals or areas of appeal, in addition to the ongoing more routine caseload, before the PCHB/SHB in the next several years:

1. Coal export project proposals. Two proposed coal export terminals are undergoing environmental review, one at the Port of Longview (Millennium Bulk Terminals Longview), and one at Cherry Point in Whatcom County (Gateway Pacific Terminal). These proposals are in different phases of environmental review. Any permits that may be issued after the review will be appealable to either the PCHB or SHB, or both, depending on the type of permit issued. These will be complex, highly contested appeals, on extremely controversial projects. There may be multiple decisions from local government and Ecology under appeal, such as shoreline permits and §401 water quality certifications. These appeals implicate the Governor's priority for Sustainable and Clean Energy.
  - See generally, Results WA, Goal 3, Sustainable and Clean Energy, Healthy Fish and Wildlife, and a Clean and Restored Environment, and Goal 2, Prosperous economy.
2. Westway and Imperium bulk liquid storage facility expansions at the Port of Grays Harbor in Hoquiam (crude oil). Based on a December 2013 decision from the Shorelines Hearings Board, these projects are in the process of a SEPA environmental review. Scoping occurred in April and May 2014 (Ecology website), and the process has now moved to preparation of a draft Environmental Impact Statement (EIS). The Board expects further appeals related to permitting of these expanded facilities along Gray Harbor, once the EIS process is complete. While no final date is available, the EIS is likely to be completed in the next biennium. These are complex, controversial projects, and will generate significant legal issues on appeal. These appeals implicate the Governor's Results Washington priorities.
  - See generally, Results WA, Goal 3, Sustainable and Clean Energy, Healthy Fish and Wildlife, and a Clean and Restored Environment, and Goal 2, Prosperous Economy.
3. Water Rights cases. The PCHB handles a steady volume of complex and routine water rights cases. For the current biennium, the Department of Ecology was required, by budget proviso language, to issue 500 water rights decisions in the first fiscal year of each biennium and the agency expects to issue an equivalent number of permits the second fiscal year as well. Ecology anticipates that a similar proviso will be contained in the upcoming budget. It is likely there will be an increasing number of appeals to the PCHB of these water rights decisions. Population growth, economic development, the need for clean, adequate water supplies for drinking water,

commercial and agricultural uses, and to sustain fish and the natural environment will continue to present Ecology with difficult water resource decisions, and those will be appealed to the PCHB. Examples of issues presented in recent cases include: 1) Modification of instream flows on the Columbia River, and use of "out-of-kind" mitigation, 2) use of statutory exemptions to deplete instream flows on the Nisqually and Deschutes Rivers, 3) application of the municipal water rights law, 4) use of mitigation for water depletion, 5) dam-related water rights. These cases directly implicate aspects of Goal 3, Results Washington.

- Goal 3, Outcome Measure 2.2 (Increase the percentage of ESA-listed salmon and steelhead populations at healthy, sustainable levels...);
- Goal 3, Outcome Measure 3.2 (Increase the percentage of rivers meeting good water quality....).

4. Renewal of National Pollutant Discharge Elimination System (NPDES) General Permits. Ecology renews NPDES General Permits on a rolling basis. These permit appeals are a major workload driver for the PCHB. Expected permit renewals or modifications include the Industrial Stormwater, Municipal Stormwater, and Construction Stormwater permits, among several others. Attachment B to this decision Package is list of General Permits that will be issued in the next biennium and are subject to potential appeal to the PCHB. These permits are complex, and have generated a continuing set of appeals to the PCHB over the last 10 years, as Ecology reissues the permits. For example, the Industrial Stormwater General Permit (ISGP) covers over 1,200 Industrial facilities operating in the State. The last appeal raised over 75 legal issues, generated multiple rounds of summary judgment motions and a several week long hearings. The permit expires on January 1, 2015 and Ecology plans to issue a new ISGP in late 2014, with an effective date of January 1, 2015. These permits, which set water quality discharge standards for multiple sectors, directly affect the Governor's Results Washington Goal 3, Outcomes and Leading Indicators.

- Goal 3, Healthy Fish and Wildlife, subtopic Pacific Salmon, Outcome Indicator 2.2 (Increase the percentage of ESA-Listed salmon and steelhead populations at healthy, sustainable levels....), and Leading Indicator 2.2.a (Demonstrate increasing trend in Puget Sound Chinook populations....).
- Goal 3, Clean and Restored Environment, subtopic Clean, Cool Water, Outcome Measure 3.2 (Increase the percentage of rivers meeting good water quality), and Leading Indicator 3.2.a. (Increase the number of projects that provide stormwater treatment or infiltration....).

5. Challenges to permit terms that include or implicate Ecology's new water quality standards that address human health criteria based on fish consumption rate. While the expected new fish consumption rule cannot be directly challenged before the PCHB, the rule will require implementation of new, more rigorous water quality standards, which will be incorporated into NPDES discharge permits. Such permits can be appealed to the PCHB. Ecology expects to adopt the final rule after the 2015 Legislative Session. The PCHB would expect to see appeals of NPDES permits incorporating the new water quality standards, or requirements to reduce toxic discharges, during the 2015-17 biennium and going forward. These will be complex appeals that implicate Results Washington Goals related to Sustainable Energy and a Clean Environment.

- Goal 3, Healthy Fish and Wildlife, subtopic Pacific Salmon, Outcome Indicator 2.2 (Increase the percentage of ESA-Listed salmon and steelhead populations at healthy, sustainable levels....), and Leading Indicator 2.2.a (Demonstrate increasing trend in Puget Sound Chinook populations....).

6. Aquaculture. The Shorelines Hearings Board has had multiple appeals related to expansion of the commercial aquaculture industry in Washington (the culture or farming of fish, shellfish, or other aquatic plants and animals). Many of these cases have related shoreline permits issued for geoduck or mussel farms. These appeals have raised multiple water quality and shoreline use issues, resulting in multi-day hearings. The Board expects that the continued expansion of the aquaculture industry will result in further appeals. Expansion of the shellfish industry in Washington is addressed directly in Goal 3 of the Results Washington effort.

- Goal 3, Healthy Fish and Wildlife, subtopic Shellfish, Outcome Measure 2.1 (Increase improved shellfish classification acreage in Puget Sound, and Leading Indicator-2.1.b. (Increase number of implemented agricultural BMPs to improve quality in shellfish growing areas....).
- Goal 2, Prosperous Economy.

7. Hanford. The PCHB has seen a number of appeals over the last several years related to Ecology's enforcement of environmental laws on the Hanford Nuclear Reservation. These have been actions directed at both the U.S. Department of Energy, as well as contractors at the site. One case is currently pending before the Board, and is set for a three week hearing in the fall of 2014.

- Goal 3, Clean and Restored Environment, subtopic Healthy Lands.

8. Air permits and enforcement. The PCHB has a steady load of appeals related to enforcement of the State's air quality laws. Some cases relate to emission standards for large industrial facilities, such as expanded data centers located in Quincy (Microsoft, Yahoo!, Intergate), or large composting facilities in Western WA (Cedar Grove). Others relate to new facilities or the burning of biofuels, and related emissions. There is also a steady load of appeals of smaller enforcement actions taken by local air agencies and Ecology. These cases directly address appropriate air emission standards, addressed in Goal 3, Results Washington.

- Goal 3, Clean and Restored Environment, subtopic Healthy Air, Outcome Measure 3.3 (Increase percent of population living where air quality meets federal standards...).

9. **Shoreline Development:** The SHB has a steady load of appeals related to development along the state's shorelines. These cases can range from individual dock or bulkhead developments, to large commercial, industrial or municipal development and redevelopment. The appeals routinely raise issues related to habitat protection, loss of eelgrass, cumulative impacts of development, salmon and other aquatic organism protection, public access and recreational use of shorelines, and private property interests, among many others. These cases are time sensitive, and the Board is required to issue decisions within 180 days of the date of appeal. Many aspects of Goal 3 of the Results Washington effort are addressed through these decisions.
- Goal 3, Working and Natural Lands, subtopic Habitat Protection, Outcome Indicator 4.3(Reduce rate of loss of priority habitats...), and Leading Indicators 4.3.c; 4.3.e, 4.3.f (conversion of marine and freshwater riparian habitat in Puget Sound; increase eelgrass beds in Puget Sound, and increase the acreage of Puget Sound estuaries restored, respectively), and
  - Goal 3, Healthy Fish and Wildlife, subtopic Shellfish, Outcome Measure 2.1 (Increase improved shellfish classification acreage in Puget Sound, and Leading Indicator-Increase number of implemented agricultural BMPs to improve quality in shellfish growing areas...), and
  - Goal 3, Working and Natural Lands, subtopic Outdoor Recreation, Outcome Measure 4.2. (Increase participation in outdoor experiences on state public recreation lands and waters...)
  - Goal 2, Prosperous Economy.
10. **Forest Practices:** The PCHB will continue to see appeals of various forest practice applications and actions by DNR.
- See generally, Results WA, Goal 3, Working and Natural Lands, subtopic Forest and Farmlands, and related Leading Indicators. (reduce loss of designated forests of long-term commercial significance).

***What are the other important connections or impacts related to this proposal?***

Appeals are filed with the PCHB and SHB from decisions by the Departments of Ecology, Fish and Wildlife, Natural Resources, all air authorities, and local governments (and a few miscellaneous other agencies). Parties to these appeals include the following, in addition to the state agencies and local governments: Individual citizens, environmental organizations (both local and national), non-profit groups, individual businesses (from small independently owned businesses to Boeing or BNSF), business associations, Tribes, neighborhood associations, and consortium or broader-based trade or interest groups, such as Association of Washington Business, Washington Environmental Council, Associated General Contractors, BIAW, Farm Bureau. These entities and individuals are directly affected by the funding level of the Boards.

***What alternatives were explored by the agency, and why was this alternative chosen?***

ELUHO has considered a number of alternatives to hiring adequate AAJ staff to support the PCHB/SHB. The option to restore funding for AAJs was chosen because it is a proven, competent, reliable resource that can enable the agency to accomplish its adjudicative responsibilities without the need for statutory changes, lengthy and controversial stakeholder processes, or reliance on alternative, less stable resources. Options explored, but rejected, include:

- 1) Elimination of either or both the quasi-judicial adjudicatory boards that address appeals of land use and environmental decisions in this state (GMHB and/or PCHB/SHB). This option considered elimination of the Boards in favor of direct appeals to Superior Court. Based on past fiscal notes attendant to legislation that proposed such an alternative to the GMHB, the cost of this option is prohibitive, as it results in a much higher cost than the cost of the current administrative process. Litigants would be faced with longer appeal times at a much greater cost to the state and the parties.
- 2) Eliminate statutory deadlines for issuance of decisions. This option has been discussed, but would require amendment of both the APA, and the Shoreline Management Act, or potentially, a separate amendment of Ch. 43.21B RCW to exempt the PCHB from the APA decision deadlines. The Board would expect any such change in statutory deadlines for issuing decisions to be controversial, as those deadlines exist in order to avoid the very delays discussed above.
- 3) A change in the composition and size of the GMHB. This option considered possible further reductions in the size, political and regional make-up of the GMHB. Because of the politically sensitive nature of all issues involving the Growth Management Act in this state, this option is not feasible in the absence of a well-developed stakeholder process, with a resulting consensus as to how a newly constituted GMHB would function and handle expected caseloads going forward. Legislation may be required if the composition or regional make-up of the GMHB were to be changed in any significant way. This would likely be a controversial and difficult legislative undertaking.
- 4) Legislation to provide ELUHO Boards the authority to appoint pro tem judges or Board members. Currently, none of the Boards within ELUHO have clear authority to appoint or hire qualified individuals to act as Board members on a temporary or pro tem basis. Such authority could allow the Board the opportunity to handle spikes in caseload through temporary appointments, rather than full time positions. While a viable option, the agency would need adequate funding to pay for the services of these pro tem appointees. Current funding levels, and expected reductions make this option less viable.
- 5) Further reductions in Goods and Services and Travel expenditures. ELUHO has considered and rejected further reductions in

these supporting cost objects beyond those offered in related decision packages, as risking over-expenditure and as contrary to the mission of the agency and the Boards it supports. Because the GMHB is regionally based, some travel is essential to attend hearings. The PCHB and SHB also travel to attend hearings under certain circumstances (shoreline or water rights cases in the locale). It is not feasible to further reduce lease and rent costs, as ELUHO only recently relocated to a new facility that meets the functional needs of the Boards (hearing and mediation rooms available), pays a reasonably low market rate, and would, within an unreasonably short period of time, pay another substantial sum (unbudgeted) to relocate.

***What are the consequences of adopting or not adopting this package?***

The consequences of not funding adequate Administrative Appeals Judges for the PCHB and SHB include:

1. Slowed time for issuance of decisions.
2. Reduced quality of case management and final decisions issued by the Boards.
3. Elimination of mediation services.
4. Disappointed constituent groups who expect Board presence in local areas for hearings, and timely and understandable decisions so projects may proceed.
5. Poor quality in the finished product of the Boards, due to inadequate staff to review, edit and complete tasks.
6. Recruitment and retention problems, due to part-time nature of positions, and need for Board members to take on substantially higher caseloads.
7. Lack of adequate staff to handle the workload of appeals, particularly at times of transition or when there is a delay in an appointment to the Board.

***What is the relationship, if any, to the state's capital budget?***

None.

***What changes would be required to existing statutes, rules, or contracts, in order to implement the change?***

None.

***Expenditure and revenue calculations and assumptions***

Expenditure authority requested is based on:

Restoration of a 20% reduction for one current AAJ making a salary of \$92,328 per year plus benefits which are estimated at 17.3% of gross salary (Salary \$92,328 x 20% = \$18,466 , Benefits \$3,186).

Restoration of a 40% reduction for one current AAJ making a salary of \$90,000 per year plus benefits estimated at 17.3% of gross salary (Salary \$90,000 x 40% = \$36,000, Benefits \$6,202).

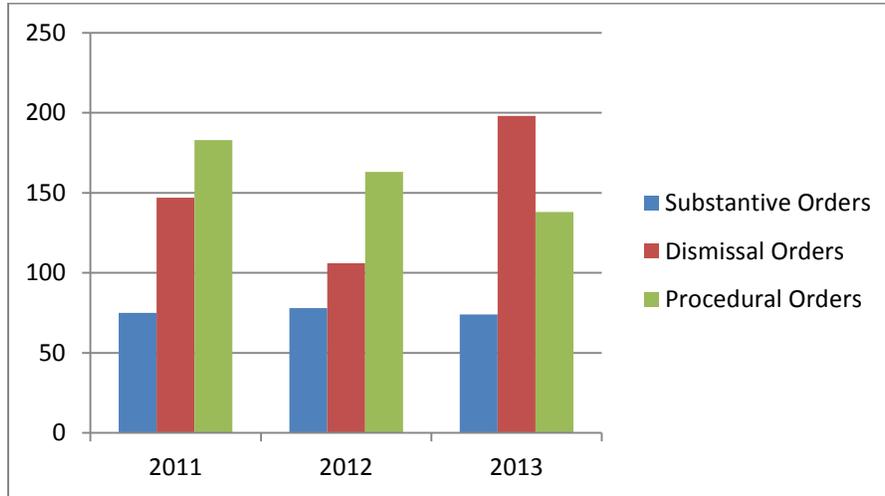
***Which costs and functions are one-time? Which are ongoing? What are the budget impacts in future biennia?***

The costs and functions are ongoing salary and benefits costs to ELUHO. There would be an ongoing budget impact in future biennia, equal to these salary and benefit costs, and any increases in salary and benefits provided to these positions over time.

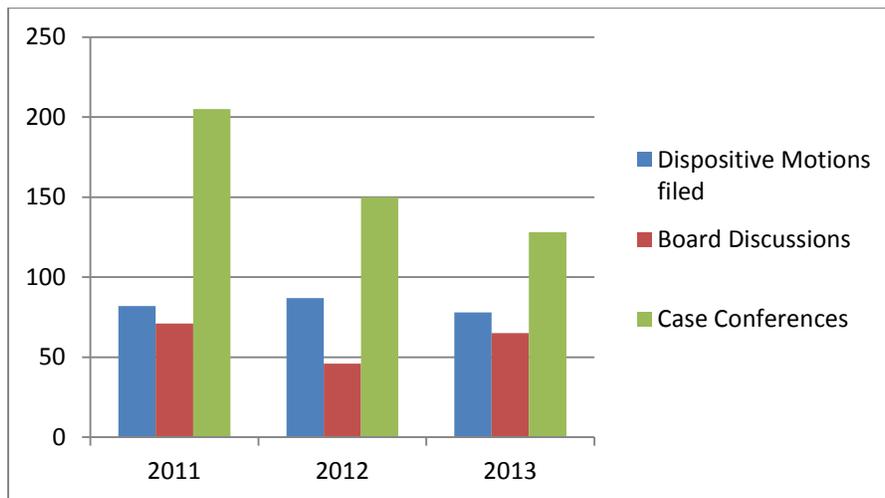
<b><u>Object Detail</u></b>	<b><u>FY 2016</u></b>	<b><u>FY 2017</u></b>	<b><u>Total</u></b>
A Salaries And Wages	54,466	54,466	108,932
B Employee Benefits	9,388	9,388	18,776
<b>Total Objects</b>	<b>63,854</b>	<b>63,854</b>	<b>127,708</b>

# PCHB/SHB WORKLOAD INDICATORS

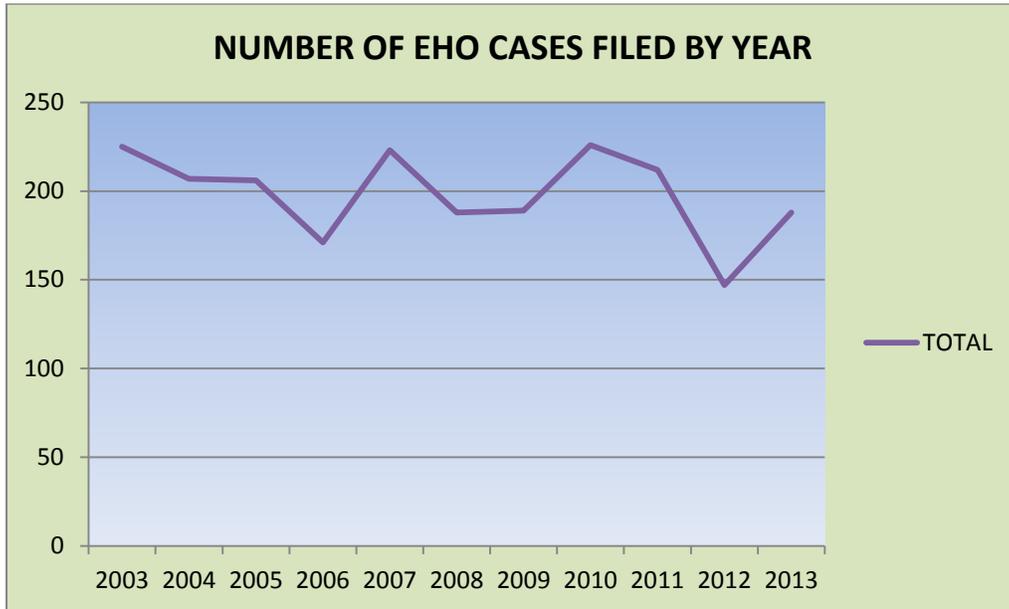
## 1. ORDERS ISSUED BY THE PCHB/SHB



## 2. DISPOSITIVE MOTIONS FILED; BOARD DELIBERATIONS; AND CASE STATUS CONFERENCES



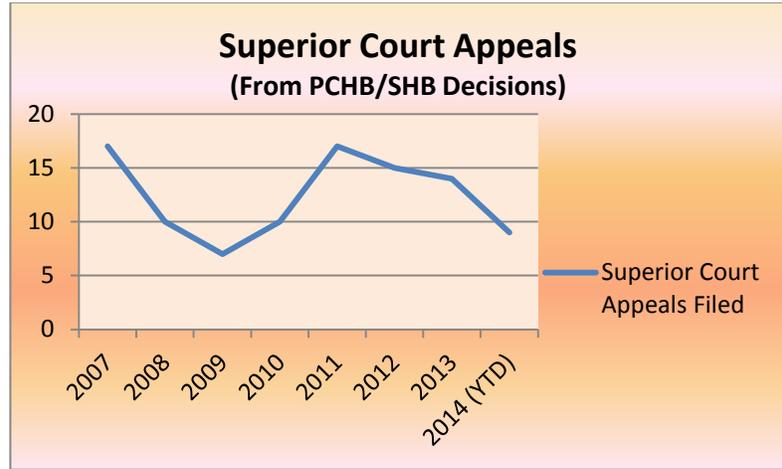
## PCHB/SHB WORKLOAD INDICATORS



Average number of cases per year = 198

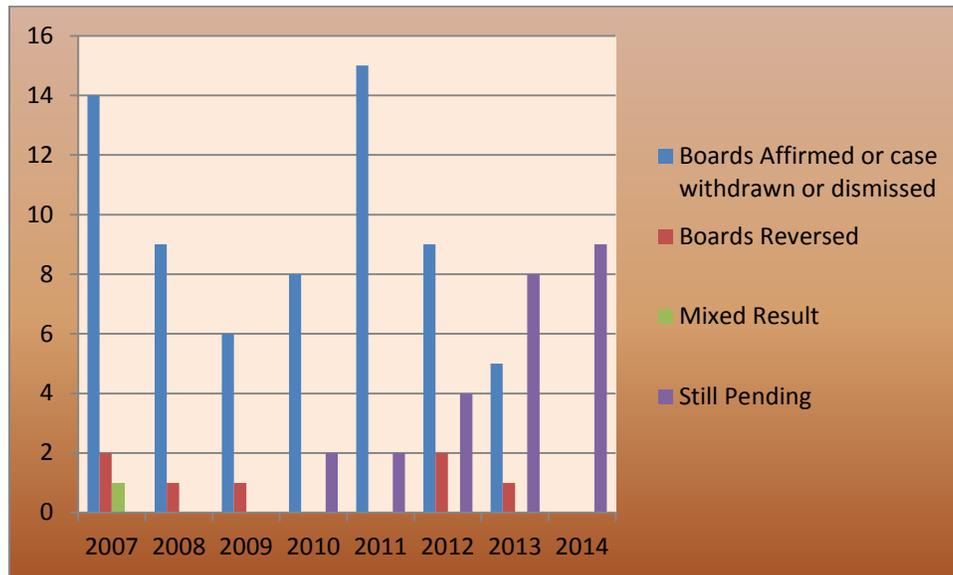
## APPEALS FROM PCHB-SHB CASES FILED TO COURT

<i>Superior Court Appeals Filed</i>	
Year	Filed
2007	17
2008	10
2009	7
2010	10
2011	17
2012	15
2013	14
2014 (YTD)*	9



\*Results as of 7/31/14

## OUTCOMES OF COURT APPEALS TAKEN FROM PCHB/SHB DECISIONS\*



\*Outcomes do not correlate with appeals filed in given year (time delays on appeal)

**PROJECTED APPEALS OF  
ECOLOGY GENERAL PERMITS (GP)\***

<b>TIMELINE</b>	<b>PERMIT</b>
May, 2014	Eelgrass GP (Pending)
<b>2015</b>	
January, 2015	Phase I/Phase II Municipal Stormwater - Modification
January, 2015	Rotenone IP (change to GP)
January, 2015	Industrial Stormwater GP
June, 2015	Burrowing Shrimp IP
October, 2015	Sand and Gravel GP
December, 2015	Winery GP
<b>2016</b>	
January, 2016	Concentrated Animal Feeding Operation (CAFO) GP
May, 2016	Boatyard GP
<b>2017</b>	
March, 2017	Eelgrass GP Modification
June, 2017	Irrigation GP
<b>2018</b>	
July, 2018	Phase I Municipal Stormwater
July, 2018	Phase II Municipal Stormwater

\*Timeline includes only those General Permits where Ecology assesses risk of appeal as moderate to high.

**Agency:** 468 Environmental & Land Use Hearings  
**Decision Package Code/Title:** N2 Restore GMHB to 6 Members/No Furloughs  
**Budget Period:** 2015-17  
**Budget Level:** PL - Performance Level

**Recommendation Summary Text:**

This decision package requests a first and highest-priority buyback of funding to restore a reduction necessary to achieve the lower budget base, set out in the four decision packages from ELUHO. Specifically, the current decision package seeks to restore \$117,589 to ELUHO's land use adjudication program in order to eliminate a proposed two-day-per-month furlough for each of the six members of the Growth Management Hearings Board in the first year of the biennium and to fund a full-time 6th Member of the GMHB on a going-forward basis (when a current member retires in 2016).

**Fiscal Detail**

<b>Operating Expenditures</b>	<b><u>FY 2016</u></b>	<b><u>FY 2017</u></b>	<b><u>Total</u></b>
001-1 General Fund - Basic Account-State	61,693	55,896	117,589
<b>Total Cost</b>	<b>61,693</b>	<b>55,896</b>	<b>117,589</b>
<b>Staffing</b>	<b><u>FY 2016</u></b>	<b><u>FY 2017</u></b>	<b><u>Annual Average</u></b>
FTEs	.5	.5	.5

**Package Description:**

ELUHO proposed a decision package (one of four from ELUHO) that would reduce ELUHO's appropriation for the 2015-17 biennium by \$117,589 to address a portion of budget reductions equal to 15% of its General Fund maintenance level budget. The proposed reduction would come from salaries and benefits appropriated to the agency to support six full-time Governor-appointed Growth Management Hearings Board members. The decision package proposed a permanent reduction in funding for the land use adjudication program of ELUHO, by reducing one Board member position to half-time in the second year of the biennium (upon retirement of one of the Board members)(\$55,896) and imposing a two-day-per-month furlough on each of the six Board members in the first year of the biennium (\$61,693). ELUHO now proposes to restore such funding, as six full-time Board members need to be fully funded to support the core mission and responsibilities of the GMHB in view of projected case load associated with legislatively-required local plan updates in 2015 through 2019.

By statute, the GMHB consists of seven members, appointed by the Governor, residing in specified areas of the state. RCW 36.70A.250. The Governor may reduce the Board to six members if warranted by the Board's caseload. RCW 36.70A.252. Since May 2011, the GMHB has functioned as a six member Board, and the Governor has not appointed the seventh member. ELUHO has submitted a decision package cutting funding for the seventh GMHB member and a second decision package cutting an additional half-time member position in the second year of the biennium and reducing the working time of all Board members in the first year. This second decision package assumes that the Governor has the authority to appoint a part-time position to the Board, and that further statutory changes are not necessary to implement the proposal. This second decision package also assumed no caseload increase during the biennium. Funding is requested to restore the cuts offered in this second decision package, based primarily on caseload drivers.

The GMHB adjudicates appeals of local jurisdiction land use legislation. Each Board member presides over a set of cases, managing all aspects of conferences, board consultations, hearings, and writing all opinions and orders. No staff attorneys or other adjudicative staff support the GMHB. Board members work from their homes located throughout the state and hear cases in multiple locations. Appeals are heard and decided by panels of three Board members, and each member serves on case panels across the state. Reducing

each Board member's working time in the first year would significantly reduce the GMHB flexibility to respond to caseload fluctuation, provide regionally-responsive case resolution, and ensure timely and legally-sound written orders. Cutting a sixth position to half time in the second year of the biennium and thereafter would eliminate the Board's ability to meet the expected caseload increases in 2016 through 2020 associated with legislatively-required updates of city and county land use comprehensive plans.

The Growth Management Hearings Board is an independent quasi-judicial adjudication board within ELUHO. The GMHB resolves disputes regarding local government compliance with the land use requirements of the Growth Management Act (GMA), Shoreline Management Act (SMA), and associated environmental review under SEPA. The GMHB hears appeals of city and county comprehensive plans, development regulations and shoreline master programs. The Board conducts hearings, evaluates factual and scientific evidence, and produces written legal decisions that interpret and apply the GMA, SMA, and SEPA. The GMHB provides independent review of city and county actions in an expedited, cost-effective and regionally-sensitive process. The GMHB's written decisions and orders must be thorough and legally rigorous to satisfy statutory and case law standards for a quasi-judicial tribunal. An additional GMHB responsibility arises from the statutory authority granted to invalidate city or county legislation that substantially interferes with GMA goals.

The options to meet a 15% budget reduction across ELUHO are limited. The agency is largely composed of statutorily established Boards, with governor-appointed Board members. The majority of the agency budget is dedicated to salary and benefits for board members and limited support personnel. The proposal to further reduce funding that supports a 6th full-time GMHB member position was the only option remaining short of eliminating the Board itself. This option was offered despite prior budget reductions and legislative action reducing the GMHB from 9 to 7 members in 2010 and a separate 2015-17 decision package that would result in a loss of funding for the 7th GMHB position.

The proposal to permanently reduce the GMHB to 5.5 members would be a substantial further reduction of the GMHB, which less than 5 years ago consisted of 9 full-time members served by 5 office staff and a staff attorney working out of three regional offices. Through a combination of prior budget reductions and legislation in 2010, the former three separate, regionally-based, three-member GMHBs became one board with seven members. The Board closed two offices (Seattle and Yakima), and eliminated support staff positions including the staff attorney who had provided critical back-up to non-attorney Board members. GMHB members now work from home offices (there is one Olympia office-based position). In 2011, the GMHB was brought under the administrative umbrella of ELUHO, and in early 2012, the Olympia office of the GMHB co-located with the other Boards of ELUHO, for further savings in space and support staff costs. The seventh position on the GMHB became vacant March 2011, and the Governor has not appointed a replacement in view of legislatively-postponed caseload.

Although ELUHO offered a further reduction to 5.5 GMHB members, it now requests restoration of the funding to support this vital function, as the consequences of accepting such a reduction will impair the capacity of the GMHB to issue timely, well-reasoned decisions that will withstand scrutiny of the parties and appellate courts. In creating the GMHB, the Legislature rejected the idea that land use disputes under the GMA should be subject to local litigation and appeal processes, choosing instead to establish the GMHB as the forum for those contending local government plans and programs fail to comply with the GMA, SMA or SEPA. The Board is expected to render independent, regionally-sensitive review of legislative actions taken by cities and counties, and to do so in a manner that is less formal, less costly, and more expeditious than the superior court. Maintenance of funding for six full-time Board members, without disruptive furloughs in the first year, is essential to provide the Board capacity to respond to variable caseload fluctuations during a given year and still meet the fundamental statutory requirement to adjudicate and resolve local land use disputes within 180 days from inception.

#### **Board case load and city/county planning cycles.**

The GMHB caseload reflects city and county planning cycles. The GMHB resolves land use disputes in which citizens challenge the legislative actions of cities and counties under the Growth Management Act (GMA), Shoreline Management Act (SMA) and SEPA. Statutory deadlines require local jurisdictions to review and update their land use plans and regulations and their shoreline master programs periodically. These updates generate surges of appeals. For example, the previous round of required comprehensive plan updates for just three counties and their cities (King, Pierce, and Snohomish) resulted in 49 cases filed with the Central Puget Sound GMHB in 2005, the year following the update deadlines. In addition, because these plan updates are comprehensive and cover a broad range of land use and environmental topics, plan updates are often appealed by multiple parties objecting to different aspects and creating a complex and intense adjudication.

In the last five years, the GMHB workload has been reduced, with fewer appeals filed. The GMHB's recent caseload reduction results, in large part, from legislative action in 2010 which rescheduled the deadlines for cities and counties to update their comprehensive plans from 2011-2014 to 2015-2019. This legislative deferral of deadlines for local government plan updates (RCW 36.70A.130(5)), together with Ecology's extension of deadlines for local governments to update their shoreline master programs (per telephone with

Tim Gates, Ecology), has shifted the GMHB workload forward. In 2010-2014 the GMHB new caseload dropped to 20 to 30 petitions per year, as the following chart demonstrates. The GMHB has operated effectively as a six-person board since May 2011 with the reduced caseload.

ELUHO's decision package offering further reduction of the GMHB expressly assumed a continuation of lower caseloads, based on the last five years of caseload data, which is as follows:

Actual	Petitions for Review	Cases (after consolidation)
2010	50	33
2011	26	21
2012	30	24
2013	43	29

However, city and county comprehensive plan updates are now statutorily set for June 30, 2015 to June 30, 2018. The lowest likely caseload from this next planning cycle was projected in the GMHB Efficiency and Restructuring Study (Triangle Report, 2009) as 40 to 65 petitions per year anticipated in 2011-2014. The Triangle-projected caseload must now be moved forward to 2015- 2019 (appeals must be filed within sixty days of the update adoption). The second chart presents the projected workload, based on the changed planning cycle for local governments.

Year	Jurisdictions with Updates Due	Projected Petitions
2015	79	41
2016	45	65
2017	62	46
2018	50	51
2019		41

In addition to comprehensive plan updates, cities and counties are mandated to update their Shoreline Master Programs. Approximately 105 of 260 updates have been completed. The remainder were to have been finished in 2014, but (per telephone with Ecology's Tim Gates) extensions have been granted and SMP updates are now projected to be completed over the next three years. The GMHB is projecting increased case filings challenging updated SMPs in the 2015-17 biennium.

In addition, GMHB case load is affected by the state economy. With economic recovery, increased commercial, homebuilding, and subdivision development is occurring, particularly in the Board's Western and Central regions. The Board anticipates an incremental increase in appeals of city and county planning actions as a result.

Thus, for future staffing, the GMHB must assume an increase in workload, driven primarily by the mandated comprehensive plan and SMP updates. As long as the GMHB remains a 6-member Board, there is adequate capacity on the Board in its current configuration to take on some additional work. Further reduction of the Board to 5.5 is ill-advised in light of the projected workload. Reduced Board member availability in the first year and loss of a half-time position in the second year will not allow the GMHB to respond to the additional caseload with the same quality and timeliness of GMHB decisions going forward.

**Impact of furloughs and half-time Board appointment.**

When new petitions are filed, a GMHB Board member is assigned as presiding officer and a three-member panel is created. By statute, the makeup of the panel must meet requirements for regionalism, one attorney and one former local elected official, and partisan balance. RCW 36.70A.260. The GMHB currently operates with six full-time quasi-judicial officers, two each from the Eastern Washington Region, Western Washington Region, and Central Puget Sound Region. This is the minimum number needed to maintain the three GMA regions so as to comply with the legislative mandate to reflect regional differences and give full consideration to local circumstances when hearing and deciding land use cases arising in the state's three regions. The further reduction of Board member availability through furloughs in the first year and a half time appointment of the 6th member in the second year will compound the difficulty of comprising panels that meet statutory requirements.

Each GMHB member presides over a share of cases. The presiding officer conducts conferences and hearings by telephone and in person, prepares and issues all procedural orders, convenes panel consultations pre- and post-hearing, and writes decisions on motions, the final order, compliance, and remand, including findings of fact and conclusions of law. The burden of legal research, legal analysis, and preparation of findings of fact and conclusions of law falls on attorney Board members for not only their own cases but also for other cases where written decisions of non-lawyer Board members need legal review and case law authorities. Furloughs of working Board Members will substantially reduce flexibility for scheduling hearings, case consultations, and writing and review of decisions.

Uniquely for State adjudicative bodies, GMHB members work in isolation and with minimal staff support. The GMHB

work-from-home structure creates logistical and efficiency challenges. While the ELUHO office in Olympia provides administrative support, GMHB members must manage office equipment, files, correspondence, and telecommunications functions from remote locations while making decisions that require, for highest quality, on-site hearings and intensive ongoing panel deliberations. The difficulty of case management increases, as each Board member serves on multiple panels across the state without a logistical home where panel consultations are convenient and ongoing. Case conferences and some hearings can be held telephonically, but hearings on the merits involve cross-state travel for panel members. GMHB Board members also carry out other duties, such as rule making, digesting decisions for the website, training local planners through quarterly Department of Commerce conferences, maintaining a practice handbook for litigants, and offering mediation services. Restoration of funding is essential to sustain these services.

Both the proposed furlough in the first year of the biennium and half-time appointment of the 6th member in the second year will have incremental and fundamental impacts that go to the very purposes for which the GMHB exists. Those purposes are timely, affordable and accessible review of land use disputes, in recognition of the state's regional differences. Restoration of funding will offer support to the mission of the GMHB as follows:

*Timely decision-making.* Local governments, private citizens, the environmental and business communities and others rely on the GMHB process for timely and accessible resolution of land use disputes. Restoration of funding will enable six full-time Board members to handle the additional caseload from appeals of updates to comprehensive plans, critical areas ordinances, and shoreline master programs scheduled for the next two biennia. Longer decision times are contrary to the mandate of the GMA, which requires a final decision within 180 days of petition filing and a compliance order within 45 days of a hearing. RCW 36.70A.300(2); .330(2). In the absence of restoration of funding, these deadlines may be missed and other types of decisions (reconsideration, compliance, dispositive motions) are likely to slide.

*Retain clarity and quality in final decisions.* With 6 full-time Board members to issue written decisions, the Board will continue to present well-reasoned, legally-sound decisions with adequate and complete analysis. The ability to produce thorough and thoughtful written decisions is at the core of the GMHB adjudicatory function. The Ninth District Court of Appeals explained how the statutory provisions render the Board members' role "functionally comparable" to that of a judge: an adversarial proceeding, a decision-maker insulated from political influence, a decision based on evidence submitted by the parties, and a decision provided to all the parties on all the issues of fact and law. *Buckles, et al., v King County*, 191 F.3d 1127, 1134 (1999). Funding for six full-time Board members ensures that attorney members have time to review and support the written decisions of non-lawyer Board members to meet these high standards and be upheld on appeal.

*Regional balance.* Because the GMHB uniquely rules on local legislative adoption of land use plans and policies, Board composition has been carefully crafted by the legislature to ensure regional balance and statewide political credibility. Reducing the three prior boards to a single 7-member GMHB resulted from an intensive stakeholder process that identified regional balance as a continuing requirement. Triangle reported: "Any [restructuring] option that does not preserve this regional representation is likely to face significant opposition." [Triangle Associates: "Growth Management Hearings Board Efficiency Study and Restructuring Analysis," October 2009, p. 28.] Reducing the GMHB further to 5.5 members would result in frequent inability to form case panels with the legislatively mandated regional representation. The Triangle Report (p. 24) reflected the opinion that a five-member board "would not be adequate to either handle the workload or preserve regional representation and a balance in the other membership criteria." Thus restoring funding for six full-time Board members retains the capability for hearing cases with regional panels as required by RCW 36.70A.260.

*Certainty and finality in land use regulation.* Certainty and predictability are lodestar principles of Washington land use law. *Thurston County v WWGMHB*, 164 Wn.2d 329, 345 (2008). Citizens, businesses, and local governments rely on the GMHB to provide timely resolution of challenges to local comprehensive plans, regulations, and shoreline master programs. In light of the required comprehensive plan updates in the next two biennia, GMHB members will need to work at full strength to manage the projected caseload. Restoration of funding is essential to ensure timely final determinations of GMA and SMA compliance, and to prevent delays to local jurisdictions seeking planning and regulatory certainty, delays to the development community, and deferrals of needed environmental protections.

*Reduced risk of vesting of non-compliant development.* Because city and county land use plans and regulations are presumed valid upon adoption, non-compliant projects may vest and be permitted before the GMHB completes its review of a challenged enactment. Board member furloughs and subsequent reduction to 5.5 members increases the likelihood of procedural delays that allow opportunities for such vesting. Thus, delays and less-thorough Board decisions may allow urban sprawl, loss of agricultural land, and development that contravenes the GMA. Even the 180-day final order deadline is not always short enough to prevent vesting of aggressive projects. See, *Town of Woodway v Snohomish County*, 180 Wn.2d 165 (2014). Restoration of funding will give the GMHB capacity to be more nimble to forestall action contrary to the laws it adjudicates.

*Protection of natural resource lands and the environment.* Restoration of funding enables the GMHB to fulfill its statutory responsibility for protection of resource lands and environmental values. The GMA and SMA require local jurisdictions to adopt regulations conserving farm and forest lands, protecting environmentally critical areas, and planning wise use of shorelines. Board member furloughs and subsequent reduction of 5.5 members increases the risk of degradation or loss of natural resources while disputes concerning such regulations go unresolved or if the thoroughness and legal acumen of decisions is compromised.

The ELUHO contact for this request is Kathy Mix, Executive Director, (360) 664-9178.

## **Narrative Justification and Impact Statement**

### ***What specific performance outcomes does the agency expect?***

Restoration of funding for six full-time GMHB members is essential for the GMHB to continue to meet its performance measure for "Percent of final decisions and compliance orders issued within statutory deadlines." The target for this measure is 100% of final decisions and 90% of compliance orders, and since the 2009-2011 biennium, the GMHB has consistently met this measure, issuing all final decisions within the 180-day deadline and over 90 % of compliance orders within the 45-day deadline. The Board has done so since 2011 with six full time members. However, in light of projected caseload increase due to legislatively-mandated city and county updates in 2015-19, the Board is unlikely to be able to continue to meet the deadlines with only 5.5 members. The Board's statutory authority does not provide for extension of the 180-day final decision deadline based on Board member unavailability. Restoration of funding ensures the capacity for the Board to respond to fluctuating and increasing caseloads and still meet the fundamental statutory requirement to adjudicate and resolve local land use disputes within statutory deadlines.

### **Performance Measure Detail**

#### **Activity:**

No measures submitted for package

#### **Incremental Changes**

### ***Is this decision package essential to implement a strategy identified in the agency's strategic plan?***

Restoration of funding is essential to implement strategies in the GMHB strategic plan. In addition to the bottom-line performance measure of rendering timely decisions, the GMHB has adopted strategies to assure accommodation of regional differences, provision of an accessible and efficient appeals process, and LEAN operations. Each of these strategies depends on this decision package.

The GMHB strategic plan requires recognition of regional differences through assigning case panels with two regional Board members and a regional presiding officer and holding substantive hearings in the locale of origin. (Objective 1.6) Board furloughs in the first year and reduction to 5.5 members in the second year of the biennium substantially reduce flexibility to meet these targets.

GMHB strategies for provision of an accessible adjudicatory process include maintaining a user-friendly website (Objective 2.1), a practice handbook (Objective 2.2) and a case digest (Objective 2.4). Rules of procedure are reviewed biennially and revised as needed. (Objective 1.3) Input from stakeholders is solicited at an annual Board meeting and by a biennial survey. (Objective 2.2, Target 2; Overall target for Goals 1 and 2). Board members make presentations to quarterly regional planner forums and occasional CLEs. (Objective 2.3) These strategies are tasks undertaken by Board members themselves (except web-site maintenance), and will not be implemented unless funding for Board members is restored. Even the LEAN operations strategy assumes Board member time to develop data collection and reporting procedures. (Objective 5.1)

### ***Does this DP provide essential support to one or more of the Governor's Results Washington priorities?***

The Growth Management Hearings Board provides the unique process by which city and county governments are required to implement many of the priorities of Results Washington Goal 3: Sustainable Energy and a Clean Environment. The GMHB regional panels hear appeals related to local government comprehensive plans, development regulations, and shoreline master programs and make legal decisions which enforce the Growth Management Act and the Shoreline Management Act. The GMHB leverages citizen and community efforts in support of Goal 3 priorities by providing an approachable, affordable forum for resolving local environmental and growth management conflicts. This enables citizen and watchdog groups to efficiently ensure compliance with the GMA and implement Goal 3, without needing a fleet of state regulators or burdening the superior courts. At the same time, the expertise of the GMHB members insures local government efforts are aided and respected. This adjudication is essential to implementing Goal 3 at the local level.

Restoring funding for six full-time GMHB members is essential for continued responsive and timely resolution of challenges to comprehensive plan and shoreline master program updates in the 2015-17 biennium. GMHB adjudication supports all four of the Goal 3 topics, as follows:

Sustainable and Clean Energy: GMHB adjudication supports the goal of reducing transportation-related greenhouse gas emissions by ensuring local land use plans reduce sprawl and ensure compact urban development, allowing transit-friendly urban densities, as required by RCW 36.70A.020(1),(2), (3). (Target 3.1.1 "reduce transportation-related greenhouse gas emissions..." ) The Board adjudicates appeals challenging a local government's compliance with these GMA standards.

Healthy Fish and Wildlife: GMHB adjudication applies a requirement for each city and county to adopt critical areas ordinances based on best available science. RCW 36.70A.060, .172. The environmental protections provided by these ordinances may clash with property owners' expectations and are often politically contentious. GMHB decisions ensure local land use provisions are protective of threatened or endangered species, including state listed species. (Target 3.2.3 "Increase the percentage of state listed species recovering ...") Board rulings make sure development along riparian corridors, marine shorelines, and wetlands is limited in order to protect anadromous fish and other aquatic resources. RCW 36.70A.172. (Target 3.2.2 "Increase percentage of ESA-listed salmon and steelhead populations at healthy levels...") Recent GMHB decisions have contributed to protection of water quality by addressing septic system standards under GMA and SMA. (Target 3.2.1(a) ""Increase inspections for on-site sewage systems..."")

Clean and Restored Environment. The goal of keeping land, water and air clean is supported by GMHB decisions which apply GMA requirements to protect water quality, especially in Puget Sound, and apply SMA requirements for "no net loss" of shoreline ecological functions. To protect the land, urban development is directed to locations within urban areas; expansion to "greenfields" is discouraged/denied. (Target 3.3.1) To protect water, local governments must use best available science to protect wetlands, critical aquifer recharge areas, streams, river and channel migration zones. (Target 3.3.2 "Increase percentage of rivers meeting good water quality...") The Board reviews the city or county record, when challenged, and has the authority to invalidate local ordinances that frustrate the goals of the GMA or SMA.

Working and Natural Lands. Under RCW 36.70A.060, local governments must identify and conserve farm land and forests of long-term commercial significance. (Target 3.4.1(a) "no net loss of acreage dedicated to working farms..." (c) "Reduce loss of designated forests..."). GMHB decisions across the state have been vitally important in reducing conversion of agricultural land, in particular. Protection of priority habitats for fish and wildlife is also enforced through the Board's adjudication of compliance with the GMA and SMA mandates to identify and protect marine and freshwater riparian habitats, especially in Puget Sound. (Target 3.4.3(a) "increase local jurisdictions' adoption of priority habitats and species..."(c) "Reduce conversion of marine and freshwater riparian habitat in Puget Sound..."(e) "Increase Puget Sound eelgrass beds..."(f) "Increase acreage of Puget sound estuaries restored..."). Numerous Board decisions also support planning for open space and trails, under GMA or SMA provisions. (Target 3.4.2).

The Growth Management Hearings Board's work also supports Results Washington Goal 2 Prosperous Economy: by ensuring city and county land use plans include provisions that match infrastructure to the needs of the population and provide multi-modal transportation options, (RCW 36.70A.020(3), (12), supporting Target 2.3.1 "maintain infrastructure assets," and Target 2.3.2 "[provide] alternative transportation commute methods").

### ***What are the other important connections or impacts related to this proposal?***

Any decision on the funding level for the GMHB should consider the resources necessary to address the complexity and significance of the matters likely to lie ahead for this Board. City and county comprehensive plan updates, originally scheduled with deadlines from 2010-2014, have been legislatively rescheduled for 2015-2019. RCW 36.70A.130(5). These updates of necessity will address important and politically sensitive issues such as urban growth area boundaries, greenhouse gas reduction strategies, development on landslide-prone or flood-prone lands, rural water and septic services, conservation of agricultural land, and the conflict between development pressures and habitat for fish and wildlife.

Shoreline Master Program Updates. In addition to comprehensive plan updates, cities and counties are mandated to update their Shoreline Master Programs. Approximately 105 of 260 updates have been completed. The remainder were to have been finished in 2014, but (per telephone with Ecology's Tim Gates) are on track to be completed over the next three years. Appeals to the GMHB have generated less than a dozen cases so far, but a current County SMP update is being challenged by three parties raising over 250 legal issues, demonstrating how contentious and complex protection of Washington shores can become.

Critical Areas Ordinances. San Juan County's process to enact a critical areas ordinance began in 2006 and was not completed until 2013. Appeals to the GMHB involved five petitioners and an intervenor, representing the full range of interests and raising over 100

legal issues. The comprehensive plan updates for all cities and counties with deadlines in the next two biennia require critical areas ordinances to be reviewed as well. Ecology has issued an Update on Wetland Buffers: The State of the Science, which will intensify debate around these issues.

*Water Resources.* Population growth, economic development, the need for clean and adequate water supplies for drinking water, commercial use, agriculture and to sustain fish and the natural environment present cities and counties with difficult water resource planning decisions. The GMA and SMA contain provisions requiring the GMHB to rule on difficult questions with far-reaching impacts for water supply and water quality. Timely, well-reasoned and legally-sound GMHB rulings are key first steps to negotiated settlements with state agencies or appellate resolution in counties on both sides of the Cascades (Whatcom, San Juan, Kittitas, Spokane).

*Floods and Landslides.* New FEMA flood mapping and a 2010 legislative amendment to the GMA restricting urban growth expansion in the floodplains have yet to be fully incorporated in city and county land use plans and regulations. RCW 36.70A.110(8). The March, 2014 Oso landslide heightens the imperative for planning that acknowledges geologic hazard areas and limits development. Regulations of such lands are politically charged and generate contentious and often highly-technical appeals.

### ***What alternatives were explored by the agency, and why was this alternative chosen?***

ELUHO has considered a number of alternatives in the effort to identify budget reduction options equivalent to 15% of its operating budget. The option presented was chosen as it reflects current workload on the GMHB, and offers some flexibility, with the option to seek supplemental appropriations, if workload increases. With specific reference to the land use adjudicatory program, these options include:

*Elimination of the GMHB that provides quasi-judicial adjudication of land use appeals in favor of direct appeals to Superior Court.* This option considered elimination of the GMHB in favor of appeals to Superior Court. Based on past fiscal notes attendant to legislation that proposed such an alternative to the GMHB, the cost of this option is prohibitive, as it results in a much higher cost to the state than the current administrative process. Litigants would be faced with longer appeal times and higher cost to the parties. Notably, the GMA has from the outset contained a provision allowing litigants by consent to remove any case directly to superior court within ten days of the filing of a petition for review. RCW 36.70A.295. To date, no GMA case has been removed to the court under this provision. Litigants clearly prefer the GMHB process.

*Further reduction in the composition and size of the GMHB.* This option considers possible further change in the size, political and regional make-up of the GMHB. Because of the politically sensitive nature of all issues involving the Growth Management Act in this state, this option is not feasible in the absence of a well-developed stakeholder process, with a resulting consensus as to how a newly constituted GMHB would function and handle expected caseloads going forward. Legislation would be required if the size, composition or regional make-up of the GMHB were to be changed in any significant way, and this would likely be a controversial and difficult legislative undertaking. Further, any budgetary savings are speculative, as a reduced Board would presumably need the assistance of staff attorney(s) or hearing examiners(s).

*Eliminate statutory deadlines for issuance of decisions.* This option has been discussed, but would require amendment of the Growth Management Act, which requires decisions to be issued within 180 days of filing of the appeal. The Board would expect any such change in statutory deadlines for issuing decisions to be controversial, as those deadlines exist in order to avoid the very delays discussed above.

*Use of Unallotted Funds (7th GMHB position).* ELUHO has received an appropriation for the 7th GMHB member position, but that position has been unfilled by the Governor since 2011. In the current biennium, OFM did not allot the funds (\$242,306) to the agency for this position, as the Governor did not intend to fill the position based on the declining workload on the GMHB. The agency considered, and rejected, the idea that the GMHB should take credit for all, or a portion of the unallotted funds as the way in which it would participate in the 15% budget reduction and effort to rebase this aspect of ELUHO's programs. This option was rejected in discussion with OFM, based on the need for each program within the agency to look at its currently funded business process and assess the resources actually needed to perform the workload. Allowing the GMHB to rely on unallotted funds would not only allow the GMHB to escape assessment of its current business practices and workload (which has declined considerably), but would unfairly require the other programs within ELUHO, including the central program that provides support to the GMHB, to unfairly shoulder the burden of the reductions and effort to rebase the agency budget.

*Legislation to provide ELUHO Boards the authority to appoint pro tem judges or Board members.* Currently, none of the Boards within ELUHO has statutory authority to appoint or hire qualified individuals to act as board members on a temporary or pro tem basis. Such authority could allow the Board the opportunity to handle spikes in caseload through temporary appointments, rather than

full time positions. While a viable option, the agency would need adequate funding to pay for the services of these pro tem appointees. Current funding levels and expected reductions make this option less viable in the short term.

*Further reductions in Goods and Services and Travel expenditures.* ELUHO has considered and rejected further reductions in these supporting cost objects beyond those offered in related decision packages, as risking over-expenditure and as contrary to the mission of the agency and the Boards it supports. Because the GMHB is regionally based, Board members must travel to attend hearings. The PCHB and SHB also travel to attend hearings under certain circumstances (shoreline or water rights cases in the locale). It is not feasible to further reduce lease and rent costs, as ELUHO only recently relocated to a new facility that meets the functional needs of the Boards (hearing and mediation rooms available), pays a reasonably low market rate, and would, within an unreasonably short period of time, pay another substantial sum (unbudgeted) to relocate to less than adequate space.

***What are the consequences of adopting or not adopting this package?***

Restoration of funding for six full-time GMHB members is consistent with the legislative restructuring of the Board in 2010 and allows continuation of the regional panel adjudicative structure approved in that legislation. The Governor still has the option of requesting a supplemental appropriation for appointment of a 7th Board member if warranted by increased caseload. The makeup of the GMHB has always been politically sensitive. Any further change in Board numbers or composition should be taken only after a thoughtful stakeholder process.

***What is the relationship, if any, to the state's capital budget?***

None.

***What changes would be required to existing statutes, rules, or contracts, in order to implement the change?***

None.

***Expenditure and revenue calculations and assumptions***

Restoring Furlough reduction:

Board members currently make an annual salary of \$95,376. The average number of 8 hour work days per year is 261. \$95,376 divided by 261 = \$365/day. Six board members X two days/ month X 12 months X \$365/ day = \$52,621/ year. Related benefits are estimated at \$9,072. The total amount needed to restore the reduction for furloughs in fiscal year 2016 is estimated at \$61,693.

Half-time to Full-time Board Member:

Board members currently make an annual salary of \$95,376. Half the salary is \$47,688. The related benefits costs would be increased by \$8,208. The total amount to restore the half- time board member to full-time in fiscal year 2017 is estimated at \$55,896.

***Which costs and functions are one-time? Which are ongoing? What are the budget impacts in future biennia?***

The costs and functions are ongoing salary and benefits costs to ELUHO. There would be an ongoing impact in future biennia, equal to that salary and benefits cost, and any increases in salary and benefits provided to this position over time.

<u>Object Detail</u>	<u>FY 2016</u>	<u>FY 2017</u>	<u>Total</u>
A Salaries And Wages	52,621	47,688	100,309
B Employee Benefits	9,072	8,208	17,280
<b>Total Objects</b>	<b>61,693</b>	<b>55,896</b>	<b>117,589</b>

**Agency:** 468 Environmental & Land Use Hearings  
**Decision Package Code/Title:** N4 Restore Essential Support Staff/Admin. Funding  
**Budget Period:** 2015-17  
**Budget Level:** PL - Performance Level

**Recommendation Summary Text:**

This decision package requests a highest priority buyback of funding to restore reductions necessary to achieve the lower base budget, reflected in four decision packages from ELUHO that offer reductions equivalent to 15% of Maintenance Level. Specifically, the current decision package seeks to restore \$83,862 (\$43,431 per fy) to ELUHO's central, across-agency program in an amount adequate to fund two key administrative support functions at 100%, and to restore funding reductions offered for Goods and Other Services, and Travel.

**Fiscal Detail**

<b>Operating Expenditures</b>	<b><u>FY 2016</u></b>	<b><u>FY 2017</u></b>	<b><u>Total</u></b>
001-1 General Fund - Basic Account-State	43,431	43,431	86,862
<b>Total Cost</b>	<b>43,431</b>	<b>43,431</b>	<b>86,862</b>
<b>Staffing</b>	<b><u>FY 2016</u></b>	<b><u>FY 2017</u></b>	<b><u>Annual Average</u></b>
FTEs	.4	.4	.4

**Package Description:**

ELUHO proposed a decision package (one of four from ELUHO) that would reduce ELUHO's appropriation for the 2015-17 biennium by \$173,724 to address a portion of budget reductions equal to 15% of its General Fund maintenance level budget. The proposed reduction would come from salaries and benefits appropriated to the agency for key administrative support personnel, including the Administrative Manager and the Legal Assistant for Case Management, and from substantial reductions in the agency's appropriation for Goods and Other Services, and Travel. ELUHO now proposes to restore some of this funding, as the agency cannot operate effectively in the absence of adequate funding for essential agency functions.

On July 1, 2011 ELUHO became the umbrella agency that administers three quasi-judicial boards. These boards include the Pollution Control Hearings Board and the Shorelines Hearings Board (environmental adjudication program), and the Growth Management Hearings Board (GMHB) (land use adjudication program). ELUHO receives a single appropriation, which it then allots to the environmental and land use adjudication programs, retaining the remainder of appropriated funds in a third, central program which provides fiscal management across the agency and funds common support functions. Support staff are centrally based, support all three Boards, and are funded through the central/Director's program of ELUHO.

Shortly after ELUHO was created, the environmental Boards and the Olympia-based staff of the GMHB co-located, and ultimately reduced the support staff functions and lease arrangements that had previously been in place, for further cost savings. This co-location, combined with the previous effort of the three GMHBs to reduce in size from three separate Boards (9 Members) to one seven-member Board that operates largely from home-based offices, allowed for a new administrative staffing model.

ELUHO proposes to increase central across-agency program expenditures from the rebased program in various cost objects for a total of \$86,862 (\$43,431 per fy) for the 2015-2017 biennium. This increased funding is based on review of expenditures during the 2013-15 biennium and expected needs of the agency for ongoing business needs.

ELUHO seeks to buy back or restore funding for Goods and Other Services and Travel in the amount of \$35,500 (\$17,750 per fy). Increases would be as follows:

- Goods and Other Services by \$20,000 (\$10,000 per fy). Restored funding would be attributable to multiple cost objects, including supplies, printing, employee development and training, subscriptions, and other contractual services.
- Travel costs by \$15,500 (\$7,750 per fy), While ELUHO would still be imposing significant reductions in travel on the various Boards, this restoration of funding would allow the Boards to engage in essential and prioritized travel, including necessary travel for outside SHB members and GMHB members who are regionally based.

In addition, ELUHO proposes to buy back or restore funding in Salaries and Benefits that fund the administrative support personnel that serve all the Boards of ELUHO. ELUHO requests the restoration of funding in the amount of \$51,362 (\$25,681 per fy). This restored funding would be directed as follows:

- Restore Administrative Manager to 100% (\$15,133 per fy)
- Restore Legal Assistant for Case Management to 100% (\$10,548 per fy)

The options to meet a 15% budget reduction across ELUHO are limited. In a decision package offered to cut funding, ELUHO offered reductions in nearly all discretionary cost objects that fund the day-to-day operations of the three Boards, including the support personnel that are necessary for the Boards to carry out their statutory responsibilities to render timely decisions on environmental and land use disputes. By the current decision package, ELUHO seeks to restore some, but not all of the rebased program cuts.

**Goods and Services Cost Object Reductions:** ELUHO has under-expended several discretionary cost objects in the Goods and Other Services category in recent biennia. A small reduction in identified cost objects can be tolerated by the agency, although not in the full amount offered in the decision package which rebases the ELUHO budget in these areas. Cost object ER (Other Contractual Services) funds the agency's contract for court reporting services. Through this contract, the Boards create the statutorily required written record of the evidentiary hearing for review on appeal, in the event there is a further appeal of a case before the Board. As a result, the agency needs sufficient flexibility of funding to address changed expenditures driven by the number of cases that go to hearing, and the length of hearing. This number can vary significantly from fiscal year to fiscal year. The same is true of Attorney General Services (EM), and ELUHO has not offered further cuts from that cost object. Other reductions will limit needed employee training and development funds (Object EG), needed subscriptions for legal periodicals for Board member and judges (Object EJ), and basic supplies and printing costs (Objects EA and EF). These are poor choices for reduction, offer little savings, and place the agency in risk of being unable to carry out basic functions. However, ELUHO has few, if any, other options, other than as discussed in related decision packages.

**Travel:** ELUHO has under-expended the funds allotted for travel in recent biennia. A small reduction in various travel cost objects can be tolerated by the agency. However, the three Boards of ELUHO (PCHB, SHB, and GMHB) are expected to travel to the locale of appeals before them, at least to some extent.

The SHB travels to the site of shoreline appeals and routinely conducts a site visit to aid in the decision making. The SHB is also comprised by law with appointees who are the representatives of the Counties, Cities and DNR. These Board Members must travel to attend hearings, which are usually multi-day matters at various sites around the state. Even if the hearings were held in Olympia, these outside Board Members would incur travel costs. ELUHO must have adequate funding to reimburse them for the costs of attending hearings.

The PCHB routinely travels to Eastern Washington when all witnesses are from that area, in order to save litigants/parties the cost of travel to Olympia. Contentious water rights cases from Eastern Washington are routinely held in that area, an effort acknowledged and appreciated by the parties to those disputes.

Because GMHB Board members work from home offices, all panelists in a case must travel to in-person hearings, which are held in the locale of the appeal. The GMHB has reduced travel by holding prehearing conferences and some hearings on motions or compliance hearings telephonically. However, given the statutory emphasis on recognition of regional differences and local circumstances, the hearing on the merits will continue to require Board member travel, with at least one panelist traveling across the state in each case. Additionally, effective decision-making requires occasional in-person meetings of the Board or panel for case consultation.

**Salaries and Benefits:** Shortly after July 2011 when ELUHO became the administrative umbrella for the three adjudicatory Boards, the agency completed co-location of Olympia functions, and merged the support staff of the environmental boards with that of the GMHB. With this merger, ELUHO finalized a staffing model for the three Boards that relies on four essential administrative support functions, (and one half-time office clerk position available for peaks in the workload). This staffing model is a significant reduction from the

staffing support that existed when the agencies were separate, and the GMHB consisted of three independent Boards in three locations around the state, each with its own support personnel (prior to 2010). The four remaining positions include an Administrative Manager, a Legal Assistant for Case Management, an Administrative Assistant and an Office Assistant. These four positions manage a huge volume of legal pleadings, scheduling, interaction with lawyers and parties, assistance to pro se parties, proofreading of orders, initial processing of new appeals, assistance to Board members, data collection, respond to public records requests, interact with members of the public seeking information concerning the Boards and their decisions, website updates, fiscal management, and processing of the day to day work of the Boards and the eleven (11) professional Board members and Judges that do the substantive work of the Boards.

Reduction of the time of two of these four positions to 80% will slow the work of the Boards, delaying issuance of final orders, scheduling of cases, and related work of the Boards. The Legal Assistant for Case Management is a central and critical position for the output of all the Boards. This position edits all final orders, handles scheduling of all appeals for cases filed with the PCHB and SHB, prepares routine legal documents and orders, and maintains a constantly changing calendar of hearings. Because reduction of the time of this position will slow the work of all three Boards of ELUHO, it is essential that full funding for the position be restored.

ELUHO also seeks funding to restore the Administrative Manager position to 100%. The Administrative Manager works with the ELUHO Director on all matters related to administration of a small agency. Since the Director is appointed from among the Board Members, the Director also carries a full caseload of the substantive work of the Board. Thus, the Director relies heavily on, and must delegate many tasks to the Administrative Manager. Maintaining the position at 100% funding will allow effective day-to-day administration of ELUHO, and allow for supervision of staff, back-up in case of peak workloads, vacations, illness and the like. The Administrative Manager is a critical and key position for managing the appointment of new Board Members, addressing inter-governmental reporting and billing, and assisting the Director with fiscal management of the agency. Keeping this position at 100% funding will provide the agency the capacity to manage the remaining staff so the agency can respond effectively to fluctuations in work load, as well as requests from other agencies for reports, fiscal information and the like.

In short, with the streamlining and co-location the ELUHO Boards have undertaken since 2010, they are now functioning at the minimal effective support staff level. Restoration of funding for essential support personnel is necessary to ensure the ability of the agency to function in a timely and professional manner, avoid turnover, and ensure ELUHO carries out basic statutory functions.

The ELUHO contact for this request is Kathy Mix, Executive Director, (360) 664-9178.

## **Narrative Justification and Impact Statement**

### ***What specific performance outcomes does the agency expect?***

The PCHB/SHB have several performance measures that will be affected by the proposed restoration of funding for administrative support personnel and across-agency discretionary cost items, as follows:

- "Number of months for the PCHB to issue decisions after completion of dispositive motions, or hearing and closure of the record." The target is 3 months. Restoration of essential support staff time will result in continued timely issuance of decisions, necessary to meet this performance measure.
- "Number of months from appeal filing to final resolution of contested Shoreline Hearings Board cases, unless waived by the parties." The target is 6 months, reflecting the requirement of the Shoreline Management Act to decide cases within 180 days of the filing of the appeal. Restoration of essential support staff time will result in continued timely issuance of decisions, necessary to meet this performance measure.

The GMHB has performance measures that will be negatively affected by the proposed reduction of administrative staff and other supporting funds, as follows:

- "Percent of final decisions and compliance orders issued within statutory deadlines." The target for this measure is 100% of final decisions and 90% of compliance orders, and since the 2009-2011 biennium, the GMHB has consistently met this measure, issuing all final decisions within the 180-day deadline and over 90 % of compliance orders within the 45-day deadline. Restoration of funding for adequate staff time will result in timely decision processing times.
- "Encourage settlement of challenges to the Growth Management Act." The target is dismissal before hearing of 50% of cases where settlement extension is requested. The restoration of funding for staff time devoted to procedural assistance to parties will assist in case settlements.

The Legal Assistant for Case Management, backed up by the Administrative Manager, is directly responsible for multiple tasks related

to the following:

- Initial processing, contact with the parties and scheduling and rescheduling of approximately 200 PCHB/SHB appeals per year.
- Preparation and editing of nearly 450 substantive and procedural orders of the PCHB, SHB, and GMHB, with the necessary transmittal documents to the parties.
- Support to 9 individual Board Members and 2 AAJs.

Restoration of funding for these positions will ensure the Boards meet the performance measures related to timely issuance of opinions, as the issuance of opinions and tasks preliminary to final opinion issuance cannot be timely carried out in the absence of adequate support personnel.

## **Performance Measure Detail**

### **Activity:**

No measures submitted for package

### **Incremental Changes**

### ***Is this decision package essential to implement a strategy identified in the agency's strategic plan?***

The agency's strategic plan includes the mission of 1) conducting fair and impartial hearings and timely issuance of clear and well-reasoned decisions, 2) providing expeditious and efficient resolution of environmental appeals through hearings and alternative dispute resolution processes, 3) Fostering a consistent statewide interpretation of Washington's environmental laws, and 4) ensuring enhanced and equal access to justice by assisting parties in understanding the hearing process to ensure meaningful opportunity to be heard. Restoration of funding for support staff who support the Boards will allow the agency to meet these goals.

Administrative support personnel are also essential to meeting many of the specific Goals and Objectives of the Strategic Plan, including 1) efforts to promote mediation and offer procedural assistance, 2) the conduct of hearings outside the Olympia area, 3) improvement of the appeals process through involvement with stakeholders, the Bar Association, and CLE presentations, and 4) legislative and rule-based actions to clarify, simplify and expedite appeals process, among other items.

The proposed reductions also impair implementation of the GMHB Strategic Plan. Reduction of support staff time will negatively affect a number of GMHB Goals and Objectives, including 1) ensuring timely issuance of orders, 2) maintaining a website with key current case and calendar information, 3) maintaining the Board's digest of decisions and client handbook, 4) conducting a biennial survey of clients as part of our LEAN strategy, and 5) ensuring an accessible system for parties to seek resolution under the statute. Reduction of travel funding will curtail GMHB strategic goals to 1) conduct key hearings in person rather than telephonically, 2) hold 90% of substantive hearings in the region of origin, 3) conduct an in-person Board meeting biannually, and 4) improve compliance with GMA, SMA and SEPA through presentations at regional planners' forums and CLEs. Reducing funding for employee development and training (Object EG) limits GMHB goals of 1) providing and supporting on-going professional development of Board members and 2) ensuring support staff are cross-trained to provide flexibility in office functions.

### ***Does this DP provide essential support to one or more of the Governor's Results Washington priorities?***

This decision package is responsive to the Governor's direction that state agencies adapt to potential changes in fiscal conditions and re-base their budgets to a level below Maintenance Level.

Any decision on the funding level for the ELUHO must consider the resources necessary to address the complex matters that likely lie ahead for the adjudicatory Boards that sit within the agency, and how such reduction will undercut essential support to the Governor's Results Washington priorities. The type of cases likely to come before the PCHB/SHB, and the GMHB in the next 2-5 years points out why essential administrative support personnel, along with adequate staffing for the Boards is necessary from a qualitative point of view. The administrative support personnel are essential to the production of decisions, management of schedules and the parties, and the work of the Boards on these important issues simply cannot be accomplished without them. The cases will be complex, controversial, of first impression in this state, and related directly to the Governor's goals, as set out in the Results Washington effort. Note: While this decision package focuses on the direct relationship between the Board's work and Goal 3 of Results Washington (Sustainable energy and A Clean Environment), the Board's work also supports aspects of Goal 2 of Results Washington (Prosperous Economy). Here is a list of likely significant appeals or areas of appeal, before the PCHB/SHB and GMHB in the next several years:

### **PCHB/SHB-Upcoming cases and relationship to Results WA.**

1. Coal export project proposals. Two proposed coal export terminals are undergoing environmental review, one at the Port of Longview (Millennium Bulk Terminals Longview), and one at Cherry Point in Whatcom County (Gateway Pacific Terminal). These

proposals are in different phases of environmental review. Any permits that may be issued after the review will be appealable to either the PCHB or SHB, or both, depending on the type of permit issued. These will be complex, highly contested appeals, on extremely controversial projects. There may be multiple decisions from local government and Ecology under appeal, such as shoreline permits and §401 water quality certifications. These appeals implicate the Governor's priority for Sustainable and Clean Energy.

- See generally, Results WA, Goal 3, Sustainable and Clean Energy, Healthy Fish and Wildlife, and a Clean and Restored Environment, and Goal 2, Prosperous economy.

2. Westway and Imperium bulk liquid storage facility expansions at the Port of Grays Harbor in Hoquiam (crude oil). Based on a December 2013 decision from the Shorelines Hearings Board, these projects are in the process of a SEPA environmental review. Scoping occurred in April and May 2014 (Ecology website), and the process has now moved to preparation of a draft Environmental Impact Statement (EIS). The Board expects further appeals related to permitting of these expanded facilities along Gray Harbor, once the EIS process is complete. While no final date is available, the EIS is likely to be completed in the next biennium. These are complex, controversial projects, and will generate significant legal issues on appeal. These appeals implicate the Governor's Results Washington priorities.
  - See generally, Results WA, Goal 3, Sustainable and Clean Energy, Healthy Fish and Wildlife, and a Clean and Restored Environment, and Goal 2, Prosperous Economy.
3. Water Rights cases. The PCHB handles a steady volume of complex and routine water rights cases. For the current biennium, the Department of Ecology was required, by budget proviso language, to issue 500 water rights decisions in the first fiscal year of each biennium and the agency expects to issue an equivalent number of permits the second fiscal year as well. Ecology anticipates that a similar proviso will be contained in the upcoming budget. It is likely there will be an increasing number of appeals to the PCHB of these water rights decisions. Population growth, economic development, the need for clean, adequate water supplies for drinking water, commercial and agricultural uses, and to sustain fish and the natural environment will continue to present Ecology with difficult water resource decisions, and those will be appealed to the PCHB. Examples of issues presented in recent cases include: 1) Modification of instream flows on the Columbia River, and use of "out-of-kind" mitigation, 2) use of statutory exemptions to deplete instream flows on the Nisqually and Deschutes Rivers, 3) application of the municipal water rights law, 4) use of mitigation for water depletion, 5) dam-related water rights. These cases directly implicate aspects of Goal 3, Results Washington.
  - Goal 3, Outcome Measure 2.2 (Increase the percentage of ESA-listed salmon and steelhead populations at healthy, sustainable levels...);
  - Goal 3, Outcome Measure 3.2 (Increase the percentage of rivers meeting good water quality....).
4. Renewal of National Pollutant Discharge Elimination System (NPDES) General Permits. Ecology renews NPDES General Permits on a rolling basis. These permit appeals are a major workload driver for the PCHB. Expected permit renewals or modifications include the Industrial Stormwater, Municipal Stormwater, and Construction Stormwater permits, among several others. Attachment B to this decision Package is list of General Permits that will be issued in the next biennium and are subject to potential appeal to the PCHB. These permits are complex, and have generated a continuing set of appeals to the PCHB over the last 10 years, as Ecology reissues the permits. For example, the Industrial Stormwater General Permit (ISGP) covers over 1,200 Industrial facilities operating in the State. The last appeal raised over 75 legal issues, generated multiple rounds of summary judgment motions and a several week long hearings. The permit expires on January 1, 2015 and Ecology plans to issue a new ISGP in late 2014, with an effective date of January 1, 2015. These permits, which set water quality discharge standards for multiple sectors, directly affect the Governor's Results Washington Goal 3, Outcomes and Leading Indicators.
  - Goal 3, Healthy Fish and Wildlife, subtopic Pacific Salmon, Outcome Indicator 2.2 (Increase the percentage of ESA-Listed salmon and steelhead populations at healthy, sustainable levels...), and Leading Indicator 2.2.a (Demonstrate increasing trend in Puget Sound Chinook populations....).
  - Goal 3, Clean and Restored Environment, subtopic Clean, Cool Water, Outcome Measure 3.2 (Increase the percentage of rivers meeting good water quality), and Leading Indicator 3.2.a. (Increase the number of projects that provide stormwater treatment or infiltration....).
5. Challenges to permit terms that include or implicate Ecology's new water quality standards that address human health criteria based on fish consumption rate. While the expected new fish consumption rule cannot be directly challenged before the PCHB, the rule will require implementation of new, more rigorous water quality standards, which will be incorporated into NPDES discharge permits. Such permits can be appealed to the PCHB. Ecology expects to adopt the final rule after the 2015 Legislative Session. The PCHB would expect to see appeals of NPDES permits incorporating the new water quality standards, or requirements to reduce toxic discharges, during the 2015-17 biennium and going forward. These will be complex appeals that implicate Results Washington Goals related to Sustainable Energy and a Clean Environment.
  - Goal 3, Healthy Fish and Wildlife, subtopic Pacific Salmon, Outcome Indicator 2.2 (Increase the percentage of ESA-Listed salmon and steelhead populations at healthy, sustainable levels...), and Leading Indicator 2.2.a (Demonstrate increasing trend in Puget Sound Chinook populations....).

6. Aquaculture. The Shorelines Hearings Board has had multiple appeals related to expansion of the commercial aquaculture industry in Washington (the culture or farming of fish, shellfish, or other aquatic plants and animals). Many of these cases have related shoreline permits issued for geoduck or mussel farms. These appeals have raised multiple water quality and shoreline use issues, resulting in multi-day hearings. The Board expects that the continued expansion of the aquaculture industry will result in further appeals. Expansion of the shellfish industry in Washington is addressed directly in Goal 3 of the Results Washington effort.
  - Goal 3, Healthy Fish and Wildlife, subtopic Shellfish, Outcome Measure 2.1 (Increase improved shellfish classification acreage in Puget Sound, and Leading Indicator-2.1.b. (Increase number of implemented agricultural BMPs to improve quality in shellfish growing areas....).
  - Goal 2, Prosperous Economy.
  
7. Hanford. The PCHB has seen a number of appeals over the last several years related to Ecology's enforcement of environmental laws on the Hanford Nuclear Reservation. These have been actions directed at both the U.S. Department of Energy, as well as contractors at the site. One case is currently pending before the Board, and is set for a three week hearing in the fall of 2014.
  - Goal 3, Clean and Restored Environment, subtopic Healthy Lands.
  
8. Air permits and enforcement. The PCHB has a steady load of appeals related to enforcement of the State's air quality laws. Some cases relate to emission standards for large industrial facilities, such as expanded data centers located in Quincy (Microsoft, Yahoo!, Intergate), or large composting facilities in Western WA (Cedar Grove). Others relate to new facilities or the burning of biofuels, and related emissions. There is also a steady load of appeals of smaller enforcement actions taken by local air agencies and Ecology. These cases directly address appropriate air emission standards, addressed in Goal 3, Results Washington.
  - Goal 3, Clean and Restored Environment, subtopic Healthy Air, Outcome Measure 3.3 (Increase percent of population living where air quality meets federal standards...).
  
9. Shoreline Development: The SHB has a steady load of appeals related to development along the state's shorelines. These cases can range from individual dock or bulkhead developments, to large commercial, industrial or municipal development and redevelopment. The appeals routinely raise issues related to habitat protection, loss of eelgrass, cumulative impacts of development, salmon and other aquatic organism protection, public access and recreational use of shorelines, and private property interests, among many others. These cases are time sensitive, and the Board is required to issue decisions within 180 days of the date of appeal. Many aspects of Goal 3 of the Results Washington effort are addressed through these decisions.
  - Goal 3, Working and Natural Lands, subtopic Habitat Protection, Outcome Indicator 4.3(Reduce rate of loss of priority habitats...), and Leading Indicators 4.3.c; 4.3.e, 4.3.f (conversion of marine and freshwater riparian habitat in Puget Sound; increase eelgrass beds in Puget Sound, and increase the acreage of Puget Sound estuaries restored, respectively), and
  - Goal 3, Healthy Fish and Wildlife, subtopic Shellfish, Outcome Measure 2.1 (Increase improved shellfish classification acreage in Puget Sound, and Leading Indicator-Increase number of implemented agricultural BMPs to improve quality in shellfish growing areas....), and
  - Goal 3, Working and Natural Lands, subtopic Outdoor Recreation, Outcome Measure 4.2. (Increase participation in outdoor experiences on state public recreation lands and waters...)
  - Goal 2, Prosperous Economy.
  
10. Forest Practices: The PCHB will continue to see appeals of various forest practice applications and actions by DNR.
  - See generally, Results WA, Goal 3, Working and Natural Lands, subtopic Forest and Farmlands, and related Leading Indicators. (reduce loss of designated forests of long-term commercial significance).

GMHB-Upcoming areas of appeal and relationship to Results WA.

The Growth Management Hearings Board provides the process by which city and county governments are required to implement many of the priorities of Results Washington Goal 3: Sustainable Energy and a Clean Environment. The GMHB regional panels hear appeals related to local government comprehensive plans, development regulations, and shoreline master programs and make legal decisions which enforce the Growth Management Act and the Shoreline Management Act. This adjudication is essential to implementing Goal 3 and its specific targets at the local level. GMHB rulings support all four of the Goal 3 topics, as follows.

1. Sustainable and Clean Energy: The GMHB supports the goal of reducing transportation-related greenhouse gas emissions by ensuring local land use plans reduce sprawl and ensure compact urban development, allowing transit-friendly urban densities, as required by RCW 36.70A.020(1),(2), (3). (Target 3.1.1) The Board adjudicates appeals challenging a local government's compliance with these GMA standards.
  
2. Healthy Fish and Wildlife: GMHB adjudication applies a requirement for each city and county to adopt critical areas ordinances based on best available science. RCW 36.70A.060, .172. The environmental protections provided by these ordinances may clash with

property owners' expectations and are often politically contentious, as well as scientifically technical. GMHB decisions ensure local land use provisions are protective of threatened or endangered species, including state listed species. (Target 3.2.3) Board rulings make sure development along riparian corridors, marine shorelines, and wetlands is limited in order to protect anadromous fish and other aquatic resources. RCW 36.70A.172. (Target 3.2.2) Recent GMHB cases have contributed to protection of water quality through decisions addressing septic system standards under GMA and SMA. (Target 3.2.1(a))

3. **Clean and Restored Environment.** The goal of keeping land, water and air clean is supported by GMHB decisions which apply GMA requirements to protect water quality, especially in Puget Sound, and apply SMA requirements for "no net loss" of shoreline ecological functions. To protect the land, urban development is directed to locations within urban areas; expansion to "greenfields" is discouraged/denied. (Target 3.3.1) To protect water, local governments must use best available science to protect wetlands, critical aquifer recharge areas, streams, and river and channel migration zones. (Target 3.3.2) The Board reviews the city or county record, when challenged, and has the authority to invalidate local ordinances that would frustrate the goals of the GMA or SMA.
4. **Working and Natural Lands.** Under RCW 36.70A.060, local governments must identify and conserve farm land and forests of long-term commercial significance. (Target 3.4.1(a) (c)). GMHB decisions across the state have been vitally important in reducing conversion of agricultural land, in particular. Protection of priority habits for fish and wildlife is also enforced through the Board's adjudication of compliance with the GMA and SMA mandates to identify and protect marine and freshwater riparian habitats, especially in Puget Sound. (Target 3.4.3(a)(c)(e)(f)). Numerous Board decisions also support planning for open space and trails, under GMA or SMA provisions. (Target 3.4.2).

### ***What are the other important connections or impacts related to this proposal?***

Appeals are filed with the PCHB and SHB from decisions by the Departments of Ecology, Fish and Wildlife, Natural Resources, all air authorities, and local governments (and a few miscellaneous other agencies). Parties to these appeals include the following, in addition to the state agencies and local governments: Individual citizens, environmental organizations (both local and national), non-profit groups, individual businesses (from small independently owned businesses to large ones such as Boeing or BNSF), business associations, Tribes, neighborhood associations, consortium or broader-based trade or interest groups, such as Association of Washington Business, Washington Environmental Council, Associated General Contractors, BIAW, Farm Bureau. The GMHB has a similar list of stakeholder groups and interested parties, including Futurewise, citizens, and local governments. These entities and individuals are directly affected by the funding level of the Boards, and any delays in the processing of cases and decisions by the Boards.

### ***What alternatives were explored by the agency, and why was this alternative chosen?***

ELUHO has considered a number of alternatives in the effort to identify budget reduction options equivalent to 15% of its operating budget. These options include:

- 1) *Elimination of either or both the quasi-judicial adjudicatory boards that address appeals of land use and environmental decisions in this state (GMHB and/or PCHB/SHB).* This option considered elimination of the Boards in favor of direct appeals to Superior Court. Based on past fiscal notes attendant to legislation that proposed such an alternative to the GMHB, the cost of this option is prohibitive, as it results in a much higher cost than the cost of the current administrative process. Litigants would be faced with longer appeal times at a much greater cost to the state and the parties.
- 2) *Eliminate statutory deadlines for issuance of decisions.* This option has been discussed, but would require amendment of the APA, the Growth Management Act, and the Shoreline Management Act, or potentially, a separate amendment of Ch. 43.21B RCW to exempt the PCHB from the APA decision deadlines. The Boards would expect any such change in statutory deadlines for issuing decisions to be controversial, as those deadlines exist in order to avoid the very delays discussed above.
- 3) *A change in the composition and size of the GMHB.* This option considered possible further reductions in the size, political and regional make-up of the GMHB. Because of the politically sensitive nature of all issues involving the Growth Management Act in this state, this option is not feasible in the absence of a well-developed stakeholder process, with a resulting consensus as to how a newly constituted GMHB would function and handle expected caseloads going forward. Legislation may be required if the composition or regional make-up of the GMHB were to be changed in any significant way. This would likely be a controversial and difficult legislative undertaking.
- 4) *Legislation to provide ELUHO Boards the authority to appoint pro tem judges or Board members.* Currently, none of the Boards within ELUHO have clear authority to appoint or hire qualified individuals to act as Board members on a temporary or pro tem basis. Such authority could allow the Board the opportunity to handle spikes in caseload through temporary appointments, rather than full time positions. While a viable option, the agency would need adequate funding to pay for the services of these pro tem appointees. Current funding levels, and expected reductions make this option less viable.
- 5) *Further reductions in Goods and Services and Travel expenditures.* ELUHO has considered and rejected further reductions in these supporting cost objects beyond those offered in its decision packages, as risking over-expenditure and as contrary to the mission

of the agency and the Boards it supports. Because the GMHB is regionally based, some travel is essential to attend hearing. The PCHB and SHB also travel to attend hearings under certain circumstances (shoreline or water rights cases in the locale). It is not feasible to further reduce lease and rent costs, as ELUHO only recently relocated to a new facility that meets the functional needs of the Boards (hearing and mediation rooms available), pays a reasonably low market rate, and would, within an unreasonably short period of time, pay another substantial sum (unbudgeted) to relocate.

***What are the consequences of adopting or not adopting this package?***

The consequences of not funding or adopting this restoration of funding for essential support staff and cross-agency discretionary cost items include:

1. Slowed time for issuance of decisions.
2. Lack of adequate capacity to handle administration of a small agency comprised of several Boards, and Governor-appointed Board Members.
3. Lack of adequate funding to sustain basic requirements of Board decision-making, such as travel, necessary legal research tools, contractual services such as court reporters
4. Disappointed constituent groups who expect Board presence in local areas for hearings, and timely decisions so projects may proceed.
5. Poor quality in the finished product of the Boards, due to inadequate staff to review, edit and complete tasks.
6. Recruitment and retention problems, due to part-time nature of support jobs, and need for Board members to take on tasks of clerical positions.
7. Risk that funding will be inadequate for fluctuating costs related to court reporters, Attorney General Services, and required travel of outside or regionally-based Board Members.

***What is the relationship, if any, to the state's capital budget?***

None.

***What changes would be required to existing statutes, rules, or contracts, in order to implement the change?***

None.

***Expenditure and revenue calculations and assumptions***

Assumptions include:

Goods and Services totaling \$10,000 per fiscal year in various discretionary cost objects including supplies, printing, employee development and training, subscriptions, and other contractual services.

Travel costs of \$7,750 per fiscal year.

<b>Position</b>	<b>Current Salary</b>	<b>Proposed Reduction</b>	<b>Salary (A) Reduction</b>	<b>Benefits (B) Reduction</b>	<b>Total A &amp; B Reduction Per Fiscal Year</b>	<b>FTE</b>
Administrative Manager	\$64,440	-20%	(\$12,888)	(\$2,245)	(\$15,133)	-.2
Legal Assistant for Case Management	\$44,820	-20%	(\$8,864)	(\$1,584)	(\$10,548)	-.2

***Which costs and functions are one-time? Which are ongoing? What are the budget impacts in future biennia?***

Restoration of funding would be ongoing, and require sustained funding in future biennia.

<b><u>Object Detail</u></b>	<b><u>FY 2016</u></b>	<b><u>FY 2017</u></b>	<b><u>Total</u></b>
A Salaries And Wages	21,852	21,852	43,704
B Employee Benefits	3,829	3,829	7,658
E Goods\Other Services	10,000	10,000	20,000
G Travel	7,750	7,750	15,500
<b>Total Objects</b>	<b>43,431</b>	<b>43,431</b>	<b>86,862</b>

**Agency:** 468 Environmental & Land Use Hearings  
**Decision Package Code/Title:** P1 Restore GMHB to 7 Members  
**Budget Period:** 2015-17  
**Budget Level:** PL - Performance Level

**Recommendation Summary Text:**

This decision package requests a fourth and lower priority buyback of a reduction proposed in a related decision package, one of four from ELUHO that offered reduction equivalent to 15% of Maintenance Level. Specifically, the current decision package seeks to restore \$242,306 to ELUHO's land use adjudication program in order to provide the Governor the option of appointing a seventh (7th) Board member to the Growth Management Hearings Board in the 2015-17 biennium. In the current biennium, this money was appropriated, but not allotted to the agency, as the Governor chose not to appoint the 7th GMHB position.

**Fiscal Detail**

<b>Operating Expenditures</b>	<b><u>FY 2016</u></b>	<b><u>FY 2017</u></b>	<b><u>Total</u></b>
001-1 General Fund - Basic Account-State	121,153	121,153	242,306
<b>Total Cost</b>	<b>121,153</b>	<b>121,153</b>	<b>242,306</b>
<b>Staffing</b>	<b><u>FY 2016</u></b>	<b><u>FY 2017</u></b>	<b><u>Annual Average</u></b>
FTEs	1.0	1.0	1.0

**Package Description:**

ELUHO proposed a decision package (one of four from ELUHO) that would reduce ELUHO's appropriation for the 2015-17 biennium by \$242,306 to address a portion of budget reductions equal to 15% of its General Fund maintenance level budget. The proposed reduction would come from salaries and benefits appropriated to the agency to support seven full-time Governor-appointed Growth Management Hearings Board members. The decision package proposed a permanent reduction in funding for the land use adjudication program of ELUHO, by reducing the Growth Management Hearings Board to six members. ELUHO now proposes to restore such funding, to preserve the Governor's ability to appoint a seventh GMHB member in light of projected case load associated with legislatively-required local plan updates in 2015 through 2019 and the centrality of growth management to the Results Washington priorities.

By statute, the GMHB consists of seven members, appointed by the Governor, residing in specified areas of the state. RCW 36.70A.250. The Governor may reduce the Board to six members if warranted by the Board's caseload. RCW 36.70A.252. Since May 2011, the GMHB has functioned as a six member Board, and the Governor has not appointed the seventh member. ELUHO has submitted a decision package cutting funding for the seventh GMHB member and a second decision package cutting an additional half-time member position in the second year of the biennium and reducing the working time of all Board members in the first year. These two decision packages assumed no caseload increase during the biennium. This decision package requests to restore funding for the seventh GMHB position. A further decision package requests restoration of funding for the half-time 6th Board member.

The GMHB adjudicates appeals of local jurisdiction land use legislation. Each Board member presides over a set of cases, managing all aspects of conferences, board consultations, and hearings, and writing all opinions and orders. No staff attorneys or other adjudicative staff support the GMHB. Board members work from their homes located throughout the state and hear cases in multiple locations. Appeals are heard and decided by panels of three Board members, and each member serves on case panels across the state. Permanently eliminating appropriation for the seventh Board member would significantly reduce the Board's capacity to meet the caseload increases in 2015 through 2019 associated with legislatively-required updates of city and county land use plans.

The Growth Management Hearings Board is an independent quasi-judicial adjudication board within ELUHO. The GMHB resolves disputes regarding local government compliance with the land use requirements of the Growth Management Act (GMA), Shoreline Management Act (SMA), and associated environmental review under SEPA. The GMHB hears appeals of city and county comprehensive plans, development regulations and shoreline master programs. The Board conducts hearings, evaluates factual and scientific evidence, and produces written legal decisions that interpret and apply the GMA, SMA, and SEPA. The GMHB provides independent review of city and county actions in an expedited, cost-effective and regionally-sensitive process. The GMHB's written decisions and orders must be thorough and legally rigorous to satisfy statutory and case law standards for a quasi-judicial tribunal. An additional GMHB responsibility arises from the statutory authority granted to invalidate city or county legislation that substantially interferes with GMA goals.

The options to meet a 15% budget reduction across ELUHO are limited. The agency is largely composed of statutorily established Boards, with governor-appointed Board members. The majority of the agency budget is dedicated to salary and benefits for board members and limited support personnel. The proposal to reduce funding that supports a 7th full-time GMHB member position was offered despite prior budget reductions and legislative action reducing the GMHB from 9 to 7 members in 2010 and a separate 2015-17 decision package that would result in a loss of funding for one-half of the 6th GMHB position.

The proposal to permanently reduce the GMHB from 7 to 6 members would be a permanent reduction in funding for the GMHB, which less than 5 years ago consisted of 9 full-time members served by 5 office staff and a staff attorney working out of three regional offices. Through a combination of prior budget reductions and legislation in 2010, the former three separate, regionally-based, three-member GMHBs became one board with seven members. The Board closed two offices (Seattle and Yakima), and eliminated support staff positions including the staff attorney who had provided critical back-up to non-attorney Board members. GMHB members now work from home offices (there is one Olympia office-based position). In 2011, the GMHB was brought under the administrative umbrella of ELUHO, and in early 2012, the Olympia office of the GMHB co-located with the other Boards of ELUHO, for further savings in space and support staff costs. The seventh position on the GMHB became vacant March 2011, and the Governor has not appointed a replacement in view of legislatively-postponed caseload.

Although ELUHO offered a permanent elimination of funding for the 7th GMHB member, it now requests restoration of the funding to support this vital function at a time when legislatively-rescheduled city and county comprehensive plan updates are projected to generate significant additional caseload for the Board. In creating the GMHB, the Legislature rejected the idea that land use disputes under the GMA should be subject to local litigation and appeal processes, choosing instead to establish the GMHB as the forum for those contending local government plans and programs fail to comply with the GMA, SMA or SEPA. The Board is expected to render independent, regionally-sensitive review of legislative actions taken by cities and counties, and to do so in a manner that is less formal, less costly, and more expeditious than the superior court. Lack of full funding and staffing risks impairing the capacity of the GMHB to issue timely, well-reasoned decisions that will withstand scrutiny of the parties and appellate courts.

#### Board case load and city/county planning cycles.

The GMHB caseload reflects city and county planning cycles. The GMHB resolves land use disputes in which citizens challenge the legislative actions of cities and counties under the Growth Management Act (GMA), Shoreline Management Act (SMA) and SEPA. Statutory deadlines require local jurisdictions to review and update their land use plans and regulations and their shoreline master programs periodically. These updates generate surges of appeals. For example, the previous round of required comprehensive plan updates for just three counties and their cities (King, Pierce, and Snohomish) resulted in 49 cases filed with the Central Puget Sound GMHB in 2005, the year following the update deadlines. In addition, because these plan updates are comprehensive and cover a broad range of land use and environmental topics, plan updates are often appealed by multiple parties objecting to different aspects of the plan and creating a complex and intense adjudication.

In the last five years, the GMHB workload has been reduced, with fewer appeals filed. The GMHB's recent caseload reduction results, in large part, from legislative action in 2010 which rescheduled the deadlines for cities and counties to update their comprehensive plans from 2011-2014 to 2015-2019. This legislative deferral of deadlines for local government plan updates (RCW 36.70A.130(5)), together with Ecology's extension of deadlines for local governments to update their shoreline master programs (per telephone with Tim Gates, Ecology), has shifted the GMHB workload forward. In 2010-2014 the GMHB new caseload dropped to 20 to 30 petitions per year, as the following chart demonstrates. The GMHB has operated effectively as a six-person board since May 2011 with the reduced caseload, and currently has capacity to take on some additional appeals.

ELUHO's decision package offering further reduction of the GMHB expressly assumes a continuation of lower caseloads, based on the last five years of caseload data, which is as follows:

Actual	Petitions for Review	Cases (after consolidation)
2010	50	33
2011	26	21
2012	30	24
2013	43	29

However, city and county comprehensive plan updates are now statutorily set for June 30, 2015 to June 30, 2018. The lowest likely caseload from this next planning cycle was projected in the GMHB Efficiency and Restructuring Study (Triangle Report, 2009) as 40 to 65 petitions per year anticipated in 2011-2014. The Triangle-projected caseload must now be moved forward to 2015- 2019 (appeals must be filed within 60 days of adoption of the update). The second chart presents the projected workload, based on the changed planning cycle for local governments.

Year	Jurisdictions with Updates Due	Projected Petitions (not consolidated)
2015	79	41
2016	45	65
2017	62	46
2018	50	51
2019		41

In addition to comprehensive plan updates, cities and counties are mandated to update their Shoreline Master Programs. Approximately 105 of 260 updates have been completed. The remainder were to have been finished in 2014, but (per telephone with Ecology's Tim Gates) extensions have been granted and SMP updates are now projected to be completed over the next three years. The GMHB is projecting increased case filings challenging updated SMPs in the 2015-17 biennium.

GMHB case load is also affected by the state economy. With economic recovery, increased commercial, homebuilding, and subdivision development is occurring, particularly in the Board's Western and Central regions. The Board anticipates an incremental increase in appeals of city and county planning actions as a result.

Thus for future staffing, the GMHB must assume an increase in workload, driven primarily by the mandated comprehensive plan and SMP updates. As long as the GMHB remains a 6-member Board, there is capacity on the Board in its current configuration to take on some additional work. However, the elimination of funding for the 7th Board member is ill-advised in light of the projected workload. The Governor should be provided the flexibility to appoint a 7th member to the Growth Management Hearings Board as needed to ensure the GMHB continues to respond to the additional caseload with the same quality and timeliness of decisions going forward.

When new petitions are filed, a GMHB Board member is assigned as presiding officer and a three-member panel is created. By statute, the makeup of the panel must meet requirements for regionalism, one attorney and one former local elected official, and partisan balance. RCW 36.70A.260. The presiding officer conducts conferences and hearings by telephone and in person, prepares and issues all procedural orders, convenes panel consultations pre- and post-hearing, and writes decisions on motions, the final order, compliance, and remand, including findings of fact and conclusions of law. The burden of legal research, legal analysis, and preparation of findings of fact and conclusions of law falls on attorney Board members for not only their own cases but also for other cases where written decisions of non-lawyer Board members need legal review and case law authorities.

Uniquely for State adjudicative bodies, GMHB members work in isolation and with minimal staff support. The GMHB work-from-home structure creates logistical and efficiency challenges. While the ELUHO office in Olympia provides administrative support, GMHB members must manage office equipment, files, correspondence, and telecommunications functions from remote locations while making decisions that require, for highest quality, on-site hearings and intensive ongoing panel deliberations. The difficulty of case management increases, as each Board member serves on multiple panels across the state without a logistical home where panel consultations are convenient and ongoing. Case conferences and some hearings can be held telephonically, but hearings on the merits involve cross-state travel for panel members. GMHB Board members also carry out other duties, such as rule making, digesting decisions for the website, training local planners through quarterly Department of Commerce conferences, maintaining a practice handbook for litigants, and offering mediation services.

Restoration of funding for the 7th GMHB position in the face of projected increases in caseload will offer support to the mission of the GMHB as follows:

*Timely decision-making.* Local governments, private citizens, the environmental and business communities and others rely on the GMHB process for timely and accessible resolution of land use disputes. Restoration of funding will enable seven full-time Board members to handle the additional caseload from appeals of updates to comprehensive plans, critical areas ordinances, and shoreline master programs scheduled for the next two biennia. Longer decision times are contrary to the mandate of the GMA, which requires a

final decision within 180 days of petition filing and a compliance order within 45 days of a hearing. RCW 36.70A.300(2); .330(2). In the absence of restoration of funding, these deadlines may be missed and other types of decisions (reconsideration, compliance, dispositive motions) are likely to slide.

*Retain clarity and quality in final decisions.* With the availability of a 7th Board member, the Board will continue to present well-reasoned, legally-sound decisions with adequate and complete analysis. The ability to produce thorough and thoughtful written decisions is at the core of the GMHB adjudicatory function. The Ninth District Court of Appeals explained how the statutory provisions render the Board members' role "functionally comparable" to that of a judge: an adversarial proceeding, a decision-maker insulated from political influence, a decision based on evidence submitted by the parties, and a decision provided to all the parties on all the issues of fact and law. Buckles, et al., v King County, 191 F.3d 1127, 1134 (1999). Funding for seven full-time Board members ensures that attorney members have time to review and support the written decisions of non-lawyer Board members to meet these high standards and be upheld on appeal.

*Regional balance.* Because the GMHB uniquely rules on local legislative adoption of land use plans and policies, Board composition has been carefully crafted by the legislature to ensure regional balance and statewide political credibility. Reducing the three prior boards to a single 7-member GMHB resulted from an intensive stakeholder process that identified regional balance as a continuing requirement. Triangle reported: "Any [restructuring] option that does not preserve this regional representation is likely to face significant opposition." [Triangle Associates: "Growth Management Hearings Board Efficiency Study and Restructuring Analysis," October 2009, p. 28.] The Triangle Report (p. 24) reflected the opinion that a five-member board "would not be adequate to either handle the workload or preserve regional representation and a balance in the other membership criteria." Thus restoring funding for possible appointment of a 7th Board member ensures the capacity for hearing cases with regional panels as required by RCW 36.70A.260 as the required updates of comprehensive plans and shoreline master programs are appealed.

*Certainty and finality in land use regulation.* Certainty and predictability are lodestar principles of Washington land use law. Thurston County v WWGMHB, 164 Wn.2d 329, 345 (2008). Citizens, businesses, and local governments rely on the GMHB to provide timely resolution of challenges to local comprehensive plans, regulations, and shoreline master programs. In light of the required comprehensive plan updates in the next two biennia, GMHB members will need to work at full strength to manage the projected caseload. Retaining funds to allow appointment of a 7th Board member is essential to ensure timely final determinations of GMA and SMA compliance, and to prevent delays to local jurisdictions seeking planning and regulatory certainty, delays to the development community, and deferrals of needed environmental protections.

The ELUHO contact for this request is Kathy Mix, Executive Director, (360) 664-9178.

## **Narrative Justification and Impact Statement**

### ***What specific performance outcomes does the agency expect?***

Restoration of funding for the 7th GMHB member will assist the GMHB to continue to meet its performance measure for "Percent of final decisions and compliance orders issued within statutory deadlines." The target for this measure is 100% of final decisions and 90% of compliance orders, and since the 2009-2011 biennium, the GMHB has consistently met this measure, issuing all final decisions within the 180-day deadline and over 90 % of compliance orders within the 45-day deadline. The Board has done so since 2011 with six full time members.

However, in light of projected caseload increase due to legislatively-mandated city and county updates in 2015-19 and required shoreline master program updates over the next three years, the Board may have difficulty continuing to meet the deadlines as a 6-member Board, if caseloads are heavier than projected. The Board's statutory authority does not provide for extension of the 180-day final decision deadline based on Board member unavailability. Restoration of funding ensures the capacity for the Board to respond to fluctuating and increasing caseloads and still meet the fundamental statutory requirement to adjudicate and resolve local land use disputes within statutory deadlines.

## **Performance Measure Detail**

### **Activity:**

No measures submitted for package

### **Incremental Changes**

***Is this decision package essential to implement a strategy identified in the agency's strategic plan?***

Restoration of funding will support implementation of strategies in the GMHB strategic plan. In addition to the bottom-line performance measure of rendering timely decisions, the GMHB has adopted strategies to assure accommodation of regional

differences, provision of an accessible and efficient appeals process, and LEAN operations. This decision package increases the Board's ability to meet these objectives.

The GMHB strategic plan requires recognition of regional differences through assigning case panels with two regional Board members and a regional presiding officer and holding substantive hearings in the locale of origin. (Objective 1.6) Availability of a 7th Board member substantially increases flexibility to meet these targets.

GMHB strategies for provision of an accessible adjudicatory process include maintaining a user-friendly website (Objective 2.1), a practice handbook (Objective 2.2) and a case digest (Objective 2.4). Rules of procedure are reviewed biennially and revised as needed. (Objective 1.3) Input from stakeholders is solicited at an annual Board meeting and by a biennial survey. (Objective 2.2, Target 2; Overall target for Goals 1 and 2). Board members make presentations to quarterly regional planner forums and occasional CLEs. (Objective 2.3) These strategies are tasks undertaken by Board members themselves (except web-site maintenance), and will be more effectively implemented if funding for Board members is restored. Even the LEAN operations strategy assumes Board member time to develop data collection and reporting procedures. (Objective 5.1)

***Does this DP provide essential support to one or more of the Governor's Results Washington priorities?***

The Growth Management Hearings Board provides the unique process by which city and county governments are required to implement many of the priorities of Results Washington Goal 3: Sustainable Energy and a Clean Environment. The GMHB regional panels hear appeals related to local government comprehensive plans, development regulations, and shoreline master programs and make legal decisions which enforce the Growth Management Act and the Shoreline Management Act. The GMHB leverages citizen and community efforts in support of Goal 3 priorities by providing an approachable, affordable forum for resolving local environmental and growth management conflicts. This enables citizen and stakeholder groups to efficiently ensure compliance with the GMA and implement Goal 3, without needing a fleet of state regulators or burdening the superior courts. At the same time, the expertise of the GMHB members insures local government efforts are aided and respected. This adjudication is essential to implementing Goal 3 at the local level.

Restoring funding for the seventh full-time GMHB member will enable the Governor to make the appointment as quickly as necessary to ensure responsive and timely resolution of challenges to comprehensive plan and shoreline master program updates in the 2015-17 biennium. GMHB adjudication supports all four of the Goal 3 topics, as follows.

Sustainable and Clean Energy: GMHB adjudication supports the goal of reducing transportation-related greenhouse gas emissions by ensuring local land use plans reduce sprawl and ensure compact urban development, allowing transit-friendly urban densities, as required by RCW 36.70A.020(1),(2), (3). (Target 3.1.1 "reduce transportation-related greenhouse gas emissions..." ) The Board adjudicates appeals challenging a local government's compliance with these GMA standards.

Healthy Fish and Wildlife: GMHB adjudication applies a requirement for each city and county to adopt critical areas ordinances based on best available science. RCW 36.70A.060, .172. The environmental protections provided by these ordinances may clash with property owners' expectations and are often politically contentious. GMHB decisions ensure local land use provisions are protective of threatened or endangered species, including state listed species. (Target 3.2.3 "Increase the percentage of state listed species recovering ...") Board rulings make sure development along riparian corridors, marine shorelines, and wetlands is limited in order to protect anadromous fish and other aquatic resources. RCW 36.70A.172. (Target 3.2.2 "Increase percentage of ESA-listed salmon and steelhead populations at healthy levels...") Recent GMHB decisions have contributed to protection of water quality by addressing septic system standards under GMA and SMA. (Target 3.2.1(a) ""Increase inspections for on-site sewage systems...").

Clean and Restored Environment. The goal of keeping land, water and air clean is supported by GMHB decisions which apply GMA requirements to protect water quality, especially in Puget Sound, and apply SMA requirements for "no net loss" of shoreline ecological functions. To protect the land, urban development is directed to locations within urban areas; expansion to "greenfields" is discouraged/denied. (Target 3.3.1) To protect water, local governments must use best available science to protect wetlands, critical aquifer recharge areas, streams, river and channel migration zones. (Target 3.3.2 "Increase percentage of rivers meeting good water quality...") The Board reviews the city or county record, when challenged, and has the authority to invalidate local ordinances that frustrate the goals of the GMA or SMA.

Working and Natural Lands. Under RCW 36.70A.060, local governments must identify and conserve farm land and forests of

long-term commercial significance. (Target 3.4.1(a) "no net loss of acreage dedicated to working farms..." (c) "Reduce loss of designated forests..."). GMHB decisions across the state have been vitally important in reducing conversion of agricultural land, in particular. Protection of priority habitats for fish and wildlife is also enforced through the Board's adjudication of compliance with the GMA and SMA mandates to identify and protect marine and freshwater riparian habitats, especially in Puget Sound. (Target 3.4.3(a) "increase local jurisdictions' adoption of priority habitats and species..."(c) "Reduce conversion of marine and freshwater riparian habitat in Puget Sound..."(e) "Increase Puget Sound eelgrass beds..."(f) "Increase acreage of Puget sound estuaries restored..."). Numerous Board decisions also support planning for open space and trails, under GMA or SMA provisions. (Target 3.4.2).

The Growth Management Hearings Board's work also supports Results Washington Goal 2 Prosperous Economy: by ensuring city and county land use plans include provisions that match infrastructure to the needs of the population and provide multi-modal transportation options, (RCW 36.70A.020(3), (12), supporting Target 2.3.1 "maintain infrastructure assets," and Target 2.3.2 "[provide] alternative transportation commute methods").

### ***What are the other important connections or impacts related to this proposal?***

Any decision on the funding level for the GMHB should consider the resources necessary to address the complexity and significance of the matters likely to lie ahead for this Board. City and county comprehensive plan updates, originally scheduled with deadlines from 2010-2014, have been legislatively rescheduled for 2015-2019. RCW 36.70A.130(5). These updates of necessity will address important and politically sensitive issues such as urban growth area boundaries, greenhouse gas reduction strategies, development on landslide-prone or flood-prone lands, rural water and septic services, conservation of agricultural land, and the conflict between development pressures and habitat for fish and wildlife.

*Shoreline Master Program Updates.* In addition to comprehensive plan updates, cities and counties are mandated to update their Shoreline Master Programs. Approximately 105 of 260 updates have been completed. The remainder were to have been finished in 2014, but (per telephone with Ecology's Tim Gates) are on track to be completed over the next three years. Appeals to the GMHB have generated complex cases: a current County SMP update is being challenged by three parties raising over 250 legal issues, demonstrating how contentious protection of Washington shores can become.

*Critical Areas Ordinances.* The comprehensive plan updates for all cities and counties with deadlines in the next two biennia require critical areas ordinances to be reviewed as well. Ecology has issued an Update on Wetland Buffers: The State of the Science, which will intensify debate around these issues. The intensity and scientific technicality of challenges to critical areas ordinances is demonstrated by a pending case: San Juan County's process to enact a critical areas ordinance began in 2006 and was not completed until 2013. Appeals to the GMHB involved five petitioners and an intervenor, representing the full range of interests and raising over 100 legal issues.

*Water Resources.* Population growth, economic development, the need for clean and adequate water supplies for drinking water, commercial use, agriculture and to sustain fish and the natural environment present cities and counties with difficult water resource planning decisions. The GMA and SMA contain provisions requiring the GMHB to rule on difficult questions with far-reaching impacts for water supply and water quality. Timely, well-reasoned and legally-sound GMHB rulings are key first steps to negotiated settlements with state agencies or appellate resolution in counties on both sides of the Cascades (Whatcom, San Juan, Kittitas, Spokane).

*Floods and Landslides.* New FEMA flood mapping and a 2010 legislative amendment to the GMA restricting urban growth expansion in the floodplains have yet to be fully incorporated in city and county land use plans and regulations. RCW 36.70A.110(8). The March, 2014 Oso landslide heightens the imperative for planning that acknowledges geologic hazard areas and limits development. Regulations of such lands are politically charged and generate contentious and often highly-technical appeals.

### ***What alternatives were explored by the agency, and why was this alternative chosen?***

ELUHO has considered a number of alternatives to restoring funding for the 7th Board member for the GMHB. Options explored, but rejected, include:

- 1) Elimination of either or both the quasi-judicial adjudicatory boards that address appeals of land use and environmental decisions in this state (GMHB and/or PCHB/SHB). This option considered elimination of the Boards in favor of direct appeals to Superior Court. Based on past fiscal notes attendant to legislation that proposed such an alternative to the GMHB, the cost of this option is prohibitive, as it results in a much higher cost than the cost of the current administrative process. Litigants would be faced with longer appeal times at a much greater cost to the state and the parties. Notably, the GMA has from the outset contained a provision allowing litigants by consent to remove any case directly to superior court within ten days of filing a petition for review. RCW 36.70A.295. To date, no GMA case has been removed to the court under this provision. Litigants clearly prefer the GMHB process.

- 2) Eliminate statutory deadlines for issuance of decisions. This option has been discussed, but would require amendment of both the APA, and the Shoreline Management Act, or potentially, a separate amendment of Ch. 43.21B RCW to exempt the PCHB from the APA decision deadlines. It would also require amendment of the Growth Management Act's 180-day deadline for issuance of a final decision and order. The agency would expect any such change in statutory deadlines for issuing decisions to be controversial, as those deadlines exist in order to avoid the very delays discussed above.
- 3) A change in the composition and size of the GMHB. This option considered possible further reductions in the size, political and regional make-up of the GMHB. Because of the politically sensitive nature of all issues involving the Growth Management Act in this state, this option is not feasible in the absence of a well-developed stakeholder process, with a resulting consensus as to how a newly constituted GMHB would function and handle expected caseloads going forward. Legislation may be required if the composition or regional make-up of the GMHB were to be changed in any significant way. This would likely be a controversial and difficult legislative undertaking. Further, any budgetary savings are speculative, as a reduced Board would presumably need the assistance of a staff attorney or hearing examiners.
- 4) Legislation to provide ELUHO Boards the authority to appoint pro tem judges or Board members. Currently, none of the Boards within ELUHO have clear authority to appoint or hire qualified individuals to act as Board members on a temporary or pro tem basis. Such authority could allow the Board the opportunity to handle spikes in caseload through temporary appointments, rather than full time positions. While a viable option, the agency would need adequate funding to pay for the services of these pro tem appointees. Current funding levels, and expected reductions make this option less viable.
- 5) Further reductions in Goods and Services and Travel expenditures. ELUHO has considered and rejected further reductions in these supporting cost objects beyond those offered in related decision packages, as risking over-expenditure and as contrary to the mission of the agency and the Boards it supports. Because the GMHB members are home based, travel is essential to attend hearings. The PCHB and SHB also travel to attend hearings under certain circumstances (shoreline or water rights cases in the locale). It is not feasible to further reduce lease and rent costs, as ELUHO only recently relocated to a new facility that meets the functional needs of the Boards (hearing and mediation rooms available), pays a reasonably low market rate, and would, within an unreasonably short period of time, pay another substantial sum (unbudgeted) to relocate to less than adequate space.

***What are the consequences of adopting or not adopting this package?***

Restoration of funding for a 7th GMHB member is consistent with the legislative restructuring of the Board in 2010, allows continuation of the regional panel adjudicative structure approved in that legislation, and provides capacity for the Board to absorb projected caseload increases.

If this package is not adopted, the Governor still has the option of requesting a supplemental appropriation for appointment of a 7th Board member if warranted by increased caseload. However, the makeup of the GMHB has always been politically sensitive. The Governor should not have to go through the supplemental appropriation process in order to increase the Board's capacity to handle workload that is foreseeable, given the 2015-2019 legislatively-scheduled updates.

***What is the relationship, if any, to the state's capital budget?***

None.

***What changes would be required to existing statutes, rules, or contracts, in order to implement the change?***

None.

***Expenditure and revenue calculations and assumptions***

It is assumed the cost of the vacant GMHB position would be funded at the same level as current board members which is a salary of \$95,376 and benefits of \$25,777 per fiscal year.

***Which costs and functions are one-time? Which are ongoing? What are the budget impacts in future biennia?***

The costs and functions are ongoing salary and benefits costs to ELUHO. There would be an ongoing impact in future biennia, equal to that salary and benefits cost, and any increases in salary and benefits provided to this position over time.

<b><u>Object Detail</u></b>	<b><u>FY 2016</u></b>	<b><u>FY 2017</u></b>	<b><u>Total</u></b>
A Salaries And Wages	95,376	95,376	190,752
B Employee Benefits	25,777	25,777	51,554
<b>Total Objects</b>	<b>121,153</b>	<b>121,153</b>	<b>242,306</b>

**Agency:** 468 Environmental & Land Use Hearings  
**Decision Package Code/Title:** P2 Restore Support Staff/Admin Funding  
**Budget Period:** 2015-17  
**Budget Level:** PL - Performance Level

**Recommendation Summary Text:**

This decision package requests a lower priority buyback of funding to restore reductions necessary to achieve the lower base budget, reflected in four decision packages from ELUHO that offer reductions equivalent to 15% of Maintenance Level. Specifically, the current decision package seeks to restore \$89,844 (\$44,922 per fy) to ELUHO's central, across-agency program in an amount adequate to fund one administrative support position at 50%, and to restore funding reductions offered for Goods and Services, Travel and Noncapitalized assets.

**Fiscal Detail**

<b>Operating Expenditures</b>	<b><u>FY 2016</u></b>	<b><u>FY 2017</u></b>	<b><u>Total</u></b>
001-1 General Fund - Basic Account-State	44,922	44,922	89,844
<b>Total Cost</b>	<b>44,922</b>	<b>44,922</b>	<b>89,844</b>
<b>Staffing</b>	<b><u>FY 2016</u></b>	<b><u>FY 2017</u></b>	<b><u>Annual Average</u></b>
FTEs	.5	.5	.5

**Package Description:**

ELUHO proposed a decision package (one of four from ELUHO) that would reduce ELUHO's appropriation for the 2015-17 biennium by \$172,944 to address a portion of budget reductions equal to 15% of its General Fund maintenance level budget. The proposed reduction would come from salaries and benefits appropriated to the agency for key administrative support personnel, including the Administrative Manager and the Legal Assistant for Case Management, and from substantial reductions in the agency's appropriation for Goods and Other Services and Travel. ELUHO now proposes to restore some of this funding, as the agency cannot operate effectively in the absence of adequate funding for essential agency functions.

On July 1, 2011 ELUHO became the umbrella agency that administers three quasi-judicial boards. These boards include the Pollution Control Hearings Board and the Shorelines Hearings Board (environmental adjudication program), and the Growth Management Hearings Board (GMHB) (land use adjudication program). ELUHO receives a single appropriation, which it then allots to the environmental and land use adjudication programs, retaining the remainder of appropriated funds in a third, central program which provides fiscal management across the agency and funds common support functions. Support staff are centrally based, support all three Boards, and are funded through the central/Director's program of ELUHO.

Shortly after ELUHO was created, the environmental Boards and the Olympia-based staff of the GMHB co-located, and ultimately reduced the support staff functions and lease arrangements that had previously been in place, for further cost savings. This co-location, combined with the previous effort of the three GMHBs to reduce in size from three separate Boards (9 Members) to one seven-member Board that operates largely from home-based offices, allowed for a new administrative staffing model.

ELUHO proposes to increase central across-agency program expenditures from the rebased program in various cost objects for a total of \$89,844 (\$44,922 fy) for the 2015-2017 biennium. This increased funding is based on review of expenditures during the 2013-15 biennium and expected needs of the agency for ongoing business needs.

ELUHO seeks to buy back or restore funding for Goods and Services, Travel and Noncapitalized assets in the amount of \$43,500 (\$21,750 per fy). Increases would be as follows:

- Goods and Services by \$23,500 (\$11,750 per fy). Restored funding would be attributable to multiple cost objects, including supplies, printing, employee development and training, subscriptions, and other contractual services.
- Travel costs by \$12,000 (\$6,000 per fy). While ELUHO would still be imposing significant reductions in travel on the various Boards, this restoration of funding would allow the Boards to engage in essential and prioritized travel, including necessary travel for outside SHB members and GMHB members who are regionally based.
- Noncapitalized assets in the amount of \$8,000 (\$4,000 fy).

In addition, ELUHO proposes to buy back or restore funding in Salaries and Benefits that fund the administrative support personnel that serve all the Boards of ELUHO. ELUHO requests the restoration of funding in the amount of \$46,344 (\$23,172 fy). This restored funding would be directed as follows:

- Restore part-time office assistant to 50% (\$ 23,172 per fy)

The options to meet a 15% budget reduction across ELUHO are limited. In a decision package offered to cut funding, ELUHO offered reductions in nearly all discretionary cost objects that fund the day-to-day operations of the three Boards, including the support personnel that are necessary for the Boards to carry out their statutory responsibilities to render timely decisions on environmental and land use disputes. By the current decision package, ELUHO seeks to restore some, but not all of the rebased program cuts. This decision package is supplemental to another decision package which seeks a high priority buy back of funding for essential administrative support staff and Goods and Other Services, and Travel funding.

*Goods and Services Cost Object Reductions:* ELUHO has under-expended several discretionary cost objects in the Goods and Other Services category in recent biennia. A small reduction in identified cost objects can be tolerated by the agency, although not in the full amount offered in the decision package which cuts funding. Cost object ER (Other Contractual Services) funds the agency's contract for court reporting services. Through this contract, the Boards create the statutorily required written record of the evidentiary hearing for review on appeal, in the event there is a further appeal of a case before the Board. As a result, the agency needs sufficient flexibility of funding to address changed expenditures driven by the number of cases that go to hearing, and the length of hearing. This number can vary significantly from fiscal year to fiscal year. The same is true of Attorney General Services (EM), and ELUHO has not offered further cuts from that cost object. Other reductions will limit needed employee training and development funds (Object EG), needed subscriptions for legal periodicals for Board member and judges (Object EJ), and basic supplies and printing costs (Objects EA and EF). These are poor choices for reduction, offer little savings, and place the agency in risk of over-expenditure, or unable to carry out basic functions. However, ELUHO has few, if any, other options, other than as discussed in related decision packages.

*Travel:* ELUHO has under-expended the funds allotted for travel in recent biennia. A small reduction in various travel cost objects can be tolerated by the agency. However, the three Boards of ELUHO (PCHB, SHB, and GMHB) are expected to travel to the locale of appeals before them, at least to some extent.

The SHB travels to the site of shoreline appeals and routinely conducts a site visit to aid in the decision making. The SHB is also comprised by law with appointees who are the representatives of the Counties, Cities and DNR. These Board Members must travel to attend hearings, which are usually multi-day matters at various sites around the state. Even if the hearings were held in Olympia, these outside Board Members would incur travel costs. ELUHO must have adequate funding to reimburse them for the costs of attending hearings.

The PCHB routinely travels to Eastern Washington when all witnesses are from that area, in order to save litigants/parties the cost of travel to Olympia. Contentious water rights cases from Eastern Washington are routinely held in that area, an effort acknowledged and appreciated by the parties to those disputes.

Because GMHB Board members work from home offices, all panelists in a case must travel to in-person hearings, which are held in the locale of the appeal. The GMHB has reduced travel by holding prehearing conferences and some hearings on motions or compliance hearings telephonically. However, given the statutory emphasis on recognition of regional differences and local circumstances, the hearing on the merits will continue to require Board member travel, with at least one panelist traveling across the state in each case. Additionally, effective decision-making requires occasional in-person meetings of the Board or panel for case consultation.

*Salaries and Benefits:* Shortly after July 2011 when ELUHO became the administrative umbrella for the three adjudicatory Boards, the agency completed co-location of Olympia functions, and merged the support staff of the environmental boards with that of the GMHB. With this merger, ELUHO finalized a staffing model for the three Boards that relies on four essential administrative support functions, and one half-time office clerk position available for peaks in the workload. This staffing model is a significant reduction from the staffing support that existed when the agencies were separate, and the GMHB consisted of three independent Boards in three locations around the state, each with its own support personnel (prior to 2010). The four remaining positions include an Administrative Manager, a Legal Assistant for Case Management, an Administrative Assistant and an Office Assistant. The fifth position, a half-time office clerk is used to address unusually high demand, and exceptional work process situations. These positions manage a huge volume of legal pleadings, scheduling, interaction with lawyers and parties, assistance to pro se parties, proofreading of orders, initial processing of new appeals, assistance to Board members, data collection, respond to public records requests, interact with members of the public seeking information concerning the Boards and their decisions, website updates, fiscal management, and processing of the day to day work of the Boards and the eleven (11) professional Board members and Judges that do the substantive work of the Boards.

Reduction or loss of funding of the half-time office clerk position will eliminate the ability of the agency to address fluctuating workload, high volumes of appeals to Superior Court, large record preparation for appeals, increased filings due to multiple party appeals, coverage due to unplanned absences and other workload peaks. Using an entry level clerk position to perform these high volume tasks frees up other, more experienced and more well-trained support staff for other, more complex job functions. The absence of the office clerk will slow production at the very times the demand is the highest.

In short, with the streamlining and co-location the ELUHO Boards have undertaken since 2010, they are now functioning at the minimal effective support staff level. Restoration of funding for essential support personnel is necessary to ensure the ability of the agency to function in a timely and professional manner, avoid turnover, and ensure ELUHO carries out basic statutory functions.

The ELUHO contact for this request is Kathy Mix, Executive Director, (360) 664-9178.

## **Narrative Justification and Impact Statement**

### ***What specific performance outcomes does the agency expect?***

The PCHB/SHB have several performance measures that will be affected by the proposed the restoration of funding administrative support personnel and across-agency discretionary cost items, as follows:

- "Number of months for the PCHB to issue decisions after completion of dispositive motions, or hearing and closure of the record." The target is 3 months. Restoration of essential support staff time will result in continued timely issuance of decisions, necessary to meet this performance measure.
- "Number of months from appeal filing to final resolution of contested Shoreline Hearings Board cases, unless waived by the parties." The target is 6 months, reflecting the requirement of the Shoreline Management Act to decide cases within 180 days of the filing of the appeal. Restoration of essential support staff time will result in continued timely issuance of decisions, necessary to meet this performance measure.

The GMHB has performance measures that will be negatively affected by the proposed reduction of administrative staff and other supporting funds, as follows:

- "Percent of final decisions and compliance orders issued within statutory deadlines." The target for this measure is 100% of final decisions and 90% of compliance orders, and since the 2009-2011 biennium, the GMHB has consistently met this measure, issuing all final decisions within the 180-day deadline and over 90 % of compliance orders within the 45-day deadline. Loss of staff time will result in longer decision processing times.
- "Encourage settlement of challenges to the Growth Management Act." The target is dismissal before hearing of 50% of cases where settlement extension is requested. The loss of staff time devoted to procedural assistance to parties may result in fewer case settlements.

## **Performance Measure Detail**

### **Activity:**

No measures submitted for package

### **Incremental Changes**

***Is this decision package essential to implement a strategy identified in the agency's strategic plan?***

The strategic plan for the environmental boards includes the mission of 1) conducting fair and impartial hearings and timely issuance of clear and well-reasoned decisions, 2) providing expeditious and efficient resolution of environmental appeals through hearings and alternative dispute resolution processes, 3) Fostering a consistent statewide interpretation of Washington's environmental laws, and 4) ensuring enhanced and equal access to justice by assisting parties in understanding the hearing process to ensure meaningful opportunity to be heard. Restoration of funding for across agency discretionary cost objects and support staff who support the Boards will allow the agency to meet these goals.

Administrative support personnel are also essential to meeting many of the specific Goals and Objectives of the Strategic Plan, including 1) efforts to promote mediation and offer procedural assistance, 2) the conduct of hearings outside the Olympia area, 3) improvement of the appeals process through involvement with stakeholders, the Bar Association, and CLE presentations, and 4) legislative and rule-based actions to clarify, simplify and expedite appeals process, among other items.

The proposed reductions also impair implementation of the GMHB Strategic Plan. Reduction of across-agency discretionary funds and support staff time will negatively affect a number of GMHB Goals and Objectives, including 1) ensuring timely issuance of orders, 2) maintaining a website with key current case and calendar information, 3) maintaining the Board's digest of decisions and client handbook, 4) conducting a biennial survey of clients as part of our LEAN strategy, and 5) ensuring an accessible system for parties to seek resolution under the statute. Reduction of travel funding will curtail GMHB strategic goals to 1) conduct key hearings in person rather than telephonically, 2) hold 90% of substantive hearings in the region of origin, 3) conduct an in-person Board meeting biannually, and 4) improve compliance with GMA, SMA and SEPA through presentations at regional planners' forums and CLEs. Reducing funding for employee development and training (Object EG) limits GMHB goals of 1) providing and supporting on-going professional development of Board members and 2) ensuring support staff are cross-trained to provide flexibility in office functions.

***Does this DP provide essential support to one or more of the Governor's Results Washington priorities?***

This decision package is responsive to the Governor's direction that state agencies adapt to potential changes in fiscal conditions and re-base their budgets to a level below Maintenance Level.

Any decision on the funding level for the ELUHO must consider the resources necessary to address the complex matters that likely lie ahead for the adjudicatory Boards that sit within the agency, and how such reduction will undercut essential support to the Governor's Results Washington priorities. The type of cases likely to come before the PCHB/SHB, and the GMHB in the next 2-5 years points out why essential administrative support personnel, along with adequate staffing for the Boards is necessary from a qualitative point of view. The administrative support personnel are essential to the production of decisions, management of schedules and the parties, and the work of the Boards on these important issues simply cannot be accomplished without them. The cases will be complex, controversial, of first impression in this state, and related directly to the Governor's goals, as set out in the Results Washington effort. Note: While this decision package focuses on the direct relationship between the Board's work and Goal 3 of Results Washington (Sustainable energy and A Clean Environment), the Board's work also supports aspects of Goal 2 of Results Washington (Prosperous Economy). Here is a list of likely significant appeals or areas of appeal before the PCHB/SHB and GMHB in the next several years:

**PCHB/SHB-UPCOMING CASES AND RELATIONSHIP TO RESULTS WA.**

1. Coal export project proposals. Two proposed coal export terminals are undergoing environmental review, one at the Port of Longview (Millennium Bulk Terminals Longview), and one at Cherry Point in Whatcom County (Gateway Pacific Terminal). These proposals are in different phases of environmental review. Any permits that may be issued after the review will be appealable to either the PCHB or SHB, or both, depending on the type of permit issued. These will be complex, highly contested appeals, on extremely controversial projects. There may be multiple decisions from local government and Ecology under appeal, such as shoreline permits and §401 water quality certifications. These appeals implicate the Governor's priority for Sustainable and Clean Energy.
  - See generally, Results WA, Goal 3, Sustainable and Clean Energy, Healthy Fish and Wildlife, and a Clean and Restored Environment, and Goal 2, Prosperous economy.
2. Westway and Imperium bulk liquid storage facility expansions at the Port of Grays Harbor in Hoquiam (crude oil). Based on a December 2013 decision from the Shorelines Hearings Board, these projects are in the process of a SEPA environmental review. Scoping occurred in April and May 2014 (Ecology website), and the process has now moved to preparation of a draft Environmental Impact Statement (EIS). The Board expects further appeals related to permitting of these expanded facilities along Gray Harbor, once the EIS process is complete. While no final date is available, the EIS is likely to be completed in the next biennium. These are complex, controversial projects, and will generate significant legal issues on appeal. These appeals implicate the Governor's Results Washington priorities.

- See generally, Results WA, Goal 3, Sustainable and Clean Energy, Healthy Fish and Wildlife, and a Clean and Restored Environment, and Goal 2, Prosperous Economy.
3. Water Rights cases. The PCHB handles a steady volume of complex and routine water rights cases. For the current biennium, the Department of Ecology was required, by budget proviso language, to issue 500 water rights decisions in the first fiscal year of each biennium and the agency expects to issue an equivalent number of permits the second fiscal year as well. Ecology anticipates that a similar proviso will be contained in the upcoming budget. It is likely there will be an increasing number of appeals to the PCHB of these water rights decisions. Population growth, economic development, the need for clean, adequate water supplies for drinking water, commercial and agricultural uses, and to sustain fish and the natural environment will continue to present Ecology with difficult water resource decisions, and those will be appealed to the PCHB. Examples of issues presented in recent cases include: 1) Modification of instream flows on the Columbia River, and use of "out-of-kind" mitigation, 2) use of statutory exemptions to deplete instream flows on the Nisqually and Deschutes Rivers, 3) application of the municipal water rights law, 4) use of mitigation for water depletion, 5) dam-related water rights. These cases directly implicate aspects of Goal 3, Results Washington.
    - Goal 3, Outcome Measure 2.2 (Increase the percentage of ESA-listed salmon and steelhead populations at healthy, sustainable levels...);
    - Goal 3, Outcome Measure 3.2 (Increase the percentage of rivers meeting good water quality....).
  4. Renewal of National Pollutant Discharge Elimination System (NPDES) General Permits. Ecology renews NPDES General Permits on a rolling basis. These permit appeals are a major workload driver for the PCHB. Expected permit renewals or modifications include the Industrial Stormwater, Municipal Stormwater, and Construction Stormwater permits, among several others. Attachment B to this decision Package is list of General Permits that will be issued in the next biennium and are subject to potential appeal to the PCHB. These permits are complex, and have generated a continuing set of appeals to the PCHB over the last 10 years, as Ecology reissues the permits. For example, the Industrial Stormwater General Permit (ISGP) covers over 1,200 Industrial facilities operating in the State. The last appeal raised over 75 legal issues, generated multiple rounds of summary judgment motions and a several week long hearings. The permit expires on January 1, 2015 and Ecology plans to issue a new ISGP in late 2014, with an effective date of January 1, 2015. These permits, which set water quality discharge standards for multiple sectors, directly affect the Governor's Results Washington Goal 3, Outcomes and Leading Indicators.
    - Goal 3, Healthy Fish and Wildlife, subtopic Pacific Salmon, Outcome Indicator 2.2 (Increase the percentage of ESA-Listed salmon and steelhead populations at healthy, sustainable levels....), and Leading Indicator 2.2.a (Demonstrate increasing trend in Puget Sound Chinook populations....).
    - Goal 3, Clean and Restored Environment, subtopic Clean, Cool Water, Outcome Measure 3.2 (Increase the percentage of rivers meeting good water quality), and Leading Indicator 3.2.a. (Increase the number of projects that provide stormwater treatment or infiltration....).
  5. Challenges to permit terms that include or implicate Ecology's new water quality standards that address human health criteria based on fish consumption rate. While the expected new fish consumption rule cannot be directly challenged before the PCHB, the rule will require implementation of new, more rigorous water quality standards, which will be incorporated into NPDES discharge permits. Such permits can be appealed to the PCHB. Ecology expects to adopt the final rule after the 2015 Legislative Session. The PCHB would expect to see appeals of NPDES permits incorporating the new water quality standards, or requirements to reduce toxic discharges, during the 2015-17 biennium and going forward. These will be complex appeals that implicate Results Washington Goals related to Sustainable Energy and a Clean Environment.
    - Goal 3, Healthy Fish and Wildlife, subtopic Pacific Salmon, Outcome Indicator 2.2 (Increase the percentage of ESA-Listed salmon and steelhead populations at healthy, sustainable levels....), and Leading Indicator 2.2.a (Demonstrate increasing trend in Puget Sound Chinook populations....).
  6. Aquaculture. The Shorelines Hearings Board has had multiple appeals related to expansion of the commercial aquaculture industry in Washington (the culture or farming of fish, shellfish, or other aquatic plants and animals). Many of these cases have related shoreline permits issued for geoduck or mussel farms. These appeals have raised multiple water quality and shoreline use issues, resulting in multi-day hearings. The Board expects that the continued expansion of the aquaculture industry will result in further appeals. Expansion of the shellfish industry in Washington is addressed directly in Goal 3 of the Results Washington effort.
    - Goal 3, Healthy Fish and Wildlife, subtopic Shellfish, Outcome Measure 2.1 (Increase improved shellfish classification acreage in Puget Sound, and Leading Indicator-2.1.b. (Increase number of implemented agricultural BMPs to improve quality in shellfish growing areas....).
    - Goal 2, Prosperous Economy.
  7. Hanford. The PCHB has seen a number of appeals over the last several years related to Ecology's enforcement of environmental laws on the Hanford Nuclear Reservation. These have been actions directed at both the U.S. Department of Energy, as well as contractors at the site. One case is currently pending before the Board, and is set for a three week hearing in the fall of 2014.
    - Goal 3, Clean and Restored Environment, subtopic Healthy Lands.

8. Air permits and enforcement. The PCHB has a steady load of appeals related to enforcement of the State's air quality laws. Some cases relate to emission standards for large industrial facilities, such as expanded data centers located in Quincy (Microsoft, Yahoo!, Intergate), or large composting facilities in Western WA (Cedar Grove). Others relate to new facilities or the burning of biofuels, and related emissions. There is also a steady load of appeals of smaller enforcement actions taken by local air agencies and Ecology. These cases directly address appropriate air emission standards, addressed in Goal 3, Results Washington.
  - Goal 3, Clean and Restored Environment, subtopic Healthy Air, Outcome Measure 3.3 (Increase percent of population living where air quality meets federal standards...).
  
9. Shoreline Development: The SHB has a steady load of appeals related to development along the state's shorelines. These cases can range from individual dock or bulkhead developments, to large commercial, industrial or municipal development and redevelopment. The appeals routinely raise issues related to habitat protection, loss of eelgrass, cumulative impacts of development, salmon and other aquatic organism protection, public access and recreational use of shorelines, and private property interests, among many others. These cases are time sensitive, and the Board is required to issue decisions within 180 days of the date of appeal. Many aspects of Goal 3 of the Results Washington effort are addressed through these decisions.
  - Goal 3, Working and Natural Lands, subtopic Habitat Protection, Outcome Indicator 4.3(Reduce rate of loss of priority habitats...), and Leading Indicators 4.3.c; 4.3.e, 4.3.f (conversion of marine and freshwater riparian habitat in Puget Sound; increase eelgrass beds in Puget Sound, and increase the acreage of Puget Sound estuaries restored, respectively), and
  - Goal 3, Healthy Fish and Wildlife, subtopic Shellfish, Outcome Measure 2.1 (Increase improved shellfish classification acreage in Puget Sound, and Leading Indicator-Increase number of implemented agricultural BMPs to improve quality in shellfish growing areas...), and
  - Goal 3, Working and Natural Lands, subtopic Outdoor Recreation, Outcome Measure 4.2. (Increase participation in outdoor experiences on state public recreation lands and waters...)
  - Goal 2, Prosperous Economy.
  
10. Forest Practices: The PCHB will continue to see appeals of various forest practice applications and actions by DNR.
  - See generally, Results WA, Goal 3, Working and Natural Lands, subtopic Forest and Farmlands, and related Leading Indicators. (reduce loss of designated forests of long-term commercial significance).

#### GMHB-UPCOMING AREAS OF APPEAL AND RELATIONSHIP TO RESULTS WA

The Growth Management Hearings Board provides the process by which city and county governments are required to implement many of the priorities of Results Washington Goal 3: Sustainable Energy and a Clean Environment. The GMHB regional panels hear appeals related to local government comprehensive plans, development regulations, and shoreline master programs and make legal decisions which enforce the Growth Management Act and the Shoreline Management Act. This adjudication is essential to implementing Goal 3 and its specific targets at the local level. GMHB rulings support all four of the Goal 3 topics, as follows.

1. Sustainable and Clean Energy: The GMHB supports the goal of reducing transportation-related greenhouse gas emissions by ensuring local land use plans reduce sprawl and ensure compact urban development, allowing transit-friendly urban densities, as required by RCW 36.70A.020(1),(2), (3). (Target 3.1.1) The Board adjudicates appeals challenging a local government's compliance with these GMA standards.
  
2. Healthy Fish and Wildlife: GMHB adjudication applies a requirement for each city and county to adopt critical areas ordinances based on best available science. RCW 36.70A.060, .172. The environmental protections provided by these ordinances may clash with property owners' expectations and are often politically contentious, as well as scientifically technical. GMHB decisions ensure local land use provisions are protective of threatened or endangered species, including state listed species. (Target 3.2.3) Board rulings make sure development along riparian corridors, marine shorelines, and wetlands is limited in order to protect anadromous fish and other aquatic resources. RCW 36.70A.172. (Target 3.2.2) Recent GMHB cases have contributed to protection of water quality through decisions addressing septic system standards under GMA and SMA. (Target 3.2.1(a)).
  
3. Clean and Restored Environment. The goal of keeping land, water and air clean is supported by GMHB decisions which apply GMA requirements to protect water quality, especially in Puget Sound, and apply SMA requirements for "no net loss" of shoreline ecological functions. To protect the land, urban development is directed to locations within urban areas; expansion to "greenfields" is discouraged/denied. (Target 3.3.1) To protect water, local governments must use best available science to protect wetlands, critical aquifer recharge areas, streams, and river and channel migration zones. (Target 3.3.2) The Board reviews the city or county record, when challenged, and has the authority to invalidate local ordinances that would frustrate the goals of the GMA or SMA.

4. Working and Natural Lands. Under RCW 36.70A.060, local governments must identify and conserve farm land and forests of long-term commercial significance. (Target 3.4.1(a) (c)). GMHB decisions across the state have been vitally important in reducing conversion of agricultural land, in particular. Protection of priority habits for fish and wildlife is also enforced through the Board's adjudication of compliance with the GMA and SMA mandates to identify and protect marine and freshwater riparian habitats, especially in Puget Sound. (Target 3.4.3(a)(c)(e)(f)). Numerous Board decisions also support planning for open space and trails, under GMA or SMA provisions. (Target 3.4.2).

***What are the other important connections or impacts related to this proposal?***

Appeals are filed with the PCHB and SHB from decisions by the Departments of Ecology, Fish and Wildlife, Natural Resources, all air authorities, and local governments (and a few miscellaneous other agencies). Parties to these appeals include the following, in addition to the state agencies and local governments: Individual citizens, environmental organizations (both local and national), non-profit groups, individual businesses (from small independently owned businesses to large ones such as Boeing or BNSF), business associations, Tribes, neighborhood associations, consortium or broader-based trade or interest groups, such as Association of Washington Business, Washington Environmental Council, Associated General Contractors, BIAW, Farm Bureau. These entities and individuals are directly affected by the funding level of the Boards, and any delays in the processing of cases and decisions by the Boards.

***What alternatives were explored by the agency, and why was this alternative chosen?***

ELUHO has considered a number of alternatives in the effort to identify budget reduction options equivalent to 15% of its operating budget. These options include:

- 1) Elimination of either or both the quasi-judicial adjudicatory boards that address appeals of land use and environmental decisions in this state (GMHB and/or PCHB/SHB). This option considered elimination of the Boards in favor of direct appeals to Superior Court. Based on past fiscal notes attendant to legislation that proposed such an alternative to the GMHB, the cost of this option is prohibitive, as it results in a much higher cost than the cost of the current administrative process. Litigants would be faced with longer appeal times at a much greater cost to the state and the parties.
- 2) Eliminate statutory deadlines for issuance of decisions. This option has been discussed, but would require amendment of the APA, the Growth Management Act, and the Shoreline Management Act, or potentially, a separate amendment of Ch. 43.21B RCW to exempt the PCHB from the APA decision deadlines. The Boards would expect any such change in statutory deadlines for issuing decisions to be controversial, as those deadlines exist in order to avoid the very delays discussed above.
- 3) A change in the composition and size of the GMHB. This option considered possible further reductions in the size, political and regional make-up of the GMHB. Because of the politically sensitive nature of all issues involving the Growth Management Act in this state, this option is not feasible in the absence of a well-developed stakeholder process, with a resulting consensus as to how a newly constituted GMHB would function and handle expected caseloads going forward. Legislation may be required if the composition or regional make-up of the GMHB were to be changed in any significant way. This would likely be a controversial and difficult legislative undertaking.
- 4) Legislation to provide ELUHO Boards the authority to appoint pro tem judges or Board members. Currently, none of the Boards within ELUHO have clear authority to appoint or hire qualified individuals to act as Board members on a temporary or pro tem basis. Such authority could allow the Board the opportunity to handle spikes in caseload through temporary appointments, rather than full time positions. While a viable option, the agency would need adequate funding to pay for the services of these pro tem appointees. Current funding levels, and expected reductions make this option less viable.
- 5) Further reductions in Goods and Services and Travel expenditures. ELUHO has considered and rejected further reductions in these supporting cost objects beyond those offered in its decision packages, as risking over-expenditure and as contrary to the mission of the agency and the Boards it supports. Because the GMHB is regionally based, some travel is essential to attend hearing. The PCHB and SHB also travel to attend hearings under certain circumstances (shoreline or water rights cases in the locale). It is not feasible to further reduce lease and rent costs, as ELUHO only recently relocated to a new facility that meets the functional needs of the Boards (hearing and mediation rooms available), pays a reasonably low market rate, and would, within an unreasonably short period of time, pay another substantial sum (unbudgeted) to relocate.

***What are the consequences of adopting or not adopting this package?***

The consequences of not funding this decision package include:

1. Lack of adequate funding to give the agency flexibility to meet the basic requirements of Board decision-making, such as travel, necessary legal research tools, contractual services such as court reporters.
2. Slowed time for issuance of decisions and management of other clerical tasks, including preparation of records for appeals to Superior Courts, due to inadequate clerical staff to manage peak workloads.

3. Recruitment and retention problems, due to part-time nature of support jobs, and need for Board members to take on tasks of clerical positions.
4. Risk that funding will be inadequate for fluctuating costs related to court reporters, Attorney General Services, and required travel of outside or regionally-based Board Members.

***What is the relationship, if any, to the state's capital budget?***

None.

***What changes would be required to existing statutes, rules, or contracts, in order to implement the change?***

None.

***Expenditure and revenue calculations and assumptions***

Assumptions include:

Goods and Services totaling \$11,750 per fiscal year in various discretionary cost objects including supplies, printing, employee development and training, subscriptions, and other contractual services.

Travel costs of \$6,000 per fiscal year.

Noncapitalized Assets in the amount of \$4,000 per fiscal year.

Restoration of the Half-time Clerical support position. The current salary is \$11,850 plus benefits of \$11,322. Total salary and benefits would be \$23,172.

***Which costs and functions are one-time? Which are ongoing? What are the budget impacts in future biennia?***

Restoration of funding would be ongoing, and require sustained funding in future biennia.

<b><u>Object Detail</u></b>	<b><u>FY 2016</u></b>	<b><u>FY 2017</u></b>	<b><u>Total</u></b>
A Salaries And Wages	11,850	11,850	23,700
B Employee Benefits	11,322	11,322	22,644
E Goods\Other Services	11,750	11,750	23,500
G Travel	6,000	6,000	12,000
J Capital Outlays	4,000	4,000	8,000
<b>Total Objects</b>	<b>44,922</b>	<b>44,922</b>	<b>89,844</b>