

ABO Operational Review – Draft Report

EXECUTIVE SUMMARY

ABO Purpose and Authority:

Pub. Authorities Law § 6:

- (1) The authorities budget office shall:
 - (a) conduct reviews and analysis of the operations, practices and reports of state and local authorities to assess compliance with the provisions of this chapter and other applicable provisions of law;
 - (e) assist state and local authorities in improving management practices and the procedures by which the activities and financial practices of state and local authorities are disclosed to the public;
 - (l) assist assess individual authorities and based upon their ability and resources, set a date by which changes made pursuant to this title shall be implemented;
- (2) The authorities budget office shall have the authority to:
 - (a) request and receive from any . . . local authority . . . such assistance, personnel, information, books, records, other documentation and cooperation as may be necessary to perform its duties;
 - (c) receive and act upon complaints or recommendations from the public or other persons or entities regarding any authority covered by this title;
 - (d) initiate formal investigations in response to complaints or appearances of non-compliance by an authority;
 - (f) publicly warn and censure authorities for non-compliance with this title, and to establish guidelines for such actions;
 - (g) recommend to the entity that appointed the officer or director suspension or dismissal of officers or directors, based on information that is, or is made, available to the public under law;

(i) compel any authority which is deemed to be in non-compliance with this title and title one of this article or article nine of this chapter to submit to the authorities budget office a detailed explanation of such failure to comply;

(3) The reports and non-proprietary information received by and prepared by the authorities budget office shall be made available to the public, to the extent practicable, through the internet.

ECWA Background Information: No issue; no action required.

Results: Issues, staff comments, and action plan listed below.

Best Practice Guide: Tabs 10, 11

INTRODUCTION AND BACKGROUND

ECWA is one of a limited number of public authorities that compensate its board members.

The Erie County Legislature sets the compensation for ECWA Commissioners, but has the power to change the compensation at any time.

Staff Comment: Compensation was originally set to coincide with the salaries paid legislators. Onondaga County Water Authority has five members at a total cost of \$35,000; Monroe County Water Authority has seven members at a total cost of \$ 49,000; Suffolk County Water Authority has 5 members at a total cost of \$92,500. ECWA has three members at a total cost of \$67,500.

The Board has established a dual management structure: Executive Director oversees many of the day-to-day operations; Secretary oversees legal and public information.

Secretary serves as Personnel Officer, Records Management Officers, and FOIL Officer, oversees the Legal Department and is responsible for ensuring the board and senior management have adequate information to make decisions.

Action Taken:

Other executive positions consist of Deputy Director, a Director of Administration and an Executive Engineer.

ECWA reported in 2017 a total of 271 employees.

Staff Comment: The actual number of employees is 233 full and part-time, plus 25 seasonal employees.

Ad Hoc Members Comment: Is the number reported in 2017?

ECWA operated on a calendar fiscal year.

2017: Total revenue: \$73.3 million.

Sale of water:	\$58.5 million
Infrastructure Investment Charge (“IFC”):	\$14.2 million

Total expenses: \$59.6 million.

Debt (Bonds): \$47.2 million

The Authority has three types of customers: small meter (residential), large meter (commercial) and bulk. Bulk customers consist of 16 municipalities and authorities that purchase water from the Authority to then sell to its own customers. The Authority charges customers based on the amount of water used: 2017 rate per 1,000 gallons: \$3.17 for residential; \$2.84 for commercial and \$2.48 for bulk customers.

Staff Comments: The Authority has three types of customers: direct service, leased managed, and bulk. The rates then fall into categories based on meter size for the infrastructure charge and type of customer for the commodity charge.

Compliance Review Objectives: See Pub. Auth. Law § 6, supra.

Compliance Review Scope and Methodology:

ABO Operational Investigation: November 2017 – March 2018

- Reviewed ECWA documents
- Attended board meetings
- Interviewed board members and employees

- Performed other testing *to ensure compliance, promote good governance practices and improve the transparency and accountability of Authority operations.*

Review period: January 1, 2016 through March 31, 2018

Documents reviewed:

- Board meeting minutes
- Board packets
- Policies and procedures
- FOIL requests and related records
- Annual reports required by Pub. Auth. Law
- Authority professional service contracts
- Authority financial records
- Information posted on the Authority's website

Scope Limitation: See below, Issue #1.

REVIEW RESULTS:

ISSUE #1

Issue#1: Incomplete review of FOIL documents and records.

MuckRock (3/3/17); Investigative Post (6/2/16); WKBW (8/29/16); BN (12/22/16)

Staff Comment: Former Secretary sent January 16, 2017 letter to ABO withholding certain documents with attorney-client privileged material. Information could be provided now.

Ad Hoc Members Comment: Board should have been advised of this action. Board had the option to waive or disclose under a confidential agreement.

Action to be Taken:

Sub-issue #1-1: ECWA should provide all requested information regarding FOIL requests and responses to ABO.

Staff Comment:

Ad Hoc Members Comment:

Action to be Taken:

ISSUE #2

Issue #2: Independence and Fiduciary Duty of Board Commissioners

Staff Comment:

Ad Hoc Members Comment: In the words of Harry Truman, the “bucks stop here” with the Board of Commissioners. Commissioners must act in a deliberative but independent manner, hoping to reach consensus, but willing to be in the minority if his/her independent judgment so dictates. Board can listen to the recommendations of its Secretary and staff, but it must not be a rubber stamp.

Applicable Law: Pursuant to Pub. Auth. Law § 2824(1) commissioners shall : (a) execute direct oversight of the authority’s chief executive and other management in the effective and ethical management of the authority (g) perform each of their duties as board members, including but not limited to those imposed by this section, in good faith and with that degree of diligence, care and skill which an ordinarily prudent person in like position would use under similar circumstances, and may take into consideration the views and policies of any elected official or body, or other person and ultimately apply independent judgment in the best interest of the authority, its mission and the public.

Applicable Policy: Policy No. 17.0: Duties and Responsibilities of Erie County Water Authority Board Members

Best Practice Guide: Tabs 1, 2, 8

Action to be Taken:

Sub-issue #2-1: Board must have adequate information to make informed decisions receive in advance of meeting.

Staff Comment: Commissioners are frequently made aware of issues on an individual basis by staff members. Commissioners receive items not made part of their meeting packet. Members are frequently on site individually and consult with staff about many issues. Board packets are not the sole source of their information. Staff could not otherwise address specific examples of when board acted without adequate information because no details were given in ABO draft report. Commissioners have not complained they are not being given adequate information.

Ad Hoc Members Comment: ABO recommends board packages be given to Commissioners at least one week in advance of board meeting. Information must be given to all Commissioners and this same information must be shared with the public so they understand how decisions are being made.

Best Practice Guide: Tabs 15, 19, 26

Action to be Taken:

Sub-issue #2-2: Board should have an employee performance review prior to the approval of employment contracts. All contracts must be reviewed and approved by board.

Staff Comment: Last performance evaluation for Deputy Director was in 2015 and salary adjustment in January 2017 prior to approval of employment contract in April 2017. Board was given copies of the employment contract for Deputy Director prior to meeting.

Commissioners knew its former chair wanted to be appointed as Executive Director, was aware of his qualifications (that were posted on the ECWA website) and had worked with him prior to his appointment.

Ad Hoc Members Comment: Board still has the authority to review this employment contract.

Applicable Policy: Policy No. 27.0: Employee Performance Reviews & Salary Increments

Action to be Taken:

Sub-issue#2-3: All contracts must be reviewed and approved by board.

Staff Comment: Board was aware a severance agreement had been negotiated with a terminated, former employee's lawyer so there was no need to detail everything in a board packet. RFP for an underwriter was discussed at the Finance Committee on July 13, 2016; minutes of July 28, 2016 reflects the Board's discussion and actions. There has been no contract or agreement entered with the underwriter. At the time of the offering, ECWA and the underwriter will enter into a Bond Purchase Agreement.

Ad Hoc Members Comment: There are no minutes posted on website for a Finance Committee meeting held on July 13, 2016. In the Board minutes for July 13, 2016, the Board approved a resolution (Item 4) authorizing the Chairman to execute an agreement with Jefferies.

Action to be Taken:

Sub-issue#2-4: Board should not approve of retainer agreement for emergency legal action without knowing the nature of the emergency.

Staff Comment: ABO review does not address the reason why a utility entity may wish to receive legal advice – not all advice given to in-house counsel results in court proceedings.

Ad Hoc Members Comment: Board might want to disclose more about this engagement and the actual work performed.

Action to be Taken:

Sub-issue #2-5: Governance committee should be keeping Board apprised of governance practices, including transparency, independence, accountability, fiduciary responsibilities, and management oversight (e.g. fiduciary oath)

Staff Comment: Failure to sign the acknowledgement of fiduciary duty does not mean the members are not following their responsibilities. Members signed once this issue was brought to their attention. Board Members are given the PARIS report in their board packets for review and approval.

Ad Hoc Members Comment: PARIS reports filed with the ABO indicated that Commissioners had signed their acknowledgement. Oath could be posted on website under the Commissioner's picture and biography.

Applicable Law: Pub. Auth. Law § 2424 (1)(h) at the time that each member takes and subscribes his or her oath of office, or within sixty days after the effective date of this paragraph if the member has already taken and subscribed his or her oath of office, execute an acknowledgment, in the form prescribed by the authorities budget office after consultation with the attorney general, in which the board member acknowledges that he or she understands his or her role, and fiduciary responsibilities.

Best Practice Guide: Tabs 5, 23

Action to be Taken:

Sub-issue#2-6: Board has the duty to review and, if necessary, correct the minutes of its meetings.

Staff Comment: Board has the right to waive the reading and to move to approve the minutes.

Ad Hoc Members Comment:

Action to be Taken:

ISSUE #3

Issue #3: Board must conduct business in an open and public manner.

Staff Comment:

Ad Hoc Members Comment:

Best Practice Guide: Tab 19

Action to be Taken:

Sub-issue #3.1: Budget sessions should be conducted in an open meeting. Commissioners should receive information during Board meetings, not staff meetings.

Staff Comment: Commissioners begin discussion of the budget with staff in October and that these staff meetings are posted.

Ad Hoc Members Comment:

Best Practice Guide: Tab 19

Action to be Taken:

Sub-issue #3.2: Customers should have access to information regarding planned rate increases, including any evaluations and recommendations made by any consultant.

Staff Comment: Staff indicates press releases in 2014 and 2015 were issued for the 2015 and 2016 amended tariff, indicating an increase for large meter customers, but not by individual meter size. *The Buffalo News* on 11/17/16 did give a range of the increase and ECWA customers could go the ECWA website to see the exact amount. ABO does not reflect that the elimination of the summer surcharge. ECWA files the necessary legal notices to publish its Tariff with the County Clerk and clerk of every municipality,

Ad Hoc Members Comment: ABO draft report indicates no press release was issued after the 2015 and 2016 budget was approved. ECAW officials told ABO that making this information known prior to the Board's formal approval would likely cause significant resistance from its customers. Staff does not indicate which two newspapers of general circulation were used to publish the tariff. Press releases should be posted on website. No press releases on website found in 2014 or 2015.

Applicable Law: Pub. Off. Law § 105

[A] public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys:

- a. matters which will imperil the public safety if disclosed;
- b. any matter which may disclose the identity of a law enforcement agent or informer;
- c. information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;
- d. discussions regarding proposed, pending or current litigation;
- e. collective negotiations pursuant to article fourteen of the civil service law;

f. the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation;

g. the preparation, grading or administration of examinations; and

h. the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof.

Action to be Taken:

Sub-issue #3-3: Board needs to strictly comply with the provisions of the Open Meetings Law regarding executive sessions.

Staff Comment: ABO found only one instance out of 10 when the board did not have the authority to go into executive session.

Ad Hoc Members Comment: Employment agreements must be discussed in open session unless the terms are still being negotiated. Board must announce it is going into executive session and must state on the records the nature of the matter to be discussed and the specific provision under the Open Meetings Law permitting such discussions in executive session. Minutes do not reflect why board is going into executive session.

Best Practice Guide: Tabs 4, 19

Action to be Taken:

Sub-issue #3-4: Board minutes should reflect any discussion or debate regarding a particular item on the agenda and should reflect reports given orally by staff members. Written staff reports should be made and posted on ECWA website.

Staff Comment:

Ad Hoc Members Comment:

Best Practice Guide: Tab 19

Action to be Taken:

Sub-issue #3-4: ECWA must provide complete and accurate public documents in a timely manner in response to any FOIL request.

Staff Comment: Staff contends there is insufficient information within the draft ABO report from which an adequate response may be made. Staff indicates that if a timely response is not given, then the request would be considered as a denial and would be subject to appeal.

Ad Hoc Members Comment: In a few instances, FOIL request revealed other areas in which staff was not complying with certain state mandates. However, these problems were address by the Legal Department once these matters surfaced.

Action to be Taken:

Sub-issue #3-5: Board must have adequate information to consider FOIL appeal and must set forth sufficient reasons for its decision.

Staff Comment: Staff contends there is insufficient information within the draft ABO report from which an adequate response may be made. Staff states two FOIL appeals by Lipsitz Green were addressed by the Board, not the Secretary.

Ad Hoc Members Comment: ABO states three of six appeals were not addressed by the Board. Margaret Murphy will discuss with Committee the two appeals from Lipsitz Green regarding certified payroll records. FOIL appeals do not need to be heard in an open meeting because such appeals are quasi-judicial in nature. Pub. Off. Law § 108 (1).

Action to be Taken:

Sub-issue #3-6: Board should ensure the public has access to materials provided to the Board in advance of any Board action by posting these materials on its website.

Staff Comment: With regard to the ECWA budget process, board members are given copies of the proposed operating and capital budgets. It is possible that the packet distributed to the public does not contain this 80-page budget document. Staff would like clarification as to what is legally required to be posted on the ECWA website.

Ad Hoc Members Comment: Board packets are and will be posted on the ECWA website. Public should have access to any information from which the board relied upon to make any decision.

Appendix A: Information that should be posted on website:

- Professional background, experience and qualifications for executive management team (making more than \$100,000) (some, but not all are posted)
- Authority Performance Measures (posted but does not meet the requirements)
- Authority Schedule of Debt (not easy to find on website)
- Board and committee meeting agendas and minutes (not posted in advance)
- Property Acquisition and Disposition Policies
- Adopted Purchasing Guidelines and Procedures (not posted)
- Annual Investment Report (documents posted are not sufficient)
- Current Year Official Statements (for those authorities issuing debt).

Application Law: Pub. Off. Law § 103 (e): Agency records available to the public pursuant to article six of this chapter, as well as any proposed resolution, law, rule, regulation, policy or any amendment thereto, that is scheduled to be the subject of discussion by a public body

during an open meeting shall be made available, upon request therefor, to the extent practicable as determined by the agency or the department, prior to or at the meeting during which the records will be discussed. Copies of such records may be made available for a reasonable fee, determined in the same manner as provided therefor in article six of this chapter. If the agency in which a public body functions maintains a regularly and routinely updated website and utilizes a high speed internet connection, such records shall be posted on the website to the extent practicable as determined by the agency or the department, prior to the meeting. An agency may, but shall not be required to, expend additional moneys to implement the provisions of this subdivision.

- (e) Open meetings of an agency or authority shall be, to the extent practicable and within available funds, broadcast to the public and maintained as records of the agency or authority. If the agency or authority maintains a website and utilizes a high speed internet connection, such open meeting shall be, to the extent practicable and within available funds, streamed on such website in real-time, and posted on such website within and for a reasonable time after the meeting.

Best Practice Guide: Tabs 5, 6, 7, 14, 16, 19

Action to be Taken:

Sub-issue #3-7: Public notice of board meeting must be conspicuously posted in one or more places and given to the media.

Staff Comment:

Ad Hoc Members Comment: Board packets are and will be posted on the ECWA website.

Application Law: Pub. Off. Law § 104:

1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given or electronically transmitted to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before such meeting.
2. Public notice of the time and place of every other meeting shall be given or electronically transmitted, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
3. The public notice provided for by this section shall not be construed to require publication as a legal notice.

Best Practice Guide: Tab 19

Action to be Taken:

ISSUE #4

Issue #4: Board must ensure its policies and procedures are being followed:

Staff Comment:

Ad Hoc Members Comment:

Best Practice Guide: Tab 19

Action to be Taken:

Sub-issue #4.1: Board must follow its Purchasing Guidelines and Procedures when emergency purchases are approved. Emergency Declaration form must be provided to the Board prior to the approval of any emergency purchase. Minutes should indicate the nature of the emergency.

Staff Comment:

Ad Hoc Members Comment: Purchasing Guidelines and Procedures should be posted on ECWA website. Board need to review Purchasing Guidelines and Procedures at a future Governance Committee meeting.

Best Practice Guide: Tabs 16, 17, 20, 24

Action to be Taken:

Sub-issue #4.1: Board must follow its own policies regarding hiring of employees, including the appointment of executive staff members.

Staff Comment: Commissioners knew its former chair wanted to be appointed as Executive Director, was aware of his qualifications (that were posted on the ECWA website) and has worked with him prior to his appointment. The appointment was discussed with each board member and each was provided with a copy of the proposed contract prior to the meeting. There was at least one other candidate for the position. ABO initially indicated its review would not include action taken in 2018.

Ad Hoc Members Comment: Discussions may have been conducted individually with commissioners and not part of a deliberated discussion in an open meeting.

Applicable Policy: Policy No. 92 – Employment Opportunity Posting

Action to be Taken:

Sub-issue #4.2: Board must follow its own policies regarding employee benefits and performance evaluation or state why it is deviating from such policies.

Staff Comment: The Board sets vacation policy and has the right to change it or make exceptions. Executive was given 16.9 days of vacation, not 30 in his first eight months.

Ad Hoc Members Comment:

Applicable Policy: Policy No. 41.0 - Vacations

Action to be Taken:

RECOMMENDATIONS:

- 1. Board members must acknowledge their fiduciary duty at the time of appointment and re-appointment in accordance with Section 2824 of Public Authorities Law. **Best Practice Guide: Tab 5**
- 2. The board should establish appropriate procedures to verify that all information reported in the Public Authorities Reporting Information System (PARIS) is complete and accurate.
- 3. Board members must perform their duties and responsibilities in good faith and with proper diligence and care. Board members are to act in the best interest of the Authority and the people it serves, and exercise independent judgment on all matters. **Best Practice Guide: Tab 2**
- 4. Board members should receive board meeting packets a minimum of one week prior to the corresponding board meeting. **Best Practice Guide: Tab 19**
- 5. Board members should independently review the necessary information to make informed decisions. **Best Practice Guide: Tabs 5, 19**
- 6. The board should ensure that a justification is provided for all emergency contracts prior to authorization.
- 7. The board should ensure that all procurements and contract payments comply with the requirements contained in the adopted Purchasing Guidelines and Procedures. This includes ensuring that all master purchase orders are approved by the board and limits established by master purchase orders are not exceeded.
- 8. The board should ensure that it reviews all payments approved by the Executive Director and Deputy Director in accordance with its Purchasing Guidelines and Procedures.
- 9. The Authority should ensure that all records and proposed resolutions to be considered by the board are available to the public prior to the board meetings. **Best Practice Guide: Tab 19**

- 10. The Authority should provide notice of public meetings to the media at least 72 hours prior to scheduled meeting in accordance with Section 104 of Public Officers Law. **Best Practice Guide: Tab 19**
- 11. The board should affirmatively seek training from the Committee on Open Government.
- 12. The board must ensure that all meetings and discussions are open to the public in accordance with Section 100 of Public Officers Law. **Best Practice Guide: Tab 19**
- 13. The board should use executive session only for those purposes set forth in Section 105 of Public Officers Law. **Best Practice Guide: Tab 4**
- 14. The board should ensure that motions to enter executive session provide the necessary details to support the exclusion from the public meeting in accordance with Public Officers Law. This includes citing the specific exemption to the Open Meetings Law as well as identifying the specific issue to be discussed. **Best Practice Guide: Tab 19**
- 15. The board must ensure that committee meeting minutes are posted on the Authority's website within two weeks of the meeting in accordance with Public Officers Law Section 106. **Best Practice Guide: Tab 7**
- 16. The board must ensure that meeting minutes accurately reflect information and reports discussed during the board meeting, including any staff reports that are presented. **Best Practice Guide: Tab 19**
- 17. The Authority should provide adequate disclosure of its decisions and appropriately notify all customers of the impact of those decisions, including anticipated rate changes.
- 18. The Authority should comply with all requirements of Article 6 of Public Officers Law regarding Freedom of Information requests, including providing accurate information and providing all information requested. Appropriate explanations should be provided in those situations where the requested information is not provided.
- 19. The board should review all appeals of decisions to deny access to requested information, and provide detailed explanations as to why information is not being provided.

- 20. The Authority should respond to all FOIL requests within five days of receipt, as required by Public Officers Law.

- 21. The Authority should improve accountability and transparency by posting all required information on its web site and making information easier to locate. **Best Practice Guide: Tab 7**