



Alan C. Lloyd, Ph.D.
Agency Secretary

State Water Resources Control Board

Office of Chief Counsel

1001 I Street, 22nd Floor, Sacramento, California 95814
P.O. Box 100, Sacramento, California 95812-0100
(916) 341-5161 ♦ FAX (916) 341-5199 ♦ <http://www.waterboards.ca.gov>



Arnold Schwarzenegger
Governor

TO: Arthur G. Baggett, Jr.
Acting Chairman

FROM: Craig M. Wilson
Chief Counsel
OFFICE OF CHIEF COUNSEL

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SUBJECT: EX PARTE COMMUNICATIONS

Introduction

At your request, I have prepared this updated memo on the subject of ex parte communications. This memo is intended to supersede previous memos from this Office regarding ex parte, all of which were written prior to additions to the State's Administrative Procedure Act (APA) covering ex parte.

Overview

1. If a proceeding is not pending or impending before a board, board members may communicate with members of the public regarding general issues within the board's jurisdiction. Board members may also participate in information gathering efforts such as tours or site visits.
2. If an adjudicatory proceeding is pending or impending before a board, ex parte communications are prohibited.
3. If a rulemaking proceeding is pending or impending before a board, a board member may, if he or she chooses to do so, have ex parte communications. If such communications occur, they must be fully disclosed on the record and must occur prior to the close of the evidentiary record.

What is an Ex Parte Communication

An ex parte communication is an “off-the-record,” private communication between a board member and any person¹ concerning a matter that is pending or impending before the applicable board. Such communications occur in absence of other parties and without notice to other parties. Examples of ex parte communication include:

1. A hearing has been scheduled to consider the assessment of administrative civil liability against a discharger for an illegal discharge. A representative of an environmental group attempts to speak to a new board member regarding the discharger’s alleged long-term violations of environmental laws. Such a communication would be ex parte.
2. A hearing has been scheduled to consider the issuance of a new discharge permit to Dairy X. The president of Dairy X invites a board member out to the site to show him the facility and explain its operation. Such a communication would be ex parte.

It is important to note what is not an ex parte communication. Ex parte rules do not apply where a matter is not pending or impending before a board.² For example, if a new board member would like to tour some of the major discharge facilities within the region, he or she may do so as long as there is not a proceeding regarding the facility pending before the board.

Why Have Rules on Ex Parte Communications

Rules regarding ex parte communications have their roots in constitutional principles of due process and fundamental fairness. Ex parte communications are fundamentally offensive in adjudicatory proceedings because they involve an opportunity by one party to influence the decision maker outside the presence of opposing parties, thus violating due process requirements. Ex parte communications can frustrate a lengthy and painstaking adjudicatory process because certain decisive facts and arguments would not be reflected in the record or in the decisions. Such communications are not subject to rebuttal or comment by other parties. Ex parte communications also may contribute to public cynicism that adjudicatory decisions are based more on politics and undue influence than on the facts, the laws, and the exercise of discretion to promote the public interest. Finally, ex parte contacts may frustrate judicial review since the record would be missing such communications.

¹ Communication with staff members are not covered in this memo, but may be restricted in limited situations based on separation of function principles (e.g., where staff act as advocates before the boards).

² Any doubts regarding whether a proceeding is about to commence should be resolved through consultation with legal counsel.

The Rules Regarding Ex Parte Depend on the Type of Proceeding

The State and Regional Water Board members wear many hats. The boards are part administrator, part planner, part adjudicator. The type of proceeding a board engages in is important in understanding how the rules regarding ex parte operate.

Adjudicatory Proceedings

Adjudicatory proceedings—sometimes called quasi-judicial—are proceedings in which an agency determines facts and applies established rules to those facts in order to formulate a decision regarding rights and duties of specific persons or entities. Adjudicatory proceedings include, but are not limited to, enforcement actions and permit issuance.³ For example, any person who proposes to discharge waste to waters of the state must apply for a discharge permit. The proceeding to consider whether to issue the permit would be adjudicatory. Adjudicatory proceedings are covered by statutory requirements contained in the State's Administrative Procedure Act (APA). Included in the APA is a requirement that there be no ex parte communications during an adjudicatory proceeding. Thus there is a clear statutory requirement prohibiting ex parte communications in adjudicatory proceedings.⁴

In some cases a board may not have initiated or may be in the middle of an adjudicatory proceeding and determine that the proceeding involves broad policy issues. In such cases, the board may choose to terminate or delay the proceeding in order to conduct widely noticed proceedings such as workshops to consider the broader policy issues. Any such proceeding would not be considered part of the original adjudicatory proceeding and would be considered rulemaking in nature.

Rulemaking Proceedings

Rulemaking proceedings are proceedings designed for the adoption, amendment, or repeal of any rule, regulations or standard of general application. Rulemaking proceedings include proceedings to adopt regulations, water quality control plans, policies or guidelines. The APA contains no prohibitions against ex parte communications during rulemaking proceedings, but does require that rulemaking be based on a public record. Because of the latter requirement, any ex parte contacts that occur during a rulemaking proceeding should be fully disclosed on the

³ The line between adjudicatory and rulemaking proceedings is not always bright. For example, prohibition zones may be established in a water quality control plan. If such a zone were small and applied to a specific group, the action to establish the zone is adjudicatory in nature.

⁴ While there is an exception regarding communication(s) on noncontroversial procedural matters, the better practice is to have staff handle such communications.

record.⁵ Thus, no board member should engage in an ex parte communication with any person who intends to influence the decision of the board member in a rulemaking proceeding unless (1) the board member notifies the person that a full disclosure of the ex parte communication will be entered in the board's record and (2) the board member discloses the ex parte communication in the board's record. The disclosure should include the identity of the persons involved in the communication, the approximate date of the communication, and the substance of the communication.

To insure fairness, interested persons should be afforded an opportunity to respond to any ex parte communication(s) after they are disclosed on the record. In addition, no ex parte communications are allowed after the close of the record in a rulemaking proceeding. Finally, if an ex parte communication would lead to a situation where the board member could not be fully objective and unbiased in the proceeding, the board member should recuse himself or herself from participation in the matter.

Conclusion

Ex parte contacts are prohibited where an adjudicatory proceeding is pending or impending. Adjudicatory proceedings include the following:

- ◆ National Pollutant Discharge Elimination System (NPDES) permits
- ◆ Waste Discharge Requirements (WDRs) Administrative Civil Liability (ACL)
- ◆ Cease and Desist Orders Cleanup and Abatement Orders
- ◆ Water Right Permits and Enforcement Actions

Ex parte contacts may take place if a board member wishes, as conditioned above, in rulemaking proceedings. Rulemaking proceedings include:

- ◆ Water quality control plans (e.g., Regional Board Basin Plan Amendments or Statewide Plans such as the Ocean Plan)

⁵ While ex parte communications are not precluded during rulemaking proceedings, a board member may always choose not to engage in such contacts to avoid even the appearance of an impropriety.

- ◆ State Policy for Water Quality Control (e.g., the State Board's Enforcement Policy)
- ◆ Guidelines
- ◆ Informal proceedings (e.g., workshops) on policy issues⁶

⁶ Informal proceedings are defined in the State Board's regulations. (Cal. Code Regs., tit. 23, § 649(b).) They include hearings to gather information relevant to matters within the Board's jurisdiction. For example, recent State Board workshops on what constitutes a subterranean stream and on simplifying the water rights permit process were informal proceedings.