

FACT SHEET
SB 965 (Wright) – As Amended March 28, 2012

State Water Boards: Ex Parte Communications

Summary

SB 965 (Wright) establishes a statutory framework governing ex parte communications between members of the State Water Resources Control Board (or a regional water quality control board) and parties having an interest in adjudicatory matters pending before any of the water boards.¹

SB 965 prohibits a water board member or any person who intends to influence the decision of a board member on a permit-related matter before the water board, from engaging in an oral or written ex parte communication, but excuses the communication if a full disclosure of the communication is entered in the record of proceeding of the board.

Specific Provisions of SB 965

- 1) The bill defines “ex parte communication” as any oral or written communication concerning matters, other than purely procedural matters, under the jurisdiction of the water boards pursuant to specified provisions of state law governing:
 - a) Issuance of prescribed waste discharge requirements; or
 - b) Compliance with permitting provisions of the federal Clean Water Act.
- 2) This bill prohibits a water board member, or any person who intends to influence the decision of a water board member on a waste discharge requirement or Clean Water Act permit matter that is pending before the board, from engaging in ex parte communications.²
- 3) If an ex parte communication occurs, the board member shall notify the interested party that a full disclosure of the ex parte communication shall be entered in the board’s record.
- 4) Once the board member, or the person who engaged in the communication with the board member, fully discloses the ex parte communication, and requests in writing that the communication be entered in the board’s official record of the proceeding, the communication thereby ceases to be an ex parte communication.³

¹ The term “water board” refers to both the State Water Resources Control Board and the regional water quality control boards.

² A board staff member acting in his or her official capacity may engage in ex parte communications.

³ A communication also ceases to be an ex parte communication when 2 or more board members receive substantially the same written communication, or are party to the same oral communication, from the same party on the same matter, and a single board member fully discloses the communication on behalf of the other board member or members who received the communication and requests in writing that it be placed in the board's official record of the proceeding.

Existing Law

- 1) Authorizes the State Water Resources Control Board (SWRCB) to hold any hearings it deems necessary. All hearings held by the SWRCB or by any member shall be open and public. (Water Code § 183)
- 2) Requires a regional water quality control board, after any necessary hearing, to prescribe waste discharge requirements as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge. (Water Code § 13263)
- 3) Directs the state water boards to issue waste discharge requirements as required or authorized by the Federal Clean Water Act,⁴ and directs that the state to act to ensure consistency with the requirements for state programs implementing the Federal Clean Water Act.⁵

Background

I

SB 965 would align state water board ex parte prohibitions with rules applicable to many other state environmental boards and commissions

- 1) SB 965 enacts ex parte rules for water boards that are identical to rules governing proceedings at the former Integrated Waste Management Board

The specific provisions of SB 965 enact rules relating to ex parte communications for the state water boards are derived from former Public Resources Code § 40412, which established ex parte communication rules for all adjudicative/quasi-judicial proceedings of the Integrated Waste Management Board (IWMB).⁶ Like the state water boards, the IWMB was an administrative board within CalEPA, and it approved, denied and amended integrated waste management plans, permits, exemptions, and time extensions.⁷ The Law Revision Commission (LRC) determined these proceedings to be adjudicative in nature.⁸ The determination was made as the LRC was developing fundamental reforms and revisions to adjudicative provisions of the Administrative Procedure Act (APA) that were codified in 1995. During that process, the LRC elected to leave intact the IWMB's ex parte rules and prohibitions.

⁴ See Water Code § 13377

⁵ Water Code § 13372

⁶ Senate Bill 63 (Strickland) abolished the IWMB. (Stats. 2009, ch. 21).

⁷ See, former Pub. Res. Code § 40510

⁸ *Administrative Adjudication: Conforming Revisions*, Memorandum 95-5, p.2, Law Revision Commission, January 20, 1995.

SB 965 applies this same set of time-honored rules to the state water boards. These rules governing ex parte communications were in effect for more than 2 decades, and ably protected the interests of parties, the IWMB, and the public.

2) Coastal Commission

Public Resources Code § 30321 describes the comprehensive adjudicatory/quasi-judicial jurisdiction of the Coastal Commission to include:

“...any permit action, federal consistency review, appeal, local coastal program, port master plan, public works plan, long-range development plan, categorical or other exclusions from coastal development permit requirements, or any other quasi-judicial matter requiring commission action, for which an application has been submitted to the commission.”

Coastal Commission members must disclose in the public record an ex parte communication from an interested person. Once disclosed and placed in the Commission’s official record, a communication ceases to be an ex parte communication.⁹

Notably, SB 965 applies a very similar set of rules to the state water boards. These rules governing ex parte communications have also been in effect for more than 2 decades, and have protected the interests of parties, the Coastal Commission, and the public.

3) Air Resources Board

Regulations adopted by the Air Resources Board (ARB) require an officer or board member to promptly disclose an ex parte communication on the record or the proceeding, and give all parties the opportunity to address it. In a recent study of ex parte communications, the State Library’s California Research Bureau reports that ARB Members receive extensive ex parte communications:

“According to Chairperson Nichols, Board Members...are not only permitted, they’re actually encouraged to communicate with people ... outside of Board proceedings. But when we do have such contacts, we have to disclose the names of the people that we had contact with and the general content of those communications for the record.”¹⁰

⁹ Public Resources Code § 30324

¹⁰ *Ex Parte Communications: The Law and Practices at Six California Boards and Commissions*, p.7, California State Library, California Research Bureau, January 2008

II

Ex parte rules in SB 965 would NOT APPLY in enforcement proceedings Held by the State or a regional water board

As noted above, SB 965 (Wright) APPLIES ONLY to matters before the state or a regional water control board pertaining to: (a) Issuance of Waste Discharge Requirements or (b) Issuance of NPDES permits pursuant to State authorization (by the U.S. EPA) under the Clean Water Act.

SB 965 enacts ex parte rules that apply to matters pending before the water boards pursuant to “*Article 4 (commencing with Section 13260)*.” Article 4 is captioned as follows: “Article 4. Waste Discharge Requirements.”

Similarly, SB 965 also applies these ex parte rules on matters pending before the water boards pursuant to “...*Chapter 5.5 (commencing with Section 13370)*.” Chapter 5.5 is captioned as follows: “CHAPTER 5.5. COMPLIANCE WITH THE PROVISIONS OF THE FEDERAL WATER POLLUTION CONTROL ACT [as amended in 1972] - 13370-13389”

Enforcement proceedings of the water boards are governed by Chapter 5 of the relevant Water Code provisions – NOT by either Article 4 or Chapter 5.5, as referred to above. Chapter 5 is captioned as follows: CHAPTER 5. ENFORCEMENT AND IMPLEMENTATION.¹¹

Therefore, the provisions in the APA prohibiting ex parte communications, but without any curative process in place to excuse the communications, would remain in place and would be applicable in all enforcement proceedings (cease and desist orders, etc) pending before the State Water Board or a regional water board.

III

The Department of Water Resources has questioned current practices of the state water boards concerning its choice and application of ex parte rules

Existing state law confers distinct standing to the Department of Water Resources (DWR) concerning actions and proceedings of the state water boards. Section 184 of the Water Code provides that DWR “shall have an interest and may appear as a party in any hearing held by the [state water] board and may commence or appear in any judicial proceeding brought to inquire into the validity of any action, order, or decision of the board.”

Perhaps its statutorily defined interest in hearings of the state water boards prompted DWR to write to the water board, recommending that it reexamine its position on ex parte communications:

¹¹ See, Water Code §§ 13300 - 13365

“As we understand the Board’s interpretation of the ex parte communications rules, both Board members and staff are prohibited from having contact with parties ...this interpretation essentially precludes all contacts between parties and the Board and staff ...The Department [of Water Resources] believes that such a strict reading of the ex parte communication rules is not in the public interest, because it reduces the ability of the public and parties to seek assistance from the Board and staff on complicated water rights issues and to work toward resolving problems. *We also believe that the Board’s position on ex parte communications is not legally required.*”¹²

IV

Enactment of SB 965 would have no effect on the state water boards’ authorization to administer the federal Clean Water Act

Among other things, the federal Clean Water Act prohibits discharges of pollutants by any person except as authorized by a permit issued under the National Pollutant Discharge Elimination System (NPDES) by the U.S. EPA.¹³ The NPDES permit may be issued by the U.S. EPA or by a state, like California, in which the water boards have been approved by the EPA to issue NPDES permits in accordance with the CWA.

Ex parte rules are not required for state authorization under the Clean Water Act

It has been suggested that any modification to the non-statutory ex parte rules that have been adopted by the water boards would result in loss of EPA authorization to California water boards to issue NPDES permits under the Clean Water Act. This is simply not true.

It should be noted that SB 965 would enact a comprehensive rule prohibiting ex parte communications—yet the U.S. EPA has ruled that EPA’s NPDES State program regulations¹⁴ *do not* require any State that is authorized to administer the NPDES program to prohibit ex parte communications in NPDES proceedings.

The issue came before the U.S. EPA in connection with a re-authorization for Michigan to administer the NPDES program. The National Wildlife Federation urged EPA to disapprove Michigan’s application because Michigan Environmental Quality

¹² Memorandum to Harry M. Schueller, Chief, Division of Water Rights, State Water Resources Control Board, November 22, 2000. See also January 2008. *Ex parte Communications: The Law and Practices at Six California Boards and Commissions*. California Research Bureau, p. 13 [“The Board ‘has wrestled with its ex parte communication standards.’”]

¹³ See e.g., 33 U.S.C. § 1342

¹⁴ The EPA’s NPDES State Program regulations are set forth in 40 C.F.R part 123

officials had engaged in ex parte communications about a contested case currently pending a decision. EPA noted that:

“Nothing in EPA's NPDES State program regulations...requires that States authorized to administer the NPDES program prohibit such ex parte communications. Consequently, the...concern that the Michigan Attorney General has not certified that the laws of Michigan adequately prohibit such ex parte communications, are not sufficient bases for disapproving of any revisions to Michigan's NPDES program.”¹⁵

V

The Little Hoover Commission recommends ex parte rule changes

The Little Hoover Commission (LHC) reports that the self-imposed ex parte rules adopted by the water boards have resulted in a lack of transparency and accountability. The LHC states that a strict prohibition against ex parte communications undermines stakeholder confidence in the system. Among other things, the LHC observed, “water users and others involved in the process complain that ex parte rules limit regulated entities’ ability to discuss important and complex issues with board members. Instead, local governments, businesses and other stakeholders are often limited to just a few minutes of testimony before the board during a formal hearing, despite the profound fiscal impact board decisions can have on these regulated entities.”¹⁶

A key policy recommendation of the LHC includes a suggestion that the water boards revise their ex parte rules to allow communication between the regulated community and the board members, as long as the communication is disclosed at a public meeting.

This is precisely what SB 965 proposes to enact.

Alternatively, the LHC recommends that state and regional board members should exempt themselves entirely from ex parte rules within the APA that prohibit interaction with regulated entities.¹⁷

In support of its recommendations, the LHC quoted testimony it had received from a California homebuilder:

¹⁵ 62 Federal Register, p. 61172 [Approval of Modifications to Michigan's Approved Program To Administer the National Pollutant Discharge Elimination System Permitting Program]

¹⁶ *Clearer Structure, Cleaner Water: Improving Performance and Outcomes at the State Water Boards*, Little Hoover Commission, January 2009, P. 48.

¹⁷ *Clearer Structure, Cleaner Water: Improving Performance and Outcomes at the State Water Boards*, Little Hoover Commission, January 2009, P. 89

“As for the fairness of the process, the regulated community is frustrated by the fact that members of the [State water boards] say they are unapproachable under state law. While it is perfectly acceptable and appropriate to speak with elected city, state and federal officials, it is unfathomable that the same rights do not apply to un-elected board members.”

Support

Atlas Pacific Corporation
Bazz Houston Co.
Buddy Bar Casting
California Contract Cities Association
California League of Food Processors
California Metals Coalition
California Municipal Utilities Association
California Refuse Recycling Council
California State Association of Counties
CASTCO
City of Artesia
City of Auburn
City of Bellflower
City of Ceres
City of Goleta
City of Kingsburg
City of Monterey
City of Placerville
City of Pismo Beach, Public Works Department
City of Redding
City of Rocklin
City of Roseville
City of Santa Maria
City of Vacaville
City of Vernon
City of Yreka
Inland Empire Disposal Association
League of California Cities
Lodi Iron Works, Inc.
Los Angeles County Waste Management Association
Magnesium Alloy Products Company, Inc.
Orange County Board of Supervisors
Pacific Alloy Casting
Pacific Merchant Shipping Association
Peace Officers Research Association (PORAC)
Ranger Die Casting

Regional Council of Rural Counties
Roseville Police Officers Association
San Gabriel Valley Council of Governments
San Juan Water District
Solid Waste Association of Orange County
State of California Auto Dismantlers Association
TST, Inc.
Western Wood Preservers Institute

Opposition

None on file

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