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Ex Parte Communications: The Law and Practices at Six California Boards and Commissions

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Ex Parte Communications: The Law and Practices at Six California Boards and Commissions

By Charlene Wear Simmons, Ph.D.

Requested by Assembly member Loni Hancock

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I F O R N I A R E S E A R C H B U R E A U

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The Law and Practices at Six
California Boards and
Commissions**

By Charlene Wear Simmons, Ph.D.

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EXECUTIVE SUMMARY

This report, which was requested by Assemblymember Loni Hancock, Chair of the Natural Resources Committee, examines the legal limitations on ex parte communications between board commissioners and interested outsiders on the following state boards and commissions:

California Air Resources Board

California Integrated Waste Management Board

State Water Resources Control Board

California Energy Resources Conservation and Development Commission (Energy Commission)

Public Utilities Commission

California Coastal Commission.

Ex parte communications are made in private between an interested party in a decision-making process and an official in a decision-making position. Because they can introduce an element of bias in a decision-making process and violate basic due process requirements, state law requires that the involved officials publicly disclose ex parte communications made during adjudicative proceedings. However the legal requirements and practices for rulemaking (or “quasi-legislative) proceedings vary for the six boards and commissions analyzed for this report, and the public disclosure process evidenced in their meeting minutes is uneven.

BACKGROUND

THE KEY ELEMENT: PROCEDURAL BIAS

An ex parte communication is a private, off the record communication between “...interested outsiders and agency adjudicators.”¹ The one-sided and private nature of an ex parte communication can introduce an improper element of bias into a decision-making process:

Ex parte communications essentially consist of evidence, arguments, or other information relevant to a disputed issue that are transmitted to a judging-type of decision maker in a way that renders the information insufficiently open to challenge and testing by an adversely affected party.²

The core requirements of procedural due process, required by the Fifth and Fourteenth Amendments to the U.S. Constitution whenever an adjudicative governmental action deprives a person of life, liberty, or property, include:³

- Effective prior notice to directly affected parties.
- A meaningful opportunity to participate in the process.
- Decision makers who are as unbiased as possible.

The U.S. Supreme Court has found that the presence of a significantly biased decision maker in an adjudicative government action is a fundamental violation of procedural due process (*Tumey v. Ohio*, 273 U.S. 510, 532 [1927]). Bias can occur when a decision maker receives information relative to a decision that not all of the directly affected parties have had an equal opportunity to hear or challenge. Ex parte communications are a particular concern because they involve an opportunity for one party to influence a decision maker outside the presence of other parties and off the record, violating due process requirements.⁴

There are also nonconstitutional standards that demand decision maker impartiality in an adjudicative process, both statutory and regulatory: “In any situation in which the law imposes the requirement of a hearing, courts normally infer a prohibition against various forms of decision maker bias.”⁵

FEDERAL PROHIBITIONS

The federal *Administrative Procedure Act* defines ex parte contacts as “oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given.”⁶ In formal rulemaking or adjudication, ex parte contacts are forbidden; any such communication must be placed in the public record.

For example, the U.S. Environmental Protection Agency (EPA) has adopted the following regulations regarding ex parte communications (*Code of Federal Regulations*, Title 40, Chapter 1, Subchapter C) for adjudicative decisions in its Acid Rain Program.

§ 78.10 Ex parte communications during pendency of a hearing.

(a)(1) No party or interested person outside EPA, representative of a party or interested person, or member of the EPA trial staff shall make, or knowingly cause to be made, to any member of the decisional body an ex parte communication on the merits of a proceeding under this part.

(2) No member of the decisional body shall make, or knowingly cause to be made, to any party or interested person outside EPA, representative of a party or interested person, or member of the EPA trial staff, an ex parte communication on the merits of any proceeding under this part.

(3) A member of the decisional body who receives, makes, or knowingly causes to be made an ex parte communication prohibited by this paragraph shall file with the Environmental Appeals Board (or, if the proceeding is pending before an Administrative Law Judge, with the Hearing Clerk) for inclusion in the record of the proceeding under this part any such written ex parte communications and memoranda stating the substance of any such oral ex parte communication.

(b) Whenever any member of the decisional body receives an ex parte communication made, or knowingly caused to be made by a party or representative of a party to a proceeding under this part, the person presiding over the proceedings then in progress may, to the extent consistent with justice, require the party to show good cause why its claim or interest in the proceedings should not be dismissed, denied, disregarded, or otherwise adversely affected on account of these ex parte communications.

Similarly, the *Model State Administrative Procedure Act*'s provisions for adjudicative proceedings forbids ex parte communications regarding "any issue in the proceeding."⁷

CALIFORNIA ADMINISTRATIVE PROCEDURE ACT PROHIBITIONS

The California *Administrative Procedure Act* (APA) was significantly amended in 1995 (SB 523) after a seven year statutorily-mandated review by the Law Revision Commission.⁸ The chapter of the state's APA governing administrative adjudication covers about 63 agencies, most of which handle occupational licensing and conduct hearings with Administrative Law Judges. About 95 percent of state adjudicating agencies are not directly covered by the APA and have their own hearings practices, which must meet minimum standards established in the APA.⁹ The California Coastal Commission, the Integrated Waste Management Board, and the Public Utilities Commission (PUC) are exempted from the APA's prohibition on ex parte communications, among other state agencies (including the Board of Equalization).

The California APA prohibits any communication, direct or indirect, to a presiding officer in an adjudicatory proceeding from any party, unless there is notice and an

opportunity for all parties to participate in the communication (*Government Code* §§ 11430.10-11430.80). As defined by the APA (*Government Code* § 11405.80), “presiding officer” means “agency head, member of the agency head, administrative law judge, hearing officer, or other person who presides in the adjudicative proceedings.”*

The APA allows exceptions for communications concerning matters of procedure or practice. If the presiding officer in an adjudicatory hearing receives a communication in violation of the ex parte prohibition, the officer must make full written disclosure, notify all parties, provide an opportunity for the opposing party to address the communication, and reopen the hearing at his or her discretion. Receipt of an ex parte communication is grounds for disqualifying the presiding officer (*Government Code* § 11430.60).

As noted above, the APA prohibition on ex parte communications covers adjudicatory hearings and not proceedings that consider broader policy issues or rulemaking proceedings to adopt or amend regulations. However the APA requires that rulemaking proceedings be based on a public record. Although not required by the APA, some agencies advise that ex parte contacts made during a rulemaking proceeding should be fully disclosed on the record and not allowed after the close of the record. Sometimes there is an unclear line between adjudicatory, and rulemaking proceedings, leading to judgment calls by staff counsels and board members.

* There are varying interpretations of the term “presiding officer” among the Boards examined in this memo. Does it include staff, for example?

CALIFORNIA AIR RESOURCES BOARD

The California Air Resources Board (ARB) falls under the provisions of the California APA. Regulations regarding ex parte communications during adjudicatory proceedings are found in the *California Code of Regulations, Title 17, Division 3, Article 2, Subarticles 3 and 4*. Entitled “Ex Parte Communications,” the regulations prohibit a hearing officer and the executive officer from participating:

...in any communications with any party, representative of party, or any person who has a direct or indirect interest in the outcome of the proceedings about the subject matter or merits of the case at issue, without notice and opportunity of all parties, to participate in communication...No pleading, letter, document or other writing shall be filed...unless service of a copy therefore...is made on all parties to a proceeding.

The regulations require that if a hearing officer or the executive officer receives a communication in violation of the ex parte prohibition, the officer is required to promptly disclose the contents on the record and give all parties the opportunity to address it. The officer has the discretion to reopen a hearing to allow all parties the opportunity to present evidence regarding the subject of the ex parte communication. Receipt of ex parte communications may be grounds for the disqualification.

As noted above, the APA does not require disclosure of ex parte communications in rulemaking proceedings or in quasi-legislative proceedings that consider broad policy questions. However the minutes of ARB meetings indicate that Board Members receive and disclose extensive ex parte communications. According to Chairperson Nichols, Board Members:

...are not only permitted, they're actually encouraged to communicate with people about rulemakings 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

The Board consistently follows this policy at its meetings. For example, at the end of its July 26, 2007, meeting, ARB Members disclosed their ex parte contacts, two of which are presented below (see <http://www.arb.ca.gov/board/mt/2007/mt072607.txt> for the full record of disclosures). The amount of disclosure varied considerably by Board Member. There was no opportunity for persons to respond to the disclosures at that meeting, as it closed shortly after the ex parte disclosures were made.¹¹

Board Member Roberts:

- On April 4th, I met with Building Industry Association Officials, San Diego County. And participating in that meeting were Mike Reynolds, Paul Trayon, Mike Shaw, and Scott Molloy. And the conversation involved staff proposals including availability of engines in the new tiers, repowering issues, and similar issues on the lines of the testimony that we heard in May.

- On April 5th, I met with the Associated General Contractors of San Diego. And participating in that meeting were John Dunlap, Mike Shaw, Mike Carcioppolo. The items covered were cost and implementation schedules, distribution of engine types, assembly line supply issues, warrantee issues, repowering issues, possible solutions focused on time lines, advantage of new credit for changes of engine fleet, changes of Carl Moyer program, and other similar programs.
- And on April 11th, I had a conference call with the National Electrical Contractor's Association (NECA). And participating in that along with staff member Gary Rotto, Karen Prescott from the NECA, and Andre Berg from NECA. And the discussion was about the provisions of the proposed regulations that focused on the impact of the regulations on the evaluation of the on-road diesel equipment and that subsequent impact on a company's bonding capacity.
- On May 17th, there was a conference call with Bonnie Holmes-Gen, the American Lung Association, and Don Anair of the Union of Concerned Scientists (UCS). Gary Ratto of my staff also participated in that. And that conversation was about a number of things, including postcards from San Diegans advocating for approvals of the rules, a study conducted by UCS demonstrated health impacts. We discussed the need for regulations...Talked about the time lines for adoption. Touched on the economic impacts and analysis. Talked about Tier 4 engines not required in the near future. Discussed the NO_x reduction proposal, its effect on South Coast and the San Joaquin Air Districts and whether NO_x reductions could go further. Discussed the reasoning for fleet average versus equipment requirements. Discussed whether regulations should have a section on sensitive sites near construction sites. Discussed the possible need for a sunseting of the low use exemption. And discussed the increased enforcement of the diesel control measure to assure that parties affected are in compliance.
- On July 12th, I again met with the Associated General Contractors (AGC) of San Diego. Brad Barnum and Jim Ryan of AGC and Mike Furby of Marathon Construction were in the meeting with a discussion of the Construction Industry Air Quality Coalition (CIAQC) proposal, including maintaining period goals while creating flexibility on an annual basis and goals for 2025. Gary Ratto of my staff was also in that meeting.
- On July 17th, there was a call with Don Anair, Union of Concerned Scientists, and Kathryn Phillips with Environmental Defense. Gary Ratto of my staff participated in that. And that concerned the new staff proposals and the dates of compliance.

Board Member Sperling:

- May 3rd, I met in Davis with Kathryn Phillips, Environmental Defense; Diane Bailey, Natural Resources Defense Counsel (NRDC); and Don Anair regarding the testimony they've presented today, the same issues.
- July 12th, with Jane Lea representing Job Corp. And her concerns have been dealt with by the staff proposal I understand.

- Conference call with Diane Bailey, NRDC; Don Anair, Union of Concerned Scientists on July 18th regarding their testimony. The same issues that Supervisor Roberts described.
- And July 18th, a call with John Dunlap and Mike Lewis about the issues that were much discussed today.

CALIFORNIA INTEGRATED WASTE MANAGEMENT BOARD

The California Integrated Waste Management Board (CIWMB) is statutorily exempted from the APA's provisions regarding ex parte communications in adjudicatory proceedings. The CIWMB holds only two or three of these quasi-judicial proceedings every year and all other matters are quasi-legislative.¹² The *Public Resources Code* § 40412 establishes the following definition of ex parte communications for the CIWMB:

“...any oral or written communication concerning matters, other than purely procedural matters, under the board's jurisdiction which are subject to a rollcall vote...”

The statute provides that no board member or person (except a staff member of the board acting in an official capacity) may conduct an ex parte communication. However if an ex parte communication occurs, the board member is to notify the interested party that a full disclosure of the communication will be entered in the board's record. The statute also provides that once a board member discloses the ex parte communication in writing and requests that it be entered in the board's official record of the proceeding, it is no longer considered an ex parte communication. Similarly, if two or more board members receive substantially the same communication and one discloses in writing and it is entered in the record, the communication is no longer considered an ex parte communication.

Any person who violates the provisions of *Public Resources Code* §§ 40411 or 40412 regarding ex parte communications is punishable by a fine of not more than \$50,000 or by imprisonment for not more than one year in the county jail or in state prison, or by both that fine and imprisonment (*Public Resources Code* § 40413). Furthermore, upon request of any person, or on his/her own initiative, the Attorney General may file a civil complaint in the superior court of the county in which the board has its principal office alleging that a board member has knowingly violated *Public Resources Code* § 40412, and asking that the member be removed from office. If the board member is found to be guilty, the judgment is removal from office (*Public Resources Code* § 40414).

According to the CIWMB's Chief Counsel, the Board receives hundreds of written and oral ex parte communications every month. The CIWMB's policy is to log all communications on items that might someday come to a roll call vote, even a year or two later. They are entered into a detailed database and are maintained as public records. Since they are usually logged prior to committee or Board meetings, their disclosure is not evident in the minutes of CIWMB meetings. Only those ex parte communications that occur at the last minute before a board meeting are disclosed at the Board meetings and thus are evident in the meeting minutes.¹³

A review of CIWMB meeting transcripts indicates that meetings begin with disclosure of recent (not already disclosed in writing) ex parte communications by Board Members. At its May 2003 meeting, the Chair opened the meeting and immediately asked for “ex partes,” as described below:¹⁴

Board Member Jones:

...on the ex parte, I saw a letter from Californians Against Waste and the Sierra Club on the tire allocation issues and then a letter from Compton Community College that I think we all got.

Chairperson Moulton-Patterson:

Okay. So you will ex parte for everyone. Because I didn't have a chance to ex parte the letter from Mark Murray, Californians Against Waste, and Bill McGavern, Sierra Club, talking about—they're concerned with back-end cleanup and tire burning technologies as a waste management strategy and our positions on it. So that has been ex parte'd.

Board Member Peace:

I had the same letters Steve did. Other than that, I don't have any to report.

Vice Chairperson Medina:

...same letter from Compton Community College. A letter from Karen Graboza in regard to Agenda Item Number 29.

After breaks at CIWMB meetings, Board Members again detail “ex partes” primarily to disclose conversations that occurred during the break. This disclosure pattern of recent ex parte communications appears to be standard at CIWMB meetings.

STATE WATER RESOURCES CONTROL BOARD

The State Water Resources Control Board (SWRCB) is subject to the APA. The Board has wrestled with its ex parte communication standards. In 2000, the Senior Staff Counsel at the Department of Water Resources wrote to the Board recommending that it reexamine its position on ex parte communications during a water rights hearing:¹⁵

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 during water rights hearings...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.

In 2001, the Chief Counsel of the SWRCB sent a memorandum to the Acting Board Chair establishing a definition of ex parte communications as "...a communication to a board member about a pending water board matter that occurs in the absence of other parties to the matter and without notice and opportunity for all parties to participate in the communication."¹⁶ This definition was maintained in a 2006 legal analysis by the Chief Counsel (which superseded the 2001 memorandum), as were the following three guides for communications with board members:¹⁷

1. If a proceeding is not pending or impending before a water board, board members may communicate with the public and governmental officials regarding general issues within the water board's jurisdiction... [and] participate in information gathering efforts such as tours or site visits.
2. If an adjudicative proceeding is pending or impending before a water board, ex parte communications with that water board's members regarding an issue in that proceeding are prohibited.
3. If a rulemaking or other proceeding is pending or impending before a water board, a board member may, if he or she chooses to do so, have ex parte communications regarding issues in that rule making.

Adjudicatory proceedings: SWRCB regulations (*California Code of Regulations*, Title 23, § 648) conform to the APA relative to adjudicatory proceedings, including the limitations on ex parte communications. The Chief Counsel of the Board advises that in the event that a board member receives a prohibited ex parte communication during an adjudicatory proceeding, the board member must disclose the communication on the record.¹⁸

Disclosure requires either (1) including a written ex parte communication in the record, along with any response from the board member, or (2) memorializing an oral

communication by including a memorandum in the record stating the substance of the communication, identifying who was present at the time of the communication, and any response from the board member. The board member must notify all parties of the ex parte disclosures.

In June 2005, the Chief Counsel opined that waivers of waste water discharge requirements are subject to the procedural requirements for adjudicatory proceedings although some waivers, such as Basin Plan amendments, might follow quasi-legislative procedures (which do not require disclosure). He pointed out the importance of that determination, and its "...implications for the type of process that must be followed, whether *ex parte* contacts are allowed, and the standard for judicial review."¹⁹

Rulemaking/Quasi-legislative proceedings: Rulemaking proceedings are "...designed for the adoption, amendment, or repeal of any rule, regulation, or standard of general application."²⁰ These include, for example, water quality control plans, state policy for water quality control, regulations and guidelines. Board disclosure of ex parte communications during rulemaking proceedings is recommended by the Board's Chief Counsel, using the guidelines for disclosure during adjudicatory hearings.

Other proceedings: The Chief Counsel has advised the SWRCB that various other proceedings the SWRCB conducts are neither adjudicative nor quasi-legislative. These other actions include informational items, contracting, grant awarding, hiring decisions, and comments to other agencies. These other proceedings are not subject to a statutory prohibition on ex parte communications and the Chief Counsel advises that disclosure of ex parte communication is not necessary.²¹

Disclosures of ex parte communications: We reviewed minutes from 13 SWRCB meetings held in 2008. Board meeting minutes would include only those ex parte disclosures made during public meetings of a quorum of the SWRCB members. In no case did the minutes reflect a Board Member's oral disclosure of an ex parte communication during a Board meeting. Decisions of considerable importance to local jurisdictions and industries were made. Topics under discussion at the February 20, 2007, meeting, for example, included allocations of funding and approval of grants to local jurisdictions and an amendment to the Water Quality Control Plan for the Lahontan Region, at which Squaw Valley Ski Corporation and others testified.

The issue of ex parte communications was raised at the Board's July 17, 2007, meeting, in which a member of the public began to speak during public forum about a matter under adjudication and that was not publicly noticed for discussion at the meeting. The member of the public was immediately "...cut off by the Chair and Chief Counsel who indicated that the prohibition on ex parte communications prevented communications concerning any issue in the proceedings."²² A similar incident occurred at the Board's December 5, 2007, meeting when the Chair prohibited an attorney from discussing a matter under adjudication and not publicly noticed for discussion.²³ The Chair's actions are consistent with the SWRCB's requirement under the APA to prohibit ex parte communications in adjudicatory matters.

CALIFORNIA ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

California Energy Resources Conservation and Development Commission (Energy Commission) regulations (*California Code of Regulations*, Title 20, Division 2, §§ 1216-1218) state that the provisions of the APA prohibiting ex parte communications apply to adjudicative proceedings conducted by the Commission. The regulations go beyond the APA to define “presiding officer” to mean all commissioners and all hearing advisors, and provide that an advisor or member of a commissioner’s staff can not be used to circumvent the prohibition on ex parte communications.

The Commission’s Public Adviser’s Office discusses ex parte communications in adjudicatory hearings in a *Frequently Asked Questions* section on the Commission’s website (see www.energy.ca.gov/public_adviser/exparte_faq.html). As required by the APA, communications must be on the record unless they concern procedural issues. Commissioners, their advisors, or the hearing officer must disclose any ex parte communication in the public file of the proceeding and describe the nature of the communication. All parties are then notified and have ten days to request an opportunity to rebut the matter on the record. The hearing officer may reopen the hearing if it has already ended.

The Commission’s ex parte communication regulations have been discussed at other meetings. In a rulemaking process related to data collection, a proposal was made to omit from the Commission’s regulations the definition of “presiding officer” and the limitation on using advisors or staff to circumvent the prohibition on ex parte communications. This proposal was critiqued in a subsequent Siting Committee Workshop.²⁴

Hearing officers in Commission adjudicatory proceedings, for example for power plant licensing, begin with a discussion of the ex parte prohibition:²⁵

It’s important to emphasize that the Committee’s proposed decision must, by law, be based solely on the evidence contained in the public record...all contacts between parties in the case and the Committee Members regarding substantive matters must occur in the context of a public discussion such as today’s event, or in the form of a written communication that is distributed to all parties in the case.

The Commission’s regular Business meetings are not adjudicatory proceedings, and disclosure of ex parte communications is not required. An electronic search through the minutes and transcripts of 18 Energy Commission Business Meetings in 2007, finds no disclosure of ex parte communications by Commission Members.

PUBLIC UTILITIES COMMISSION

The Public Utilities Act governs the Public Utilities Commission's (PUC) procedures for hearings and judicial review (Chapter 9, Article 1). The Commission holds three types of hearings: quasi-legislative, adjudicative, and rate setting (each with different ex parte requirements), and determines whether a proceeding requires a hearing and which of the three types of hearing it will be (*Public Utilities Code* § 1701.1). A party must request a rehearing on this "case categorization" decision within ten days in order for the Commission's decision to be subsequently subject to judicial review, and the Commission must render its decision regarding the rehearing within 30 days.

Case categorization decisions: The statute requires the Commission to establish regulations regarding ex parte communications for "case categorization" issues. The Commission's *Rules of Practice and Procedure* (Rule 8.2(e)) provide that ex parte communications concerning the categorization of a given proceeding are permitted, but must be reported by interested persons using the reporting requirements specified in Rule 8.3. This includes filing a "Notice of Ex Parte Communication."

- While a case categorization decision is in process, the ex parte requirements applicable to ratesetting hearings apply, although for complaints the requirements applicable to adjudicatory hearings apply (see discussion below summarizing these requirements).
- An assigned Commissioner rules on a "scoping memo," finalizing the determination of the hearing category.

Statutory Definition: The *Public Utilities Code* (§ 1701.1(c) (4)) defines ex parte communication, as:

...any oral or written communication between a decisionmaker and a person with an interest in a matter before the commission concerning substantive, but not procedural issues, that does not occur in a public hearing, workshop, or other public proceeding, or on the official record of the proceeding on the matter.

"Person with an interest," for purposes of this article, means any of the following:

- (A) Any applicant, an agent or an employee of the applicant, or a person receiving consideration for representing the applicant, or a participant in the proceeding on any matter before the commission.
- (B) Any person with a financial interest...in a matter before the commission, or an agent or employee of the person with a financial interest, or a person receiving consideration for representing the person with a financial interest.
- (C) A representative acting on behalf of any civic, environmental, neighborhood, business, labor, trade, or similar organization who intends to influence the decision of a commission member on a matter before the commission.

Regulatory Definition: Article 8, “Communications with Decisionmakers and Advisors” in the PUC’s *Rules of Practice and Procedure*, defines an ex parte communication as:²⁶

...a written communication, including a communication by letter or electronic medium) or oral communication (including a communication by telephone or in person) that:

1. Concerns any substantive issues in a formal proceeding, including categorization of a proceeding, or assignment or reassignment of a proceeding to an Administrative Law Judge.
 2. takes place between an *interested person* and a *decisionmaker*, and
 3. Does not occur in a public hearing, workshop, or other public forum established in the proceeding, or on the record of the proceeding.
- “*Interested person*” includes any applicant, respondent, petitioner, complainant, defendant, and person with a financial interest, interested party who has made a formal appearance, *Commission staff of record*, or the agents or employees of any of them, including persons receiving consideration to represent any of them. In addition, a representative acting on behalf of formally organized civic, environmental, neighborhood, business, labor, trade, or similar association is an “interested person.”
 - “*Commission staff of record*” generally includes staff assigned to an adjudicatory or rate setting proceeding but not staff acting in an advisory capacity to the Commission.
 - “*Decision maker*” includes Commissioners and administrative law judges.

Rule 8.5 provides that “Communications with Commissioner’s personal advisors are subject to all of the restrictions on, and reporting requirements applicable to, ex parte communications, except that oral communications in rate setting hearings are permitted without [the] restrictions...”

Procedural inquiries, such as the schedule or location of a hearing, are not ex parte communications.

Adjudication cases: Ex parte communications are prohibited in adjudication cases (*Public Utilities Code* § 1701.2(b)). Adjudication cases “...are enforcement cases and complaints except those challenging the reasonableness of any rates or charges as specified in Section 1702” (See *Public Utilities Code* § 1701.1(c) (2)).

Rate setting cases: Ex parte communication are also prohibited in ratesetting cases (PUC § 1701.3).” Rate setting cases are defined as “...cases in which rates are established for a specific company, including, but not limited to, general rate cases, performance-based ratemaking, and other ratesetting mechanisms” (see *Public Utilities Code* § 1701.1(c)(3)).

The ex parte prohibition is qualified for rate setting cases, as “...oral ex parte communications may be permitted at any time by any commissioner if all interested

parties are invited and given not less than three days' notice. Written ex parte communications may be permitted by any party provided that copies of the communication are transmitted to all parties on the same day." The statute further specifies that if an individual ex parte meeting is granted, all parties must be granted substantially equal periods of time and given three days notice. The PUC may establish a period not to exceed 14 days in which ex parte communications are not permitted and may meet in closed session during that time. The *Rules of Practice and Procedure* provides additional information about ratesetting meetings and ex parte prohibitions (Rule 8.2).

The following is an example of a disclosed ex parte communication in a ratesetting hearing:²⁷

NOTICE OF EX PARTE COMMUNICATIONS

The Office of Ratepayer Advocates (ORA) submits this Notice in accordance with...the California Public Utility Commission's Rules of Practice and Procedure.

The communication was between ORA, represented by Deputy Director Richard Smith, Financial Examiner Nathaniel Cole, Staff Counsel Travis Foss; the City of Fontana, represented by Ken Mackey; the Fontana Unified School District, represented by Jim Allen; and Belinda Gaetti, advisor to Commissioner Geoffrey Brown. The communication was initiated by ORA, and consisted of a discussion at CPUC headquarters on April 21, 2004, at approximately 2:00 p.m. ORA, the City, and the School District voiced their respective concerns about the Proposed Decision of ALJ Patrick that resolves this General Rate Case and authorizes an increase in rates. ORA presented a handout that summarizes its concerns, which is attached to this Notice.

Quasi-legislative cases: *Public Utilities Code* § 1701.1(c) (1) defines quasi-legislative cases as "...cases that establish policy, including, but not limited to, rulemakings and investigations which may establish rules affecting an entire industry." In quasi-legislative proceedings, ex parte communications are "...allowed without restriction or reporting requirement" (*Public Utilities Code* § 1701.4(b)). In these proceedings, a commissioner and an administrative law judge prepare the proposed rule or order, and the final oral argument must be heard by a quorum of the Commission (three of five Commissioners).

The PUC's statutory and regulatory prohibitions on ex parte communications are complex. Recently a commissioner made the following criticism:²⁸

Commissioner Peavey's view that the custom and practice here at the Commission have made it difficult to draw a clear line separating a permissible communications on procedures for addressing a policy issues from an impermissible communication concerning the substance of a complaint. Given the arcane technical nature of our ex parte rules and the lack of a bright line and enforcement procedures that can ensure that the current rules are

followed, it is difficult to see this violation as anything but a technical violation of very technical rules.

Enforcement: Enforcement of the PUC's various prohibitions on ex parte communications relies on the Commissioners and staff disclosing the communications and on the parties in adversarial hearings bringing complaints. For example, in a December 2, 2002 ruling, the Administrative Law Judge determined that AT&T, WorldCom and Z-Tel were required to document whether ex parte communications had taken place, and provide a "...complete and thorough explanation of why they failed to comply with the Commission's ex parte rules." During a previous public meeting, Commissioners had revealed that they had received ex parte communications from those companies. The opposing party, Pacific Bell Telephone Company, alleged "...that the carriers never properly reported the ex parte communications that the Commissioners alluded to...",²⁹ although the ex parte communication requirements for ratesetting proceedings were in effect pursuant to a previous ruling, requiring notice to all parties.³⁰ Several days after the judge's initial ruling, *An Opinion for Imposing Sanctions for Violations of Commission Ex Parte Rules*, was issued.³¹

This decision finds that Pacific Bell Telephone Company (Pacific) and WorldCom, Inc. (WorldCom) violated Commission Rule 7.c prohibiting ex parte communications during the "quiet time" surrounding a ratesetting deliberative meeting. The Commission assesses a fine of \$22,000 against Pacific and a fine of \$1,000 against WorldCom for these violations.

In another proceeding, Clear World Communications moved for an order prohibiting PUC staff (the Consumer Protection and Safety Division and the legal staff) from engaging in ex parte communications with the assigned Administrative Law Judge. In a *Ruling*, the judge found that the prohibited ex parte communications had taken place, as well as prohibited communications by the counsel for Clear World. The judge ruled that:³²

...all such ex parte communications cease immediately, and that those communications that may have been made part of the correspondence file in this case be stricken and removed. At the hearing, any party may move to strike evidence shown to have been tainted by an ex parte violation.

Finally, the Commission may also enforce the prohibitions on ex parte communications, as the following proposal (on which no action was taken by the Commission) indicates:

This decision determines that an agency of AT&T California and an agent and attorney of Cox Communications engaged in impermissible ex parte communications with personal advisors of three Commission officers with the intent of influencing substantive issues in pending adjudications (where ex parte bans had been imposed)...impermissible ex parte violations have occurred and the Commission should impose sanctions including a fine of \$40,000 each against AT&T and Cox.³³

CALIFORNIA COASTAL COMMISSION

Prohibition: The California Coastal Commission is exempted from the prohibition on ex parte communications contained the APA and is instead covered by provisions in the *Public Resources Code* (§§ 30300-30320). In general, ex parte communications to California Coastal Commissioners are prohibited unless disclosed. The legislature added these provisions to the Coastal Act in 1993, requiring that the Commission conduct its business in a "...open, objective, and impartial manner free from undue influence and the abuse of power and authority" (*Public Resources Code* § 30320).

Public Resources Code § 30322 define an ex parte communication with a California Coastal Commissioner as:

...any oral or written communication between a member of the Commission and an interested person, about a matter within the Commission's jurisdiction, which does not occur in a public hearing, workshop, or other official proceeding, or on the official record of the proceeding on the matter.

The Commission's jurisdiction is broadly defined for purposes of the prohibition in *Public Resources Code* § 30321, as:

...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.

An "interested person" for purposes of the prohibition on ex parte communications is defined as "any applicant, an agent or an employee of the applicant, or a person receiving consideration for representing the applicant, or a participant in a proceeding on any matter before the Commission." An "interested person" also includes a person with a financial interest in a matter before the Commission and their agents as well as organizational representatives who intend to influence Commission decisions (*Public Resources Code* § 30323).

On its *Permit Applications Form*, the Coastal Commission advises applicants:

Decisions of the Coastal Commission must be made on the basis of information in the public record available to all commissioners and the public. Permit applicants and interested parties and their representatives may contact individual commissioners to discuss permit matters outside the public hearing (an "ex parte" communication). However, the commissioner must provide a complete description of the communication either in writing prior to the hearing or at the public hearing, to assure that such communication does not jeopardize the fairness of the hearing or potentially result in invalidation of the Commission's decision by a court. Any written material sent to a commissioner should also be sent to the commission's office in San Francisco

and the appropriate district office for inclusion in the public record and distribution to other commissioners.

On its website, the Commission provides the guidance to the public relative to ex parte communications.

No written materials should be sent to Coastal Commissioners **unless** the Commission staff receives copies of all of the same materials at the same time.

All materials transmitted to Commissioners should clearly indicate (e.g., on the cover page or envelope) that they have also been forwarded to the staff. Materials that do not show that copies have been provided to staff might not be accepted, opened, or read by Commissioners. In these cases, **no** ex parte communication has occurred.

Messages of a non-procedural nature (e.g., substantive) should **not** be left for a Commissioner. These include telephone, FAX, telegraphic, or other forms of message.

All oral or written communications of a non-procedural nature by an “interested person” that are **not** made according to the above procedures are ex parte communications which are prohibited unless publicly reported by the Commissioner. If the Commissioner does not report the communication, the Commission’s action that was the subject of the communication may be revoked and penalties may result.

Coastal Commission decisions must be made on the basis of information available to all commissioners and the public. Therefore, copies of communications made to Commissioners that are forwarded to staff will be included in the public record. Public records are available for inspection at Commission meetings or in the Commission’s office.

NOTE: The purpose of these legal requirements is to protect due process and fairness in the Commission’s decision-making process. Failure to follow them could lead to fines, revocation of permits and substantial costs. If you have any questions, you can contact Commission legal staff.

Disclosure: Coastal Commission members must disclose and make public an ex parte communication from an interested person by providing a full report to the executive director within seven days. That report is to be placed in the public record. If the communication occurs within seven days of the next Commission meeting, the disclosure must be made to the full Commission on the record of the proceedings at that hearing. Once disclosed and placed in the Commission’s official record, a communication ceases to be an ex parte communication (*Public Resources Code* § 30324).

The statute limits disclosure of advocates paid to influence matters before the California Coastal Commission. Only persons who have applied for approval of a development permit—a subset of the commission’s statutory responsibilities—need disclose the names of the persons who, for compensation, will be communicating with the Commission or its

staff on their or their business partners' behalf (*Public Resources Code* § 30319).† This limitation may impede enforcement of the ex parte prohibition by limiting public disclosure of the paid advocates who might make such a communication. The full range of the Commission's statutory responsibilities includes, for example, approval of local coastal programs and master port programs (both of which require important land use and zoning components).

Penalties and Enforcement: Commission members and alternates are prohibited from making or influencing a Commission decision about which the member or alternate has knowingly had an ex parte communication that has not been fully reported. Commission members and alternates who knowingly violate the prohibition are subject to a civil fine of up to \$7,500, with no criminal penalty attached. The court may award attorneys' fees and costs to the prevailing party.

Penalties do not apply to the party that made the prohibited communication.

† Failure to disclose the names and addresses of all persons hired on behalf of an applicant for a development permit, or their business partners, is a *misdemeanor* with a maximum penalty of a \$5,000 fine and six months in jail as well as immediate denial of the permit. The guilty party may not apply to the commission for approval of the same or a similar permit for two years after the denial (*Public Resources Code* § 30319).



ENDNOTES

¹ Michael Asimow, "The Fiftieth Anniversary of the Administrative Procedure Act: Past and Prologue: The Influence of the Federal Administrative Procedure Act on California's New Administrative Procedure Act," *Tulsa Law Review*, The University of Tulsa, Winter 1996, p. 297.

² John R. Allen, "Combinations of Decision-making Functions, Ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis," *Utah Law Review*, Utah Law Review Society, 1993, p. 1138.

³ John R. Allen, "Combinations of Decision-making Functions, Ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis," *Utah Law Review*, Utah Law Review Society, 1993, p. 1135.

⁴ John R. Allen, "Combinations of Decision-making Functions, Ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis," *Utah Law Review*, Utah Law Review Society, 1993, p. 1138.

⁵ John R. Allen, "Combinations of Decision-making Functions, Ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis," *Utah Law Review*, Utah Law Review Society, 1993, p. 1143.

⁶ Richard A. Nagareda, "Ex Parte Contacts and Institutional Roles: Lessons from the OMB Experience," *University of Chicago Law Review*, University of Chicago, Spring 1988, p. 591.

⁷ Michal Asimow, "Contemporary Issues in Administrative Adjudication," *UCLA Law Review*, University of California, Los Angeles, June 1992, p. 1067.

⁸ California Law Revision Commission, *Reports, Recommendations and Studies*, Volume 25, 1995, pp. 55-542.

⁹ Michael Asimow, "The Fiftieth Anniversary of the Administrative Procedure Act: Past and Prologue: The Influence of the Federal Administrative Procedure Act on California's New Administrative Procedure Act," *Tulsa Law Review*, The University of Tulsa, Winter 1996, p. 297.

¹⁰ State of California Air Resource Board, Board Meeting, Thursday, July 26, 2007, transcript accessed at <http://www.arb.ca.gov/board/mt/2007/mt072607.txt>.

¹¹ State of California Air Resource Board, Board Meeting, Thursday, July 26, 2007, transcript accessed at <http://www.arb.ca.gov/board/mt/2007/mt072607.txt>.

¹² Elliot Block, Chief Counsel, California Integrated Waste Management Board, *Email Communication with Author*, January 22, 2008.

¹³ Elliot Block, Chief Counsel, California Integrated Waste Management Board, *Email Communication with Author*, January 22, 2008.

¹⁴ California Integrated Waste Management Board, May 14, 2003 Meeting, accessed at <http://www.ciwmb.ca.gov/Agendas/MtgDocs/2003/05/00012657.pdf>.

¹⁵ David A. Sandino, *Memorandum to Harry M. Schueller, Chief, Division of Water Rights, State Water Resources Control Board*, November 22, 2000.

¹⁶ Craig M. Wilson, *Ex Parte Communications*, State Water Resources Control Board, February 16, 2001, p. 2.

¹⁷ Michael A. M. Lauffer, *Transmittal of Ex Parte Communications Questions and Answers Document*, July 25, 2006, p. 2, and *Ex Parte Questions and Answers*, State Water Resources Control Board, July 25, 2006, p. 1.

¹⁸ Michael A. M. Lauffer, *Ex Parte Questions and Answers*, State Water Resources Control Board, July 25, 2006, p. 10.

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- ¹⁹ Craig M. Wilson, *Procedural Requirements and Appellate Review of Waivers of Waste Discharge Requirements*, State Water Resources Control Board, June 2, 2005.
- ²⁰ Michael A. M. Lauffer, *Ex Parte Questions and Answers*, State Water Resources Control Board, July 25, 2006, p. 11.
- ²¹ Michael A. M. Lauffer, *Ex Parte Questions and Answers*, State Water Resources Control Board, July 25, 2006, pp. 12-13.
- ²² State Water Resources Control Board, *Board Meeting Minutes*, July 17, 2007.
- ²³ State Water Resources Control Board, *Board Meeting Minutes*, December 5, 2007.
- ²⁴ California Energy Commission, Siting Committee Workshop, *In the Matter of: Proposed Revisions to the Regulations Governing the Rules of Practice and Procedure and Power Plant Site Certification*, November 13, 2006, pp. 8-14.
- ²⁵ California Energy Resources Conservation and Development Commission, *Public Informational Presentation and Site Visit, in the Matter of: Application for Certification Sun Valley Energy Project Edison Mission Energy*, February 27, 2006, p. 3.
- ²⁶ Public Utilities Commission, *Rules of Practice and Procedure*, July 2007.
- ²⁷ Trevis T. Foss, Staff Counsel, Office of Ratepayer Advocates, *Notice of Ex Parte Communications*, Public Utilities Commission, November 25, 2002.
- ²⁸ Public Utilities Commission, "Statement of Commissioner Timothy Simon," *Ex Parte Complaint Case*, C05-11-011, July 12, 2007.
- ²⁹ Dorothy J. Duda, *Administrative Law Judge's Ruling Requiring Explanation of Ex Parte Communication During Interim Phase*, December 2, 2002, at San Francisco, California.
- ³⁰ Jeannie Chang, *Administrative Law Judge's Ruling Lifting Ex Parte Communications Ban Solely on the Issue of Pricing of Unbundled Loop and Unbundled Switching Network Elements in the Section 271 Proceedings*, March 1, 2002, at San Francisco, California.
- ³¹ Public Utilities Commission, *Opinion Imposing Sanctions for Violations of Commission Ex Parte Rules*, Decision 02-12-003, December 5, 2002.
- ³² Public Utilities Commission, *Administrative Law Judge's Ruling Striking Ex Parte Communications from the Record*, filed June 9, 2004.
- ³³ Public Utilities Commission, "Item C05-11-012 - Related matters," *Public Agenda*, March 1, 2007.