

AMENDED IN SENATE MAY 2, 2012
AMENDED IN SENATE MARCH 28, 2012
AMENDED IN SENATE MARCH 8, 2012

SENATE BILL

No. 965

**Introduced by Senator Wright
(Coauthor: Senator Blakeslee)**

January 11, 2012

An act to add Section 13293 to the Water Code, relating to water quality.

LEGISLATIVE COUNSEL'S DIGEST

SB 965, as amended, Wright. State Water Resources Control Board and California regional water quality control boards: ex parte communications.

Under existing law, the State Water Resources Control Board (state board) and the California regional water quality control boards (regional boards) implement the Federal Water Pollution Control Act and the Porter-Cologne Water Quality Control Act by prescribing waste discharge requirements for discharges to the waters of the state, as specified. Existing law authorizes the state board and regional boards to hold hearings necessary for carrying out their duties, as specified.

The Administrative Procedure Act establishes the conduct of administrative adjudicative proceedings, which are defined as evidentiary hearings for determination of facts pursuant to which a state agency formulates and issues a decision. Existing law defines a decision as an agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person. The act prohibits, as an ex parte communication, while an adjudication

is pending, any communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer, as defined, from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication. The act provides that if the above prohibition is violated, the presiding officer shall promptly disclose the content of the communication on record and give all parties an opportunity to address the communication, as specified. The act also provides that a violation of that prohibition may be grounds for disqualification of the officer who engaged in the ex parte communication.

This bill would provide that the ex parte communications provisions of the Administrative Procedure Act do not apply to specified proceedings of the state board or a regional board. ~~This~~ *The* bill would, instead, ~~prohibit a state board, regional board member, or a person, other than a board staff member acting in his or her official capacity, who intends to influence the decision of a board member on a matter before the board, from conducting an ex parte communication, as defined. This bill would provide that 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. This bill would also provide, however, that a communication is not a prohibited ex parte communication if the communication is fully disclosed and a request is made that the communication be placed in the board's official record of the proceeding, as specified.~~ *define an ex parte communication as an oral or written communication with one or more board members regarding those specified state or regional board proceedings. The bill would permit oral ex parte communications at any time by any board member if the board member involved in the communication notifies, and provides for the participation of, all parties, as specified. The bill would permit written ex parte communications by any party provided that the interested person, as defined, who makes the communications provides copies of the communication to all parties, as specified. The bill would require that if an individual ex parte communication meeting or call is granted to any interested party, all other parties shall also be granted individual ex parte meetings of a substantially equal period of time with the board member.*

The bill would authorize a board to prohibit ex parte communications for a period beginning not more than 14 days before the day of the

board meeting at which the decision in the proceeding is scheduled for board action.

The bill would require that, in any case, all ex parte communications be reported, as specified, by the interested person, regardless of whether the communication was initiated by the interested person.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 13293 is added to the Water Code, to
2 read:

3 13293. (a) For the purposes of this section:
4 (1) "Ex parte communication" means an oral or written
5 communication with one or more board members concerning
6 matters, other than purely procedural matters, under the jurisdiction
7 of the state board or a regional a board, pursuant to Article 4
8 (commencing with Section 13260) or Chapter 5.5 (commencing
9 with Section 13370); regarding an action of the board that satisfies
10 both of the following:

11 (2) "Board" refers to both the State Water Resources Control
12 Board and the regional water quality control boards.

13 (b) A board member, or a person, other than a board staff
14 member acting in his or her official capacity, who intends to
15 influence the decision of a board member on a matter before the
16 board, shall not conduct an ex parte communication, except as
17 follows:

18 (1) If an ex parte communication occurs, the board member
19 shall notify the interested party that a full disclosure of the ex parte
20 communication shall be entered in the board's record.

21 (2) Communications cease to be ex parte communications when
22 either of the following occurs:

23 (A) The board member or the person who engaged in the
24 communication with the board member fully discloses the
25 communication and requests in writing that the communication
26 be placed in the board's official record of the proceeding.

27 (B) Two or more board members receive substantially the same
28 written communication, or are party to the same oral
29 communication, from the same party on the same matter, and a
30 single board member fully discloses the communication on behalf

1 of the other board member or members who received the
2 communication and requests in writing that it be placed in the
3 board's official record of the proceeding.

4 (A) The action does not identify specific persons as dischargers,
5 but instead allows persons to enroll or file an authorization to
6 discharge under the action.

7 (B) The action is for adoption, modification, or rescission of
8 one or more of the following:

9 (i) Waste discharge requirements pursuant to Section 13263 or
10 13377.

11 (ii) Conditions of water quality certification pursuant to Section
12 13160.

13 (iii) Conditional waiver of waste discharge requirements
14 pursuant to Section 13269.

15 (2) "Interested person" means any of the following:

16 (A) Any party to the proceeding or the agents or employees of
17 any party, including persons receiving consideration to represent
18 any of them.

19 (B) Any person with a financial interest, as described in Article
20 1 (commencing with Section 87100) of Chapter 7 of Title 9 of the
21 Government Code, in a matter at issue before a board, or that
22 person's agents or employees, including persons receiving
23 consideration to represent that person.

24 (C) A representative acting on behalf of any formally organized
25 civic, environmental, neighborhood, business, labor, trade, or
26 similar association who intends to influence the decision of a board
27 member on a matter before the board, even if that association is
28 not a party to the proceeding.

29 (e)

30 (b) Notwithstanding Section 11425.10 of the Government Code,
31 the ex parte communications provisions of the Administrative
32 Procedure Act (Article 7 (commencing with Section 11430.10) of
33 Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government
34 Code) do not apply to proceedings of the state a board or a regional
35 water quality control board to which this section applies action
36 identified in paragraph (1) of subdivision (a). This section only
37 applies to those actions.

38 (c) For the purposes of this section, ex parte communications
39 regarding a board action identified in paragraph (1) of subdivision

1 (a) shall be prohibited. *Ex parte* communications may be permitted
2 as follows:

3 (1) Oral *ex parte* communications may be permitted at any time
4 by any board member provided that the board member involved
5 in the communication does each of the following:

6 (A) Invites all parties to attend the meeting or sets up a
7 conference call in which all parties may participate.

8 (B) Gives notice of the meeting or call as soon as possible, but
9 no less than three days before the meeting or call.

10 (2) Written *ex parte* communications may be permitted by any
11 party provided that the interested person making the
12 communication serves copies of the communication on all parties
13 on the same day the communication is sent to a board member or
14 makes arrangements with the board staff to ensure that all
15 interested parties have been provided copies of the communication.

16 (3) If an individual *ex parte* communication meeting or call is
17 granted to any interested party, all other parties shall also be
18 granted individual *ex parte* meetings of a substantially equal period
19 of time with the board member. The interested person requesting
20 the initial individual meeting shall notify the parties that its request
21 has been granted, and shall file a certificate of service of this
22 notification at least three days before the meeting or call.

23 (d) A board may prohibit *ex parte* communications for a period
24 beginning not more than 14 days before the day of the board
25 meeting at which the decision in the proceeding is scheduled for
26 board action. If the board holds the decision, it may permit *ex*
27 *parte* communications during the first half of the interval between
28 the hold date and the date that the decision is calendared for final
29 decision, and may prohibit these communications for the second
30 half of the period, provided that the period of prohibition shall
31 begin not more than 14 days before the day of the board meeting
32 to which the decision is held.

33 (e) All *ex parte* communications made regarding a board action
34 identified in paragraph (1) of subdivision (a) shall be reported by
35 the interested person, regardless of whether the communication
36 was initiated by the interested person. A notice of *ex parte*
37 communication shall be filed with the board within three working
38 days of the communication. The notice may address multiple *ex*
39 *parte* communications in the same proceeding, provided that notice

1 of each communication identified therein is timely. The notice shall
2 include all of the following information:

3 (1) The date, time, and location of the communication, and
4 whether it was oral, written, or both.

5 (2) The identities of each board member involved, the person
6 initiating the communication, and any persons present during the
7 communication.

8 (3) A description of the interested person's communication and
9 the content of this communication. A copy of any written,
10 audiovisual, or other material used for or during the
11 communication shall be attached to this description.