

AMENDED IN ASSEMBLY JUNE 21, 2012

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. The bill would, instead, 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, *and would specify the only instances in which an ex parte communication involving those specified proceedings is permissible*. 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 *specified requirements* for the participation of, ~~all parties interested persons, as specified as defined~~. The bill would permit written ex parte communications by any ~~party person~~ provided that the interested person, ~~as defined~~, who makes the communications provides copies of the communication to all ~~parties interested persons, as specified~~. The bill would require that if an individual ex parte communication meeting or call is granted to any interested ~~party person~~, all other ~~parties interested persons~~ 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.

The bill would authorize the state board or a regional board, in the event that an interested person fails to provide the notice required by

the bill, to use the remedies available under the administrative adjudication provisions of the Administrative Procedure Act.

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~~ *a matter of procedure*
7 *or practice that is not in controversy*, under the jurisdiction of a
8 board, regarding an action of the board that satisfies both of the
9 following:

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

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

15 (i) Waste discharge requirements pursuant to Section 13263 or
16 13377.

17 (ii) Conditions of water quality certification pursuant to Section
18 13160.

19 (iii) Conditional waiver of waste discharge requirements
20 pursuant to Section 13269.

21 (2) “Interested person” means ~~any~~ *either* of the following:

22 ~~(A) Any party to the proceeding or the agents or employees of~~
23 ~~any party, including persons receiving consideration to represent~~
24 ~~any of them.~~

25 ~~(B)~~

26 (A) Any person *who will be required to enroll or file*
27 *authorization to discharge pursuant to the action or with a financial*
28 *interest, as described in Article 1 (commencing with Section 87100)*
29 ~~of Chapter 7 of Title 9 Section 87103~~ *of the Government Code, in*
30 *a matter at issue before a board, or that person’s agents or*
31 *employees, including persons receiving consideration to represent*
32 *that person.*

33 ~~(C)~~

1 (B) A representative acting on behalf of any formally organized
2 civic, environmental, neighborhood, business, labor, trade, or
3 similar association who intends to influence the decision of a board
4 member on a matter before the board, ~~even if that association is~~
5 ~~not a party to the proceeding.~~

6 (b) Notwithstanding Section 11425.10 of the Government Code,
7 the ex parte communications provisions of the Administrative
8 Procedure Act (Article 7 (commencing with Section 11430.10) of
9 Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government
10 Code) do not apply to a board action identified in paragraph (1)
11 of subdivision (a). This section only applies to those actions.

12 (c) For the purposes of this section, *and except as limited by*
13 *subdivision (d)*, ex parte communications regarding a board action
14 identified in paragraph (1) of subdivision (a) ~~shall be prohibited.~~
15 ~~Ex parte communications~~ may be permitted *only* as follows:

16 (1) Oral ex parte communications may be permitted at any time
17 by any board member provided that the board member involved
18 in the communication does each of the following:

19 (A) Invites all ~~parties~~ *interested persons* to attend the meeting
20 or sets up a conference call in which all ~~parties~~ *interested persons*
21 may participate.

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

24 (2) Written ex parte communications may be permitted by any
25 ~~party~~ *interested person* provided that the interested person making
26 the communication serves copies of the communication on all
27 ~~parties~~ *other interested persons* on the same day the
28 communication is sent to a board member, or makes arrangements
29 with the board staff to ensure that all interested ~~parties~~ *persons*
30 have been provided copies of the communication.

31 (3) If an individual ex parte communication meeting or call is
32 granted to any interested ~~party~~ *person*, all other ~~parties~~ *interested*
33 *persons* shall also be granted individual ex parte meetings of a
34 substantially equal period of time with the board member. The
35 interested person requesting the initial individual meeting shall
36 notify the ~~parties~~ *other interested persons* that its request has been
37 granted, and shall file a certificate of service of this notification
38 at least three days before the meeting or call.

39 (d) A board may prohibit ex parte communications for a period
40 beginning not more than 14 days before the day of the board

1 meeting at which the decision in the proceeding is scheduled for
2 board action. If the board ~~holds~~ *continues* the decision, it may
3 permit ex parte communications during the first half of the interval
4 between the ~~held~~ *originally scheduled* date and the date that the
5 decision is calendared for final decision, and may prohibit ~~these~~
6 *ex parte* communications for the second half of the period, provided
7 that the period of prohibition shall begin not more than 14 days
8 before the day of the board meeting to which the decision is ~~held~~
9 *continued*.

10 (e) All ex parte communications made regarding a board action
11 identified in paragraph (1) of subdivision (a) shall be reported by
12 the interested person, regardless of whether the communication
13 was initiated by the interested person. A notice of ex parte
14 communication shall be filed with the board within three working
15 days of the communication. The notice may address multiple ex
16 parte communications in the same proceeding, provided that notice
17 of each communication identified therein is timely. The notice
18 shall include all of the following information:

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

21 (2) The identities of each board member involved, the person
22 initiating the communication, and any persons present during the
23 communication.

24 (3) A description of the interested person's communication and
25 the content of this communication. A copy of any written,
26 audiovisual, or other material used for or during the communication
27 shall be attached to this description.

28 (f) *If an interested person fails to provide notice as required by*
29 *this section, a board may use the remedies available under the*
30 *administrative adjudication provisions of the Administrative*
31 *Procedure Act (Chapter 4.5 (commencing with Section 11400) of*
32 *Part 1 of Division 3 of Title 2 of the Government Code), including*
33 *the issuance of an enforcement order, or sanctions pursuant to*
34 *Article 12 (commencing with Section 11455.10) of Chapter 4 of*
35 *Part 1 of Division 3 of Title 2 of the Government Code.*

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