

STATE ALLOCATION BOARD RULES AND PROCEDURES SUB-COMMITTEE HEARING

Members:

Senator Loni Hancock, Chair
Assembly Member Jean Fuller
Assembly Member Julia Brownley
Scott Harvey

AGENDA

- I. Approve Minutes
- II. Operating Rules and Procedures: Discuss and Approve
Changes to the Operating Rules and Procedures Document
- III. Public Comment

Sub-committee on Rules and Procedures
State Allocation Board

Chair, Senator Loni Hancock
Assemblywoman Jean Fuller
Assemblywoman Julia Brownley
Scott Harvey, Dept. of General Services

Hearing
August 10, 2010
3:30 pm – 5pm
State Capitol Building
Room 112

AGENDA

- 1) Approve Minutes
- 2) Operating Rules and Procedures: Discuss and Approve Policies
 - a. Discuss and Approve Rules on the following items:
 - i. Subsection (2) Meetings
 - ii. Subsection (8) Quorum and Voting
 - iii. Subsection (9) Testimony on Agenda Items
 - iv. Subsection (10) Public Comment
 - v. Subsection (11) Sub-Committees and Working Groups
 - vi. Subsection (18) Procedural Guidelines
 - b. Subsection (3) Process for Setting and Changing Items to the Agenda: Discuss and Approve Policy
 - c. Subsection (4)
 - i. Section (A) Order of Business/Binder Items: Discuss and Approve Policy Section
 - ii. (B) Ex-Parte Communication: Discuss and Approve Policy
 - d. Subsection (6) Staff Analysis: Discuss and Approve Policy
 - e. Subsection (7) Agenda Item Information: Discuss and Approve Policy
 - f. Subsection (1) Officers: Discuss and Approve Policy
- 3) Public Comment

MINUTES

Sub-committee attendance:

- ✓ Senator Loni Hancock
- ✓ Assemblywoman Jean Fuller
- ✓ Assemblywoman Julia Brownley
- ✓ Scott Harvey

Minutes from May 25, 2010

Sub-committee approved the minutes from the May 25, 2010 meeting. Vote was 3-0

Discussion on “Rules and Procedures” draft

Sub-committee discussed the workload and need to continue until next meeting the discussion on exparte communication/mercy clause, and that clarification was needed on the appeals process, and that binder clarity (i.e.order of business) needed to be added to document.

Senator Hancock requested that the sentence regarding: no formalized governance or procedures rules be taken out. Lisa Jones with OPSC reminded the sub-committee that the board has not adopted formal rules – so this would be the first time the SAB would have a formal set. Scott Harvey echoed Lisa Jones statement stating that the rules and procedures this committee was working on were and an effort to make the SAB more transparent.

Senator Hancock asked that the sub-committee think about striking first sentence. The sub-committee agreed to the request.

VICE CHAIR

Sub-committee asked if there was process in place for selecting a Vice Chair. According to Lisa Jones there is a process and the position helps the chair prepare the agenda for index each board meeting. The sub-committee asked that the information be incorporated into the background information.

Discussion of the Vice Chair continued and Assemblywoman Brownley asked the length of time the Vice Chair serves. Scott Harvey said the term is at the will of the Board and this should be formalized in our document. Assemblywoman Brownley then asked what needs to occur to call for the election of the Vice Chair. Senator Hancock said the SAB should select the Vice Chair at the beginning of each 2 year session of the legislature. Assemblywoman Brownley: every December the SAB should hold an organizational meeting and elect new officers, stated an opinion that legislative members should not hold the Chair position – maybe CDE, DOF, DGS could potentially chair. Senator Hancock expressed that there was not strong opinion on this. Assemblywoman Fuller weighed in on this discussion stating that this topic should be re-visited in the future and this committee needs to decide if we want to wait to act on the Vice Chair topic and accept what is already existing or wait for the Human Resources subcommittee to meet where they can discuss the role of the AEO and the Vice Chair.

Senator Hancock: Sub section 1 officers A 1-4 as laid out is okay, B is VC – put in language from previous decision 2006 SAB report. This request was moved by Assemblywoman Fuller, seconded by Assemblywoman Brownley and passed 4-0.

Assemblywoman Brownley asked if the sub-committee needed to figure out if an annual meeting was needed to pick officers – **open item.**

MEETINGS

Senator Hancock was okay with adding that the date will normally be the 4th Wednesday unless subject to change because of quorum. Requested that last sentence be taken out – require 6 votes.

Assemblywoman Brownley made the motion to meeting chapter to add B and eliminate the last sentence under quorum. Motion passed.

AGENDA

Senator Hancock requested that set b says Chair and Vice Chair - take out for consideration and referral. Assemblywoman Brownley asked if they needed to have the EO and AEO? Senator Hancock - why not leave it there and whom ever you can get a hold of it will do it.

Assemblywoman Brownley made the motion to move the agenda section as printed except to delete for consideration and referral.

Scott Harvey asked for clarification if the language should be changed– outside of the public – change it to shall not should “regarding approval”

Motion carried 4-0.

ORDER OF BUSINESS

Senator Hancock suggestion – wants to move financial reports under EO reports, then consent and special consent should be combined – what is the difference? Generally deemed no opposition – thus only 1 consent, appeals, etc... end with Board member additional / future agenda items.

Scott Harvey liked this idea and asked 7-8-9 could be combined.

Senator Hancock - Reports for Information and Discussion (combine)

Assemblywoman Brownley wanted to know if a member makes a request – it would first go on discussion and then it would go to action – each time – may not get resolved in this section. Move that on #4 order of business – incorporate Sen Hancock draft as amended (combine 8 &9)

Motion approved 4-0.

LIMIT ON SETTING SAB AGENDA ITEMS

Highlighted in yellow for discussion next meeting.

BINDER CLARITY

Senator Hancock brought up the issue of getting reports done. Scott Harvey wants the rule to be 78 hours to make a case and if it didn't make it was not discussed. Can we shorten something in less than 5 days? Senator Hancock wants to know what Bagley Keene requires. Scott Harvey – 78 hours.

Senator Hancock stated that reports on appeals should be done by an objective 3rd party? Scott Harvey stated that the sub-committee needed to hold this item open.

Lyle Smoot made public comment.

Senator Hancock asked that all items will be provided to SAB and posted on internet no less than 78 hours before the meeting?

Bruce Hancock making a public comment stated that one of the reasons for the 5 working days – especially talking about the appeals– was because the districts do not know the position of the OPSC until the report is published and what the arguments are or what the recommendations. Districts get too little time to rebut this.

Scott Harvey replied to Bruce's comment stating that we might make an exception for appeals – but it seems what you are saying is that OPSC is not talking to the district.

Senator Hancock then responded stating that OPSC shall provide the analysis with in 78 hours except for appeals which should be 5 working days.

Motion carried 4-0

Senator Hancock asked that the word “material” be taken out – present rebuttal material no less than 48 hours

Assemblywoman Brownley asked if this was applicable to ex-parte – people need to be spoken to and everyone has the same information and so everyone is working from the same place.

Senator Hancock requested that appeals and ex-parte communication be discussed at a subsequent meeting.

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SECTION 8:

Senator Hancock: “without a quorum present” – sentence is confusing...a 6 votes are necessary to pass an item – and remove the word quorum. Lisa Jones reminded the sub-committee that the regulations say that 6 of 10 and put it in there instead of other sentence. Senator Hancock agreed with Lisa Jones and requested that language from regulations be added in.

Assemblywoman Brownley asked if a quorum had to be present when taking a vote...i.e. should SAB hold items open. Lisa Jones responded that they could have the discussion but hold vote until a quorum is present. Assemblywoman Brownley states so no casting a vote as a sub-committee member unless you are present

Rebecca Bauman stated she thought the sub-committee was recommending that the SAB adopt the Senate Rules.

Lisa Jones answered the questions stating yes you could have a vote as a sub-committee.

Senator Hancock requested quorum be removed– a majority vote of the board is required for the adoption of any board item or regulations.

Rebecca Bauman asked that this be re-worded and brought back.

Scott Harvey requested the sub-committee to look at the need for item C –do we need this formalized process (B...)

Assemblywoman Brownley agreed with Rebecca’s statement that they were going to follow Senate Rules and have the language come back to the board – Moves that the Senate Rules discussed be put into language for SAB sub-committee to vote on at the next meeting.

Motion passed 4-0.

TESTIMONY ON AGENDA ITEMS

No discussion (4-0) – adopted as is

PUBLIC COMMENT

Moved approval – no discussion (4-0)

SUB-COMMITTEES & WORKING GROUPS

Senator Hancock had an issue with the equity and Assemblywoman Brownley asked that we remove shall and make it ‘should’ or degree. Senator Hancock requested that to the extent possible – add this language in.

Assemblywoman Brownley asked that duties – make sure that full committee is SAB. Scott Harvey said it should say “SAB” and shall be determined by the SAB at the time.

Assemblywoman Brownley - #4 rules relating to full interim committee – Rules relating to SAB shall be ...

Senator Hancock - #2 – sub-committee shall have # of members designated by the Chair.

Assemblywoman Brownley - Amend item #1 – “to the extent possible” put at beginning of sentence / all sections on this section says full committee – substitute SAB

MOTION: 4-0

WORKING GROUP

Senator Hancock: Membership shall be determined by the establishing entity. Why do we need to get into the detail – what if we just said the Board or subcommittee of the board may create working groups to solicit input and direction? – Sub-committee agreed.

Assemblywoman Brownley - keep not subject to Bagley Keene – all agreed

Motion: 4-0

PROCEDURAL GUIDELINES

Senator Hancock asked if they would want to have every 2 years a workshop where the board reviews and adopts the operating rules and has an overview of how the SAB operates (lots of confusion – need to review flow chart etc...) Assemblywoman Brownley thought this was a good idea – SAB should have an organizational meeting every December and review rules and procedures then. Senator Hancock requested that staff draft a section 19 on this for the next meeting.

Motion to adopt 18 as is passed 4-0.

Next meeting is August 17th.

Before the meeting closed Assemblywoman Brownley asked about the Chair and Senator Hancock responded stating that the rules are silent – still needs to be decided. Scott Harvey weighed in stating he likes it to be the DOF. Senator Hancock responded that it should not be a legislative position – but maybe CDE, DGS, DOF – should be open to all of those. Lisa Jones informed the sub-committee that it’s been this way since 1947 when OPSC was under DOF.

STATE ALLOCATION BOARD RULES AND OPERATING PROCEDURES

To present suggested rules and operating procedures for the State Allocation Board (SAB).

DESCRIPTION

In an effort to make the SAB meetings more transparent and efficient for Board members, school districts and stakeholders alike, this item provides suggested rules and procedures for the SAB subcommittee on Rules & Procedures to review for recommendation to the full SAB for adoption and implementation.

AUTHORITY

Government Code Chapter 243, Statutes of 1947, established the SAB as a successor to the Post War Public Works Review Board.

Government Code Section 15490 stipulates the makeup of the SAB.

Education Code (EC) Section 17070.35 outlines the Board's duties, including but not limited to the duties of establishing and publishing policies and procedures for the administration of the chapter and adopting rules and regulations pursuant to the Administrative Procedures Act.

The Bagley-Keene Open Meeting Act, set forth in Government Code Sections 11120-111321, covers all State boards and commissions and requires these bodies to publicly notice their meetings, prepare agendas, accept public testimony and conduct their meetings in public unless specifically authorized by the Act to meet in closed session.

EC Section 17070.30 continues the existence of the SAB for purposes of the Leroy F. Greene School Facilities Act of 1998.

BACKGROUND INFORMATION

At the February 2009 SAB meeting, Board members voted to form a subcommittee to establish rules and procedures for the SAB. The Attachment to this item provides suggested rules and procedures drawn from the Assembly Education and Senate Education committees, and defaults to Mason's Rules a commonly used set of rules) when no specific procedure or rule is identified..

RECOMMENDATION

Discuss the attached SAB Rules and Operating Procedures and recommend revisions / changes for adoption at the full SAB.

Green Highlight = new section or change subject to discussion at Aug 17th Meeting
Teal highlight = general comments received from Board Members

GREEN HIGHLIGHT AREAS ARE SUBJECT OF AUG 17TH MEETING FOR DISCUSSION AND CONSIDERATION

PROPOSED STATE ALLOCATION BOARD RULES AND OPERATING PROCEDURES

(1) OFFICERS

A. Chair. The chair shall:

1. Call the State Allocation Board (SAB) together at the times and places necessary to enable the committee to properly perform its duties.
2. Preside over meetings of the Board.
3. Maintain order and decide all questions of order subject to appeal to the Board present.
4. Collaborate with the Executive Officers and the Assistant Executive Officer in the preparation of agenda and reports of the Board.

B. Vice Chair. The vice chair shall:

1. The Vice-Chair shall assume all responsibilities of the Chair during his/her absence.
2. Vice-Chair will participate with the Chair in reviewing the proposed SAB agenda
3. The Vice-Chair shall convene and chair the Personnel Committee of the SAB.

C. Process for Selecting Officers of the Board

1. **Chair**

- i. At the beginning of the two year legislative session, the SAB may conduct an election to confirm a Designee as the Chair of the board for a two year term.

Comments:

Currently the Chair has been the DOF by default. Should there be a reason to change this?

- Chair possibilities DOF, CDE, or DGS
- Should there be a process if the SAB wishes to change the chair?
- No legislative members should serve the Chair position
- Suggestion to Delete All of C (1) & C (2)

2. **Vice-Chair**

- i. The SAB established a Vice-Chair in 2006 by a vote of the Board.
- ii. The Vice-Chair shall be a legislative member of the SAB.
- iii. At the beginning of each two year legislative session, the SAB shall elect a Vice-Chair by a majority of the SAB.
- iv. Duration of the Vice-Chair term will be at the will of the SAB.

(2) MEETINGS

- A. Call.
The chair, or the vice chair in the absence or incapacity of the chair, may call a meeting of the Board by sending by regular mail and or electronic mail to each member of the Board written notice ten (10) days prior to the meeting, in accordance with the Bagley-Keene Open Meeting laws.
- B. Date.
The regularly scheduled monthly SAB meeting occurs on the Fourth Wednesday of each Month. Meetings are subject to change upon notice at a regular Board meeting and approval by a majority of the SAB.
- C. Frequency, Time and Place.
The time and place of meeting of the Board shall be designated by the chair or by the vice chair and coordinated with the Office of Public School Construction (OPSC) staff.
- D. Quorum.
The quorum necessary for the Board to transact business shall be a majority of the members. A quorum / majority for the Board is defined as 6 members. (*See Department of General Services Regulations, Subgroup 2, Article 1, Section 1555*)

Comments:

A majority of the members of the Board shall constitute a **QUORUM** and no item shall be approved by the Board except on the affirmative vote of a majority of the Board. A majority vote of the Board shall be required to pass an item, table an item, or remove it from the table and reconsider a vote.

A majority of those present and voting is sufficient to adopt Board policies, provided that a quorum is present.

(3) AGENDA

- A. The State Allocation Board final Agenda is set by the Chair and Vice-Chair.
- B. Any SAB Member may request the Chair, Vice-Chair, the Executive Officer, or the Assistant Executive Officer to put an item on the SAB Agenda. The request shall be made in public at a SAB meeting, or, if made outside of a meeting, it shall be approved by both the Chair and Vice-chair. Any SAB Member may request an item be placed on future agendas at an SAB meeting or 15 days in advance of an SAB meeting to the Chair, Vice-chair, the Executive Officer, or the Assistant Executive Officer.
- C. Office of Public School Construction (OPSC) Staff will post a notice of the SAB meeting in accordance with Government Code Sections 11120 -11132 (Bagley-Keene Open Meeting Act).

(4) ORDER OF BUSINESS

The OPSC shall prepare and present the following SAB Agenda items, in order as outlines below, subject to change by a majority vote of the SAB.

A. Standard Order of Business.

1. Quorum Call
2. Minutes
3. Executive Officers Report (shall include the 30/60/90 day Projected Workload Plan and Implementation Committee future agenda items)
4. Financial Reports
5. Consent
6. Appeals
7. Action Items
8. Discussion Items
9. Reports / Information and Discussion Items
10. Public Comment
11. Board Member Requests for Future Agenda Item
12. Adjournment

A Board member may request that any item be pulled from the Consent calendar for separate consideration and vote. An item removed from the Consent calendar shall become the next order of business following approval of the Consent items.

Once the SAB Agenda is publicly noticed, any SAB Member during the meeting may request items to be put over to the next SAB meeting unless another SAB Member objects. If there is an objection to an item being put over, a majority vote by the SAB shall decide the issue.

B. Ex-parte Communication

The concept of an Ex Parte rule is to ensure there is transparency in communications to Board members when there is an issue on the agenda.

- **Does Gov Code 11430 apply to SAB Members? See Government Code Sections 11430.10-11430.80 regarding Ex-parte communication. (Code Sections attached in Background)**
- **(See Attached Information in Background Item on Ex-Parte Communication received from the legal department at State Water Resources Control Board)**

Comments:

- Requested by a SAB member to be discussed and the creation of a potential policy
- Objection by another SAB member on this issue – doesn't believe it is needed
- What is the reasoning and rationale for having this?

Comments

Sample Policy re: Ex-parte Communication from Energy Commission

Commissioners and assigned hearing officer(s) shall avoid any oral or written communication with a representative of any party to the commission including those members of the commission staff who have been involved or are likely to be involved as principals in case management or who have participated or are likely to participate in the preparation or presentation of staff testimony, documentary evidence, or cross-examination concerning any substantive issue involved in the proceeding; provided, however, that communications contained in the formal record at a commission hearing shall not be prohibited. "This section, including the following subsections, is augmented by Government Code sections 11430.10--11430.80."

(a) If such a communication occurs, the commissioners or hearing officer shall make all of the following a part of the administrative record in the proceeding:

(1) If the communication is written, the writing and any written response of the commissioner or hearing officer to the communication.

(2) If the communication is oral, a memorandum stating the substance of the communication, any response made by the commissioner or hearing officer, and the identity of each person from whom the commissioner or hearing officer received the communication.

(b) The presiding member shall notify all parties that a communication described in this section has been made a part of the administrative record.

(c) If a party requests an opportunity to address the communication within 10 days after receipt of notice of the communication:

(1) The party shall be allowed to comment on the communication.

(2) The presiding member has discretion to allow the party to present evidence concerning the subject of the communication, including discretion to reopen a hearing that has been concluded.

(d) An adviser to a commissioner or any other member of a commissioner's own staff shall not be used in any manner that would circumvent the purposes and intent of this section.

[RATIONALE: The existing regulation is narrower than and not as explicit as the Administrative Procedure Act as to what is covered by the ex parte rule. The proposed amendments would conform the regulation to the APA and also incorporate by reference the sections of the APA that govern ex parte contacts. The Energy Commission is governed by the APA sections on ex parte contacts whether or not the sections are incorporated by reference in the Commission's regulations.]

(5) LIMIT ON SETTING OF SAB AGENDA ITEMS

SAB items may be set on the SAB Agenda no more than three times, unless new information is available for presentation and consideration by the SAB that shall aid in the resolution of the item or resolution of the item is forthcoming the next time the item is set on the agenda. After that threshold is met, taking into consideration the exceptions listed below, the status quo will be deemed the default resolution of the item:

A. No quorum (before or during issue)

B. SAB Member request to put over (unless another SAB Member objects or the item is not heard)

C. District not able to attend meeting

D. District and OPSC both agree to request that the item be withdrawn

E. Staff analysis is not distributed or deemed complete at least 72 hours prior to the meeting

F. More information on the item is requested by the Board

Comments

- This section should be removed all together. It does not address the systemic problem of staff writing board reports on appeals for items that they have rejected. Board reports must be written by an objective third party. Our suggestion is the AEO. If reports are complete and clear, fewer questions will arise at the board meeting and decisions can be made efficiently.
- Three times (like the Assembly's 3 times passed on the floor agenda and the bill fails) seems reasonable for appeal items, but may not be appropriate for all items before the board
- Either construct very narrowly (i.e. appeals or delete)

(6) STAFF ANALYSES

SAB Agenda items shall have a Staff analysis. The OPSC shall provide the analysis to the SAB and post them to the internet no less than 72 hours prior to the SAB meeting, except for appeals which shall be 5 working days.

On appeals, policy discussions, reports and information items the staff analysis shall be presented in the following format:

- Purpose
- Staff Recommendation
- Background
- Description
- Authority (Law / Regulation / Precedent)
- Staff Analysis / Statements
- Conclusion

Comments:

Senator Hancock is requesting an item to be included re: Binder Clarity

Suggestion:

The analyses could be improved by following a set order –

- Title
- Date of report and staff contact
- School District Name
- Date of last attempted and Date of last passed Bond with dollar amounts
- One sentence explanation
- Staff Recommendation
- A – preference
- B – Options as appropriate
- Summary of issue
- Analysis

Order of projects by County and LEA with project number noted or provided in both formats
Page numbers that are easy to find and follow.

(7) AGENDA ITEM INFORMATION

In order to be considered by the SAB, letters or documents that contain information pertinent to an SAB Agenda item, including those documents presented to any or all of the SAB membership, shall be submitted to the SAB's Executive Officer and Assistant Executive Officer, no less than **forty-eight (48)** hours prior to the SAB meeting at which the relevant item is scheduled to be heard.

Comments

What happens if it is not turned in?

Remove this item. Staff reports are frequently being redrafted on the day of the board meeting. The board would not receive full information if the public were not allowed to respond in writing to late information.

Districts will receive Agenda Item material five days before the SAB meeting and if the District is not in agreement with the Agenda Item will provide a response to the OPSC within 48 hours.

(8) QUORUM AND VOTING

- A. The majority of the statutorily set SAB Membership shall constitute a quorum. Majority for this purpose of this section shall be defined as 6 out of the 10 members of the Board. **A consensus vote of at least six persons is required for all decisions or action of the Board. (Dept of General Services, Subgroup 2, Article 1, Section 1555).**
- B. **Once a quorum is established, motions may be made by any of the SAB Members present. A second to the motion is required on all motions and may be made by any other present SAB Member.**
- C. The SAB may take testimony and hear items as a subcommittee. A majority of those present as a subcommittee and voting does not constitute a quorum.
- D. **Upon establishment of a unanimous roll call, SAB items (Consent, Appeal, Action and Discussion) may be acted on by a single vote. However, any SAB Member may request a voice roll call vote on any SAB Agenda item.**
- E. **A members can request a call be lifted or the Chair can initiative a life of a call when additional members are available or desire to vote.**
- F. **After the final vote on a motion is announced, any SAB Member may change his or her vote or "add on" before adjournment of the meeting unless the change or addition would alter the announced outcome of the vote.**
- G. **Voting on items before the Board shall be by roll call vote only. All roll call votes taken in Committee shall be recorded by the Board Assistant. The provisions of this rule shall not apply to:**
 - (a) **Procedural motions which do not have the effect of disposing of an agenda item.**
 - (b) **Withdrawal of an item from a Board agenda at the request of a member.**

H. On the Chair's own initiative, or at the request of any member of the Board, the Chair shall order a call. When an agenda item is on call, a member may vote on the item only when the call is lifted. However, when a item has already received a majority vote of the Board, or has failed passage, a member shall be allowed to add his or her vote to the roll, provided that his or her vote will not affect the passage or failure of the item. Under no circumstances shall a member be allowed to add his or her vote to any item after the Board has been officially adjourned.

(9) TESTIMONY ON AGENDA ITEMS

The Chair, in the necessary interest of time, and while preserving fairness and equity, may limit individual witness testimony and/or the number of witnesses, excluding presenters, on any given Agenda item, upon a majority vote of the SAB to limit witness testimony. Such restrictions will apply equally to both proponents and opponents of any SAB Agenda item.

(10) PUBLIC COMMENT

An opportunity for Public comment shall be included at the end of every agenda. Public comment is an opportunity for testimony on any items not on the agenda.

(11) SUBCOMMITTEES AND WORKING GROUPS

The Chair, or any other SAB Member, subject to a majority of the SAB concurring, may create a subcommittee or working group of the SAB.

(A) SUBCOMMITTEES

1. Composition.

- i. To the extent possible, membership on subcommittees should be distributed among legislative and administrative appointees to ensure nearly proportional representation
- ii. Subcommittees shall have a number of members as designated by the full SAB, but no subcommittee shall have less than three (3) appointed members.
- iii. Subcommittees are subject to the Bagley-Keene Open Meeting Laws.

2. Quorum.

A quorum of a subcommittee with an even number of members shall be one-half (1/2) of the members, who may act on any question. A quorum of a subcommittee with an odd number of members shall be a simple majority of the membership, who may act on any question.

3. Duties.

Subcommittees shall perform the duties assigned to them and shall report on all matters referred to them. Actions of a subcommittee shall be reported in the form of proposals or recommendations to the SAB only, and shall have no force or binding effect except by action of the SAB.

4. Rules.

Rules relating to the SAB shall be followed by subcommittees, except with regard to a quorum.

5. Staff
Staff to the subcommittee shall be determined by the SAB.

(B) WORKING GROUPS

1. Composition

- i. Membership on a working group shall be determined by the establishing entity.
- ii. Working Groups are not subject to the Bagley-Keene Open Meeting Laws.

2. Duties

Working groups shall perform the duties assigned to them and shall report on all matters referred to them if created by the SAB or a SAB subcommittee.

(12) RECONSIDERATION

A motion to reconsider or to rescind actions of the Board, unless made at the same meeting at which the action was taken, may be made by anyone on the Board.

Comments

- Mason's states that reconsideration can be made by anyone anytime during the meeting.
- Need to discuss legal authorization of SAB to handle reconsideration – what circumstances

Three different subjects of Reconsideration

- 1) Failed motion - reconsideration
- 2) Policy position – reconsideration
- 3) Funding issue – reconsideration

Should take 6 votes to reconsider an item for which a vote has been taken and the outcome announced. Reconsideration of regulations or interpretations should not affect actions already taken on specific projects.

Reconsideration should follow the Senate Rules process. Reconsideration for a motion should be a “courtesy” given immediately after a vote is taken. Reconsideration should be granted by those present.

Reconsideration of a past item requested at a subsequent meeting should be identified as reconsideration of the Board's policy or the Board's funding of an item – not reconsideration of a motion. (Should it be a whole new vote of the Board requiring a majority without regard to an earlier vote? -- Definitely a policy issue – how does city council do this – or other elected bodies?)

(13) APPEALS PROCESS

An appeal analysis shall be presented to the SAB in the following format:

- A. timeline
- B. documents
- C. precedence
- D. final arbitration

Comments:

- Appeals must be researched, written and reported to the board by an objective third party. We recommend the AEO. The current OPSC Appeals staff positions should be transferred to the SAB under the AEO.
- It is not appropriate for OPSC, the entity that rejected the district request to write and report the appeal to the board. This is the equivalent of asking the prosecutor to act as both prosecutor and defense attorney before a judge.
- This section should be removed all together. It does not address the systemic problem of staff writing board reports on appeals for items that they have rejected. Board reports must be written by an objective third party. Our suggestion is the AEO. If reports are complete and clear, fewer questions will arise at the board meeting and decisions can be made efficiently.
- Agenda should be prepared by independent group or at very least by a different group within OPSC. If the format outlined above is followed, and there is no subjective information put in the item, it would work better. Would like to see the full ten days required on all appeals, so there is plenty of give and take time. In addition, there needs to be a way to resolve factual disputes (that is where the AEO intervention could really play out).

(14) MATERIAL INACCURACY

The Board should have the authority to waive any part of the MI penalty, subject to a majority vote of the members.

(15) MERCY CLAUSE

Request of Senator Hancock

Comments:

- *Ask Imp Comm. for suggestions. They know better than anyone what happens in a district to necessitate mercy. Presumably include language about “beyond the control of the district” “human error” etc.*

(16) FINAL ARBITER OVER RULES DISPUTES

In case of a dispute regarding SAB operating rules and procedures, the final arbiter shall be _____ [dependent on the issue].

SAMPLE: If the dispute is regarding the procedural operating rules of the Board, the Board shall consult Greg Schmidt and/or Senate Rules committee staff. If the dispute is regarding the legal interpretation of a statute, regulation, policy or rule of the Board, the final arbiter shall be _____ (an appointed designee by the SAB from the attorney general's office or / or DGS / or Legislative Counsel).

- The Senate Rules Committee staff could be consulted for an operational rule procedural question. The final arbitrator of a legal interpretation of a statute, regulation, policy or rule should be a majority of the State Allocation Board after consultation with legal counsel. **NO OTHER ENTITY SHOULD SUPERCEDE the BOARD'S AUTHORITY.**

Should the SAB have two arbiters? One for procedure and one for legal?

- **What are the costs for two arbiters?**

Violation of Rules ~ in Mason's when a rule is violated, the motion must be restated until a majority votes and approves the action.

What about a factual dispute?

(17) LEGAL OPINIONS

The State Allocation Board Counsel shall be a designee of the State's Attorney General office / or Counsel from Department of General Services.

Who should the SAB attorney be (DGS or Designee from AG's office)?

Comments:

- The first preference would be to utilize the current legal budget to hire SAB an attorney much the way school districts hire and/or cities hire legal counsel.
- The second option would be to utilize Legislative Counsel, if that is allowed, or the Attorney General's office.
- We have learned that counsel must have a firewall between their service to OPSC and their service to the SAB. We believe this creates a conflict of interest when the needs of the SAB differ from those of OPSC. Therefore, it is important that the SAB have legal representation that singularly represents the concerns of the SAB.

(18) CLOSED SESSION

The State Allocation Board may meet in closed session in accordance with Government Code Section 11126, which may include, but is not limited to the following items.

- A. Pending and/or ongoing litigation (pursuant to California Government Code 11126(e))
- B. Appointment, employment, evaluation of performance, or dismissal of an employee (pursuant to California Government Code 11126(a))

(19) PROCEDURAL GUIDELINES

On all other parliamentary procedures, including motions and other actions not provided for by these rules, the authority is the California Senate rules, with a default to *Mason's Manual of Legislative Procedure* which shall govern procedural matters for the SAB and its subcommittees not covered elsewhere in these rules.

The Board shall review and adopt the operating Rules & Procedures of the Board at the first meeting of the Board at the beginning of each legislative session. These rules shall remain in effect until replaced or revised by a majority vote of the Board.

(20) ORGANIZATIONAL MEETING

Sen. Hancock WRITING

EX PARTE COMMUNICATION

GOVERNMENT CODE SECTION 11430.10-11430.80

11430.10. (a) While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer 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.

(b) Nothing in this section precludes a communication, including a communication from an employee or representative of an agency that is a party, made on the record at the hearing.

(c) For the purpose of this section, a proceeding is pending from the issuance of the agency's pleading, or from an application for an agency decision, whichever is earlier.

11430.20. A communication otherwise prohibited by Section 11430.10 is permissible in any of the following circumstances:

(a) The communication is required for disposition of an ex parte matter specifically authorized by statute.

(b) The communication concerns a matter of procedure or practice, including a request for a continuance, that is not in controversy.

11430.30. A communication otherwise prohibited by Section 11430.10 from an employee or representative of an agency that is a party to the presiding officer is permissible in any of the following circumstances:

(a) The communication is for the purpose of assistance and advice to the presiding officer from a person who has not served as investigator, prosecutor, or advocate in the proceeding or its pre-adjudicative stage. An assistant or advisor may evaluate the evidence in the record but shall not furnish, augment, diminish, or modify the evidence in the record.

(b) The communication is for the purpose of advising the presiding officer concerning a settlement proposal advocated by the advisor.

(c) The communication is for the purpose of advising the presiding officer concerning any of the following matters in an adjudicative proceeding that is non-prosecutorial in character:

(1) The advice involves a technical issue in the proceeding and the advice is necessary for, and is not otherwise reasonably available to, the presiding officer, provided the content of the advice is disclosed on the record and all parties are given an opportunity to address it in the manner provided in Section 11430.50.

(2) The advice involves an issue in a proceeding of the San Francisco Bay Conservation and Development Commission, California Tahoe Regional Planning Agency, Delta Protection Commission, Water Resources Control Board, or a regional water quality control board.

11430.40. If, while the proceeding is pending but before serving as presiding officer, a person receives a communication of a type that would be in violation of this article if received while serving as presiding officer, the person, promptly after starting to serve, shall disclose the content of the communication on the record and give all parties an opportunity to address it in the manner provided in Section 11430.50.

11430.50. (a) If a presiding officer receives a communication in violation of this article, the presiding officer shall make all of the following a part of the record in the proceeding:

(1) If the communication is written, the writing and any written response of the presiding officer to the communication.

(2) If the communication is oral, a memorandum stating the substance of the communication, any response made by the presiding officer, and the identity of each person from whom the presiding officer received the communication.

(b) The presiding officer shall notify all parties that a communication described in this section has been made a part of the record.

(c) If a party requests an opportunity to address the communication within 10 days after receipt of notice of the communication:

(1) The party shall be allowed to comment on the communication.

(2) The presiding officer has discretion to allow the party to present evidence concerning the subject of the communication, including discretion to reopen a hearing that has been concluded.

11430.60. Receipt by the presiding officer of a communication in violation of this article may be grounds for disqualification of the presiding officer. If the presiding officer is disqualified, the portion of the record pertaining to the ex parte communication may be sealed by protective order of the disqualified presiding officer.

11430.70. (a) Subject to subdivisions (b) and (c), the provisions of this article governing ex parte communications to the presiding officer also govern ex parte communications in an adjudicative proceeding to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

(b) An ex parte communication to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated is permissible in an individualized ratemaking proceeding if the content of the communication is disclosed on the record and all parties are given an opportunity to address it in the manner provided in Section 11430.50.

(c) An ex parte communication to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated is permissible in an individualized determination of an application for site certification pursuant to Chapter 6 (commencing with Section 25500) of Division 15 of the Public Resources Code, that is before the State Energy Resources Conservation and Development Commission, if the communication is made by an employee of another state agency and is made for the purpose of enabling the presiding officer to effectively manage the proceeding.

11430.80. (a) There shall be no communication, direct or indirect, while a proceeding is pending regarding the merits of any issue in the proceeding, between the presiding officer and the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

(b) This section does not apply where the agency head or other person or body to which the power to hear or decide in the proceeding is delegated serves as both presiding officer and agency head, or where the presiding officer does not issue a decision in the proceeding.

§ 1215. Dangerous Weapons or Articles.**HISTORY**

1. Order of Repeal filed 6-3-85 by OAL pursuant to Government Code Section 11349.7; effective thirtieth day thereafter (Register 85, No. 26).

§ 1216. Signs, Posters, Placards, Banners.

(a) Carrying, transporting or using signs, posters, placards or banners exceeding thirty inches (30") by thirty inches (30") in size in or on any State building or grounds is prohibited unless prior written permission has been obtained from the Director or the Chief of the State Police or his designate whose review, under this section, shall not be made on the basis of content.

(1) The size of the handles or supports for such signs, posters, placards or banners shall be limited to one-fourth inch (1/4") in thickness by three-fourth inch (3/4") in width and shall extend no more than eighteen inches (18") beyond a single exterior edge of such sign, poster, placard or banner except with the prior written permission of the Director or the Chief of the State Police.

(2) All such handles or supports shall be of wood without exception.

(b) All such signs, posters, placards or banners shall be hand carried and not in any way affixed, fastened, or attached to the premises; nor self-supporting and placed for display; nor leaned against any wall, partition, or other portion of a State building or grounds.

(c) The carrying of such signs, posters, placards or banners in a way that obstructs freedom of passage over or through, or in State buildings or grounds is prohibited.

NOTE: Authority and reference cited: Section 14685, Government Code.

HISTORY

1. Amendment filed 1-20-83; effective thirtieth day thereafter (Register 83, No. 4).

§ 1219. Review of Denial or Cancellation of Permits.

The denial or cancellation of a permit under Section 1208 shall state the reasons for such denial or cancellation. Within five days of the notification of the denial or cancellation the applicant or permittee may apply to the Department of General Services for a review of the reasons for the denial or cancellation. The proceedings for review shall be held within five working days thereafter before the Director of the Department or his/her delegate.

NOTE: Authority and reference cited: Section 14685, Government Code.

HISTORY

1. New section filed 1-20-83; effective thirtieth day thereafter (Register 83, No. 4).

Subchapter 3. Fairs and Expositions Division

HISTORY

1. Subchapter 3 (Sections 1300-1329, not consecutive) repealed by operation of Chapter 1152, 1973 Statutes. For prior history, see Register 18, No. 1 and Register 63, No. 18.

Subchapter 4. Office of Public School Construction

Group 1. State Allocation Board

Subgroup 1. State Allocation Board—Conflict of Interest Code

NOTE: It having been found, pursuant to Government Code Section 11409(a), that the printing of the regulations constituting the Conflict of Interest Code is impractical and these regulations being of limited and particular application, these regulations are not published in full in the California Code of Regulations. The regulations are available to the public for review or purchase at cost at the following locations:

STATE ALLOCATION BOARD

1130 K STREET, SUITE 400
SACRAMENTO, CA 95814

**SECRETARY OF STATE
(ARCHIVES)**

1020 "O" STREET
SACRAMENTO, CA 95814

FAIR POLITICAL PRACTICES COMMISSION

428 J STREET, SUITE 800
SACRAMENTO, CA 95804-0807

The Conflict of Interest Code is designated as Subgroup 1, Group 1, Subchapter 4, Chapter 3, Division 2 of Title 2 of the California Code of Regulations, and consists of sections numbered and titled as follows:

Subgroup 1. State Allocation Board— Conflict of Interest Code

Section 1550.	General Provisions Appendix
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NOTE: Authority cited: Sections 87300 and 87304, Government Code. Reference: Sections 87300, et seq., Government Code.

HISTORY

1. Repealer of Subgroups 1-3 (Sections 1550-1745, not consecutive) filed 12-30-76; effective thirtieth day thereafter (Register 77, No. 1). For prior history see Registers 2; 4; 10, Nos. 1 and 5; 18, No. 3; 19, Nos. 1 and 3; 58, Nos. 10 and 13.
2. New Subgroup 1 (Sections 1550-1557; Appendices A and B) filed 4-13-79; effective thirtieth day thereafter. Approved by Fair Political Practices Commission 1-3-79 (Register 79, No. 15).
3. Repealer of Subgroup 1 (Articles 1-5, Sections 1550-1557 and Appendices A and B) and new Subgroup 1 (Section 1550 and Appendix) filed 2-26-81; effective thirtieth day thereafter. Approved by Fair Political Practices Commission 12-1-80 (Register 81, No. 9).
4. Editorial correction of section number (Register 98, No. 49).
5. Amendment of subchapter 4 heading filed 12-3-98 as an emergency; operative 12-3-98 (Register 98, No. 49). A Certificate of Compliance must be transmitted to OAL by 4-2-99 or emergency language will be repealed by operation of law on the following day.
6. Amendment of subchapter 4 heading refiled 3-31-99 as an emergency; operative 3-31-99 (Register 99, No. 14). A Certificate of Compliance must be transmitted to OAL by 7-29-99 or emergency language will be repealed by operation of law on the following day.
7. Certificate of Compliance as to 7-29-99 order transmitted to OAL 8-26-99 and filed 10-8-99 (Register 99, No. 41).
8. Editorial correction adding HISTORY 8 (Register 2001, No. 14).
9. Amendment of addresses for the State Allocation Board and the Fair Political Practices Commission and amendment of Appendix filed 4-4-2001; operative 5-4-2001. Approved by Fair Political Practices Commission 2-15-2001 (Register 2001, No. 14).

Subgroup 2. State Allocation Board Regulations

Article 1. State Allocation Board Meetings

§ 1555. State Allocation Board Quorum.

There are ten persons that are constitutionally or statutorily empowered to vote and act upon matters coming before the State Allocation Board which pertain to the allocation and apportionment of funds to school districts for the purpose of school construction or purposes related thereto pursuant to Government Code Section 15490.

Any six such persons shall constitute a quorum. A consensus vote of at least six such persons is required for all decisions or actions of the Board which expressly pertain to the apportionment or allocation of funds for the purpose of school construction or purposes related thereto.

NOTE: Authority cited: Section 15503, Government Code; and Section 16009, Education Code. Reference: Section 1, Article 16, California Constitution; Sections 7.8 and 15490, Government Code; and Section 16009, Education Code.

HISTORY

1. New section filed 6-23-87; operative 7-23-87 (Register 87, No. 26).
2. Amendment of section and NOTE filed 2-11-2003 as an emergency; operative 2-11-2003 (Register 2003, No. 7). A Certificate of Compliance must be trans-

The Senate Committee Rules are a sub set of the Senate Rules.

2009-2010 Legislative Session

COMMITTEE RULES

1. The **OFFICERS** of the Senate Elections, Reapportionment, and Constitutional Amendments Committee shall be a Chair, Vice Chair and Committee Assistant.
2. The **CHAIR** shall preside at meetings when present except when the Committee is considering a bill of which he is the sole author or the lead author. Whenever the Chair is not presiding, the Vice Chair shall assume the duties of the Chair. In the absence of both, a member designated by the Chair shall preside.
3. The Committee Assistant shall keep a complete **RECORD** of the meetings and actions taken by the Committee. Bills favorably acted upon shall be reported to the Senate as expeditiously as the reports can be prepared.
4. The Committee shall meet in **REGULAR SESSION** in the room and on the day and hour designated by the Rules Committee. Adjourned meetings or special meetings shall be held at the time fixed in the adjourning motion, or on the call of the Chair for the special meeting.
5. **SPECIAL MEETINGS** may be called by the Chair, with the approval of the Committee on Rules, by giving reasonable notice to the public and all members of the Committee either in writing or by telephone, specifying the purpose of the meeting, the time and place thereof, and the matters to be considered at such special meeting. Notice of hearing of bills as provided by Joint Rule 62(a) shall be given in the Daily File.
6. A majority of the members of the Committee shall constitute a **QUORUM** and no bill shall be voted out of Committee except on the affirmative vote of a majority of the Committee. A majority vote of the Committee shall be required to report a bill out of committee, table a bill, or remove it from the table and reconsider a vote on a bill. A majority of those present and voting is sufficient to adopt committee amendments, provided that a quorum is present.

COMMITTEE RULES (Cont.)

Page 2

The Chair shall set the hearings of bills and arrange the calendar for Committee meetings. Notice of hearing of bills shall be given to the author and shall be published in the Senate Daily File at least four days prior to the hearing.

Bills will not be considered in the absence of the author without his or her consent; however, bills may be presented by another member of the Legislature or the author's staff with written authorization from the author.

7. Voting on the disposition of bills shall be by roll call vote only. All roll call votes taken in Committee shall be recorded by the Committee Assistant. Bills favorably acted upon shall be reported to the Senate as expeditiously as the reports can be prepared.

The provisions of this rule shall not apply to:

- (a) Procedural motions which do not have the effect of disposing of a bill.
- (b) Withdrawal of a bill from a committee calendar at the request of an author.
- (c) Return of bills to the Senate, where the bills have not been voted on by the committee.
- (d) The assignment of bills to committee.

A roll call vote on motion to amend shall be reported only if the motion carries or when requested by a member of the committee or by the author of the bill under consideration.

8. On the Chair's own initiative, or at the request of any member of the Committee, the Chair shall order a call. When a bill is on call, a member may vote on the bill only when the call is lifted. However, when a bill has already received a majority vote of the Committee membership, or has failed passage, a member shall be allowed to add his or her vote to the roll, provided that his or her vote will not affect the passage or failure of the bill. Under no circumstances shall a member be allowed to add his or her vote to any bill after the Committee has been officially adjourned.

COMMITTEE RULES (Cont.)

Page 3

9. **RECONSIDERATION** of a bill which has been voted out of the Committee, held in Committee, or defeated shall conform to the requirements of Joint Rule 62(a), as follows:
 - (a) A motion to reconsider a vote on a bill which is voted out of Committee shall be voted upon at the same meeting. If the motion is carried by the affirmative vote of a majority of the Committee, the bill may be re-heard at that meeting, if the author is present, or at a subsequent meeting.
 - (b) Reconsideration of a bill which has been defeated may be taken up at the same meeting or a subsequent meeting, but not beyond 15 legislative days. If reconsideration is granted to a defeated bill at the same meeting wherein the bill is defeated, it can not be re-heard until a subsequent, properly noticed meeting.
 - (c) Any bill which has been laid on the table and which is removed from the table at a later meeting shall not be heard again until a subsequent meeting of the Committee after being calendared in the Senate Daily File and after notice.
 - (d) No bill which has been voted upon shall be given a re-hearing more than one time.
10. An author may make minor or technical **AMENDMENTS** to a bill at any time prior to or during a hearing. Substantive amendments, however, must be submitted to the Committee Assistant in Legislative Counsel format by noon five days prior to the committee hearing at which the bill has been set. The Committee Assistant will provide the amendments to the Vice Chair on the same day as received. Should the Committee meet at a time other than its regularly scheduled day, the Chair will announce the due date for amendments. The Chair has sole discretion in ruling on whether an amendment is "substantive" pursuant to this rule.
11. **A BILL MAY BE SET** for hearing THREE TIMES ONLY. If the Committee postpones a hearing it is not counted as being set. If the Committee adopts amendments other than those offered by the author and orders the bill reprinted prior to its further consideration, the hearing shall not be counted as the final time a bill may be set. Any measure which has been set three times is subsequently ineligible for hearing.

COMMITTEE RULES (Cont.)

Page 4

12. Bills with no opposition may be placed on a Committee **CONSENT CALENDAR** prior to the hearing. This consent calendar shall be made available to the public prior to the hearing. If a Committee member objects to a bill being placed on the consent calendar, that bill will be removed and heard as a regular agenda item.
13. The Chair may appoint from the members of the Committee, subcommittees of one or more members to consider and recommend to the full Committee action on such matters as may be assigned by the Chair. The recommendation of a subcommittee may be accepted by the affirmative vote of a majority of the members of the Committee.
14. Unless otherwise specified by the Chair, Committee staff analyses of bills scheduled for hearing will be made available to the public the day prior to the day of the Committee hearing. In the case of special hearings, the analyses will be made available to the public at the time of the hearing and prior to any testimony being taken on the bill.
15. A copy of Committee analyses will be sent to the bills' authors and to members of the Committee prior to its general distribution to the public.
16. The Committee Assistant will forward a worksheet to the authors of bills referred to the Committee. The Chair may withhold setting of a bill for hearing until the completed worksheet is returned to the Committee in duplicate (i.e., the worksheet contains all requested information regarding facts, demonstration of the need for the bill, background, etc.).
17. Executive Reorganization Plans referred to the Committee pursuant to Section 12080 of the Government Code shall be considered in the same manner as a bill.

After consideration, and at least 10 days prior to the end of the 60-day period specified in Section 12080.5 of the Government Code, the Committee shall forward a report to the Senate Floor which may include the Committee's recommendation on whether or not to allow the plan to take effect.

COMMITTEE RULES (Cont.)

Page 5

18. The Committee Assistant is the custodian of the Committee's legislative records. Pursuant to Section 9080 of the Government Code, the Committee Assistant shall preserve the Committee's current legislative records and may lodge the Committee's older legislative records with the State Archives. The Committee's legislative records that are in the possession of the Committee Assistant are open to inspection and copying by the public in the Committee's office, Room 2203 of the State Capitol, during the normal office hours of 9:00 a.m. to 5:00 p.m., Monday through Friday. The Committee's legislative records that are lodged with the State Archives are open to inspection and copying by the public, subject to the procedures established by the Secretary of State.
19. In all cases not provided for by these rules, the Senate Rules, or the Joint Rules, the authority shall be Mason's Manual.



Linda S. Adams
Secretary for
Environmental Protection

State Water Resources Control Board

Office of Chief Counsel

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Arnold Schwarzenegger
Governor

TO: [via e-mail]
Board Members
**STATE WATER RESOURCES CONTROL BOARD AND
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARDS**

FROM: Michael A.M. Lauffer
Chief Counsel
OFFICE OF CHIEF COUNSEL

DATE: September 17, 2008

SUBJECT: TRANSMITTAL OF EX PARTE COMMUNICATIONS QUESTIONS AND
ANSWERS DOCUMENT

Attached please find an updated document on ex parte communications. This memorandum and the accompanying Ex Parte Questions and Answers supersede all previous Office of Chief Counsel memoranda on the same subject.¹ The changes in the attached are minor and reflect issues that have arisen since my July 25, 2006 memorandum. Aside from minor consistency issues, the changes in the question and answer document have been updated to more carefully describe water quality petitions in abeyance (Question 15), settlement discussions (Question 22), and public forum communications (Question 41).

The State Water Resources Control Board and the nine California Regional Water Quality Control Boards perform a variety of functions. The boards convene to set broad policy consistent with the laws passed by Congress and the Legislature. In this regard, the boards perform a legislative function. The boards also routinely determine the rights and duties of individual dischargers or even a class of dischargers. In this regard, the boards perform a judicial function. The judicial function manifests itself when the boards adopt permits and conditional waivers or take enforcement actions.

Different rules apply depending on the type of action pending before a water board. Some of these rules concern the specific rights available to participants and the meeting processes the board will use to decide the action. One of the distinctions between the two types of proceedings is the prohibition against ex parte communications. An ex parte communication is 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

¹ The most recent memorandum was a July 25, 2006 memorandum from me to members of the State Water Resources Control Board and the California Regional Water Quality Control Boards. That memo superseded prior memoranda from the Office of Chief Counsel concerning ex parte communications.

participate in the communication. The accompanying questions and answer document addresses common issues pertaining to ex parte communications.

I have structured the questions and answers document to serve as a reference document for board members and the attorneys within the Office of Chief Counsel. By breaking the subject matter into discrete questions, my intent is to provide a list that board members can quickly scan to identify relevant issues and the accompanying legal answer. Further, the questions and answers document includes a flow chart to facilitate analyzing routine ex parte issues and answering questions.

While the attached document addresses the common questions concerning ex parte communications, there are three broad themes pertaining to communications with board members.

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. Water board members may also 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 proceeding.

The questions and answer document does not and cannot address all the issues pertaining to ex parte communications. Over time additional questions may be added based on feedback from board members. Similarly, areas where the law is unclear may be addressed through revisions to the State Water Resources Control Board's regulations.

Attachment

cc: [All via e-mail only]

Dorothy Rice, EXEC
Tom Howard, EXEC
Jonathan Bishop, EXEC
All Executive Officers, Regional Water Boards
All Assistant Executive Officers, Regional Water Boards
Branch Offices
All Office of Chief Counsel attorneys

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EX PARTE QUESTIONS AND ANSWERS

I. EX PARTE SUMMARY

Summary of ex parte framework:

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. Water board members may also 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 proceeding.

1. Q. What is an ex parte communication?

A. An ex parte communication is a communication to a board member from any person¹ 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. People often refer to these communications as "one-sided," "off-the-record," or private communications between a board member and any person concerning a matter that is pending or impending before the applicable water board.

One-sided communications does not mean that the communication must occur in privacy or among two people in order to be an ex parte communication. Even a public communication before a large audience may still be an ex parte communication if other parties to the proceeding do not have notice of and an opportunity to participate in the communication.

Examples of ex parte communications include:

1. A water board has scheduled a hearing to consider the assessment of administrative civil liability against a discharger for an illegal discharge. Before the hearing, 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 water board has scheduled a hearing 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/her the facility and explain its operation. Such a communication would be ex parte.

2. Q. What is a communication?

Communications include face-to-face conversations, phone calls, written correspondence, e-mails, instant messaging, and the next level of technology that presents itself. The Office of Chief Counsel also considers site visits and tours to be

¹ There are special rules for certain staff who advise the board member. Please see Question 22.

EX PARTE QUESTIONS AND ANSWERS

ex parte communications. By their very nature, site visits communicate evidentiary information to board members. Site visits can be a useful part of the decision-making process and special procedures should be used for site visits. (Please see Questions 35-37.)

3. Q. What purposes are served by limitations on ex parte communications?

Rules regarding ex parte communications have their roots in constitutional principles of due process and fundamental fairness. With public agencies, ex parte communications rules also serve an important function in providing transparency. Ex parte communications may contribute to public cynicism that decisions are based more on special access and influence than on the facts, the laws, and the exercise of discretion to promote the public interest.

Ex parte communications are fundamentally offensive in adjudicative 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. Such communications are not subject to rebuttal or comment by other parties. Ex parte communications can frustrate a lengthy and painstaking adjudicative process because certain decisive facts and arguments would not be reflected in the record or in the decisions. Finally, ex parte contacts may frustrate judicial review since the record would be missing such communications.

4. Q. Do ex parte communications rules prevent water board members from understanding the issues and people's concerns?

Ex parte communications rules do not prevent the flow of information to water board members. Instead, ex parte rules shape how the board members receive that information and are intended to ensure that board members receive relevant information in a fair and transparent manner. A person can share issues and concerns by filing appropriate documents with the board and during a public meeting consistent with the water boards' administrative procedures.

Essentially, ex parte rules allow everyone to know and, if desired, rebut the information upon which the water boards make decisions before they make their decisions. The rules are also intended to ensure that all board members have a common record upon which to make their decisions and that a court will be able to ascertain the bases for such decisions.

5. Q. How can board members educate themselves without violating the prohibition on ex parte communications?

Rules on ex parte communications should not serve to prevent board members from understanding the matters to be considered and decided by the board. If a board member needs additional information about a matter, there are appropriate processes that can be used. There is no substitute for an active, engaged board member when it comes to understanding an issue. Asking questions on the record, or requesting staff and interested persons to specifically address certain issues on the record, helps provide the necessary foundation for board action. In addition, staff assigned to advise the board (see Question 22) may provide assistance and advice, and may help evaluate

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evidence in the record, so long as the staff does not furnish, augment, diminish, or modify the evidence in the record.

6. Q. How can water board members explain ex parte rules to the public?

This is a decision for individual board members to make. Board members are free to refer callers to the Office of Chief Counsel. If the board member chooses to explain ex parte limitations with a person, there are certain themes to keep in mind when explaining ex parte rules.

First, ex parte rules do not prevent anyone from providing information to the water boards or requesting specific actions from the water boards. Ex parte rules simply require that the information come into the record through a writing subject to public review or in a duly noticed, public meeting. Second, ex parte rules are designed to ensure fairness for everyone. No person or interest uniquely benefits from ex parte rules. The rules apply to everyone, and prevent any one person or interest from having special access to water board members. Third, ex parte rules provide transparency, allowing everyone to understand and to appreciate how the water boards reach a decision. By encouraging persons to submit written comments or speak on the record, a person's comments will be heard by all the water board members and other stakeholders. If a person persists, however, a board member can explain that s/he might become subject to disqualification, in which case the person's efforts to communicate with the board member will have been to no avail.

7. Q. What proceedings are subject to the prohibition on ex parte communications?

Only adjudicative proceedings are subject to the prohibition on ex parte communications. The water boards function in many capacities, from setting broad policies on water quality control, to planning to implement those policies, to implementing those policies through specific regulatory actions that determine the rights and duties of a person or class of persons. Adjudicative proceedings fall in the latter category of implementing policies through actions that determine the specific rights and duties of persons. (Please see Questions 8-11.)

The continuum from policy-setting to policy-implementing does not have discrete breakpoints. This question and answer document is designed to answer some of the most common questions and provide a useful framework for understanding ex parte issues. It does not create any rules beyond those contained in the Administrative Procedure Act or court decisions. Board members will need to work closely with legal counsel at times to determine whether the prohibition on ex parte communications applies to a specific action or proceeding.

II. ADJUDICATIVE PROCEEDINGS

A. Types of Adjudicative Actions

8. Q. What actions are adjudicative?

Adjudicative actions are those actions where the water boards make a decision after determining specific facts and applying laws and regulations to those facts. Adjudicative proceedings are the evidentiary hearings used to determine the facts by which a water

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board reaches a decision that determines the rights and duties of a particular person or persons. Adjudicative proceedings include, but are not limited to, enforcement actions and permit issuance. 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 and the conditions to include in the permit would be adjudicative.

Below is a partial list of common water board actions that often follow adjudicative proceedings:

- National Pollutant Discharge Elimination System (NPDES) permits;
- Waste discharge requirements (WDRs);
- Water right permits and requests for reconsideration;
- Orders conditionally waiving waste discharge requirements;
- Administrative civil liability (ACL) orders;
- Cease and desist orders;
- Cleanup and abatement orders;
- Water quality certification orders (401 certification);
- Permit revocations.

A list of common actions that are not subject to the ex parte prohibition is provided in Part III.

9. Q. Are ex parte communications prohibited for pending adjudicative actions?

Yes. The ex parte communications prohibition for adjudicative proceedings originates in court decisions and has been codified in Chapter 4.5 of the Administrative Procedure Act. The Administrative Procedure Act prohibits “direct or indirect” communications to water board members about an issue in a pending adjudicative proceeding.

10. Q. Does the ex parte communications prohibition apply to general permits?

Yes. General waste discharge requirements determine the rights and duties of those persons subject to the general permit. General waste discharge requirements are directly enforceable against the dischargers who enroll under the permit. General waste discharge requirements are specifically exempt from the rulemaking provisions of the Administrative Procedure Act. The water boards adopt general waste discharge requirements following the same procedures as are used for any other permitting decision, as opposed to the legislative procedures used to adopt water quality control plans or for administrative rulemaking. General waste discharge requirements are also subject to the same judicial review standards as any other permit. In function and form, the issuance of general waste discharge requirements is an adjudicative action. The proceedings culminating in the issuance of general waste discharge requirements are, therefore, more appropriately considered adjudicative proceedings.

Under appropriate circumstances, a discrete, significant policy issue may be segregated from the adjudicative proceeding and decided using suitable procedures for policy-setting (e.g., regulations, amendments to a water quality control plan, or state policy for water quality control). The Court of Appeal recently sanctioned this approach in the *State Water Resources Control Board Cases*,² while noting the importance of

² *State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674.

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recognizing the different requirements that apply to matters decided in an adjudicative proceeding and those decided separately in legislative proceedings. Those issues considered in the policy-setting procedure would not be subject to the prohibitions on ex parte communications during the policy-setting proceeding. However, the ex parte communications prohibition still applies to the general permit's adjudicative proceeding (including those issues not involved in the policy-setting proceeding and those issues addressed in the policy-setting proceeding once the policy-setting proceeding has concluded).

11. Q. Does the ex parte communications prohibition apply to waivers?

Yes. For many of the same reasons set forth in Question 10, the issuance of a conditional waiver pursuant to Water Code section 13269 is more appropriately considered an adjudicative proceeding. As discussed in Question 10, discrete, significant policy issues may be segregated from the adjudicative proceeding and decided using appropriate procedures for policy-setting (e.g., regulations, amendments to a water quality control plan, or state policy for water quality control).

B. Pending Adjudicative Proceeding

12. Q. When is a proceeding pending?

A proceeding is pending from the time the water board issues an initial pleading in an evidentiary proceeding, or from the time an application for a decision is filed that will require an evidentiary hearing, whichever is earlier. In many circumstances, the "initial pleading" will be a notice of hearing with the staff's proposed action.

For example, an adjudicative proceeding is pending for an administrative civil liability order from the time an administrative civil liability complaint is issued. A proceeding for issuance of waste discharge requirements is pending before a regional water board when the board receives a report of waste discharge, because that is an application for decision that will occur in a hearing before the board. For general waste discharge requirements, the notice of an evidentiary hearing makes the matter pending. For water rights permits, the best legal interpretation is that the proceeding is pending when the State Water Board issues a notice of hearing, because prior to that time there is no assurance that there will be an evidentiary hearing since the division chief may issue certain water rights permits.

13. Q. What is an impending matter?

The Administrative Procedure Act only addresses "pending" proceedings, however, there may be circumstances where board members are aware that an adjudicative action is impending. The fairness and transparency of the process are no less compromised if an ex parte communication takes place a few days before the issuance of a notice of hearing or the filing of a report of waste discharge. The desire of a person to speak with a board member about a specific site should generally be viewed as a signal that something is impending. Where a proceeding is clearly impending, water board members should consider ex parte communications to be prohibited based on due process considerations. For example, if a water board member knows that a notice on an enforcement action is to be signed on a Tuesday, it would be inappropriate for the board member to receive an ex parte communication concerning the enforcement matter

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on Monday night. On the other hand, a matter would generally not be considered impending if the issuance of a notice of hearing or the filing of a report of waste discharge is not reasonably expected to occur until several months after the communication in question.

The issues concerning impending matters can be difficult and fact-specific. The most important issue with impending matters is to avoid a situation where it appears the communication was timed to avoid the Administrative Procedure Act's prohibition on ex parte communications for pending adjudicative actions. In the event there is a communication received on an impending matter, the board member may want to consider whether an appropriate disclosure should be made to avoid a subsequent allegation of impropriety. (Please see Question 26.) Water board members should consult with legal counsel if they have any questions on a specific communication in an impending matter.

14. Q. How can a board member determine whether an action is pending?

Some regional water boards maintain a list of applications under consideration and outstanding notices. Confer with your regional water board's Executive Officer (or for State Water Board members, the Executive Director) to determine how your water board maintains a list of pending adjudicative actions.

15. Q. Are adjudicative matters pending before the regional water boards also pending before the State Water Board?

No, but once the State Water Board receives a petition requesting the State Water Board to commence review of a regional water board action, the ex parte communications prohibition applies to the petition proceeding. The State Water Board has the authority to review the regional water boards' adjudicative actions. Most regional water board adjudicative actions are not petitioned to the State Water Board. It would be inappropriate to consider a matter pending before the State Water Board while it is still pending before the regional water board and it might never be challenged to the State Water Board.

A State Water Board member may wish to confer with the Office of Chief Counsel before having a communication about a controversial regional water board adjudicative action where there is a substantial likelihood that a petition will be filed with the State Water Board. In certain circumstances, the more cautious legal advice may be to regard the adjudicative proceeding as *impending* before the State Water Board, even though it is still pending before the regional water board. Determining whether the matter is impending would be a fact-specific inquiry, and would only be the advice of legal counsel in light of those facts.

Once the State Water Board receives a petition, the basis for the State Water Board's review will generally be the evidentiary and administrative record before the regional water board. As a result, the same prohibition on ex parte communications that applies to regional water board members in the region taking the action applies to the State Water Board members deciding the petition on the merits. The prohibition on communications with the State Water Board members concerning a petition begins

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when the State Water Board receives a petition requesting the State Water Board to commence review of a regional water board's action or inaction.

The State Water Board's regulations authorize an interested person to submit a petition and hold that petition in abeyance. The regulations also authorize a petitioner to request that a petition be removed from active review and placed in abeyance. Consistent with the Administrative Procedure Act, a petition in abeyance is not pending before the State Water Board because a petition in abeyance does not request the State Water Board to make a decision. The petition in abeyance serves as a placeholder that allows the interested person to request a decision from the State Water Board at a later date. Until and unless a petition in abeyance is activated, there is no application for a decision pending before the State Water Board.

16. Q. Does a reopener provision in a permit mean an action is pending?

No, not until a specific reopener or permit modification action is noticed for board action. Many permits include provisions that allow the regional water board to modify the permit based on subsequent information or conditions. The ability for a regional water board to reopen and modify the permit in the future does not trigger the prohibition on ex parte communication. However, once a water board issues a notice to reopen the permit, the rules concerning pending adjudicative proceedings would apply to the consideration of permit amendments.

C. Scope of Ex Parte Communications Prohibition

17. Q. What subjects are covered by the ex parte communications prohibition?

The Administrative Procedure Act's prohibition on ex parte communications is very broad. It extends to "direct and indirect" communications. Board members must be mindful that persons who ordinarily would not be subject to the prohibition (e.g., secretaries, staff assigned to advise the board) cannot be used as a conduit for a prohibited ex parte communication, and thereby a source of an indirect communication.

The ex parte communications prohibition also extends to "any issue in the proceeding." With limited exceptions discussed in Questions 19-20, if the communication involves any issue in the proceeding, be it a factual issue, a legal issue, or a policy issue, it is subject to the ex parte communications prohibition.

18. Q. Are all communications prohibited with a person interested in an adjudicative proceeding pending before a water board?

No. Communications are only prohibited to the extent they reach an issue in the proceeding. Even where a matter is pending before a water board, a communication with a party to the matter is not considered ex parte if the communication does not relate to the matter.

19. Q. Are there exceptions to the prohibition?

There are certain limited exceptions to the prohibition on ex parte communications. First, as discussed in Question 22, certain staff advising the board are not subject to the prohibition. Second, there are limited statutory exemptions, but generally they should

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only be used after consultation with legal counsel. The first statutory exemption is typically not available to the water boards, and involves communications to resolve an ex parte matter specifically authorized by statute. The second statutory exemption is for communications that concern a matter of procedure or practice that is not in controversy.

20. Q. What is a matter of practice or procedure that is not in controversy?

The Law Revision Commission comments supporting the Administrative Procedure Act give several examples of the types of “practice and procedure” matters that are not in controversy. Matters of practice and procedure include the format of papers to be submitted, the number of copies, manner of service, and calendaring meetings. The Administrative Procedure Act also identifies continuances, as a matter of practice or procedure. Delays associated with a continuance request, however, may often be controversial. As a result, a request for continuance ordinarily should be made through more formal procedures to ensure that all parties are aware of the request and have an opportunity to respond.

Generally, staff or counsel, as opposed to a board member, would handle the types of matters embraced by this exception to the Administrative Procedure Act’s prohibition on ex parte communications.

D. Persons Subject to the Ex Parte Communications Prohibition

21. Q. Who is subject to the rules prohibiting ex parte communications?

Generally, the prohibition on ex parte communications extends to any person attempting to communicate with a board member about an issue in a pending adjudicative proceeding. The Administrative Procedure Act broadly defines person to include “an individual, partnership, corporation, governmental subdivision or unit of a governmental subdivision, or public or private organization or entity of any character.” As a result, essentially anyone expressing an interest in a water board action and attempting to communicate with a board member is subject to the prohibition on ex parte communications in adjudicative proceedings.

The notable exceptions to the prohibition are for communications between board members and from certain staff of the water boards (see Question 22). Because board members collectively serve as the presiding officer for an adjudicative hearing, communications among the board members are not subject to the ex parte prohibition. Obviously the members remain subject to other substantive and procedural laws (such as the Bagley-Keene Open Meeting Act, which prohibits a quorum of a state board from discussing an issue either collectively or through serial discussions).

22. Q. May staff communicate with board members without violating ex parte rules?

Certain staff may communicate with the board members without violating ex parte rules. Staff may communicate with water board members about a pending adjudicative proceeding under three circumstances. Staff and legal counsel will generally be responsible for knowing their assignments on specific proceedings, and will only contact board members if appropriate pursuant to one of the following circumstances. If a board member wishes to communicate with staff and does not know which staff may be an

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appropriate contact, the board member should contact the Office of Chief Counsel to determine the appropriate staff contact. (Please see Question 42.)

(1) *Staff Assigned to Assist and Advise the Board:* In virtually all circumstances, there are some staff (including at least one attorney) assigned to assist and advise a water board. These staff members are not advocates for a particular action, and in fact, cannot have served as investigators, prosecutors, or advocates in the proceeding or its pre-adjudicative stage for the ex parte exception to apply. These staff members may evaluate the evidence in the record but shall not furnish, augment, diminish, or modify the evidence in the record. For certain proceedings, the water board may issue a memorandum detailing staff responsibilities and identifying the staff assigned to assist and advise the board.

(2) *Staff Advising the Board on a Settlement Offer:* A staff member of the water boards, even if s/he has previously served as an investigator or advocate in the pending adjudicative proceeding, may communicate with a board member concerning a settlement proposal advocated by the staff member. In order to fit within this exception, the settlement proposal must be a specific proposal, supported by the staff member and another party to the proceeding, and the staff member must be advocating for the specific proposal. While the Administrative Procedure Act permits such communications, the more cautious approach would be for the water board to receive the proposed settlement communication in writing to avoid any subsequent claims of irregularity and to allow the water board to receive a candid assessment from advisory staff who have not participated in the investigation or advocacy of a specific action. A written communication should be used when the proposed settlement is not supported by all the parties to the proceeding.

(3) *Staff Advising the Board in Nonprosecutorial Proceedings:* A staff member of the water boards, even if s/he has previously served as an investigator or advocate in the pending adjudicative proceeding may communicate with a board member concerning issues in a non-prosecutorial proceeding. These discussions are not subject to the ex parte communications prohibition.

23. Q. Are other government officials subject to the ex parte rules?

Yes. Persons representing other government officials and agencies (local, state, or federal) are subject to the Administrative Procedure Act's prohibition on ex parte communications if they attempt to communicate with a water board member about a pending adjudicative proceeding. Keep in mind that the State Water Board and regional water boards are separate state agencies. As a result, the ex parte rules extend to communications between members of different water boards.

24. Q. May a board member attend a publicly noticed staff-level workshop on an adjudicative matter?

Yes. When water board staff notice a meeting, even as a staff-level workshop, interested persons are on notice that issues pertaining to the adjudicative matter will be discussed. The staff workshop record (including, for example, the audio tape from the workshop) would become part of the record and basis for the subsequent action by the water board. It is permissible for a board member or multiple board members to attend

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such a workshop, and the communications received during such a workshop are not ex parte communications. If a quorum of the water board may be present, a Bagley-Keene Open Meeting Act notice may also be necessary.

E. Consequences of Prohibited Ex Parte Communications

25. Q. What are the consequences of violating the ex parte communications prohibition?

Prohibited ex parte communications can have a number of consequences. First, board members must disclose a prohibited ex parte communication on the record and the board may be required to hear comments or additional evidence in response to the ex parte communication. Second, a prohibited ex parte communication may be grounds for disqualifying the board member from participating in the adjudicative proceeding. Third, a prohibited ex parte communication could be used as a basis for a subsequent legal challenge to the board's adjudicative action, especially if the communication is not properly disclosed and the board member participates in the proceeding. The Administrative Procedure Act also authorizes a water board to sanction a person violating the prohibition on ex parte communications, although this is likely to be used only for egregious or recurring violations.

26. Q. How may a board member cure an inadvertent ex parte communication?

The Administrative Procedure Act provides explicit procedures that a board member is required to follow if there has been an ex parte communications. These procedures do not subsume the rule or provide a mechanism for circumventing the Legislature's prohibition on ex parte communications in adjudicative proceedings.

In the event of receiving a prohibited ex parte communication, the water board member must disclose the communication on the record. 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. Additional proceedings may be necessary if a party timely requests an opportunity to address the disclosure.

In the event a board member receives what may be a prohibited ex parte communication, it is important to work with legal counsel to determine whether the communication is indeed prohibited, and, if the communication is prohibited, that it is disclosed as required by the Administrative Procedure Act.

27. Q. What if a board member received a communication about an adjudicative proceeding before becoming a board member?

The Administrative Procedure Act requires a water board member to disclose any communications the member received, prior to becoming a board member, about adjudicative proceedings pending before the water board at the time the member received the communication. This provision recognizes that the communication was not per se prohibited (because the person was not yet a board member), but still provides a

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mechanism to disclose such communications in the interest of fairness. The disclosure follows the same procedure discussed in Question 26.

Importantly, this provision of the Administrative Procedure Act does not require all communications the new board member has ever received to be disclosed simply because the communication involves an issue in the adjudicative proceeding. Instead, the provision only reaches back to the time the adjudicative proceeding was pending before the water board. Further, the factual circumstances requiring disclosure rarely occur because there are three necessary elements to trigger this disclosure requirement: (1) a communication the member recalls receiving prior to serving on the board, (2) the communication involves an adjudicative matter pending before the board, and (3) the communication occurred at a time the adjudicative matter was already pending before the board.

III. RULEMAKING AND OTHER PROCEEDINGS

28. Q. What actions are rulemaking?

Rulemaking proceedings are proceedings designed for the adoption, amendment, or repeal of any rule, regulation, or standard of general application. Rulemaking proceedings include proceedings to adopt regulations, water quality control plans, policies, or guidelines. The water boards adopt most total maximum daily loads (TMDLs) as basin plan amendments, so TMDLs typically are rulemaking proceedings.

Below is a partial list of common water board actions resulting from rulemaking proceedings:

- Water quality control plans (e.g., basin plan amendments, statewide plans such as the Ocean Plan);
- State Policy for Water Quality Control (e.g., the State Water Board's Water Quality Enforcement Policy);
- Regulations;
- Guidelines.

29. Q. Is there a prohibition on private communications in rulemaking actions?

No. The Administrative Procedure Act contains no prohibition against private communications during rulemaking proceedings. However, information obtained outside of the public record for the rulemaking action may not form the basis for a board's action and the board's action must be supported by the information contained in the record. Some of the same policy rationales for the ex parte communications prohibition exist for rulemaking. Nothing prevents individual water board members from choosing to avoid such communications during rulemaking proceedings.

30. Q. What is the Office of Chief Counsel's recommendation on handling communications in rulemaking proceedings?

There is no constitutional or statutory duty to disclose private communications in rulemaking proceedings, but the Office of Chief Counsel advises water board members to disclose on the record any private communications received during rulemaking proceedings. The reasons for this recommendation are multifold. First, the water

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boards must base rulemaking decisions on the public record, because the public record is a water board's justification for defending an action in court. If a board member supports a specific rulemaking decision because of technical information the member receives from an ex parte communication but fails to disclose the communication, that information will not be in the record to support the board's action.

Second, the same fairness and transparency issues that underlie the ex parte prohibition for adjudicative proceedings support disclosing private communications in rulemaking proceedings. The water boards only have limited jurisdiction within the ambit delegated by the Legislature. It is appropriate that the public know the information and basis for the water boards' decisions to ensure that those decisions are being made not only in conformance with the law, but also within the scope of the considerations identified by the Legislature and water board regulations.

31. Q. If a member chooses to disclose a communication, what is the preferred procedure?

If a board member chooses to participate in private communications in rulemaking proceedings and chooses to disclose those communications, the Office of Chief Counsel recommends a procedure similar to that described in Question 26 for adjudicative proceedings. First, the board member would notify the person that a full disclosure of the private communication will be entered in the water board's record. Second, the board member would disclose the private communication in the water board's record. The disclosure would include the identity of the persons involved in the communication, the approximate date of the communication, and the substance of the communication.

32. Q. May a board member communicate with a person about how a general requirement may be translated into a subsequent permit requirement?

Yes, as long as the subsequent permit proceeding is not pending or impending. When a water board is considering a general provision of rulemaking action it is appropriate to hear testimony about how the general provision may be converted into specific, subsequent permit requirements. The fact that this information is received during a rulemaking proceeding does not trigger the ex parte communications prohibition for the subsequent adjudicative proceeding that implements the requirements of the rulemaking. The ex parte communications prohibition will attach when the subsequent adjudicative action is pending. (Please see Questions 12-13.)

33. Q. What are "other proceedings"?

Certain proceedings before the water boards are neither adjudicative nor rulemaking proceedings. For example, the water boards often have informational items presented by staff or stakeholders. Informational items do not necessarily lead to a specific board action, but inform members about general water quality or water rights matters. In addition, the State Water Board takes some actions that are neither rulemaking or adjudicative actions (e.g., certain contracting and grants actions).

Below is a list of common, other proceedings:

- Information items;
- Workshops not conducted as part of an adjudicative or rulemaking proceeding;

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- Contracting;
- Grant awarding;
- Hiring decisions and awards for employee accomplishments;
- Adopting or making comments to other entities conducting their own proceedings, such as comments on a federal Environmental Impact Statement;
- Discretionary actions to initiate or consider initiating proceedings, not amounting to a decision on the merits, such as referral of a matter to the Attorney General for enforcement.

34. Q. Are “other proceedings” subject to ex parte rules?

These other proceedings do not trigger ex parte communications prohibitions under the Administrative Procedure Act and do not have the same factors supporting the Office of Chief Counsel’s recommendation to disclose ex parte communications in rulemaking proceedings. Where these proceedings involve closed sessions, communications subject to the attorney-client privilege, or certain law enforcement related information, confidentiality protections may apply. Otherwise, nothing prevents individual water board members from choosing to avoid such communications or to disclose such communications.

IV. SITE VISITS

35. Q. Is a site visit a form of ex parte communication?

Yes. Unless a tour or site visit is publicly noticed, the Office of Chief Counsel considers a site visit or tour of a facility, while an adjudicative proceedings is pending for that facility, to be an ex parte communication. By their very nature, site visits communicate evidentiary information to water board members. In addition, site visits frequently result in communications from the site operator about the pending matter.

36. Q. Can a board member visit a regulated facility when an adjudicative action is pending?

Yes, but only if the board provides interested persons notice and an opportunity to participate. Site visits can be a useful part of the decision-making process and special procedures should be used for site visits. A site visit essentially moves part of the evidentiary proceeding from the board hearing to a visit of the site. It is not necessary that all board members participate in the site visit for it to be permissible. In fact, a single board member can participate in a staff-level site visit if the board properly notices the visit.

To notice a site visit, the interested party list for an adjudicative proceeding should be provided sufficient notice with information about the tour and how to participate. There may be special concerns about accessibility and liability that may raise other legal issues. It is important to work with legal counsel when arranging site visits during a pending adjudicative proceeding.

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- 37. Q. Can a board member visit a regulated facility when no adjudicative action is pending for that facility?**

Yes. When there is no adjudicative action pending or impending, a water board member may visit a site that is subject to the water board's regulations. Before scheduling such a visit, it is important to coordinate with water board staff to ensure there is no pending enforcement action involving the facility and to ensure that the owner has no objection to a visit.

V. GENERAL ISSUES

- 38. Q. Why can legislators talk to anyone and the board members cannot?**

Ex parte communications rules reflect the water boards' hybrid powers. Unlike the Legislature, the water boards have attributes of both legislative power and judicial power. The ex parte communications prohibition arises when the water boards are exercising their judicial power. Rules and due process preclude judges from receiving ex parte communications on matters pending before them or inferior courts. Similarly, even when exercising legislative power, the water boards do so within the narrow confines of power granted by the Legislature. Ex parte rules can help ensure that the water boards are exercising the powers conferred by the Legislature within the confines of the power conferred by the Legislature.

- 39. Q. Why can the public talk to city council members and not board members?**

There is some overlap between ex parte communications prohibitions for city council members and water board members. To the extent the prohibition is broader for water board members it reflects the greater number of adjudicative matters decided by the water boards and the breadth of the Administrative Procedure Act. The Administrative Procedure Act is not directly applicable to city councils. As a result, ex parte communications with city council members do not necessarily reach "direct and indirect" communications on "any issue in the proceeding."

- 40. Q. How should a board member handle comments concerning pending adjudicative proceedings raised in connection with other proceedings in which the board member participates?**

As part of a board member's participation in other matters, a board member may receive communications relating to specific adjudicative proceedings. For example, a legislator may ask a State Water Board member to participate in a meeting related to proposed proceedings relating to application processing. As part of that meeting the legislator or another participant may complain about how a particular application, that is the subject of a pending adjudicative proceeding, is being handled. The meeting does not involve an improper ex parte contact, because it concerns proposed legislation, not an adjudicative proceeding, but the specific complaint involves an inappropriate ex parte contact.

To avoid this problem, board members should make clear at the outset that they cannot discuss specific adjudicative proceedings pending before the water boards. If, despite this warning, a participant begins to raise issues concerning a specific pending

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proceeding, the board member should interrupt to remind the participants that the board member cannot discuss those issues. Any ex parte communications that occur as part of the meeting should be disclosed, following the procedures discussed in Question 26.

41. Q. Is a communication about a pending adjudicative matter, received during a public forum, an ex parte communication?

Yes. While the water boards traditionally allow members of the public to briefly address during a “public forum” any items not on the agenda, persons interested in a pending adjudicative proceeding do not have notice that their issue may be discussed during a specific public forum. Therefore, even though the board receives the communication during a public meeting, the communication may violate the ex parte prohibition if it concerns a pending adjudicative proceeding. Legal counsel will typically work with a water board’s chair if this circumstance occurs. Fortunately, such communications can typically be cured by including a copy of the public forum transcript or tape into the administrative record for the adjudicative proceeding.

42. Q. Whom can a board member speak with to clarify ex parte concerns?

Water board members should contact the Office of Chief Counsel with questions about ex parte issues. A regional water board member should contact the attorney assigned to represent the member’s region or the assistant chief counsel for regional board services. State Water Board members should contact the chief counsel.

In all circumstances, a water board member should indicate that he or she has a question about ex parte communications in *Matter X*—identifying the specific matter. It is important to identify the specific matter, because at times certain attorneys within the Office of Chief Counsel (even the chief counsel) may be recused from a matter or may be assigned to prosecute the matter. By identifying the matter from the outset of the communication, the attorney can make sure you are getting the correct advice from the correct person.

43. Q. Who is responsible for complying with the ex parte rules – the board members or the public?

There is a shared responsibility for complying with the ex parte communications prohibition of the Administrative Procedure Act. Water board members are expected to know the rules and remain vigilant in their application of the rule. If a person attempts to violate the prohibition on ex parte communications, the board member should be prepared to stop the communication, because of the risk the communication could result in disqualification of the board member.

Persons participating in adjudicative proceedings also have an obligation to understand and follow the rules, particularly attorneys and professional lobbyists. As discussed in Question 25, in egregious circumstances violating the prohibition on ex parte communications can subject a person to civil contempt proceedings.

EX PARTE QUESTIONS AND ANSWERS

VI. SIMPLIFIED EX PARTE FLOW CHART

