

# Briefing on Commission Regulations on Ex Parte Communications

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Agenda Item 12



# Regulations Governing Ex Parte Communications

- § 10280 – Purpose
- § 10281 – Definition of Ex Parte Communication
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## **§ 10280 – Purpose**

- Public confidence in government is highest when an agency conducts its adjudicatory business openly and impartially.
- The regulations supplement and help explain legal requirements for disclosure of communications that occur outside the normal hearing process and would therefore not be part of the record when the Commission acts on a permit application or an enforcement case.

## **§ 10281 – Definition of Ex Parte Communication**

- Any oral or written communication
- Regarding a pending adjudicatory proceeding
- Between a Commissioner and either any party to the pending adjudicatory proceeding or a member of the public
- That does not occur in a Commission public hearing, Commission workshop, or other official Commission proceeding

## **§ 10282 – Definitions of Adjudicatory and Legislative Proceedings**

An adjudicatory action affects specific rights or interests of an individual or entity based on specific facts, such as:

- Granting a permit
- Issuance of an enforcement order
- Review of a federal consistency determination

Legislative action generally applies to a class or group of individuals or entities and usually takes the form of:

- A plan amendment
- Policy
- Regulation

## **§ 10285 – When the Policy on Ex Parte Communications Applies**

- For a permit application or federal consistency determination, policy commences to apply when an applicant submits a permit application or consistency determination
- For an enforcement action, policy commences to apply when staff mails a violation report or complaint for administrative civil penalties
- Policy does not apply to legislative matters such as adoption of a plan, plan amendment, regulation, or regulation amendment, or comments on proposed or pending legislation (§10283(f))

## § 10284 – Permissible Ex Parte Communications

The following ex parte communications are not prohibited and do not require disclosure:

- Communications authorized by statute and required for disposition of adjudicatory matter
- Communication involves a matter of procedure or practice not in controversy
- Communication from a BCDC employee:
  - Who has not served as a prosecutor or advocate during the proceeding and whose purpose is to advise the Commission
  - And concerns a settlement proposal
  - And involves a non-prosecutorial proceeding

## **§ 10283 – General Policy and Disclosure of Ex Parte Communications**

- Ex parte communications are prohibited in adjudicatory actions.
- If a prohibited communication occurs, a Commissioner receiving an ex parte communication shall disclose the content of the communication on the record.
- If written ex parte communication, disclose by sending a copy of the written communication and any response to the E.D. ASAP.
- If oral ex parte communication, disclose by submitting a memo to the E.D. that includes the substance of the communication, any response, and the identity of each person from whom the Commissioner received the communication.

## **§ 10286 – Notification of Parties and Interested Persons**

As soon as practicable, the E.D. shall notify in writing all parties to the proceeding and all interested parties that a Commissioner has received an impermissible ex parte communication.

- If the communication oral, E.D. shall include a copy of the memo and any response required by § 10283 with the notification.
- If the communication in writing, E.D. shall include a copy of the written communication with the notification.
- Notice shall state that the party or person being notified must request an opportunity to address the Commission concerning the communication within 10 days or shall waive the opportunity to address the Commission.

## **§ 10287 – Opportunity to Respond to an Ex Parte Communication**

If a party requests opportunity to address the Commission concerning the communication within 10 days, the Commission shall grant the request and may allow the requesting party to present rebuttal evidence concerning the subject of the ex parte communication.

## **§ 10288 – Ex Parte Communications After Public Hearing and Time for Written Comments; Public Comments and Responses**

- If ex parte communication occurs after close of public hearing or after deadline for written comments, the ex parte communication shall be disclosed per § 10283.
- The Chair or Commission may determine that: (1) the communication contains new or different information pertinent to the decision being make; and (2) reopening the public hearing is necessary to protect the integrity of the decision-making process.
- If both determinations made, the communication shall be circulated to the entire Commission and the hearing may be re-opened to allow the public sufficient opportunity to comment on and rebut the information contained in the communication.
- If necessary, either the deadline for the Commission vote shall be extended or the application shall be denied because of the public's inability to comment on the new or different information.

## § 10289 – Field Trips

- A Commissioner may take an individual field trip to the site of a proposed project or pending enforcement action provided he or she discloses the fact of the field trip and the substance of all that he or she observed to the Commission as soon as practicable
- The policy on ex parte communications applies to any communication that involves a Commissioner that occurs during a field trip