COLORADO
Water & Wastewater Facility
Operators Certification Board
Department of Public Health & Environment

INFORMATION AND GUIDELINES CONCERNING *EX PARTE* COMMUNICATIONS

June 30, 2015

Definition of an *ex parte* communication:

An oral or written communication between a party and a decision-maker* that occurs:

1) After the adoption of a notice for a rulemaking hearing or after an appeal/request for adjudicatory hearing;
2) In the absence of other parties and without notice and opportunity for all parties to participate;
3) That is directed to the merits or outcome of a pending proceeding.

* "Decision-maker" means a commissioner or board member, including non-voting members.

Contexts in which *ex parte* communications can occur:

Adjudicatory Proceedings (appeals or disciplinary proceedings) – The State Administrative Procedures Act ("State APA") expressly prohibits *ex parte* communications in the context of adjudicatory proceedings, including disciplinary proceedings. *See* CRS § 24-4-105(14)(a) (adjudicatory hearings); and as cross-referenced in CRS § 24-4-104(6) (procedures for license suspension and revocation). This prohibition applies any time after an appeal or a request for hearing has been filed with the Board.

Rulemaking Proceedings – The State APA is silent about *ex parte* communications in the rulemaking context, and thus there is more flexibility in formulating an *ex parte* policy for rulemakings.

Background and rationale behind *ex parte* rules and policies:

There are over 200 State boards and commissions in Colorado. All of them must adhere to the State APA prohibition in the context of **adjudicatory proceedings** or appeals. For **rulemaking proceedings** some boards/commissions have their own rules or written policies concerning *ex parte* communications. Such policies are based upon a common sense approach**,** seeking to uphold the following principles:

- **Fair and impartial decision making**

Real or perceived by the public – to preserve the integrity of the decision-making process.

- **Due process of law – notice and opportunity to be heard**
  Ex parte communications deny parties relevant information to make their cases.
- **Fundamental fairness in agency decision-making**
  Transparency and assurance that decisions are based on the record.

WWFOCB *EX PARTE* GUIDELINES

Adjudicatory Proceedings:

Ex parte communications in the context of adjudicatory proceedings are prohibited by the State APA, which applies to any time after a determination is formally appealed to the Board or after a hearing is requested.

The types of adjudicatory proceedings over which the Board may preside are those involving Division determinations (e.g., recommendation for disciplinary action; classification of a facility) and Contractor determinations (e.g., denial of application for exam; assignment of training units for courses).

- In context of an adjudicatory hearing, Board members <u>shall not</u> communicate with the any party to the proceeding, including the Division or the Board's Contractor(s), regarding opinion or any relevant substantive information.
- If a party to the proceeding contacts a Board member directly, the Board member should tell that party that it is inappropriate for the Board member to communicate with them off the record and encourage that party to put the information on the record as part of the formal process.
- If the party actually gives the Board member any relevant information (written or oral), the Board member shall disclose the substance of the communication to Board Administrator as soon as possible. The information will then be made part of the hearing record, and any other interested parties will be given the opportunity to respond as part of their case.

Rulemaking Proceedings:

Although *ex parte* communications in the rulemaking context are not expressly prohibited by state statute, it is recommended that Board members adhere to the following guidelines.

The Board's rulemaking proceedings involve three stages: 1) the stakeholder process; 2) after notice of the hearing is published, but before the hearing itself; and 3) during the hearing.

1) During the "informal" stakeholder process, Board members are allowed to communicate about proposals with the public, including potential parties to the rulemaking proceeding.

   Board members should always make it clear, however, that any opinions they express regarding the rulemaking proposal(s) are theirs as individuals, and do not represent the collective position of the Board.

2) After the notice for the rulemaking hearing is published, but before the hearing itself (the time period when formal prehearing statements are being filled, etc.), Board members should cease communicating about the issue(s) with parties to the rulemaking hearing. If communication occurs, the Board member should disclose that fact to the Board Administrator and make the substance of the communication known to the Board and to the public.

   Since the Water Quality Control Division acts as staff to the Board in rulemaking proceedings, Board members can communicate with the Division during this time (for example, if a Board member desires clarification while reviewing prehearing materials).

3) During the rulemaking hearing itself, there should be no communication about the substance of the proceeding with parties to the hearing, and even though the Division is staff to the Board, it is best at that point in the proceedings to have any conversations about the substance of the rulemaking on the record (i.e., during direct testimony at the hearing, even if the record needs to be reopened).

   This guideline is intended to address transparency and fairness concerns, especially in instances where a rulemaking proposal may be controversial, and the Division's position is contrary to another party's in the rulemaking proceeding.