

ORDINANCE NO. 99

**AN ORDINANCE OF THE BOARD OF DIRECTORS OF THE
MONTEREY PENINSULA WATER MANAGEMENT DISTRICT
REQUIRING DISCLOSURE OF EX PARTE COMMUNICATIONS AND
ESTABLISHING PENALTIES AND REMEDIES FOR NON-DISCLOSURE**

FINDINGS

1. The Water Management District is charged under the Monterey Peninsula Water Management District Law with the integrated management of the ground and surface water resources in the Monterey Peninsula area. In performing this duty, the Board is authorized to adopt rules and regulations to carry out its powers and duties.
2. The Water Management District has general, specific and implied powers to implement its statutory mandate, and to carry out the objects and purposes of the District as set forth in Section 301 of the Monterey Peninsula Water Management District Law.
3. Section 301 of the Monterey Peninsula Water Management District Law provides that a violation of a District ordinance is a misdemeanor subject to provisions of the California Penal Code.
4. Water Management District Board intends that its decisions shall be made on the basis of information available to all Directors and to members of the public. The goal is to protect due process and fairness in the Board's decision-making process. The policy enunciated by this ordinance allows continued communication as currently exists. The policy does not prevent communication between members of the public and elected Board members.
5. This ordinance shall add Regulation XIV and Rules 140, 141, 142 and 143 to the Rules and Regulations of the Water Management District.

NOW THEREFORE be it ordained as follows:

ORDINANCE

Section One: Short Title

This ordinance shall be known as the Ex Parte Communication Ordinance of the Monterey Peninsula Water Management District.

Section Two: Purpose

This ordinance protects due process and fairness in the Board's decision-making process. The Rules enacted by this ordinance allow continued communication as previously occurred, but establishes a framework for disclosure, and consequences for non-disclosure of specific types of communications between members of the public and elected Board members.

Section Three: Definition of the Term "Permit"

Rule 11 of the Rules and Regulations of the Water Management District shall be amended to include a definition for the term "Permit" as follows:

PERMIT - "Permit" means any written approval by the staff or Board of the Monterey Peninsula Water Management District, based on an application, request, or appeal. This term shall include, but shall not be limited to, approvals referenced in Regulation II, "Permits", Regulation VI, "Fees", Regulation VII, "Appeals", and/or Regulation IX, "Variances".

Section Four: Addition of Regulation XIV (Disclosure Responsibilities)

The Rules and Regulations of the Water Management shall be amended to add Regulation XIV (Disclosure Responsibilities).

Section Five: Addition of Rule 140 (Disclosure of Agents)

Rule 140 (Disclosure of Agents) shall be added to Regulation XIV (Disclosure Responsibilities) of the Rules and Regulations of the Water Management District. This Rule shall provide as follows:

RULE 140. DISCLOSURE OF AGENTS

A. Any person who applies to the Water Management District for a permit that requires Board approval shall provide the District with the names and addresses of all persons who will be communicating with the District Directors on the applicant's behalf or on behalf of the applicant's business partners. That disclosure shall be provided to the District prior to any such communication. Failure to comply with this disclosure requirement shall subject the application to immediate denial of the permit.

B. An applicant whose permit is denied due to his or her failure to comply with Paragraph A of this Rule may not apply to the Water Management District for approval of an identical or similar request for a period of twenty four (24) months from the date of the permit denial.

Section Six: Addition of Rule 141 (Disclosure of Ex Parte Communications)

Rule 141 (Disclosure of Ex Parte Communications) shall be added to Regulation XIV (Disclosure Responsibilities) of the Rules and Regulations of the Water Management District. This Rule shall provide as follows:

RULE 141 DISCLOSURE OF EX PARTE COMMUNICATIONS

A. Scope. This Rule shall apply to all communications on quasi-judicial matters pending decision before the Board of Directors. Quasi-judicial matters are applications and hearings that determine rights or obligations of named individuals or of specific property. Examples include, but are not limited to, requests for variances, appeals, and similar matters requiring decision of the Board of Directors based upon specific notice and a hearing record. This Rule shall not apply to communications on quasi-legislative matters. Quasi-legislative matters are decisions of general policy or direction such as ordinances or resolutions.

B. Policy Statement. Copies of communications, including but not limited to electronically transmitted communications such as email, email attachments, facsimile transmissions and the like made to one or more District Directors and the General Manager will be included in the public record. The General Manager should receive copies of all materials given to District Directors at the same time that they are distributed to one or more Directors.

C. Procedure. All materials transmitted to Directors should clearly indicate that they have also been forwarded to the General Manager. All materials that so indicate are not Ex Parte communication and do not need to be reported to the General Manager. Any materials that do not so indicate, and all oral and other forms of communications, shall be reported to the General Manager on the Form for Disclosure of Ex Parte Communication according to the guidelines shown thereon.

1. Communications subject to this Rule include oral or written communications of a non-procedural nature (i.e., substantive) regarding a matter pending before the Board to one or more Directors. In this use, the term "pending" shall mean any quasi-judicial matter that has been submitted by way of application, variance, or appeal or other process that is to be decided by the Board of Directors, but for which a final decision has not yet been made. Communications include written, telephone, email, facsimile, or other forms of message. Communications exclusively between Directors or exclusively between Directors and District staff shall not be deemed ex parte communications.

2. All oral or written communications, except those dealing solely with procedural matters, regarding a matter pending before the Board that are not made or reported according to the above procedures are prohibited.

3. Directors shall consult the General Manager or District Counsel on any question arising concerning this policy, prior to initiating or receiving any non-disclosed ex parte communication.

Section Seven: Addition of Rule 142 (Participation Prohibition Disclosure)

Rule 142. (Participation Prohibition) shall be added to Regulation XIV (Disclosure Responsibilities) of the Rules and Regulations of the Water Management District. This Rule shall provide as follows:

RULE 142 PARTICIPATION PROHIBITION

No Water Management District Board member shall make, participate in making, or in any other way attempt to use his or her official position to influence a District decision about which the member has knowingly had an ex parte communication that has not been reported pursuant to Rule 140.

Section Eight: Addition of Rule 143 (Consequences of Participation without Disclosure)

Rule 143 (Consequences of Participation without Disclosure) shall be added to Regulation XIV (Disclosure Responsibilities) of the Rules and Regulations of the Water Management District. This Rule shall provide as follows:

RULE 143 CONSEQUENCES OF PARTICIPATION WITHOUT DISCLOSURE

If a violation of either Rule 140, Disclosure of Agents, Rule 141, Disclosure of Ex Parte Communications, or Rule 142, Participation Prohibition, occurs and a Water Management District decision may have been materially affected by the violation, the Board may revoke its action on the motion of any Board member (four affirmative votes required to revoke) if such motion is made within twenty four (24) months from the date of that Board action (including the month in which the decision was made). If revocation is ordered, the Board shall thereafter review the administrative record and render its de novo decision on the matter.

As an alternative to Board revocation stated in this Rule, any individual may seek a writ of mandate from a court of competent jurisdiction to require the Water Management District to revoke its action and rehear the matter upon allegation and proof that the prior Water Management District Board decision was materially affected by a violation of either Rule 140, Disclosure of Agents, Rule 141, Disclosure of Ex Parte Communications, or of Rule 142, Participation Prohibition. The action referenced in this paragraph must be filed within twenty four (24) months of the date of that Board action (including the month in which the decision was made).

Section Nine: Publication and Application

The provisions of this ordinance shall amend the Rules and Regulations of the Monterey Peninsula Water Management District. Section titles and captions are provided for convenience and shall not be construed to limit the application of the text.

Section Ten: Effective Date and Sunset

This ordinance shall take effect at 12:01 a.m. on the day after both of the following events have occurred: (1) thirty (30) days have elapsed following enactment of this ordinance on second reading, and (2) the Board has approved, by motion, detailed guidelines to implement the disclosure requirements and responsibilities imposed by regulation XIV (Disclosure Responsibilities) of the District Rules and Regulations enacted herein. This ordinance shall not have a sunset date.

Section Eleven: Severability

If any subdivision, paragraph, sentence, clause or phrase of this ordinance is, for any reason, held to be invalid or unenforceable by a court of competent jurisdiction, such invalidity shall not affect the validity or enforcement of the remaining portions of this ordinance, or of any other provisions of the Monterey Peninsula Water Management District Rules and Regulations. It is the District's express intent that each remaining portion would have been adopted irrespective of the fact that one or more subdivisions, paragraphs, sentences, clauses, or phrases be declared invalid or unenforceable.

On motion of Director Erickson, and second by Director Henson the foregoing ordinance is adopted upon this 19th day of November, 2001, by the following vote:

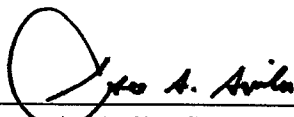
AYES: Directors Erickson, Henson, Pendergrass, Potter and Lindstrom

NAYS: Directors Chesshire and Edwards

ABSENT: None

I, Ernesto A. Avila, Secretary to the Board of Directors of the Monterey Peninsula Water Management District, hereby certify the foregoing is a full, true and correct copy of an ordinance duly adopted on the 19th day of November, 2001.

Witness my hand and seal of the Board of Directors this 27th day of November, 2001.



Ernesto A. Avila, Secretary to the Board

**IMPLEMENTATION GUIDELINES
FOR DISCLOSURE OF EX PARTE COMMUNICATIONS
(Ordinance No. 99)**

1. Purpose of these Guidelines. These guidelines clarify duties and responsibilities relating to communications between Board Members and members of the public in accord with Monterey Peninsula Water Management District Ordinance No. 99 (Ex Parte Communication Ordinance). Key terms used in these guidelines are defined in Section 8 below. Requirements set by Ordinance No. 99 apply to all written or oral communications to Board Members on any quasi-judicial matter pending decision before the Monterey Peninsula Water Management District Board of Directors. These matters include, but shall not be limited to, Board hearings relating to permits, fee waivers, appeals, and/or variances to determine rights or obligations of named individuals or of specific property. (Reference: Findings; Ord. 99; Rule 141.)

2. Intent of Ordinance No. 99. Ordinance No. 99 is intended to promote quasi-judicial decision-making that is open and public, and to protect due process and fairness in the Water Management District's processes. To achieve this goal, information available to any one Board Member is to be shared and made available to each other Board Member and to the public at large. Ordinance No. 99 shall not be construed, however, to prevent communication between members of the public and Board Members. Ordinance No. 99 establishes a framework for disclosure, and consequences for non-disclosure for specific communications between members of the public and Board Members relating to quasi-judicial matters. (Reference: Findings; Ord. 99; Rule 141.)

3. Duties of Members of the Public.

A. Disclosure of Agents by Applicant. At the time any person first applies to the Water Management District for a permit, fee waiver, appeal, and/or variance that requires Board approval, that individual shall complete a *Disclosure Statement* to list the names and addresses of all persons authorized to communicate with the District Directors on that application. The applicant shall revise and amend the *Disclosure Statement* whenever another person is authorized to communicate regarding that matter. This disclosure shall be provided to the District prior to any such communication. A communication is deemed to be "provided to the District" on the date of a postmarked letter, the date marked on a facsimile transmission or e-mail message, or the Water Management District date receipt stamp on any other *Disclosure Statement* such as one that is hand-delivered. Oral disclosure of agents shall not be accepted. Section 7 of these Implementation Guidelines describes penalties that apply for failure to comply with this disclosure requirement. (Reference: Rule 140.)

B. Limitation on Ex Parte Communications. As defined in Section 8 of these Implementation Guidelines, any ex parte communication (whether oral or written) regarding any quasi-judicial matter pending before the Board shall be prohibited

unless that communication is disclosed to all Board Members and the General Manager, or unless that communication deals solely with procedural (non-substantive) issues, or unless that communication is made during a noticed meeting of the District Board, or at a meeting of a District committee. (Reference: Rule 141.)

C. Materials Provided to District Board Members. When any person gives written material regarding a quasi-judicial matter pending before the Board to one or more Board Members, that person shall also forward a copy to the General Manager requesting that the material be provided to all Board members. These materials shall be clearly marked to indicate that a copy has been provided to the General Manager (e.g., “cc: General Manager” or “see service list attached”). Failure to provide a copy of the document to the General Manager shall render the transmission of that document an ex parte communication, and shall compel each receiving Board Member to complete the *Form for Disclosure of Ex Parte Communication* referenced in Section 5 B of these Implementation Guidelines. (Reference: Rule 141.)

4. Duties of Public Officials.

A. Limit on Ex Parte Communications. Any communication (whether oral or written) regarding any quasi-judicial matter pending before the Board shall be prohibited unless that communication is disclosed to all Board Members and the General Manager, or unless that communication deals solely with procedural (non-substantive) issues, or unless that communication is made during a noticed meeting of the District, or at a meeting of a District committee. (Reference: Rule 141.)

B. Materials Provided to District Board Members. When written material regarding a quasi-judicial matter pending before the Board is provided to one or more Board Members, a copy shall also be forwarded to the General Manager requesting that the material be provided to all Board members. These materials shall be clearly marked to indicate that a copy has been provided to the General Manager (e.g., “cc: General Manager” or “see service list attached”). Failure to provide a copy of the written material to the General Manager shall render the transmission of that material an ex parte communication, and shall compel each receiving Board Member to complete the *Form for Disclosure of Ex Parte Communication* referenced in Section 5 B of these Implementation Guidelines. (Reference: Rule 141.)

5. Duties of Board Members.

A. Consult with General Manager or General Counsel. Directors shall consult the General Manager or District Counsel respecting any non-disclosed ex parte communication. (Reference: Rule 141.)

B. Report Ex Parte Communications. Any oral or written communication received regarding any quasi-judicial matter pending before the Board shall be reported to the General Manager on the *Form for Disclosure of Ex Parte*

Communication. Materials that clearly indicate they have been forwarded to the General Manager are not ex parte communications and do not need to be reported to the General Manager.

If the ex parte communication occurs more than seven (7) calendar days in advance of the Board hearing on the matter, Directors should complete the *Form for Disclosure of Ex Parte Communication* and transmit it to the General Manager, together with a copy of any written material received regarding any quasi-judicial matter, as soon as possible after receipt. If the ex parte communication occurs within seven (7) calendar days of the hearing, Board Members should complete the *Form for Disclosure of Ex Parte Communication*, provide the General Manager with a copy of any written material received as part of the communication as soon as possible after receipt, and provide the information orally on the record of the proceeding,

Communications exclusively between Board Members or exclusively between Board Members and staff of the Water Management District are not ex parte communications. (Reference: Rule 141.)

C. Provide Copies to General Manager. Each Board Member shall forward a copy to the General Manager of any written material received regarding any quasi-judicial matter pending before the District Board if that material does not clearly indicate that a copy has been provided to the General Manager. Receipt of materials not provided to the General Manager shall render the transmission of those materials an ex parte communication, and shall compel the Board Member to complete the *Form for Disclosure of Ex Parte Communication* referenced in Section 5 B of these Implementation Guidelines. (Reference: Rule 141.)

D. Limit on Participation if Communication Not Reported. No Board Member shall make, participate in making, or in any other way attempt to use his or her official position to influence a quasi-judicial decision of the District Board of Directors for which the Board Member has knowingly had an ex parte communication that has not been reported. (Reference: Rule 141.)

6. Duties of Staff

A. Provide Guidance to Board Members. The General Manager and General Counsel shall each, upon request, provide guidance to Board Members on questions regarding Ordinance No. 99. (Reference: Rule 141.)

B. Provide Forms to Board Members and Public. The General Manager shall create and make available a *Form for Disclosure of Ex Parte Communication* to be completed by Board Members, and a *Disclosure Statement* to be completed by applicants for District permits, fee waivers, appeals, variances, and/or any other matter that requires a decision by the Monterey Peninsula Water Management District Board

of Directors to determine rights or obligations of named individuals or of specific property. (Reference: Rules 140 and 141.)

C. Provide Disclosure Statement to Applicants. The General Manager shall provide each person who applies for a permit, fee waiver, appeal, and/or variance that requires Board approval, a *Disclosure Statement* whereon that applicant shall list names and addresses for all persons authorized to communicate with the District Directors on that application. The General Manager shall retain all completed *Disclosure Statements* and place a copy in the record of that quasi-judicial matter. (Reference: Rules 140 and 141.)

D. Maintain and Transmit List of Matters and Agents. The General Manager in consultation with Counsel shall maintain and transmit each week to Board Members a list of pending matters that fall within the purview of Ordinance No. 99. This list shall include all applications for permits, fee waivers, appeals, variances and/or any other matters pertaining to rights or obligations of named individuals or of specific property that are presently pending quasi-judicial determination by the Board of Directors. This list shall also name the persons authorized to communicate on each matter as shown on the applicant's *Disclosure Statement*. Once listed as within the purview of Ordinance No. 99, all matters shall remain on the weekly list until a decision is made by the District Board of Directors on the matter or the matter is withdrawn by the applicant. Once a decision by the District Board is made, General Counsel shall advise the General Manager when the matter can be removed from the weekly list. (Reference: Rules 140 and 141.)

E. Retain Disclosure Forms. The General Manager shall retain all *Forms for Disclosure of Ex Parte Communication* completed and provided by Board Members. A copy of each relevant form shall be included in the record of that quasi-judicial matter. (Reference: Rule 141.)

F. Retain Written Communications. The General Manager shall maintain copies of all communications, including but not limited to electronically transmitted communications such as email, email attachments, facsimile transmissions and the like, in the public record of each quasi-judicial matter decided by the Board of Directors. (Reference: Rule 141.)

G. Transmit Copies of Materials. Upon receipt by the General Manager of a copy of written material regarding a quasi-judicial matter pending before the Board, where the original has been provided to one or more Board Members, the General Manager shall forward copies to all other Board Members within one week. (Reference: Rule 141.)

7. Consequences of Non-Compliance

A. Failure to Complete a Disclosure Statement. Failure by an applicant to disclose the name of individuals who shall communicate with the District Board Members on the applicant's behalf or on behalf of the applicant's business partners shall subject the application to immediate review and denial of the permit. (Reference: Rule 140.)

B. Failure to Disclose Communication. Any oral or written ex parte communication by an applicant or his or her agent regarding any quasi-judicial matter pending before the Board where that communication has not been disclosed to all Board Members or unless that communication deals solely with procedural (non-substantive) issues shall subject the application to immediate review and denial of the permit. (Reference: Rule 141.)

C. Review for Non-Disclosure. Within five (5) working days of discovery of an apparent non-disclosure by an applicant, the General Manager shall inform the applicant in writing of the apparent non-disclosure. The applicant may, within ten (10) working days, respond to clarify the apparent non-disclosure, and/or amend the *Disclosure Statement*. Within fifteen (15) days of receipt of the applicant's response, or if there is no response, the General Manager shall determine whether or not a failure to disclose occurred. In any circumstance where the General Manager finds a failure to disclose, the application shall then be deemed incomplete. Any permit issued for that application shall be revoked. The determination of the General Manager may be appealed to the Board of Directors in accord with District Rule 70.

D. Revocation on Later Discovery of Violation. In the event a violation of Disclosure of Agents (Rule 140), Disclosure of Ex Parte Communications (Rule 141), or Participation Prohibition (Rule 142) occurs and a Water Management District Board decision may have been materially affected by the violation, the Board may revoke its action within twenty-four (24) months. If revocation is ordered, the Board shall thereafter review the administrative record and render its de novo decision on the matter. In the alternative, an individual within twenty-four (24) months may ask the court to revoke the District Board's decision and rehear the matter upon proof the prior decision was materially affected by the violation. (Reference: Rule 140.)

E. 24-Month Waiting Period for Denied Matters. An applicant whose permit is denied due to failure to comply with disclosure limits set by Ordinance No. 99 may not apply to the Water Management District for approval of an identical or similar request for a period of twenty four (24) months from the date of the permit denial. (Reference: Rule 140.)

8. Definitions.

The following definitions shall be used to construe terms in these guidelines and in Ordinance No. 99.

Communications. The term “communications” shall mean include oral, written, telephone, email, facsimile, photographic or other forms of message. This term shall include but not be limited to electronically transmitted communications such as email, email attachments, facsimile transmissions and the like. (Reference: Rule 141.)

Ex Parte. The term “ex parte” shall mean by or for one party or by one side; an act on behalf of one party or side only. (Reference: Black’s Law Dictionary.)

Ex Parte Communication. The term “ex parte communication” shall mean any oral or written communication to District Directors regarding quasi-judicial matters pending decision before the District Board of Directors that is not on the public record and which reasonable prior notice to all appropriate District officials is not given. Communications that deal solely and exclusively with procedural (non-substantive) issues shall not, however, constitute ex parte communications. Communications exclusively between Board Members or exclusively between Board Members and staff of the Water Management District shall not be deemed ex parte communications. Materials that clearly indicate they have also been forwarded to the General Manager shall not constitute ex parte communications. (Reference: Rule 11.)

Identical. The term “identical” in reference to an application shall mean an application that involves the same legal parcel(s) as the original application. This term shall apply even if one or more of the legal parcel(s) on the original application are not included on the subsequent application.

Non-substantive. The term “non-substantive” shall refer to procedural issues such as when a hearing will occur or where a hearing will be held.

Pending. The term “pending” shall mean any quasi-judicial matter that has been submitted by way of application, variance, or appeal or other process that is to be decided by the Board of Directors, but for which a final decision has not yet been made. This shall include quasi-judicial matters before they appear on a Board agenda provided a decision is required by the Board of Directors. (Reference: Rule 141.)

Permit. The term “permit” shall mean any written approval by the District staff or Board based on an application, request, or appeal. This term shall include, but shall not be limited to, approvals for permits, fee waivers, appeals, and/or variances as those terms are defined in the District Rules and Regulations. (Reference: Rule 11.)

Quasi-judicial. The term “quasi-judicial” shall refer to the exercise of public discretion by the Board of Directors in ascertaining the existence of facts, and in drawing conclusions based thereon, as a basis for official action. (Reference: Black’s Law Dictionary.)

Quasi-judicial Matters. The term “quasi-judicial matters” shall refer to applications and hearings that determine rights or obligations of named individuals or of

specific property. Examples include, but are not limited to, requests for variances, appeals, and similar matters requiring decision of the Board of Directors based upon specific notice and a hearing record. Quasi-judicial matters are to be contrasted from quasi-legislative matters that relate to decision or discussion of general policy or direction such as ordinances or resolutions. (Reference: Rule 141.)

Similar. The term “similar” in reference to an application shall mean an application that includes one or more legal parcel(s) as shown on the original application, but also includes some legal parcel(s) that were not on the original application.

Staff. The terms “staff” or “District staff” shall refer to employees, counsel, and retained contractors of the Water Management District.

MPWMD/New/Ord/Implementation Guidelines (Ord 99.)
November 11, 2001

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Wednesday, November 14 2001