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Calif. Water Rules Should Help Petitioners

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Law360, New York (March 21, 2014, 12:36 AM ET) -- The California State Water Resources Control Board has proposed amendments to the regulations governing the review of administrative petitions challenging an action or failure to act by a regional water quality control board that will, finally, provide a measure of certainty to aggrieved parties and establish a definitive time frame for such parties to either obtain relief or exhaust the administrative review process.[1]

For owners and operators of facilities in California subject to regional board investigation or cleanup directives and/or orders, the proposed rule changes would help resolve a fundamental shortcoming in existing regulations, which do not specify a deadline for resolving administrative appeals. The resulting backlog of “petitions for review” — as the state board acknowledges in proposing the rule change — has adversely affected the ability of aggrieved parties to obtain timely state board review of disputed regional board actions, which is a prerequisite step to seeking judicial review under the administrative exhaustion doctrine.

The Porter-Cologne Water Quality Control Act establishes a broad framework for regulating the quality of all surface and ground water in California. This includes addressing actual or threatened discharges of hazardous substances or waste, and conferring each of the State’s nine regional boards with the authority to require alleged “dischargers” to investigate and/or cleanup and abate the effects of any “waste discharges” that threaten or impair water quality.

Regulated entities are afforded recourse to challenge any action, or failure to act, by a regional board that is “inappropriate or improper.” Oftentimes, such challenges seek to address the evidentiary grounds for naming, or failing to name, one or more parties in a cleanup order, or the scope of required investigation or cleanup work. Depending on the nature of the site, hundreds of thousands, or even millions, of dollars in investigation and cleanup costs and years of work could potentially be at issue.

Currently, Water Code Section 13320(a) provides that within 30 days of a regional board’s action or failure to act, an aggrieved party may petition the state board to review that action or failure to act. The state board has the discretion to either review or dismiss any filed petition. Pursuant to 23 C.C.R. Section 2050.5(b), which implements the requirements of Section 13320, the state board is required to review and act on a petition within 270 days of mailing a notification that responses to the petition may be filed — or the petition will be deemed dismissed by operation of law. However, neither the water code nor state board regulations prescribe how long the board has to decide whether to mail a notification in the first place.

Compounding this situation, the number of petitions annually received by the state board has significantly increased since the adoption of its petition regulations over 30 years ago. In the last several years, and due in part to state budget cuts, the state board has lacked the necessary resources to timely process filed petitions for review, particularly where petitions involve multiparty or complex disputes.

Consequently, this has resulted in a huge backlog of pending petitions of review with the state board. In addition, it has caused tremendous uncertainty for aggrieved parties in the position of having to evaluate the pros and cons of seeking administrative review (or, thereafter, judicial review after exhausting the administrative remedy) in the face of potential civil penalties for failure to comply with pending regional board directives or orders. Indeed, many parties have simply opted to forego filing a petition for review based on the unavailability of timely or certain relief.

The proposed amendments would largely rectify this longstanding dilemma by specifying the state board must either mail the notification within 90 days of receipt of a petition for review or it will be deemed dismissed by operation of law. As a result, petitioners that file a petition with the state board will have the certainty of knowing within 360 days — including any briefing and hearing schedule the board established — whether the board will dismiss their petition or

adopt an order upholding, setting aside, modifying or remanding the regional board's underlying decision or failure to act. This, in turn, will allow petitioners to decide whether to seek judicial review under Section 13330, which authorizes filing a writ of mandamus action within 30 days of the state board's decision.

The proposed amendments also propose to resolve its backlog of existing petitions by establishing the following timeframes for mailing its notification: (1) for petitions received before Jan. 1, 2011, within 120 days of the effective date of the amendments; and (2) for petitions received from Jan. 1, 2011, to Dec. 31, 2012, within 240 days of the effective date of the amendments; and (3) for petitions received from Jan. 1, 2013, to the day before the effective date of the amendments, within one year of the effective date. While the state board should further expedite these deadlines at least they also provide a measure of certainty for parties with pending petitions.[2]

In conclusion, it is our view that the state board has proposed a clear and practical solution to a problem that has long vexed parties subject to controversial regional board orders or directives by providing a timely opportunity for relief. Under these proposed amendments, petitioners will finally have a measure of certainty with respect to the administrative review timeline and an opportunity for timely judicial review, thereby enhancing their ability to make strategic decisions. We intend to submit written comments expressing general support for the proposed amendments and urge other interested persons to do the same.

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[1] The notice of proposed rulemaking announcing proposed amendments to the California Code of Regulations ("CCR"), title 23, division 3, chapter 6, along with the initial statement of reasons and full text of the proposed amendments, are available at http://www.swrcb.ca.gov/laws_regulations/. Written comments to the state board are due on April 30, 2014, at 5 p.m., and we encourage interested persons to express support of the proposed amendments.

[2] Note, the state board also proposes a minor clarification to the regulation that governs incomplete petitions that are not amended by the petitioner in a timely manner. 23 CCR Section 2051(b). The current regulation states that the petition shall be dismissed. As set forth in the state board's initial statement of reasons: "The use of the term 'dismissed' improperly suggests that the petitioner may then seek judicial review of the regional water quality control board's action. 'Deemed withdrawn' is more appropriate in this context, because the petitioner failed to file a complete petition. It would not be appropriate to allow the petitioner to seek judicial review in this circumstance, since the petitioner failed to exhaust its administrative remedy by filing a complete petition."