

Beth, Margarete@Waterboards

From: Hurley, Bill@Waterboards
Sent: Friday, May 30, 2014 11:22 AM
To: Beth, Margarete@Waterboards
Subject: FW: application of ex parte restrictions to San Francisquito Creek Flood Control Project application for 401 certification

Categories: Paperless

From: Austin, Tamarin@Waterboards
Sent: Friday, May 30, 2014 9:40 AM
To: 'Stump, Molly'
Subject: RE: application of ex parte restrictions to San Francisquito Creek Flood Control Project application for 401 certification

Hi Molly,

I am looking into the specific circumstances involved in your situation, including what communications have occurred and whether staff anticipate that this is a 401 that will go before the Board, and will hopefully have more information back to you next week. I do note, however, that the portion you have highlighted below pertains to water rights permits, which is inapplicable to your situation. Your situation, involving a 401, is more akin to a waste discharge requirement and we generally interpret a "pending" action as when the application has been filed.

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.

This is consistent with Government Code section 11430.10(c):

(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.

Have a great weekend.

Tamarin E. Austin
Senior Staff Counsel
Office of Chief Counsel
State Water Resources Control Board
(916) 341-5171

From: Stump, Molly [<mailto:Molly.Stump@CityofPaloAlto.org>]
Sent: Thursday, May 29, 2014 5:27 PM
To: Austin, Tamarin@Waterboards
Subject: application of ex parte restrictions to San Francisquito Creek Flood Control Project application for 401 certification

Hello Tamarin –

Thank you for taking time this afternoon to talk with me about the ex parte restrictions and how they apply to the Flood Control and Golf Course 401 certification matters.

I believe you were going to research further the question of whether the ex parte restrictions apply to the Regional Board in a situation where the EO has been delegated authority to grant or deny a 401 certification, and does not himself adhere to the ex parte restrictions in doing that work.

I'd like to ask you to look at one other issue. After our conversation, I reviewed the FAQ document again. At paragraph B(12), p. 5, the FAQs state:

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12. Q. When is a proceeding pending?

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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.

In our call today, we discussed one approach to the ex parte question, which would be to take the position that if there is any chance that an adjudicative matter might progress to the Board, then the restrictions on ex parte contacts should be honored from the outset. Paragraph B(12) appears to reject that prophylactic approach in favor of applying the restrictions on ex parte contacts only when a notice of hearing or complaint is actually filed at the Board level. If I'm reading this right, this is a different approach than what we discussed today. Both are constitutional. Because our matter is of significant regional importance, I need to anticipate that policy makers will seek assurances that the rules are being applied in a consistent way, so I'd ask that you look at this issue as well.

I appreciate your work on this matter. I will give you a call next week to follow up.

Regards,

Molly



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