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Flood of Intervention Stems Due Process in Regional Water Proceedings

By Paul Singarella

Gov. Arnold Schwarzenegger promised to "blow up the boxes" of agency bureaucracy through action by the ongoing California Performance Review, an organization and commission formed to assess and correct bureaucratic dysfunction.

The time is ripe for this watchdog commission to focus its attention on the state's regional water quality control boards, which have granted environmentalists a virtual stipulation to intervene in permit and enforcement proceedings - undermining due process by ignoring existing statutory safeguards to keep such interest groups from interfering in adjudicatory proceedings.

This problem is evident in a pending adjudication in Monterey County, where the Central Coast Regional Water Quality Control Board is demanding that the Pebble Beach golf course and local cities eliminate stormwater drainage into so-called "areas of special biological significance."

Clearly, environmental groups have an interest in such matters; in the mid-1970s, the state designated 34 biologically significant areas along California's coast - including sections off the Monterey Peninsula - affording them protection by special provisions in the California Ocean Plan.

The problem with the environmentalists' intervention in the Monterey proceedings - and other proceedings like it - is that it threatens the ability of the named parties to defend themselves against unprecedented and onerous enforcement.

Despite the common regional board practice of granting virtually automatic party status to environmental groups, the California Administrative Procedure Act and state board regulation make clear that these groups must satisfy a strict test before they legally may secure such status. The California Performance Review commission should direct the regional boards to start following that test - an important step toward addressing present dysfunction.

For any agency that elects by regulation (as the regional water board has) to follow the Administrative Procedure Act, the act specifies a test for intervention by third parties in adjudicative proceedings. An "adjudicative proceeding" is defined as an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision. Such proceedings include regional board enforcement and permit proceedings.

Under the intervention test, a third party must move for intervention in a written motion, served on all parties

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“Proceedings involving California's regional water quality control boards have turned into a free-for-all for environmentalists.”

named in the agency's pleading. The motion must be made as early as practicable before the hearing, and in advance of a prehearing conference, if one is scheduled.

These important procedural safeguards are coupled with two even more important substantive elements. One of them is standing. Standing under the Administrative Procedure Act test is conferred where the intervention motion "states facts demonstrating that the applicant's legal rights, duties, privileges or immunities will be substantially affected by the proceedings or that the applicant qualifies as an intervenor under a statute or regulation."

Thus, standing to intervene is recognized where agency action will constitute a substantial deprivation of property rights - such as where the agency names an industrial tenant in a contamination proceeding, and the property owner seeks to intervene, or when an association representing the likely permittees of a general permit seeks to intervene.

As stated in the 1995 Law Revision Commission comment on the standing test:

"This provision is not intended to permit intervention by a person such as a victim or interest group whose legal rights are not affected by the proceeding, but to permit intervention only by a person who has a legal right entitled to protection by due process of law that will be substantially impaired by the proceeding."

The Law Revision Commission relied on *Horn v. County of Ventura*, 24 Cal.3d 605 (1979), in which the California Supreme Court held that landowners adjacent to land to be subdivided were at risk of a "governmental deprivation of a significant property interest," and that, therefore, they deserved "reasonable notice and an opportunity to be heard" in the subdivision proceeding in accordance with "due

process requirements ... compelled by the ... force of constitutional principle."

In contrast, regional board action does not threaten to deprive environmental groups of the due process touchstone - "a significant property interest" - at least when their interest is in the interpretation and implementation of water quality laws and the public policy questions implicated.

The interests of such groups are more akin to an amicus curiae interest, and are protected fully by regulations allowing interested persons to submit policy statements during regional board proceedings.

Alternatively, standing is conferred where a third-party applicant qualifies as an "intervenor" under a statute or regulation. The water code provisions governing regional board adjudications, however, do not contain an intervention statute. And while the state board promulgated an intervention regulation in 1998, that regulation cannot be read reasonably to expand the regional boards' discretion beyond the Administrative Procedure Act's intervention statute.

That state board regulation, Section 648.1(a) of Title 23 of the California Code of Regulations, merely provides that parties to a regional board adjudication include, in addition to permittees and other persons named in the agency pleading, "any other person whom the Board determines should be designated as a party."

While the regulation grants discretion for the agency to designate parties not named on the face of the agency's pleading, the Administrative Procedure Act statute, incorporated by reference into that regulation, is the source of the standard by which that discretion is exercised. This interpretation allows the statute and the Title 23 regulation to be read in harmony, and it prevents the latter from nullifying the former - which would violate rules of construction.

The contrary interpretation urged by environmental groups - that Section 648.1(a) grants broad discretion to let in third parties, the substantive rights of which are not put in any material jeopardy by the agency action - emasculates the Administrative Procedure Act intervention statute and creates conflict between it and Section 648.1(a), when the two provisions can be reconciled (as they should be since the 1998 regulation was promulgated to implement the 1995 statute).

Further, severing Section 648.1(a) from the Administrative Procedure Act statute would leave the intervention inquiry by the regional board completely rudderless, as Section 648.1(a) does not itself contain a standard for the regional board to follow in evaluating an intervention request.

The Administrative Procedure Act further specifies that a regional board must conclude that third-party intervention will not impair "the interests of justice and the orderly and prompt conduct of the proceeding." Granting full participation rights to third parties necessarily will complicate the "orderly and prompt conduct of the proceeding" when the proceeding already includes multiple parties, raises numerous questions of law and entails significant coordination and prehearing discovery.

For example, in the pending Monterey Peninsula adjudication, a third party that is claiming "designated party" status has sought to depose parties (and their experts) named in a cease and desist order, though the prosecuting agency itself has not pursued such prehearing discovery. Further, the agency threatened to quash the administrative subpoena of the named parties if they did not coordinate with "designated parties," which had not even made a written motion for intervention.

The interests of justice are not being served in the Monterey matter, as the ability of the named parties to prepare

and put on a defense to a very serious cease and desist order is being impaired by the agency's improper liberality. This particular proceeding is not anomalous, as the environmental groups orchestrate throughout the state to take advantage of compliant regional boards, frequently securing "designated party" status with ease.

The Administrative Procedure Act intervention statute follows in large part the 1981 Model State Administrative Procedure Act. However, the 1981 act contains a second, permissive intervention test that the California Legislature did not adopt - further testament to the impropriety of the regional boards' excessively liberal intervention practice.

Under the 1981 act, an agency permissively "may grant ... intervention" if doing so "is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings." Whereas under the act this impairment test serves as a sufficient basis in and of itself to grant intervention, the California Legislature incorporated the impairment inquiry as a second substantive element that must be satisfied in addition to the standing element.

Thus, the state Legislature determined to insulate California agencies from third-party distractions and complications more so than is provided under the 1981 act.

The Legislature's 1995 determination to limit intervention through meaningful safeguards should be reinforced through California Performance Review. However, with or without such reinforcement, one cannot assume that a habit long engaged will be broken easily. Certainly, the environmental groups will respond on all fronts, including legislative, if they perceive material threat to the special status to which they have grown accustomed in regional board proceedings.

Fortunately, the policy behind the Administrative Procedure Act intervention statute is to facilitate

"judicial review on an expedited basis before the [agency] hearing commences" - in the event of an "unfavorable" agency ruling on intervention.

Judicial review is facilitated by requiring the agency to issue an order granting or denying the motion for intervention in advance of the hearing on the merits of the permit or enforcement action. Such an order would appear ripe for potential

interlocutory relief by means of a writ of mandate proceeding in superior court under the Code of Civil Procedure.

Expedited relief is warranted given the constitutionally protected rights to a fair hearing that weigh in the balance.

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