

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO 2004 -0025- EXEC

In the Matter of the Petition for Reconsideration of
LOS ANGELES DEPARTMENT OF WATER AND POWER
Regarding Water Right Fee Determinations

**ORDER GRANTING IN PART AND DENYING IN PART THE PETITION FOR
RECONSIDERATION**

BY THE EXECUTIVE DIRECTOR¹

1.0 INTRODUCTION

By this order, the Executive Director grants in part and denies in part the Los Angeles Department of Water and Power's (LADWP) petition for reconsideration of the State Water Resources Control Board's (SWRCB) determination that LADWP was required to pay the following annual water right fees: \$6,328.33 for License 10190 (Application 531, Board of Equalization (BOE) Account No. WR MT 94-000347); \$100.00 for License 110 (Application 570, BOE Account No. WR MT 94-000355); \$100.00 for License 582 (Application 1754, BOE Account No. WR MT 94-000538); \$571.09 for License 9783 (Application 3850; BOE Account No. WR MT 94-000899); \$5,034.00 for License 10191 (Application 8042, BOE Account No. WR MT 94-001804); and \$3,224.93 for License 10192 (Application 8043; BOE Account No. WR MT 94-001805).

LADWP argues that the fees for Licenses 10191 and 10192 should have taken into account a diversion limitation imposed by SWRCB Decision 1631 (1994). In addition, LADWP argues that the SWRCB's regulations implementing the fees authorized the SWRCB to assess fees

¹ SWRCB Resolution No. 2002 - 0104 delegates to the Executive Director the authority to supervise the activities of the SWRCB. Unless a petition for reconsideration raises matters that the SWRCB wishes to address or requires an evidentiary hearing before the SWRCB, the Executive Director's consideration of a petition for reconsideration of a disputed fee falls within the scope of the authority delegated under Resolution No. 2002 - 0104. Accordingly, the Executive Director has the authority to refuse to reconsider a petition for reconsideration, deny the petition, or set aside or modify the fee assessment.

based only on the amount of water authorized to be directly diverted under the licenses, not the amount authorized to be stored. LADWP requests an appeals conference with staff counsel or a supervising tax auditor, or a hearing before the SWRCB.

Preliminarily, LADWP's request for a hearing is denied because LADWP's petition does not raise factual issues that merit a hearing. For the reasons set forth below, the Executive Director finds that the fees for Licenses 10191 and 10192 should have taken into account the diversion limitation imposed by Decision 1631, but the decision to impose the fees was otherwise appropriate and proper. Accordingly, LADWP's petition for reconsideration is granted in part and denied in part.

2.0 LEGAL AND FACTUAL BACKGROUND

The SWRCB's Division of Water Rights (Division) is the entity primarily responsible for administering the state's water right program. In Fiscal Year 2003-2004, the Budget Act of 2003 (Stats. 2003, ch. 157) requires the Division's program to be supported by fee revenues amounting to \$4.4 million, replacing a General Fund reduction of \$3.6 million. Senate Bill 1049 (Stats. 2003, ch. 741) requires the SWRCB to adopt emergency regulations revising and establishing fees to be deposited in the Water Rights Fund in the State Treasury and revising fees for water quality certification. The SWRCB must set a fee schedule that will generate revenues in the amount the Budget Act sets for water right fee revenues. BOE is responsible for collecting the annual fees.

On December 15, 2003, the SWRCB adopted Resolution No. 2003 - 0077 approving emergency fee regulations to meet the requirements of the Budget Act and Senate Bill 1049. In general, the fee regulations increase filing fees for applications, petitions, registrations, and other filings and adopt annual fees for permits, licenses, water leases, and projects subject to water quality certification. Most fees will be deposited in the Water Rights Fund, which can be used to support all activities in the water right program. The Office of Administrative Law approved the emergency regulations on December 23, 2004, and both Senate Bill 1049 and the emergency regulations became effective on January 1, 2004.

BOE issued bills on or about January 8, 2004, for certain types of fees, including annual permit and license fees. These bills included Notices of Determination that LADWP owed annual water right fees for Licenses 10190, 110, 582, 9783, 10191, and 10192. License 10190 authorizes the diversion of water from the Owens River, and License 9783 authorizes the diversion of water from Rock Creek, a tributary to the Owens River. The remaining licenses authorize the diversion of water from tributaries to Mono Lake. Pursuant to section 1066, subdivision (a) of the SWRCB's regulations,² the annual fees for LADWP's licenses was the greater of \$100.00 or \$0.03 per acre-foot, based on the total amount of water authorized to be diverted under the licenses. For Licenses 10190, 9783, and 10192, LADWP received the 50 percent discount or reduction in annual fees for hydroelectric projects. (Cal. Code Regs., tit. 23, § 1071, subd. (a)(2).)

LADWP filed a petition for reconsideration of these fees, which was received on February 4, 2004.³

3.0 GROUNDS FOR RECONSIDERATION

On petition by any interested person or entity, the SWRCB may order reconsideration of all or part of a decision or order adopted by the SWRCB, including a determination that a person or entity is required to pay a fee or a determination regarding the amount of the fee. (Wat. Code, §§ 1122, 1537, subd. (b)(2).) Pursuant to Water Code section 1537, subdivision (b)(4), the SWRCB's adoption of the regulations may not be the subject of a petition for reconsideration. When an SWRCB decision or order applies those regulations, a petition for reconsideration may include a challenge to the regulations as they have been applied in the decision or order.

² All further regulatory references are to the SWRCB's regulations located in title 23 of the California Code of Regulations unless otherwise indicated.

³ The SWRCB is directed to order or deny reconsideration on a petition within 90 days from the date on which the SWRCB adopts the decision or order. (Wat. Code, § 1122.) If the SWRCB fails to act within that 90-day period, a petitioner may seek judicial review, but the SWRCB is not divested of jurisdiction to act upon the petition simply because the SWRCB failed to complete its review of the petition on time. (See *California Correctional Peace Officers Ass'n v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147-1148, 1150-1151 [43 Cal.Rptr.2d 681]; SWRCB Order WQ 98 - 05 -UST at pp. 3-4.)

California Code of Regulations, title 23, section 768 provides that an interested person may petition for reconsideration upon any of the following causes:

- (a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) The decision or order is not supported by substantial evidence;
- (c) There is relevant evidence that, in the exercise of reasonable diligence, could not have been produced;
- (d) Error in law.

A petition for reconsideration of a fee assessment must include certain information, including the name and address of the petitioner, the specific SWRCB action of which petitioner requests reconsideration, the reason the action was inappropriate or improper, the reason why the petitioner believes that no fee is due or how the petitioner believes that the amount of the fee has been miscalculated, and the specific action that petitioner requests. (Cal. Code Regs., tit. 23, § 769, subd. (a)(1)-(6); § 1077, subd. (a).) In addition, the petition may include a claim for refund. (*Id.* § 1074, subd. (g).) Section 769, subdivision (c) of the regulations provides further that a petition for reconsideration shall be accompanied by a statement of points and authorities in support of the legal issues raised in the petition. A petition must be filed within 30 days after adoption of the SWRCB decision or order of which the petitioner requests reconsideration. (*Id.* § 768.)

The SWRCB may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768. (*Id.* § 770, subd. (a)(1).) Alternatively, after review of the record, the SWRCB also may deny the petition if the SWRCB finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.* § 770, subd. (a)(2)(A)-(C).)

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4.0 DISCUSSION

4.1 The Annual Fees for Licenses 10191 and 10192 Should Have Been Based on the Diversion Limitation Imposed by Decision 1631

The annual fee for License 10191 was calculated based on the fact that the license contains a diversion limitation of 167,800 acre-feet per annum (afa). The annual fee for License 10192 was based on the fact that the license authorizes the direct diversion of 200 cubic feet per second (cfs) year-round and the diversion of 70,200 afa by storage. LADWP argues that the annual fees for Licenses 10191 and 10192 should have been based on the diversion limitation of 16,000 afa that was imposed on the licenses by Decision 1631. This argument has merit.

Section 1066, subdivision (b) of the SWRCB's regulations provides that an annual permit or license fee shall be "based on the total annual amount of diversion authorized by the permit or license, without regard to the availability of water for diversion or any bypass requirements or other conditions or constraints that may have the practical effect of limiting diversions *but do not constitute a condition of the permit or license that expressly sets a maximum amount of diversion.*" (Italics added.)

In order to protect the public trust uses of Mono Lake, Decision 1631 amended Licenses 10191 and 10192 to include a limitation on diversions depending on the level of Mono Lake. If the water level of Mono Lake is at or above 6,380 feet above mean sea level and below 6,391 feet, LADWP may divert up to 16,000 afa. (Decision 1631, pp. 202-203.) Once the lake reaches 6,391 feet, the diversion limitation is lifted, provided that lake levels do not fall below that level. (*Id.* at p. 203.) The applicable diversion limitation is determined based on the level of the lake as measured on April 1 of each year and applies from April 1 through March 31 of the following year. (*Id.* at p. 202.)

As of April 1 of 2003, the lake level was 6382.5 feet. As of April 1 of this year, the lake level was 6381.8 feet. Thus, throughout Fiscal Year 2003-2004, for which the annual fees for the licenses were assessed, the licenses were subject to a diversion limitation of 16,000 afa. This limitation constitutes a condition of the licenses that expressly sets a maximum amount of diversion. Accordingly, the annual fees for the licenses should have been based on this

limitation. The annual fee for License 10191 should have been \$480.00 and the annual fee for License 10192, which qualifies for the 50 percent discount for hydroelectric projects, should have been \$240.00.

It bears emphasis that, although the limitation applicable to the licenses each year is set based on the level of Mono Lake, it is distinguishable from a bypass requirement, lake level requirement, or other condition that does not expressly set a maximum diversion amount. Such a condition may have the practical effect of limiting diversions under a given permit or license, but the amount of water that can be diverted in any given year consistent with the condition depends on a variable water supply and cannot be ascertained from the face of the permit or license. For this reason, the SWRCB's regulations do not allow an annual fee to be based on the amount of water that actually can be diverted under a permit or license, taking into account any conditions that do not expressly set a maximum amount of diversion. (Cal. Code Regs., tit. 23, § 1066, subd. (b).) By contrast, once the level of Mono Lake is measured on April 1, the amount of water that may be diverted under LADWP's licenses is limited to a specified amount for the period of April 1 through March 31, irrespective of any hydrologic changes that may occur during that period.

For purposes of assessing annual fees, the diversion limitation imposed by Decision 1631 presents a timing issue because, unlike most annual diversion limitations, it is subject to change. By September 2014, Mono Lake should reach the target level of 6,391 feet, and once it reaches that target level, the 16,000 acre-foot diversion limitation will no longer apply. (Decision 1631, p. 203.) The SWRCB may require a fee payer to provide any additional information necessary to determine the appropriate fee. (Cal. Code Regs., tit. 23, § 1075, subd. (b).) In order to ensure that the annual fees for Licenses 10191 and 10192 are properly assessed, LADWP should be required to report to the SWRCB when the lake level reaches 6,391 feet as of April 1. LADWP is hereby placed on notice that if LADWP fails to timely notify the SWRCB that the target lake level has been reached and the appropriate fees are not assessed as a result, LADWP subsequently may be assessed the additional fees due plus interest and penalties. (Wat. Code, §§ 1536, 1537; Rev. & Tax. Code, § 55061.)

Another timing issue is presented by the fact that Decision 1631 sets the diversion limitation for the period of April 1 through March 31, which does not coincide with the fiscal year of July 1 through June 30. Provided that the SWRCB's fee regulations are not substantively amended, the annual fees for Licenses 10191 and 10192 should be assessed based on the less restrictive diversion limitations contained in the licenses for the fiscal year during which the level of Mono Lake as measured on April 1 reaches the target level. (Cal. Code Regs., tit. 23, § 1074, subd. (b).) At the time the SWRCB assesses the annual fees, however, the SWRCB will not necessarily know whether the target level will be reached during that fiscal year. Once LADWP notifies the SWRCB that the target lake level had been reached as of April 1, the SWRCB may adjust the annual fees for that fiscal year consistent with the less restrictive diversion limitations in effect from April 1 through June 30.

4.2 The Fees Were Properly Assessed Based on Maximum Diversion to Storage Amounts

All of LADWP's licenses except for License 110 authorize the diversion to storage of a specified amount of water in addition to the direct diversion of water at a specified rate. LADWP argues that the SWRCB's regulations authorized the SWRCB to assess fees based only on the amount of water authorized to be directly diverted under the licenses, not the amount authorized to be stored. This argument lacks merit.

The SWRCB's regulations provide that annual fees shall be based on the total amount of water authorized to be diverted under a permit or license, regardless of whether the permit or license authorizes direct diversion or diversion to storage, or both. (Wat. Code, § 1066.) No good reason exists to exempt storage projects from paying annual permit or license fees, and the regulatory history establishes that the SWRCB did not intend to provide for such an exemption. (Victoria A. Whitney, Chief, Division of Water Rights, mem. to file, December 29, 2003, pp. 1, 3-4.)

Accordingly, the annual fees were properly based on the maximum amounts authorized to be diverted to storage under the LADWP's licenses in addition to the amounts authorized to be directly diverted.

5.0 CONCLUSION

For the reasons discussed above, the annual fees for Licenses 10191 and 10192 should have been based on the diversion limitation imposed by Decision 1631, but the decision to impose the annual fees for LADWP's licenses was otherwise appropriate and proper. Accordingly, LADWP's petition for reconsideration should be granted in part and denied in part.

ORDER

IT IS HEREBY ORDERED:

1. LADWP's petition for reconsideration is granted to the extent that LADWP sought to have the annual fees for Licenses 10191 and 10192 based on the 16,000 acre-foot diversion limitation imposed by Decision 1631. The SWRCB will reassess the annual fees for Licenses 10191 and 10192 and direct BOE to refund or cancel the fees previously assessed, as appropriate.
2. LADWP shall report to the SWRCB within 10 days of April 1 in the year when the level of Mono Lake reaches 6,391 feet as of April 1. The report shall state that (1) the target lake level of 6,391 was reached as of April 1; (2) pursuant to Decision 1631, the 16,000 acre-foot per annum diversion limitation no longer applies once the target level is reached; and (3) consistent with this order, it may be appropriate to assess higher annual fees for Licenses 10191 and 10192.
3. Except as otherwise provided in ordering paragraph one, above, LADWP's petition for reconsideration is denied.

Dated: May 3, 2004

ORIGINAL SIGNED BY HARRY M. SCHUELLER for
Celeste Cantú
Executive Director

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