

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO 2004-0030-EXEC

In the Matter of

STOCKTON EAST WATER DISTRICT

Regarding Supplemental Water Right Application Filing Fee for Pending Applications X3500, X3514, X3515, X3516, X3517, X3518, X3519, X3386 and State Filed Applications 13333 - 13338

ORDER GRANTING AND DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR¹

1.0 INTRODUCTION

The Stockton East Water District (SEWD) petitions the State Water Resources Control Board (SWRCB) for reconsideration of the SWRCB's assessment of supplemental filing fees for pending Applications X3500, X3514, X3515, X3516, X3517, X3518, and X3519, and for petitions for partial assignment of State Filed Applications 13333 - 13338. SEWD also petitions for reconsideration of the annual fee on Application X3386. The letter assessing fees from which SEWD seeks reconsideration was mailed on March 22, 2004. It assesses water right fees in the amount of \$5,395,140 and additionally assesses Department of Fish and Game fees under Public Resources Code section 10005 in the amount of \$5,950 for eight applications. SEWD faxed its petition for reconsideration to the SWRCB on April 21, 2004. SEWD also mailed a letter to the SWRCB dated May 20, 2004, addressing some of the issues in its petition for reconsideration. To the extent that the letter raises new issues that were not raised in the petition for reconsideration, such new issues are untimely for inclusion as a part of the petition for reconsideration. To the extent that the letter withdraws issues in its petition for reconsideration from consideration or clarifies that SEWD is not seeking reconsideration on those issues, this

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 petitions for reconsideration of disputed fees falls within the scope of the authority delegated under Resolution No. 2002 - 0104. Accordingly, the Executive Director has the authority to deny a petition for reconsideration or set aside or modify the water right fee assessment.

order takes into account the contents of the letter in affirming the fee assessments in the March 22, 2004 letter.

This order grants reconsideration of the supplemental filing fees for Applications X3500, X3514, X3515, X3516, X3517, X3518, and X3519, and grants reconsideration of the fees assessed on the petitions for partial assignment of state-filed applications. This order denies reconsideration of the annual fee on Application X3386 and denies reconsideration of the fees the SWRCB is required to collect on behalf of the Department of Fish and Game.

2.0 GROUND FOR RECONSIDERATION

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, however, a petition for reconsideration may include a challenge to the regulations.

Under California Code of Regulations, title 23, section 768, an interested person may petition for reconsideration upon any of the following causes:²

- (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 the name and address of the petitioner, the specific board action for which the petitioner requests reconsideration, the reason

² Unless otherwise indicated, all further regulatory references are to the SWRCB's regulations in title 23 of the California Code of Regulations.

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 which 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).)

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).)

SEWD raises issues that implicate the causes listed in section 768, subdivisions (b) and (d). To the extent that this order does not address all of the issues raised in the petition for reconsideration, the SWRCB finds that either these issues are insubstantial or that SEWD failed to meet the requirements for a petition for reconsideration under the SWRCB's regulations. (*Id.* §§ 768-769, 1077.)

3.0 BACKGROUND AND DISCUSSION OF PETITION FOR RECONSIDERATION

3.1 Basis for Fee Requirement

The SWRCB's Division of Water Rights (Division) has the staff responsibility for administering the state's water right program. In Fiscal Year 2003-2004, the Budget Act of 2003 (Stats. 2003, c. 157) requires the water rights program to be supported by fee revenues. Senate Bill 1049 (Stats. 2003, c. 741) requires the SWRCB annually to adopt emergency regulations revising and establishing fees to be deposited in the Water Rights Fund in the State Treasury.

The Legislature enacted the water right fee provisions of the Budget Act and Senate Bill 1049 based on the recommendations of the Legislative Analyst. The Legislative Analyst concluded that the water right program provides benefits to the water right applicants and water right holders regulated by the program. (Legislative Analyst's Office, Analysis of the 2003-04 Budget Bill at pp. B-123 through B-126.) Accordingly, the Legislative

Analyst recommended fee changes, including an increase in application and other filing fees, assessment of new annual fees, and establishment of a new special fund for deposit of the revenues generated by the 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, 2003, and both Senate Bill 1049 and the emergency regulations became effective on January 1, 2004.

3.2 The Petition for Reconsideration

3.2.1 *SEWD's Request for Relief*

SEWD requests that the SWRCB take the following actions:

1. Use the fee schedule that was in effect in January 2003 to assess fees for the six proposed completed state-filed applications and for the petitions for partial assignment of the six state-filed applications.
2. Rescind the annual fee for Application X3386.
3. Continue to diligently and expeditiously process all of the applications.³
4. Apply repayments allegedly due from a prior fee on Application A30602 to any fees that are due on the applications for which fees are considered herein, and refund any amounts due to SEWD from the fee on A30602.⁴

³ This request is not directly addressed herein, as it does not appear to be based on the action of the SWRCB from which the petition for reconsideration was taken.

⁴ This request addresses SEWD's method of payment for the fees it must pay, not whether SEWD owes the fees assessed in the March 22, 2004 letter. SEWD made the same request in its letter dated January 8, 2003. In a letter dated December 9, 2003, the Chief of the Division of Water Rights responded that the filing fees are nonrefundable. The letter was hand-delivered to SEWD's representatives at a meeting on December 9, 2003. SEWD did not request reconsideration of that letter within thirty days after SEWD received it.

3.2.2 Legal Argument Incorporated by Reference

SEWD argues that imposition of the supplemental filing fee is invalid for the reasons stated in *Northern California Water Association v. State Water Resources Control Board* (Sacramento County Superior Court No. 03CS01776) (*NCWA v. SWRCB*) and in a petition for reconsideration, also filed by the *NCWA* petitioners.

The arguments made in the petition for reconsideration filed by the *NCWA* petitioners and incorporated by reference in SEWD's petition are addressed in SWRCB Order WRO 2004-0011-EXEC. These include some arguments that are inapplicable to the supplemental application fees at issue in this proceeding. Except as discussed below, SEWD does not provide any points and authorities or other argument or supporting information to support the arguments in the *NCWA* petition. Order WRO 2004-0011-EXEC correctly decides the issues raised by SEWD through its incorporation by reference of that petition for reconsideration. For the reasons set forth in Order WRO 2004-0011-EXEC, the arguments raised by SEWD by virtue of its incorporation by reference of the petition for reconsideration filed by the *NCWA* petitioners are denied.

3.3 Assessment of New Fee Schedule to Applications Submitted in December 2002 and in January 2003

SEWD has nine coordinated water right applications, eight of which are the subject of SEWD's petition for reconsideration. Much of the water appropriated under these applications will be used in SEWD's Farmington groundwater recharge project. The legal issues regarding the petitions for reconsideration of the fee determinations on Applications X3500 and X3514 through X3519⁵ are alike, and are discussed together, *infra*, to avoid repetition.⁶

⁵ The numbering of an application starting with an "X" previously was used by the Division to distinguish applications that the Division had received and was holding without filing them, pending review to determine whether they should be filed and given a regular application number starting with an "A."

⁶ SEWD also petitioned for reconsideration of fees imposed for Application X3386, under which SEWD seeks to divert water from the Calaveras River. Application X3386 was filed on February 7, 2002. The basis of the petition for reconsideration of the fees assessed on Application X3386 differs from the other applications. The part of the petition for reconsideration addressing fees imposed on Application X3386 is discussed below.

Under Applications X3500 and A30602, SEWD seeks to divert water from Littlejohn's Creek. SEWD filed A30602 in 1996 and submitted application X3500 on December 5, 2002. SEWD submitted its last revision of Application A30602, originally filed on April 4, 1997, on January 8, 2003.

By letter dated January 8, 2003, SEWD also submitted six petitions for partial assignment of state-filed applications. With each petition for partial assignment of a state filed application, SEWD submitted a proposed completed application as directed by Water Code section 10504.01. Under these applications, numbered X3514 through X3519, SEWD proposes to take water by direct diversion from Littlejohn's and Rock creeks via French Camp Slough. SEWD submitted the applications and petitions without paying any filing fees. SEWD requested, in its letter dated January 8, 2003, that the SWRCB pay the fee from a refund that SEWD claimed was due after SEWD reduced the amount of water it was applying for under Application 30602.⁷ By letter dated December 9, 2003, the Division rejected the assertion that a refund was due of part of the fee on Application 30602, stating that the fee is nonrefundable.⁸

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⁷ Since SEWD filed Application 30602 in 1996, it has amended it twice, reducing the amount of water SEWD would appropriate under this application. Application 30602 is not the subject of a petition for reconsideration, but SEWD asserts in its petition for reconsideration that the SWRCB should apply part of the filing fees previously paid for Application 30602 to the other applications. As part of a petition for reconsideration of the March 22, 2004, letter, this issue is inapposite. The March 22, 2004, letter did not address this request. Consequently, this issue is not properly part of the petition for reconsideration of the March 22, 2004, letter assessing fees. Because the SWRCB rejected this request in an earlier letter, dated December 9, 2003, any petition for reconsideration of that rejection was due thirty days thereafter.

⁸ SEWD paid a fee on A30602 in September 1997 in the amount of \$19,780. SEWD later reduced the amount of water it was seeking to appropriate and dropped the surface storage component of the application. SEWD alleges that an employee of the SWRCB advised SEWD in 1999 that it would receive a refund of approximately \$18,500 due to SEWD having dropped the surface storage component from the application.

A refund, even if agreed to, would have been contrary to law. The fee was for filing the application. SEWD apparently does not dispute that the fee was accurately calculated at the time when A30602 was filed, and that it was based on the amount of water SEWD sought to appropriate under the application as filed. Further, the SWRCB did significant amounts of work on the application after it was filed and before the application was amended. Under Government Code section 13142, a refund is not authorized in this case, and if issued would be a gift of public money in violation of California Constitution, article 16, section 6. The SWRCB has informed SEWD that the filing fee on A30602 is not refundable.

In addition to incorporating the arguments in the *NCWA* petition by reference, SEWD argues that the fees charged for these applications in the March 22, 2004, fee letter are improperly retroactive. SEWD also argues that there is no reasonable relationship between the fees and the costs of processing these applications.

SEWD argues that because Applications X3500 and X3514 through X3519 were received by the SWRCB on December 5, 2002, and on January 8, 2003, respectively, that they were filed on those dates, and consequently should be subject to the fee schedule in effect prior to July 1, 2003. In fact, all three of the applications were received by the SWRCB on January 9, 2003, although they were dated December 5, 2002, and January 8, 2003. Upon review, the SWRCB agrees that the applications were filed on January 9, 2003, and that the fee schedule prior to July 1, 2003, is applicable. Under that fee schedule, the application fee for Application X3500 will be \$6,100 and the application fees for Applications X3514 through X3519 will be, respectively, \$1,600; \$1,600; \$650; \$650; \$1,000; \$1,000, for a total of \$12,600. The Division will send a new fee bill to SEWD for the fees on these applications, and will assign regular application numbers to these applications.

3.4 The Overall Limit in the Applications on the Amount of Water Does Not Justify a Lower Application Fee

SEWD emphasizes throughout its petition for reconsideration that the overall maximum amount of water it is seeking under all of the applications, including Application 30602, for which it previously has paid application fees, is 260,000 acre-feet per year (260 TAF). The fee assessed to SEWD for the applications is based on applications totaling 534,630 acre-feet per year. SEWD asserts that this fee is duplicative, because it is based on the total amount of water applied for, not on the maximum amount of water SEWD is seeking to appropriate. SEWD, however, has chosen to file redundant applications for similar amounts of water under the petition and assignment process for state-filed applications and under the regular application process, and as a result SEWD's applications total more than twice the amount of water it argues that it intends to pursue. This double filing is beneficial to SEWD. The state-filed applications would provide better water rights to SEWD, since they could provide water with a higher seniority and a greater frequency of availability than the new applications would provide. If the partial assignments of

the state-filed applications are not approved, however, SEWD will need to rely on the new applications.

Under the application fees that were in effect before July 1, 2003, the fee was to be calculated for each application.⁹ Accordingly, SEWD filed its duplicative applications knowing that it would be charged filing fees for each application. SEWD filed the additional applications as part of a strategy to provide a backup. No provision exists for setting fees for filing applications based on the combined total among several applications. Accordingly, SEWD's argument on this point is rejected.

3.5 Application X3386

Under Application X3386, SEWD seeks to divert water from the Calaveras River. On January 22, 2002, SEWD filed Application X3386, and on February 7, 2002, submitted the minimum filing fee, in the amount of \$100. SEWD also submitted the Department of Fish and Game fees for Application X3386 under Public Resources Code section 10005 in the amount of \$850. The total fee due on the application under the fee schedule in effect at that time was \$10,300. The SWRCB letter assessing fees, dated March 22, 2004, assesses the remaining balance of \$10,200 owing to the SWRCB for filing the application. Additionally, the March 22, 2004, letter assesses an annual application fee in the amount of \$8,640.

SEWD, in its petition for reconsideration, does not object to the assessment of the balance due on this application, but it does object to the assessment of the annual application fee on this application, in the amount of \$8,640. By letter dated May 20, 2004, SEWD submitted a check for \$10,200 in payment for the balance due on Application X3386 and clarified that it does not object to this fee, but SEWD reiterated its objection to the annual application fee.

SEWD is required to pay the annual application fee. Notwithstanding that SEWD claims in its petition for reconsideration that it has not requested a delay in processing the application,

⁹ The assessment of filing fees for each duplicative filing did not change when the current filing fees went into effect. Under the SWRCB regulation effective January 1, 2004, regarding application fees, the fee is to be calculated for each application. (Cal. Code Regs., tit. 23, § 1062.)

SWRCB's records indicate that SEWD has requested a delay that is still in effect, as specified below. Under the SWRCB's regulations, at California Code of Regulations, title 23, section 1063, subdivision (b), a water right applicant shall pay an annual fee if:

“(b) The applicant requests the board to delay processing the water right application.”

Under this provision, SEWD owes an annual fee for this application. The Division has a contact report in its files dated February 7, 2003, recording a telephone conversation on that date in which SEWD's General Manager, Kevin Kaufman, told SWRCB staff that the engineering firm representing SEWD was revising the maps for this application, and requested that the Division hold off on processing the application until they had submitted the new maps. SEWD has not yet submitted the revised maps for which it requested the delay.

3.6 Legality of the New Fee Schedule

This order applies the new fee schedule only to the annual application fee on Application X3386. On pages 10 - 13 of its petition for reconsideration, SEWD argues that for the reasons stated in the complaint filed in *NCWA v. SWRCB* and in the NCWA petition for reconsideration, the application of the new fee schedule is contrary to law, improperly retroactive as to the applications and has no reasonable relationship to the costs of processing the applications. It does not appear, however, that SEWD is referring to Application X3386 with respect to either of these arguments. First, its argument regarding retroactivity on page 11, line 17, of its petition for reconsideration refers to the applications that it filed in January 2003. The annual application fee on X3386 is not retroactive, since it is an annual fee that is assessed in 2004 for maintaining the application. Second, SEWD's argument regarding the reasonable relationship between the fees and the costs of processing the applications, starting on page 12, line 20, specifically addresses the supplemental water right application fees established by SB 1049 and the new fee schedule.

SEWD's arguments with respect to applying the new application fee to the applications filed in January 2003 are moot, since this order requires that the fees be recalculated as SEWD requests. As discussed above, this order holds that the supplemental new application fees are not to be applied to Applications X3500 and X3514 through X3519 because the applications were filed

before July 1, 2003. Accordingly, the SWRCB herein need not address the arguments on pages 10 - 13 with respect to Applications X3500 and X3514 through X3519.

3.7 Department of Fish and Game Fees

In footnote 1 of its petition for reconsideration, SEWD stated that it does not object to the request for Department of Fish and Game fees contained in the March 22, 2004 letter. By letter dated May 20, 2004, however, SEWD asserted that it does not owe more than one fee for the seven applications that include the proposed completed applications (X3514-X3519) filed with the petitions for assignment of state filed applications and Application X3500. SEWD's objection to the Department of Fish and Game fees is untimely as a petition for reconsideration. Water Code section 1122 provides that a petition for reconsideration "shall be filed not later than 30 days from the date on which the board adopts a decision or order." Accordingly, SEWD's objection to the Department of Fish and Game fees imposed under Public Resources Code section 10005 is rejected as being untimely.

If SEWD still believes it should be given a refund or discount from the fees under section 10005, SEWD should contact the Department of Fish and Game (Department). If the Department decides that fewer appropriations are involved, the Department can so advise the SWRCB and SEWD.

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ORDER

IT IS HEREBY ORDERED THAT the petition for reconsideration filed by Stockton East Water District seeking reconsideration of the March 22, 2004 assessment by the Division of Water Rights of the State Water Resources Control Board of fees is granted in part and denied in part, as set forth below.

1. The request to apply the fee schedule that was in effect before July 1, 2003 in assessing supplemental filing fees for pending Applications X3500 and X3514-X3519, and for fees on petitions for partial assignment of State Filed Applications 13333-13338, is granted. The Division shall send petitioner a revised fee assessment.
2. The request to rescind the annual fee on Application X3386 is denied.

Dated: June 18, 2004

ORIGINAL SIGNED BY
Celeste Cantú
Executive Director

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