STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2009-0010-EXEC

In the Matter of the Petition for Reconsideration of the

SAN LUIS & DELTA-MENDOTA WATER AUTHORITY AND WESTLANDS WATER DISTRICT

Regarding Water Right Fee Determinations for Fiscal Year 2008-2009

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR[1]

1.0 INTRODUCTION

San Luis & Delta-Mendota Water Authority (Water Authority), acting for and on behalf of its member agencies, and Westlands Water District petition the State Water Resources Control Board (State Water Board or board) for reconsideration of annual water right fees assessed by the State Board of Equalization (BOE) for Fiscal Year (FY) 2008-2009.[2] The petition requests the State Water Board to adjust the water right fees imposed on the Water Authority's members, including Westlands Water District, and to refund monies "unduly paid." Petitioners seek to have the State Water Board recalculate water right fees assessed to the United States Bureau of Reclamation's (Reclamation) water supply contractors to account for the revocation of Reclamation's water right permits held in connection with the Auburn-Folsom South Unit of the Central Valley Project (the Auburn Dam Project).

The State Water Board will not reconsider its decision to assess annual water right fees because the petition was not timely filed with the board and does not raise substantial issues

[1] State Water Board Resolution No. 2002-0104 delegates to the Executive Director the authority to supervise the activities of the board. Unless a petition for reconsideration raises matters that the State Water Board wishes to address or requires an evidentiary hearing before the board, the Executive Director's consideration of petitions for reconsideration of disputed fees falls within the scope of authority 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.

[2] For ease of reference, these entities are collectively referred to herein as "Petitioners."

related to the causes for reconsideration set forth in California Code of Regulations, title 23, section 768.[3] Alternatively, the State Water Board denies the petition because it finds that the decision or order in question was appropriate and proper.

2.0 GROUNDS FOR RECONSIDERATION

According to the State Water Board's regulations governing reconsideration of fees, only a fee payer may petition for reconsideration of the board's determination that the fee payer is required to pay a fee, or the board's determination regarding the amount of the fee.[4] (§ 1077.) A fee payer may petition for reconsideration on any of the following grounds: (1) irregularity in the proceeding, or any ruling, or abuse of discretion, by which the fee payer was prevented from having a fair hearing; (2) the fee determination is not supported by substantial evidence; (3) there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced; or (4) error in law. (§§ 768, 1077.)

A petition for reconsideration of a fee assessment must include certain information, including a copy of the notice of assessment or certain information that would be contained in the notice. (§ 1077, subd. (a).) In Exhibit A of the petition for reconsideration, Petitioners include notices of assessment for some, but not all, of the Water Authority's members identified in footnote 1 of the petition. Only the following entities have met this particular requirement of section 1077: Banta-Carbona Irrigation District, Byron Bethany Irrigation District, Del Puerto Water District, Eagle Field Water District, James Irrigation District, Mercy Springs Water District, Pacheco Water District, Panoche Water District, Patterson Irrigation District, Reclamation District No. 1606, San Benito County Water District, San Luis Water District, Santa Clara Valley Water District, Tranquility Irrigation District, West Stanislaus Irrigation District, and Westlands Water District. The other entities identified in footnote 1 of the petition have failed to meet this requirement, and the petition is defective as to their claims.

The State Water Board 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 of the board's regulations. (§ 770, subd. (a)(1).) Alternatively, after review

[3] All further regulatory references are to the title 23 of the California Code of Regulations unless otherwise indicated.

[4] The Water Authority does not hold a water right permit or license or pay annual water right fees, and therefore cannot be considered a fee payer under section 1077.

of the record, the State Water Board also may deny the petition if the board 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.[5] (*Id.*, subd. (a)(2)(A)-(C.)

3.0 THE PETITION FOR RECONSIDERATION WAS NOT TIMELY FILED

If the subject of a petition for reconsideration relates to an assessment of a fee by BOE, the State Water Board's decision regarding the assessment is deemed adopted on the date of assessment by BOE. (§ 1077, subd. (b).) A petition is timely filed only if the State Water Board receives it within 30 days of the date the assessment is issued. (*Ibid.*) BOE assessed the annual water right fees on November 10, 2008. Thus, the deadline for filing a petition for reconsideration of the November 10, 2008 assessment was December 10, 2008. Petitioners' request for reconsideration is dated December 31, 2008, and was received by the State Water Board on that same day. Their request is not timely, and will not be considered by the State Water Board for this reason.

The State Water Board revoked the Auburn Dam Project permits on December 2, 2008.[6] In light of the requirements of section 1077, Petitioners cannot (and do not) argue that the deadline for submitting their petition for reconsideration and a recalculation of fees in connection with State Water Board's revocation of the Auburn Dam Project permits is triggered by the board's revocation order. Again, only the fee assessment date, not any other date, is the relevant date for purposes of determining whether a petition for reconsideration of water right fees is timely filed. (§ 1077, subd. (b).) Moreover, the State Water Board revoked the Auburn Dam Project permits within the fee reconsideration period that ended December 10, 2008. Petitioners had an opportunity to file a timely petition if they so chose.

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[5] The State Water Board is directed to order or deny reconsideration on a petition within 90 days from the date on which the board adopts the decision or order. (Wat. Code, § 1122.) Because the petition for reconsideration was not timely filed, it is defective and not a proper petition within the aegis of Water Code section 1122. Nonetheless, even if the petition was properly filed, and the State Water Board fails to act within that 90-day period, the board is not divested of jurisdiction to act upon the petition simply because it 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]; State Water Board Order WQ 98-05-UST at pp. 3-4.)

[6] The Water Authority and Westlands Water District participated in the revocation proceeding and therefore were aware of the potential for revocation well before the State Water Board's action. The State Water Board distributed a draft revocation order to the service list no later than October 23, 2008.

4.0 THE PETITION FOR RECONSIDERATION FAILS TO RAISE SUBSTANTIAL ISSUES

The State Water Board assesses an annual water right fee to each holder of a water right permit or license based upon the total authorized diversion amount of that permit or license. (§ 1066, subd. (b).) Reclamation holds extensive water rights in California, but as a federal agency, it does not pay fees to the state. Accordingly, pursuant to Water Code section 1540, if the State Water Board determines that a fee payer such as Reclamation is likely to decline to pay a fee or expense based on a claim of sovereign immunity, then the board may allocate the fees to that fee payer's water supply contractors. Section 1073 of the fee regulations contains a formula by which the State Water Board passes Reclamation's fees through to Reclamation's contractors by prorating the fees for Reclamation projects among the contractors for each project. This is commonly referred to as the "pass-through" fee. The water right fee assessed against Reclamation's permits and licenses is calculated based on the same rate that is applied to all other fee payers.

On December 2, 2008, by Order WR 2008-0045, the State Water Board revoked Reclamation's water right permits[7] held in connection with the Auburn Dam Project.[8] Without citing any authority, Petitioners assert that the water right fees should be recalculated.

This issue is governed by section 1074, subdivision (b) of the fee regulations, which states:

> Except as provided in this subdivision, if the circumstances establishing a requirement for payment of an annual fee occur during a year, the entire annual fee shall be imposed for that year, even if those circumstances occur for only a portion of the year.

Annual fees are imposed on a fiscal year basis. (§ 1074, subd. (a).) At the beginning of Fiscal Year (FY) 2008-2009, Reclamation held Auburn Dam Project water right Permits 16209, 16210, 16211, and 16212 (Applications 18721, 18723, 21636, and 21637). Accordingly, the circumstances establishing a requirement for payment of the annual fee were met in FY 2008-2009, and the entire annual fee must be imposed for the fiscal year. In other words, Petitioners were properly assessed annual fees for the entire fiscal year, even though Reclamation's permits were subsequently revoked halfway through the year.

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[7] Permits 16209, 16210, 16211, and 16212 (Applications 18721, 18723, 21636, and 21637).

[8] The State Water Board received one petition for reconsideration of its decision to revoke the Auburn Dam Project permits. On February 17, 2009, the State Water Board denied the petition for reconsideration.

There is one exception to the requirement of section 1074, subdivision (b). The subdivision further provides that:

> [t]he board may decide not to assess an annual fee if a permittee or licensee requests revocation of the permit or license before the annual fee is assessed and the board determines that revocation likely would be appropriate.

In this case, however, Reclamation did not request revocation of the Auburn Dam Project permits, and the exception is inapplicable.[9]

5.0 CONCLUSION

The petition for reconsideration was not timely filed and does not raise substantial issues related to the causes for reconsideration. Accordingly, the State Water Board will not reconsider its decision to assess annual water right fees. Alternatively, for the same reasons discussed above, the State Water Board denies the petition because it finds that the decision or order in question was appropriate and proper.

ORDER

IT IS HEREBY ORDERED THAT the petition for reconsideration is denied.

Dated: 2/19/09

Tom Howard
Dorothy Rice
Executive Director

[9] The State Water Board need not decide whether the exception applies when a contractor subject to the "pass-through" fees requests revocation of the permits for a federal project because the Water Authority and Westlands Water District did not request revocation of the Auburn Dam Project permits. Moreover, the exception merely authorizes the State Water Board to decline to assess fees when a permittee or licensee requests revocation. Because the State Water Board has incurred substantial expenses in conducting the revocation proceeding and adopting a revocation order in FY 2008-2009, it is appropriate to impose fees for FY 2008-2009 based on the permits that are the subject of the revocation proceeding.