

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2010-0004-EXEC

In the Matter of the Petition for Reconsideration of the
YUBA COUNTY WATER AGENCY
Regarding Annual Water Quality Certification Fee Determinations
FERC Project 2246

**ORDER PARTIALLY GRANTING AND
PARTIALLY DENYING RECONSIDERATION**

BY THE EXECUTIVE DIRECTOR:¹

1.0 INTRODUCTION

Yuba County Water Agency (YCWA) alleges that the imposition of hydroelectric relicensing fees for Fiscal Year (FY) 2009-2010 was improper because: (1) none of the events that trigger annual fees for hydroelectric projects licensed by the Federal Energy Regulatory Commission (FERC) under California Code of Regulations, title 23, section 3833.1 has occurred; and (2) water right fees are unconstitutional and invalid for the reasons alleged by petitioners in consolidated cases under *Northern California Water Association, et. al. v. State Water Resources Control Board, et al.*, Sacramento Superior Court No. S. 03CS01776 and in the depublished decision *California Farm Bureau Federation v. California State Water Resources Control Board* (2007) 146 Cal.App.4th 1126. The State Water Resources Control Board (State Water Board or Board) finds that none of the events that trigger annual water quality certification fees for YCWA has occurred. The Division of Water Rights has directed the State Board of Equalization to cancel fees associated with FERC Project 2246 for FY 2009-2010, and therefore

¹ State Water Board Resolution No. 2002-0104 delegates to the Executive Director the authority to conduct and supervise the activities of the State Water 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 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.

no additional action is required. The allegation that water rights fees are invalid is improperly raised and is dismissed.²

2.0 GROUNDS FOR RECONSIDERATION

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. (Cal. Code Regs., tit. 23, §§ 768, 1077.)³ Pursuant to Water Code section 1537, subdivision (b)(4), the State Water Board's adoption of the regulations may not be the subject of a petition for reconsideration. When a State Water Board 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.

A petition for reconsideration of a fee assessment must include certain information, including the name and address of the petitioner, the specific State Water Board action of which the 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 the petitioner requests. (§§ 769, subd. (a)(1)-(6), 1077, subd. (a).) A petition for reconsideration of a fee assessed by BOE must include either a copy of the notice of assessment or certain information. (§ 1077, subd.(a).) Section 769, subdivision (c) of the regulations further provides 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.

If the subject of the petition 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.

² The Water Code directs the State Water Board to act on a petition for reconsideration within 90 days from the date on which the State Water Board adopts the decision or order that is the subject of the petition. (Wat. Code, § 1122.) If the State Water Board fails to act within that 90-day period, a petitioner may seek judicial review, but the State Water Board is not divested of jurisdiction to act upon the petition simply because the State Water Board 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, 1147-48, 1150-51 [43 Cal.Rptr.2d 681]; State Water Board Order WQ 98-05-UST at pp. 3-4.)

³ All further regulatory references are to the State Water Board's regulations located in title 23 of the California Code of Regulations unless otherwise indicated.

(§ 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.*) The deadline for filing a petition for reconsideration of the November 3, 2009 assessment was December 3, 2009. (*Ibid.*) YCWA timely filed a petition for reconsideration.

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 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. (*Id.*, subd. (a)(2)(A)-(C).)

3.0 ANALYSIS

YCWA operates the Yuba River Development Project, a hydroelectric facility authorized under FERC License No. 2246. The facility's FERC license expires on April 30, 2016. In order to receive a new license from FERC for a facility that has the potential to discharge into the waters of a state, an applicant must apply to the state for water quality certification. (33 U.S.C. § 1341; 18 CFR § 5.23.) The process for relicensing a FERC facility begins years prior to expiration of the current license. (See, e.g., 18 CFR § 16.6.)

There are several triggers which can initiate the onset of annual fees to support the State Water Board's work in preparing a water quality certification for a FERC-licensed hydroelectric facility, as described in section 3833.1, subdivision (b)(2) of the regulations:

- (A) A notice of intent is filed pursuant to 18 CFR § 5.5 or 18 CFR § 16.6.
- (B) Consultation is initiated pursuant to 18 CFR § 4.38.
- (C) An application for water quality certification is filed. (*Id.*)

For the current facility, no notice of intent [NOI] or water quality certification application has been filed. The consultation provisions of 18 CFR § 4.38 do not apply because the provision applies only to original licenses, license exemptions and certain license amendments, not to the relicensing of an existing facility like the Yuba River Project. (See *id.*, subd. (a)(6).) Thus, although State Water Board staff have attended meetings convened by YCWA for relicensing,

these activities do not constitute consultation "pursuant to 18 CFR § 4.38" and do not trigger the requirement for payment of annual fees under the fee regulations.

Based on the federal regulations for re-licensing of hydropower facilities, the State Water Board does not anticipate that YCWA will file an NOI before November 1, 2010. (18 CFR §§ 5.5(d), 16.6 (c)(1).) YCWA is not required to file a water quality certification until 60 days after FERC accepts an application for relicensing, which will not be due until April 30, 2014. (18 CFR §§ 5.17(a), 5.23.) Therefore, none of the triggers for the annual fee for water quality certification for a FERC-licensed hydropower facility has occurred or is expected to occur in FY 2009-2010.

Accordingly, the Division of Water Rights has ordered the State Board of Equalization to cancel all fees associated with FERC Project No. 2246 for FY 2009-2010.

YCWA petition further alleges that the fees were improper because the fees themselves are

improper, invalid and unconstitutional for the reasons alleged by petitioners in (*Northern California Water Association, et al. v. State Water Resources Control Board, et al*, Sacramento Superior Court NoS. 03CS01776 ... and for the reasons stated by the Court of Appeal in *California Farm Bureau Federation v. California State Water Resources Control Bd.*, (2007) 146 Cal.App.4th 1126.⁴

YCWA failed to include a statement of points and authorities regarding its arguments, or describing the applicability of the broader case to its particular hydropower fee. (See § 769, subd. (c).) This element of the petition for reconsideration is therefore dismissed.

4.0 CONCLUSION

The State Water Board finds that its decision to impose water right fees was improper because no event that would trigger the annual fee for water quality certifications for a FERC-licensed hydropower facility has occurred. The petition for reconsideration on this ground is granted, and the Division of Water Rights has directed the State Board of Equalization to cancel all relevant fees. The State Water Board further finds that the allegation that water right fees are invalid and unconstitutional has not been properly raised, and reconsideration on this ground is denied.

⁴ Petitioners refer the State Water Board to the Court of Appeal's January 17, 2007 opinion. The appellate court's opinion, however, was superseded when the California Supreme Court granted review. The opinion is no longer considered published and may not be cited. (Cal. Rules of Court, Rule 8.1105 and Rule 8.1115.)

ORDER

IT IS HEREBY ORDERED THAT the petition for reconsideration is granted in part and denied in part, for the reasons stated above.

Because the Division of Water Rights has directed the State Board of Equalization to cancel all fees associated with water quality certification for the relicensing of the Yuba River Development Project, Federal Energy Regulatory Commission Project No. 2246, no additional action is required.

Dated: 2-08-10

Dorothy Rice
Dorothy Rice
Executive Director