

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2010-0006-EXEC

In the Matter of the Petition for Reconsideration of the
**NORTHERN CALIFORNIA WATER ASSOCIATION,
CENTRAL VALLEY PROJECT WATER ASSOCIATION,
AND INDIVIDUAL PETITIONERS**
Regarding Annual Water Right Fee Determinations

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:¹

1.0 INTRODUCTION

The Northern California Water Association (NCWA), the Central Valley Project Water Association (CVPWA) and other persons and entities, collectively referred to herein as "Petitioners,"² petition the State Water Resources Control Board (State Water Board) for reconsideration and a refund of Fiscal Year (FY) 2009-2010 water right fees assessed by the State Board of Equalization (BOE) on November 3, 2009. Petitioners incorporate the arguments set forth in their previous petitions challenging the imposition of annual water right fees for FY 2006-2007 and 2007-2008. In general, through the incorporation of their previously made arguments, Petitioners allege that the State Water Board's decision to impose the water right fees constitutes an abuse of discretion, is not supported by substantial evidence, and is illegal. The State Water Board finds that its decision to impose the fees was appropriate and proper and denies Petitioners' request for reconsideration.

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.

² The term "Petitioners" is used for ease of reference and does not confer the legal status of petitioner on NCWA, CVPWA, or other persons or entities.

2.0 STATUS OF LITIGATION

The State Water Board must consider the petition for reconsideration at a time when the statute authorizing water right fees and the basic structure of the implementing regulations are being challenged in pending litigation. Each year since 2003, NCWA, CVPWA and the California Farm Bureau Federation (Farm Bureau) have filed suit against the State Water Board and BOE, alleging, in part, that the fee legislation and the State Water Board's fee regulations are unconstitutional and invalid. The NCWA, CVPWA, and Farm Bureau actions over the FY 2003-2004 fees have been consolidated, and the other actions have been stayed pending resolution of the consolidated case. In 2005 the Sacramento County Superior Court issued a judgment upholding the water right fees in their entirety, and NCWA, CVPWA, and the Farm Bureau appealed. On January 17, 2007, the Third District Court of Appeal issued a decision upholding the fee statute and invalidating the fee regulations for FY 2003-2004. All parties petitioned the California Supreme Court for review, and the Court granted review on April 11, 2007. The case is still pending before the Supreme Court.

3.0 GROUND 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. (Cal. Code Regs., tit. 23, § 1077.)³ 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.) 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

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.

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. (§ 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.*) NCWA and CVPWA timely filed a petition for reconsideration and an addendum to the petition.

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.⁴ (*Id.*, subd. (a)(2)(A)-(C).)

4.0 LEGAL AND FACTUAL BACKGROUND

The State Water Board's Division of Water Rights (Division) is the entity primarily responsible for administering the State's water right program. The primary source of funding for the water right program is regulatory fees deposited in the Water Rights Fund in the State treasury. Legislation enacted in 2003 (Sen. Bill No. 1049, Stats. 2003, ch. 741) required the State Water

⁴ 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.) If the State Water Board fails to act within that 90-day period, a petitioner may seek judicial review, but 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. (State Water Board Order WR 2009-0061 at p. 2, fn. 1); 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.)

Board to adopt emergency regulations revising and establishing water right fees and revising fees for water quality certification. (Wat. Code, §§ 1525, 1530.) Pursuant to this legislation, the State Water Board reviews the fee schedule each fiscal year and, as necessary, revises the schedule so that the fees will generate revenues consistent with the amount set forth in the annual Budget Act. (*Id.*, § 1525, subd. (d)(3).) If the revenue collected in the preceding year was greater or less than the revenue levels set forth in the annual Budget Act, the State Water Board may adjust the annual fees to compensate for the over- or under-collection of revenue. (*Ibid.*) BOE is responsible for collecting the annual fees. (*Id.*, § 1536.)

In FY 2009-2010, the Budget Act of 2009 appropriates \$11.658 million to the State Water Board for regulatory activities included in the Board's water right program. Most of this funding – a total of \$7.447 million – is appropriated from the Water Rights Fund.⁵ In addition to the amounts appropriated to the State Water Board, the Budget Act appropriates \$397,000 from the Water Rights Fund to BOE for its water right fee collection efforts and appropriates \$40,000 from the Water Rights Fund to the California Environmental Protection Agency for support functions that the agency provides for the State Water Board's water right program. (Stats. 2009, 3rd Ex. Sess., ch. 1.)⁶

In accordance with the Water Code, the State Water Board sets a fee schedule each fiscal year so that the amount collected and deposited into the Water Rights Fund during that fiscal year will support the appropriation made from the Water Rights Fund in the annual Budget Act, taking into account money in the fund from other sources.⁷ To account for higher than anticipated fee revenues and lower than anticipated expenditures in FY 2008-2009,⁸ the State Water Board

⁵ In addition to appropriations from the Water Rights Fund, the State Water Board's budget for the water right program includes \$3.772 million in general funds, \$291,000 in tobacco tax funds, and \$148,000 in federal trust funds. The calculations used to determine water right fees do not include appropriations from funds other than the Water Rights Fund, and do not include appropriations from the Water Rights Fund that are attributable to transfers from other funds.

⁶ In addition to making appropriations that are specific as to the particular fund and agency involved, the Budget Act includes appropriations that are allocated by the Department of Finance. The Budget Act also includes generally applicable sections that provide for adjustments of appropriations by the Department of Finance.

⁷ Other sources of money in the Water Rights Fund, in addition to fee collections made during the fiscal year, include unexpended reserves from fee collections in previous years (see Wat. Code, § 1525, subd. (d)(3)), penalties collected for water right violations (*id.*, § 1551, subd. (b)), and money transferred from other funds.

⁸ As explained in the Memorandum to File, dated December 3, 2009, from Victoria A. Whitney, Deputy Director for Water Rights, on June 30, 2009, the Water Rights Fund had an ending balance of \$4.09 million. Fee revenues were higher than anticipated, in part due to the unexpectedly high collection of one-time filing fees, and budgeted expenditures were lower projected, in part, due to furloughs. The Division ultimately anticipates total fee revenues of \$7.05 million for FY 2009-2010.

revised the emergency regulations establishing annual permit and license fees to provide a one-time credit in FY 2009-2010 of \$.007 for each acre-foot by which the annual diversion authorized by the permit or license is greater than 10 acre-feet. (§ 1066, subd. (a).) The State Water Board also revised other portions of the fee schedule for FY 2009-2010, which are not the subject of this petition for reconsideration.⁹

On September 15, 2009, the State Water Board adopted Resolution No. 2009-0071, revising the emergency regulations governing water right fees for FY 2009-2010. The Office of Administrative Law approved the emergency regulations on October 21, 2009.

5.0 FEE DETERMINATIONS COVERED BY THE PETITION

The State Water Board's review in this order is limited to annual fee assessments issued on November 3, 2009. According to their petition, Petitioners are NCWA, CVPWA, persons identified in the caption of the petition, identified in Exhibit A of the petition, or fee payers referencing the petition.¹⁰ NCWA and CVPWA are not fee payers and cannot be considered petitioners in this order. (§ 1077.) The State Water Board will consider the persons identified in the caption or Exhibit A of the NCWA-CVPWA petition and the persons filing separate letters of reference to be petitioners under the NCWA-CVPWA petition if they otherwise meet the requirements for a petition for reconsideration. Attachment 1 identifies the persons who were assessed an annual water right fee, have met the regulatory requirements for filing a petition for reconsideration, and are properly considered petitioners for purposes of this order.

6.0 PETITIONERS' ARGUMENTS REGARDING THE CONSTITUTIONALITY OF THE FEES AND THE ADMINISTRATION OF THE FEES ARE WITHOUT MERIT

By incorporating arguments set forth in their previous petitions challenging the imposition of the annual water right fees, Petitioners raise a variety of challenges to the water right fees, including claims that (1) the administration of the water rights fees violates due process; (2) the fees

⁹ The State Water Board adjusted the upper limit on certain filing fees, reduced groundwater recordation filing fees, and clarified that fees for change petitions involving water transfers also apply to petitions for temporary urgency changes involving water transfers. It merits noting that over the past two years, water right application processing has been fully supported by application filing fees, application annual fees, and general fund revenue. Over the past four years, the State Water Board has collected a total of \$3,212,551 in application filing fees and expended a total of \$3,144,658 in water right fee revenues on application processing—an average difference of slightly less than \$17,000 per year.

¹⁰ The State Water Board has received separately filed letters referencing either the NCWA petition or Petitioners' counsel (Somach, Simmons & Dunn). Such letters must have been timely filed to be considered in this order.

constitute an unconstitutional tax; (3) the fees are unconstitutionally discriminatory; (4) the fees unlawfully seek to assess the federal government and its contractors; and (5) the fees are arbitrary and capricious, exceed the State Water Board's authority, and violate Government Code section 11010.¹¹ NCWA and CVPWA have raised these issues in their petitions challenging annual fees every fiscal year since the emergency fee regulations were first adopted in 2003.¹² The State Water Board has rejected Petitioners' legal arguments, most recently by Order WR 2009-0007-EXEC.

Petitioners have not provided any new arguments, new information, or supporting authorities that materially change any of the issues raised in their previous petitions challenging the annual water right fees.¹³ With respect to the issues that are incorporated in the petition now before the State Water Board, this order adopts and incorporates the reasoning of Order WR 2007-0007-EXEC and the orders incorporated by reference in that order.

7.0 CONCLUSION

The State Water Board finds that its decision to impose water right fees was appropriate and proper. The petition for reconsideration is denied.

¹¹ In order to be a valid regulatory fee, an assessment must bear a fair or reasonable relationship to the fee payers' burdens on or benefits from the regulatory activity. (*California Assn. of Professional Scientists v. Dept. of Fish and Game* (2000) 79 Cal.App.4th 935.) The annual water right fees are imposed on the group of water users—permittees and licensees—that account for the majority of the State Water Board's regulatory efforts. (Wat. Code, § 1525, subds. (a), (c).) Certain water users who are regulated by the State Water Board to a far lesser degree, such as surface water users not under the permitting authority of the State Water Board, do not pay water right permit and license fees. To address concerns that certain water users benefit from, or place burdens on, the water right regulatory program, but do not pay fees, the Division has analyzed the program resources dedicated to those non-paying water users. As explained in the Memorandum to File from Victoria A. Whitney, Deputy Director for Water Rights, dated February 1, 2010, regarding "Analysis of Water Right Program Activities and Expenditure of Resources", the Division has found that the State Water Board directs a *de minimis* amount of resources toward those water users who do not pay annual permit or license fees.

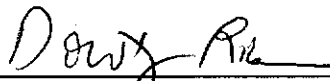
¹² Without citation to legal authority, Petitioners contend that a petition for reconsideration reasserting their same arguments made in prior years, "is unnecessary as a matter of law," because the State Water Board has previously rejected those arguments and has not revised its regulations "in any relevant respect." The requirement to exhaust administrative remedies, however, is mandated by statute. A fee payer must exhaust administrative remedies before seeking judicial review of the State Water Board's decision where, as here, that decision has been delegated to an officer or employee of the board. (Wat. Code, §§ 1537, subd. (b)(2)-(3), 1126, subd. (b); see also Cal. Code Regs., tit. 23, § 1077 [establishing requirements for reconsideration of fee determinations].) The requirement for exhaustion not only affords the State Water Board an opportunity to correct any factual errors in assessing the fees at an administrative level, but the requirement also is necessary for the board to be able to determine who is entitled to a refund and the proper amount of the refund if a judicial challenge to the fees is successful. The State Water Board evaluates each petition for reconsideration on its merits, regardless of whether petitioners have filed similar petitions in previous years.

¹³ 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 denied.

Dated: 2-08-10



Dorothy Rice
Executive Director

Attachment