

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2010-0007-EXEC

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In the Matter of the Petition for Reconsideration of the

**CALIFORNIA FARM BUREAU FEDERATION,  
VARIOUS COUNTY FARM BUREAUS  
AND INDIVIDUAL PETITIONERS**

Regarding Annual Water Right Fee Determinations

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**ORDER DENYING RECONSIDERATION**

BY THE EXECUTIVE DIRECTOR<sup>1</sup>

**1.0 INTRODUCTION**

The California Farm Bureau Federation (Farm Bureau), various county farm bureaus, and other persons or entities collectively referred to herein as "Petitioners,"<sup>2</sup> petition the State Water Resources Control Board (State Water Board or 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 challenge the State Water Board's decision to impose the water right fees on several constitutional grounds, including a claim that the fees constitute an unconstitutional tax in violation of Article XIII A of the California Constitution (commonly referred to as "Proposition 13"). They request the State Water Board to reconsider the water right fees that were imposed, declare the fee statute invalid, refund all water right fees paid, and to vacate and rescind State Water Board Resolution No. 2009-0071 and the fee regulations. The State

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<sup>1</sup> 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.

<sup>2</sup> The term "Petitioners" is used for ease of reference in this order and does not confer the legal status of petitioner.

Water Board finds that its decision to impose the fees was appropriate and proper and denies Petitioners' petition for reconsideration.

## **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, the Northern California Water Association (NCWA), the Central Valley Project Water Association (CVPWA), and the 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.)<sup>3</sup> 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

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<sup>3</sup> 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.

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. (§ 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.*) The State Water Board will not consider late petitions or late-filed letters referencing the Farm Bureau 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.<sup>4</sup> (*Id.*, subd. (a)(2)(A)-(C).)

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<sup>4</sup> 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.)

#### 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 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.<sup>5</sup> 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, 3<sup>rd</sup> Ex. Sess., ch. 1.)<sup>6</sup>

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

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<sup>5</sup> 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.

<sup>6</sup> 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.

into account money in the fund from other sources.<sup>7</sup> To account for higher than anticipated fee revenues and lower than anticipated expenditures in FY 2008-2009,<sup>8</sup> the State Water Board 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.<sup>9</sup>

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 ASSESSMENTS ADDRESSED IN THIS ORDER**

The Farm Bureau's petition for reconsideration identifies itself, county farm bureaus representing themselves and the interests of their individual members in their respective counties, Chimney Rock Ranch, Pollenator Ranch, Lawrence B. Groteguth, William A. Gruenthal, Bob J. Murphy, and Patricia Pereira as petitioners. A number of persons or entities also filed petitions incorporating the Farm Bureau petition by reference. In its Exhibit 1, the Farm Bureau identifies water right holders by name and water right application, which it purports to represent under the doctrine of associational standing. The State Water Board has previously rejected the Farm Bureau's argument that it, the county farm bureaus, and individuals identified in Exhibit 1 may be considered petitioners under the State Water Board's regulations governing reconsideration of fees. (See Order WRO 2005-0002-EXEC, at pp. 5-7.) As explained in Order WRO 2005-0002-EXEC, each person who seeks reconsideration of fee

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<sup>7</sup> 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.

<sup>8</sup> As explained in the Memorandum to File from Victoria A. Whitney, Deputy Director for Water Rights, dated December 3, 2009, 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.

<sup>9</sup> 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.

assessment must independently meet the statutory and regulatory requirements for reconsideration of a fee assessment. The reasoning of Order WRO 2005-0002-EXEC is incorporated by reference herein.

Moreover, the State Water Board receives a very large number of petitions for reconsideration on annual fees, which must be decided in a relatively brief period, and certain identifying information is necessary to enable the board to know exactly which fee determinations are before it and to properly process the petitions. Accordingly, the State Water Board's regulations require a petition for reconsideration of a fee assessed by BOE to include either a copy of the notice of assessment or all of the following information: (i) the fee payer's name; (ii) the water right or BOE identification number; (iii) the amount assessed; and (iv) the billing period or assessment date. (§ 1077, subd. (a)(2).)<sup>10</sup> The Farm Bureau's petition states that the amounts assessed to the water right holders identified in Exhibit 1 of its petition are unknown, but that the Farm Bureau believes that the amount assessed for the "vast majority" was \$100 per water right. Regardless, if the Farm Bureau's petition and exhibits do not meet the requirements for a petition for reconsideration, including submitting a notice of assessment or specifying the amount assessed under section 1077 for each fee payer, then the petition is defective as to those fee payers. In other words, if information regarding the amount assessed has not been submitted for the fee payers identified in Exhibit 1, either in another Farm Bureau exhibit or by separate, timely-filed correspondence, then those fee payers are not properly considered petitioners.

Only persons who were assessed a fee on November 3, 2009, and who met the State Water Board's reconsideration requirements are considered petitioners for purposes of this order.<sup>11</sup> Those petitioners are identified in Attachment 1.

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<sup>10</sup> Section 1077, subdivisions (a)(2) and (b), refers to a "notice of assessment." BOE refers to this notice as a "notice of determination." These notices are the same thing.

<sup>11</sup> Petitioners contest the State Water Board's decision to impose the water right fees, stating that the board decided to impose the FY 2009-2010 annual water right fees on or about September 15, 2009. On that date, the State Water Board adopted Resolution No. 2009-0071, which adopted emergency regulations revising the water right fee schedule and regulations in accordance with the Budget Act of 2009. For purposes of a petition for reconsideration relating to an assessment by BOE, however, the State Water Board's decision is deemed adopted on the date of the assessment by BOE, which was November 3, 2009. (§ 1077, subd. (b).) Because, however, Petitioners have identified the assessment date, and included notices of determination with the November 3, 2009 date, the State Water Board will construe their request for reconsideration to include those assessments.

The State Water Board will not consider late-filed letters referencing the Farm Bureau petition for reconsideration. The deadline for filing a petition for reconsideration of the November 3, 2009, assessment was December 3, 2009. (§ 1077, subd.(b).) Although the State Water Board requires strict adherence to the statute and regulations governing a petition for reconsideration, it can accept a timely filed petition that inadvertently omits required information if the information is provided before the State Water Board acts on the petition. Accordingly, if the Farm Bureau identified a person in a timely filed petition, and that person subsequently submitted a notice of assessment or required information before the board acted on the petition, the State Water Board considered that person to be a Petitioner subject to this order.

The Farm Bureau's petition is dismissed to the extent it seeks review of any fee determinations other than the fee determinations identified for petitioners listed in Attachment 1. Moreover, to the extent that Petitioners' contentions are not relevant to any of the annual fee assessments for which their petition for reconsideration has been filed, those contentions are not within the scope of the petitions for reconsideration.

Petitioners do not make specific arguments regarding annual application fees, the annual petition fees, the federal water supply contractor fees, or the water quality certification fees. To the extent that Petitioners' challenge to these fees is based on the same contentions as they make concerning the annual permit and license fees, those contentions are addressed in this order and in the orders incorporated by reference. If Petitioners intended to rely on other grounds, then their challenge is deficient because they failed to specify those grounds and to include points and authorities in support of the legal issues raised. (§ 769, subd. (c).) Additionally, the State Water Board will not consider allegations that Petitioners seek to incorporate by reference in other documents, such as its complaints or the Court of Appeal's January 17, 2007 decision,<sup>12</sup> if the Petitioners have failed to include the necessary points and authorities with their petition. (*Ibid.*)

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<sup>12</sup> Petitioners assert that the State Water Board's actions were inappropriate and improper for the reasons set forth by the Court of Appeal in its 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.)

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

Petitioners raise a variety of constitutional challenges to Senate Bill 1049 and the fee regulations, including claims that the fees (1) constitute an unconstitutional tax in violation of Proposition 13;<sup>13</sup> (2) unconstitutionally deprive Petitioners of their property rights without due process of law; (3) unconstitutionally deprive Petitioners of their property rights and constitute a taking; and (4) unconstitutionally deprive Petitioners of their equal protection rights. Petitioners previously raised these issues, nearly verbatim, in the petitions that the Farm Bureau previously has filed challenging annual fees since 2004. The State Water Board has rejected Petitioners' arguments, most recently by Order WR 2009-0005-EXEC. Petitioners have not provided any new arguments, new information, or supporting authorities that materially change any of the issues raised in the earlier petitions. With respect to the issues that were raised in the previous petitions and are repeated in the petition now before the State Water Board, this order adopts the reasoning of Order WR 2007-0008-EXEC and the orders incorporated by reference in that Order.<sup>14</sup>

## **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.

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<sup>13</sup> 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.

<sup>14</sup> This order addresses the principal issues raised by the Farm Bureau and the individual petitioners. To the extent that this order does not address all of the issues raised by Petitioners, the State Water Board finds that either these issues are insubstantial or that Petitioners have failed to meet the requirements for a petition for reconsideration under the State Water Board's regulations. (§§ 768-769, 1077.)



**ORDER**

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

Dated: 2-08-10

*Dorothy Rice*  
Dorothy Rice  
Executive Director

Attachment