



September 10, 2015

Via Electronic Mail to: commentletters@waterboards.ca.gov

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000

Re: **9/16/15 BOARD MEETING, Item 3 (Water Right Fees)**

Dear Ms. Townsend and Board Members:

These comments are being provided by the Northern California Water Association (NCWA), the Central Valley Project Water Association (CVPWA), the Imperial Irrigation District (IID), and Petitioners in the existing action pending before the Third District Court of Appeal, entitled *Northern California Water Association et al. v. State Water Resources Control Board et al.*, Case No. C075866, and Petitioners in actions filed in subsequent years¹, in response to a State Water Resources Control Board Meeting Notice regarding proposed emergency regulations revising the State Water Resources Control Board's (SWRCB) fee schedules for the water right program. The stated purpose of the meeting is to consider a resolution adopting proposed emergency regulations revising the SWRCB's water right fee schedule.

The current fee regulations are those originally adopted by the SWRCB in December 2003 and revised in certain years to conform to the Budget Act. In developing the regulations, the SWRCB held public workshops and many parties, including petitioners, submitted comments and proposed revisions to those regulations. Those parties have participated and commented each year as fee schedules are revised, and have challenged the fees in court. To date, the SWRCB has not wavered from its original

¹NCWA, CVPWA and other individually named petitioners have challenged the fees in each year, as set forth in the controlling statutes and regulations. (*Northern California Water Assn., et al. v. State Water Resources Control Board, et al.*, Sacramento Superior Court Case No. 04CS01467; *Northern California Water Assn., et al. v. State Water Resources Control Board, et al.*, Sacramento Superior Court Case No. 05CS01488; *Northern California Water Assn., et al. v. State Water Resources Control Board, et al.*, Sacramento Superior Court Case No. 06CS01517; *Northern California Water Assn., et al. v. State Water Resources Control Board, et al.*, Sacramento Superior Court Case No. 34-2008-00003004; *Northern California Water Assn., et al. v. State Water Resources Control Board, et al.*, Sacramento Superior Court Case No. 34-2009-80000183, and *Northern California Water Assn., et al. v. State Water Resources Control Board, et al.*, Sacramento Superior Court Case No. 34-2010-80000461; *Northern California Water Assn., et al. v. State Water Resources Control Board, et al.*, Sacramento Superior Court Case No. 34-2011-80000828.) These cases are all stayed pending resolution of the case before the Supreme Court.

improper fee scheme. In that regard, petitioners fully incorporate herein the comments previously submitted by NCWA and CVPWA in connection with the adoption of the original and revised fee regulations, the arguments made in Superior Court, the Court of Appeals, and the California Supreme Court regarding the Water Right Fees.² The existing action pending in the Third District Court of Appeal, identified above, is a result of the SWRCB's appeal of an adverse decision in the Sacramento Superior Court where the Court invalidated the SWRCB's fee regulations as violating Article XIII A of the California Constitution, violating the Supremacy Clause of the United States constitution, and being otherwise arbitrary.

COMMENTS

1. The SWRCB's Proposed Regulations Impose a Tax on Water Users in Violation of the California Constitution

The SWRCB's proposed regulations result in an unlawful tax, passed in violation of the California Constitution. Further, the SWRCB's proposed regulations impose an unlawful tax because the charges assessed exceed the reasonable cost of the SWRCB's regulatory activity. The SWRCB's proposed regulations, imposing the entirety of the cost of the Division of Water Rights on licensed and permitted water right holders ignores the Division's activities related to pre-1914 and riparian water rights, groundwater uses, and end-users of water, among others, not subject to the fees, and the substantial time and money spent by the Division on issues related to the public generally, including, but not limited to, public trust, wildlife, recreation, and carrying out the Constitutional mandate that waters of the State be put to beneficial use to the greatest extent possible. The SWRCB has not met its burden of demonstrating that the amounts charged are reasonably related to the service provided.

2. The SWRCB's Proposed Regulations Unconstitutionally Impose Charges on Water Rights Held by the United States and Unlawfully Assess Federal Contractors

Water Code section 1540 authorizes the SWRCB to pass through an appropriate portion of the fee "to persons or entities who have contracts for the delivery of water from the person or entity on whom the fee or expense was initially imposed." The SWRCB's regulations recognize that the United States may claim sovereign immunity and refuse to pay the assessment and authorize the Division Chief to levy assessments otherwise payable by the United States on persons or entities who have contracts for

² Petitioners have made these arguments in each year to the SWRCB through comments, Petitions for Reconsideration, and through court actions. The SWRCB has repeatedly rejected Petitioners' arguments and, as such, Petitioners are not required to exhaust administrative remedies to preserve a right to a refund. (See *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1080-1081.)

Central Valley Project (CVP) water. The SWRCB's proposed regulations impermissibly pass through the charges unlawfully imposed on the United States to federal contractors.

The SWRCB's regulations fail to segregate the beneficial interest of federal contractors to which the fees imposed on the United States are "passed through." Instead, the SWRCB simply and impermissibly imposed the entirety of the fees charged against the water rights held by the United States Bureau of Reclamation (USBR) for the CVP on federal water contractors. As SWRCB staff testified at the trial on the fees, the SWRCB *never* conducted a beneficial interest analysis to determine what interest, if any, the water service contractors had in the water rights for the CVP. The SWRCB simply ignored the multiple purposes of the CVP, the fact that half of the water rights are held for power purposes, and that the water rights are held for purposes other than providing water supplies. The fact that the CVP operates in an "integrated" fashion is not relevant in determining the federal contractors beneficial interest. As set forth in the Decision, imposing the entirety of the fees charged to the USBR on the federal water contractors violates the Supremacy Clause of the United States Constitution.

In addition, because the SWRCB failed to consider the beneficial interest of the federal contractors, the SWRCB acted arbitrarily in imposing the entirety of the fees charged to the USBR on the federal contractors. This is particularly evident in a year like this year, where most federal contractors received a zero percent (0%) allocation of water deliveries, yet the SWRCB proposes to substantially *increase* the fees charged to those contractors.

3. The Regulations Are Arbitrary

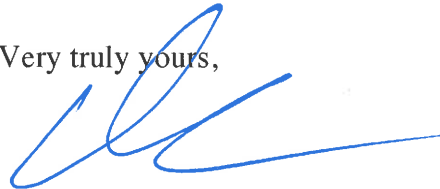
The regulations impose fees on water right holders based solely on the "face value" of a water right. Such a scheme ignores cumulative limitations contained in the water rights themselves, and treats water right holders differently, depending on how the SWRCB or its predecessors issued permits. Imposing fees on *some* water right holders over and over again for the redirection of the *same* water is arbitrary. Under the fee scheme, certain water right holders pay an exponentially higher fee for the same or less regulatory burden than others. In addition, and as explained above, forcing the federal water contractors to pay the entirety of the water right fees imposed on the USBR, without considering the actual beneficial interest of the contractors, ignoring others who receive benefit from the water rights held by the USBR, and ignoring the multiple purposes of the CVP is arbitrary.

Jeanine Townsend, Clerk to the Board
Re: State Water Resources Control Board
September 10, 2015
Page 4

CONCLUSION

The SWRCB's regulations imposing water right fees, and the proposed fee increase, constitute a tax and are otherwise arbitrary. This is so because the fee structure does not allocate costs to water rights holders based on their burden on, or benefit from, the regulatory activities of the Division and because the fees are unlawfully charged to federal contractors.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'DK', with a long horizontal flourish extending to the right.

Daniel Kelly

DK:yd