

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO 2004-0039-EXEC

In the Matter of the Petition for Reconsideration of the
STOCKTON EAST WATER DISTRICT
Regarding Annual Application Fee for Pending Application 30603

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR¹

1.0 INTRODUCTION

The Stockton East Water District (SEWD) petitions the State Water Resources Control Board (SWRCB) for reconsideration of the SWRCB's assessment of an annual application fee for pending Water Right Application 30603 and seeks a refund of the annual application fee. Under Application 30603, SEWD seeks to appropriate water from the Stanislaus River in Stanislaus County. SEWD filed the application in April 1997. By Notice of Determination (Notice) dated June 17, 2004, the Board of Equalization (BOE) billed SEWD for an annual application fee for the period from July 1, 2003, through June 30, 2004, in the amount of \$12,210.00. SEWD paid the annual fee under protest concurrently with filing its petition for reconsideration.

SEWD argues that the Notice is improper because SEWD has diligently pursued processing of Application 30603 and any delay in processing has been due to inaction by SWRCB staff.

¹ SWRCB Resolution No. 2002 - 0104 delegates to the Executive Director the authority to supervise the activities of the SWRCB. Unless a petition for reconsideration raises matters that the SWRCB wishes to address or requires an evidentiary hearing before the SWRCB, 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 deny a petition for reconsideration or set aside or modify the water right fee assessment.

SEWD raises issues that implicate the causes listed in section 768, subdivision (b). To the extent that this order does not address all of the issues raised in the petition for reconsideration, the SWRCB finds that either these issues are insubstantial or that SEWD failed to meet the requirements for a petition for reconsideration under the SWRCB's regulations. (*Id.* §§ 768-769, 1077.)

3.0 BACKGROUND

3.1 Basis for Fee Requirement

The SWRCB's Division of Water Rights (Division) is responsible for administering the state's water right program. In Fiscal Year 2003-2004, the Budget Act of 2003 (Stats. 2003, ch. 157) required the water right program to be supported in part by fee revenues. Senate Bill 1049 (Stats. 2003, ch. 741) requires the SWRCB annually to adopt emergency regulations revising and establishing fees to be deposited in the Water Rights Fund in the State Treasury.

The Legislature enacted the water right fee provisions of the Budget Act and Senate Bill 1049 based on the recommendations of the Legislative Analyst. The Legislative Analyst concluded that the water right program provides benefits to the water right applicants and water right holders regulated by the program. (Legislative Analyst's Office, Analysis of the 2003-04 Budget Bill at pp. B-123 through B-126.) Accordingly, the Legislative Analyst recommended fee changes, including an increase in application and other filing fees, assessment of new annual fees, and establishment of a new special fund for deposit of the revenues generated by the fees.

On December 15, 2003, the SWRCB adopted Resolution No. 2003 - 0077 approving emergency fee regulations to meet the requirements of the Budget Act and Senate Bill 1049. In general, the fee regulations increased filing fees for applications, petitions, registrations, and other filings and established annual fees for applications, permits, licenses, water leases, and projects subject to water quality certification. Most fees will be deposited in the Water Rights Fund, which can be used to support all activities in the water right program. The Office of Administrative Law approved the emergency regulations on December 23, 2004, and both Senate Bill 1049 and the emergency regulations became effective on January 1, 2004.

3.2 The Petition for Reconsideration

SEWD argues that imposition of the annual application fee is improper because SEWD has diligently pursued processing Application 30603 and any delay in processing has been the result of inaction by SWRCB staff. As background, SEWD explains that under Application 30603 SEWD seeks both to appropriate water during the season when the water in the Stanislaus River is not fully appropriated and to appropriate water that currently is appropriated by the United States. The latter component of the application is based on an area of origin claim.

The notice of the application was issued in January 1999. Several entities filed timely protests against the application, and SEWD claims it subsequently reached settlement agreements to dismiss some of the protests. SEWD states, however, that it will not be able to resolve all of the protests.

SEWD argues that the delays in processing Application 30603 are the fault of the SWRCB staff. SEWD cites several instances in which it did not get correspondence from the SWRCB. First, SEWD points to a letter dated April 3, 2000, in which the Chief of the Division of Water Rights refused to grant a time extension to SEWD and stated in closing that the Division would advise SEWD of specific required steps “in the near future.” SEWD points out that the SWRCB did not send further correspondence.

Second, SEWD cites a series of letters in which it requested bifurcation of Application 30603 into two parts so that it could move forward with what SEWD characterizes as the non-controversial part of the application, which is for wet year appropriations during periods when water is available for appropriation (surplus water component). SEWD alleges that none of the protests object to this part of the application. SEWD further alleges that in a June 2002 letter regarding bifurcation it stated that if it were allowed to bifurcate the application, SEWD would like to begin CEQA compliance for the surplus water component of the application immediately. SEWD points out that the SWRCB did not respond to any of the letters it cited.

3.2.1 Standards for Imposition of Annual Fee

The circumstances or standards under which a water right applicant must pay an annual fee are set forth in California Code of Regulations, title 23, section 1063. SEWD argues that none of the standards set forth in section 1063 apply to Application 30603. In fact, there can be no question that subdivision (c) of section 1063 applies to Application 30603. Subdivision (c) provides that an annual fee is due if:

“The applicant is a lead agency under the California Environmental Quality Act (CEQA) (commencing with Public Resources Code section 21000) and has not adopted or certified a final environmental document for the project for which the application is filed, as may be required under CEQA, within two years after the board provides notice of the water right application.” (Cal. Code Regs., tit. 23, § 1063, subd. (c).)

This section describes the exact circumstances regarding Application 30603. As SEWD states in its petition, the SWRCB provided notice of Application 30603 in January 1999. Substantially more than two years have passed since the SWRCB issued the notice. Although SEWD commenced the scoping process under CEQA after the protest period on Application 30603 ended, SEWD has not completed the CEQA process.

SEWD seeks to blame the SWRCB for its failure to complete the CEQA process. SEWD claims that it could not prepare CEQA documentation until the SWRCB had bifurcated Application 30603 into a component for “surplus water” and a component for water that might be available under Water Code section 11460, et seq.³ In a letter SEWD sent to the SWRCB in January 2002, SEWD said it intended to begin CEQA compliance for only the surplus water component of Application 30603 as soon as the SWRCB had bifurcated the application. SEWD claims that it did not begin preparing its CEQA documentation because it had not received a written response from the SWRCB.

SEWD’s argument has no basis in the language of section 1063. Section 1063, subdivision (c), does not base the fee on a determination that there has been an unreasonable delay in completing

³ Under section 11460, SEWD seeks to appropriate water that the U.S. Bureau of Reclamation currently appropriates under permitted Applications 14859, 19303, and 19304.

the CEQA process, nor does section 1063, subdivision (c), require any determination as to who may be to blame if there has been an unreasonable delay. Instead, section 1063, subdivision (c), sets a standard that can be easily administered. Accordingly, the SWRCB's past inaction on the bifurcation request does not provide a basis for giving SEWD relief from the requirement to pay an annual application fee under section 1063, subdivision (c).

Further, the delay in bifurcating Application 30603 is not a valid reason for SEWD to delay CEQA compliance. Regardless of how the CEQA project is analyzed, SEWD has cited no basis for not having prepared CEQA documentation for this project before now. SEWD is both the lead agency and the applicant. As the applicant and the lead agency, it has the power to determine the scope of its project for the purpose of CEQA. In theory, if part of the application could be separated out as a complete project and the remainder either were abandoned or were unrelated, SEWD could narrow the CEQA documentation to cover only that part of the application. (See Cal. Code Regs., tit. 14, § 15082.)

It is more likely, however, that SEWD would have to analyze a larger project under CEQA regardless of whether Application 30603 is bifurcated.⁴ Because the scope of a "project" for the purpose of CEQA is not necessarily defined by a single application for which approval is needed, it appears that SEWD will have to prepare a CEQA document that covers all of the several water right applications it is currently pursuing.⁵ SEWD has eleven applications before the SWRCB, counting the two recently bifurcated parts of Application 30603, all of which are directed toward improving the water supply for SEWD's customers and contributing to the Farmington Groundwater Recharge Project. If SEWD intends to pursue the part of A30603 under which it

⁴ Prior to the date of this order, the SWRCB bifurcated Application 30603.

⁵ "Project" is defined as "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment . . ." (Cal. Code Regs., tit. 14, § 15378, subd. (a).) Further, "[t]he term 'project' refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term 'project' does not mean each separate governmental approval." (Cal. Code Regs., tit. 14, § 15378, subd. (c).) "Where the lead agency could describe the project as either the adoption of a particular regulation under Subsection (a)(1) or as a development proposal which will be subject to several governmental approvals under Subsections (a)(2) or (a)(3), the lead agency shall describe the project as the development proposal for the purpose of environmental analysis. This approach will implement the lead agency principle as described in Article 4." (Cal. Code Regs., tit. 14, § 15378, subd. (d).)

would appropriate water currently appropriated by the U.S. Bureau of Reclamation, that part of the application would appear to be properly a part of SEWD's overall project under CEQA. Since, as discussed above, the possibilities are either that SEWD has to analyze the watershed of origin claim in its A30603 proposal as part of the overall project under CEQA regardless of the bifurcation, or that SEWD could have narrowed its project to only the "surplus water" part of A30603 in preparing a CEQA document, the SWRCB's past inaction on the bifurcation request clearly is not a cause for SEWD's delay in preparing CEQA documentation. Accordingly, this argument is unfounded.

3.2.2 Fairness and Public Policy Do Not Preclude Imposition of the Annual Fee

SEWD argues that it is unfair and contrary to public policy to impose an annual fee on Application 30603. SEWD alleges as support for this argument that the SWRCB staff has taken no action on the application and has incurred no costs for processing the application since June 2001.⁶ Further, SEWD argues that the annual fee would be punitive in light of its efforts to conserve its resources by coordinating its CEQA review on this application with the other applications for the Farmington Recharge Project. As discussed above, SEWD could have proceeded with its CEQA documentation for the Farmington Recharge Project. This argument is irrelevant to the criteria for assessing annual application fees, and is therefore denied.

IT IS HEREBY ORDERED that the petition for reconsideration filed by Stockton East Water District seeking reconsideration of the June 17, 2004, assessment of an annual application fee for pending Application 30603, is denied. The request for a refund of the annual application fee of \$12,210.00 for Application 30603 also is denied.

Dated: September 14, 2004

ORIGINAL SIGNED BY HARRY M. SCHUELLER for
Celeste Cantú
Executive Director

⁶ Although SEWD's allegation does not contribute to establishing or proving the absence of any of the criteria for assessing annual application fees, it should be noted that the files of the SWRCB show that the SWRCB has had several meetings with SEWD regarding elements of SEWD's overall project including this application, and has written significant correspondence to SEWD, in the past year.