

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2010-0008-EXEC

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In the Matter of the Petition for Reconsideration of

**THE NEVADA HYDRO COMPANY, INC.**

Regarding Annual Water Quality Certification Fee Determination

FERC Project No. 11858

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**ORDER DENYING RECONSIDERATION**

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

**1.0 INTRODUCTION**

The Nevada Hydro Company, Inc. (TNHC) petitions the State Water Resources Control Board (State Water Board or Board) for reconsideration of an annual fee of \$73,600 assessed to TNHC for Fiscal Year (FY) 2009-2010 by the State Board of Equalization (BOE) in connection with water quality certification for a Federal Energy Regulatory Commission (FERC) licensed hydroelectric project application (FERC Project No. 11858).

TNHC contends that the assessed fees are: 1) unreasonable; 2) not supported by substantial evidence; and 3) constitute an abuse of discretion.

For the reasons set forth below, the petition for reconsideration is denied.

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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.

## **2.0    GROUND S 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.)<sup>2</sup> 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. (§ 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.*) TNHC 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

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<sup>2</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.

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 LEGAL AND FACTUAL BACKGROUND**

#### **3.1 Annual Water Right Fees**

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.)

The fee schedule includes fees for the State Water Board's costs in connection with water quality certification of FERC licensed hydroelectric projects. Water Code Section 13160.1 authorizes the State Water Board to recover costs incurred in connection with applications for water quality certification requested pursuant to section 401 of the Clean Water Act by applicants for a federal permit or license. The State Water Board assesses annual fees for projects under review for water quality certification for FERC licensing and FERC-licensed projects for which water quality certification has been issued. (§ 3833.1.) Fees associated with water quality certification for FERC licensing are deposited in the Water Rights Fund. (Wat. Code, § 1551, subd. (c).) The State Water Board has set the fee schedule so that the

projected revenues from water quality certification fees for projects under review for FERC licensing are equivalent to the Board's estimated program costs for this activity.<sup>3</sup>

### **3.2 FERC Project No. 11858**

On March 11, 2005, TNHC and Elsinore Valley Municipal Water District (EVMWD) filed with the State Water Board an application for water quality certification for a proposed 500-megawatt pumped storage project in Cleveland National Forest.<sup>4</sup> Pursuant to section 3835, subdivision (b), TNHC was allowed to withdraw and resubmit its application in 2006, 2007, 2008 and 2009. The most recent submittal was made on January 21, 2009.

On October 1, 2009, pursuant to section 3836, subdivision (c), the Division of Water Rights denied TNHC's water quality certification application without prejudice. In its petition for reconsideration of the assessed fees, TNHC requests that the petition be held in abeyance pending resolution of its separate petition for reconsideration of the water quality certification denial. In the alternative, TNHC requests that the Board return the \$73,600 in assessed fees, "or an amount that reflects the reasonable costs to the State Board related to Petitioner's 401 certification application."<sup>5</sup>

The petition for reconsideration of fees is independent of the petition for reconsideration of the Board's denial of the water quality certification application. The Board's action on TNHC's separate petition for reconsideration of the denial of water quality certification will not affect the determination whether annual fees are due for FY 2009-2010. Accordingly, the request to hold this fee petition in abeyance is not granted.

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<sup>3</sup> See October 6, 2008 Memorandum to File entitled "Recommended Water Right and Water Quality Certification Fee Schedule for Fiscal Year 2008-2009," from Victoria A. Whitney, Deputy Director for Water Rights, at p. 3.

<sup>4</sup> Although EVMWD and TNHC are co-applicants for a FERC license and for a water quality certification from the State Water Board, only the Nevada Hydro Company is listed on the petition for reconsideration of the water quality certification fees.

<sup>5</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 TNHC'S ARGUMENTS THAT THE FEES IMPOSED WERE UNREASONABLE, NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND CONSTITUTE AN ABUSE OF DISCRETION ARE WITHOUT MERIT**

TNHC argues that the \$73,600 in annual water quality certification fees exceeds the reasonable costs that the Board incurred in relation to its water quality certification application. TNHC asserts that the State Water Board is not incurring any costs or regulatory burdens associated with the water quality certification application because the Board denied the application on October 1, 2009. TNHC requests that the Board return \$73,600, or an amount that reflects the the Board's reasonable costs related to the water quality certification action.

The California Supreme Court has stated that when assessing fees, a state agency must demonstrate: 1) the estimated costs of the service or regulatory activity, and 2) the basis for determining the manner in which the costs are apportioned so that charges allocated to the payor bear a fair and reasonable relationship to the payor's burdens on or benefits from the regulatory activity. (*Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 878.) A regulatory fee, however, does not require a precise cost-fee ratio to survive as a fee. (*California Assn. of Professional Scientists v. Dept. of Fish & Game*, (2000) 79 Cal App.4th 935, 950 (CAPS).) In CAPS, the court recognized that flexibility is an inherent component of reasonability and that regulatory fees, unlike other types of fees, often are not easily correlated to a specific, ascertainable cost. The court stated that this may be due to the complexity of the regulatory scheme, the multifaceted responsibilities of the responsible agency and its employees, intermingled funding sources, and accounting systems that are not designed to track specific tasks. (CAPS at 950.)

TNHC does not challenge the constitutionality of the fees in general or the fee schedule the Board has adopted for water quality certification actions. Instead, TNHC claims that the fees are unreasonable as applied in this case. To support its claim that the fees are unreasonable and must be levied to compensate for services or benefits provided, TNHC cites *Northwest Energetic Services, LLC v. California Franchise Tax Bd.* (2008) 159 Cal. App. 4<sup>th</sup> 841 (NES).

NES does not support TNHC's contention that the fee was unreasonable. In that case, the court found that the assessed fee was a tax rather than a valid regulatory fee. The court noted that the Legislature's plain intent in passing the act that authorized the levy was to raise revenue

to make up for lost income tax. (*NES*, 159 Cal. App. 4th 841, 857.) Unlike the regulatory fees required to support the Division of Water Rights' water quality certification program, the levy at issue in *NES* did not support a regulatory program. Both the facts and statute at issue in *NES* are inapposite to the circumstances present in this case.

With respect to water quality certification fees, Water Code section 13160.1, which authorizes the collection of the fees, clearly states that a fee schedule may be established to cover the costs incurred by the Board in connection with water quality certification.<sup>5</sup> TNHC had an active application for a water quality certification on file with the Division on July 1, 2009. All applicants with active applications on file on July 1, 2009 were assessed an annual fee, and the application for certification was considered by the Division during the annual fee assessment period for FY 2009-2010.

Although the water quality certification application was denied (without prejudice), State Water Board regulations provide that the certification process for which the fees at issue here are charged is complete only when: 1) FERC issues or denies a license, 2) FERC determines no license is necessary, or 3) when the applicant abandons the project.<sup>6</sup> This is because until the FERC proceedings are completed, the State Water Board continues to incur costs in connection with applications for water quality certification, which may include costs of processing petitions for reconsideration of certification decisions and costs of participation in proceedings before FERC leading to a FERC licensing decision based on the State Water Board's certification. Thus, because FERC has not acted on the project application and TNHC has not abandoned the project, the State Water Board will continue to expend resources in connection with TNHC's application. Nothing in the regulations or authorizing statute provides for a refund of fees if an application is denied by the State Water Board or withdrawn by the applicant who is continuing to pursue the project. So long as TNHC has a project application pending before FERC, the State Water Board will incur expenses related to TNHC's request for water quality certification.

The fact that the Division dismissed the certification application before the end of the fiscal year does not make the imposition of a fee for water quality certification unreasonable. TNHC's

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<sup>5</sup> Section 3833.1 subdivision (b) provides that the annual fee is \$1,000 plus \$0.220 per kilowatt based on the authorized or proposed generating capacity of the hydroelectric facility.

<sup>6</sup> Section 3833.1 subdivision (b)(3)(A)-(C).

primary argument seems to be that it did not receive proportionate services in exchange for the fees assessed. But TNHC overlooks the fact that it is seeking an entitlement from the State Water Board, and fees are assessed upon submission of an application. A reasonableness determination is not based on *when* an agency requires a fee for its services. For example, in *Carlton Santee Corp. v. Padre Dam Municipal Water Dist.* (1981) 120 Cal. App. 3d 14, the court upheld a fee schedule where the developer was required to make immediate payment of \$2.9 million for water and sewer connection fees notwithstanding that the developer had yet to obtain approval of the tentative subdivision map, the final subdivision map and necessary building permits. The developer was required to pay fees upon the district's determination of availability rather than upon the actual furnishing of the service. Noting the impropriety of courts substituting their own judgment of reasonableness for that of the responsible agency, the court upheld the reasonableness both of the timing and amount of the facilities fees charged. (*Id.* at 28-30.)

A regulatory fee is charged to cover the reasonable cost of a service or program connected to a particular activity. Regulatory fees are not compulsory. Rather, "fee payers have some control both over when, and if, they pay any fee, i.e., when or if they elect to engage in a regulated activity, and/or the amount of the fee they are compelled to pay." (*California Building Industry Assn. v. San Joaquin Valley Air Pollution Control Dist.* (2009) 178 Cal. App. 4<sup>th</sup> 120, 132.) In addition, as was noted by the court in *CAPS*, "whether the fees collected exceed the cost of the regulatory program they are collected to support need not be proved on an individual basis. Rather, the agency is allowed to employ a flexible assessment of proportionality within a broad range of reasonableness in setting fees." (*CAPS* at 948-49.)

In summary, because the fee schedule provides a fair and reasonable basis for determining when annual fees are due, and an individualized determination of costs is not required, the water quality certification fees applied to TNHC are fair and reasonable. Prorating fees based on the proportion of the year during which an application for certification is pending is unnecessary and would be unworkable. The proportion of the year during which an application for certification is on file with the Board bears little relation to the Board's costs in connection with water quality certification because (1) applications frequently are withdrawn and resubmitted, (2) even if an application is denied, it may be reinstated if the applicant successfully petitions for reconsideration, and (3) the State Water Board continues to incur costs during those periods before the application is resubmitted and reinstated. Moreover,

because the fee schedules are established and the fees assessments are determined relatively early in the fiscal year and applications may be denied or withdrawn after the fees are assessed, calculating the fees based on the proportion of the fiscal year during which the applications for certification are pending would be unworkable.

It should also be noted that while an individualized determination of costs is not required, the State Water Board has incurred and is continuing to incur substantial costs in connection with TNHC's project. The denial of certification was issued October 1, 2009, meaning that the Board incurred costs up to that point, including but not limited to the costs of processing the denial. Additionally, the Board is now incurring costs in processing TNHC's petition for reconsideration of the denial of certification and will continue to incur costs until the Board takes final action on the petition for reconsideration. Because a petition for reconsideration makes available a higher level of review, with the Board members as a board reviewing certification decisions issued by the Executive Director under delegated authority, the State Water Board incurs substantial costs in processing a petition for reconsideration even where the ultimate decision is to uphold the Executive Director's action. Accordingly, no reduction or refund of the fee is required.

#### 5.0 CONCLUSION

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

#### ORDER

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

Dated: \_\_\_\_\_

2-08-10

  
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Dorothy Rice  
Executive Director