

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2014-0005-EXEC

In the Matter of the Petition for Reconsideration of

KINGS RIVER WATER ASSOCIATION

Regarding Annual Water Right Fee Determinations

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR¹

1.0 INTRODUCTION

The Kings River Water Association (Petitioner) petitioned the State Water Resources Control Board (State Water Board or Board) for reconsideration and a refund of annual fees assessed by the State Board of Equalization (BOE) for Fiscal Year (FY) 2013-14. Petitioner contends that the water rights fees are invalid and requests that its fees be canceled, or, in the alternative, reduced by the Board.

For the reasons discussed below, the State Water Board finds that the decision to impose the fees was appropriate and proper and denies Petitioner's request for reconsideration.

2.0 GROUND FOR RECONSIDERATION

A fee payer may petition for reconsideration of the State Water Board's determination that the fee payer is required to pay a fee, or the Board's determination regarding the amount of the fee.

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.

(Cal. Code Regs., tit. 23, § 1077.)² 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 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)(2).) 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 State Water Board will not consider late petitions.

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

² 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.

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

3.0 LEGAL AND FACTUAL BACKGROUND

The State Water Board is the state agency primarily responsible for administering the State's water right program. The State Water Board administers the program through its Division of Water Rights (Division). The funding for the water right program is scheduled separately in the Budget Act (and through a continuous appropriation discussed below) and includes funding from several different sources. 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 (S.B. 1049)) 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 appropriated by the Legislature from the Water Rights Fund, taking into account the reserves in the fund. (*Id.*, § 1525, subd. (d)(3).) If the revenue collected in the preceding year was greater, or less than, the amounts appropriated, 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.)

As explained in the Memorandum to File from Barbara Evoy, Deputy Director for the Division of Water Rights, dated January 31, 2014, entitled "Recommended Water Right Fee Schedule for Fiscal Year 2013-14" (hereinafter "Evoy Memorandum"), in FY 2013-14, the Legislature appropriated \$18.908 million from all funding sources for water right program expenditures by the State Water Board. The Evoy Memorandum provides more detail, but in sum, this amount includes \$13.0 million for the support of the State Water Board from the Water Rights Fund and

³ 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; State Water Board Order WQ 98-05-UST at pp. 3-4.)

a continuous appropriation from the Water Rights Fund of \$3.75 million for enforcement⁴ for a total of \$16.75 million appropriated to the State Water Board from the Water Rights Fund (not including an approximately \$17,000 carryover from prior years' continuous appropriations). The State Water Board's budget for the water right program also includes \$1.067 million in General Fund and \$499,000 from other sources. In addition to the amounts appropriated to the State Water Board, the Legislature appropriated \$475,000 from the Water Rights Fund to BOE for its water right fee collection efforts, \$39,000 from the Water Rights Fund to the California Environmental Protection Agency for support functions that the agency provides for the Board's water right program, and \$78,000 to the Financial Information System of California.

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 appropriations made from the fund, taking into account money in the fund from other sources.⁵ As explained in the Evoy Memorandum, the Water Rights Fund had a beginning balance of \$3.758 million for the fiscal year. In calculating the amount needed to be collected through fee revenues, the Division also considered the Water Rights Fund balance at the beginning of the fiscal year, which serves as a prudent reserve for economic uncertainty. In reviewing the fee schedule, the Division considers a 10 percent fund reserve to be prudent. In recent years, the fund reserve has been drawn down by collecting less revenue annually than is expended. Without any annual fee increase, the projected reserve for FY 2013-14 would be 9.1 percent, which is below the amount the Division considers to be prudent. To prevent the projected fund reserve from being drawn down below 10 percent, the Division proposed increasing annual permit, license and pending application fees by increasing the per acre-foot charge from \$0.05 to \$0.053. The Division also proposed adjusting the caps on application and petition filing fees based on changes in the consumer price index; and amending section 1068 to specify that the \$250 registration fee for any person who registers an appropriation of water

⁴ In addition to the annual Budget Act, Senate Bill No. 8 of the 2009-2010 Seventh Extraordinary Session (Stats. 2009, 7th Ex. Sess., ch. 2) (SB 7X 8), § 11, makes a continuous appropriation from the Water Rights Fund of \$3.75 million for water right enforcement. In 2011, the Legislature amended Water Code section 1525, subdivision (d)(3) to clarify that the amounts collected through fees should be sufficient to cover the appropriations set forth in the Budget Act and the continuous appropriation in SB 7X 8. (Stats. 2011, ch. 579, § 9.)

⁵ 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)) and penalties collected for water right violations (*id.*, § 1551, subd. (b)). The calculations used to determine water right fees do not include appropriations from funds other than the Water Rights Fund.

for small domestic, livestock stock pond or small irrigation use is non-refundable. With these increases, the projected fee revenue is \$16.181 million. With estimated total expenditures of \$17.462 million for the fiscal year, expenditures will exceed fee revenues by \$1.281 million, thereby decreasing the total amount in reserve to \$2.477 million, which amounts to a 14.2 percent fund reserve. Although this fee schedule will not draw down the fund reserve to 10 percent of annual expenditures, the fund is expected to reach a 10 percent reserve level in FY 2014-15 based on the Governor's proposed budget for FY 2014-15 and the current fee schedule. For the purposes of calculating this year's fees, the Division forecasted a total of \$15.100 million to be collected in regulatory fees for FY 2013-14. The total projected revenue for the Water Rights Fund in FY 2013-14 is \$16.181 million.

On October 8, 2013, the State Water Board accepted the Division's recommendations and adopted Resolution 2013-0032, revising the emergency regulations governing water right fees for FY 2013-14. The Office of Administrative Law approved the emergency regulations on October 31, 2013. On November 5, 2013, the State Water Board issued the annual fee assessments. The deadline for filing a petition for reconsideration of the November 5, 2013 assessments was December 5, 2013. Petitioner filed a petition for reconsideration of the determination that it was required to pay annual fees, which was received on November 22, 2013.

4.0 LITIGATION REGARDING THE ANNUAL WATER RIGHT FEES

In 2011, the California Supreme Court issued a decision on the statute authorizing the water right fees and the State Water Board's annual fee regulations for FY 2003-2004. (*California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421 (hereafter *CFBF v. State Water Board*)). The Supreme Court upheld the water right fee statutes (e.g., Wat. Code, §§ 1525, 1540, 1560), but remanded issues concerning the application of these fees through the State Water Board's regulations back to the trial court for further fact-finding. Specifically, the Supreme Court directed the trial court to make factual findings as to whether the fees, including the annual permit and license fees, constituted fair, reasonable and substantially proportional assessments of all costs related to the regulation of affected fee payers. (*CFBF v. State Water Board, supra*, at pp. 442, 446.) In December 2012, a trial was held in the Sacramento County Superior Court on the application of the water right fees for FY 2003-2004. On November 12, 2013, the superior court issued its Final Statement of Decision, invalidating the 2003 fee regulations. That decision explicitly acknowledges that it is not

directed at fee regulations applied in subsequent years, including the fees at issue in the present petition. The State Water Board disagrees with the superior court's decision on the FY 2003-04 fee regulations and is appealing the decision.

5.0 THE WATER RIGHT FEES PROVIDE A FAIR, REASONABLE, AND SUBSTANTIALLY PROPORTIONATE ASSESSMENT OF ALL COSTS RELATED TO THE REGULATION OF AFFECTED PAYORS

Petitioner argues that the fees are invalid because they “do not ‘provide a fair, reasonable, and substantially proportionate assessment of all costs related to the regulation of affected payors’ as required by the Supreme Court.” (Petition, at p. 1, citing *CFBF v. State Water Board*, *supra*, at p. 442.) This contention is based on Petitioner’s false allegation that “the fees imposed under the Current Regulations allocate the entire cost of the Water Rights Division’s activities entirely on those holding licenses and permits.” (*Ibid.*) Petitioner argues further that other parties that place burdens on and benefit from the Division’s activities, namely riparian and pre-1914 appropriative water right holders, have not been assessed fees, and therefore allocating the entire cost of the Division’s activities on the fee payers is not a “fair, reasonable, and substantially proportionate” allocation of the costs related to the regulation of the fee payers.

Contrary to Petitioner’s allegation that the entire cost of the Division’s activities has been allocated to fee payers, not all of the Division’s activities are funded by the water rights fees.⁶ As discussed more fully in the Evoy Memorandum (see also section 3, *supra*), the Division of Water Rights, the Office of Chief Counsel, and the Delta Watermaster undertake work involving riparian and pre-1914 water rights. Any such work that is not also associated with the administration of the permit and license program is funded by the General Fund and Tobacco Tax Fund and is not funded by the Water Rights Fund. These other funding sources are allocated to these other water right program activities at the start of the fiscal year and expenditures against these funding sources are tracked by charges made to specific task codes. Work is performed and charges are made to the task codes for these other activities only to the extent the funds are available. If funding from these sources becomes unavailable, then the activity must cease.

⁶ It should also be noted that, contrary to Petitioner’s claim, the fees paid into the Water Rights Fund are not limited to fees imposed on persons who hold or are applying for permits or licenses. (See Wat. Code, §§ 1525, subd. (b)(6), 1528, 1529, 2040 et seq., 2850 et seq., 13160.1, subd. (e).)

Thus, the Supreme Court affirmed that, in assessing the validity of a regulatory fee, the focus is properly on the regulatory activity and its associated costs. Therefore, the relative amount of water held by various water right holders that are not regulated by the State Water Board under the water right permit and license system, and which account for only a very small percentage of water right program expenditures, has no bearing on the validity of the water right fees. Moreover, the fact that some riparian and pre-1914 appropriative water right holders may also benefit from or place burdens on the water right program does not mean that the water right fees are not reasonably related to the costs of regulating the fee payers.⁸

6.0 CONCLUSION

The State Water Board finds that its decision to impose water right fees was appropriate and proper, and that the fees imposed were calculated and billed correctly. This order addresses the principal issues raised by the petition. To the extent that this order does not address all of the issues raised by Petitioner, the State Water Board finds that either these issues are insubstantial or that Petitioner has failed to meet the requirements for a petition for reconsideration under the Board's regulations. (§§ 768-769, 1077.) The petition for reconsideration is denied.

ORDER

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

Dated: 3/4/14


Thomas Howard
Executive Director

⁸ See the Memorandum to File from Victoria A. Whitney, Deputy Director for Water Rights, dated February 1, 2010, entitled "Analysis of Water Right Program Activities and Expenditure of Resources" for a more detailed analysis of this issue.