

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR-2014-0014-EXEC

In the Matter of Petition for Reconsideration of the
DEPARTMENT OF WATER RESOURCES
Regarding Annual Water Quality Certification Fee Determination

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:¹

1.0 INTRODUCTION

The Department of Water Resources (DWR) timely petitioned the State Water Resources Control Board (State Water Board or Board) for reconsideration of an annual fee of \$261,894.70 assessed for Fiscal Year 2013-14 by the State Board of Equalization (BOE) on November 5, 2013, for DWR's Oroville Facilities (Federal Energy Regulatory Commission (FERC) Project No. 2100). DWR recognizes the State Water Board's authority to collect reasonable fees for the Clean Water Act section 401 water quality certification program, but claims the fees are unreasonable because of a delay in the relicensing proceeding caused by a third party and asserts that the State Water Board has been incurring no costs since issuance of the water quality certification. This order denies reconsideration.

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, including the authority to act on petitions for reconsideration, unless a petition raises matters that the State Water Board wishes to address or unless it requires an evidentiary hearing before the Board. 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.

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 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) requires 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 and adopts 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.*) The fee schedule includes fees for the State Water Board's costs in connection with water quality certification of FERC licensed hydroelectric projects. BOE is responsible for collecting the annual fees. (*Id.*, § 1536.)

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. Water Code section 13160.1 specifically authorizes imposition of fees not only on applicants for certification, but also on those who file a notice of intent to apply for a federal permit or license for which water quality certification is required, and on those who hold licenses for which water quality certification has been issued. (Wat. Code, § 13160.1, subd. (2)(A-C).) Fees associated with water quality certification for FERC licensing are

deposited in the Water Rights Fund. (*Id.*, § 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. Annual fees are charged for each year from the initiation of review in anticipation of consideration of certification through the completion of certification and related federal proceedings. (Cal. Code Regs., § 3833.1, subd. (b)(1).) Once a review in anticipation of certification is initiated, certification fees are assessed until one of the following circumstances occurs: 1) the applicant abandons the license application; 2) a license is granted or denied by FERC; or 3) FERC determines no license is necessary. (*Id.*, subd. (b)(3).)

4.0 FACTUAL BACKGROUND REGARDING WATER QUALITY CERTIFICATION FOR THE DEPARTMENT OF WATER RESOURCES' OROVILLE FACILITIES

DWR owns and operates the Oroville Facilities, FERC Project No. 2100. The original FERC license for the Oroville Facilities expired in January 2007, and the facilities have continued to run under annual licenses since that time.

DWR applied for water quality certification for the Oroville Facilities in October 2005. DWR reached a settlement agreement regarding relicensing of the hydroelectric facilities in 2006, significantly amending its proposed project. The settlement agreement includes timeframes for future facilities and operational modifications that depend on future consultation with the State Water Board, as well as the Board's future review and approval. In order to address uncertainty regarding the provisions necessary to protect water quality and beneficial uses into the future, the settlement agreement also includes significant adaptive management which will also require future consultation, review and approval by the Board or its designee.

DWR adopted its final Environmental Impact Report in July 2008. The State Water Board issued water quality certification for the Oroville Facilities in December 2010. A water quality certification takes effect upon incorporation into a new federal license or permit authorizing the activity for which certification is sought. (33 U.S.C. § 1341(d).)

Under section 7 of the federal Endangered Species Act, FERC must complete pre-licensing consultation with responsible federal agencies regarding listed species potentially affected by a project. (16 U.S.C. § 1536.) The National Marine Fisheries Service (NMFS) has not yet completed consultation by issuing a final Biological Opinion for the Oroville Facilities. Accordingly, FERC has not yet issued a new license, and the water quality certification is not yet in effect.

In April 2012, Golden Gate Salmon Association and California Sportfishing Protection Alliance submitted a petition to the State Water Board to reopen and amend the water quality certification for the Oroville Facilities, based on new information regarding the presence of the North American green sturgeon in the Feather River. The petition suggested that terms in the water quality certification could harm the threatened species. State Water Board staff reviewed the information submitted and contacted NMFS and the California Department of Fish and Wildlife, with copies to DWR, for their opinions regarding whether to hold a workshop to address the information. All three agencies responded in June and July of 2012. At that time, NMFS anticipated issuing a final Biological Opinion within a few months. While that has not yet occurred, NMFS staff have asserted that they continue to actively work on a final Biological Opinion during periodic informal communications with State Water Board staff. After careful consideration, staff has decided to await issuance of the final Biological Opinion before making a recommendation to the State Water Board on whether the Golden Gate Salmon Association and California Sportfishing Protection Alliance petition warrants further action.

5.0 DISCUSSION

DWR asserts that the delays in licensing are out of its control, and that the "SWRCB [State Water Resources Control Board] has been charging DWR an annual fee when SWRCB is not incurring costs associated with the certification." While recognizing the State Water Board's authority to collect reasonable fees, DWR "respectfully submits that the fee is not reasonable and requests that the annual fee for Fiscal Year 2013-14 and

future years be waived until such time as work resumes on the certification after FERC issues a license.” DWR also notes that it has paid fees for two fiscal years since issuance of the water quality certification.

5.1 DWR HAS FAILED TO MEET THE PROCEDURAL REQUIREMENTS OF CALIFORNIA CODE OF REGULATIONS, SECTION 769

California Code of Regulations, section 769 requires any legal issues raised in the petition be supported by a memorandum of points and authorities. (*Id.* at subd. (c).) DWR’s letter failed to include a memorandum of points and authorities which would develop why DWR believes that the State Water Board’s fee structure or its application to DWR is not legal or otherwise should be reconsidered.

This failure to comply with regulatory requirements provides grounds to dismiss the petition. (See State Water Board Orders WR 99-10, pp. 3-4; WR 95-2, pp. 3-4.)

5.2 DWR’S OROVILLE FACILITIES FALL SQUARELY WITHIN THE FEE PAYMENT REQUIREMENTS OF CALIFORNIA CODE OF REGULATIONS, SECTION 3833.1

California Code of Regulations, section 3833.1 governs water quality certification annual fees for FERC-licensed hydropower facilities, and requires payment in years:

(b)(1) ... until and including the fiscal year in which certification *and related federal proceedings* are complete...

(Italics added.)

As the highlighted language makes clear, the regulation requires payments until both issuance of certification (which has occurred) and completion of the “related federal proceeding.” Here, that proceeding is still ongoing, as there is no final decision on issuance of a new FERC license. Thus, the regulatory trigger for halting fee collection has not been met. DWR apparently does not dispute that the Oroville Facilities fall squarely within the applicable fee regulation.

5.3 THE STATE WATER BOARD HAS CONTINUED TO INCUR COSTS ASSOCIATED WITH WATER QUALITY CERTIFICATION SINCE DECEMBER 2010, AND WILL TO CONTINUE TO DO SO IN THE FUTURE

As discussed in section 5.4 of this order, the fees assessed would be reasonable even if there were no costs in any given year. However, DWR's stated premise that the State Water Board's costs associated with the water quality certification ceased after issuance is incorrect. As described above, the State Water Board has incurred costs related to a petition to reopen the water quality certification to address alleged potential conflicts between the certification and protection of the threatened North American green sturgeon in all three fiscal years since issuance of the water quality certification. As NMFS continues to work actively on the final Biological Opinion, issuance of which will trigger review of the opinion and a decision on whether to hold a workshop on potentially revising the water quality certification, it was reasonable to anticipate at the adoption of the emergency regulations (and remains reasonable to anticipate) that the State Water Board would incur additional costs in the present fiscal year, as well. Furthermore, the costs related to water quality certification are expected to continue over the 30-50 years of any FERC license issued, as the project was structured to require ongoing oversight of water quality issues for adaptive management and facilities and operational changes.

5.4 THE WATER QUALITY CERTIFICATION FEES FOR FERC-LICENSED HYDROELECTRIC FACILITIES ARE FAIR AND REASONABLE

As affirmed in previous decisions, 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, supra*, 79 Cal.App.4th, 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. (*Id.* at 950.) 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." (*Id.* at 948-49.)

As noted above, the State Water Board incurred regulatory costs related to water quality certification for the Project in all fiscal years since issuance of water quality certification, and is likely to include further costs in the current fiscal year. But an annual water quality certification fee can be reasonable even if there are no costs for a given project in a particular year. The validity of the fee depends on the reasonableness of the fee schedule in general, not whether the regulatory fee matches the regulatory expenses for any individual fee payer. (*Cal. Farm Bur. Fed'n v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 438 ["The question of proportionality is not measured on an individual basis ... Rather, it is measured collectively, considering all rate payers... [Fees] need not be finely calibrated to the precise benefit each individual fee payor might deserve".])

Even reaching the question of the relationship of the fees to the regulatory costs for the individual fee payer, an annual fee that is reasonable considering the overall costs of the multi-year period over which the fees were imposed would not be rendered invalid simply because there were no costs in any particular year. 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 a developer was required to make immediate payment of \$2.9 million for water and sewer connection fees even though 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. (*Ibid.*) 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.)

The State Water Board's FERC fees are tailored to cover the projected annual costs of the Board's water quality certification activities, both before and after a water quality certification goes into effect: the fees are not designed for dollar-for-dollar exactitude, and they do not need to be. In some years, staff time spent on an applicant or licenseholder's project may cost the State Water Board more than the yearly fee. In others, such work may cost the state less. Such a fee schedule is fair and reasonable, particularly given the long-term benefits FERC project owners and operators receive, the costs of maintaining the FERC program, and the considerable uncertainty in projecting a particular applicant or operator's costs to the state in an upcoming year. In all years, applicants benefit from the availability of staff with expertise regarding their particular projects to address the complex issues that arise in FERC water quality certification proceedings, and they also benefit from certainty in planning for annual costs.

State Water Board sets the fee schedule for water quality certification in consideration of the estimated revenues from applicants subject to the fee under the fee regulations—including those for whom certification has been issued but a FERC license is still pending before the start of the fiscal year. It is not unusual for FERC to issue a license in a later fiscal year than the one in which certification was issued. Thus, during the years before issuance of certification, all applicant's fees are lower than they would have been if projects that had received certification but not yet had their FERC licenses approved were excluded from the calculation. Overall, the fee burden is spread out over a greater number of years.

DWR has not asserted that, even in its individual case, the costs of the project overall are unreasonable in light of the overall costs of the State Water Board's pre- and post-certification actions. For this particular project, the pre-certification costs the State Water Board incurred were considerable. The staff divided responsibilities with one team advising settlement development and another advising on whether to adopt DWR's proposed settlement. A large number of stakeholders weighed in on the terms of the settlement and the Board's first and second proposed draft water quality certifications, and the certification was ultimately adopted by the full State Water Board at a public meeting. Furthermore, DWR submitted a settlement agreement that relies heavily on adaptive management and future decision-making. This structure allows the State Water Board to be able to certify that the project will meet water quality requirements in the future, yet allow the flexibility to tailor decisions based on current information, rather than the best available science and professional judgment at the time of adoption of a 30-50 year license. Yet, this structure also effectively delays State Water Board costs that in most instances would be associated with issuance of the water quality certification until long after the water quality certification itself is first adopted.

DWR alleges that it's particular situation, where a delay in another agency's expected timeline has postponed FERC licensing, makes the State Water Board's fees unreasonable: but this project actually highlights the need for spreading costs over the years, maintaining staff knowledge on the intricacies of the certification, and charging fees in the time period between water quality certification and FERC license issuance.

5.5 DWR'S REQUEST TO WAIVE FUTURE FEES IS PREMATURE

A request for reconsideration necessarily requires that a decision have been made. The State Water Board has made no determination as to future fees for DWR's Oroville facilities, and a request to reconsider such decision is premature. To the extent the request regarding future fees rests on the assertion that this year's fee is unreasonable, such request is denied for the reasons given above.

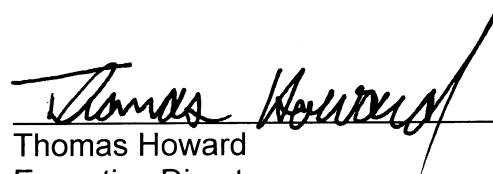
6.0 CONCLUSION

Because DWR's petition fails to comply with the California Code of Regulations, and because the water quality certification fee schedule and its application to DWR's Oroville Facilities are fair and reasonable, the petition for reconsideration is denied.

ORDER

IT IS HEREBY ORDERED THAT the Department of Water Resources' petition for reconsideration is denied.

Dated: 2/3/14


Thomas Howard
Executive Director