



October 1, 2013

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: **10/08/2013 BOARD MEETING, Item 4 (Water Right Fees)**

Dear Ms. Townsend and Board Members:

These comments are being provided by Petitioners in the existing action pending before the Sacramento Superior Court, entitled *California Farm Bureau Federation et al. v. State Water Resources Control Board, et al.*, consolidated with *Northern California Water District et al. v. State Water Resources Control Board et al.*, Case Nos. 03CS01776 and 04CS00473, 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 SWRCB's regulations implementing Water Code section 1525, 1540, 1560 and related statutes (Fee Statutes), impermissibly impose a tax on water right holders, in violation of the California Constitution and violate federal law by imposing a charge on water rights held in the name of the United States and by imposing charges on federal contractors in excess of any "beneficial interest" held by those contractors. The implementing regulations are also arbitrary as they fail to consider the "beneficial

¹Northern California Water Association (NCWA), Central Valley Project Water Association (CVPWA) and other individually named petitioners have challenged the fees in each successive 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.

interest” of federal contractors and because they treat similarly situated water right holders differently, in an arbitrary manner.

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, many of which were not incorporated into the SWRCB’s fee regulations. 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 Sacramento Superior Court, identified above, has resulted in a *Proposed Statement of Decision* by the Court, which will be the subject of a hearing on October 30, 2013, after which the Court will issue a *Statement of Decision*. That *Statement of Decision* will bear directly on the regulations at issue here. The proposed findings and conclusions in the *Proposed Statement of Decision* are incorporated herein. In addition, Petitioners submit the following general comments.

COMMENTS

1. **The SWRCB’s Proposed Regulations Impose a Tax on Water Users in Violation of Proposition 13**

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, 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.

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.)

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 of a 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 Central Valley Project water. The SWRCB's proposed regulations impermissibly pass through the charges unlawfully imposed on the United States to federal contractors. Moreover, 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," and therefore violate the Supremacy Clause of the United States Constitution.

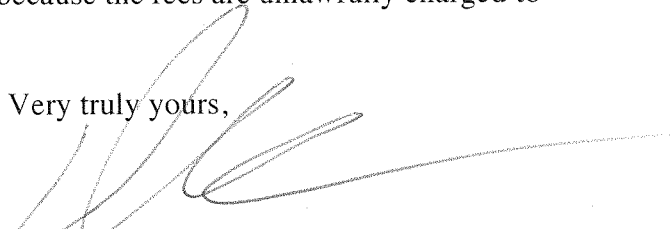
3. The Regulations Are Arbitrary

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. Under the fee scheme, certain water right holders pay an exponentially higher fee for the same or less regulatory burden than others. Moreover, the SWRCB's failure to consider the beneficial interest, if any, of federal contractors, is arbitrary.

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,



Daniel Kelly