STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2011–0008-EXEC

In the Matter of the Petition for Reconsideration of the

CALIFORNIA FARM BUREAU FEDERATION,
VARIOUS COUNTY FARM BUREAUS
AND INDIVIDUAL PETITIONERS

Regarding Annual Water Right Fee Determinations

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR[1]

1.0 INTRODUCTION

The California Farm Bureau Federation (Farm Bureau), various county farm bureaus, and individual persons or entities collectively referred to herein as "Petitioners,"[2] petition the State Water Resources Control Board (State Water Board) for reconsideration and a refund of Fiscal Year (FY) 2010-2011 water right fees assessed by the State Board of Equalization (BOE) on December 6, 2010. Petitioners challenge the State Water Board's decision to impose the water right fees on several constitutional grounds, including a claim that the fees constitute an unconstitutional tax in violation of Article XIII A of the California Constitution (commonly referred to as "Proposition 13"). They request the State Water Board to reconsider the water right fees that were imposed, declare the fee statute invalid, refund all water right fees paid, and to vacate and rescind State Water Board Resolution No. 2010-0052 and the fee regulations. The State

[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.

[2] The term "Petitioners" is used for ease of reference in this order and does not confer the legal status of petitioner.

Water Board finds that its decision to impose the fees was appropriate and proper and denies Petitioners' petition for reconsideration.

2.0 STATUS OF LITIGATION

On January 31, 2011, the California Supreme Court issued a decision in long-standing litigation over the statute authorizing the water right fees and the implementing regulations adopted for FY 2003-2004. (*California Farm Bureau Federation v. State Water Resources Control Bd.* (S150518).) Each year since 2003, the Northern California Water Association (NCWA), the Central Valley Project Water Association (CVPWA), and Farm Bureau have filed suit against the State Water Board and BOE, alleging, in part, that the fee legislation and the State Water Board's fee regulations are unconstitutional and invalid. The NCWA, CVPWA, and Farm Bureau actions over the FY 2003-2004 fees have been consolidated, and the other actions have been stayed pending resolution of the consolidated cases. In 2005 the Sacramento County Superior Court issued a judgment upholding the water right fees in their entirety, and NCWA, CVPWA, and the Farm Bureau appealed. In January 2007 the Third District Court of Appeal issued a decision upholding the fee statute and invalidating the fee regulations for FY 2003-2004. The California Supreme Court granted review in April 2007.

In its decision, the Supreme Court upheld the water right fee statutes. (E.g., Wat. Code, §§ 1525, 1540, 1560.) The Supreme Court also reversed the two adverse holdings of the Court of Appeal concerning the State Water Board's regulations governing annual permit and license fees and the annual fees passed through to the federal water contractors. (Cal. Code Regs., tit. 23, § 1066, 1073.)[3] The Supreme Court 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 annual permit and license fees were reasonably related to the costs of the regulatory activity and findings related to the annual water right fees passed through to the federal water contractors. The Supreme Court's decision otherwise left intact the appellate court's holdings that were favorable to the State Water Board.

[3] 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.

3.0 GROUNDS FOR RECONSIDERATION

According to the State Water Board's regulations governing reconsideration of fees, only a fee payer may petition for reconsideration of the board's determination that the fee payer is required to pay a fee, or the board's determination regarding the amount of the fee. (Cal. Code Regs., tit. 23, § 1077.)[4] 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 deadline for filing a petition for reconsideration of the December 6, 2010 assessment was January 5, 2011. The State Water

[4] 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.

Board will not consider late petitions or late-filed letters referencing the Farm Bureau 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 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.[5] (*Id.*, subd. (a)(2)(A)-(C).)

4.0 LEGAL AND FACTUAL BACKGROUND

The State Water Board is the state agency entity 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 includes funding from several different sources. (See Stats. 2009, ch. 712, § 2.00, Item 3940-001-0439, schedules (2), (6), (11), (18) & (19).) 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.)

As explained in the Memorandum to File from Barbara Evoy, Deputy Director for the Division of Water Rights, dated February 25, 2011, entitled "Recommended Water Right and Water Quality

[5] 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.)

Certification Fee Schedule for [FY] 2010-2011" (hereinafter "Evoy Memorandum"), in FY 2010-2011, which is incorporated by reference herein, the Legislature appropriated $18.012 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 a $9.104 million appropriation from the Water Rights Fund in the Budget Act of 2010[6] and a continuing appropriation from the Water Rights Fund of $3.75 million for enforcement positions,[7] for a total of $12.854 million appropriated to the State Water Board from the Water Rights Fund. The State Water Board's budget for the water right program also includes $4.698 million in general funds and $460,000 from other sources. In addition to the amounts appropriated to the State Water Board, the Budget Act appropriates $429,000 from the Water Rights Fund to BOE for its water right fee collection efforts and appropriates $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.

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 appropriation made from the fund in the annual Budget Act, taking into account money in the fund from other sources.[8] As explained in the Evoy Memorandum, the Water Rights Fund had a beginning balance of $5.701 million for the fiscal year, and the Division determined that the fund condition projections for FY 2010-2011 should include a reserve for economic uncertainty of about $2.7 million. For the purposes of calculating this year's fees, the amount by which reserves would be spent down to reduce the fund balance to a $2.7 million reserve was subtracted from the total amount that would otherwise be collected in fee revenues, resulting in a fee revenue target of $8.959 million.

Also as described in the Evoy Memorandum, the Division recommended continuing to charge water right permit and license holders an annual fee of $100 plus $0.03 for each acre-feet in

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[6] Stats. 2010, ch. 712.

[7] In addition to the Budget Act appropriation of $9.104 million, Senate Bill No. 8 of the 2009-2010 Seventh Extraordinary Session (Stats. 2009 (7th Ex. Sess.) ch 2) (SB 7X 8) authorizes a continuous appropriation to the Water Rights Fund of $3.75 million for water right enforcement positions.

[8] 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.

excess of 10 acre-feet.[9] (§ 1066.) The Division also recommended revising other portions of the fee schedule for FY 2010-2011, which are not the subject of this petition for reconsideration.[10]

On October 19, 2010, the State Water Board accepted the Division's recommendations and adopted Resolution No. 2010-0052, revising the emergency regulations governing water right fees for FY 2010-2011. The Office of Administrative Law approved the emergency regulations on November 17, 2010.

5.0 FEE ASSESSMENTS ADDRESSED IN THIS ORDER

The Farm Bureau's petition for reconsideration identifies itself, county farm bureaus representing themselves and the interests of their individual members in their respective counties, Chimney Rock Ranch, Pollenator Ranch, Lawrence B. Groteguth, William A. Gruenthal, Bob J. Murphy, and Patricia Pereira as petitioners. A number of persons or entities also filed petitions incorporating the Farm Bureau petition by reference. In its Exhibit 1 of its petition, the Farm Bureau identifies water right holders by name and water right application, which it purports to represent under the doctrine of associational standing. The State Water Board has previously rejected the Farm Bureau's argument that it, the county farm bureaus, and individuals identified in Exhibit 1 may be considered petitioners under the State Water Board's regulations governing reconsideration of fees. (See Order WRO 2005-0002-EXEC, at pp. 5-7.) As explained in Order WRO 2005-0002-EXEC, each person who seeks reconsideration of fee assessment must independently meet the statutory and regulatory requirements for reconsideration of a fee assessment. The reasoning of Order WRO 2005-0002-EXEC is incorporated by reference herein.

Moreover, the State Water Board receives a very large number of petitions for reconsideration on annual fees, which must be decided in a relatively brief period, and certain identifying information is necessary to enable the board to know exactly which fee determinations are before it and to properly process the petitions. Accordingly, the State Water Board's regulations require a petition for reconsideration of a fee assessed by BOE to include either a copy of the notice of assessment or all of the following information: (i) the fee payer's name; (ii) the water

[9] Last fiscal year, annual permit and license fee payers received a one-time credit to reduce the fund surplus. As explained in the Evoy Memorandum, the one-time credit is no longer in effect in FY 2010-2011.

[10] The State Water Board reduced the upper limit on certain filing fees commensurate with decreases in the consumer price index (§ 1064) and increased annual water quality certification fees for projects licensed, or subject to licensing, by the Federal Energy Regulatory Commission (§ 3833.1).

right or BOE identification number; (iii) the amount assessed; and (iv) the billing period or assessment date. (§ 1077, subd. (a)(2).)[11] The Farm Bureau's petition states that the amounts assessed to the water right holders identified in Exhibit 1 of its petition are unknown, but that the Farm Bureau believes that the amount assessed for the "vast majority" was $100 per water right. Regardless, if the Farm Bureau's petition and exhibits do not meet the requirements for a petition for reconsideration, including submitting a notice of assessment or specifying the amount assessed for each fee payer, as required by section 1077, then the petition is defective as to those fee payers. In other words, if information regarding the amount assessed has not been submitted for the fee payers identified in Exhibit 1, either in another Farm Bureau exhibit or by separate, timely-filed correspondence, then those fee payers are not properly considered petitioners.

Only persons who were assessed a fee on December 6, 2010, and who met the State Water Board's reconsideration requirements are considered petitioners for purposes of this order.[12] Those petitioners are identified in Attachment 1. The Farm Bureau's petition is dismissed to the extent it seeks review of any fee determinations other than the fee determinations identified for petitioners listed in Attachment 1 of this order.[13] Moreover, to the extent that Petitioners' contentions are not relevant to any of the annual fee assessments for which their petition for reconsideration has been filed, those contentions are not within the scope of the petitions for reconsideration. Additionally, the State Water Board will not consider allegations that Petitioners seek to incorporate by reference in other documents, such as its complaints or the Court of Appeal's January 17, 2007 decision,[14] if the Petitioners have failed to include the necessary points and authorities with their petition. (§ 769, subd. (c).)

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[11] Section 1077, subdivisions (a)(2) and (b), refers to a "notice of assessment." BOE refers to this notice as a "notice of determination." These notices are the same thing.

[12] Petitioners contest the State Water Board's decision to impose the water right fees, stating that the board decided to impose the FY 2010-2011 water right fees on October 19, 2010. On that date, the State Water Board adopted Resolution No. 2010-0052, which adopted emergency regulations revising the water right fee schedule and regulations in accordance with the Budget Act of 2010. For purposes of a petition for reconsideration relating to an assessment by BOE, however, the State Water Board's decision is deemed adopted on the date of the assessment by BOE, which was December 6, 2010. (§ 1077, subd. (b).) Because, however, Petitioners have identified the assessment date, and included notices of determination with the December 6, 2010 date, the State Water Board will construe their request for reconsideration to include those assessments.

[13] The Farm Bureau's petition and the petitions filed by reference do not include notices of assessment for annual application fees or water quality certification fees and Petitioners do not make specific arguments regarding these types of fees.

[14] Petitioners assert that the State Water Board's actions were inappropriate and improper for the reasons set forth by the Court of Appeal in its January 17, 2007, opinion. As explained herein, the California Supreme Court recently issued its decision reversing the appellate court's determination that the implementing regulations are invalid as applied and remanding the matter to the trial court.

6.0 PETITIONERS' ARGUMENTS REGARDING THE CONSTITUTIONALITY OF THE FEES AND THE ADMINISTRATION OF THE FEES ARE WITHOUT MERIT

Petitioners raise a variety of constitutional challenges to Senate Bill 1049 and the fee regulations, including claims that the fees (1) constitute an unconstitutional tax in violation of Proposition 13;[15] (2) unconstitutionally deprive Petitioners of their property rights without due process of law; (3) unconstitutionally deprive Petitioners of their property rights and constitute a taking; and (4) unconstitutionally deprive Petitioners of their equal protection rights. Petitioners previously raised these issues, nearly verbatim, in the petitions that the Farm Bureau previously has filed challenging annual fees since 2004. The State Water Board has rejected Petitioners' arguments, most recently by Order WR 2010-0007-EXEC.

The recent Supreme Court opinion in *California Farm Bureau Federation v. State Water Resources Control Bd.* disposes of Petitioners' claims regarding the constitutionality of the fee statutes. Once final, the Supreme Court's decision conclusively determines Petitioners' issues. (See *Bernhard v. Bank of America Nat. Trust & Savings Ass'n* (1942) 19 Cal.2d 807, 810 [explaining that the doctrine of res judicata precludes parties or their privies from relitigating a cause of action that has been finally determined].)

With respect to those issues not resolved by the Supreme Court's opinion, Petitioners have not provided any new arguments, new information, or supporting authorities that materially change any of the issues raised in the earlier petitions. With respect to the issues that were raised in the previous petitions and are repeated in the petition now before the State Water Board, this order adopts the reasoning of Order WR 2007-0008-EXEC and the orders incorporated by reference in that Order.

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[15] In order to be a valid regulatory fee, an assessment must bear a fair or reasonable relationship to the fee payers' burdens on or benefits from the regulatory activity. (*California Assn. of Professional Scientists v. Dept. of Fish and Game* (2000) 79 Cal.App.4th 935.) The annual water right fees are imposed on the group of water users—permittees and licensees—that account for the majority of the State Water Board's regulatory efforts. (Wat. Code, § 1525, subds. (a), (c).) Certain water users who are regulated by the State Water Board to a far lesser degree, such as surface water users not under the permitting authority of the State Water Board, do not pay water right permit and license fees. To address concerns that certain water users benefit from, or place burdens on, the water right regulatory program, but do not pay fees, the Division has analyzed the program resources dedicated to those non-paying water users. As explained in the Memorandum to File from Victoria A. Whitney, Deputy Director for Water Rights, dated February 1, 2010, regarding "Analysis of Water Right Program Activities and Expenditure of Resources," the Division has found that the State Water Board directs a de minimis amount of resources toward those water users who do not pay annual permit or license fees. Moreover, as explained in the Evoy Memorandum, the costs relating to implementation of the State Water Board's program for processing statements of water diversion and use (Wat. Code, § 5100 et seq.) and other actions relating to non-fee payers are paid for with general funds this fiscal year.

7.0 CONCLUSION

The State Water Board finds that its decision to impose water right fees was appropriate and proper. This order addresses the principal issues raised by the Farm Bureau and the individual petitioners. To the extent that this order does not address all of the issues raised by Petitioners, the State Water Board finds that either these issues are insubstantial or that Petitioners have 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: MAR 7 2011

Thomas Howard
Executive Director

Attachment