

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO 2004 -0010 - EXEC

In the Matter of the Petitions for Reconsideration

OF THE CALIFORNIA FARM BUREAU FEDERATION, VARIOUS COUNTY FARM BUREAUS, BRUCE W. BLYTHE, HARRY E. BLYTHE, JR., LAWRENCE B. GROTEGUTH, WILLIAM A. GRUENTHAL, HORACE G. KELSEY, ANNA M. MESQUITA, BOB J. MURPHY, AND PATRICIA PEREIRA

Regarding Water Right Fee Regulations

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:¹

1.0. INTRODUCTION

The California Farm Bureau Federation (Farm Bureau), various county farm bureaus, Bruce W. Blythe, Harry E. Blythe, Jr., Lawrence B. Groteguth, William A. Gruenthal, Horace G. Kelsey, Anna M. Mesquita, Bob J. Murphy, and Patricia Pereira collectively and individually petition the State Water Resources Control Board (SWRCB) for reconsideration and a refund of water right fees assessed by the State Board of Equalization (BOE) on or about January 8, 2004. In general, these persons and entities allege that the SWRCB's decision to impose water right fees constitutes an abuse of discretion, is not supported by substantial evidence, and is illegal. They request the SWRCB to vacate and rescind Resolution No. 2003-0077 authorizing the water right

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¹ SWRCB Resolution No. 2002 - 0104 delegates to the Executive Director the authority to supervise the activities of the SWRCB. Unless a petition for reconsideration raises matters that the SWRCB wishes to address or requires an evidentiary hearing before the SWRCB, the Executive Director's consideration of petitions for reconsideration of water right 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 water right fee assessment.

§ 769, subd. (a)(1)-(6); § 1077, subd. (a).) In addition, the petition may include a claim for refund. (§ 1074, subd. (g).)

The SWRCB 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.

(§ 770, subd. (a)(1).) Alternatively, after review of the record, the SWRCB also may deny the petition if the SWRCB 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.

(§ 770, subd. (a)(2)(A)-(C).)

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 in each of the petitions for reconsideration, the SWRCB finds that these issues are insubstantial. (§§ 768-770.)

3.0 LEGAL AND FACTUAL BACKGROUND

In Fiscal Year 2003-2004, the Budget Act requires the SWRCB's Division of Water Rights' (Division) program to be supported by fee revenues amounting to \$4.4 million, replacing a General Fund reduction of \$3.6 million. The Budget Act allocates a total of \$9.0 million for support of the water right program. Senate Bill 1049 (Stats. 2003, ch. 741) requires the SWRCB to adopt emergency regulations revising and establishing fees to be deposited in the Water Rights Fund in the State Treasury and revising fees for water quality certification. The SWRCB must set a fee schedule that will generate revenues in the amount the Budget Act sets for water right fee revenues. Accordingly, the SWRCB will collect fees for the 2003-2004 fiscal year, but the fees will support half of the Division's program costs this fiscal year. The SWRCB will review and revise the fees each fiscal year as necessary to conform to the revenue levels set forth in the annual Budget Act. BOE is responsible for collecting the annual fees.

The Legislature enacted the water right fee provisions of the Budget Act and Senate Bill 1049 based on the recommendations of the Legislative Analyst. The Legislative Analyst concluded that the water right program provides benefits to the applicants and water right holders regulated

by the program. (Legislative Analyst's Office, Analysis of the 2003-04 Budget Bill at pp. B-123 through B-126.) With respect to existing water right holders, the Legislative Analyst observed:

[T]he water rights program provides *ongoing* benefits directly to water rights holders. This is mainly because SWRCB is charged with assuring that applications for new water rights do not cause harm to any other existing legal water rights holder. In addition, the program conducts routine compliance and inspections of existing water rights. These activities also provide direct benefits to water rights holders by ensuring the terms and conditions of the water rights permits and licenses held by others are upheld.

(*Id.* at p. B-125 [italics in original].) Accordingly, the Legislative Analyst recommended an increase in application fees, plus new annual fees assessed on all permit and license holders, and establishment of a new special fund for deposit of the revenues generated by the fees. (*Ibid.*)⁴

On December 15, 2003, the SWRCB adopted Resolution No. 2003-0077 approving emergency regulations to meet the requirements of the Budget Act and Senate Bill 1049. In general, the emergency regulations increase filing fees for applications, petitions, registrations, and other filings and adopt annual fees for permits, licenses, water leases, and projects subject to water quality certification. Most fees will be deposited in the Water Rights Fund, which can be used to support all activities in the water right program. The Office of Administrative Law approved the emergency regulations on December 23, 2004, and both Senate Bill 1049 and the emergency regulations became effective on January 1, 2004. BOE issued the first bills by Notice of Determination on or about January 8, 2004.⁵

⁴ The Legislative Analyst recommended that the entire water right program be funded through fees, and that the fees also support the water rights related activities of the Department of Fish and Game. (Legislative Analyst's Office, Analysis of the 2003-04 Budget Bill at p. B-125 through B-126.) Although the Legislative Analyst states that water right holders "benefit directly" from the water right program (*id.* at p. B-125), this statement simply recognizes that the fee payers benefit from the program, even though the program also serves to protect against harm to a public resource. The Legislative Analyst recognized that the water right program is a regulatory program that includes environmental review of proposed appropriations and continuing oversight of permitted and licensed diversion and use. (See *id.* at pp. B-123 through B-124.) The Legislative Analyst proposed fees for various resource and environmental programs that included a combination of fees for services that directly benefit the fee payer, such as fire protection fees, and regulatory fees, such as fees for dam safety inspections. (*Id.* at pp. B-3 through B-4.) Senate Bill 1049 establishes the water right fees as regulatory fees, which may be based on the need for regulation instead of basing the fees on the value of the benefits conferred. (See Wat. Code, § 1525, subd. (c).)

⁵ The BOE mistakenly used a form that did not fully reflect differences between these fees and other fees and taxes collected by BOE. In particular, the form incorrectly specified the procedures to be followed if there was a [footnote continues on next page]

The Farm Bureau timely filed a petition for reconsideration on behalf of itself, 53 county farm bureaus, and individual members. The SWRCB also received four letters of protest from individuals identified in the Farm Bureau petition: Lawrence B. Groteguth, Anna M. Mesquita, Bob J. Murphy, and Patricia Pereira.

4.0 FEE DETERMINATIONS COVERED BY THE PETITIONS

The Farm Bureau's petition for reconsideration identifies itself, various county farm bureaus representing themselves and the interests of their individual members in their respective counties, Bruce W. Blythe, Harry E. Blythe, Jr., Lawrence B. Groteguth, William A. Gruenthal, Horace G. Kelsey, Anna M. Mesquita, Bob J. Murphy, and Patricia Pereira as petitioners. A threshold issue is whether the SWRCB can consider the Farm Bureau's petition for reconsideration to the extent it purports to represent the various county farm bureaus and their members.

The SWRCB requires strict adherence to the statute and regulations governing a petition for reconsideration. As explained above, a petition for reconsideration of a fee assessment must include certain information, including the specific order or decision for which it seeks review. (§§ 769, 1077.) The reason for requiring this specificity is to enable the SWRCB to know exactly which fee determinations are before it, for purposes of its own review, for purposes of notifying BOE which bills to adjust if the SWRCB finds merit to the petitions, and for purposes of judicial review.

The Farm Bureau's petition seeks to include the county farm bureaus and their individual members as petitioners, but does not identify the individual members. While a single petition may be filed for reconsideration of any number of individually identified actions, and there are no specific words or formula that must be invoked to identify those orders or decisions, the petition must be specific enough so that it is clear what orders and decisions are before the

disagreement over the billing. On or about January 14, 2004, BOE sent a letter to the fee payers notifying them that the correct procedure was the filing of a petition for reconsideration with the SWRCB, within 30 days of the original
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SWRCB. The SWRCB will neither accept generic references regarding who is to be included as a petitioner, nor interpret the petition to apply to other similarly situated fee payers who are not included or identified in the petition. If a petition for reconsideration is not clear enough to know whether a particular fee payer is covered, then it is defective under the SWRCB's statute and regulations governing reconsideration. Moreover, a petition cannot be extended to other fee payers by invoking a category or class of fee determinations, because to do so would convert the SWRCB's adjudicative action in reviewing a decision or order into a quasi-legislative proceeding. Accordingly, the SWRCB finds that, to the extent that the petition fails to identify the specific fee payer involved, and instead seeks to petition on behalf of a class or category of fee payers, the petition fails to adequately identify the specific fee determination it seeks to have reviewed, and thus fails to include the information required to be included in a petition for reconsideration. Accordingly, the petition is dismissed to the extent it seeks review of any fee determinations other than the fee determinations for the eight specifically named fee payers.

With respect to the eight individual fee payers, the petition identifies the fee payer, but does not provide any additional information to identify the specific fee determination involved.

Nonetheless, the SWRCB was able to use the names of the individual fee payers to ascertain which fee determinations are before it. Accordingly, the SWRCB will consider the Farm Bureau petition for reconsideration as seeking review of the fee determinations identified in Attachment 1, and issued to Bruce W. Blythe, Harry E. Blythe, Jr., Lawrence B. Groteguth, William A. Gruenthal, Horace G. Kelsey, Anna M. Mesquita, Bob J. Murphy, and Patricia Pereira (collectively referred to herein as "Petitioners"). These persons are properly considered Petitioners for purposes of this order.

BOE issued bills on or about January 8, 2004, for annual permit and license fees under section 1066 of the regulations, annual permit and license fees passed through to Bureau of Reclamation (Bureau or USBR) contractors under section 1073, and annual water quality certification fees under section 3833.1. Petitioners received bills for annual permit or license fees and accordingly, this order will only address issues specific to those fees. Fee determinations that

billing. The billing included a reference to the "taxpayer;" the correction refers to the "fee payer."

were not the subject of the fee bills issued on January 8, 2004, such as the filing fees for applications and petitions, and fees bills issued to fee payers who did not seek reconsideration of those fee determinations, are not within the scope of the petitions for reconsideration.

5.0 SENATE BILL 1049 AND THE FEE REGULATIONS ESTABLISH LAWFUL REGULATORY FEES

Petitioners raise a variety of challenges to Senate Bill 1049⁶ and the fee regulations, contending that the fees establish an unconstitutional tax under California Constitution, article XIII A, section 3 (Proposition 13). These challenges are without merit.

5.1 The Fees Are Regulatory Fees That Are Reasonably Related to the Benefits Provided by and Burdens to SWRCB's Water Right Program

Under Proposition 13, the state cannot impose a tax unless the tax is approved by a two-thirds vote of each house of the Legislature.⁷ The Legislature, however, can authorize a state agency to charge a regulatory fee by passing a bill by a majority vote. A regulatory fee is a fee “charged in connection with regulatory activities, which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and which are not levied for unrelated revenue purposes.” (*Sinclair Paint Co. v. State Board of Equalization (Sinclair Paint)* (1997) 15 Cal.4th 866, 876 [64 Cal.Rptr.2d 447].) Senate Bill 1049 and the SWRCB’s fee regulations establish regulatory fees in accordance with *Sinclair Paint* and subsequent judicial decisions.

⁶ Pursuant to the California Constitution, an administrative agency such as the SWRCB has no power to declare a statute unconstitutional or unenforceable, or to refuse to enforce a statute on the basis that the statute is unconstitutional or federal law prohibits enforcement of the statute unless an appellate court has made that determination. (Cal. Const., Art. III, § 3.5.) This provision does not prohibit a party from raising a constitutional issue as part of petition challenging a decision or order applying the statute, however, and any constitutional issues should be raised before the administrative agency if a party wants to preserve those issues for judicial review. Although a state agency cannot declare a statute unconstitutional in the absence of a judicial determination of that issue, the agency retains the power to interpret the statute, and may take constitutional issues into account in determining how the statute should be interpreted. Likewise, where applying and enforcing a statute involves and exercise of discretion, the agency may take constitutional issues into account in deciding how to exercise that discretion.

⁷ Section 3 of Proposition 13 states: “From and after the effective date of this article, any changes in State taxes enacted for the purpose of increasing revenues collected pursuant thereto whether by increased rates or changes in methods of computation must be imposed by an Act passed by not less than two-thirds of all members elected to [footnote continues on next page]”

The annual permit or license fees are calculated based on the total annual amount of diversion authorized by the permit or license, or “face value” of the water right, and not on actual water use or purpose of use. (Cal. Code Regs., tit. 23, §1066, subd. (a).) Section 1066, subdivision (b)(2) specifies that if “a permit or license contains an annual use limitation that is applicable only to that permit or license, and the limitation is less than the calculated diversion volume,” then the fee shall be based on that limitation. If, however, a person holds multiple water rights with a combined annual use limitation, but the person may divert the full amount of water under a particular right, then the fee shall be based on the face value of that individual right. (*Id.* § 1066, subd. (b)(3).) Additionally, the fee is calculated without regard to the availability of water, bypass requirements, or any limitation on the diversion of water that does not constitute a condition in the permit or license that expressly sets a maximum amount of diversion. (*Id.* § 1066, subd. (b).)

Petitioners allege that the fees “exceed the reasonable cost of providing services necessary to the [SWRCB’s] regulatory activity.” With respect to the cost-fee ratio contested by Petitioners, 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 a payor bear a fair or reasonable relationship to the payor’s burdens on or benefits from the regulatory activity.” (*California Association of Professional Scientists v. Department of Fish and Game* (2000) 79 Cal.App.4th 935, 945-950 [94 Cal.Rptr.2d 535] (hereafter *CAPS*) (citing *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227, 235 [211 Cal.Rptr. 567]).) A regulatory fee, however, does not require a precise cost-fee ratio to survive as a fee. (*CAPS, supra*, at p. 950.) 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 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. (*Ibid.*)

each of the two houses of the Legislature, except that no new ad valorem taxes on real property, or sales or
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Accordingly, the SWRCB has discretion and flexibility in developing a regulatory fee structure, so long as it is reasonable. (*CAPS, supra*, 79 Cal.App.4th at p. 950.) Annual fees provide the majority of funding for the Division's regulatory activities in the second half of Fiscal Year 2003-2004, and a significant portion of the Division's costs are related to managing and protecting existing water rights. Those regulatory costs are distributed in proportion to the distribution of water among permit and license holders. Accordingly, after considering several methods for calculating fees, the SWRCB determined that a fee based on the face value of each permit or license provides the most fair and efficient method of calculation. In general, the Division's workload is related to size of the authorized diversion, and the Water Code expressly authorizes the SWRCB to set fees schedules that are graduated. (Wat. Code, § 1530, subd. (a).) Larger diversions generally have a greater impact on the environment and on other water right holders. Thus, the fee allocation bears a reasonable relationship to the benefits provided by and burdens to the regulatory activity. Absolute precision is not required. While Petitioners may have preferred a different approach, this does not render the SWRCB's approach irrational or unreasonable.

Moreover, an annual fee that is based on the total annual amount of diversion authorized by each permit and license provides an objective measure that is easily determined on the face of the permit or license. Sometimes a person will hold multiple water rights with an annual use limitation that is applicable to a combination of those rights. These limitations tend to occur in the most junior rights held by the diverter. If a water right does not contain the combined use limitation, then the water right holder may divert the full amount authorized under that particular right if no diversions occur under the right(s) containing the limiting condition or if those rights are transferred or revoked. Because the water right holder still has the flexibility to divert the full amount of water under an individual right, the fee is based on the total annual amount for that individual right.

Petitioners appear to seek a mechanism that apportions to each individual permittee and licensee

transaction taxes on the sales of real property may be imposed.”

a proportionate share of the cost of the SWRCB's services. The SWRCB, however, is not required to demonstrate the proportionality of the fees on an individual basis. (See *CAPS, supra*, at p. 946 [rejecting argument that an agency must demonstrate an individual correlation between the amount of the fee and the cost of the benefit or burden].) "Proportionality is measured collectively to assure that the fee is indeed regulatory and not revenue raising." (*Id.* at p. 948.) Moreover, a regulatory program is for the protection of the health and safety of the public; accordingly, a regulatory fee is enacted for purposes broader than assigning the privilege to use a service or to obtain a permit. For example, costs of environmental protection may be shifted to persons who seek to impact the State's natural resources without subverting Proposition 13's objectives. (*Id.* at p. 950.)

In alleging that the SWRCB's fee structure imposes a disproportionate burden of supporting the Division's budget "on passive water right holders" who have had little contact with the Division over the years, Petitioners fail to recognize that more than half of the Division's costs are related to actions that are for the primary purpose of managing existing water rights. These actions include investigating complaints alleging violation of permit or license conditions, waste of water or violation of the public trust in water, conducting compliance inspections of existing diversion facilities, processing petitions to amend permit or license conditions, conducting field inspections of permitted diversion projects to determine the amount of water beneficially used prior to issuing a water right license, and administering the requirements for SWRCB approval of changes in point of diversion, place of use, or purpose of use.⁸ Additionally, a substantial portion of the cost of processing applications and petitions is devoted to protecting other water right holders, including providing notification to permit and license holders when applications or petitions are filed and consideration of protests filed by those permit and license holders. Similarly, much of the environmental review costs for new applications involves consideration of the cumulative impacts of the proposed diversion in combination with the diversions of others holding permits and licenses to divert from the same stream system.

⁸ The fee schedule adopted by the SWRCB also includes fees for change petitions, but these fees will not cover the entire cost of those proceedings. Both to avoid enforcement problems and because of difficulties in determining how much water should be deemed to be involved when a change in permit or license terms is proposed, the SWRCB decided that most of the cost of administering changes in permits and licenses should be borne by annual permit and license fees instead of petition fees.

Alleging that the SWRCB has not contemplated the cost of the regulatory burden imposed by individual water right holders, Petitioners criticize the SWRCB's decision to charge a fee for each permit or license regardless of whether multiple permits cover the same water. Each water right holder is assessed a fee based on the amount authorized under each individual permit or license regardless of whether certain non-consumptive and consumptive water rights overlap. Each permit or license requires administrative oversight and it is reasonable for the SWRCB to assess the water right fee accordingly.

Petitioners also object to the SWRCB's decision to charge the \$100 minimum annual permit and license fee. The SWRCB determined that an appropriate annual fee rate is \$0.03 per acre-foot. However, approximately half of water right permits and licenses authorize the diversion of 10 acre-feet of water or less. For permits and licenses authorizing very small diversions, the costs of administering the permit or license substantially exceeds \$0.03 per acre-foot. Indeed, even the costs of administering the fee system exceed that amount. If these water right holders were billed based on the per acre-foot charge of \$0.03, the cost of billing would exceed the amount of the bill.

Staff determined that a minimum charge of \$100 is appropriate to recover the cost of providing services to these water right holders. While for larger water rights costs generally increase as the authorized diversion increases, certain basic costs apply for every permit or license, no matter how small. These include the costs of maintaining records, costs of processing address and ownership changes, costs of reviewing and filing reports of permittee and licensee, costs of processing revocations where the right has not been used, and costs of providing notification to water right holders of proceedings that may affect their rights.

In fact, the process of making fee determinations has generated a substantial workload for the Division, especially with respect to holders of permits and licenses subject to the \$100 annual fee. This includes efforts to update the database before the bills were sent out, and processing requests submitted in response to the billings. The Division has received hundreds of requests for change in address, change in ownership, and revocation. Many of these staff requests require

significant staff time for processing, including cases where the record owner to whom BOE sent the bill does not know who the current owner is, or the current owner refuses to accept responsibility. Similarly, there may be a substantial workload in processing requested revocations because they include cases where the permit or license holder has diversion structures in place. Before approving the requested revocation, the Division will need to consider the potential for unauthorized diversions or evaluate any adverse environmental effects from removing the diversion structures.

It should also be recognized that, because the fees are set to cover program costs as specified in the Budget Act, a change in the approach by which the amount of water involved is calculated would not necessarily reduce the fee charged to Petitioners who argue for that change. For example, because the combined face value of all permits and licenses vastly exceeds the amount of water diverted each year, the amount charged per acre foot would be many times higher if permit and license fees were based on actual use instead of face value. Thus, many of the Petitioners would pay higher annual fees if those fees were calculated based on amounts actually used, and the charge per acre foot was adjusted accordingly. Other suggested changes, such as changes to reflect overlapping water rights or permits and licenses for multiple diversions of the same water, would have a similar effect of increasing the fee per acre-foot.

5.2 The Fees Are Charged in Connection With the SWRCB's Regulatory Water Right Activities and Not for Unrelated Revenue Generation

Petitioners argue that the primary purpose of the fees is revenue generation because Senate Bill 1049 and the fee regulations were adopted to replace revenue lost from the General Fund. Through Senate Bill 1049, the Legislature has authorized the SWRCB to charge regulatory fees to water users. Water Code section 1525, subdivision (c) requires the SWRCB to set the fee schedule so that the total amount of fees collected equals the amount necessary to recover the water right program's costs. The SWRCB must set a fee schedule that will generate revenues in the amount the Budget Act sets for water right fee revenues and it must review and revise the fees each fiscal year as necessary to conform to the revenue levels set forth in the annual Budget Act. If the revenue collected is greater or less than the amount set in the annual Budget Act, then the SWRCB may further adjust the annual fees to compensate for the over or under collection of

revenue. (Wat. Code, § 1525, subd. (d)(3).) In accordance with the Water Code, the water right fees are calculated solely to cover the costs of the SWRCB's regulatory program and not to generate additional revenue.

According to the Budget Act, the total cost of the SWRCB's water right program in Fiscal Year 2003-2004 is approximately \$9 million. Less than half, \$4.4 million, is to be collected through fee revenues, and a portion of the fee revenues is being spent on administration of the fee.

Accordingly, the fees collected are not intended to exceed the costs of the SWRCB's water right program, including costs of administering and collecting the fee, and to the extent that fees are over collected in any given year, the SWRCB will adjust the annual fees accordingly.

In addition, Senate Bill 1049 created a special fund, the Water Rights Fund, to assure that the fees are used for water right program costs, and not for unrelated revenue purposes. (See Wat. Code, § 1550). All water right fees and all water quality certification fees for Federal Energy Regulatory Commission (FERC) licensed hydroelectric projects are deposited in the Water Rights Fund. (*Id.* § 1551.) These funds may be expended only for specified purposes, all of which involve administration of the water rights program, administration of water quality certification for FERC licensed hydroelectric projects, a program carried out by the Division, or administration of the fees by the SWRCB and BOE. (*Id.* § 1552.) In combination with the periodic recalculation of the fees under Water Code section 1525, subdivision (d)(3), the deposit of fee revenues in a special fund that can be used only for program purposes assures that the fees will not be used for unrelated revenue purposes.

Moreover, the requirement that the fee not be levied for unrelated revenue purposes is not violated simply because a fee is intended to allow a shift in program funding from general funds to fee revenues, thereby allowing more general funds to be spent on other programs. For example, in rejecting a challenge to an emission-based fee to support air pollution control programs made on grounds similar to those raised by Petitioners, the Fourth District Court of Appeal concluded:

Proposition 13's goal of providing . . . tax relief is not subverted by the increase in fees or the emissions-based apportionment formula. A reasonable way to achieve Proposition 13's goal of tax relief is to shift the costs of controlling . . . sources of pollution from the tax-paying public to the pollution causing industries themselves

(San Diego Gas & Electric Co. v. San Diego County Air Pollution Control District (1988) 203 Cal.App.3d 1132, 1148 [250 Cal.Rptr. 420, 430]. See also, *Brydon v. East Bay Mun. Util. Dist.* (1994) 14 Cal.App.4th 178 [29 Cal.Rptr.2d 128] [approving an inclined rate structure for water customers as a regulatory fee, in part, because it achieved the regulatory goal of water conservation].)⁹

Petitioners object to the SWRCB's assumption of 40 percent nonpayment when it estimated the revenues to be generated in Fiscal Year 2003-04. They claim that this assumption has the effect of unfairly charging some fee payers more in order to make up for those who fail to pay their fees.¹⁰ Senate Bill 1049 requires the SWRCB to set the fees at an amount necessary to recover the water right program's costs and thus, it is necessary for the SWRCB to assume a certain non-collection rate to ensure that it collects the proper amount of revenue. To assume a 100 percent collection rate, as Petitioners seem to suggest, is an unrealistic assumption even for an established fee program. The SWRCB assumed a 60 percent rate of collection for this fiscal year. This assumption is based upon staff's experience with return rates on required water right filings, recognition that certain fee payers may claim sovereign immunity from paying fees,¹¹

⁹ As in the case of emission-based fees, the water right fees are based in part on the principle that the activities of the fee payers create the need for the regulatory program, and they benefit from it. As the Legislative Analyst observed: "Since water rights holders benefit directly from all aspects of the water rights program—including permit issuance and compliance monitoring—we conclude that the existing fee structure should be revised so that fee revenues replace all General Fund support budgeted for the board's program." (Legislative Analyst's Office, Analysis of the 2003-04 Budget Bill at p. B-125.)

¹⁰ These arguments fail to take into account how fees will be allocated and revenues collected over the long term. The SWRCB used the 40 percent nonpayment assumption to estimate revenues that would be collected this fiscal year; it does not mean those fees will never be collected. The SWRCB and BOE will continue to seek collection of the fees from those who fail to pay. In many cases, the fees still will be collected later, with interest and penalties, and deposited in the Water Rights Fund. (Wat. Code, § 1551.) To the extent the SWRCB and BOE are able to collect delinquent fees, those revenues will be used to support the water rights program, and the fees set in later years will be adjusted to take into account these additional revenues.

¹¹ Senate Bill 1049 includes a mechanism by which fees may be passed through to the water supply contractors of a water right holder who claims sovereign immunity. (Wat. Code, § 1560.) Some federal and tribal projects do not have water supply contractors, however, and the SWRCB had good reason to believe, based on comments submitted [footnote continues on next page]

recognition that some water right holders will refuse to pay the fees, consideration of likelihood that some of the fees had been miscalculated and refunds would be awarded as part of the petition process, and recognition that some of the addresses in the Division's files are out of date, resulting in substantial delays before fees can be collected on some permits and licenses. As the fee program is implemented in the first few years, the SWRCB expects that the collection rate will increase and that fees will be reduced accordingly.

Petitioners object to the Legislature's decision to have fees pay for the entire cost of the regulatory program, instead of have a portion of the cost borne by taxpayers or by parties, such as environmental groups or fish and wildlife agencies, who participate in the water right process to prevent harm to the public interest or the environment. But a fee system may legitimately impose the cost of regulation on the parties whose activities threaten harm to the environment or the public interest, without requiring that the public share in the cost. (See *CAPS, supra*, 79 Cal.App.4th at p. 950.) Petitioners contend that "there is simply no authority [for] a fee system that funds an entire regulatory agency." In fact, there are many regulatory agencies in state government that are fee supported, without any General Fund appropriations. Moreover, the fees at issue here support the water right program, not the entire SWRCB. It is well established that a regulatory program may be paid for from fees, without any General Fund support. (*In re Attorney Discipline System* (1998) 19 Cal.4th 582, 595 [79 Cal.Rptr.2d 836, 843].)

In sum, the water right fees adopted by the SWRCB do not violate Proposition 13, in part, because the fee revenues collected do not surpass the costs of the regulatory program they support and the cost allocations to individual payers have a reasonable basis in the record. (*CAPS, supra*, at p. 950.)

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in workshops on the proposed fee regulations, that many water supply contractors would contend that the fees could not be passed through to them.

5.3 The Fees Are Regulatory Fees and Not Ad Valorem Taxes Subject to Proposition 13

Although water rights are considered to be property rights that are usufructuary in nature,¹² Petitioners contend that water rights should be considered to be real property falling within the aegis of Proposition 13. More specifically, Petitioners contend that the fees are ad valorem taxes prohibited by Proposition 13.

As discussed above, the water right fees are fees, not taxes. Moreover, the fees bear none of the indicia of taxation that Proposition 13 purports to address. For example, the terminology in Proposition 13 contemplates land and buildings, not water, as the property to be protected. Appropriative water rights differ, in part, because they can be separated from the land and moved to other land.

Moreover, the fees are not ad valorem. Section 3 of Proposition 13 prohibits new ad valorem taxes on real property. Revenue and Taxation Code section 2202 defines ad valorem tax to mean “any source of revenue derived from applying a property tax rate to the assessed value of property.” (See *Heckendorn v. City of San Marino* (1986) 42 Cal.3d 481, 487, fn. 4 ([229 Cal.Rptr. 324] [finding it reasonable to construe ad valorem tax in light of the definition found in the Revenue and Taxation Code’s chapter on property tax rates for local agencies since Proposition 13 related to the general subject of property tax relief].) Despite Petitioner’s efforts to equate the quantity of water authorized to be diverted under a water right with its value, the water right fees are not based on the assessed value of the water right involved. (See, *id.* at p. 487 [finding no ad valorem tax where ordinance imposed tax based on residential zones that included lots varying in size and no appraisal of value was made].) This claim has no merit.

6.0 SENATE BILL 1049 AND THE FEE REGULATIONS ARE CONSTITUTIONALLY APPLIED TO PETITIONERS

Petitioners raise a variety of constitutional challenges to Senate Bill 1049 and the fee regulations, contending that the fees unconstitutionally deprive Petitioners of their property rights without

¹² The right of property in water “consists not so much of the fluid itself as the advantage of its use.” (*United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 100 [227 Cal.Rptr. 161] [quoting *Eddy v. Simpson* (1853) 3 Cal. 249, 252].)

due process of law and in violation of the takings clauses under the federal and state constitutions. They also claim that the fees unconstitutionally deprive Petitioners of their equal protection rights. These challenges are without merit.

6.1 The Water Right Fees Do Not Deprive Petitioners of Property Rights Without Due Process

Petitioners argue that imposition of the water right fees unconstitutionally deprives the Petitioners of their property rights without due process of law. They claim that the fees are unreasonable, arbitrary and not rationally related to a proper public purpose. Petitioners argue that the fees are unfair and unreasonable and violate substantive due process. The facts they assert support the existence of a violation are: 1) the fees are set at a level that assumes a 40 percent noncollection rate; 2) the fees are imposed for all water right permits and licenses without discriminating among uses; 3) the fees discriminate by favoring federal agencies that claim sovereign immunity; 4) the fees discriminate between water right holders and the general public; 5) the fees are assessed against multiple permits or licenses to the same water; and 6) the minimum fee is not based on an annual water use limits.

The standard for substantive due process is that government legislative action must not be “arbitrary” or “discriminatory” or lacking in a reasonable relation to a proper legislative purpose. (See *Morgan v. City of Chino* (2004) 115 Cal.App.4th 1192, [9 Cal.Rptr.3d 784, 788-789]; *Kavanau v. Santa Monica Rent Control Board* (1997) 16 Cal. 4th 761, 771 [66 Cal.Rptr.2d 672, 678], and cases cited therein.) The recent cases address this issue in the context of rent controls on mobile home spaces, and not in the context of the imposition of a fee. A violation of substantive due process in those cases could occur if rent control precluded the investor in the property from realizing a reasonable return on the capital investment as a whole. The analysis involves a balancing of interests and a consideration of the facts.

In this case, the facts Farm Bureau cites do not amount to a violation of substantive due process:

1. The assumption of a 40 percent noncollection rate was reasonable in light of the return rate on water right filings, factors that might lead to non-payment of the new fees, and previous efforts at collection of fees. If the total fees collected exceed the amount required, the fees in the next fiscal year will be reduced commensurate with any over collection in the current year.
2. It is not unreasonable to assess a fee based on the total amount of water authorized to be appropriated without regard to whether the water is used for public uses such as instream or environmental uses.¹³ All appropriations of water affect the availability of water for other water users. Rating different types of water use at differing fee levels would favor some appropriators to the detriment of others. Further, while the extent of interference with other uses may vary among uses, most permits and licenses authorize more than one use of water.
3. The assessment of fees does not improperly discriminate between the holders of water rights who claim or do not claim sovereign immunity. The water rights of both kinds of water right holders are subject to the payment of a fee on the water right. Where a water right holder claims to be beyond the reach of the State for purposes of collecting a fee, the SWRCB imposes a proportionate share of the fee on those who have water supply contracts with the water right holder. This practice does not unreasonably or otherwise shift the burden of the fees onto non-federal water right permittees and licensees. Moreover, to the extent the SWRCB may not be able to pass through a fee to a federal agency's or Indian tribe's water supply contractors – for example where a project has no water supply contractors – the sovereign immunity provided for under federal law, and the need to maintain good relationships between state, federal and tribal governments, provide a rational basis for treating water rights held by federal and tribal agencies differently than other water rights.

¹³ Petitioners do not argue that the SWRCB acted improperly in providing a discount for hydropower generation. (Cal. Code Regs., tit. 23, § 1071.) In setting the fees, the SWRCB recognized that processing actions related to water right permits and licenses for hydropower projects generally requires less staff work than other permits and licenses and adjusted the fees accordingly. (See, Memorandum to File by Victoria A. Whitney, Division Chief (Dec. 29, 2003).)

4. The assessment of fees against water right holders does not discriminate between the water right holders and the general public. The water right holders are the entities who benefit economically from the water rights, and whose activities create the need for the regulatory program. There is no constitutional requirement that the public pay for the cost of preventing regulated activities from harming the public interest or the environment.
5. It is not unreasonable to assess fees on each of more than one duplicative permits or licenses held by the same water right holder for the same water. In these cases, there are differences in the conditions of each right, and the right holder has the flexibility to use one right to the exclusion of the other or to use each right partially. If the water right holder maintains duplicative rights, then the water right holder apparently believes there is value to having the duplicative rights. Moreover, the existence of duplicative rights imposes additional cost of regulation, especially in determining when water is available to for appropriation by other users or in determining when one of the duplicative rights should be revoked for non-use, even if duplicative water rights do not result in any additional water use.
6. The imposition of a \$100 minimum fee on all permits or licenses is not unreasonable, and is related to the cost of maintaining the water right. As discussed above, the basic costs of maintaining any permit and license as part of the water right system, including the handling of required reports and filings and sending required notices to these permittees and licensees, will impose costs that on average will equal or exceed the minimum fee.

With respect to all of the issues raised by the Petitioners, arguments can be made for a different fee structure, but these arguments do not affect the conclusion that the fees bear a reasonable relationship to the legislative purpose of funding the water rights regulatory program through the assessment of fees on the persons who appropriate the water.

6.2 The Requirement to Pay a Fee on Water Rights Does Not Constitute a Taking

Petitioners claim that the fees are a financial exaction on a preexisting right, and that this violates the takings clause in the Fifth Amendment of the United States Constitution, 42 U.S.C. section 1983, and California Constitution, article I, section 7. While some limitations may exist

regarding the imposition of fees, the facts presented do not amount to an unconstitutional taking. In the absence of a physical invasion of property or the deprivation of all economic use of property, the courts will review several factors to determine whether there is a taking. These are: 1) the economic impact of the regulation on the claimant; 2) the extent to which the regulation interferes with distinct investment-backed expectations; and 3) the character of the governmental action. (*Kavanau v. Santa Monica Rent Control Board* (1997) 16 Cal. 4th 761, 775-779 [66 Cal.Rptr.2d 672, 681-684].) Based on these factors, the SWRCB’s action in assessing the fees is not a taking. Petitioners do not suggest that the fees involve a physical invasion of property; nor do Petitioners claim that the fees leave the water right holders without economically beneficial use of their property. (See *Tahoe Keys Property Owners’ Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1477-1478 [28 Cal.Rptr.2d 734, 744].) Nor do Petitioners provide any basis for a claim that the fees would impose a substantial economic effect on the water right holders or interfere with their reasonable investment-backed expectations.

Petitioners argue that the purpose of the fees is to contribute to “general government revenues” because they are to make up for recent budget cuts, not to pay for the cost of the water rights regulatory program. As discussed above, however, a regulatory fee may be adopted to pay for a program that previously was funded by the proceeds of taxes. (See *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control District* (1988) 203 Cal.App.3d 1132, 1148 [250 Cal.Rptr. 420, 430].) The establishment of the fee at a time when inadequate General Fund revenues might otherwise have forced a cutback in appropriations to support the program does not change the fact that the fees are used to pay for the cost of the regulatory program.

Petitioners claim that it is unfair to make them pay the fees, and that program costs should be borne by the public as a whole. As discussed above, the water rights fees are valid regulatory fees, consistent with the principle that water right holders, who benefit from and create the need for the regulatory program, should pay the cost of the program.

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6.3 Senate Bill 1049 and the Fee Regulations Do Not Deprive Petitioners of Their Equal Protection Rights

In alleging that they have been deprived of their equal protection rights under the California and United States Constitutions, Petitioners claim that the SWRCB has created illegitimate classifications of fee payers in that some persons must pay a higher fee than others. The fee regulations apply equally, however, to each permit or license. With certain exceptions to which Petitioners do not object, all fee payers pay the same rate – the greater of \$100 or \$0.03 per acre-foot based on the total annual amount of diversion authorized by the permit or license. (Cal. Code Regs., tit. 23, § 1066, subd. (a).)

Petitioners' bare claim of an equal protection violation, with virtually no explanation of which classifications are being challenged and how those classifications have a discriminatory purpose or effect, does not satisfy the requirements for an adequate explanation to raise an equal protection claim. (See Cal. Code Regs., tit. 23, § 769, subs. (a)(4) & (c).) Nonetheless, it should be clear that the fee regulations do not violate equal protection.

In areas of environmental and economic policy, including requirements setting regulatory fees, a classification that is not based on a suspect class and does not infringe on fundamental constitutional rights must be upheld “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” (*FCC v. Beach Communications, Inc.* (1993) 508 U.S. 307, 313 [113 S.Ct. 2096].) A classification does not “offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality.” (*Central Delta Water Agency v. State Water Resources Control Board* (1993) 17 Cal.App.4th 621, 637 [21 Cal.Rptr.2d 453] [quoting *Dandridge v. Williams* (1970) 397 U.S. 471, 485 [90 S.Ct. 1153].) As discussed in the previous sections, the SWRCB had a rational basis for structuring the annual fee as it did.

To the extent Petitioners identify a particular classification as objectionable, they appear to be challenging the different treatment of fee payers and entities exempt from paying the fees. This reference apparently is based on the fact that Senate Bill 1049 recognizes that claims of sovereign immunity may prevent collection of some of the fees; accordingly, if the SWRCB

determines that a fee payer such as the Bureau is likely to decline to pay a fee or expense based on a claim of sovereign immunity, then the SWRCB may allocate the fees due to that fee payer's water contractors.¹⁴ (Wat. Code §§ 1540, 1560.) A state law that treats entities differently based on the different treatment of those entities under federal law, in a manner that does not discriminate against federal interest, almost unquestionably must be upheld against a discrimination claim. The Legislature rationally could have exempted permit and license fees for facilities that have sovereign immunity under federal law, based on the belief that claims of sovereign immunity would impede the prompt collection of the fees, or that relationships between the state and federal governments might be undermined by efforts to collect the fees.

7.0. THE SWRCB HAD THE AUTHORITY TO ADOPT THE FEE REGULATIONS PRIOR TO THE EFFECTIVE DATE OF SENATE BILL 1049

Petitioners contend that the SWRCB did not have the authority to adopt Resolution 2003-0077 approving the fee regulations on December 15, 2003, which was before the January 1, 2004, effective date of Senate Bill 1049. Petitioners did not submit any analysis or supporting authorities to explain the basis for this claim. Accordingly, the petition is defective, and the claim is denied. (See Cal. Code Regs., tit. 23, § 769, subd. (c).)

The SWRCB clearly had authority to adopt the regulations. (See Gov. Code, § 11349, subd. (b) [defining authority for purposes of adopting administrative regulations].) Water Code section 1058, as in effect both before and after January 1, 2004, authorizes the SWRCB to make rules and regulations that it deems advisable to carry out its powers and duties. The effective date of the fee regulations was January 1, 2004, the same date as Senate Bill 1049. It was reasonable, and within the discretion granted to the SWRCB in section 1058, to adopt regulations implementing a change in the statutes governing water right fees to take effect at the same time as that statutory change took effect. Because the regulations did not take effect before January 1, 2004, adopting the regulations did not create any conflict between the regulations and the statutes in effect before that date. By updating its regulations, with an effective date of

¹⁴ The Division's records indicate that the Bureau holds rights to over 30 percent of the water that is diverted under water right permits or licenses. In the past, the Bureau has declined to pay water right fees to the state, claiming sovereign immunity.

January 1, 2004, the SWRCB assured consistency between its regulations and the relevant provisions of Senate Bill 1049 as soon as those provisions took effect. (See Gov. Code, § 11349, subd. (d).) The SWRCB proceeding in a manner fully consistent with the fundamental requirement that administrative regulations be consistent with applicable statutes.

8.0 FACTUAL CLAIMS RAISED BY PETITIONERS

Lawrence B. Groteguth, Anna M. Mesquita, Bob J. Murphy, and Patricia Pereira submitted letters protesting their water right fees. Ms. Mesquita appears to suggest that she has a riparian right and that she should not have been charged a water right fee. A review of the Division's water right database, however, confirms that she holds water right license (Application A006226; License 002074) and is responsible for paying the annual water right fee under section 1066 of the SWRCB's regulations. Although these four Petitioners did not allege that their fees had been miscalculated, Division staff has confirmed that these individuals' fees were, indeed, properly calculated. Accordingly, the SWRCB finds that its water right fee determinations were appropriate and proper.

9.0 CONCLUSION

For the reasons discussed above, the SWRCB finds that its decision to impose water right fees was appropriate and proper and the petitions for reconsideration are denied.

ORDER

IT IS HEREBY ORDERED THAT the petitions for reconsideration are denied.

Dated: April 6, 2004

ORIGINAL SIGNED BY
Celeste Cantú
Executive Director