

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO 2004 -0013- EXEC

In the Matter of the Petition for Reconsideration of
COACHELLA VALLEY WATER DISTRICT
Regarding Water Right Fee Determinations

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR¹

1.0 INTRODUCTION

By this order, the Executive Director denies Coachella Valley Water District's (CVWD) petition for reconsideration of the State Water Resources Control Board's (SWRCB) determination that CVWD was required to pay the following annual water right fees: \$8,687.73 for Permit 536 (Application 1122; Board of Equalization (BOE) Account No. WR MT 94-000438); \$1,170.00 for Permit 3011 (Application 2922; BOE Account No. WR MT 94-000705); and \$43,438.65 for Permit 7650 (Application 7483; BOE Account Number WR MT 94-001703). In general, CVWD alleges that the SWRCB's decision to impose the fees is unlawful because the amount of the fees (1) exceeds the costs of services provided to CVWD by the SWRCB and (2) was premised on the assumption that 40 percent of the fees billed would not be collected. CVWD requests the SWRCB to (1) determine that CVWD is not required to pay any annual water right fees for Permits 536, 3011, and 7650; (2) cancel the fee assessment; and (3) refund CVWD's payments.

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 a petition for reconsideration of a disputed fee 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.

For the reasons set forth below, the Executive Director finds that the decision to impose the fees was appropriate and proper and therefore CVWD's petition for reconsideration is denied.

2.0 LEGAL AND FACTUAL BACKGROUND

The SWRCB's Division of Water Rights (Division) is the entity primarily responsible for administering the state's water right program. In Fiscal Year 2003-2004, the Budget Act of 2003 (Stats. 2003, ch. 157) requires the Division's program to be supported by fee revenues amounting to \$4.4 million, replacing a General Fund reduction of \$3.6 million. The Budget Act of 2003 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 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 water right 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.*)²

On December 15, 2003, the SWRCB adopted Resolution No. 2003 - 0077 approving emergency fee regulations to meet the requirements of the Budget Act and Senate Bill 1049. In general, the fee 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 bills on or about January 8, 2004, for certain types of fees, including annual permit and license fees. These bills included Notices of Determination that CVWD owed annual water right fees for Permits 536, 3011, and 7650. Pursuant to section 1066, subdivision (a) of the SWRCB's regulations,³ the annual fee for CVWD's permits was \$0.03 per acre-foot, based on the total amount of water authorized to be diverted under the permits. The annual fee for Permit 3011 was based on the diversion limitation of 39,000 acre-feet per annum (afa). The amount of water authorized to be diverted under Permits 536 and 7650 was calculated by multiplying the authorized rate of diversion (400 cubic feet per second (cfs) and 2000 cfs, respectively) by the

² The Legislative Analyst recommended that the entire water right program be funded through fees, and that the fees also support the water right related activities of the Department of Fish and Game. (Legislative Analyst's Office, Analysis of the 2003-04 Budget Bill at pp. B-125 through B-126.) Although the Legislative Analyst states that water right holders "benefit directly" from the water rights 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).)

³ All further regulatory references are to the SWRCB's regulations located in title 23 of the California Code of Regulations unless otherwise indicated.

length of time in the authorized season of diversion (365 days). (Cal. Code Regs., tit. 23, § 1066, subd. (b)(1).)

CVWD filed a petition for reconsideration of these fees which was received on February 5, 2004.⁴

3.0 GROUND S FOR RECONSIDERATION

On petition by any interested person or entity, the SWRCB may order reconsideration of all or part of a decision or order adopted by the SWRCB, including a determination that a person or entity is required to pay a fee or a determination regarding the amount of the fee. (Wat. Code, §§ 1122, 1537, subd. (b)(2).) Pursuant to Water Code section 1537, subdivision (b)(4), the SWRCB's adoption of the regulations may not be the subject of a petition for reconsideration. When an SWRCB 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.

California Code of Regulations, title 23, section 768 provides that an interested person may petition for reconsideration upon any of the following causes:

- (a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) The decision or order is not supported by substantial evidence;
- (c) There is relevant evidence that, in the exercise of reasonable diligence, could not have been produced;
- (d) Error in law.

A petition for reconsideration of a fee assessment must include certain information, including the name and address of the petitioner, the specific SWRCB action of which petitioner requests reconsideration, the reason the action was inappropriate or improper, the reason why the

⁴ The SWRCB is directed to order or deny reconsideration on a petition within 90 days from the date on which the SWRCB adopts the decision or order. (Wat. Code, § 1122.) If the SWRCB fails to act within that 90-day period, a petitioner may seek judicial review, but the SWRCB is not divested of jurisdiction to act upon the petition simply because the SWRCB failed to complete its review of the petition on time. (See *California Correctional Peace Officers Ass'n v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147-1148, 1150-1151 [43 Cal.Rptr.2d 681]; SWRCB Order WQ 98 - 05 -UST at pp. 3-4.)

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 petitioner requests. (Cal. Code Regs., tit. 23, § 769, subd. (a)(1)-(6); § 1077, subd. (a).) In addition, the petition may include a claim for refund. (*Id.* § 1074, subd. (g).) Section 769, subdivision (c) of the regulations provides further 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. A petition must be filed within 30 days after adoption of the SWRCB decision or order of which the petitioner requests reconsideration. (*Id.* § 768.)

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. (*Id.* § 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. (*Id.* § 770, subd. (a)(2)(A)-(C).)

4.0 DISCUSSION

CVWD does not allege that the SWRCB improperly calculated the annual permit fees pursuant to the SWRCB's regulations. Rather, CVWD argues that the SWRCB's fee regulations are unlawful for a variety of reasons. For the reasons discussed below, these arguments are without merit.

4.1 The Fee Regulations Establish Lawful Regulatory Fees

CVWD contends that the fees constitute a tax because the fees exceed the reasonable cost of the regulatory services provided by the SWRCB to CVWD. Based on the contention that the fees are taxes, CVWD argues that the fee regulations exceed statutory authority because Water Code section 1525 authorizes the imposition of fees, not taxes. In addition, CVWD argues that the fees violate various provisions of the California Constitution governing property taxes. More specifically, CVWD contends that the fees constitute real property taxes that violate the two-thirds vote requirement and the prohibition against new ad valorem property taxes set forth in article XIII A, section 3 of the California Constitution. CVWD also argues that the fees violate

article XIII, section 1 of the Constitution because the fees are not based on the assessed value of the water rights, and that CVWD is exemption from taxation under article XIII, section 3(b). Contrary to CVWD's contention, however, the water right fees are regulatory fees, not taxes, and therefore the fee regulations do not exceed statutory authority or violate the California Constitution.

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* (1997) 15 Cal.4th 866, 876 [64 Cal.Rptr.2d 447].) Regarding cost-fee ratios, 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] (hereinafter *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*, 79 Cal.App.4th at p. 950.) In *CAPS*, the court recognized that flexibility is an inherent component of reasonableness 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. (*Id.* at p. 950.)

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.

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 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 hydroelectric projects licensed by the Federal Energy Regulatory Commission, a program carried out by the Division, or administration of the fees by the SWRCB and BOE. (*Id.* § 1552.)

CVWD contends that the fees exceed the reasonable cost of the SWRCB's regulatory services provided to CVWD in connection with CVWD's permits. CVWD claims that the SWRCB's only regulatory activity in connection with permits consists of mailing and recording statements of diversion, and that the costs of providing this service vastly exceeds the annual permit fees imposed on CVWD.

CVWD assumes that a regulatory fee must allocate to each individual permittee and licensee 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].) The SWRCB is required only to demonstrate a reasonable relationship between the fee and the estimated costs of its regulatory program. (*Id.* at p. 946.) "Proportionality is measured collectively to assure that the fee is indeed regulatory and not revenue raising." (*Id.* at p. 948.)

The annual permit fees at issue here meet this test. More than half of the Division's costs are related to actions that are for the primary purpose of managing existing water rights, including permitted rights. These actions include the following: 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.⁵ 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 considering protests filed by those permit and license holders. Similarly, much of the environmental review costs associated with processing 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.

In addition to bearing a reasonable relationship to the SWRCB's costs of administering existing water rights, the annual permit and license fees are apportioned among permittees and licensees in a reasonable manner. The annual fees are distributed in proportion to the amount of water that each permit and license holder is authorized to use. 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).) Because permittees and licensees pay the same rate per acre-foot, larger diverters pay higher fees. This is reasonable because larger diversions generally have a greater impact on third-party water right holders and the environment.

In summary, the water right fees are regulatory fees, not taxes. Accordingly, the SWRCB's fee regulations do not exceed statutory authority. In addition, the fees do not violate the constitutional provisions governing property taxes cited by CVWD. (See *Kern County Farm*

⁵ 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. It can be difficult to determine how much water should be deemed to be involved when a change in permit or license terms is proposed and the costs of processing a petition are not closely related to the amount of water involved. In addition, imposing higher fees for change petitions may result in unauthorized activities, thus causing additional enforcement issues. Accordingly, the SWRCB decided that most of the cost of administering changes in permits and licenses should be supported by annual permit and license fees instead of petition fees.

Bureau v. County of Kern (1993) 19 Cal.App.4th 1416, 1427 [23 Cal.Rptr.2d 910] [landfill charge not a tax and therefore did not violate constitutional prohibition against double taxation].)

4.2 The Fees Are Consistent With Government Code Section 11010

CVWD also contends that the fees violate Government Code section 11010 because the fees exceed the actual costs of services performed. Section 11010, subdivision (b)(1) prohibits a state agency, supported from the General Fund, from levying or collecting “any fee or charge in an amount that exceeds the estimated actual or reasonable cost of providing the service, inspection, or audit for which the fee or charge is levied or collected”

Without deciding whether section 11010 applies to the water right fees,⁶ it merits note that this provision follows the same language as had been used in cases determining whether local exactions were special taxes or regulatory fees. (See, e.g. *Kern County Farm Bureau v. County of Kern* (1993) 19 Cal.App.4th 1416, 1421 [23 Cal.Rptr.2d 910] [charges are regulatory fees if they “do not exceed the reasonable cost of providing the service or activity for which the fee is charged”] quoting *City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264, 280-281 [17 Cal.Rptr.2d 845].) These cases recognize that the service can be administration of a regulatory program, and that the fees may include programmatic costs, not just costs attributable to a specific fee payer. (E.g., *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1998) 203 Cal.App.3d 1132 [250 Cal.Rptr. 420].) Section 11010 also expressly recognizes that fees may be based on estimates; absolute precision is not required. In adopting virtually identical language to that used in these cases, section 11010 adopts the same standard as had been adopted by the courts to distinguish local regulatory fees from taxes, and was later adopted by the courts to distinguish state regulatory fees from taxes. As discussed above, the fees are regulatory fees that are reasonably related to the costs of the water right program and thus, do not contravene section 11010.

⁶ Section 11010 applies when an agency is “supported by the General Fund,” and may not necessarily apply when fees are charged for activities supported by a special fund, and the fees are paid into that special fund.

4.3 The 40 Percent Non-Collection Assumption Was Appropriate and Proper

CVWD's final argument is that the fees are unlawful because they were based on the assumption that 40 percent of the fees billed for the 2003-2004 fiscal year would not be collected. CVWD argues that Water Code section 1525, subdivision (d)(3), which authorizes the SWRCB to adjust the fees each year to compensate for the under or over collection of fees during the preceding year, provides the exclusive method for addressing under-collection in a given year. CVWD also asserts that the 40 percent non-collection assumption is arbitrary and capricious because it is not based on any evidence and has the effect of charging those who pay their fees extra in order to make up for those who do not pay.⁷ Contrary to CVWD's argument, however, the 40 percent non-collection assumption is consistent with Water Code section 1525 and has a reasonable basis in the record.

Senate Bill 1049 delegates to the SWRCB substantive rulemaking authority; accordingly, the SWRCB's regulations are quasi-legislative rules with the dignity of a statute and as such, are subject to a more narrow scope of judicial review than an administrative interpretation. (Wat. Code, § 1530; *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 10 [78 Cal.Rptr.2d 1].) "If satisfied that the rule in question lay within the lawmaking authority delegated by the Legislature, and that it is reasonably necessary to implement the purpose of the statute, judicial review is at an end." (*Id.* at pp. 10-11.)

In this case, the 40 percent non-collection assumption is reasonably necessary to implement the statutory requirement to set the fees so that the amount "collected" in a fiscal year covers the water right program's costs. (Wat. Code, § 1525, subds. (c) & (d)(3).) 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 CVWD seems to suggest, is an unrealistic assumption even for an established fee program. The SWRCB assumed a 60 percent rate of

⁷ 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 non collection 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.

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,⁸ 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.

5.0 CONCLUSION

For the reasons discussed above, the SWRCB finds that its decision to impose the annual water right permit fees on CVWD was appropriate and proper. CVWD's petition for reconsideration should be denied.

ORDER

IT IS HEREBY ORDERED THAT CVWD's petition for reconsideration is denied.

Dated: April 7, 2004

ORIGINAL SIGNED BY HARRY M. SCHUELLER for
Celeste Cantú
Executive Director

⁸ 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 in workshops on the proposed fee regulations, that many water supply contractors would contend that the fees could not be passed through to them.