

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO 2004 -0015- EXEC

In the Matter of

**THE PETITION FOR RECONSIDERATION
OF LAWRENCE AND RUTH SCHNEIDER**

Regarding Water Right Fee Determination

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR¹

1.0. INTRODUCTION

This matter comes before the State Water Resources Control Board (SWRCB) on a petition for reconsideration filed by Lawrence and Ruth Schneider (Petitioner). Petitioner requests reconsideration and refund of the water right fees assessed by the State Board of Equalization (BOE) for Application A004501 (WR MT 94-001059). Petitioner alleges that the charges under Senate Bill (SB) 1049 are an unconstitutional tax because it was not passed by a two-thirds vote of the Legislature, and that SB 1049 amounts to an ex post facto law because it was applied retroactively. In addition, Petitioner charges that the \$100 minimum fee for small water right permits and licenses is a grossly disproportionate share of the SWRCB's regulatory costs compared to the assessment on larger water users, and questions the legality of the fee when the right to use this water under their license has, until now, always been free. The SWRCB finds that the fees are appropriate and are not an unconstitutional tax. In addition, the SWRCB finds that SB 1049 and the fee regulations are applied prospectively, and that the SWRCB properly exercised its discretion to impose a minimum annual fee on all permit and license holders because certain basic costs apply for every permit or license, no matter how small. Accordingly, the SWRCB denies Petitioner's petition for reconsideration.

¹ State Water Resources Control Board (SWRCB) Resolution No. 2002 - 0104 delegates to the Executive Director the authority to deny a petition for reconsideration or set aside or modify the water right fee assessment.

2.0 GROUNDS 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 board action of which 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 which 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).)

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).)

3.0 LEGAL AND FACTUAL BACKGROUND

The SWRCB 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 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 rights program. SB 1049 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 of 2003 and SB 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. 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.

(Legislative Analyst's Office, Analysis of the 2003-04 Budget Bill 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.*)

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. Fees will be deposited in the Water Rights Fund, which will 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 SB 1049 and the emergency regulations became effective on January 1, 2004. BOE issued the first bills by Notice of Determination on January 8, 2004.

A Notice of Determination dated January 8, 2004 was sent to Petitioner for a \$100 fee based on Application No. A004501 (License 1728). Petitioner timely filed a petition for reconsideration on February 2, 2004.

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

First, without any supporting analysis or argument, Petitioner contends that the fees established by SB 1049 and the fee regulations amount to an unconstitutional tax because the legislation was not passed by a two-thirds vote of the California State Legislature. This assertion is without merit.

The fees authorized and adopted under SB 1049 are regulatory fees charged in connection with regulatory activities, not a tax. A regulatory fee is a fee “charged in connection with regulatory activities, [that] 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].)

Through SB 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. In addition, SB 1049 created a special 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). 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.

The fees do not exceed the reasonable cost of providing the regulatory service. To survive as a regulatory fee, 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]).) The SWRCB has met this burden. The costs of the regulatory program are governed by the appropriation in the Budget Act: \$9 million. The revenues generated by the fees amount to substantially less than that. Of the portion of program cost paid for through fees, most of the fee revenues will be paid through annual fees on existing permits and licenses. Allocating these costs to annual fees is appropriate because a major portion of the Division's costs is related to managing and protecting these existing water rights. Managing existing water rights includes the following: investigating complaints alleging violation of permit or license conditions, waste of water or violation of the public trust; 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. Additionally, a substantial portion of the cost of processing applications and petitions is devoted to protecting other existing 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 sum, the fees adopted by the SWRCB constitute a regulatory fee, not a tax, because the fee revenues collected do not surpass the costs of the SWRCB’s regulatory programs they support and the cost allocations to individual payers bear a reasonable relationship to the SWRCB’s regulatory service. (*CAPS, supra*, at p. 950.)

Under California Constitution, article XIII A (Proposition 13), the state cannot impose a tax unless the tax is approved by a two-thirds vote of each house of the Legislature. The Legislature may, however, authorize a state agency to charge a regulatory fee by passing a bill by a majority vote. As explained above, SB 1049 establishes a regulatory fee, not a tax, and therefore is not prohibited under Proposition 13.

Although water rights are considered to be property rights that are usufructuary in nature, 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. In addition, the fees are not 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).) The water right fees, however, 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).) Rather, the fees are based on the amount of water authorized to be diverted and/or stored under each permit or license.

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5.0 SB 1049 AND FEE REGULATIONS ARE APPLIED PROSPECTIVELY

Petitioner charges that SB 1049 amounts to ex post facto legislation because it affects a time period before the date the law was enacted. This argument lacks merit and misconstrues the structure of the legislation and corresponding fee structure regulations. Senate Bill 1049 was enacted on October 9, 2003 and took effect on January 1, 2004. The bill sets fees for the 2003-2004 fiscal year, beginning July 1, 2003. (Wat. Code, § 1525, subd. (e).) Like the bill, the SWRCB's implementing regulations took effect January 1, 2004, and determine the fees to be paid into the Water Rights Fund for Fiscal Year 2003-2004.

The annual fee that Petitioner challenges was applied prospectively to permits and licenses that existed as of January 1, 2004. Although all of the fees paid into the Water Rights Fund are available for expenditure to pay for costs incurred during the entire 2003-2004 fiscal year, according to the Budget Act of 2003, the fees collected will cover only half of the SWRCB's costs incurred over this fiscal year in conducting activities for which fees have been imposed. In other words, the fees are essentially the same as they would have been if the SWRCB had recovered all of its estimated costs for the period January 1, 2004, through June 30, 2004, and relied exclusively on General Funds for costs incurred in 2003.

6.0 THE SWRCB PROPERLY EXERCISED DISCRETION TO CHARGE THE \$100 MINIMUM ANNUAL PERMIT AND LICENSE FEES

Petitioner also claims that the \$100 minimum fee disproportionately burdens small water users over larger water users for the share of SWRCB expenses. This argument lacks merit. 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. The minimum fee on all permits and licenses is consistent with the need for and costs of the SWRCB's regulatory activity.

If you have financial difficulty paying the water right fee, you may wish to contact the State Board of Equalization to arrange a payment plan. If the last two digits of your account number are between 00 and 32, call (916) 324-2290. If the last two digits of your account number are between 33 and 66, call (916) 324-2117. If the last two digits of your account number are between 67 and 99, call (916) 327-3356.

ORDER

IT IS HEREBY ORDERED THAT the petition for reconsideration is DENIED.

Dated: April 7, 2004

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