

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO 2004 -0016- EXEC

In the Matter of
**THE PETITION FOR RECONSIDERATION OF THE
SOUTH FEATHER WATER & POWER AGENCY**
Regarding Water Right Fee Determinations

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 the South Feather Water & Power Agency (Petitioner). Petitioner requests reconsideration and refund of the water right fees assessed by the State Board of Equalization (BOE). Petitioner alleges that generally the charges under Senate Bill (SB) 1049 are an unconstitutional tax, that the SWRCB regulations adopted to collect the fees are inconsistent with SB 1049, and that various specific fees were calculated incorrectly because of permit and license terms that limit the total amount of water that may be diverted under multiple permits and licenses. In addition, Petitioner contests a bill sent pursuant to water right Application No. A014948, and requests information explaining the fee issued for the South Feather hydroelectric facility. The SWRCB finds that the fees are appropriate and are not an unconstitutional tax. In addition, the SWRCB finds that the specific fees issued to the Petitioner were calculated correctly. Accordingly, the SWRCB denies Petitioner's petition for reconsideration. The fee under A014948 was sent to Petitioner in error. The SWRCB has corrected its records and directed BOE to issue a refund, and thus, this issue is moot.

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.

Notices of Determination dated January 8, 2004 were sent to Petitioner for fees based on Application Nos. A002979, A001651, A002142, A002778, A13676, A13956, A013957, A14112, A14113, and A014948. In addition, BOE issued a Notice of Determination for Petitioner's hydroelectric facility under FERC2088. The fees add up to a total sum of \$50,275.98. Petitioner timely filed a petition for reconsideration on February 6, 2004.²

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 fees exceed the reasonable cost of providing the regulatory service. 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*

² Although the petition states that the lawsuit filed by Northern California Water Association (NCWA) "supports this petition," Petitioner did not incorporate NCWA's petition by reference in accordance with section 4(a) of the Stipulation and Order. The SWRCB therefore is acting on Petitioner's petition in a separate order, instead of as part of the NCWA petition.

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.)

Second, Petitioner submits the bald statement that SB 1049 imposes a new tax in violation of California Constitution Article XIII A, sections 1 and 2. Petitioner also concludes that SWRCB Resolution No. 2003 - 0077 and the Fee Regulations impose charges not related to regulatory functions and thus amount to an unlawful tax and/or an ad valorem tax in violation of California Constitution Article XIII A, sections 1 and 2. These conclusions are not supported by any analysis or explanation, and lack merit.

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.

Petitioner also claims "SB 1049 is unconstitutionally discriminatory as applied to water rights holders, CVP [Central Valley Project] water service contractors, and others." It is unclear from this statement what Petitioner is arguing, and in that respect the petition is defective. If Petitioner means to state that SB 1049 discriminates between water right holders and CVP water service contractors, the petition should specify which interests are being given less favorable treatment and how. Moreover, Petitioner lacks standing to petition on behalf of CVP water service contractors because Petitioner's water rights are not pursuant to any federal water contracts. If Petitioner means to challenge the allocation of fees based on the amount of water authorized, this argument too lacks merit. The SWRCB has a rational basis for concluding that permits and licenses that authorize larger diversions require more regulatory oversight. This approach distributes the costs of regulation in proportion to the distribution of water. Although far from uniform, the Division's workload is related to the size of the project. Moreover, larger diverters generally have a greater impact on the environment. Therefore, the cost allocation bears a reasonable relationship to the benefits provided.

5.0 CONSISTENCY OF FEE REGULATIONS WITH STATUTORY AUTHORITY

Petitioner states that the SWRCB regulations adopted to collect fees are inconsistent with the authorization contained in SB 1049. This statement is not accompanied by any analysis or explanation, and lacks merit. As described in the legal and factual background of this Order, 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. The SWRCB must set a fee schedule that will generate revenues in the amount the Budget Act sets for water right fee revenues. The Budget Act of 2003 allocates a total of \$9.0 million for support of the water right

program. For 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. On December 15, 2003, the SWRCB adopted Resolution No. 2003 - 0077 approving emergency fee regulations to meet the requirements of the Budget Act and SB 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.

SB 1049 requires the SWRCB to set a fee schedule "so that the total amount of fees collected ... equals the amount necessary to recover costs incurred in connection with the issuance, administration, review, monitoring, and enforcement of permits, licenses, certificates, and registrations to appropriate water, water leases, and orders approving changes in point of discharge, place of use, or purpose of use" (Wat. Code, § 1525, subd. (c).) "The fee schedules may be graduated in accordance with the number of diversions or the amount of water involved." (Wat. Code, § 1530, subd. (a).) As outlined in section 4.0 of this Order, the water right fees are calculated solely to cover the costs of the SWRCB's regulatory program and not to generate additional revenue. Moreover, the cost allocations to payers bear a reasonable relationship to the SWRCB's regulatory service based generally on the amount of water authorized. Once the standard for a regulatory fee is met, a precise cost ratio for each fee is not required, nor would it be feasible in this context.

6.0 FACTUAL ALLEGATIONS

6.1 Permit and License Term Limiting Amount of Authorized Division Under Combined Permits and Licenses

Petitioner claims that it was overcharged for the fees under A013676, A014112 and A014113 because the licenses and permits contain a limit on the total amount of diversion under these licenses combined. Petitioner claims that it was overcharged for the fees under A013956 and A013957 for the same reason. This claim lacks merit because the regulations specifically provide that if 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. (Cal. Code Regs., tit. 23, §1066, subd. (b)(3).)

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, or the combined use limitation exceeds the amount otherwise authorized to be diverted under that particular permit or license, then the water right holder may divert the full amount authorized under that particular right if no diversions occur under the other 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.

Petitioner's fees were appropriately based on the total annual amount of water that they may divert under each individual water right. The water right fees assessed for permits and licenses that contain a combined annual use limit should not be reduced and no correction in the fees is required. Water right holders may request revocation of unused portions of permits or licenses to avoid payment of water right fees beginning with Fiscal Year 2004-2005.

6.2 FERC2088

Petitioner contests the fee under FERC2088 and requests an explanation of this billing. This fee is assessed under Water Code section 13160.1 and the corresponding fee schedule in the California Code of Regulations, title 23, section 3833.1. Applicants seeking water quality certification for a hydroelectric power project subject to the Federal Energy Regulatory Commission (FERC) license or license amendment shall pay an annual fee of \$500 plus \$0.085 per kilowatt, based on the authorized or proposed installed generating capacity of the facility. (Cal. Code of Regs., tit.23, § 3833.1, subd. ((b)(4).) Petitioner owns and operates the South Feather Power Project, subject to FERC relicensing in 2009. The project is also subject to the Clean Water Act section 401 water quality certification by the SWRCB. The annual fee under FERC2088 was calculated correctly based on the authorized amount of 104,100 kilowatts for the South Feather Project. Accordingly, no reduction or refund of the fee is required.

6.3 A014948

Petitioner contests the bill assessed under A014948. This fee was assessed to South Feather Water and Power Agency in error. The Division has updated its records to remove Petitioner as the owner of record of A014948 and directed BOE to issue a refund of the fee assessed under this water right license. Accordingly, this issue is moot.

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