

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2005-0007-EXEC

In the Matter of Petition for Reconsideration of the
**NORTHERN CALIFORNIA WATER ASSOCIATION,
THE CENTRAL VALLEY PROJECT WATER ASSOCIATION,
AND INDIVIDUAL PETITIONERS**
Regarding Annual Water Right and Water Quality Fee Determinations

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR¹

1.0 INTRODUCTION

The Northern California Water Association (NCWA), the Central Valley Project Water Association (CVPWA) and other persons and entities, collectively referred to herein as “Petitioners,”² petition the State Water Resources Control Board (State Water Board or SWRCB) for reconsideration and a refund of water right and water quality certification fees assessed by the State Board of Equalization (BOE) on November 23, 2004. In general, Petitioners allege that the State Water Board’s decision to impose the water right fees constitutes an abuse of discretion, is not supported by substantial evidence, and is illegal. They request the State Water Board to vacate and rescind SWRCB Resolution No. 2004 – 0061, which adopted emergency regulations amending the water right and water quality certification fees,³ and to refund Petitioners’ payments. Petitioners also request the State Water Board to hold the petition for

¹ SWRCB Resolution No. 2002 - 0104 delegates to the Executive Director the authority to supervise the activities of the State Water Board. Unless a petition for reconsideration raises matters that the SWRCB wishes to address or requires an evidentiary hearing before the State Water Board, the Executive Director’s consideration of petitions for reconsideration of disputed fees falls within the scope of the authority delegated under Resolution No. 2002 - 0104. Accordingly, the Executive Director has the authority to refuse to reconsider a petition for reconsideration, deny the petition, or set aside or modify the fee assessment.

² The term “Petitioners” is used for ease of reference and does not confer the legal status of petitioner.

³ Petitioners refer to the water right and water quality certification fees revised by State Water Board under SWRCB Resolution No. 2004 - 0061 collectively as “water right fees.”

reconsideration in abeyance pending resolution of litigation over the State Water Board's adoption of water right fees in 2003.⁴ The State Water Board finds that its decision to impose the fees was appropriate and proper and denies Petitioners' request for reconsideration that are based on legal argument. Additionally, certain Petitioners have raised factual issues relating to their fee bills; only one claim is meritorious and the State Water Board has directed BOE to act appropriately. Accordingly, the State Water Board denies reconsideration of that meritorious claim on the basis that it is now moot and also denies reconsideration of the factual claims that are without merit.

2.0 GROUNDS FOR RECONSIDERATION

A fee payer may petition for reconsideration of the State Water Board's determination that the fee payer is required to pay a fee, or the State Water Board's determination regarding the amount of the fee. (Cal. Code Regs., tit. 23, § 1077.)⁵ A fee payer may petition for reconsideration on any of the following grounds: (1) irregularity in the proceeding, or any ruling, or abuse of discretion, by which the fee payer was prevented from having a fair hearing; (2) the fee determination is not supported by substantial evidence; (3) there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced; or (4) error in law. (§§ 768, 1077.) Pursuant to Water Code section 1537, subdivision (b)(4), the State Water Board's adoption of the regulations may not be the subject of a petition for reconsideration. When a State Water Board decision or order applies those regulations, a petition for reconsideration may include a challenge to the regulations as they have been applied in the decision or order.

A petition for reconsideration of a fee assessment must include certain information, including the name and address of the petitioner, the specific 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.

⁴ In December 2003 NCWA and CVPWA filed suit against the State Water Board and BOE challenging the State Water Board's adoption of fee regulations for Fiscal Year 2003-2004. In November 2004 they filed suit challenging the 2004-2005 fees. The litigation is pending.

⁵ All further regulatory references are to the State Water Board's regulations located in title 23 of the California Code of Regulations unless otherwise indicated.

(§§ 769, subd. (a)(1)-(6), 1077, subd. (a).) A petition for reconsideration of a fee assessed by BOE must include a copy of the notice of assessment. (§ 1077, subd. (a).) Section 769, subdivision (c) of the regulations further provides that a petition for reconsideration shall be accompanied by a statement of points and authorities in support of the legal issues raised in the petition.

If the subject of the petition relates to an assessment of a fee by BOE, the State Water Board's decision regarding the assessment is deemed adopted on the date of assessment by BOE. (§ 1077, subd. (b).) A petition is timely filed only if the State Water Board or BOE receives it within 30 days of the date the assessment is issued. (*Ibid.*)

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the State Water Board's regulations. (§ 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board also may deny the petition if the State Water Board finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subd. (a)(2)(A)-(C).)

This Order addresses the principal issues raised by NCWA and CVPWA and the individual petitioners. To the extent that this Order does not address all of the issues raised by Petitioners, the State Water Board finds that either these issues are insubstantial or that Petitioners have failed to meet the requirements for a petition for reconsideration under the State Water Board's regulations. (§§ 768-769, 1077.)

3.0 LEGAL AND FACTUAL BACKGROUND⁶

The State Water Board's Division of Water Rights (Division) is the entity primarily responsible for administering the state's water right program. The primary source of funding for the water rights program is regulatory fees deposited in the Water Rights Fund in the state treasury.

⁶ SWRCB Order WRO 2004-0011-Exec, which denied reconsideration of petitions for reconsideration filed by NCWA, CVPWA, and certain individual petitioners, contains a discussion of the history of, and basis for, the State Water Board's water right and water quality certification fee program.

Legislation enacted in 2003 (Senate Bill 1049, 2003-04 Reg. Sess., Stats. 2003, ch. 741) required the State Water Board to adopt emergency regulations revising and establishing water right fees and revising fees for water quality certification. (Wat. Code, §§ 1525, 1530.) Pursuant to this legislation, the State Water Board revises the fee schedule each fiscal year, so that the fees will generate revenues consistent with the amount set forth in the annual Budget Act. (*Id.* § 1525, subd. (d).) BOE is responsible for collecting the annual fees. (*Id.* § 1536.)

In Fiscal Year 2004-2005, the Budget Act of 2004 appropriates \$10.79 million for the state's water right program, including \$10.362 million for water right administration by the State Water Board and \$0.428 million for water right fee collection by BOE.⁷ The appropriation includes an appropriation of \$9.69 million from the Water Rights Fund. In accordance with the Water Code fee provisions, the State Water Board sets a fee schedule each fiscal year so that the amount collected and deposited into the Water Rights Fund during that fiscal year will support the appropriation made from the Water Rights Fund in the annual Budget Act, taking into account money in the fund from other sources.⁸ In Fiscal Year 2003-2004, the State Water Board collected \$7.44 million in water right fees and water quality certification fees deposited in the Water Rights Fund.⁹ This amount exceeded the \$4.6 million appropriation from the Water Rights Fund made under the Budget Act of 2003 (Stats. 2003, ch. 157) by \$2.84 million.¹⁰ The 2004-2005 budget assumes that the Water Rights Fund will have a balance of \$0.89 million at

⁷ The budget figures referenced in this Order for Fiscal Year 2004-2005 are based on the line item appropriations in the Budget Act of 2004. (Stats. 2004, ch. 208.) These figures are subject to adjustment based on control sections in the Budget Act. (See, e.g., *id.* § 3.60.) After these adjustments are made, the precise amounts budgeted will be slightly different than the line item appropriations indicated in the Budget Act, but the differences are not material for purposes of any of the issues addressed in this Order.

⁸ Other sources of money in the Water Rights Fund, in addition to fee collections made during the fiscal year, include unexpended reserves from fee collections in previous years (see Wat. Code, § 1525, subd. (d)(3)) and money transferred from other funds. The budget allocation of \$9.69 million from the Water Rights Fund includes \$1.5 million to pay for work described in Assembly Bill 2121 (Stats. 2004, ch. 943). The Budget Act provides for the transfer of funds from the Resources Trust Fund, which is supported by tidelands oil revenues, to cover this work, but in the event that those funds are not available, the Governor's Office has directed the Division not to perform the work described in Assembly Bill 2121. The water right fees have not been set to cover this work.

⁹ Fees associated with water quality certification for Federal Energy Regulatory Commission licensing are deposited in the Water Rights Fund. (Wat. Code, § 1551, subd. (c).)

¹⁰ The 2003-2004 fee calculations were based on a fee revenue target of \$4.4 million, which was the amount specified in the Governor's proposed budget. The final budget, which included the adjustments called for by control sections in the Budget Act, provided for a \$4.6 million allocation from the Water Rights Fund.

the end of the year. Taking into account the over-collection of fees from last fiscal year, the amount to remain in reserve, and the \$1.5 million to be funded through a transfer from the Resources Trust Fund to the Water Rights Fund, the State Water Board determined that the fee schedule should be set so that fee collections deposited in the Water Rights Fund would amount to \$6.24 million this fiscal year. Assuming a non-collection rate of 15 percent,¹¹ the State Water Board determined that the total amount to be billed is \$7.34 million.

On September 30, 2004, the State Water Board adopted emergency regulations amending the water right and water quality certification fee schedules to meet the requirements of the Water Code and the Budget Act. (SWRCB Resolution No. 2004 - 0061.) The emergency regulations became effective on October 14, 2004, and on November 23, 2004, BOE sent out the notices of determination for annual permit and license fees that are passed through to the United States Bureau of Reclamation's (USBR) water supply contractors (often referred to as "pass-through fees") and for annual water quality certification fees for Federal Energy Regulatory Commission (FERC) licensed hydroelectric projects. (§§ 1073; 3833.1.)

4.0 FEE DETERMINATIONS COVERED BY THE PETITION

According to the NCWA-CVPWA petition, Petitioners are NCWA, CVPWA, and persons identified in the caption of the petition. The State Water Board also has received a number of separately filed letters referencing either the NCWA-CVPWA petition or NCWA and CVPWA's counsel (Somach, Simmons, & Dunn). The State Water Board will consider the persons identified in Exhibit B of the NCWA-CVWPA petition and the persons timely filing separate

¹¹ This assumption is based on the rate of collection in Fiscal Year 2003-2004. Although over a quarter of the fee payers did not pay their fees by the end of the last fiscal year, most of the delinquent fee payers owed relatively small amounts of money. Most fee payers who owed larger amounts paid their fees on time. The figures available to the State Water Board indicate that during Fiscal Year 2003-2004, BOE collected 88 percent of the amount billed. There is some uncertainty as to whether fee collections this year will run as high as last year. In fact, several larger fee payers who paid their fees for Fiscal Year 2003-2004 on time failed to do so this year. (See § 1074, subd. (d) [annual fees are due and payable 30 days after BOE issues a notice of assessment].) The State Water Board anticipates that after it has acted on pending petitions for reconsideration and BOE issues notices of redetermination, these larger fee payers will pay their fees in order to avoid late penalties. (See *id.*, subd. (g)(1) [allowing postponement of payment during the pendency of a petition for reconsideration, subject to interest from the original due date].) The assumption made when the State Water Board adopted the fee regulations for Fiscal Year 2004-2005 — that collection rates would approximate those for Fiscal Year 2003-2004 — still provides the most reliable basis available for projecting fee collections.

letters of reference to be petitioners under the NCWA-CVWPA petition if they otherwise meet the requirements for a petition for reconsideration. Attachment 1 identifies the persons considered to be petitioners for purposes of this order.¹²

After the period for timely filing a petition for reconsideration ended, NCWA and CVPWA submitted Notices of Determination, which Petitioners had omitted from Exhibit B of their petition, as errata to their request for reconsideration.¹³ The entities identified in the errata already had been identified as petitioners in the caption of NCWA-CVPWA petition. The State Water Board's regulation governing petitions for reconsideration of fee assessments requires a fee payer to provide the State Water Board with a copy of the notice of assessment. (§ 1077, subd. (a).) Although the State Water Board requires strict adherence to the statute and regulations governing a petition for reconsideration, it can accept a timely filed petition that inadvertently omits required information if the information is provided before the State Water Board acts on the petition. Accordingly, the State Water Board will consider those entities identified in the errata to be Petitioners subject to this Order.

It bears emphasis, however, that the requirement for including a copy of the notice of assessment serves an important function. A petition is not acceptable simply because the information provided in the notice of assessment might be available somewhere in the materials included in or incorporated by reference in the petition. The State Water Board receives a very large number of petitions for reconsideration on annual fees,¹⁴ which must be decided in a relatively brief period, and the information included in the notice of assessment is necessary to properly process the petitions for reconsideration. To the extent the State Water Board is required to track down this information because the petitioner fails to comply with the requirements specified in State

¹² This order and Attachment 1 use the following identification numbers in identifying the fee payers: (1) numbers starting with "USBR" refer to annual permit or license fees passed through to USBR water supply contractors; and (2) numbers starting with "FERC" refer to annual water quality certification fees.

¹³ Although the last errata is captioned the "Fourth Errata," NCWA and CVWPA actually submitted a total of five errata on the following dates: December 27, 2004, January 5, 2005, two errata on January 13, 2005, and January 25, 2005. The errata cover Oro Loma Water District (USBR 1175), Tranquillity Public Utility District (USBR 1095), Thomes Creek Water District (USBR 1143), Natomas Central Mutual Water Company (USBR 1227), and Central San Joaquin Water Conservation District (USBR 1248).

¹⁴ For example, over three hundred persons or entities protested the fee assessments sent out on October 18, 2004.

Water Board regulations, the processing of petitions for reconsideration would be delayed, and for many petitions the staff time that would have to be devoted to the effort would be disproportionate to the amount of the fee involved. In the future, the State Water Board may deny a petition for reconsideration for failure to meet the applicable petition requirements, including a failure to include a copy of the notice of assessment if required under the regulations.

The State Water Board will not consider late-filed letters referencing the NCWA-CVPWA petition for reconsideration or late amendments to the petition. A petition for reconsideration must be received by either BOE or the State Water Board within 30 days of the date of the assessment is issued, i.e., December 23, 2004, for bills issued on November 23, 2004. (§ 1077, subd. (b).) The State Water Board received several letters referencing the NCWA-CVPWA petition after the deadline of December 23, 2004, and will not reconsider the fee assessments that are the subject of those letters. In addition, NCWA and CVWPA filed an addendum, dated December 27, 2004, to their petition seeking to add Delano-Earlimart Irrigation District (USBR 1300, 1301), which had been omitted from the caption of their petition, as a petitioner and providing notices of determination for the district. The State Water Board will not accept Petitioners' addendum because, in contrast to the entities that were the subject of the errata discussed above, the district was not timely identified as a petitioner within the reconsideration period.¹⁵ Petitioners cannot circumvent the deadlines for a petition for reconsideration or expand the scope of an original petition by filing addenda seeking to add additional persons or entities not previously identified as petitioners.

The State Water Board's review in this Order is limited to the November 23 assessments for annual pass-through fees and water quality certification fees. (Wat. Code § 1537, subd. (b)(2); Cal. Code Regs., tit. 23, § 1077.) BOE previously assessed certain annual fees on October 18, 2004, and will issue additional assessments for some annual fees that were not included in October 18 or November 23 assessments. Those earlier- and later-assessed fees are not properly

¹⁵ Delano-Earlimart Irrigation District is not prejudiced by this decision because it timely filed its own petition for reconsideration that will be considered separately.

within the scope of review of the November 23 fee assessments.¹⁶ Petitioners' contentions that may be relevant to earlier- or later-issued assessments, but are not relevant to any of the fee determinations that were issued on November 23, will not be considered in this order. Additionally, the State Water Board will not consider allegations that Petitioners seek to incorporate by reference in other documents, such as the complaint, if the Petitioners have failed to include points and authorities in support of the legal issues raised. (§ 769, subd. (c).)

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

Petitioners raise a variety of challenges specific to the pass-through fees and Resolution No. 2004 - 0061, including claims that the fees constitute an unconstitutional tax because (1) there is no nexus between the water right regulatory program and Central Valley Project (CVP) contractors and no basis for the State Water Board to impose regulatory fees on the contractors; (2) the fees facially and factually discriminate against federal contractors; (3) the fees unlawfully assess the federal government and its contractors; and (4) the fees unlawfully interfere with contracts. Petitioners also allege that the fees are arbitrary, capricious, exceed the State Water Board's authority and violate Government Code section 11010 because the CVP contractors do not have a regulatory relationship with the State Water Board.

Petitioners raised these issues, and other general issues regarding the administration and constitutionality of the water right fees, in the petitions that NCWA and CVWPA previously filed challenging the fees assessed in Fiscal Years 2003-2004 and 2004-2005. The State Water Board denied those petitions in Order WRO 2004-0011-EXEC and Order WRO 2004-0045-EXEC. In large part, the NCWA-CVWPA petition now before the State Water Board repeats the same arguments verbatim, and the Petitioners have not provided any new arguments, new information, or supporting authorities that materially change any of the issues raised in the earlier petitions. With respect to the issues that were raised in the previous petitions and are repeated in the petition now before the State Water Board, this Order adopts the reasoning of

¹⁶ Properly filed petitions requesting reconsideration of those later-issued assessments will be considered separately as appropriate.

Order WRO 2004-0011-EXEC and Order WRO 2004-0045-EXEC, and incorporates those orders by reference.¹⁷ Petitioners' causes of reconsideration are denied.

Nonetheless, it may be helpful to further explain the basis for the water right fees that are passed through to the USBR's CVP contractors. Since first adopting a revised water right fee schedule in 2003, the State Water Board has assessed an annual water right fee to each holder of a water right permit or license based upon the total authorized diversion amount of that permit or license. Under Water Code sections 1540 and 1560, if the State Water Board determines that a fee payer is likely to decline to pay a fee or expense based on a claim of sovereign immunity, then the State Water Board may allocate the fees due to that fee payer's water supply contractors. Historically, the USBR has refused to pay water right fees to the state, claiming sovereign immunity. The State Water Board has consulted with the USBR as to whether it would pay the revised water right fees and the USBR has stated that it will not pay the fees. Based on this information and past experience, the State Water Board has determined that the USBR would decline to pay the fees this fiscal year.¹⁸ Accordingly, the State Water Board has passed the USBR's water right fees through to its CVP contractors by prorating the fees for the CVP among the water supply contractors for the project based on either the contractor's entitlement under the contract, or if the contractor has a base supply under the contract, the contractor's supplemental supply entitlement. (§ 1073, subs. (b)(2), (e).)

Petitioners claim that there is no basis for the State Water Board to impose regulatory fees on the CVP contractors. There is no question, however, that the State Water Board has the authority to regulate the diversion and use of water subject to USBR contracts. (Wat. Code. §§ 275, 1051, 1052, 1211; *California v. United States* (1978) 438 U.S. 645 [98 S.Ct. 2985]; see *Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183 [161 Cal.Rptr. 466][regulation of point of diversion where USBR contractor takes water]; SWRCB Decision 1600 (1984) [regulation to prevent waste or unreasonable use of water delivered under water

¹⁷ To the extent Orders WRO 2004-0011-EXEC and WRO 2004-0045-EXEC address issues that are not properly before the SWRCB in this Order and are not relevant to the issues decided in this Order, the incorporation by reference of the Orders does not extend to those issues and those issues have not been decided by this Order.

¹⁸ More recently, at the State Water Board's January 4, 2005, workshop, the USBR reiterated its position that it would not pay the fees.

supply projects with the Secretary of the Interior].) When a permit or license holder diverts water for use by another person or entity that contracts for delivery of the water, the State Water Board ordinarily expects the permit or license holder to assure compliance with the terms of the permit or license. The State Water Board regulates the contractors indirectly, through the conditions of the permits and licenses held by the water suppliers who serve those contractors. Water used under contract with the permit or license holder must be used in compliance with the terms of the permit or license.

Although the State Water Board's regulation is indirect, the activities of the water supply contractors impose a burden on, and benefit from, the regulatory water right program. The contractors' demand for water is a primary purpose of the USBR's water supply projects and they benefit from the USBR's appropriation of water under the State's regulatory permit and license system, which administers the water rights on which the contractors depend for their contracted water. The contractors' use of the water delivered by a permit and license holder such as the USBR is subject to the permit and license system, and oversight is necessary to prevent violations. Thus, it is reasonable for the contractors pay the regulatory fees for the water right permits and licenses that are necessary to operate the water supply projects from which they have contracted to receive and use water.

To constitute a valid fee, the basis for allocating charges to a payer must bear a fair or reasonable relationship to the fee payer'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].) A precise cost-fee ratio is not required. (*Id.* at p. 950). Nor is it necessary that the agency imposing the fee have a direct regulatory relationship with the fee payer. (*Id.* at p. 535.) The pass-through fees are fair and reasonable because the water supply contractors benefit from the State's administration of water rights, and their activities create a need for the regulatory program. The fees attributable to USBR projects are paid for by beneficiaries of those projects, instead of having other fee payers who do not rely on USBR projects cover the costs that would be allocated to the USBR's projects but for the USBR's claim of sovereign immunity. The pass-through fees also serve to treat USBR contractors similarly to contractors of other projects, like the State Water Project, where the water right holder includes

water right fees among the costs it passes through to its contractors. Ideally, the USBR would waive sovereign immunity and the State would impose fees directly on the USBR. But the law does not require that the basis for allocating fees be ideal, and if the USBR paid the fees it would pass those costs through to its contractors. Apportioning the fees attributable to USBR projects among the USBR's water supply contractors is fair and reasonable.

6.0 FACTUAL CLAIMS RAISED BY PETITIONERS REGARDING ANNUAL PERMIT OR LICENSE FEES

Certain individual petitioners raised factual claims specific to their pass-through fees or water quality certification fees.¹⁹ As discussed below, these claims have no merit.

6.1 East Bay Municipal Utility District

The East Bay Municipal Utility District (EBMUD), which adopts the NCWA-CVWPA petition that is the subject of this Order, also filed a separate petition for reconsideration with the State Water Board objecting to the imposition of water right fees on CVP contractors and the calculation of such fees against EBMUD. Because EBMUD's separate petition raises issues similar to those raised by NCWA and CVWPA in their petition, and EBMUD has adopted that petition, these issues will be addressed here. EBMUD alleges (1) that the State Water Board improperly assessed EBMUD a fee for a water right that it does not hold but which is held by another party, the USBR; and (2) assuming, *arguendo*, that assessing a fee for the USBR's water rights to a person or entity other than the USBR is valid, the amount of the fee has been miscalculated. EBMUD's claims are without merit.

As discussed above, the Water Code and the State Water Board's regulations allow the State Water Board to allocate fees to a fee payer's water supply contractors if the State Water Board determines that the fee payer is likely to decline to pay a fee or expense based on a claim of sovereign immunity.

¹⁹ The State Water Board did not receive notices of determination for two of these individuals, Feather Water District (USBR 1324) and Fresno Irrigation District (USBR 1019). Accordingly, the State Water Board did not consider those requests for reconsideration in this order. (§ 1077, subd. (a).) The State Water Board, however, previously considered and rejected nearly identical claims by those entities in Order WRO 2004-0011.

(Wat. Code, §§ 1540, 1560; Cal. Code Regs., tit. 23, § 1073.) Accordingly, the State Water Board has the authority to assess EBMUD water right fees for water rights held by the USBR. Additionally, the State Water Board previously considered and rejected these same arguments in Order WRO 2004-0011-EXEC. (Order WRO 2004-0011-EXEC at p. 17.) The reasoning of Order WRO 2004-0011-EXEC is incorporated here and this cause of reconsideration is denied.

EBMUD was assessed a fee of \$44,533.52, which EBMUD surmises is based on a contract amount of 133,000 acre-feet. EBMUD alleges that the correct contract amount is 55,000 acre-feet. EBMUD and the Bureau executed an amendatory contract effective July 20, 2001, that reduced the contract amount. The amendatory contract entitles EBMUD to take delivery of water at Freeport on the Sacramento River of up to a total of 133,000 acre-feet of project water for municipal and industrial purposes in any year that certain hydrologic conditions exist, provided that EBMUD cannot receive more than 165,000 acre-feet in any three consecutive years in which EBMUD's storage forecast is below 500,000 acre-feet. One third of 165,000 is 55,000 acre-feet, and apparently this is the basis for EBMUD's assertion that its contract amount should be 55,000 acre-feet. In fact, however, EBMUD has the option to take up to 133,000 acre-feet in any single year under its water supply contract. The fee is based on the maximum contract amount and has been correctly calculated. This cause of reconsideration is denied.

6.2 El Dorado Irrigation District

The El Dorado Irrigation District (EID) challenges the determination that EID must pay an annual water quality certification review fee in the amount of \$4,000. EID has filed an application for water quality certification in connection with its application for a new FERC license to operate FERC Project No. 184, a hydroelectric project located on the South Fork of the American River and its tributaries. EID contends that it submitted its application for water quality certification before the effective date of the fee and imposing the fee retroactively was arbitrary and capricious.

As explained in greater detail below, this argument lacks merit. First, the requirement that EID pay an annual water quality certification review fee was effective before EID filed its application for water quality certification. The amount of the fee was increased effective October 14, 2004,

after EID filed its application and three and a half months into the 2004-2005 fiscal year. In large part, this increase was not applied retroactively. Rather, it was applied prospectively to recover the State Water Board's ongoing costs of reviewing pending applications for water quality certification, including EID's application. In addition, EID was on notice at the time it filed its application that it would be required to pay an annual review fee and that the fee would be increased if necessary to meet revenue targets for the 2004-2005 fiscal year. Finally, to the extent that the incremental increase in the fee was applied retroactively it was not arbitrary or capricious.

The requirement that an applicant for water quality certification pay a fee is not new. Before Senate Bill 1049 was enacted, Water Code section 13160.1 authorized the State Water Board to establish a reasonable fee schedule to recover the costs of issuing water quality certifications. Pursuant to that authority, section 3833 of the State Water Board's regulations established a fee for an application for water quality certification. For an application for certification of a hydroelectric project licensed by FERC, an initial fee was due upon filing, subsequent deposits were required under certain circumstances, and a fee covering the balance of the State Water Board's costs incurred processing the application was due when the State Water Board took action on the application. (Former § 3833, subd. (b).)

Water Code section 13160.1 was amended by Senate Bill 1049, which was enacted on October 9, 2003, and took effect January 1, 2004. Among other things, the amendments (1) detail the types of costs that may be recovered through water quality certification fees, (2) specify that application filing fees or annual fees may be imposed, and (3) describe who may be required to pay a fee. The amendments require the State Water Board to set the fees consistent with revenue levels in the annual Budget Act for water quality certification activities. The State Water Board must review the fee schedule every year and revise it as necessary by adopting emergency regulations.

Consistent with the amendments to Water Code section 13160.1 described above, the State Water Board amended the regulations governing water quality certification review fees by emergency regulation effective January 1, 2004. The new fee schedule established an annual

review fee for FERC-licensed hydroelectric projects of \$500 plus \$0.085 per kilowatt, based on the generating capacity of the facility. (Former § 3833.1.) The new fees were designed to recover a portion of the State Water Board's costs incurred in conducting water quality certification activities during fiscal year 2003-2004.

Previously, EID filed an application for water quality certification on April 28, 2003. On April 16, 2004, EID withdrew that application and filed a new application, which is currently pending. The amendments to section 13160.1 and the State Water Board's regulations were in effect on January 1, 2004, before EID refiled its application. Accordingly, EID was on notice when it filed its application that EID would be assessed an annual fee pursuant to section 3833.1 of the State Water Board's regulations until and including the fiscal year in which certification and related federal proceedings are complete. (§ 3833.1, subd. (b).)

The Annual Budget Act for 2004-2005 was adopted on July 31, 2004. By emergency regulation effective October 14, 2004, the State Water Board increased the annual fee for FERC-licensed projects to \$1,000 plus \$0.15 per kilowatt in order to generate revenue consistent with the 2004-2005 Budget Act. (§ 3833.1.) As stated above, in large part this increase was applied prospectively to recover the State Water Board's ongoing costs of reviewing pending applications for water quality certification, including EID's application. Moreover, EID was on notice when it filed its application that the fee would be increased to the extent necessary to meet the revenue levels set in the annual Budget Act. (Wat. Code, § 13160.1, subd. (d)(1).)

Arguably, the increase in the fee was applied retroactively to the extent that it recovers costs incurred prior to October 14, 2004. As discussed below, however, the retroactive application of the increased fee to recover costs incurred during the preceding three and a half months was not arbitrary or capricious.

In Order WRO 2004-0011-EXEC, the State Water Board rejected the contention that the annual permit and license fees and the water quality certification review fees for fiscal year 2003-2004 had been applied retroactively. (Order WRO 2004-0011-EXEC at pp. 24-28.) The State Water Board also rejected the contention that the retroactive application of an increase in filing fees was unlawful. (*Ibid.*) Although Order WRO 2004-0011-EXEC addressed the argument whether

retroactive application of the fees violated due process requirements, the reasoning in that order serves to address EID's present argument that retroactive application of the annual review fee is arbitrary and capricious.

The reasoning contained in Order WRO 2004-0011-EXEC is incorporated by reference and will not be repeated in its entirety here. In short, the State Water Board explained that retroactive application of legislation that imposes an economic burden satisfies due process requirements, provided that retroactive application of the legislation is justified by a rational legislative purpose. (Order WRO 2004-0011-EXEC at p. 26.) In this case, the retroactive application of an increase in the water quality certification review fee serves the legitimate legislative purpose of recovering the State Water Board's costs incurred conducting water quality certification activities during the entire 2004-2005 fiscal year. Assessing fees based on the fiscal year supports the Legislature's ability to conduct the budget planning process in a uniform and efficient manner. For these reasons, the retroactive application of the incremental increase in the fee was not arbitrary or capricious.

In sum, the requirement that EID pay an annual water quality certification review fee was effective before EID filed its application. Most of the incremental increase in the fee effective October 14, 2004, was applied prospectively to recover the State Water Board's ongoing costs of reviewing pending applications for water quality certification. Moreover, EID was on notice when it filed its application that EID would be assessed an annual fee for the 2004-2005 fiscal year, and that the State Water Board must revise the fees each fiscal year to meet the revenue levels set in the annual Budget Act. Finally, to the extent that the increase in the fee was applied retroactively, assessment of the fee was not arbitrary or capricious.

6.3 Friant Division, Class II Contractors

Certain Petitioners, including Chowchilla Water District (USBR 1102; USBR 1287; USBR 1286), Porterville Irrigation District (USBR 1303; USBR 1304), and Saucelito Irrigation District (USBR 1294; USBR 1295) hold contracts for Class II water from the Friant Division of the CVP. Petitioners first claim that they should not be subject to the water right fees, alleging that the water they receive is "supported in substantial part upon pre-1914 water rights and/or riparian

rights, which the Bureau either acquired outright or acquired by exchange.” Petitioners further argue that even if Friant Division, Class II contractors are subject to the fees, the contractors are being treated in an arbitrary, capricious, unreasonable, and irrational manner because they get less yield from Class II supplies and those supplies should be assessed at a lower rate. The State Water Board previously considered and rejected these same arguments in Order WRO 2004-0011-EXEC. (Order WRO 2004-0011-EXEC at pp. 52-57.) The reasoning of Order WRO 2004-0011-EXEC is incorporated here and Petitioners’ causes of reconsideration are denied.

6.4 Stockton East Water District and Central San Joaquin Water Conservation District

The Stockton East Water District (USBR 1247) and Central San Joaquin Water Conservation District (USBR 1248) object to being assessed a fee for their full contractual entitlement of 75,000 acre-feet and 80,000 acre-feet, respectively, to water appropriated by the USBR’s New Melones Project, which is part of the CVP. The USBR has placed a collective limit of 90,000 afa on all of its contract supplies from the New Melones Project even though the maximum allocation under the New Melones Project contracts totals 155,000 acre-feet. In essence, Petitioners argue that it is not equitable to charge a fee to Petitioners based on their full contract amount when the USBR refuses to deliver the full amount under the contract. The State Water Board previously considered and rejected these same arguments in Order WRO 2004-0011-EXEC. (Order WRO 2004-0011-EXEC at pp. 49-52.) It merits noting again that the fees assessed to Petitioners are not based solely on the maximum amount of water separately appropriated by the New Melones Project, but are instead assessed as a proportion of the entire CVP fee. Thus, the fees for the New Melones are distributed among all of the CVP water users and are not assessed solely to the New Melones water supply contractors. The reasoning of Order WRO 2004-0011-EXEC is incorporated here and Petitioners’ causes of reconsideration are denied

6.5 Stony Creek Water District

Stony Creek Water District (Stony Creek) (USBR 1004) has a contract with the USBR for 2,920 afa from the Black Butte Dam Project. In Fiscal Years 2003-2004 and 2004-2005, the State Water Board assessed fees for the Black Butte Dam Project separately from the CVP, based on information provided by the USBR indicating that the Black Butte Dam Project is not

operationally part of the CVP. The USBR holds two water rights for the Project that total 221,200 acre-feet. Orland Unit Water Users Association (Orland Unit) is the major contractor for the Project, and uses up to 100,000 acre-feet of water. In response to a petition for reconsideration filed by the Orland Unit last year, the State Water Board excused the Orland Unit from paying fees because Orland held an exchange contract only. (See Order WRO 2004-0011-EXEC at p. 58; see § 1073, subd. (b)(2).) This shifted the majority of the fee responsibility to Stony Creek in this year's billing. Stony Creek petitions for reconsideration of the \$4,961.73 fee imposed on Stony Creek this year, a fee that is dramatically higher than the fee imposed last year, and far higher than the fees imposed on CVP contractors who have contracted for similar amounts.

A review of the circumstances involving the fees allocated to Stony Creek indicates that the Black Butte Dam Project should be treated as part of the CVP for purposes of water right fee allocations. While the dam is owned by the Corps of Engineers and was originally authorized by the Flood Control Act of 1944, the Black Butte Integration Act of October 1970 made Black Butte Dam an integral part of the CVP. The Black Butte Project is financially integrated with the CVP. Moreover, while Black Butte Dam Project was not operationally integrated with the CVP until recently, operations have been changed. By Order dated April 1, 1996, the Division approved an additional point of rediversion and purpose of use at the Tehama-Colusa Canal crossing of Stony Creek that allows releases of CVP water from Black Butte Reservoir, including bypass flows for fish. Accordingly, the fees for Stony Creek should be calculated based on treatment of the Black Butte Project as part of the CVP. The recalculated fee is reduced to \$979.82 plus any interest due. The Division has directed BOE to take appropriate action and this cause of action is denied on the grounds that it is moot.

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7.0 CONCLUSION

For the reasons discussed above, the State Water Board finds that its decision to impose water right fees was appropriate and proper or that it has remedied any erroneous fee bills, thus rendering those claims moot. To the extent that this order does not address all of the issues raised in the petition for reconsideration, the State Water Board finds that either these issues are insubstantial or that Petitioners have failed to meet the requirements for a petition for reconsideration under the State Water Board's regulations. The petition for reconsideration is denied.

ORDER

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

Dated: February 4, 2005

ORIGINAL SIGNED BY
Celeste Cantú
Executive Director

**In the Matter of the Petition for Reconsideration of the
Northern California Water Association et al.
Attachment 1**

NAME	SWRCB ID
ANDERSON -COTTONWOOD IRRIGATION DISTRICT	USBR1085
ARVIN-EDISON WATER STORAGE DISTRICT	USBR1061
ARVIN-EDISON WATER STORAGE DISTRICT	USBR1326
BABER, JACK, ET AL	USBR1035
BANTA-CARBONA IRRIGATION DISTRICT	USBR1115
BELLA VISTA WATER DISTRICT	USBR1214
BROADVIEW WATER DISTRICT	USBR1187
CALAVERAS COUNTY WATER DISTRICT	USBR1307
CENTERVILLE COMMUNITY SERVICES DISTRICT	USBR1091
CENTINELLA WATER DISTRICT	USBR1265
CENTRAL SAN JOAQUIN WATER CONSERVATION	USBR1248
CHOWCHILLA WATER DISTRICT	USBR1102
CHOWCHILLA WATER DISTRICT	USBR1286
CHOWCHILLA WATER DISTRICT	USBR1287
CLEAR CREEK COMMUNITY SERVICES DISTRICT	USBR1130
COLUSA COUNTY WATER DISTRICT	USBR1082
COLUSA DRAIN MUTUAL WATER COMPANY	USBR1270
COLUSA, COUNTY OF	USBR1204
CONTRA COSTA WATER DISTRICT	USBR1302
CORNING WATER DISTRICT	USBR1153
DAVIS WATER DISTRICT	USBR1149
DAVIS, OLIVE P., ET AL	USBR1055
DEL PUERTO WATER DISTRICT	USBR1233
DUNNIGAN WATER DISTRICT	USBR1103
EAGLE FIELD WATER DISTRICT	USBR1173
EAST BAY MUNICIPAL WATER DISTRICT	USBR1134
EL DORADO IRRIGATION DISTRICT	FERC184
EL DORADO IRRIGATION DISTRICT	USBR1027
EL DORADO IRRIGATION DISTRICT	USBR1164

Attachment 1 continued

NAME	SWRCB ID
FRESNO SLOUGH WATER DISTRICT	USBR1105
FRESNO, CITY OF	USBR1229
GLENN-COLUSA IRRIGATION DISTRICT	USBR1215
GLIDE WATER DISTRICT	USBR1262
JAMES IRRIGATION DISTRICT	USBR1155
KANAWHA WATER DISTRICT	USBR1126
KERN-TULARE WATER DISTRICT	USBR1220
LA GRANDE WATER DISTRICT	USBR1260
LAGUNA WATER DISTRICT	USBR1245
LOWER TULE RIVER IRRIGATION DISTRICT	USBR1193
LOWER TULE RIVER IRRIGATION DISTRICT	USBR1296
LOWER TULE RIVER IRRIGATION DISTRICT	USBR1297
MADERA IRRIGATION DISTRICT	USBR1106
MADERA IRRIGATION DISTRICT	USBR1298
MADERA IRRIGATION DISTRICT	USBR1299
MAXWELL IRRIGATION DISTRICT	USBR1150
MERCY SPRINGS WATER DISTRICT	USBR1086
MERIDIAN FARMS WATER COMPANY	USBR1211
MOUNTAIN GATE COMMUNITY SERNICES	USBR1154
NATOMAS CENTRAL MUTUAL WATER COMPANY	USBR1227
ODYSSEUS FARMS PARTNERSHIP	USBR1218
ORANGE COVE IRRIGATION DISTRICT	USBR1283
ORLAND-ARTOIS WATER DISTRICT	USBR1210
ORO LOMA WATER DISTRICT	USBR1175
PACHECO WATER DISTRICT	USBR1251
PANOCHÉ WATER DISTRICT	USBR1181
PATTERSON IRRIGATION DISTRICT	USBR1098
PELGER MUTUAL WATER COMPANY	USBR1053
PIXLEY IRRIGATION DISTRICT	USBR1194
PLACER COUNTY WATER AGENCY	USBR1133

Attachment 1 continued

NAME	SWRCB ID
PLAINVIEW WATER DISTRICT	USBR1180
PLEASANT GROVE-VERONA MUTUAL WATER	USBR1146
PORTERVILLE IRRIGATION DISTRICT	USBR1303
PORTERVILLE IRRIGATION DISTRICT	USBR1304
PRINCETON-CORDORA-GLENN IRRIGATION	USBR1213
PROBERTA WATER DISTRICT	USBR1163
PROVIDENT IRRIGATION DISTRICT	USBR1217
RAG GULCH WATER DISTRICT	USBR1209
RECLAMATION DISTRICT NO. 1004	USBR1230
RECLAMATION DISTRICT NO. 108	USBR1224
RECLAMATION DISTRICT NO. 1606	USBR1101
RIVER GARDEN FARMS	USBR1225
ROSEVILLE, CITY OF	USBR1094
SACRAMENTO COUNTY WATER AGENCY	USBR1066
SACRAMENTO COUNTY WATER AGENCY	USBR1253
SACRAMENTO MUNICIPAL UTILITY DISTRICT	FERC2101
SACRAMENTO MUNICIPAL UTILITY DISTRICT	USBR1135
SAN BENITO COUNTY WATER DISTRICT	USBR1268
SAN JUAN WATER DISTRICT	USBR1033
SAN JUAN WATER DISTRICT	USBR1254
SAN LUIS WATER DISTRICT	USBR1174
SANTA CLARA VALLEY WATER DISTRICT	USBR1089
SANTA CLARA VALLEY WATER DISTRICT	USBR1261
SAUCELITO IRRIGATION DISTRICT	USBR1294
SAUCELITO IRRIGATION DISTRICT	USBR1295
SHAFTER-WASCO IRRIGATION DISTRICT	USBR1107
SHAFTER-WASCO IRRIGATION DISTRICT	USBR1108
SHASTA COUNTY SVC AREA 25 -KESWICK	USBR1025
SHASTA COUNTY WATER AGENCY	USBR1090
SOLANO COUNTY WATER AGENCY	USBR1316

Attachment 1 continued

NAME	SWRCB ID
STOCKTON EAST WATER DISTRICT	USBR1247
STOCKTON EAST WATER DISTRICT	USBR1306
STONE CORRAL IRRIGATION DISTRICT	USBR1293
STONY CREEK WATER DISTRICT	USBR1004
SUTTER MUTUAL WATER COMPANY	USBR1191
TEA POT DOME WATER DISTRICT	USBR1167
THOMES CREEK WATER DISTRICT	USBR1143
TRACY, CITY OF	USBR1177
TRANQUILLITY IRRIGATION DISTRICT	USBR1095
TRANQUILLITY IRRIGATION DISTRICT	USBR1156
TULARE IRRIGATION DISTRICT	USBR1289
TULARE IRRIGATION DISTRICT	USBR1290
WEST SACRAMENTO, CITY OF	USBR1010
WEST SIDE IRRIGATION DISTRICT, THE	USBR1263
WEST STANISLAUS IRRIGATION DISTRICT	USBR1016
WESTLANDS WATER DISTRICT	USBR1011
WESTLANDS WATER DISTRICT	USBR1088
WESTLANDS WATER DISTRICT	USBR1131
WESTLANDS WATER DISTRICT	USBR1273
WESTSIDE WATER DISTRICT	USBR1192
WESTSIDE WATER DISTRICT	USBR1206
WILDREN WATER DISTRICT	USBR1185