

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

**ORDER WR 2005-0019-EXEC**

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In the Matter of the Petitions for Reconsideration of  
**Nelson & Sons, Inc.**  
Regarding Water Right Fees for Applications 17624, 24140, 29763, 29765

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**ORDER DENYING RECONSIDERATION**

**BY THE EXECUTIVE DIRECTOR<sup>1</sup>**

**1.0 INTRODUCTION**

Nelson & Sons, Inc. (Petitioner) petitions the State Water Resources Control Board (State Water Board or SWRCB) for reconsideration and a refund of water right fee assessed by the State Board of Equalization (BOE) on October 18, 2004, and on February 11, 2005. Petitioner holds water right Applications 17624, 24140, 29763, 29765. The State Water Board finds that its decision to impose the fees was appropriate and proper and denies Petitioner's request for reconsideration.

**2.0 GROUND 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

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<sup>1</sup> 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 State Water Board 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. This delegation is not affected by *Central Delta Water Agency v. State Water Resources Control Board* (2004) 124 Cal.App.4th 245 [20 Cal.Rptr.3d 898]. In that case, the court held that the State Water Board, after a hearing, could not defer making findings that were prerequisite to issuing water right permits by delegating the remaining findings to its staff for subsequent determinations by the staff. 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.

of the fee. (Cal. Code Regs., tit. 23, § 1077.)<sup>2</sup> 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.)

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. (§§ 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.

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 reviewing 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).)

### **3.0 LEGAL AND FACTUAL BACKGROUND**

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 right program is regulatory fees deposited in the Water Rights Fund in the state treasury. Legislation enacted in 2003 (Sen. Bill No. 1049) required the State Water Board to adopt

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<sup>2</sup> All further regulatory references are to the State Water Board's regulations located in title 23 of the California [footnote continues on next page]

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.)

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, which became effective on October 14, 2004, require annual application fees, petition fees, and permit and license fees. (§§ 1063, 1065, 1066.)

On October 18, 2004, BOE assessed Petitioner annual fees of \$104.55 and \$114.75 for Applications 17624 (License 12648) and 24140 (Permit 17331), respectively. On February 11, 2005, BOE assessed Petitioner annual petition fees of \$1,000 each for Applications 17624 and 24140, and annual application fees of \$100.50 and \$103.23 for Applications 29765 and 29763, respectively. Petitioner filed three identical petitions for reconsideration,<sup>3</sup> listing five BOE accounts covering these four water right applications. Although not listed on the petitions, Petitioner also submitted a notice of determination for the annual petition fee for Application 24140. In mid-April 2005 BOE forwarded the petitions to the State Water Board.<sup>4</sup>

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Code of Regulations unless otherwise indicated.

<sup>3</sup> Because these petitions are identical, they will be treated as one petition.

<sup>4</sup> The Water Code directs the State Water Board to order or deny reconsideration on a petition within 90 days from the date on which the State Water Board adopts the decision or order. (Wat. Code, § 1122.) If the State Water Board fails to act within that 90-day period, a petitioner who filed a timely petition for reconsideration may seek judicial review, but the State Water Board is not divested of jurisdiction to act upon the petition simply because the State Water Board failed to complete its review of the petition on time. (See *California Correctional Peace Officers Assn 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.)

#### **4.0 THE STATE WATER BOARD PROPERLY IMPOSED A FEE AGAINST PETITIONER**

Petitioner's request for reconsideration is denied. As a preliminary matter, a petition for reconsideration should be filed with the State Water Board, but will be considered timely filed if received by the State Water Board or BOE within 30 days of the date the assessment is issued. (§ 1077, subd. (b).) Although Petitioner dated each of the petitions November 15, 2004, it appears that Petitioner did not actually file any of the petitions until sometime after it received the February 11, 2005 assessments. Each of the petitions includes a list of account numbers, including account numbers from the February 11, 2005 assessments. In addition, it is not likely that BOE would have forwarded all three of the petitions to the State Water Board at the same time unless BOE received the petitions at about the same time. Thus, it appears that Petitioner's request for reconsideration of the October 18, 2004 assessments was not filed until several months after the deadline for filing. Given that BOE did not forward the petitions to the State Water Board until mid-April, Petitioner's request for reconsideration of the February 11, 2005 assessments may also have been untimely. However, because BOE did not date stamp the petitions or otherwise indicate the date on which it received the petitions, this order considers all of the assessments.

The State Water Board's decision to impose the annual fees was appropriate and proper. The water right fees are legitimate regulatory fees and are not unconstitutional taxes. (See generally *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866 [64 Cal.Rptr.2d 447]; *California Association of Professional Scientists v. Department of Fish and Game* (2000) 79 Cal.App.4th 935 [94 Cal.Rptr.2d 535].) Moreover, Petitioner does not dispute the factual basis on which the water right fees were assessed. The State Water Board properly assessed the fees.

Petitioner incorporates by reference the California Farm Bureau Federation's (Farm Bureau) arguments in its petitions for reconsideration and pending lawsuit against the State Water Board over the fees.<sup>5</sup> The State Water Board denied the Farm Bureau's 2004 and 2005 petitions for

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<sup>5</sup> After Petitioner filed its petition for reconsideration, the Farm Bureau filed a second lawsuit, in April 2005, challenging the water right fees for fiscal year 2004-2005. That litigation has been stayed pending resolution of the Farm Bureau's original lawsuit, challenging the water right fees for fiscal year 2003-2004. In a recent trial court ruling, the Sacramento County Superior Court rejected that challenge and found that the water right fees are [footnote continues on next page]

reconsideration by State Water Board Orders WRO 2004-0010-EXEC and WRO 2005-0002-EXEC. With respect to the issues concerning the annual permit and license fees that were the subject of the October 18, 2004, assessments, this Order adopts the reasoning of Orders WRO 2004-0010-EXEC and WRO 2005-0002-EXEC, and incorporates those orders by reference.<sup>6</sup>

With respect to the annual application and petition fees, those fees were not within the scope of the Farm Bureau petitions for reconsideration, and Petitioner cannot rely on those petitions. Additionally, the State Water Board will not consider allegations that Petitioner seeks to incorporate by reference in other documents, such as the Farm Bureau's complaint or petitions for reconsideration, if Petitioner has failed to include points and authorities in support of the legal issues raised. (§ 769, subd. (c).) Nonetheless, to the extent that Petitioner attempts to challenge the annual application and petition fees by incorporating general issues regarding the constitutionality and validity of the fees raised in the Farm Bureau's petitions, this Order adopts the reasoning of Orders WRO 2004-0010-EXEC and WRO 2005-0002-EXEC, and incorporates those orders by reference.

## **5.0 CONCLUSION**

For the reasons discussed above, the State Water Board finds that its decision to impose the water right fees was appropriate and proper. To the extent that this order does not address all of the issues raised in the petitions for reconsideration, the State Water Board finds that either these issues are insubstantial or that Petitioner has failed to meet the requirements for a petition for reconsideration under the State Water Board's regulations. Petitioner's request for reconsideration is denied.

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legitimate regulatory fees and not unconstitutional taxes. (*Northern California Water Assn. v. State Water Resources Control Board* consolidated with *California Farm Bureau Federation v. State Water Resources Control Board* (Super. Ct. Sacramento County, May 25, 2005, Nos. 03CS01776, 04CS00473) Order Denying Motion for Peremptory Writ of Mandate or Prohibition.)

<sup>6</sup> To the extent Orders WRO 2004-0010-EXEC and WRO 2005-0002-EXEC address issues that are not properly presented before the State Water Board in this Order and are not relevant to the issues decided in this Order, the incorporation by reference of Orders WRO 2004-0010-EXEC and WRO 2005-0002-EXEC does not extend to those issues.

**ORDER**

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

Dated: July 14, 2005

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