

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

**ORDER WR 2012-0015-EXEC**

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In the Matter of the Petition for Reconsideration of the  
**ELSINORE VALLEY MUNICIPAL WATER DISTRICT**  
Regarding Annual Water Quality Certification Fee Determination

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**ORDER DENYING RECONSIDERATION**

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

**1.0 INTRODUCTION**

The Elsinore Valley Municipal Water District (District) petitions the State Water Resources Control Board (State Water Board or Board) for reconsideration of an annual fee of \$113,860 assessed to the District and its co-applicant The Nevada Hydro Company (Nevada Hydro) for Fiscal Year (FY) 2011-2012 by the State Board of Equalization (BOE) in connection with water quality certification for a Federal Energy Regulatory Commission (FERC) licensed hydroelectric project application (FERC Project No. 11858).

The District contends that the assessed fees are: 1) a result of irregularity in proceedings; 2) not supported by substantial evidence; and 3) an error of law as applied to the District.

For the reasons set forth below, the petition for reconsideration is denied.

**2.0 GROUND FOR RECONSIDERATION**

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

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<sup>1</sup> State Water Board Resolution No. 2002-0104 delegates to the Executive Director the authority to conduct and 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 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.

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. (Cal. Code Regs., tit. 23, §§ 768, 1077.)<sup>2</sup> 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 State Water Board action of which the 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 that the petitioner requests. (§§ 769, subd. (a)(1)-(6), 1077, subd. (a).) A petition for reconsideration of a fee assessed by BOE must include either a copy of the notice of assessment or certain information. (§ 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 receives it within 30 days of the date the assessment is issued. (*Ibid.*) The deadline for filing a petition for reconsideration of the November 2, 2011 assessment was December 3, 2011. Nevada Hydro timely filed a petition for reconsideration, which was denied on January 31, 2012. The District submitted a petition for reconsideration dated February 29, 2012.<sup>3</sup>

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

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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 Code of Regulations unless otherwise indicated.

<sup>3</sup> The State Water Board is directed to order or deny reconsideration on a petition within 90 days from the date on which the Board adopts the decision or order. (Wat. Code, § 1122.) If the State Water Board fails to act within that 90-day period, a petitioner may seek judicial review, but the Board is not divested of jurisdiction to act upon the petition simply because it failed to complete its review of the petition on time. (State Water Board Order WR 2009-0061 at p. 2, fn. 1; see *California Correctional Peace Officers Ass'n v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147-1148, 1150-1151; State Water Board Order 98-05-UST at pp. 3-4.)

forth in section 768 of the Board's regulations. (§ 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board also may : deny the petition if the 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 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, 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 reviews the fee schedule each FY and, as necessary, revises the schedule so that the fees will generate revenues consistent with the amount set forth in the annual Budget Act. (*Id.*, § 1525, subd. (d)(3).) If the revenue collected in the preceding year was greater or less than the revenue levels set forth in the annual Budget Act, the State Water Board may adjust the annual fees to compensate for the over- or under-collection of revenue. (*Ibid.*) BOE is responsible for collecting the annual fees. (*Id.*, § 1536.)

The fee schedule includes fees for the State Water Board's costs in connection with water quality certification of FERC licensed hydroelectric projects. Water Code section 13160.1 authorizes the State Water Board to recover costs incurred in connection with applications for water quality certification requested pursuant to section 401 of the Clean Water Act by applicants for a federal permit or license. The State Water Board assesses annual fees for projects under review for water quality certification for FERC licensing and FERC-licensed projects for which water quality certification has been issued. (§ 3833.1.) Fees associated with water quality certification for FERC licensing are deposited in the Water Rights Fund. (Wat. Code, § 1551, subd. (c).) The State Water Board has set the fee schedule so that the projected revenues from water quality certification fees for projects under review for FERC licensing are equivalent to the Board's estimated program costs for this activity.<sup>4</sup> Annual fees are charged for each year from the initiation of review in anticipation of consideration of certification through

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<sup>4</sup> See January 23, 2012 Memorandum to File entitled "Recommended Water Right and Water Quality Certification Fee Schedule for FY 2011-2012," from Barbara Evoy, Deputy Director for Water Rights.

the completion of certification and related federal proceedings. (§ 3833.1, subd. (b)(1).) Once a review in anticipation of certification is initiated, certification fees are assessed until one of the following circumstances occurs: 1) the applicant abandons the license application; 2) a license is granted or denied by FERC; or 3) FERC determines no license is necessary. (*Id.*, subd. (b)(3). )

#### **4.0 FACTUAL BACKGROUND FOR THE DISTRICT AND NEVADA HYDRO WATER QUALITY CERTIFICATION (FERC PROJECT NO. 11858)**

Nevada Hydro, a private entity, was a co-applicant with the District for FERC license application no. 11858, a proposed 500-megawatt pumped storage project (Project) in Cleveland National Forest. In 2005, Nevada Hydro and the District filed with the State Water Board an application for water quality certification for the Project pursuant to section 3835, subdivision (b). Nevada Hydro and the District were allowed to withdraw and resubmit their application in 2006, 2007, 2008 and 2009. The most recent submittal was made on January 21, 2009.

On October 1, 2009, pursuant to section 3836, subdivision (c), the Division of Water Rights (Division) denied the water quality certification application without prejudice.

Nevada Hydro petitioned for reconsideration of the denial of the certification and of the assessment of fees for 2009-2010. The petition for reconsideration of the fees was denied by State Water Board Order 2010-0008-EXEC on February 8, 2011. The petition for reconsideration of the State Water Board's denial of the water quality certification application was denied by Board Order WQ 2011-0005 on March 1, 2011.

On April 1, 2011, Nevada Hydro filed a writ of mandate petition in San Diego Superior Court challenging the denial of water quality certification. The District filed an answer as a real party in interest. Nevada Hydro voluntarily dismissed the case on November 28, 2011.

On July 12, 2011, FERC issued an Order denying license application no. 11858. On August 11, 2011, Nevada Hydro filed a request for rehearing. On September 12, 2011, FERC issued an order granting rehearing for the purpose of affording additional time for consideration of the issues raised in the request for rehearing. On September 13, 2011, the District submitted a response to the request for rehearing submitted by Nevada Hydro. FERC accepted the motion filed by the District. On November 17, 2011, FERC issued a final order denying the request for rehearing.

On November 2, 2011, the BOE mailed a notice of determination that assessed an annual 401 certification fee of \$113,860.00 for FY 2011-2012 on behalf of the State Water Board. The invoice was sent to the mailing address on record for "The Nevada Hydro Company." The District claims it never received the notice because it was mailed to Nevada Hydro's address. On November 28, 2011, Nevada Hydro filed a petition for reconsideration of the fee assessment with the State Water Board. Nevada Hydro copied the District on its petition to the State Water Board. The District claims it received a copy of the Nevada Hydro petition in early December.

On January 6, 2012, the District submitted a letter to the Board and to the BOE stating there was no longer a federal proceeding that merited the processing fee and that pursuant to contractual arrangements, Nevada Hydro was completely responsible for any fees associated with the certification application.

On January 31, 2012, the State Water Board Executive Director denied Nevada Hydro's petition for reconsideration of the fee assessed for FY 2011-2012. The caption identified the matter as a petition for reconsideration of the District and Nevada Hydro, and the District was copied on the decision. Neither Nevada Hydro nor the District filed a timely petition for judicial review. According to the District, the denial of the petition for reconsideration is the first notice the District received from the State Water Board or BOE that a fee was due for the FY 2011-2012 fee cycle. By letter dated February 29, 2012, the District submitted a petition for reconsideration to the State Water Board challenging the assessment of fees for FY 2011-2012.

## **5.0 DISCUSSION**

### **5.1 THE DISTRICT'S ARGUMENT THERE WAS AN IRREGULARITY IN PROCEEDINGS BECAUSE THEY WERE NOT NOTIFIED OF THE FEES UNTIL FEBRUARY 3, 2012**

The District claims that it did not receive proper notice from the State Water Board of the annual water quality certification fees until February 3, 2012 when it received the Board's denial of Nevada Hydro's petition for reconsideration. Thus, it claims its petition for reconsideration should be considered timely as it was filed within 30 days of notice of the assessment of the fee.

The District cites no authority for the proposition that where a fee is assessed based on an application or permit, an invoice or a copy of the invoice must be sent to all co-applicants or co-permittees, instead of designating a lead applicant or lead permittee for purposes of invoicing.

Nevada Hydro and the District were co-applicants for the FERC license and had been co-applicants for a water quality certification. Both were equally responsible for the fees and notice was provided to an applicant of record on November 2, 2011.

It is unnecessary to decide whether the District was entitled to separate notice; however, the evidence in the record clearly indicates that the District received notice. The District was copied on the November 28, 2011, petition for reconsideration that Nevada Hydro submitted to the Board. The District claims it did not receive this notice until "early December." The District did not submit its petition for reconsideration until February 29, 2012, however, more than thirty days after the District admittedly received notice. The District's Petition was not timely.

## **5.2 THE DISTRICT ASSERTS THE ASSESSMENT OF FEES WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE**

Even if the District's petition were considered timely, it would be denied.

The District claims that it was not involved in any proceedings that extended the certification proceedings into FY 2011-2012. It asserts that Nevada Hydro, acting on its own initiative, decided to extend the certification proceedings by filing a lawsuit in April 2011, and by requesting rehearing of FERC's July 12, 2011, denial of the license application.

Whether the above-mentioned actions were initiated by Nevada Hydro or the District is not relevant in a determination of whether fees were properly assessed for FY 2011-2012. There is no question that during FY 2011-2012 the District was a co-applicant for a license with FERC. As the District correctly points out, FERC dismissed the application on July 12, 2011. That decision was made after the July 1, 2011 beginning of the FY. The fee regulations clearly specify that the fee applies to the FY in which the FERC proceedings are completed. (§ 3833.1, subd. (b)(1); see also *id.*, § 1074, subds. (a) & (b) [Annual fees are based on the FY, and apply even if the circumstances providing for imposition of the annual fee occur for only a portion of the FY]). And FERC did not make a final determination on the application until November 17, 2011, which was after the fee was assessed.

There is no dispute that proceedings before FERC were still pending in FY 2011-2012 in relation to Nevada Hydro's and the District's license application no. 11858. The regulations are clear, proceedings are not complete until one of several actions takes place: 1) abandonment of

an application; 2) certification is issued; or 3) proceedings are complete before FERC. (*Id.*, § 3833.1 subd. (b)(3).) None of the above criteria were met. FERC proceedings were not complete until November 17, 2011, when rehearing was denied. The District and Nevada Hydro may have disagreed about the course to take with their FERC application, as is evidenced by the District's September 13, 2011, submission to FERC that commented on Nevada Hydro's request for rehearing, but the District remained a co-applicant.

Because none of the criteria were met to terminate the collection of fees for FY 2011-2012, and in fact State Water Board activities related to the Project continued during FY 2011-2012, substantial evidence supports the imposition of fees for FY 2011-2012.

### **5.3 THE DISTRICT CLAIMS THE FEE, AS APPLIED, IS UNCONSTITUTIONAL BECAUSE IT IS NOT REASONABLY RELATED TO THE ASSOCIATED COSTS OF THE REGULATORY ACTIVITY**

The District contends that the fee assessed is unconstitutional as applied. The District asserts that the federal license application was active for just 12 days of the FY before being dismissed by FERC.<sup>5</sup> First, the District claims that because the State Water Board denied the certification on March 1, 2011, (the date the Board denied reconsideration of the denial) there was no ongoing regulation in relation to the certification that occurred during FY 2011-2012. The District also asserts that the lawsuit filed by Nevada Hydro, which was not dismissed until November 28, 2011, was initiated solely by Nevada Hydro and that the District cannot be responsible for the FERC proceedings continuing until November 17, 2011.

The District's argument primarily pertains to its perceived reasonableness of the fees in relation to the benefit it received. The California Supreme Court recently upheld the legality of the statutes authorizing the collection of water right fees. (*California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal. 4<sup>th</sup> 421 (CFBF).) In its discussion of regulatory fees, the Court affirmed prior decisions holding that the scope of a regulatory fee is somewhat flexible and that regulatory fees are valid despite the absence of any perceived benefit accruing to the fee payers. (CFBF at 438.)

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<sup>5</sup> The District's argument ignores the effect of FERC's September 12, 2011 order granting rehearing. This had the effect of setting aside the earlier dismissal until FERC took final action on the petition for rehearing on November 17, 2011. And because the litigation challenging the State Water Board's denial of water quality certification was not dismissed until after FERC took final action on the petition for rehearing, the State Water Board continued to incur [footnote continues on next page]

As affirmed in previous decisions, the California Supreme Court has stated that when assessing fees, 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 the payor bear a fair and reasonable relationship to the payor's burdens on or benefits from the regulatory activity. (*Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 878.) A regulatory fee, however, does not require a precise cost-fee ratio to survive as a fee. (*California Assn. of Professional Scientists v. Dept. of Fish & Game*, (2000) 79 Cal App.4th 935, 950 (CAPS).) In CAPS, the Court recognized that flexibility is an inherent component of reasonability and that regulatory fees, unlike other types of fees, often are not easily correlated to a specific, ascertainable cost. The Court stated that this may be due to the complexity of the regulatory scheme, the multifaceted responsibilities of the responsible agency and its employees, intermingled funding sources, and accounting systems that are not designed to track specific tasks. (CAPS at 950.) In addition, as was noted by the court in CAPS, "whether the fees collected exceed the cost of the regulatory program they are collected to support need not be proved on an individual basis. Rather, the agency is allowed to employ a flexible assessment of proportionality within a broad range of reasonableness in setting fees." (CAPS at 948-49.)

The District also suggests the fees are unreasonable because it did not receive proportionate services in exchange for the fees assessed. But the District overlooks the fact that it (along with its co-applicant Nevada Hydro) was seeking an entitlement from the State Water Board when it initiated the certification process, and the Board incurs substantial expenses as part of the certification process. Regulatory fees charged to applicants or permittees are not unreasonable or otherwise unreasonable simply because the regulatory costs recovered through those fees are affected by the activities of others, especially where, as here, it is a co-applicant whose activities are at issue.

As discussed above, the State Water Board's regulatory costs related to water quality certification for the Project included costs incurred in FY 2011-2012. But the water quality certification fees would not be unreasonable even if there were no costs that FY. The validity of the fee depends on the reasonableness of the fee schedule in general, not whether the regulatory fee matches the regulatory expenses for any individual fee payer. And even if the

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expenses arising out of the application for water quality certification, even after FERC's July 12, 2011 initial dismissal  
[footnote continues on next page]

relationship of the fees to the regulatory costs for the individual fee payer was the test, an annual fee that is reasonable considering the overall costs of the multi-year period over which the fees were imposed would not be rendered invalid simply because there were no costs in any particular year. A reasonableness determination is not based on *when* an agency requires a fee for its services. For example, in *Carlton Santee Corp. v. Padre Dam Municipal Water Dist.* (1981) 120 Cal. App. 3d 14, the Court upheld a fee schedule where the developer was required to make immediate payment of \$2.9 million for water and sewer connection fees even though the developer had yet to obtain approval of the tentative subdivision map, the final subdivision map, and necessary building permits. The developer was required to pay fees upon the district's determination of availability rather than upon the actual furnishing of the service. Noting the impropriety of courts substituting their own judgment of reasonableness for that of the responsible agency, the Court upheld the reasonableness both of the timing and amount of the facilities fees charged. (*Id.* at 28-30.)

The water quality certification fees applied to the District and Nevada Hydro are fair and reasonable. The State Water Board continued to incur costs related to the District and Nevada Hydro's application for a FERC license in FY 2011-2012. Prorating fees based on the proportion of the year during which an application for certification is pending is unnecessary, and would be unworkable. The fee schedules are established and the fee assessments are determined relatively early in the FY. Applications may be denied or withdrawn after the fees are assessed. Calculating the fees based on the proportion of the FY during which the applications for certification are pending would be unworkable. And as this case indicates, the State Water Board continues to expend resources in response to applications for water quality certification even after a certification is dismissed. The annual fee for the Project was calculated correctly based on the authorized generation capacity of 500 megawatts.

In summary, because the fee schedule provides a fair and reasonable basis for determining when annual fees are due, an individualized determination of costs is not required. Accordingly, no reduction or refund of the fee is required.

## **6.0 CONCLUSION**

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of the application for FERC licensing.

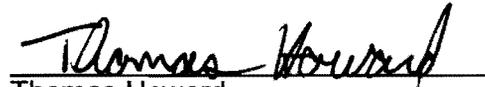
The Executive Director finds that the decision to impose 401 certification fees on co-applicants The Nevada Hydro Company and Elsinore Valley Municipal Water District was appropriate and proper. The petition for reconsideration is denied.

**ORDER**

**IT IS HEREBY ORDERED THAT** Elsinore Valley Municipal Water District's petition for reconsideration is denied.

Dated:

10/10/2012

  
Thomas Howard  
Executive Director