

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

**ORDER WRO 2004 -0021- EXEC**

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In the Matter of the Petition for Reconsideration of  
**PALO VERDE IRRIGATION DISTRICT**  
Regarding Water Right Fee Determinations

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**ORDER DENYING RECONSIDERATION**

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

**1.0 INTRODUCTION**

By this order, the Executive Director denies Palo Verde Irrigation District's (PVID) petition for reconsideration of the State Water Resources Control Board's (SWRCB) determination that PVID was required to pay an annual water right fee in the amount of \$32,578.99 for Permit 7652 (Application 9280; Board of Equalization (BOE) Account No. WR MT 94-002098). PVID argues that Senate Bill 1049 and the SWRCB's fee regulations are unlawful for a variety of reasons. In addition, PVID claims that it does not hold a state water right and, to the extent that it does, that the SWRCB improperly calculated the annual permit fee.

For the reasons set forth below, the Executive Director finds that the decision to impose the fee was appropriate and proper and therefore PVID's petition for reconsideration is denied.

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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 SWRCB. Unless a petition for reconsideration raises matters that the SWRCB wishes to address or requires an evidentiary hearing before the SWRCB, the Executive Director's consideration of a petition for reconsideration of a disputed fee 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.

## **2.0 LEGAL AND FACTUAL BACKGROUND**

The SWRCB's 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 (Stats. 2003, ch. 157) 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 right program. Senate Bill 1049 (Stats. 2003, ch. 741) 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 and Senate Bill 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. (Legislative Analyst's Office, Analysis of the 2003-04 Budget Bill at pp. B-123 through B-126.) 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.

(*Id.* 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.*)<sup>2</sup>

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. Most fees will be deposited in the Water Rights Fund, which can 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 Senate Bill 1049 and the emergency regulations became effective on January 1, 2004.

BOE issued bills on or about January 8, 2004, for certain types of fees, including annual permit and license fees. These bills included a Notice of Determination that PVID owed an annual water right fee for Permit 7652. Permit 7652 authorizes the diversion of water from the Colorado River for irrigation and domestic purposes at an average rate not to exceed 1,500 cubic feet per second from January 1 to December 31. Pursuant to section 1066, subdivision (a) of the SWRCB's regulations,<sup>3</sup> the annual fee for PVID's permit was \$0.03 per acre-foot, based on the total amount of water authorized to be diverted under the permit. The amount of water authorized to be diverted was calculated by multiplying the maximum average rate of diversion

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<sup>2</sup> The Legislative Analyst recommended that the entire water right program be funded through fees, and that the fees also support the water right related activities of the Department of Fish and Game. (Legislative Analyst's Office, Analysis of the 2003-04 Budget Bill at pp. B-125 through B-126.) Although the Legislative Analyst states that water right holders "benefit directly" from the water rights program (*id.* at p. B-125), this statement simply recognizes that the fee payers benefit from the program, even though the program also serves to protect against harm to a public resource. The Legislative Analyst recognized that the water right program is a regulatory program that includes environmental review of proposed appropriations and continuing oversight of permitted and licensed diversion and use. (See *id.* at pp. B-123 through B-124.) The Legislative Analyst proposed fees for various resource and environmental programs that included a combination of fees for services that directly benefit the fee payer, such as fire protection fees, and regulatory fees, such as fees for dam safety inspections. (*Id.* at pp. B-3 through B-4.) Senate Bill 1049 establishes the water right fees as regulatory fees, which may be based on the need for regulation instead of basing the fees on the value of the benefits conferred. (See Wat. Code, § 1525, subd. (c).)

<sup>3</sup> All further regulatory references are to the SWRCB's regulations located in title 23 of the California Code of Regulations unless otherwise indicated.



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 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).) Section 769, subdivision (c) of the regulations provides further 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. A petition must be filed within 30 days after adoption of the SWRCB decision or order of which the petitioner requests reconsideration. (*Id.* § 768.)

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).)

#### **4.0 DISCUSSION**

PVID alleges that (1) PVID does not hold any state water rights; (2) the fee constitutes an unconstitutional tax; (3) Senate Bill 1049's provision for under-collection of fees imposes a discriminatory tax; (4) the fee should have been based on the amount of water consumed by PVID; (5) the provisions of Senate Bill 1049 that authorize the SWRCB to impose fees on certain water supply contractors are unconstitutional and discriminatory; and (6) the SWRCB lacked the authority to adopt the fee regulations before the effective date of Senate Bill 1049.

For the reasons discussed below, these arguments are without merit. In addition, PVID's petition should be denied for failure to comply with the SWRCB's procedural requirements. The petition, which is one and a half pages long, does not provide an adequate statement of points and authorities in support of the legal issues raised, in violation of section 769, subdivision (c) of the SWRCB's regulations. It is difficult to ascertain the basis of PVID's arguments based on the petition. In addition, the petition does not include the information required by section 769, subdivisions (a)(3), (5) & (6).

#### **4.1 PVID Is the Owner of Record of Permit 7652**

PVID alleges that it does not hold any state water rights and that its right to divert from the Colorado River is solely a contract right. PVID has a contractual entitlement to Colorado River water, but it is also the owner of record of Permit 7652. Accordingly, the annual permit fee was properly assessed.

#### **4.2 The Fee Regulations Establish Lawful Regulatory Fees**

PVID contends that the fee constitutes an unlawful tax because the fee exceeds the reasonable cost of the regulatory services provided by the SWRCB. In addition, PVID argues that the fee violates various provisions of the California Constitution governing property taxes. More specifically, PVID contends that the fee is a tax on real property in excess of the limits contained in article XIII, sections 1 and 2. PVID also contends that the fee is unconstitutional because Senate Bill 1049 was not passed by a two-thirds vote as required by article XIII, sections 1 and 2.<sup>5</sup> Contrary to PVID's contentions, however, the water right fee is a regulatory fee, not a tax, and therefore the fee does not violate the constitutional provisions cited by PVID.

A regulatory fee is a fee “charged in connection with regulatory activities, which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and which are not levied for unrelated revenue purposes.” (*Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 876 [64 Cal.Rptr.2d 447].) 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] (hereinafter *CAPS*) citing *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227, 235 [211 Cal.Rptr. 567].)

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<sup>5</sup> Article XIII, sections 1 and 2 do not contain a two-thirds vote requirement for real property taxes. Presumably, PVID intended to refer to article XIII, section 3.

A regulatory fee does not require a precise cost-fee ratio to survive as a fee. (*CAPS, supra*, 79 Cal.App.4th at p. 950.) In *CAPS*, the court recognized that flexibility is an inherent component of reasonableness and that regulatory fees, unlike other types of fees, often are not easily correlated to a specific, ascertainable cost 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. (*Id.* at p. 950.) (See *CAPS, supra*, at p. 946 [rejecting argument that an agency must demonstrate an individual correlation between the amount of the fee and the cost of the benefit or burden].) “Proportionality is measured collectively to assure that the fee is indeed regulatory and not revenue raising.” (*Id.* at p. 948.)

The water right fees, including the annual permit fee at issue here, satisfy the first prong of the test of regulatory fees because the fees do not exceed the estimated costs of administering the water right program. In accordance with the Water Code, the water right fees are calculated solely to cover the costs of the SWRCB’s water right program and not to generate additional revenue. (Wat. Code, §1525, subd. (c).) The SWRCB must set a fee schedule that will generate revenues in the amount the Budget Act sets for water right fee revenues, and it must review and revise the fees each fiscal year as necessary to conform to the revenue levels set forth in the annual Budget Act. If the revenue collected is greater or less than the amount set in the annual Budget Act, then the SWRCB may further adjust the annual fees to compensate for the over or under collection of revenue. (Wat. Code, § 1525, subd. (d)(3).)

In addition, Senate Bill 1049 created a special fund, the 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). All water right fees are deposited in the Water Rights Fund. (*Id.* § 1551.) These funds may be expended only for specified purposes, all of which involve administration of the water rights program, administration of water quality certification for hydroelectric projects licensed by the Federal Energy Regulatory Commission, a program carried out by the Division, or administration of the fees by the SWRCB and BOE. (*Id.* § 1552.)

The water right fees satisfy the second prong of the test of regulatory fees because the costs

apportioned to each fee payer bear a reasonable relationship to the payer's burdens on or benefits from the SWRCB's regulatory activities. Annual permit and license fees provide the majority of funding for the Division's regulatory activities in the second half of Fiscal Year 2003-2004. This is appropriate because a majority of the Division's costs are related to managing and protecting existing water rights. These actions include the following: investigating complaints alleging violation of permit or license conditions, waste of water, or violation of the public trust in water; 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.<sup>6</sup> Additionally, a substantial portion of the cost of processing applications and petitions is devoted to protecting other 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 addition to bearing a reasonable relationship to the SWRCB's costs of administering existing water rights, the annual fees are apportioned among permittees and licensees in a reasonable manner. The annual fees are distributed in proportion to the distribution of water among permit and license holders. In general, the Division's workload is related to size of the authorized diversion, and the Water Code expressly authorizes the SWRCB to set fees schedules that are graduated. (Wat. Code, § 1530, subd. (a).) Because permittees and licensees pay the same rate per acre-foot, larger diverters pay higher fees. This is reasonable because larger diversions

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<sup>6</sup> The fee schedule adopted by the SWRCB also includes filing fees for change petitions, but these fees will not cover the entire cost of those proceedings. It can be difficult to determine how much water should be deemed to be involved when a change in permit or license terms is proposed and the costs of processing a petition are not closely related to the amount of water involved. In addition, imposing higher filing fees for change petitions may result in unauthorized activities, thus causing additional enforcement issues. Accordingly, the SWRCB decided that most of the cost of administering changes in permits and licenses should be supported by annual permit and license fees instead of petition filing fees.



generally have a greater impact on third-party water right holders and the environment. Thus, the fee allocation bears a reasonable relationship to the benefits provided by and burdens to the regulatory activity. Absolute precision is not required.

In summary, the water right fees are regulatory fees, not taxes. Accordingly, the fees do not violate the constitutional provisions governing property taxes cited by PVID. (See *Kern County Farm Bureau v. County of Kern* (1993) 19 Cal.App.4th 1416, 1427 [23 Cal.Rptr.2d 910] [landfill charge not a tax and therefore did not violate constitutional prohibition against double taxation].)

#### **4.3 The Provisions for Under-Collection of Fees Do Not Impose a Discriminatory Tax**

PVID argues that the provisions of Senate Bill 1049 that authorize uncollected fees to be passed on to others constitutes a discriminatory tax because the fees are not reasonably related to the cost of providing the service attributable to the fee. Water Code section 1525, subdivision (d)(3) permits the SWRCB to adjust the annual fees to compensate for the over or under collection of revenues. Contrary to PVID's assertion, the purpose of this provision is to ensure that the fees are reevaluated to avoid collection of revenues in excess of long-term program needs. (See, e.g., *CAPS, supra*, [upholding constitutionality of statute imposing fee where statute provided for annual review and recommendations for adjustment of fees as necessary to pay the program's costs].) In combination with the deposit of fee revenues in a special fund that can be used only for program purposes, the periodic recalculation of the fees under Water Code section 1525, subdivision (d)(3) assures that the fees will not be used for unrelated revenue purposes.

Although PVID does not challenge the SWRCB's regulations directly, it merits note that the fee schedule set forth in the regulations is based on the assumption that 40 percent of the fees billed this fiscal year would not be paid. The 40 percent non-collection assumption was necessary to implement the statutory requirement that the fees be set so that the amount "collected" this fiscal year would cover the water right program's costs. (Wat. Code, § 1525, subs. (c) & (d)(3).) Although the fees assessed to each individual permit or license holder this fiscal year are higher than they would have been if the SWRCB had assumed 100 percent of the assessed fees would be paid, the SWRCB is not required to demonstrate the proportionality of the fees on an individual basis. (See *CAPS, supra*, at p. 946.) Moreover, the fees will be adjusted over the long

term to account for the collection of unpaid fees. The SWRCB and BOE will continue to seek collection of the fees from those who fail to pay. In many cases, the fees will be collected later, with interest and penalties, and deposited in the Water Rights Fund. (Wat. Code, § 1551.) To the extent that the SWRCB and BOE are able to collect delinquent fees, those revenues will be used to support the water right program, and the fees set in later years will be adjusted to take into account these additional revenues.

#### **4.4 The Annual Fee for Permit 7652 Was Properly Calculated**

PVID argues that the annual permit fee should have been assessed based on the amount of water that PVID consumptively uses each year. The SWRCB properly calculated the fee, however, based on the total amount authorized to be diverted, in accordance with the SWRCB's regulations. (Cal. Code Regs., tit. 23, § 1066, subd. (b).)

Senate Bill 1049 delegates to the SWRCB substantive rulemaking authority. Accordingly, the SWRCB's regulations are quasi-legislative rules with the dignity of a statute and, as such, are subject to a more narrow scope of judicial review than an administrative interpretation. (Wat. Code, § 1530; *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 10 [78 Cal.Rptr.2d 1].) "If satisfied that the rule in question lay within the lawmaking authority delegated by the Legislature, and that it is reasonably necessary to implement the purpose of the statute, judicial review is at an end." (*Id.* at pp. 10-11.)

In this case, basing annual fees on the amount of water that is authorized to be diverted under each permit and license is a reasonable method of apportioning the SWRCB's regulatory costs among water users as required by Senate Bill 1049. The amount of water authorized to be diverted serves as an objective measure that is easily determined on the face of the permit or license. To assess a fee, as PVID suggests, that accounts for the detailed minutia of actual water use each year for each individual permit or license is administratively impossible for the SWRCB at this time, due to a variety of factors, including the annual changes that occur as a result of the inherent variability of the water supply, the lack of adequate measuring devices and reporting, database constraints, and limited staff resources. The number of variables that the

SWRCB would need to consider in calculating each individual fee assessment, if based on actual water use, renders this approach impracticable.

Moreover, a fee system based on the amount of water used would ignore the fact that much of the water right system is based on water that is authorized for diversion under a permit or license, but not currently being put to use. For instance, before approving an application for a water right, the SWRCB must find that water is available for appropriation. (Wat. Code, § 1375, subd. (d).) This requirement is intended to avoid over-committing the water supply. Therefore, the evaluation is by necessity conservative. This evaluation includes consideration of other diversions authorized under permits and licenses in determining whether and on what conditions to approve new appropriations. Further, much of the ongoing administration of water rights under the program involves the continuing oversight of permits and licenses and the water right holder's compliance with applicable terms and conditions. These activities include the Division's review of whether permitted water rights are being developed in accordance with the due diligence requirements of the Water Code and SWRCB regulations, consideration of changes proposed to make use of appropriations that are authorized but have not yet been perfected by putting the water to beneficial use, and monitoring and enforcement to determine when permits and licenses should be revoked for non-use.

It should also be recognized that, because the fees are set to cover program costs as specified in the Budget Act, a change in the approach by which the amount of water involved is calculated would not necessarily reduce the fee charged to PVID. For example, because the combined face value of all permits and licenses vastly exceeds the amount of water diverted each year, the amount charged per acre-foot would be many times higher if permit and license fees were based on actual diversion instead of face value. If fees were based on consumptive use, as PVID suggests, the amount charged per acre-foot would be even higher, because many diversions are for non-consumptive uses, such as hydropower generation. PVID would be assessed a substantially higher fee if annual fees were calculated based on amounts consumptively used, and the charge per acre-foot were increased accordingly.

#### **4.5 PVID Lacks Standing to Challenge Fees Imposed on Water Supply Contractors**

PVID claims that Senate Bill 1049 discriminates against water supply contractors who may be assessed fees relative to permittees and licensees. PVID was not assessed a fee on the basis of a water supply contract, however, and therefore lacks standing to challenge the fees assessed against water supply contractors.

#### **4.6 The SWRCB Had the Authority to Adopt the Fee Regulations Prior to Effective Date of Senate Bill 1049**

PVID's final argument is that the SWRCB did not have the power to adopt the fee regulations on December 15, 2003, because that was before the January 1, 2004, effective date of Senate Bill 1049. PVID does not provide any analysis or citation to authorities to explain the basis for this claim.

The SWRCB clearly had authority to adopt the regulations. (See Gov. Code, § 11349, subd. (b) [defining authority for purposes of adopting administrative regulations].) Water Code section 1058, as in effect both before and after January 1, 2004, authorizes the SWRCB to make rules and regulations that it deems advisable to carry out its powers and duties. The effective date of the fee regulations was January 1, 2004, the same date as Senate Bill 1049. It was reasonable, and within the discretion granted to the SWRCB in section 1058, to adopt regulations implementing a change in the statutes governing water right fees, to take effect at the same time as that statutory change took effect. Because the regulations did not take effect before January 1, 2004, adopting the regulations did not create any conflict between the regulations and the statutes in effect before that date. By updating its regulations, with an effective date of January 1, 2004, the SWRCB assured consistency between its regulations and the relevant provisions of Senate Bill 1049 as soon as those provisions took effect. (See Gov. Code, § 11349, subd. (d).) The SWRCB proceeded in a manner fully consistent with the fundamental requirement that administrative regulations be consistent with applicable statutes.

#### **5.0 CONCLUSION**

PVID's petition for reconsideration does not comply with the SWRCB's procedural requirements. In addition, for the reasons discussed above, the SWRCB's decision to impose the

annual water right permit fee on PVID was appropriate and proper. Accordingly, PVID's petition for reconsideration should be denied.

**ORDER**

**IT IS HEREBY ORDERED THAT** PVID's petition for reconsideration is denied.

Dated: April 15, 2004

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

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