

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2005-0018-EXEC

In the Matter of the Petition for Reconsideration of
BOULDER CREEK GOLF AND COUNTRY CLUB, INC.
Regarding Annual Water Right Petition Fee for Application 24172

ORDER GRANTING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR¹

1.0 INTRODUCTION

Boulder Creek Golf and Country Club, Inc. (Petitioner) petitions the State Water Resources Control Board (State Water Board or SWRCB) for reconsideration and a refund of an annual water right petition fee assessed by the State Board of Equalization (BOE) on February 11, 2005. The State Water Board grants Petitioner's request for reconsideration.²

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

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 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.

² 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.)

of the fee. (Cal. Code Regs., tit. 23, § 1077.)³ 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

³ 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 became effective on October 14, 2004. Pursuant to section 1065, subdivision (b) of the regulations, a person must pay an annual petition fee for projects where a person has filed a change petition, but “diverts or uses water, before the [State Water Board] approves the requested change, in a manner that is not authorized without approval of the requested change.” (§ 1065, subd. (b).)

In June 2004 Petitioner filed two petitions on Application 24172 (Permit 18224), a change petition and a time extension petition. On February 11, 2005, BOE assessed Petitioner two annual petition fees of \$1,000 each, pursuant to section 1065, subdivision (b) of the State Water Board’s regulations. Petitioner timely filed a petition for reconsideration.

4.0 PETITIONER SHOULD BE ASSESSED ONLY ONE ANNUAL PETITION FEE

Petitioner’s sole objection is that State Water Board imposed two annual petition fees instead of one. In other words, Petitioner believes that it should pay a total of only \$1,000 in annual petition fees. Petitioner cites to the introductory provision of section 1065, which states that “a person filing a petition shall pay an annual fee of \$1,000 for each water right permit or license covered by the petition.” Because Petitioner seeks changes to only one permit, Petitioner contends, section 1065 only requires a single annual petition fee.⁴

Code of Regulations unless otherwise indicated.

⁴ Alternatively, Petitioner contends, section 1065 only applies to change petitions and not time extension petitions. (But see § 1064 [setting filing fees for petitions and using the term “petition” to include petitions for extension of time].) Because the State Water Board grants reconsideration on other grounds, it need not address this argument.

Although the issue is a close one, the better interpretation of section 1065 is that it requires only one annual petition fee when multiple petitions are filed on a single water right. As Petitioner points out, this interpretation is consistent with the State Water Board's regulations that require a single filing fee when multiple changes are involved on single water right and those changes are of such a nature that action can be taken on them simultaneously. (§ 793.)⁵ Accordingly, Petitioner's request for reconsideration of its annual petition fees is granted and Petitioner shall receive a refund of \$1,000 plus any interest due on that amount.

The State Water Board notes, however, that it may consider this issue further in future revisions to the fee regulations and may amend the regulations accordingly.

5.0 CONCLUSION

For the reasons discussed above, the State Water Board grants Petitioner's request for reconsideration of its annual petition fees.

ORDER

IT IS HEREBY ORDERED THAT the petition for reconsideration is granted. The State Water Board shall direct BOE to refund Petitioner's \$1,000 annual petition fee plus any interest due on that amount.

Dated: July 14, 2005

ORIGINAL SIGNED BY HARRY SCHUELLER for
Celeste Cantú
Executive Director

⁵ Section 793 is part of an article setting procedures for changes for petitions for change in point of diversion, place of use or purpose of use, but State Water Board regulations also provide that these procedures should be followed to the extent possible in processing petitions for other types of changes. (§ 791, subd. (e).) In fact, the State Water Board charged Petitioner only one filing fee for the two petitions. There is no apparent basis for interpreting section 1064, which sets the initial filing fees for petitions, in a different way than section 1065, which sets subsequent annual fees for petitions, in this regard.