

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2015 -0021- EXEC

In the Matter of the Petition for Reconsideration of
COACHELLA VALLEY WATER DISTRICT
Regarding Water Right Fee Determinations

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR¹

1.0 INTRODUCTION

By this order, the Executive Director denies Coachella Valley Water District's (CVWD) petition for reconsideration of the State Water Resources Control Board's (State Water Board or Board) determination that CVWD was required to pay the following annual water right fees imposed for fiscal year 2013-14: \$15,497.79 for Permit 536 (Application 1122; Board of Equalization (BOE) Account No. WR STF 94-000438); \$2,216.47 for Permit 3011 (Application 2922; BOE Account No. WR STF 94-000705); and \$76,891.08 for Permit 7650 (Application 7483; BOE Account Number WR STF 94-001703). In general, CVWD alleges that the fees are unlawful because (1) they exceed the reasonable cost of regulating the activity for which the fees are charged, and (2) they do not provide a fair, reasonable, and substantially proportionate assessment of costs attributable to the regulation of CVWD's exercise of its permitted rights. CVWD requests the State Water Board to (1) determine that CVWD is not required to pay any annual water right fees for Permits 536, 3011, and 7650; (2) cancel the fee assessment; and (3) refund CVWD's payment of a total of \$94,605.34.

¹ State Water Board Resolution No. 2002 - 0104 delegates to the Executive Director the authority to supervise the activities of the Board. Unless a petition for reconsideration raises matters that the Board wishes to address or requires an evidentiary hearing before the Board, 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.

For the reasons set forth below, the Executive Director finds that the decision to impose the fees was appropriate and proper and therefore CVWD's petition for reconsideration should be denied.

2.0 LEGAL AND FACTUAL BACKGROUND

The State Water Board is the state agency primarily responsible for administering the State's water right program. The State Water Board administers the program through its Division of Water Rights (Division). The funding for the water right program is scheduled separately in the Budget Act (and through a continuous appropriation discussed below) and includes funding from several different sources. 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 (S.B. 1049)) 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 fiscal year and, as necessary, revises the schedule so that the fees will generate revenues consistent with the amount appropriated by the Legislature from the Water Rights Fund, taking into account the reserves in the fund. (*Id.*, § 1525, subd. (d)(3).) If the revenue collected in the preceding year was greater than, or less than, the amounts appropriated, 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.)

As explained in a Memorandum to File from Barbara Evoy, Deputy Director for the Division of Water Rights, dated January 31, 2014, entitled "Recommended Water Right Fee Schedule for Fiscal Year 2013-14" (hereinafter "Evoy Memorandum"), in fiscal year 2013-14, the Legislature appropriated \$18.908 million from all funding sources for water right program expenditures by the State Water Board. The Evoy Memorandum provides more detail, but in sum, this amount includes \$13.0 million for the support of the State Water Board from the Water Rights Fund and a continuous appropriation from the Water Rights Fund of \$3.75 million for enforcement² for a

² In addition to the annual Budget Act, Senate Bill No. 8 of the 2009-2010 Seventh Extraordinary Session (Stats. 2009, 7th Ex. Sess., ch. 2) (SB 7X 8), § 11, makes a continuous appropriation from the Water Rights Fund of \$3.75 million for water right enforcement. In 2011, the Legislature amended Water Code section 1525, subdivision (d)(3) to clarify that the amounts collected through fees should be sufficient to
[[footnote continues on next page]

total of \$16.75 million appropriated to the State Water Board from the Water Rights Fund (not including an approximately \$17,000 carryover from prior years' continuous appropriations). The State Water Board's budget for the water right program also included \$1.067 million in General Fund³ and \$499,000 from other sources. In addition to the amounts appropriated to the State Water Board, the Legislature appropriated \$475,000 from the Water Rights Fund to BOE for its water right fee collection efforts, \$39,000 from the Water Rights Fund to the California Environmental Protection Agency for support functions that the agency provides for the Board's water right program, and \$78,000 to the Financial Information System of California.

In accordance with the Water Code, 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 appropriations made from the fund, taking into account money in the fund from other sources.⁴ As explained in the Evoy Memorandum, the Water Rights Fund had a beginning balance of \$3.758 million for the 2013-2014 fiscal year. In calculating the amount needed to be collected through fee revenues, the Division also considered the Water Rights Fund balance at the beginning of the fiscal year, which serves as a prudent reserve. In reviewing the fee schedule, the Division considers a 10 percent fund reserve to be prudent. In recent years, the fund reserve has been drawn down by collecting less revenue annually than is expended. Without any annual fee increase, the projected reserve for fiscal year 2013-14 would have been 9.1 percent, which is below the amount the Division considers to be prudent. To prevent the projected fund reserve from being drawn down below 10 percent, the Division proposed increasing annual permit, license and pending application fees by increasing the per acre-foot charge from \$0.05 to \$0.053. The Division also proposed adjusting the caps on application and petition filing fees based on changes in the consumer price index; and amending section 1068 to specify that the \$250 registration fee for any person who registers an appropriation of water for small domestic, livestock stock pond or small irrigation use is

cover the appropriations set forth in the Budget Act and the continuous appropriation in SB 7X 8. (Stats. 2011, ch. 579, § 9.)

³ The Legislature appropriated an additional \$2.5 million in General Fund for drought-related water right and water conservation actions as part of an amendment to the Budget Act included in drought response legislation enacted after the Evoy Memorandum as prepared. (Stats. 2014, ch. 346, § 16.)

⁴ 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 penalties collected for water right violations (*id.*, § 1551, subd. (b)). The calculations used to determine water right fees do not include appropriations from funds other than the Water Rights Fund.

non-refundable. With these increases, the projected fee revenue was \$16.181 million. With estimated total expenditures of \$17.462 million for the fiscal year, expenditures were projected to exceed fee revenues by \$1.281 million, thereby decreasing the total amount in reserve to \$2.477 million, which amounts to a 14.2 percent fund reserve. Although this fee schedule would not draw down the fund reserve to 10 percent of annual expenditures, the fund was expected to reach a 10 percent reserve level in fiscal year 2014-15 based on the Governor's proposed budget for fiscal year 2014-15 and the fee schedule for fiscal year 2013-14. For the purposes of calculating the fees for fiscal year 2013-14, the Division forecasted a total of \$15.100 million to be collected in regulatory fees for fiscal year 2013-14. The total projected revenue for the Water Rights Fund in fiscal year 2013-14 was \$16.181 million.

On October 8, 2013, the State Water Board accepted the Division's recommendations and adopted Resolution 2013-0032, revising the emergency regulations governing water right fees for fiscal year 2013-14. The Office of Administrative Law approved the emergency regulations on October 31, 2013. On November 5, 2013, the State Water Board issued the annual fee assessments. The deadline for filing a petition for reconsideration of the November 5, 2013 assessments was December 5, 2013. Petitioner filed a petition for reconsideration of the determination that it was required to pay annual fees, which was received on December 3, 2013.

3.0 LITIGATION REGARDING THE ANNUAL WATER RIGHT FEES

In 2011, the California Supreme Court issued a decision on the statute authorizing the water right fees and the State Water Board's annual fee regulations for fiscal year 2003-2004. (*California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421 (hereafter *CFBF v. State Water Board*)). The Supreme Court upheld the water right fee statutes (e.g., Wat. Code, §§1525, 1540, 1560), but remanded issues concerning the application of these fees through the State Water Board's regulations back to the trial court for further fact-finding. Specifically, the Supreme Court directed the trial court to make factual findings as to whether the fees, including the annual permit and license fees, were reasonably related to the costs of the regulated activity. (*CFBF v. State Water Board, supra*, 51 Cal.4th at pp. 442, 446.) In December 2012, a trial was held in the Sacramento County Superior Court on the application of the water right fees for fiscal year 2003-2004. On November 12, 2013, the superior court issued its Final Statement of Decision, invalidating the 2003 fee regulations. That decision explicitly acknowledges that it is not directed at fee regulations applied in subsequent

years, including the fees at issue in the present petition. The State Water Board disagrees with the superior court's decision on the fiscal year 2003-04 fee regulations and has appealed the decision. The appeal remains pending.

4.0 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 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 State Water 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 that 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)(2).) 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.

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.

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 State Water Board will not consider late petitions.

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. (*Id.* § 770, subd. (a)(1).) Alternatively, after review of the record, the 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.* § 770, subd. (a)(2)(A)-(C).)⁶

5.0 DISCUSSION

5.1 The Fee Regulations Establish Lawful Regulatory Fees

CVWD contends that the annual permit and license fees constitute taxes, not regulatory fees. Based on the contention that the fees are taxes, CVWD argues that the fee regulations exceed statutory authority because Water Code section 1525 authorizes the imposition of fees, not taxes. In addition, CVWD argues that interpreting Water Code section 1525 to authorize imposition of taxes would make the statute unconstitutional because article XIII A, section 3 of the California Constitution requires any tax increases to be imposed by a statute passed by a two-thirds vote in each house of the Legislature, and section 1525 was not enacted by a two-thirds vote. Contrary to CVWD's contention, however, the water right fees are regulatory fees, not taxes, and therefore the fee regulations do not exceed statutory authority or violate the two-thirds vote requirement for state tax increases.

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

⁶ 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 WQ 98-05-UST at pp. 3-4.)

charged and which are not levied for unrelated revenue purposes." (*Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 876[.]) Regulatory fees must bear a reasonable relationship to the costs of the regulatory activity. (*CFBF v. State Water Board, supra*, 51 Cal.4th at p. 442.) In *California Association of Professional Scientists v. Department of Fish and Game* (2000) 79 Cal.App.4th 935, 950, 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.

CVWD argues that the annual permit and license fees are not valid regulatory fees because they exceed the reasonable cost of regulating permit and license holders. In support of this argument, CVWD points out that no fees are assessed against holders of thirty-eight percent of all water rights in California, including riparian and pre-1914 appropriative right holders, despite the fact that such holders benefit from the Board's regulatory activities.

This argument lacks merit because the annual permit and license fees bear a reasonable relationship to the cost of regulating permittees and licensees, and the fact that riparian and pre-1914 appropriative right holders also may benefit from the Board's regulatory activities does not render the fees invalid. Most of the Division's costs involve administration and oversight of the water right permit and license program. 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 Board approval of changes in point of diversion, place of use, or purpose of use.⁷ Additionally, a substantial portion of the cost of

⁷ The fee schedule adopted by the State Water Board also includes 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 fees for change petitions may result in unauthorized activities, thus causing additional enforcement issues. Accordingly, the Board 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 fees.

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.

To the extent that the Division's costs do not involve administration of the permit and license program, the Division's costs are covered by other funding sources. In fiscal year 2013-14 General Fund appropriations, including the funding appropriated as part of response legislation,⁸ and other non-fee supported appropriations amounted to about 19 percent of the funds appropriated for the water right program. As discussed more fully in the Evoy Memorandum, the Division of Water Rights, the Office of Chief Counsel, and the Delta Watermaster undertake work involving riparian and pre-1914 appropriative water rights. Any such work that is not also associated with the administration of the permit and license program is funded by the General Fund or other sources and is not funded by the Water Rights Fund. Funding from sources other than the Water Rights Fund are allocated to activities that do not involve administration of the permit and license program at the start of the fiscal year, and expenditures against these funding sources are tracked by charges made to specific task codes. Work is performed and charges are made to the task codes for these other activities only to the extent the funds are available. If funding from these sources becomes unavailable, then the activity must cease.

As described above, the annual permit and license fees bear a reasonable relationship to the State Water Board's costs of regulating permittees and licensees. Accordingly, the fees are valid, notwithstanding the fact that riparian and pre-1914 water right holders also benefit from the State Water Board's regulatory activities.

In addition to its contention that the annual permit and license fees as a whole are invalid, CVWD contends that the fees assessed against CVWD in particular are invalid because they exceed the cost of regulatory services provided to CVWD. CVWD claims that the State Water Board's only regulatory activity in connection with CVWD's permits consists of mailing and

⁸ See fn. 3, *supra*.

recording statements of diversion, and that the costs of providing this service vastly exceeds the annual permit fees imposed on CVWD.

CVWD assumes that a regulatory fee must allocate to each individual permittee and licensee a proportionate share of the cost of the State Water Board's services. The Board, however, is not required to demonstrate the proportionality of the fees on an individual basis. As discussed by the California Supreme Court, permissible fees "need not be finely calibrated to the precise benefit each individual fee payor might derive." (*CFBF v. State Water Board, supra*, 51 Cal.4th 421, 438.) "The question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payors." (*Ibid.*, citing *California Association of Professional Scientists v. Department of Fish and Game, supra*, 79 Cal.App.4th 935, 948.)

The annual permit and license fees are apportioned among permittees and licensees in a reasonable manner. The annual fees are distributed in proportion to the amount of water that each permit and license holder is authorized to use. In general, the Division's workload is related to size of the authorized diversion, and the Water Code expressly authorizes the State Water Board 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 generally have a greater impact on third-party water right holders and the environment. Thus, the fee allocation bears a reasonable relationship to the burdens placed on the regulatory system by permittees and licensees.

CVWD argues that the State Water Board's regulatory activity is generated by actual diversions, not authorized diversions, and therefore CVWD's fees should have been calculated based on the total amount of water actually diverted under its permits. Contrary to this argument, the fees were properly calculated based on the amount of water authorized to be diverted under CVWD's permits, as required by the Board's regulations. (§ 1066, subd. (b).) This method of apportioning the fees was valid because, as stated above, a general correlation exists between the Division's workload and the amount of water authorized to be diverted under permits and licenses. Moreover, apportioning the fees, as CVWD suggests, based on actual water use under each individual permit or license would not have been feasible or reasonable, for the reasons set forth at pages 29-33 of Order WRO 2004-0011. The reasoning set forth in Order WRO 2004-0011 is incorporated herein by reference.

In summary, the water right fees are valid regulatory fees, not taxes. Accordingly, the State Water Board's fee regulations do not exceed statutory authority or violate the two-thirds vote requirement for state tax increases. (See *Kern County Farm Bureau v. County of Kern* (1993) 19 Cal.App.4th 1416, 1427 [landfill charge not a tax and therefore did not violate constitutional prohibition against double taxation].)

5.2 The Non-Collection Assumption Was Appropriate and Proper

CVWD's final argument is that the fees are unlawful because they were based on the assumption that some percentage of the fees billed for the 2013-2014 fiscal year would not be collected. CVWD argues that Water Code section 1525, subdivision (d)(3), which authorizes the State Water Board to adjust the fees each year to compensate for the under or over collection of fees during the preceding year, provides the exclusive method for addressing under-collection in a given year. CVWD also asserts that the non-collection assumption was arbitrary and capricious because it was not based on any evidence and has the effect of charging those who pay their fees extra in order to make up for those who do not pay.

As described in the Evoy Memorandum, the State Water Board assumed a modest non-collection rate of approximately five percent for the 2013-2014 fiscal year. As explained below, taking this non-collection rate into account in determining the amount of revenue needed to be collected in fees was consistent with Water Code section 1525 and had a reasonable basis in the record.

The State Water Board'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[.] "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, the five percent non-collection assumption was reasonably necessary to implement the statutory requirement to set the fees so that the amount "collected" in a fiscal year covers the water right program's costs. (Wat. Code, § 1525, subds. (c) & (d)(3).) It was necessary for the State Water Board to assume a certain non-collection rate to ensure that it collects the proper amount of revenue. And the assumption of a non-collection rate of five percent was

supported by substantial evidence. When the fee program was first implemented, the non-collection rate was relatively high. But non-payment has decreased since then, and BOE has collected past-due fees. The non-collection rate in recent years has been approximately five percent, and it was reasonable to assume that the non-collection rate for fiscal year 2013-2014 would remain the same. To have assumed a 100 percent collection rate, as CVWD seems to suggest, would have been unrealistic and contrary to the Board's recent experience.

6.0 CONCLUSION

For the reasons discussed above, the State Water Board finds that its decision to impose the annual water right permit fees on CVWD was appropriate and proper. CVWD's petition for reconsideration should be denied.

ORDER

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

Dated: _____

4/27/15

Thomas Howard
Executive Director