

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO 2004-0022-EXEC

In the Matter of the Petition for Reconsideration of
CACHUMA OPERATION AND MAINTENANCE BOARD
Regarding Water Right Fee Determinations

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR¹

1.0 INTRODUCTION

By this order, the Executive Director denies the Cachuma Operation and Maintenance Board's (COMB) request that the State Water Resources Control Board (SWRCB) adjust the annual water right fees, totaling \$20,976.00, that were assessed against Santa Barbara County Water Agency for the U.S. Bureau of Reclamation's (USBR) Cachuma Project (Board of Equalization (BOE) Account No. WR MT 94-000008, USBR 1008). The fees were \$10,422.00 for Permit 11308 (Application 11331); \$9,336.00 for Permit 11310 (Application 11332); \$341.00 for Permit 11311 (Application 11761); \$341.00 for Permit 11312 (Application 11762); and \$536.00 for Permit 11309 (Application 11989). The SWRCB allocated the fees to Santa Barbara County Water Agency pursuant to Water Code section 1540 because the agency has a contract for the delivery of Cachuma Project water from the USBR and the USBR declined to pay the fees. Santa Barbara County Water Agency delivers the water to the Cachuma Project Member Units pursuant to a master contract with the USBR. COMB paid the fees on behalf of the Cachuma Member Units.

¹ 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.

COMB argues that no annual fees should have been assessed for Permits 11311 and 11312 because no water is currently being used under the permits. COMB also expresses the concern that the same water was counted twice in calculating the fees for Permits 11308 and 11310 because water is diverted and stored under the permits using the same dam and reservoir.

COMB's request for a fee adjustment is not styled as a petition for reconsideration and, as discussed below, it does not meet the SWRCB's procedural requirements for a petition for reconsideration. Moreover, for the reasons set forth below, the Executive Director finds that the decision to impose the fees was appropriate and proper. Therefore, to the extent that COMB's request constitutes a petition for reconsideration, the petition is denied.

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. 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. BOE is responsible for collecting the annual fees.

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 Santa Barbara County Water Agency owed annual water right fees for Permits 11308, 11310, 11311, 11312, and 11309. Pursuant to section 1066, subdivision (a) of the SWRCB's regulations,² the annual fees for the permits were \$0.03 per acre-foot, based on the total amount of water authorized to be diverted under the permits.

COMB filed a request for adjustment of the fees, which was received on February 6, 2004.³

3.0 GROUNDS FOR RECONSIDERATION

On petition by any interested person or entity, the SWRCB may order reconsideration of all or part of a decision or order adopted by the SWRCB, including a determination that a person or entity is required to pay a fee or a determination regarding the amount of the fee. (Wat. Code, §§ 1122, 1537, subd. (b)(2).) Pursuant to Water Code section 1537, subdivision (b)(4), the SWRCB's adoption of the regulations may not be the subject of a petition for reconsideration. When an SWRCB 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.

California Code of Regulations, title 23, section 768 provides that an interested person may petition for reconsideration upon any of the following causes:

- (a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) The decision or order is not supported by substantial evidence;

² All further regulatory references are to the SWRCB's regulations located in title 23 of the California Code of Regulations unless otherwise indicated.

³ The SWRCB is directed to order or deny a petition for reconsideration within 90 days from the date on which the SWRCB adopts the decision or order. (Wat. Code, § 1122.) If the SWRCB fails to act within that 90-day period, a petitioner may seek judicial review, but the SWRCB is not divested of jurisdiction to act upon the petition simply because the SWRCB failed to complete its review of the petition on time. (See *California Correctional Peace Officers Ass'n 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.)

- (c) There is relevant evidence that, in the exercise of reasonable diligence, could not have been produced;
- (d) Error in law.

A petition for reconsideration of a fee assessment must include certain information, including the name and address of the petitioner, the specific SWRCB 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. (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

4.1 The Annual Fees for Permits 11311 and 11312 Were Properly Calculated

COMB argues that no annual fees should have been assessed for Permits 11311 and 11312, which authorize the diversion of water from Lauro Creek, because no water has been diverted under the permits since the 1960s and the USBR is amendable to having the permits voluntarily revoked. The SWRCB properly calculated the fees for these permits, 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).) The USBR may request revocation of Permits 11311 and

11312 to avoid the assessment of annual permit fees against the Santa Barbara County Water Agency beginning with Fiscal Year 2004-2005.

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 COMB 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.

4.2 The Annual Fees for Permits 11308 and 11310 Were Appropriate and Proper

COMB also expresses a concern with the manner in which the fees were calculated for Permits 11308 and 11310, which authorize the diversion of water from the Santa Ynez River. Permit 11308 authorizes the direct diversion of 100 cubic feet per second (cfs) and the diversion to storage of 275,000 acre-feet per annum (afa) for purposes of domestic use, salinity control, incidental recreational use, and irrigation. Permit 11310 authorizes the direct diversion of 50 cfs and the diversion to storage of 275,000 afa for purposes of municipal, industrial, and incidental recreational uses. The total maximum amount of water that may be diverted to storage under both permits is 275,000 afa. The authorized season of diversion under both permits is the same. COMB's concern is that, for purposes of assessing the annual permit fees, the same water was counted twice because water is diverted under the permits using the same diversion and storage facilities.

COMB does not allege that the determination to impose the fees was unlawful or any other permissible cause for reconsideration. (Cal. Code Regs., tit. 23, § 768.) Nor does COMB specify what action COMB requests the SWRCB to take, as required by section 769, subdivision (a)(5) of the SWRCB's regulations.⁴ Accordingly, to the extent that COMB's request for a fee adjustment constitutes a petition for reconsideration, the petition should be denied for failure to comply with the SWRCB's procedural requirements.

⁴ In addition, the petition does not include the information required by section 769, subdivisions (a)(3) & (6), and it is questionable whether the petition, which is one and a half pages long, provides an adequate statement of points and authorities in support of the legal issues raised, as required by section 769, subdivision (c).

Moreover, the annual fees for Permits 11308 and 11310 were properly calculated in accordance with the SWRCB's regulations. The regulations provide that if a person holds multiple water rights with a combined annual use limitation, but the person may divert the full amount of water under a particular right, then the fee shall be based on the amount authorized to be diverted under each individual right. (Cal. Code Regs., tit. 23, § 1066, subd. (b)(3).)

COMB states that it intends to evaluate the possibility of applying for a single permit in the future. The USBR has filed change petitions that seek to consolidate the purposes of use under Permits 11308 and 11310. If the petitions are approved, the USBR could request revocation of one of the permits. COMB is advised, however, that the authorization to directly divert 100 cfs under Permit 11308 could not be combined with the authorization to directly divert 50 cfs under Permit 11310, for a total of 150 cfs authorized to be diverted under a single permit.

5.0 CONCLUSION

COMB's request for a fee adjustment does not comply with the SWRCB's procedural requirements for a petition for reconsideration. In addition, for the reasons discussed above, the SWRCB's decision to impose the annual water right fees on Santa Barbara County Water Agency was appropriate and proper. Accordingly, to the extent that COMB's request constitutes a petition for reconsideration, the petition should be denied.

ORDER

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

Dated: April 16, 2004

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

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