

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2005-0012-EXEC

In the Matter of the Petition for Reconsideration of the
STOCKTON EAST WATER DISTRICT
Regarding Annual Application Fees for Pending Applications 30603A and 30603B.

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR¹

1.0 INTRODUCTION

The Stockton East Water District (SEWD) petitions the State Water Resources Control Board (State Water Board) for reconsideration of the State Water Board's assessment of annual application fees for pending Water Right Applications 30603A and 30603B and seeks a refund of the annual application fees.

SEWD filed Application 30603 in April 1997. By letter dated September 10, 2004, the Division of Water Rights (Division) bifurcated Application 30603 into Applications 30603A and 30603B as requested by SEWD. Under Applications 30603A and 30603B, SEWD seeks to appropriate water from the Stanislaus River. Applications 30603A and 30603B are part of SEWD's Farmington Groundwater Recharge Project, under which water diverted from surface streams would be used to recharge groundwater. In the September 10, 2004 letter, the Division advised SEWD that it would require additional information and would require a new notice of the

¹ State Water Board 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. No such findings are involved here. Accordingly, the Executive Director has the authority to deny a petition for reconsideration or set aside or modify the water right fee assessment.

applications. SEWD provided some additional information. The Division has not yet issued a new notice of the applications.

By Notices of Determination (Notices) dated February 11, 2005, the Board of Equalization (BOE) billed SEWD for annual application fees for the period from July 1, 2004, through June 30, 2005, in the amount of \$2,897.25 for Application 30603A and \$10,274.75 for Application 30603B. SEWD did not pay the annual fee concurrently with filing its petition for reconsideration.

SEWD argues that the Notices are improper because under California Code of Regulations, title 23, section 1063(c),² an annual fee cannot be imposed on an application for which documentation under the California Environmental Quality Act (CEQA) has not been completed until two years after the Division has issued notice of the application. SEWD also argues that the Division is causing SEWD's delay in preparing CEQA documentation by asking that SEWD prepare a programmatic CEQA document that includes all of the applications SEWD is pursuing for its groundwater recharge project rather than preparing individual CEQA documents for each application.

2.0 GROUNDS FOR RECONSIDERATION

The State Water Board may order reconsideration of all or part of a decision or order adopted by the State Water Board, 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).)

Section 768 of the regulations provides that a petition for reconsideration may be based 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 State Water Board's regulations located in title 23 of the California Code of Regulations unless otherwise indicated.

- (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 board action for 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 which 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 if the petitioner pays the fee at or before the time of filing the petition for reconsideration. (*Id.* § 1074, subd. (g).)

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 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.* § 770, subd. (a)(2)(A)-(C).)

SEWD raises issues that implicate the causes listed in section 768, subdivision (d). To the extent that this order does not address all of the issues raised in the petition for reconsideration, the State Water Board finds that either these issues are insubstantial or that SEWD failed to meet the requirements for a petition for reconsideration under the State Water Board's regulations. (*Id.* §§ 768-769, 1077.)

3.0 LEGAL BACKGROUND

The State Water Board's Division is responsible for administering the state's water right program. The primary source of funding for the water rights program is regulatory fees deposited in the Water Rights Fund in the state treasury. Legislation enacted in 2003 (Sen. Bill No. 1049, 2003-2004 Reg. Sess., 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 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).) The BOE is responsible for collecting the annual fees. (*Id.*, § 1536.)

In Fiscal Year 2004-2005, the Budget Act of 2004 appropriates \$10.79 million for the state's water right program, including \$10.362 million for water right administration by the State Water Board and \$0.428 million for water right fee collection by BOE.

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. (State Water Board Resolution No. 2004-0061.) The emergency regulations became effective on October 14, 2004.

4.0 THE PETITION FOR RECONSIDERATION

SEWD argues that imposition of the annual application fee is improper because SEWD has diligently pursued processing Applications 30603A and 30603B and any delay in processing has been the result of inaction by State Water Board staff. SEWD further argues that imposition of an annual fee on these applications is not authorized by section 1063 of the State Water Board's regulations.

Under these applications, SEWD seeks both to appropriate water during the season when the water in the Stanislaus River is not fully appropriated (A30603A) and to appropriate water that currently is appropriated by the United States (A30603B). Application 30603B is based on an area of origin claim.

The notice of the application was issued in January 1999. Several entities filed timely protests against the application, and in 2001 SEWD advised the Division that it believed it could resolve protests filed by five of the nine entities filing protests. To date, however, SEWD has presented to the Division a signed settlement agreement with only one of the protestants.

4.1 Standards for Imposition of Annual Fee

The circumstances or standards under which a water right applicant must pay an annual fee are set forth in California Code of Regulations, title 23, section 1063. SEWD argues that none of the standards set forth in section 1063 apply to Applications 30603A and 30603B. The annual fee was imposed on SEWD under subdivision (c) of section 1063; SEWD argues this subdivision does not apply.

Subdivision (c) provides that an annual fee is due if:

“The applicant is a lead agency under the California Environmental Quality Act (CEQA) (commencing with Public Resources Code section 21000) and has not adopted or certified a final environmental document for the project for which the application is filed, as may be required under CEQA, within two years after the board provides notice of the water right application.” (Cal. Code Regs., tit. 23, § 1063, subd. (c).)

As SEWD states in its petition, the State Water Board provided notice of Application 30603 in January 1999. Substantially more than two years have passed since the State Water Board issued the notice of the application. Although SEWD commenced the scoping process under CEQA after the protest period on Application 30603 ended, SEWD has not completed the CEQA process, and also has not completed the protest resolution process. SEWD argues that the fee is not due because two years has not passed after the forthcoming new notice of the applications, and argues that the State Water Board is the cause of the delay in preparing CEQA documentation.

SEWD’s argument regarding the CEQA process has no basis in the language of section 1063; nor does it have a basis in fact. Section 1063, subdivision (c), does not base the fee on a determination that there has been an unreasonable delay in completing the CEQA process. Further, section 1063, subdivision (c), does not require any determination as to who may be to blame if there has been an unreasonable delay. Finally, the time for imposing a fee under section 1063, subdivision (c), runs from the date of notice of the application, not from the date of a new notice of the application.

4.1.1 The State Water Board Has Not Caused a Delay in CEQA Documentation

SEWD seeks to blame the State Water Board for its failure to complete the CEQA process. SEWD claims that it could not prepare CEQA documentation until the State Water Board had bifurcated Application 30603 into a component for “surplus water” and a component for water that might be available under Water Code section 11460, et seq.³ In a letter SEWD sent to the State Water Board in January 2002, SEWD said it intended to begin CEQA compliance for only the surplus water component of Application 30603 as soon as the State Water Board had bifurcated the application. SEWD argues that it did not begin preparing its CEQA documentation because it had not received a written response from the State Water Board regarding its request to bifurcate Application 30603. SEWD first requested bifurcation in a letter dated November 9, 2001. SEWD is the lead agency under CEQA. As the lead agency, it has the ability to define the project for which it prepares documentation. (See Cal. Code Regs., tit. 14, §§ 15051(a), 15060, 15378.) If a lead agency wants to analyze a project that does not include components of an application it has filed with a responsible agency, however, it can analyze only the parts of the project for which it will seek approval from the responsible agency.

To the extent that SEWD argues that it cannot develop a CEQA document for its project without knowing whether the application would be bifurcated, this argument is without basis. Any delay in bifurcating Application 30603 is not a valid reason for SEWD to delay CEQA compliance. Regardless of how the CEQA project is analyzed, SEWD has cited no valid basis for not having prepared CEQA documentation for this project before now.⁴ Further, there is no apparent reason why SEWD would prepare an individual CEQA document for each separate application, since there are eleven net water right applications that are part of SEWD’s overall Farmington Groundwater Recharge Project. These applications include Applications 31536 through 31541 or alternatively state-filed Applications 13333 through 13338 for diversions from Littlejohns Creek and Rock Creek, plus Applications 31534 (Calaveras River, Mormon Slough tributary and Stockton Diverting Canal), 31535 and 30602 (Littlejohns Creek and Rock Creek), in addition to

³ Under section 11460, SEWD seeks to appropriate water that the U.S. Bureau of Reclamation currently appropriates under permitted Applications 14859, 19303, and 19304.

⁴ A factor potentially contributing to the delay in CEQA compliance is the failure of SEWD to complete the protest resolution process. Until SEWD determines whether certain issues will have to be decided by the State Water Board, it may not feel that it is ready to prepare CEQA documentation.

Applications 30603A and 30603B (Stanislaus River). CEQA does not require separate documents for individual applications. Quite the opposite, it defines a “project” as “the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and that is any of the following: . . . (1) An activity directly undertaken by any public agency including but not limited to public works construction and related activities including . . . zoning ordinances, and the adoption or amendment of local General Plans or elements thereof” (Cal. Code Regs., tit.14, § 15378, subd.(a).) (Emphasis added.)⁵ Further, CEQA requires that for a total undertaking that comprises a project with significant environmental effect, a single program EIR be prepared for the ultimate project. (Cal. Code Regs., tit. 14, §§ 15165, 15168.)

4.1.2 The Need to Re-Notice Applications 30603A and 30603B Does Not Restart The Clock
SEWD creatively argues that because the Division has advised it that the applications will need to be re-noticed due to passage of time, that means that the original notice of the applications is no longer valid,⁶ and that the entire processing of the applications must start over. Based on this argument, SEWD claims that the annual fee requirement has not yet been triggered. SEWD argues that the State Water Board intended in adopting its fee regulations that annual application fees only be imposed on applicants who are delaying the processing of their applications, and that no fees are due if the staff is still working on the application.

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⁵ “The term ‘project’ refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term ‘project’ does not mean each separate governmental approval.” (Cal. Code Regs., tit. 14, § 15378, subd. (c).) “Where the lead agency could describe the project as either the adoption of a particular regulation under Subsection (a)(1) or as a development proposal which will be subject to several governmental approvals under Subsections (a)(2) or (a)(3), the lead agency shall describe the project as the development proposal for the purpose of environmental analysis. This approach will implement the lead agency principle as described in Article 4.” (Cal. Code Regs., tit. 14, § 15378, subd. (d).)

⁶ SEWD claims that the Division said in its letter dated September 10, 2004, that the original notice was “invalid.” The letter does not say that the original notice is “invalid.” It simply points out that a new notice is needed because the project has changed significantly as well as the application having been divided. The State Water Board has not yet issued a new notice.

SEWD is wrong. SEWD disregards the State Water Board's regulations regarding new notices of applications. First, issuance of an original notice does not mean that the staff has finished working on the application. (§ 685; Wat. Code, §§ 1275-1276.)

Second, issuance of a new notice (SEWD calls it a re-notice) of an application does not recommence the entire process. Instead, it updates the project information the State Water Board previously issued in the original notice. The State Water Board issues a new notice when, in its judgment, the record does not reflect, among other matters, up-to-date circumstances because of changes in the project. (§ 684, subd. (b).) In this case, there have been significant changes in the project. When it issues a new notice, the Board directs the applicant to post or publish it, and it mails a copy of the new notice to all persons who filed a protest to the application in response to the original notice and it informs them that they may either submit a new protest or stand on their existing protest. (§ 684, subd. (b).) This process does not extinguish other steps that already have been completed.

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In other words, a new notice of an existing application keeps the protestants and potential protestants informed of changes in the proposed project so that they can decide whether, as currently proposed, it may adversely impact them, and so that they have an opportunity to object to the project as it exists after changes have been made. It is in the public interest to issue a new notice in these circumstances, since it would be unfair to persons who potentially could be injured by a proposed water appropriation if they were precluded from objecting to a project because the objectionable features of the project were not known or disclosed at the time of the original notice.

ORDER

IT IS HEREBY ORDERED that the petition for reconsideration filed by Stockton East Water District seeking reconsideration of the February 11, 2005, assessments of annual application fees for pending Applications 30603A and 30603B, is denied.

Dated: May 11, 2005

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