

**STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING SESSION – DIVISION OF ADMINISTRATIVE SERVICES
OCTOBER 7, 2008**

ITEM 5

SUBJECT

CONSIDERATION OF A RESOLUTION ADOPTING EMERGENCY REGULATIONS AMENDING WATER RIGHT AND WATER QUALITY CERTIFICATION FEE SCHEDULES IN TITLE 23, DIVISION 3, OF THE CALIFORNIA CODE OF REGULATIONS.

DISCUSSION

Water Code section 1525 requires the State Water Board to adopt, by emergency regulations, a schedule of fees to recover certain costs incurred in connection with the State Water Board's water right program. Water Code section 1525 further requires the State Water Board to adjust the fees annually to conform to the revenue levels set forth in the Budget Act. Water Code Section 1551 requires that all water right fee revenues be deposited in the Water Rights Fund. The current annual fee schedules were adopted on September 22, 2005.

Financial Condition of the Water Rights Fund

The FY 2007-08 beginning balance for the Water Rights Fund was \$3.3 million. Total revenues were \$10.1 million, with expenditures of \$7.85 million. Revenues included \$2.1 million in application fee payments for applications filed on a fully appropriated stream. Some of the applicants assert that the State Water Board must refund these fees if it does not accept the applications for filing. Revenues exceeded expenditures by \$2.3 million, leaving an ending balance of \$5.5 million.

In FY 2008-09, revenues are expected to fall \$1.9 million below expenditures (1) if the above-noted \$2.1 million in application fees is refunded, and (2) due to a loan repayment. This will leave a projected ending balance of \$3.6 million. Going forward, revenues are expected to be close to or slightly below expenditures.

Proposed Changes for FY 2008-09

The State Water Board proposes to bring Federal Energy Regulatory Commission (FERC) program revenue in line with Board expenditures by increasing annual fees for projects under review for Clean Water Act (CWA) section 401 certification for FERC licensing and for projects issued FERC licenses pursuant to CWA section 401 certification. The proposed revisions to the FERC regulations will also clarify when certification and related proceedings shall be deemed completed. In addition, the State Water Board proposes to adjust the cap on filing fees for applications, change petition requests, and change petitions involving a transfer of water. The revised schedule will decrease fees for most temporary permits filed under Water Code section 1425. The proposed revisions will also amend the requirements for petitions for reconsideration by allowing a petitioner the option of including specific information in the petition for reconsideration or including a notice of the assessment.

POLICY ISSUE

Should the State Water Board approve the proposed resolution?

FISCAL IMPACT

- 1) **FERC Program:** Currently, the FERC program expends \$938,000 while generating \$585,000 in revenues. This change would increase revenue by \$353,000 by:
- Increasing from \$.13 to \$.22 the per-kilowatt charge to water right holders with FERC licenses that are pending a 401 certification. This would generate additional revenue of \$324,000.
 - Increasing from \$.01 to \$.017 the per-kilowatt charge to water right holders with FERC licenses and a 401 certification. This would generate additional revenue of \$29,000.
- 2) **Application Fee Caps:** The following table indicates the change in the application caps based on California Consumer Price Index¹:

Application	Present Cap	Proposed Cap (7.3%)
Applications	\$410,000	\$440,000
Change Petitions	\$5,150	\$5,525
Change Petitions w/ Water Transfer	\$410,000	\$440,000

REGIONAL BOARD IMPACT

None.

STAFF RECOMMENDATION

Staff recommends that the State Water Board approve the proposed resolution.

¹ As published by the Department of Industrial Relations for Fiscal Years 2005-06 and 2006-07.

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STATE WATER RESOURCES CONTROL BOARD RESOLUTION NO. 2008-

ADOPT EMERGENCY REGULATIONS AMENDING WATER RIGHT AND WATER QUALITY CERTIFICATION FEE SCHEDULES IN TITLE 23, DIVISION 3, OF THE CALIFORNIA CODE OF REGULATIONS

WHEREAS:

1. Pursuant to Water Code section 1058, the State Water Resources Control Board (State Water Board) has the authority to adopt regulations to carry out its powers and duties under the Water Code.
2. Chapter 8 (commencing with section 1525) of part 2 of division 2 of the Water Code and Water Code section 13160.1 require the State Water Board to adopt emergency regulations establishing and revising fees to be deposited in the Water Right Fund in the State Treasury including fees for water quality certification. The emergency regulations must be adopted to implement the fee revenue requirement in the Budget Act. The emergency regulations may include provisions concerning the administration and collection of the fees.
3. The State Water Board must set a fee schedule that will generate revenues to support expenditures in the amount the Budget Act sets for specified regulatory activities. In Fiscal Year (FY) 2008-2009, the Budget Act authorizes the expenditure of \$11.835 million to support the water right program, including the water right fee collection efforts of the State Board of Equalization and oversight of the program provided by the California Environmental Protection Agency. Of this amount, \$7.84 million is appropriated from the Water Rights Fund, which is supported by fee revenues.
4. The Budget Act delegates to the Department of Finance the authority to make specified adjustments to the amounts specified in the Budget Act. The State Water Board has taken into account the anticipated adjustments that the Department of Finance will make under its delegated authority in determining the amount of fee revenues, consistent with the Budget Act, that are required to support the water right program.
5. The Water Code authorizes the State Water Board to adjust the fee schedule annually to account for over- or under-collection of fee revenues in previous years. For FY 2008-2009, fee revenues from FY 2007-2008 plus funds carried over from previous years resulted in more funding being available in the Water Right Fund than was necessary to support expenditures at the level set forth in the Budget Act in FY 2007-2008. The State Water Board has considered adjustments for nonpayment of fees and the surplus of revenue in the Water Right Fund at the end of FY 2007-2008 in determining the amount of annual fees that must be billed to collect the amount of revenue set forth in the Budget Act for FY 2008-2009.
6. State Water Board staff prepared recommended revisions to the State Water Board's water right and water quality regulations to implement the Water Code and the requirements of the Water Code and the Budget Act.
7. The water right and water quality certification fee regulations and schedules will be contained in division 3 of title 23 of the California Code of Regulations.

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8. The State Water Board provided an opportunity for public comment on the proposed regulations and considered the regulations at a public meeting conducted on October 7, 2008.
9. These emergency regulations will take effect upon filing with the Secretary of State or the effective date of the Budget Act of 2008, whichever occurs later.

THEREFORE BE IT RESOLVED THAT:

The State Water Board adopts emergency regulations revising division 3 of title 23 of the California Code of Regulations as recommended by staff to implement the Water Code and provisions of the Budget Act of 2008.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on October 7, 2008.

Jeanine Townsend
Clerk to the Board

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STATE WATER RESOURCES CONTROL BOARD EMERGENCY REGULATIONS

Amendments to Division 3 of Title 23 of the California Code of Regulations

Amend the following section:

§ 1062. Filing Fees for Water Right Applications.

(a) A person who files a water right application shall pay to the board a filing fee as follows:

(1)(A) Except as provided in subparagraphs (B) and (C), the fee for a water right application shall be \$1,000, plus \$15 for each acre-foot that the applicant seeks to divert in excess of 10 acre-feet. The total fee shall not exceed ~~\$440~~ 40,000, plus any additional fee due pursuant to subparagraphs (2) and (3).

(B) At a facility where a small hydroelectric generating facility meets the criteria for a Class 28 categorical exemption under the California Environmental Quality Act, as established in California Code of Regulations, title 14, section 15328, the fee shall be \$1,000.

(C) The fee for an application for a temporary permit filed under Water Code section 1425 shall be the greater of either (i) 50 percent of the fee calculated under subparagraph (A), above, or (ii) \$2,000; except that the fee for an application for a temporary permit at a small hydroelectric generating facility that meets the criteria for a Class 28 categorical exemption under the California Environmental Quality Act, as established in California Code of Regulations, title 14, section 15328, shall be \$1,000. The filing fee includes the annual permit fee if a temporary permit is issued.

(2) If a water right application is accompanied by a petition to revise a declaration of fully appropriated stream systems, then \$10,000 shall be added to the fee.

(3) If a water right application is accompanied by a petition for assignment of a state-filed application pursuant to Water Code section 10504, then \$5,000 shall be added to the fee.

(b) A person who filed a water right application on or after July 1, 2003, and prior to January 1, 2004, shall pay a supplemental filing fee equal to the difference between the filing fee already paid and the amount due pursuant to the regulation in effect on January 1, 2004.

(c) The application filing fee includes a non-refundable \$250 initial review fee.

Authority: Sections 1058 and 1530, Water Code.

Reference: Sections 1425, 1525 and 1535, Water Code.

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Amend the following section:

§ 1064. Filing Fees for Petitions or Requests.

(a) A person who files a petition or a request for release from priority shall pay to the board a filing fee for each water right application, permit or license covered by the petition or request in accordance with this section.

(1) For purposes of calculating the filing fee, a petition to change one or more terms of a single application, permit, license, or other water right shall be considered a single petition, provided that action can be taken on the changes simultaneously, except that a petition for an extension of time shall be considered a separate petition, subject to a separate fee, from a petition to change one or more other terms in a water right. A petitioner requesting changes to more than one application, permit, license, or other water right shall file a separate petition or petitions for each water right and a filing fee shall be required for each petition. A separate filing fee shall be required for each change petition subsequently filed on a water right that is already the subject of a pending petition for change.

(A) Except as provided in subparagraphs (i), (ii), and (iii), the fee for a petition to change the terms of an application, permit or license shall be as follows. The fee shall be a minimum of \$1,000. If the total annual amount of diversion sought by the pending application or authorized by the permit or license, as calculated in accordance with section 1066, is greater than 10 acre-feet, then the petitioner shall pay an additional \$0.30 for each acre-foot in excess of 10 acre-feet. The total fee shall not exceed \$5,~~450~~525.

(i) The fee for a petition for change pursuant only to Water Code section 1707 shall be \$850.

(ii) The fee for a change petition involving a transfer of water pursuant to Water Code section 382, 1701, 1725, or 1735 shall be \$2,000, plus \$0.30 for each acre-foot that the petitioner seeks to transfer in excess of 10 acre-feet. The fee shall be based on the maximum amount of water proposed to be transferred annually, not the amount of water proposed to be transferred over the entire term of the transfer. The total fee shall not exceed \$~~410~~40,000.

(iii) The fee for a petition for extension of time shall be \$1,000.

(2) The fee for a petition to change the point of discharge, place of use, or purpose of use of treated wastewater pursuant to Water Code section 1211 shall be \$1,000.

(3) The fee for a request for release from priority of a state-filed application pursuant to Water Code section 10504 shall be \$5,000.

(4) The fee for a petition filed pursuant to Water Code section 1228.7 to change the point of diversion or place of use under a registration of an appropriation for small domestic or livestock stockpond use shall be \$250.

(b) A person who filed a petition or a request for release from priority on or after July 1, 2003, and prior to January 1, 2004, shall pay a supplemental filing fee equal to the difference between the filing fee already paid and the amount due pursuant to the regulation in effect on January 1, 2004.

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(c) The petition filing fee includes a non-refundable \$250 initial review fee.

Authority: Sections 1058 and 1530, Water Code.
Reference: Sections 386, 1525 and 1535, Water Code.

Amend the following section.

1077. Petition for Reconsideration.

(a) The board's determination that a person is required to pay a fee, or determination regarding the amount of the fee, shall be subject to reconsideration under chapter 4 (commencing with Section 1120) of part 1 of division 2 of the Water Code. Any petition for reconsideration shall be submitted by the fee payer in accordance with that chapter and article 12 (commencing with section 768) of chapter 2 of division 3 of this title.

(1) The petition also shall specify why the petitioner believes that no fee is due or how the petitioner believes that the amount of the fee has been miscalculated.

(2) A petition for reconsideration of a fee assessed by the State Board of Equalization must include either a copy of the notice of assessment or all of the following information: (i) the fee payer's name; (ii) the water right or State Board of Equalization identification number; (iii) the amount assessed; and (iv) the billing period or assessment date.

(b) If the subject of a petition for reconsideration relates to an assessment by the State Board of Equalization, the board's decision regarding an annual fee shall be deemed adopted on the date of assessment by the State Board of Equalization. A petition for reconsideration is timely filed only if the board receives the petition within 30 days of the date the assessment is issued.

(c) The State Board of Equalization shall not accept a petition for reconsideration of the board's determination that a person is required to pay a fee, or the amount of the fee. If the State Board of Equalization receives any petition for reconsideration, it shall promptly forward the petition to the board.

Authority: Sections 1058 and 1530, Water Code.
Reference: Sections 1120 and 1537, Water Code.

Amend the following section:

3833.1. Annual Fees for FERC Licensed Hydroelectric Projects.

(a) Each applicant seeking water quality certification for an activity that includes, or involves construction or modification of facilities for the purpose of, producing hydroelectric power, where the activity or facilities require the issuance or amendment of a FERC license, shall pay an annual fee in accordance with this section.

(b)(1) An annual fee calculated pursuant to paragraphs (4) and (5) shall apply in each fiscal year (July 1 through June 30) during or after the year in which review in anticipation of consideration of certification is initiated as specified in paragraph (2) and until and including the fiscal year in which certification and related federal proceedings are complete as specified in paragraph (3).

(2) Review in anticipation of consideration of certification shall be deemed to have been initiated when any of the following occurs or has occurred:

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(A) A notice of intent is filed pursuant to 18 CFR § 5.5 or 18 CFR § 16.6.

(B) Consultation is initiated pursuant to 18 CFR § 4.38.

(C) An application for water quality certification is filed.

(3) Certification and related proceedings shall be deemed to have been completed when any of the following occurs:

(A) FERC issues or denies the license or license amendment for which review in anticipation of consideration of certification was initiated.

(B) FERC determines that no license, other than a license already in effect, or license amendment is required.

(C) The applicant abandons the proposed activity, including withdrawal or ~~voluntary~~ surrender of any applicable notification of intent, FERC preliminary permit, FERC license application, or other application for FERC approval or FERC license.

(4) The annual fee shall be \$1,000 plus \$0.~~43~~220 per kilowatt, based on the authorized or proposed installed generating capacity of the hydroelectric facility.

(A) In the case of an application for an original, new or subsequent license, as those terms are used in Parts 4, 5 and 16 of Title 18 of the CFR, the annual fee shall be based on the installed generating capacity of the facility as proposed in the notification of intent, application for FERC license, application for certification, or existing license that is proposed for takeover or relicensing, whichever is greatest.

(B) In the case of a proposed amendment to an existing FERC license, the component of the fee based on installed generating capacity shall be based on the amount by which the installed generating capacity of the hydroelectric facility would be increased by the proposed amendment.

(5) If an applicant for certification has paid any deposit pursuant to subdivision (b) of section 3833 as that subdivision was in effect before January 1, 2004, the state board shall credit against the annual fee specified in paragraph (4) any portion of that deposit that was for costs incurred after June 30, 2003. If an applicant for certification was required to pay but did not pay any deposit pursuant to subdivision (b) of section 3833 as that subdivision was in effect before January 1, 2004, the annual fee shall include any unpaid deposit, less any portion of that unpaid deposit that was for costs incurred after June 30, 2003, in addition to the annual fee specified in paragraph (4).

(6) If an application for certification is filed for an activity for which no annual fees have previously been imposed, the annual fee shall be due upon filing of the application for certification, and shall be paid to the state board. In all other cases, the annual fee shall become due thirty days after the State Board of Equalization gives notice of the fee, and shall be paid to the State Board of Equalization.

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(c)(1) The holder of any FERC license for a hydroelectric project for which water quality certification has been issued shall pay an annual fee in the amount of \$100 plus \$0.017 per kilowatt, based on the authorized installed generating capacity of the hydroelectric project.

(2) The fee imposed under this subdivision shall not apply in the fiscal year when the FERC license is issued if an annual fee is imposed in that fiscal year pursuant to subdivision (b).

(3) The annual fee imposed under this subdivision shall be due thirty days after the State Board of Equalization gives notice of the fee, and shall be paid to the State Board of Equalization.

(d)(1) A determination by the state board that an applicant is required to pay a fee under this section or paragraph (1) of subdivision (b) of section 3833, and any determination by the state board regarding the amount of that fee, is subject to review under chapter 4 (commencing with Section 1120) of part 1 of division 2 of the Water Code. Any petition by an applicant to the state board for review shall be submitted in accordance with that chapter and article 12 (commencing with section 768) of chapter 2 of division 3 of this title.

(2) If the subject of a petition for reconsideration relates to an annual fee, other than an annual fee first required to be paid pursuant to paragraph (1) of subdivision (b) of section 3833, the board's decision regarding an annual fee shall be deemed adopted on the date of assessment by the State Board of Equalization. The petition must be received by the board within 30 days of the date of assessment by the State Board of Equalization.

Authority: Section 13160.1, Water Code.

Reference: Section 13160.1, Water Code.

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Fiscal Year 2008-09 Draft Water Rights Fee Schedule Summary

Annual Fee Categories (Collected by State Board of Equalization)	
Fee Category	Fiscal Year 2008/09 Fee
Permit & License Annual Fees ^[1]	\$100 plus \$0.03 per each acre-foot greater than 10 acre-feet
Pending Application Annual Fee ^[2]	\$100 plus \$0.03 per each acre-foot greater than 10 acre-feet
Petition Annual Fee ^[3]	\$1,000
Water Lease Annual Fee (for leases under Water Code § 1020 et seq. involving water districts) ^[1]	\$1,000 plus \$15 per each acre-foot greater than 10 acre-feet based on the amount of water proposed to be leased for each year the lease is in effect.
Projects under review for 401 Certification for FERC licensing	\$1,000 plus \$0.22 per Kilowatt
Projects issued FERC licenses pursuant to 401 certification	\$100 plus \$0.017 per Kilowatt

Fiscal Year 2007/08 Fee
\$100 plus \$0.030 per each acre-foot greater than 10 acre-feet
\$100 plus \$0.03 per each acre-foot greater than 10 acre-feet
\$1,000
\$1,000 plus \$15 per each acre-foot greater than 10 acre-feet based on the amount of water proposed to be leased for each year the lease is in effect.
\$1,000 plus \$0.13 per Kilowatt
\$100 plus \$0.01 per Kilowatt

One-Time Fee Categories (Collected by State Water Board)	
Fee Category	Fiscal Year 2008/09 Fee
Application ^{[4][5]}	\$1,000 plus \$15 per each acre-foot greater than 10 acre-feet based on the total annual amount of diversion sought by the application or \$440,000, whichever is less.
Application for Small Hydroelectric ^[5]	\$1,000
Application for Temporary Permit filed pursuant to Water Code §1425 ^{[4][5]}	\$2,000 or 50% of the fee calculated under §1062(a)(1)(A), whichever is greater
Application for Temporary Permit for Small Hydroelectric that meets criteria established in CCR, title 14, §15328 ^[5]	\$1,000
Petition to Revise Declaration of Fully Appropriated Streams filed with Application	\$10,000 in addition to Application Fee
Petition for Assignment of a State Filed Application	\$5,000 in addition to Application Fee
Change Petition ^[5]	\$1,000 plus \$0.30 per each acre-foot greater than 10 acre-feet based on the total annual amount of diversion covered by the permit or license, or \$5,526, whichever is less
Change Petition Pursuant to Water Code §1707 ^[5]	\$850
Change Petition involving a transfer of water pursuant to Water Code section 382, 1701, 1725, or 1735 ^[5]	\$2,000 plus \$0.30 per each acre-foot greater than 10 acre-feet based on the total annual amount of water sought to be transferred annually or \$440,000, whichever is less
Time Extension Petition ^[5]	\$1,000
Wastewater Petitions ^[5]	\$1,000
Request for Release from Priority (State Filing) ^[5]	\$5,000 in addition to Application Fee
Change Petition filed pursuant to Water Code section 1228.7 for a domestic or stockpond registration	\$250
401 Certification for Water Development Projects not subject to FERC Licensing	Fee Based on Project Specific Costs
Water Lease Application (for leases under Water Code § 1020 et seq. not involving water districts)	\$1,000 plus \$15 per each acre-foot leased greater than 10 acre-feet based on the total amount of water proposed to be leased over the term of the lease
Small Domestic and Stockpond Registration/ 5-year Renewal Fee	\$250 \$100
Proof of Claim under Water Code §2575 et seq.	\$500
Groundwater Recordation under Water Code §4999 et seq.	\$115

Fiscal Year 2007/08 Fee
\$1,000 plus \$15 per each acre-foot greater than 10 acre-feet based on the total annual amount of diversion sought by the application or \$410,000, whichever is less.
\$1,000
\$10,000 in addition to Application Fee
\$5,000 in addition to Application Fee
\$1,000 plus \$0.30 per each acre-foot greater than 10 acre-feet based on the total annual amount of diversion covered by the permit or license, or \$5,150, whichever is less
\$850
\$2,000 plus \$0.30 per each acre-foot greater than 10 acre-feet based on the total annual amount of water sought to be transferred annually or \$410,000, whichever is less
\$1,000
\$1,000
\$5,000 in addition to Application Fee
\$250
Fee Based on Project Specific Costs
\$1,000 plus \$15 per each acre-foot leased greater than 10 acre-feet based on the total amount of water proposed to be leased over the term of the lease
\$250 \$100
\$500
\$115

^[1] Total acre-feet per annum will be considered equal to the diversion rate multiplied by the length of the direct diversion season, and the total collection amount for storage, unless otherwise specified. If the permit or license includes both direct diversion and storage, the two amounts will be additive unless a total annual amount is specified.

^[2] Due under specific circumstances such as: (1) project is initiated prior to the State Water Board issuing a permit authorizing the diversion; (2) applicant requests a delay in processing application; (3) applicant is lead agency under California Environmental Quality Act (CEQA) and has not adopted or certified a final environmental document for the project within two years after the water right application is noticed; (4) applicant fails to provide requested supplemental information; or (5) Division has determined that a permit may be issued but the applicant has failed to pay filing fees.

^[3] Due under specific circumstances such as: (1) petitioner diverts water prior to the State Water Board approving the requested change; (2) petitioner requests a delay in processing petition; (3) petitioner is lead agency under CEQA and has not adopted or certified a final environmental document for the project within two years after the petition is noticed; or (4) petitioner fails to provide requested supplemental information.

^[4] Total acre-feet per annum will be considered equal to the diversion rate multiplied by the length of the direct diversion season, and the total collection amount for storage, unless otherwise specified. If the application includes both direct diversion and storage, the two amounts will be additive unless a total annual amount is specified.

^[5] This filing fee is inclusive of a non-refundable \$250 fee for an initial review.