

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO 2004-0017-EXEC

In the Matter of
THE KINGS RIVER WATER ASSOCIATION
Regarding Water Right Fee Determinations

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:¹

1.0. INTRODUCTION

On February 6, 2004, the Kings River Water Association (Association) petitioned the State Water Resources Control Board (SWRCB) for reconsideration and a refund of fees assessed by the State Board of Equalization (BOE). The Association alleges that the water rights fees assessed by the Notices of Determination were incorrectly calculated, were arrived at through errors of law, result from an abuse of discretion and are not supported by substantial evidence. The Association requests that the SWRCB refund the Association's payments. The SWRCB finds that its decision to impose the fees was appropriate and proper and denies the Association's petition for reconsideration insofar as it challenges the legal basis for the fees. The Association has raised factual issues relating to its fee bills. The SWRCB has recalculated the fees where those claims are meritorious, and directed BOE to take appropriate action based on that recalculation. Accordingly, the SWRCB denies reconsideration to the extent the fees have been recalculated, on the basis that those factual claims that resulted in recalculation are now moot, and denies reconsideration of the Association's remaining factual claims as being without merit.

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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 petitions for reconsideration of water right fees 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 water right fee assessment.

2.0 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).)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:³

- (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;
- (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 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. (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).)

² The SWRCB is directed to order or deny reconsideration on a petition 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.)

³ All further regulatory references are to the SWRCB's regulations located in title 23 of the California Code of Regulations unless otherwise indicated.

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).)

This order addresses the principal issues raised by the Association. To the extent that this order does not address all of the issues raised in the petition for reconsideration, the SWRCB finds that either these issues are insubstantial or that the Association has failed to meet the requirements for a petition for reconsideration under the SWRCB's regulations. (*Id.* §§ 768-769, 1077.)

3.0 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. The Budget Act of 2003 allocates a total of \$9.0 million for support of the water rights program. 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. Accordingly, the SWRCB will collect fees for the 2003-2004 fiscal year, but the fees will support half of the program costs this fiscal year. The SWRCB will review and revise the fees each fiscal year as necessary to conform to the revenue levels set forth in the annual Budget Act. BOE is responsible for collecting the annual fees.

The Legislature enacted the water right fee provisions of the Budget Act and Senate Bill 1049 based on the recommendations of the Legislative Analyst. The Legislative Analyst concluded that the water right program provides benefits to the water right applicants and water right

holders regulated by the program. (Legislative Analyst's Office, Analysis of the 2003-04 Budget Bill at pp. B-123 through B-126.) With respect to existing water right holders, the Legislative Analyst observed:

[T]he water rights program provides *ongoing* benefits directly to water rights holders. This is mainly because SWRCB is charged with assuring that applications for new water rights do not cause harm to any other existing legal water rights holder. In addition, the program conducts routine compliance and inspections of existing water rights. These activities also provide direct benefits to water rights holders by ensuring the terms and conditions of the water rights permits and licenses held by others are upheld.

(*Id.* at p. B-125 [italics in original].) Accordingly, the Legislative Analyst recommended an increase in application fees, plus new annual fees assessed on all permit and license holders, and establishment of a new special fund for deposit of the revenues generated by the fees. (*Ibid.*)⁴

On December 15, 2003, the State Water Resources Control Board 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 the first bills by Notice of Determination on January 8, 2004.

⁴ The Legislative Analyst recommended that the entire water right program be funded through fees, and that the fees also support the water right related activities of the Department of Fish and Game. (Legislative Analyst's Office, Analysis of the 2003-04 Budget Bill at p. B-125 through B-126.) Although the Legislative Analyst states that water right holders "benefit directly" from the water rights program (*id.* at p. B-125), this statement simply recognizes that the fee payers benefit from the program, even though the program also serves to protect against harm to a public resource. The Legislative Analyst recognized that the water right program is a regulatory program that includes environmental review of proposed appropriations and continuing oversight of permitted and licensed diversion and use. (See *id.* at pp. B-123 through B-124.) The Legislative Analyst proposed fees for various resource and environmental programs that included a combination of fees for services that directly benefit the fee payer, such as fire protection fees, and regulatory fees, such as fees for dam safety inspections. (*Id.* at pp. B-3 through B-4.) Senate Bill 1049 establishes the water right fees as regulatory fees, which may be based on the need for regulation instead of basing the fees on the value of the benefits conferred. (See Wat. Code, § 1525, subd. (c).)

4.0 FEE CALCULATIONS FOR THE ASSOCIATION'S LICENSES

Pursuant to SB 1049 and the emergency regulations, the SWRCB has assessed an annual water right fee to each holder of a permit or license based upon the volume of water in acre-feet authorized for diversion under that water right permit or license. In accordance with the emergency regulations adopted by the SWRCB, the annual fee for permits and licenses in fiscal year 2003-2004 is "the greater of \$100 or \$0.03 per acre-foot based on the total annual amount of diversion." (Cal. Code Regs. tit. 23, § 1066.)

The Division's records show that the Association is the current owner of record of water right Licenses 11517, 11518, 11519, 11520, 11521 and 11522 (Applications 353, 360, 5640, 10979, 015231, and 016469). Based on the authorized direct diversion rates and storage amounts of the Association's licensed rights, and in accordance with the annual water right fees adopted by the SWRCB, the annual water right fees assessed to Applications 353, 360, 5640, 10979, 015231, and 016469 are calculated, as follows:

Kings River Water Association

APPLICATIONS A000353, A000360, A005640, A010979, A015231, A016469

Application Number	License/Permit Number	Licensed/Permitted Maximum Direct Diversion Rate and/or Storage Amount	Licensed Direct Diversion Season	Special Diversion Limitation Condition and/or Uses
<u>A000353</u>	<u>L011517</u>	D/D: 613 cfs STO: 188,000 afa	6/1 – 6/30	<u>SEE "A"</u> Irrigation
<u>A000360</u>	<u>L011518</u>	D/D: 5,000 cfs STO: 600,000 afa	1/1 – 12/31	<u>SEE "B"</u> Irrigation
<u>A005640</u>	<u>L011519</u>	D/D: 3,059 cfs STO: 355,200 afa	5/1 – 7/31	<u>SEE "C"</u> Irrigation Domestic
<u>A010979</u>	<u>L011520</u>	STO: 128,000 afa	-	Irrigation
<u>A015231</u>	<u>L011521</u>	D/D: 1.096 cfs	1/1 – 12/31	<u>SEE "D"</u>

		STO: 796,000 afa		Irrigation Domestic Stockwatering
<u>A016469</u>	<u>L011522</u>	STO: 102,500 afa	-	Irrigation

"A" - The maximum amount of water to be taken from the source (direct diversion plus collection to storage) shall not exceed 224,500 afa.

"B" - The total amount of water to be taken from this source (direct diversion plus collection to storage) under this license and any license issued pursuant to Permit 15715 (Application 5640) shall not exceed 2,786,000 afa.

"C" - The total amount of water to be taken from this source (direct diversion plus collection to storage) under this license and any license issued pursuant to Permit 15714 (Application 360) shall not exceed 2,786,000 afa.

"D" - The maximum amount of water to be taken from the source (direct diversion and storage) shall not exceed 960,700 afa.

Each annual fee is calculated based on the following formula:

- $Fee = (\$0.03) \times (\text{Direct Diversion Amount} + \text{Storage Amount})$
- $Fee = (\$0.03) \times [[(\text{Maximum Direct Diversion Rate in cfs}) \times (\text{Diversion Days}) \times (1.9835 \text{ acre-feet/day per cfs})] + \text{Storage Amount}]$

After the Association filed its petition for reconsideration, the Division reviewed the basis on which it had calculated the fees for Association's licenses. The corrected fee calculations are discussed below:

Fee Calculation – A000353:

- $Fee = (\$0.03) \times [[(613 \text{ cfs}) \times (30 \text{ days}) \times (1.9835)] + [188,000 \text{ afa}]]$
- $Fee = (\$0.03) \times [36,476.56 \text{ afa} + 188,000 \text{ afa}]$
- $Fee = (\$0.03) \times 224,476.56 \text{ afa}$

License 11517 includes a maximum annual diversion limitation condition (direct diversion plus collection to storage) of 224,500 afa. Because License 11517's authorized diversion amount of 224,476.56 afa is less than the maximum annual diversion limitation condition amount, the water right fee should be based on the lower annual amount. Therefore, the fee for Application 363 is:

- Fee = $(\$0.03) \times 224,476.56 \text{ afa}$
- Fee = \$6,734.29

Fee Calculation – A000360:

- Fee = $(\$0.03) \times [[(5,000 \text{ cfs}) \times (365 \text{ days}) \times (1.9835)] + [600,000 \text{ afa}]$
- Fee = $(\$0.03) \times [3,619,887.5 \text{ afa} + 600,000 \text{ afa}]$
- Fee = $(\$0.03) \times 4,219,887.5 \text{ afa}$

License 11518 includes a maximum diversion limitation condition (direct diversion plus collection to storage) of 2,786,000 afa. Because License 11518's authorized diversion amount of 4,219,887.5 afa is greater than the maximum annual diversion limitation condition amount, the water right fee should be based on the lower maximum annual diversion limitation condition amount. Therefore, the fee for Application 360 is:

- Fee = $(\$0.03) \times 2,786,000 \text{ afa}$
- Fee = \$83,580.00

Fee Calculation – A005640:

- Fee = $(\$0.03) \times [[(3,059 \text{ cfs}) \times (92 \text{ days}) \times (1.9835)] + [355,200 \text{ afa}]$
- Fee = $(\$0.03) \times [[558,212.44 \text{ afa}] + [355,200 \text{ afa}]]$
- Fee = $(\$0.03) \times 913,412.44 \text{ afa}$

License 11519 includes a maximum diversion limitation condition (direct diversion plus collection to storage) of 2,786,000 afa. Because License 11519's authorized diversion amount of 913,412.44 afa is less than the maximum annual diversion limitation condition amount, the water right fee should be based on the lower annual amount. Therefore, the fee for Application 5640 is:

- Fee = $(\$0.03) \times 913,412.44 \text{ afa}$
- Fee = \$27,402.37

Fee Calculation – A010979:

- Fee = $(\$0.03) \times [[0] + [(128,000 \text{ afa})]]$
- Fee = \$3,840

Fee Calculation - A015231:

- Fee = $(\$0.03) \times [(1,096 \text{ cfs}) \times (365 \text{ days}) \times (1.9835)] + [796,000 \text{ afa}]$
- Fee = $(\$0.03) \times [793,479.34 \text{ afa} + 796,000 \text{ afa}]$
- Fee = $(\$0.03) \times 1,589,479.34 \text{ afa}$

License 11521 includes the maximum diversion limitation condition (direct diversion and storage) of 960,700 afa. Because License 11521's authorized diversion amount of 1,589,479.34 afa is greater than the maximum annual diversion limitation condition amount, the water right fee should be based on the lower maximum diversion limitation condition amount. Therefore, the fee for Application 15231 is:

- Fee = $(\$0.03) \times 960,700 \text{ afa}$
- Fee = \$28,821

Fee Calculation - A016469:

- Fee = $(\$0.03) \times [[0] + [(102,500 \text{ afa})]]$
- Fee = \$3,075

The following table provides a summary of the fees that were originally assessed to the Association by the BOE, the annual fees as calculated above, and any changes in the amount due.

Kings River Water Association

APPLICATIONS A000353, A000360, A005640, A010979, A015231, A016469

Application Number	License/Permit Number	BOE Account Number	BOE Assessed Fees	Recalculated Fees	Difference
<u>A000353</u>	<u>L011517</u>	94000323	<u>\$6.735</u>	\$6,734.29	\$0.71
<u>A000360</u>	<u>L011518</u>	94000324	<u>\$126,596.63</u>	\$83,580.00	\$43,016.63

<u>A005640</u>	<u>L011519</u>	94001288	<u>\$27,402.37</u>	\$27,402.37	\$0.00
<u>A010979</u>	<u>L011520</u>	94002671	<u>\$3,840.00</u>	\$3,840	\$0.00
<u>A015231</u>	<u>L011521</u>	94004455	<u>\$28,821.00</u>	\$28,821	\$0.00
<u>A016469</u>	<u>L011522</u>	94005057	<u>\$3,075.00</u>	\$3,075	\$0.00

The Division has directed BOE to take appropriate action consistent with the recalculation of the fees discussed above.⁵ The SWRCB concludes that, as recalculated, the fees are correctly calculated. The petition is moot to the extent the fees have been recalculated.

In its petition, the Association includes its own calculation of the amount of fees due. The basis for the Association's calculations is unclear, but the totals are not consistent with authorized diversions under each of the licenses, taking into account any annual limitations that apply to that particular license.⁶ To the extent that Association contends that the fees should be calculated in an amount less than the recalculations made by the Division, the SWRCB finds that the Division has correctly calculated the fees, and the petition is denied on that basis.

5.0 ARGUMENTS REGARDING CONSTITUTIONALITY OF SENATE BILL 1049 AND THE SWRCB'S ADOPTION OF THE FEE REGULATIONS

The Association raises a variety of constitutional challenges to Senate Bill 1049⁷ and the SWRCB's fee regulations. These challenges are without merit.

⁵ The Division Chief has the authority to assess, impose, and collect fees pursuant to section 2.6.3 of the attachment to Resolution No. 2002 - 0106. This authority includes the ability to correct any billings that were mistakenly made, thus obviating a fee payer's need to file a petition for reconsideration or rendering a pending petition moot.

⁶ The Association presents a table that lists beneficial use (apparently a reference to total diversions) in amounts less than set forth above. The basis for the Association's table is not explained, however, and the table does not set forth the fee for each license separately. To the extent that the Association may have calculated the fees by substituting a single fee for several licenses, based on a limitation that applies to the combined diversions under two or more of those licenses, instead of calculating the fee for each individual license as set forth above, the Association's calculations are not consistent with the fee regulations. Title 23, section 1066, subdivision (b)(3) specifies that: "If a person holds multiple water rights that contain an annual use limitation that is applicable to the combination of those rights, but the person may still divert the full amount authorized under a particular right, the fee shall be based on the total annual amount for that individual right."

⁷ Pursuant to the California Constitution, an administrative agency such as the SWRCB has no power to declare a statute unconstitutional or unenforceable, or to refuse to enforce a statute on the basis that the statute is unconstitutional or federal law prohibits enforcement of the statute unless an appellate court has made that determination. (Cal. Const., art. III, § 3.5.) This provision does not prohibit a party from raising a constitutional
[footnote continues on next page]

5.1 Senate Bill 1049 and the Fee Regulations Establish Lawful Regulatory Fees

The Association contends that the fees established by Senate Bill 1049 and the fee regulations amount to an unconstitutional tax because (1) the fees exceed the reasonable cost of providing the regulatory service and (2) the fee regulations constitute a tax based solely on property ownership. Petitioners' claims are without merit.

5.1.1 *The Fees are Regulatory Fees Charged in Connection with Regulatory Activities*

Under California Constitution, article XIII A (Proposition 13), the state cannot impose a tax unless the tax is approved by a two-thirds vote of each house of the Legislature.⁸ The Legislature, however, can authorize a state agency to charge a regulatory fee by passing a bill by a majority vote. 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 charged and which are not levied for unrelated revenue purposes." (*Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 876 [64 Cal.Rptr.2d 447].)

Regarding cost-fee ratios, a state agency must demonstrate "(1) the estimated costs of the service or regulatory activity, and (2) the basis for determining the manner in which the costs are apportioned, so that charges allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity." (*California Association of Professional Scientists v. Department of Fish and Game* (2000) 79 Cal.App.4th 935, 945-950 [94 Cal.Rptr.2d 535] (hereafter *CAPS*) (citing *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227, 235 [211 Cal.Rptr. 567]).) A regulatory fee, however, does not require a precise cost-fee ratio to survive as a fee. (*CAPS, supra*, 79 Cal.App.4th at p. 950.) In *CAPS*, the court recognized that flexibility is an inherent component of reasonability and that

issue as part of petition challenging a decision or order applying the statute, however, and any constitutional issues should be raised before the administrative agency if a party wants to preserve those issues for judicial review. Although a state agency cannot declare a statute unconstitutional in the absence of a judicial determination of that issue, the agency retains the power to interpret the statute, and may take constitutional issues into account in determining how the statute should be interpreted.

⁸ Section 3 of Proposition 13 states: "From and after the effective date of this article, any changes in State taxes enacted for the purpose of increasing revenues collected pursuant thereto whether by increased rates or changes in methods of computation must be imposed by an Act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature, except that no new ad valorem taxes on real property, or sales or transaction taxes on the sales of real property may be imposed."

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. (*Id.* at p. 950.)

Through Senate Bill 1049, the Legislature has authorized the SWRCB to charge regulatory fees to water users. Water Code section 1525, subdivision (c) requires the SWRCB to set the fee schedule so that the total amount of fees collected equals the amount necessary to recover the water right program's costs. The SWRCB must set a fee schedule that will generate revenues in the amount the Budget Act sets for water right fee revenues and it must review and revise the fees each fiscal year as necessary to conform to the revenue levels set forth in the annual Budget Act. If the revenue collected is greater or less than the amount set in the annual Budget Act, then the SWRCB may further adjust the annual fees to compensate for the over or under collection of revenue. (Wat. Code, § 1525, subd. (d)(3).) In accordance with the Water Code, the water right fees are calculated solely to cover the costs of the SWRCB's regulatory program and not to generate additional revenue.

In addition, Senate Bill 1049 created a special fund, the Water Rights Fund, to assure that the fees are used for water right program costs, and not for unrelated revenue purposes. (See Wat. Code, § 1550). All water right fees and all water quality certification fees for FERC licensed hydroelectric projects are deposited in the Water Rights Fund. (*Id.* § 1551.) These funds may be expended only for specified purposes, all of which involve administration of the water rights program, administration of water quality certification for FERC licensed hydroelectric projects, a program carried out by the Division, or administration of the fees by the SWRCB and BOE. (*Id.* § 1552.)

The Association argues that the primary purpose of the fees is revenue generation because Senate Bill 1049 and the fee regulations were adopted to replace revenue lost from the General Fund. The requirement that the fee not be levied for unrelated revenue purposes is not violated simply because a fee is intended to allow a shift in program funding from the General Fund to fee revenues, thereby allowing more money from the General Fund to be spent on other programs.

For example, in rejecting a challenge to an emission-based fee to support air pollution control programs made on grounds similar to those raised by Petitioners, the Fourth District Court of Appeal concluded:

Proposition 13's goal of providing . . . tax relief is not subverted by the increase in fees or the emissions-based apportionment formula. A reasonable way to achieve Proposition 13's goal of tax relief is to shift the costs of controlling . . . sources of pollution from the tax-paying public to the pollution causing industries themselves

(San Diego Gas & Electric Co. v. San Diego County Air Pollution Control District (1988) 203 Cal.App.3d 1132, 1148 [250 Cal.Rptr. 420, 430]. See also, *Brydon v. East Bay Mun. Util. Dist.* (1994) 14 Cal.App.4th 178 [29 Cal.Rptr.2d 128] [approving an inclined rate structure for water customers as a regulatory fee, in part, because it achieved the regulatory goal of water conservation].)⁹

The Association contends that the fees will impermissibly generate income that surpasses the costs of the services provided because Water Code section 1525, subdivision (d)(3) permits the SWRCB to adjust the annual fees to compensate for the over or under collection of revenues. To the contrary, however, the purpose of this provision is to ensure that the fees are reevaluated to avoid collection of revenues in excess of long-term program needs. (See, e.g., *CAPS, supra*, [upholding constitutionality of statute imposing fee where statute provided for annual review and recommendations for adjustment of fees necessary to pay the program's costs].) In combination with the deposit of fee revenues in a special fund that can be used only for program purposes, the periodic recalculation of the fees under Water Code section 1525, subdivision (d)(3) assures that the fees will not be used for unrelated revenue purposes.

⁹ As in the case of emission-based fees, the water right fees are based in part on the principle that the activities of the fee payers create the need for the regulatory program, and they benefit from it. As the Legislative Analyst observed: "Since water rights holders benefit directly from all aspects of the water rights program—including permit issuance and compliance monitoring—we conclude that the existing fee structure should be revised so that fee revenues replace all General Fund support budgeted for the board's program." (Legislative Analyst, Analysis of the 2003-04 Budget Bill, State Water Resources Control Board (3940).)

The Association argues that the Legislature may appropriate money deposited in the Water Rights Fund for other purposes not related to the SWRCB's water rights-related activities. Water Code section 1552 authorizes five general categories of expenditures of money deposited in the Water Rights Fund. The authorized expenditures are set forth in subdivisions (a) through (e) of section 1552. These are the only authorized purposes of the expenditures and they are the only purposes for which the money is actually being spent.

The Association argues that because Water Code section 1525, subdivision (d) (3) uses the word "may" in the phrase "the board may further adjust the annual fees to compensate for the over or under collection of revenue," it "means that the Board need not adjust the annual fees to compensate for the over-collection of revenues if that occurs." (Statement of Points and Authorities in Support of Kings River Water Association, et al. Petition for Reconsideration, p. 2, emphasis in original.) The use of the word "may" in subdivision (d)(3) of section 1525 apparently reflects the fact that the SWRCB's authority to compensate for over or under collection in previous years depends on a contingency: the board's determination that over or under collection has occurred. The SWRCB does not read this provision as giving the SWRCB unbridled discretion to ignore over collections from the previous years, no matter how large, in setting the fees for the following year. There also may be circumstances where a minor over collection, or a portion of a larger over collection, should be treated as a reserve, in case collections in the following year are less than projected. In any event, the Association's speculation about how the fees might be calculated in future years does not provide any support for a claim that the fees will be used for purposes unrelated to the SWRCB's water right activities. All water right fees, including fees collected but not expended in previous years, are deposited in the Water Rights Fund, and money in the water rights fund may be expended only for water rights related activities. (Wat. Code, §§ 1550-1552).¹⁰

¹⁰ In this respect, Senate Bill 1049 goes beyond the requirements of the case law upholding regulatory fees. A fee will be upheld if projected fee revenues do not exceed the estimated cost of the regulatory activity. (See *CAPS*, *supra*, 79 Cal.App.4th at 945.) The cases do not establish a requirement that if fee collections turn out to exceed revenue projections or program expenditures turn out to be less than estimated, the excess collections be held in a special fund to be expended only for program purposes. The potential for over collection does not establish that the revenue projections or cost estimates are unreasonable, and the establishment of a special fund to be used only for program purposes provides additional assurance that the fees will not be established or expended for unrelated revenue purposes.

The Association claims that, because fees may be adjusted in later years to make up for under collection in earlier years, some fee payers will effectively be charged more to make up for those who fail to pay their fees. Similarly, it objects to the SWRCB's assumption of 40 percent nonpayment when it estimated the revenues to be generated in Fiscal Year 2003-04, claiming that this assumption has the effect of charging those who pay their fees extra in order to make up for those who do not pay.¹¹ The Association appears to seek a mechanism that apportions to each individual permittee and licensee a proportionate share of the cost of the SWRCB's services. The SWRCB, however, is not required to demonstrate the proportionality of the fees on an individual basis. (See *CAPS, supra*, at p. 946 [rejecting argument that an agency must demonstrate an individual correlation between the amount of the fee and the cost of the benefit or burden].) "Proportionality is measured collectively to assure that the fee is indeed regulatory and not revenue raising." (*Id.* at p. 948.) According to the Budget Act of 2003, the total cost of the SWRCB's water right program in Fiscal Year 2003-2004 is approximately \$9 million. Less than half, \$4.4 million, is to be collected through fee revenues, and a portion of the fee revenues is being spent on administration of the fee. Accordingly, the fees collected are not intended to exceed the costs of the SWRCB's water right program, including costs of administering and collecting the fee, and to the extent that fees are over collected in any given year, the SWRCB will adjust the annual fees accordingly.

Moreover, Senate Bill 1049 requires the SWRCB to set the fees so that the amount "collected" covers the water right program's costs (Wat. Code, § 1525, subd. (c)). Thus, it is necessary for the SWRCB to assume a certain non-collection rate to ensure that it collects the proper amount of revenue. To assume a 100 percent collection rate, as the Association seems to suggest, is an unrealistic assumption even for an established fee program. The SWRCB assumed a 60 percent rate of collection for this fiscal year. This assumption is based upon staff's experience with

¹¹ These arguments fail to take into account how fees will be allocated and revenues collected over the long term. The SWRCB used the 40 percent nonpayment assumption to estimate revenues that would be collected this fiscal year; it does not mean those fees will never be collected. The SWRCB and BOE will continue to seek collection of the fees from those who fail to pay. In many cases, the fees still will be collected later, with interest and penalties, and deposited in the Water Rights Fund. (Wat. Code, § 1551.) To the extent the SWRCB and BOE are able to collect delinquent fees, those revenues will be used to support the water rights program, and the fees set in later years will be adjusted to take into account these additional revenues.

return rates on required water right filings, recognition that certain fee payers may claim sovereign immunity from paying fees,¹² recognition that some water right holders will refuse to pay the fees, consideration of likelihood that some of the fees had been miscalculated and refunds would be awarded as part of the petition process, and recognition that some of the addresses in the Division's files are out of date, resulting in substantial delays before fees can be collected on some permits and licenses. As the fee program is implemented in the first few years, the SWRCB expects that the collection rate will increase and that fees will be reduced accordingly.

Much of the Division's costs are related to actions that are for the primary purpose of managing existing water rights. 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 SWRCB approval of changes in point of diversion, place of use, or purpose of use.¹³ Additionally, a substantial portion of the cost of 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 consideration of protests filed by those permit and license holders. Similarly, much of the environmental review costs for 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.

¹² Senate Bill 1049 includes a mechanism by which fees may be passed through to the water supply contractors of a water right holder who claims sovereign immunity. (Wat. Code, § 1560.) Some federal and tribal projects do not have water supply contractors, however, and the SWRCB had good reason to believe, based on comments submitted in workshops on the proposed fee regulations, that many water supply contractors would contend that the fees could not be passed through to them.

¹³ The fee schedule adopted by the SWRCB also includes fees for change petitions, but these fees will not cover the entire cost of those proceedings. Both to avoid enforcement problems and because of difficulties in determining how much water should be deemed to be involved when a change in permit or license terms is proposed, the SWRCB decided that most of the cost of administering changes in permits and licenses should be borne by annual permit and license fees instead of petition fees.

In sum, the fees adopted by the SWRCB do not violate Proposition 13, because the fee revenues collected do not surpass the costs of the SWRCB's regulatory program they support and the cost allocations to individual payers have a reasonable basis in the record. (*CAPS, supra*, at p. 950.)

5.1.2 The Fees are Regulatory Fees and Not Property Taxes

Although water rights are considered to be property rights that are usufructuary in nature,¹⁴ the Association contends that water rights should be considered to be real property falling within the aegis of Proposition 13.¹⁵ More specifically, the Association contends the fees constitute real property taxes in violation of Proposition 13 and the equal protection clause of the Fourteenth Amendment of the United States Constitution.

The water right fees are fees, not taxes. Moreover, the fees bear none of the indicia of taxation that Proposition 13 purports to address. For example, the terminology in Proposition 13 contemplates land and buildings, not water, as the property to be protected. Appropriative water rights differ, in part, because they can be separated from the land and moved to other land.

In addition, the fees are not ad valorem. Section 3 of Proposition 13 prohibits new ad valorem taxes on real property.¹⁶ Revenue and Taxation Code section 2202 defines ad valorem tax to mean "any source of revenue derived from applying a property tax rate to the assessed value of property." (See *Heckendorn v. City of San Marino* (1986) 42 Cal.3d 481, 487, fn. 4 [229 Cal.Rptr. 324] (finding it reasonable to construe ad valorem tax in light of the definition found in

¹⁴ The right of property in water "consists not so much of the fluid itself as the advantage of its use." (*United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 100 [227 Cal.Rptr. 161] [quoting *Eddy v. Simpson* (1853) 3 Cal. 249, 252].)

¹⁵ The Association does not argue that California Constitution, article XIII D, section 3, is applicable here. This provision generally prohibits a local agency from assessing a tax, assessment, fee, or charge on any parcel of property or on any person as an incident of property ownership, and is not applicable to state agencies.

¹⁶ The Association also alleges that Senate Bill 1049 imposes a new tax in violation of sections 1 and 2 of Proposition 13. Section 1 establishes the maximum amount of ad valorem tax on real property, which is restated in section 3, *Kennedy Wholesale, Inc. v. State Board of Equalization* (1991) 53 Cal.3d 245, 253 [279 Cal.Rptr. 325], [footnote continues on next page]

the Revenue and Taxation Code's chapter on property tax rates for local agencies since Proposition 13 related to the general subject of property tax relief.) The water right fees, however, are not based on the assessed value of the water right involved. (See, *id.* at p. 487 (finding no ad valorem tax where ordinance imposed tax based on residential zones that included lots varying in size and no appraisal of value was made).)

6.0 CONSISTENCY OF FEE REGULATIONS WITH STATUTORY AUTHORITY

The Association claims that the emergency fee regulations are arbitrary, capricious, and violate Government Code section 11010. 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.)

6.1 The Fees are Reasonably Calculated Based on the Total Annual Amount of Diversion authorized by a Water Right Permit or License

The Association contends that it has been illegally assessed fees for rights to the same water if that water is subject to more than one permit or license and for its pre-1914 appropriative rights that "overlap" its permits and licenses. The Association also contends that the water rights fees assessed by the SWRCB against the Association are arbitrary, capricious, and unreasonable. The annual permit or license fees are calculated based on the total annual amount of diversion authorized by the permit or license, or face value of the water right, and not on actual water use. (Cal. Code Regs., tit. 23, §1066, subd. (a).) Further, the fees are based solely on the permits and licenses, and not on any other right. Section 1066, subdivision (b)(2) specifies that if "a permit or license contains an annual use limitation that is applicable only to that permit or license, and the limitation is less than the calculated diversion volume," then the fee shall be based on that limitation. If, however, 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 face value of that individual right. (*Id.* § 1066, subd. (b)(3).) Additionally, the fee is calculated without regard to the availability of water, bypass requirements, or any limitation on the diversion of water that does not constitute a condition in the permit or license that expressly sets a maximum amount of diversion. (*Id.* § 1066, subd. (b).)

The SWRCB has discretion and flexibility in developing a regulatory fee structure, so long as it is reasonable. (*CAPS, supra*, 79 Cal.App.4th at p. 950.) As explained above, the SWRCB's fee regulations meet the legal standards for a regulatory fee. Annual fees provide the majority of funding for the Division's regulatory activities in the second half of Fiscal Year 2003-2004, and a significant portion of the Division's costs are related to managing and protecting existing water rights. Those regulatory costs are distributed in proportion to the distribution of water among permit and license holders. Accordingly, after considering several methods for calculating fees, the SWRCB determined that a fee based on the face value of each permit or license provides the most fair and efficient method of calculation. In general, the Division's workload is related to size of the authorized diversion, and the Water Code expressly authorizes the SWRCB 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. Larger diversions generally have a greater impact on the environment and on other water right holders. Thus, the fee allocation bears a reasonable relationship to the benefits provided by and burdens to the regulatory activity. Absolute precision is not required.

An annual fee that is based on the total annual amount of diversion authorized by each permit and license provides an objective measure that is easily determined on the face of the permit or license. Sometimes a person will hold multiple water rights with an annual use limitation that is applicable to a combination of those rights. If a water right does not contain the combined use limitation, then the water right holder may divert the full amount authorized under that particular right if no diversions occur under the right(s) containing the limiting condition or if those rights are transferred or revoked. Because the water right holder still has the flexibility to divert the full amount of water under an individual right, the fee is based on the total annual amount for that individual right. While the Association may prefer a different approach, this does not render the SWRCB's approach irrational or unreasonable.

Nonetheless, the Association requests a reduction in their fees because they hold multiple water rights with a combined use limitation. Their fees, however, were appropriately based on the total annual amount of water that they may divert under an individual permit or license. The water right fees assessed for permits and licenses that contain a combined annual use limit should not be reduced and no correction in the fees is required. The Association may request revocation of unused portions of permits or licenses to avoid payment of water right fees beginning with Fiscal Year 2004-2005.¹⁷

Similarly, each water right holder is assessed a fee based on the amount authorized under each individual permit or license regardless of whether certain water rights overlap with claimed pre-1914 appropriative rights or claimed riparian rights. It is common for the SWRCB to issue permits and licenses that include claimed pre-14 rights or riparian rights. In those cases, the SWRCB does not make a finding of the validity of the claimed rights and limits the permit to be inclusive of and not in addition to the claimed right. The SWRCB did this in Decision 1290, cited by the Association as proof of its pre-14 rights. In Decision 1290, the SWRCB did not find that the pre-14 right claimed by the Association was valid and specifically required a condition in the permits to prevent excessive combined rights as the result of the overlapping of rights. (Decision 1290, pp. 35, 47.) The Association may request revocation of overlapping rights to avoid payment of water right fees beginning with Fiscal Year 2004-2005.

Each permit or license requires administrative oversight and it is reasonable for the SWRCB to assess the water right fee accordingly. To assess a fee, as the Association 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

¹⁷ Long-standing state policy discourages "cold storage" of water rights for speculative projects or projects that no longer exist. (*California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585, 618-619 [255 Cal.Rptr. 184].) The fee schedule adopted by the SWRCB furthers this policy by encouraging the voluntary reduction of unused water rights.

assessment, if based on actual water use, renders this approach impracticable. The "face value" approach adopted by the SWRCB constitutes a reasonable method of efficiently calculating the fees because it relies on an objective measure that is easily determined from the four corners of the permit or license.

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.

It should also be recognized that, because the fees are set to cover program costs as specified in the Budget Act, a change in the approach by which the amount of water involved is calculated would not necessarily reduce the fee charged to petitioners who argue for that change. For example, because the combined face value of all permits and licenses vastly exceeds the amount of water diverted each year, the amount charged per acre foot would be many times higher if permit and license fees were based on actual use instead of face value. Thus, many of the fee payers would pay similar annual fees if those fees were calculated based on amounts actually used, and the charge per acre-foot was increased accordingly. Other suggested changes, such as changes to reflect overlapping water rights or permits and licenses for multiple diversions of the same water, would have a similar effect of increasing the fee per acre-foot.

6.2 The Fees are Consistent with Government Code section 11010

The Association contends that the fees violate Government Code section 11010 because the fees exceed the estimated actual or reasonable cost of providing the regulatory service for which the fees are levied. The Association claims that because the fees violate Government Code section 11010, the fees are an invalid tax.

Section 11010, subdivision (b)(1) prohibits a state agency, supported from the General Fund, from levying or collecting “any fee or charge in an amount that exceeds the estimated actual or reasonable cost of providing the service, inspection, or audit for which the fee or charge is levied or collected” Without deciding whether section 11010 applies to the water right fees,¹⁸ it merits noting that this provision follows the same language as had been used in cases determining whether local exactions were special taxes or regulatory fees. (See, e.g. *Kern County Farm Bureau v. County of Kern* (1993) 19 Cal.App.4th 1416, 1421 [23 Cal.Rptr.2d 910] [charges are regulatory fees if they “do not exceed the reasonable cost of providing the service or activity for which the fee is charged”] quoting *City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264, 280-281 [17 Cal.Rptr.2d 845].) These cases recognize that the service can be administration of a regulatory program, and that the fees may include programmatic costs, not just costs attributable to a specific fee payer. (E.g., *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1998) 203 Cal.App.3d 1132 [250 Cal.Rptr. 420].) Section 11010 also expressly recognizes that fees may be based on estimates; absolute precision is not required. In adopting virtually identical language to that used in these cases, section 11010 adopts the same standard as had been adopted by the courts to distinguish local regulatory fees from taxes, and was later adopted by the courts to distinguish state regulatory fees from taxes. As explained elsewhere in this order, the fees are regulatory fees that are reasonably related to the costs of the water right program. Thus, the fees do not contravene section 11010.

¹⁸ Section 11010 applies when an agency is “supported from the General Fund,” and may not necessarily apply when fees are charged for activities supported by a special fund, and the fees are paid into that special fund. In addition, many of the features that the Association finds objectionable, such as taking estimated collections into account in setting fees, are expressly authorized by Senate Bill 1049. (See Gov. Code, § 11010, subd. (b)(3), Wat. Code, § subd.(c).)

7.0 CONCLUSION

For the reasons discussed above, the SWRCB finds that its decision to impose water right fees was appropriate and proper. It has corrected the erroneous fee bills, thus rendering those claims moot. To the extent that this order does not address all of the issues raised in the petition for reconsideration, the SWRCB finds that these issues are insubstantial. The petition for reconsideration should be denied.

ORDER

IT IS HEREBY ORDERED THAT the petition for reconsideration is denied.

Dated: 4-08-01



Celeste Cantu
Executive Director