

Court of Appeal Strikes Down State Board's Annual Fees For Water Right Permits and Licenses

January 23, 2007

In the recent case *California Farm Bureau Federation, et al. v. California State Water Resources Control Board*, the Court of Appeal for the Third Appellate District declared unconstitutional the annual fees imposed by the State Water Resources Control Board beginning in 2004 on two types of water users: holders of water right permits and licenses, and federal contractors entitled to water from the U.S. Bureau of Reclamation.

The roots of this case lay in the passage of Senate Bill 1049 (2003), codified in part at Water Code sections 1525, 1540 and 1560. This bill eliminated state funding for the State Board's Division of Water Rights regulatory activities, including the processing of applications and changes to existing permits and licenses, as well as enforcement, thereby forcing the State Board to assess fees on all permitted water right holders. The Farm Bureau, Northern California Water Association (NCWA), and Central Valley Project Water Association (CVPWA) opposed the fees and sued to enjoin the State Board for imposing them.

On January 17, the Court of Appeal upheld the constitutionality of the Water Code provisions authorizing the State Board to impose fees on water right holders, but struck down the fee schedule formulas adopted by the State Board to implement that authority. The problem, according to the Court, was the State Board's formula for calculating the annual fees, which allowed the State Board to charge the greater of \$100 or three cents per acre-foot for the total annual amount of diversion authorized by the permit or license, regardless of whether that total quantity of water was actually available for diversion. The Court held the State Board had failed to demonstrate that the fees imposed on the permit and license holders bore "a fair or reasonable relationship" to the cost of regulating permittees and licensees because the funds collected were used to support regulatory activities not related to the water rights recognized by permits or licenses.

The immediate effect of the Court's ruling in this case is that the State Board has 180 days from the day the opinion becomes final (which will be February 16 unless the State Board petitions for reconsideration or review of the decision) to adopt valid fee schedule formulas and determine the amount of fees improperly assessed during

the 2003-2004 fiscal year. After the State Board has calculated what refunds may be due, the State Board of Equalization will refund any annual fees unlawfully collected to those parties who filed timely petitions for reconsideration of their fee with the State Board, or who are subject to the January 20, 2004 stipulation between NCWA, CVPWA, the State Board and Board of Equalization.

If you or your organization hold a water right permit or license issued by the State Board, you may be eligible for a refund if you filed a petition for reconsideration with the State Board, or if you are a member of the Farm Bureau, NCWA or CVPWA.

If you or your organization hold a water right permit or license issued by the State Board, you may be eligible for a refund if you filed a petition for reconsideration with the State Board, or if you are a member of the Farm Bureau, NCWA or CVPWA. Permittees and licensees who paid the State Board fees without petitioning for reconsideration, even if paid under protest, are most likely not eligible for refunds. Given the short time frame for the State Board to formulate a new fee structure, the impact of this ruling will be felt very soon, and every permit and license holder will be affected.

Unfortunately, an additional effect of this decision may be a further reduction in funding for the State Board, thereby exacerbating already significant delays in the processing of water right matters. Hatch and Parent will continue monitoring the State Board's regulatory activities for the results of this decision.

Hatch & Parent's Water Practice Group will continue to monitor this case and other State Board fee issues. For more detailed information on whether you may qualify for a refund, please contact Wes Strickland at (805) 963-7000 or WStrickland@HatchParent.com, or Morgan Evans at (805) 963-7000 or MEvans@HatchParent.com.