Case No. S150518

IN THE
SUPREME COURT OF CALIFORNIA

CALIFORNIA FARM BUREAU FEDERATION, *ET AL.*,

Plaintiffs and Appellants,

v.

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, *ET AL.*,

Defendants and Respondents.

After A Decision By The Court Of Appeal,
Third Appellate District, Case No. C050289

Sacramento County Superior Court
The Honorable Raymond M. Cadei
CASE NO. 03CS01776 consolidated with CASE NO. 04CS00473

ANSWER TO PETITION FOR REVIEW OF CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, *ET AL.*

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I. INTRODUCTION

Plaintiffs and Appellants California Farm Bureau Federation, *et al.* ("Appellants") respectfully file this Answer to the Petition for Review filed by Defendants and Respondents California State Water Resources Control Board, *et al.* ("Respondents"). The Petition raises no issues worthy of this Court's review and should be denied.

California Rule of Court 28(b)(1) authorizes this Court to grant review "when necessary to secure uniformity of decision or to settle an important question of law." Respondents have failed to identify any decision that is actually at odds with the Court of Appeal's decision here, or identified any important question of law that need be addressed by this Court. Accordingly, there is no basis for review properly raised by Respondents.

It should be noted that Appellants have sought review of the breadth of the relief granted by the Court of Appeal in a separate Petition for Reconsideration, and review of that independent issue should be granted. The Court of Appeal erroneously ruled that only those feepayors who filed petitions for reconsideration, or on whose behalf petitions were filed such as by Appellant County Farm Bureaus on behalf of their members, with the State Water Resources Control

Board ("SWRCB") on the ground that the fees were unconstitutional, and who now file claims for refunds, may receive refunds. Given that under the California Constitution, neither the SWRCB, nor any other administrative agency, has the power to declare a statute unconstitutional, the filing of a petition for reconsideration on the grounds of unconstitutionality here would have been a futile act, which well-established California law does not require. *See* Cal. Const. art. III, § 3.5(b). The opposite conclusion reached by the Court of Appeal thus contradicts California caselaw, and it furthermore lacks logic and rewards wrongdoing because it permits agencies to keep illegally collected fees. Review thus is appropriate only to determine whether mandatory refunds to all who paid the illegal fees are appropriate.

II. REASONS FOR DENYING REVIEW

A. Consistent With California Caselaw, The Court Of Appeal Properly Applied A *De Novo* Standard Of Review

Respondents concede that: "Whether a regulation is consistent with the constitution is ultimately a question of law. It is well-established that issues of law are subject to independent review." *See* Petition for Review ("Pet.") at 14. Respondents nonetheless argue that the SWRCB's "findings and exercise [sic] of discretion" and

"policy determinations" are subject to the "arbitrary and capricious" standard of review," and thus the Court of Appeal erred in applying a *de novo* standard of review here. *Id.* at 13-14. Respondents are wrong. Courts exercise independent review in determining whether regulations promulgated by agencies comport with Proposition 13 or any part of the Constitution. *See, e.g., Apartment Ass'n of Los Angeles County v. City of Los Angeles* (2001) 24 Cal. 4th 830, 836 (review of city ordinance under Proposition 13 required "'independent review of the facts'") (quoting *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal. 4th 866, 874); *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal. 4th 216, 271-72 ("[w]hether the . . . regulations actually adopted, including the incorporated generic determinations, are consistent with Proposition 103 – and with the law generally – is also examined independently."); *see also Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal. 4th 866, 874 (a *de novo* standard of review is appropriate in Proposition 13 cases).

The "arbitrary and capricious" standard Respondents advocate applies where an agency allegedly exceeded the authority granted by its enabling statute in promulgating regulations. *See, e.g., Lungren v. Superior Court* (1996) 14 Cal. 4th 294, 309. As the Court of Appeal

correctly found, that is not the case here where Appellants have not alleged that the SWRCB overstepped its authority in promulgating the Emergency Regulations, but rather that the terms of the mandate handed to the SWRCB and the resulting "fees" are illegal under Proposition 13. *See* slip opinion ("Slip Op.") at 30 ("On appeal, the question whether the annual fees imposed under section 1525, subdivision (a) are unconstitutional and the emergency regulations invalid are questions of law subject to our independent review. Contrary to the SWRCB's suggestion, plaintiffs do not argue that the agency overstepped its quasi-legislative authority under section 1525. Thus, the deferential standard applied to the review of quasi-legislative actions by ordinary mandamus . . . is inapplicable here.").

Regulations that conflict with the Constitution are void, "'and no protestations that they are merely an exercise of administrative discretion can sanctify them.'" *Henning v. Div. of Occupational Safety & Health* (1990) 219 Cal. App. 3d 747, 759 (quoting *Morris v. Williams* (1967) 67 Cal. 2d 733, 737). As such, the SWRCB simply had no "discretion" to exceed the outer limits set by the Constitution; nor would any valid "policy considerations" justify such an action. *See Ass'n for Retarded Citizens v. Dep't of Developmental Servs.* (1985)

38 Cal. 3d 384, 390 ("if the court concludes that the administrative action transgresses the agency's statutory authority, it need not proceed to review the action for abuse of discretion; in such a case, there is simply no discretion to abuse"); *Kerrigan v. Fair Employment Practice Comm'n* (1979) 91 Cal. App. 3d 43, 52 (the "independent judgment standard" must be applied "where constitutional rights are circumscribed"); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs* (2001) 531 U.S. 159, 173-74 (refusing to defer to agency's interpretation of statute when it raised "significant constitutional questions"). The Court of Appeal thus properly identified the nature of the challenge to the statute and the regulations, and properly applied an independent standard of review here.[1] Respondents' Peti-

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[1] Furthermore, Respondents' assertion that the Court of Appeal's conclusion that the challenged fees are illegal "reflect[s] the court's disagreement with the SWRCB's policy judgments" is a gross misstatement of the Court of Appeal's decision. Pet. at 13. Indeed, the Court of Appeal based its conclusion that the fees were illegal on the evidence that feepayors paid for costs associated with others not subject to the annual fees – not by disregarding any purported "policy considerations" by which Respondents sought to justify the fees.

For example, Respondents have consistently argued that that the vast majority of the costs imposed by one-time feepayors are properly borne by annual feepayors because to impose the full costs on

[Footnote continued on next page]

tion for Review on this ground thus should be denied.

B. The Court of Appeal's Opinion Does Not Conflict With the Decision In *Sinclair Paint Co. v. State Board of Equalization* Or Any Other Decision

1. Consistent With The Decisions Of The Courts Of This State, The Court of Appeal Properly Found That The Fees At Issue Related Neither To The "Benefits *And* Burdens" Nor The "Burdens *Or* Benefits" Of The Feepayors

Respondents erroneously assert that the Court of Appeal's opinion conflicts with *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal. 4th 866 ("*Sinclair*") and *California Association of Pro-*

[Footnote continued from previous page]

one-time feepayors would have a deterrent effect on regulatory compliance, while the lower fee gives the one-time feepayor an incentive to comply. Neither Appellants nor the Court of Appeal disputed that the SWRCB may have been motivated by laudable policy goals such as promoting regulatory compliance in apportioning the fees, but the fact remains that such apportionment *necessarily* means that annual feepayors bear considerably more than their "fair share" of costs where they bear the lion's share of the costs associated with one-time actions and thus the fees violate the Constitution – whatever the policy justification. *See* AA761, Ex. RR (Depo. Ex. 30) at 8 (May 17, 2004 PowerPoint presentation by Victoria Whitney, "Water Right and Water Quality Certification Fees, FY 2004-2005") (About ***60%*** of the costs the DWR are associated with one-time services, the SWRCB collected only about 10% of that cost in one-time service fees, with the remainder again being borne by the annual feepayors). Thus, even if the SWRCB were accorded deference in this policy determination, the determination that the fees are illegal would remain the same.

fessional Scientists v. Department of Fish and Game (2000) 79 Cal. App. 4th 935 ("*CAPS*"). Pet. at 8-12. Respondents argue that while those cases require that fees bear a fair relationship to the burdens imposed by *or* benefits received by feepayors, the Court of Appeal purportedly "analyz[ed] the fee allocation as though the fees should be linked to *both* the benefits *and* the burdens the regulation provides." *Id.* at 8. Respondents are wrong. The Court of Appeal plainly found that the fees at issue related neither to the "benefits *and* burdens" (Op. at 39), nor the "burdens *or* benefits" of the feepayors (Op. at 29, 36-37, 41); thus, the Court of Appeal's Opinion is consistent with *Sinclair* and *CAPS* and Respondents' argument to the contrary fails on its face.

Furthermore, the record clearly supports the Court of Appeal's conclusion the fees imposed on feepayors did not correlate to their burdens on or benefits from the Water Rights Program because they are only a small percentage of those who may impose burdens on or receive benefits from the Water Rights Program, but they inequitably pay the costs associated with *all* who impose burdens on or receive

benefits from the Water Rights Program.[2] Indeed, Respondents' sug-

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[2] Respondents again try to create confusion as to what portion of the costs of the Water Rights Program were paid for with fees, stating that "[t]he total cost of the water rights regulatory program for fiscal year 2003-2004 was about $9 million," and "the new fees were intended to provide about half of the program's funding." Pet. at 2. Respondents do not deny that the 2003-2004 fees simply could not be implemented in time to fund operations for the first half of the fiscal year, but that in future years, the fees are intended to cover essentially all of the costs of the Water Rights Program for the entire fiscal year. AA575-576, Ex. Q (Whitney Depo., Vol. III, 626:3-13). Consistent with this, in Fiscal Year 2004-05, the fees were intended to fund 95-96% of the Water Rights Program (AA577-579, Ex. R (Whitney Depo., Vol. II, 251:6-252:15), as they have in each fiscal year following Fiscal Year 2003-2004.

In Fiscal year 2003-2004, as the SWRCB has conceded in the record, the difference between the $9 million annual budget, and the $4.4 million the "fees" were to raise, was funded by the General Fund for the first part of the year. AA527-531, Ex. I (Depo Ex. 23) (Frequently Asked Questions Regarding Water Rights Fees ("FAQs")) (Answer to "Why are water right fees being increased?); AA532-533, Ex. J (Whitney Depo., Vol. II, 253:14-17). Respondents do not contest that the General Fund monies were spent in roughly the first half of the fiscal year, while the "fee" revenue funded costs of *all* aspects of the program in the remaining portion of the year. AA525-526, Ex. H (Whitney Depo., Vol. II, 260:15-18); AA539-543, Ex. L (Depo. Ex. 19); AA544-547, Ex. M (Whitney Depo., Vol. III, 629:6-631:12); AA548-552, Ex. N (Whitney Depo. Vol. II, 266:4-10, Vol. III, 461:2-463:23). In fact, the SWRCB itself created a chart to show how the revenue from the "annual fees" would be divided during the *second half of the fiscal year* to fund all aspects of the program. AA553-570, Ex. O (Depo. Ex. 27) at 00463 ("Stakeholder Meeting, Water Right Fee Allocation," November 6, 2003); AA571-574, Ex. P (Whitney Depo., Vol. II, 366:22-368:12).

gestion that the SWRCB spends 95 percent of its time regulating feepayors is wholly contrary to the findings by the Court of Appeal and the record:

- The Court of Appeal properly found (Op. at 40), and the SWRCB admits, that an estimated "***one-third*** of [the Division of Water Rights'] resources are spent on the public interest or public trust purposes" – all of which is funded by the annual feepayors. *See* AA2298; AA959-962, Ex. BBBB (Whitney Depo., Vol. II, 233:17-235:20) (emphasis added);
- The Court of Appeal properly found (Op. at 40), and the SWRCB admits, that only 10 percent of the costs associated with one-time services are paid by one-time feepayors, and the remaining costs are funded by the annual feepayors – even though about ***60 percent*** of the costs the Division of Water Rights are associated with one-time services. *See* AA761, Ex. RR (Depo. Ex. 30) at 8 (May 17, 2004 Power-Point presentation by Victoria Whitney, "Water Right and Water Quality Certification Fees, FY 2004-2005");
- The Court of Appeal properly found (Op. at 40), and the SWRCB admits, "Approximately 30 percent of the appropri-

ated water in California is held by the federal government, which refuses to pay [regulatory] fees," and the fees of the annual feepayors were ***inflated by 40 percent*** to cover the costs of those who refuse to pay the fees, claiming sovereign immunity or otherwise. *See* AA5960597, Ex. V. (Depo. Ex. 51) (SWRCB Talking Points for Meeting with Legislative Analyst's Office) (emphasis added); AA857-858, Ex. HHH (Whitney Depo., Vol. III, 545:7-545:15); AA853-856, Ex. GGG (Whitney Depo., Vol. II, 307:5-9, 321:20-322:15) ("Q: So by dividing by .6, essentially you impose costs on the fee payers for the sums not collected from [those claiming sovereign immunity or who otherwise refuse to pay]; isn't that correct? A: Yes.");

- The Court of Appeal properly found (Op. at 40), and the SWRCB admits, "[o]f the total water beneficially used, 30 percent or more may be held by [non-permitted and non-licensed water right holders]. Nonetheless, such users receive benefits from the Water Rights Program in terms of complaint resolution, protection of existing rights, and on occasion, adjudication of present rights. . . ." – the costs of which

are funded by the annual feepayors. AA5960597, Ex. V. (Depo. Ex. 51) (SWRCB Talking Points for Meeting with Legislative Analyst's Office); AA857-858, Ex. HHH (Whitney Depo., Vol. III, 545:7-545:15); *See* AA896-899, Ex. SSS (Depo. Ex. 58) at 662 (draft SWRCB "Issue Paper California Water Rights Fees Responses to LAO Report"); AA900-902, Ex. TTT (Whitney Depo., Vol. III, 562:8-563:3).

Nor, as Respondents suggest, does the Court of Appeal's opinion or the record support the premise underlying Respondents' argument – that feepayors are the only ones "burdening" the Water Rights Program, and members of the public, non-permitted and non-licensed water right holders, one-time feepayors, or those who claim sovereign immunity or otherwise refuse to pay fees merely "benefit" from the Water Rights Program's "protection" from feepayors.[3] *See* Pet. at 9-

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[3] With this assertion, Respondents merely try to recast their argument that the "polluter pays" rationale justifying the fees in *Sinclair* and *CAPS*, whereby fees are apportioned such that polluters bear responsibility for contribution to pollution, and fees offer an incentive to reduce pollution, should apply here. The Court of Appeal properly rejected this argument because the "polluter pays" rationale has no application here. *See* Op. at 42-43. The Division of Water Rights ("DWR") and the SWRCB's purpose is not to dis-

[Footnote continued on next page]

12. Indeed, these groups are not simply receiving some "irrelevant"

[Footnote continued from previous page]

courage feepayors' right to use water. Rather, as Respondents admit, it is "required by law" to "ensure that water is put to its fullest beneficial use." AA2042 (Opp. at 38). The SWRCB enforces the mandate of California Constitution, Article X, section 2, which provides:

> It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.

Cal. Const. art. X, § 2. Likewise, California Water Code § 100 mandates that "the water resources of the State be put to beneficial use to the fullest extent of which they are capable." AA1135-1136, Ex. NNNNN. Given the mandate of the DWR and the SWRCB, as well as the obvious fact that water right holders treat and deliver drinking water to the population of California, and irrigate the crops that provide both food and economic strength to this State, the position that the "fee" schedule here is intended to offer an incentive to water right holders to reduce the amount of water diverted is simply untenable. Indeed, as stated rather logically in the Report of the Conservation Commission of the State of California, upon which Respondents rely in their Opposition Brief: "such resources are of no good to the public unless they are *used* for the public benefit." AA2628-2677, Ex. B to Respondents' Request for Judicial Notice at 7 (emphasis added). Respondents' argument for the "polluter pays" rationale here thus fails because a policy of encouraging the universal reduction in the use of water, or ownership of the right to use water, is not the purpose behind the new fees.

ancillary benefits derived from the regulation of feepayors. *Id.* at 10-12. To the contrary, these groups impose their own substantial *independent* burdens on, and benefits from, the Water Rights Program. For example, Respondents admit that while the SWRCB determined that the average cost of processing an application for a water right is $23,000, one-time feepayors pay only $1,000. RB49. Respondents likewise have admitted that the costs to process the majority of change petitions would exceed the $1,000 fee paid by one-time feepayors, and in fact, "it's not very likely" that the SWRCB actually could process a change petition for $1,000 or less. AA742-744, Ex. OO (Whitney Depo., Vol. III, 611:23-612:24).

Similarly, the SWRCB has admitted that any member of the general public can seek certain of the SWRCB's services and not pay *any* fee, including filing a protest against an application, filing a complaint, participating in hearings, or filing documents associated with hearings. AA959-962, Ex. BBBB (Whitney Depo., Vol. II, 233:17-234:13). And, of course, water rights permit and license holders who refuse to pay *any* fees, claiming sovereign immunity or otherwise, place burdens on and benefit from the Water Rights Program the same way that feepayors do. AA847-852, Ex. FFF (Whitney Depo., Vol. II,

305:17-22, 306:8-18, 307:5-9, Vol. III, 473:19-474:2) (water rights holders who refuse to pay the fees, claiming sovereign immunity or otherwise, benefit from the SWRCB's activities "[t]he same way that everybody else benefits").

Furthermore, the Court of Appeal properly pointed to the SWRCB's own admissions that non-permitted and non-licensed water rights holders (*i.e.*, pre-1914, riparian, and pueblo water rights holders) benefit from the Water Rights Program but do not pay fees, as well as Victoria Whitney's testimony "under oath at her deposition" that such admissions were "correct":

> "The LAO's recommendation is based on an assumption that all water right actions benefit to the regulated community (water right permit and license holders). This assumption is not true. In many instances, the prior rights that are protected by the imposition of permit conditions in new permits or by the enforcement of permits and licenses rights that are held by parties other than post-1914 appropriative right holders. *If the goal is that the party receiving the benefit pay their proportional share of the costs of the program, individuals who use groundwater and those who use surface water under some other basis of right should pay a portion of the program costs.* The SWRCB's responsibility over non-permit holders is not included in the LAO recommendation. Certainly a portion of the SWRCB's regulatory/supervision function can and should be logically supported by the General Fund."

Slip. op. at 14 (quoting AA587-589, Ex. T (Depo. Ex. 39) ("State Wa-

ter Resources Control Board Responses to LAO Recommendations") (emphasis added)); *see also* AA883-889, Ex. PPP (Whitney Depo., Vol. II, 330:15-331:15, 419:22-422:14) (affirming that those statements are correct); *see also* AA553-570, Ex. O (Depo. Ex. 27) at 00473 ("Stakeholder Meeting, Water Rights Fee Allocation, November 6, 2003" meeting handout) (non-permitted and non-licensed water right holders "receive[s] benefits from the Water Rights Program in terms of complaint resolution, protection of existing rights, and on occasion, adjudication of present rights. . . .").

In sum, the Court of Appeal applied the proper test under *Sinclair* and *CAPS*, and properly reached the conclusion that the fees are illegal because the fees imposed do not correlate to feepayors' burdens on or benefits from the Water Rights Program. Review on this ground therefore should be denied.

2. The Court Of Appeal Did Not Rule That A *De Minimus* Exception Would Not Be Appropriate

Respondents also erroneously asserts that the Court of Appeal's decision conflicts with *Sinclair*, *CAPS*, and *United Business Commission. v. City of San Diego* (1979) 91 Cal. App. 3d 156 because while those cases "have permitted exemptions for those who impose only a

de minimus social or economic burden," the Court of Appeal's decision does not. Pet. at 10-11. Respondents misstate the Court's holding. The Court did not hold that a *de minimus* exception could not be appropriate – indeed, it had no occasion to address whether such an exception could be appropriate because, as Respondents have admitted, there was no *de minimus* exception here, nor any other justification for imposing the costs of non-permitted or non-licensed water right holders on feepayors. AA896-899, Ex. SSS (Depo. Ex. 58) at 662 (draft SWRCB "Issue Paper California Water Rights Fees Responses to LAO Report"); AA900-902, Ex. TTT (Whitney Depo., Vol. III, 562:8-563:3) ("Q: Turning your attention to Bate stamp 662 under 'other issues,' number five says, 'How do we justify imposing fees on current water rights holders that would be used to pay for riparian and pre-1914 water rights holders? . . . And how did the Division decide to justify that if it did? A: I don't think we did."); AA1115-1124, Ex. KKKKK (Whitney Depo., Vol. II, 222:1-20, 224:19-22) (there is no *de minimus* exemption even for those holding rights to use the smallest amounts of water). Indeed, the Court of Appeal even noted "it would be difficult to make a *de minimus* argument," where, as here, there was no "*evidence* to demonstrate that the

services and benefits provided to the non-paying water right holders were de minimus," and in fact, where there was evidence to the contrary. Slip. op. at 41 (emphasis added). Moreover, the Court of Appeal held, consistent with California caselaw, that the fees were not properly apportioned because, as set forth in detail above, feepayors pay for the significant costs associated with non-feepayors, including non-permitted or non-licensed water right holders on feepayors. As such, Respondents are not entitled to review on this ground.

III. CONCLUSION

For the foregoing reasons, Respondents' Petition for Review should be denied.

Respectfully submitted,

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March 16, 2007

CERTIFICATION OF WORD COUNT

(Cal. Rules of Court, rule 28.1, subdivision (d)(1))

I, Eileen M. Ahern, hereby certify that the total number of words in this Answer To Petition For Review Of California State Water Resources Control Board, *Et Al.* is 3,744 words as counted by the word-processing program used to generate this brief.

DATED: March 16, 2007

Eileen M. Ahern

CERTIFICATE OF SERVICE

I, Mary Anderson, declare as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 333 South Grand Avenue, Los Angeles, California 90071, in said County and State; I am employed by Gibson, Dunn & Crutcher and am currently working with Eileen Ahern, a member of the bar of this Court, and at her direction, on **March 16, 2007** I served the within:

ANSWER TO PETITION FOR REVIEW OF CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, ET AL.

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Mary Anderson

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