

In the Supreme Court of the State of California

**CALIFORNIA BUILDING INDUSTRY
ASSOCIATION,**

Plaintiff and Appellant,

v.

**STATE WATER RESOURCES CONTROL
BOARD,**

Defendant and Respondent.

5
Case No. S226723

SUPREME COURT
FILED

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Frank A. Holman, Clerk

Deputy

First Appellate District, Division Two, Case No. A137680
San Francisco County Superior Court Case No. CGC-11-516510
The Honorable Curtis E.A. Karnow, Judge

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TABLE OF CONTENTS

	Page
Introduction.....	1
Background.....	1
Argument.....	2
I. The Court of Appeal’s decision does not conflict with <i>Capistrano Taxpayers</i>	2
II. The Court of Appeal’s decision does not create any need to settle an important question of law.	3
A. The Court of Appeal’s decision adheres to well- established law that regulatory fees need only be allocated by a reasonable method and need not be allocated precisely.....	3
B. The Court of Appeal properly placed the burden of proof on CBIA.....	5
C. The Court of Appeal correctly interpreted Water Code section 183.....	5
Conclusion.....	7

TABLE OF AUTHORITIES

Page

CASES

Brooktrails Township Community Service District v. Board of Supervisors of Mendocino County
(2013) 218 Cal.App.4th 195.....5

California Farm Bureau Federation v. State Water Resources Control Bd.
(2011) 51 Cal.4th 421 1, 5

Capistrano Taxpayers Ass'n v. City of San Juan Capistrano
(2015) 235 Cal.App.4th 1493 1, 2, 3

Equilon Enterprises v. State Bd. of Equalization
(2010) 189 Cal.App.4th 865.....4

STATUTES

Wat. Code, § 183 5, 6

Wat. Code, § 13260..... 1, 2

Wat. Code, § 13260, subd. (d)(1)(A).....1

Wat. Code, § 13260, subd. (f)(1).....1

CONSTITUTIONAL PROVISIONS

Cal. Const., art. XIII A, § 3 3, 5

Cal. Const., art. XIII D.....3

COURT RULES

Cal. Rules of Court, rule 8.500(b).....1

INTRODUCTION

The petition for review filed by the California Building Industry Association (CBIA) fails to raise any ground for review under rule 8.500(b) of the California Rules of Court:

- The Court of Appeal's decision does not conflict with *Capistrano Taxpayers Ass'n v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493 (*Capistrano Taxpayers*), which concerned a different constitutional provision and a different kind of fee.
- The Court of Appeal followed well-settled law that regulatory fees may be allocated among fee payers by any reasonable method and need not be allocated precisely.
- The Court of Appeal correctly followed *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, by placing the burden on CBIA to prove its claim that the fees were allocated unreasonably.
- The Court of Appeal correctly interpreted a provision of the Water Code regarding hearing procedures of the State Water Resources Control Board (the Board), and there is no conflict in reported cases on that issue.

BACKGROUND

Water Code section 13260 creates a program to regulate discharges of waste that may affect the quality of California's waters. Section 13260 also requires dischargers to help support the program by paying an annual fee. (Wat. Code, § 13260, subd. (d)(1)(A).) The Board must adopt a fee schedule each year to set the amount of fees that each discharger must pay. (Wat. Code, § 13260, subd. (f)(1).) The total fees must generate the amount of revenue prescribed by that year's budget act. (*Ibid.*)

For administrative convenience, the Board has divided dischargers into eight categories. (Joint Appendix (JA) 0230-0233.) Each year the Board creates a budget for its regulation of each category of dischargers and uses that budget to determine the fees that each category should pay. (JA 0232-0233 [see table 1, listing the budgeted amounts for 2011-12].) CBIA does not contend that the total fees imposed under section 13260 exceed the total cost of the waste discharge permit program. Instead, CBIA alleges that only one category of dischargers, those discharging storm water, have been charged too much and that the fee schedule for 2011-12 therefore imposes an unconstitutional tax. (JA 0005, JA 0006, JA 0010, JA 0012-0015.)

The Board necessarily bases each year's fee schedule on projections regarding the amount of fees that will be collected from each class of dischargers. The Board cannot know in advance the number of discharge permits that will be requested each year or the nature of the discharges associated with each permit, and those factors will affect the amount of fees ultimately collected. (See generally, JA 0435-0436, JA 0439-0441.) For example, either a boom or a recession in the construction industry will affect the number of permit applications the Board receives from members of that industry who are storm water dischargers. As with any governmental charge, there will also be varying levels of nonpayment. Consequently, some categories of dischargers may pay a smaller or larger share of the total fees in some years than the Board projected.

ARGUMENT

I. THE COURT OF APPEAL'S DECISION DOES NOT CONFLICT WITH *CAPISTRANO TAXPAYERS*.

CBIA erroneously contends that the Court of Appeal's decision conflicts with *Capistrano Taxpayers*. (E.g., Petition for Review, pp. 7-8.)

The two cases concern different kinds of fees and different constitutional provisions.

In *Capistrano Taxpayers*, the plaintiffs argued that a city's water rate structure violated Proposition 218, which provides that fees imposed by local governments "upon a parcel or upon a person as an incident of property ownership" cannot exceed "the proportional cost of services attributable to the parcel." (*Capistrano Taxpayers*, at p. 1504, quoting Cal. Const., art. XIII D, § 6, subd. (b)(3).) The waste discharge fee in the present case was not imposed by a local government and was not imposed "as an incident of property ownership," so Proposition 218 does not apply.

Unlike the plaintiff in *Capistrano Taxpayers*, CBIA does not rely on Proposition 218 but instead relies on cases applying section 3 of Proposition 13. (Slip opn., p. 18, fn. 9.) That section does not mention "property ownership" and does not limit fees to the "proportional cost of services." (Former Cal. Const., art. XIII A, § 3, added by initiative, Primary Elec. (June 6, 1978); amended by initiative, Gen. Elec. (Nov. 2, 2010), commonly known as Prop. 26.) Regulatory fees governed by section 3 of Proposition 13 may instead be allocated by any reasonable method, as discussed below.

II. THE COURT OF APPEAL'S DECISION DOES NOT CREATE ANY NEED TO SETTLE AN IMPORTANT QUESTION OF LAW.

A. The Court of Appeal's Decision Adheres to Well-Established Law that Regulatory Fees Need Only Be Allocated by a Reasonable Method and Need Not Be Allocated Precisely.

CBIA argues that fees paid by each category of dischargers must match the Board's actual costs of regulating that same category of dischargers. (E.g., Petition for Review, pp. 5-7.) The Court of Appeal correctly rejected that argument. Although the *total* fees cannot exceed the costs of the *entire* waste discharge program, fees must only be allocated

among dischargers by some reasonable method. A precise allocation is not required.

As noted by the Court of Appeal, the total fees imposed under the Board's fee schedule did not exceed the cost of the entire waste discharge permit program. (Slip opn., pp. 14-18, 20-21.) For fiscal year 2011-12, the Board's fee schedule provided for anticipated revenue of \$101.2 million, including \$100.7 million in fee revenue and \$602,000 in other revenue. (JA 0239.) Those anticipated revenues closely corresponded to the projected expenditures of \$101.4 million. (JA 0239.)

CBIA's argument does not challenge the total amount of fees, but "is essentially an allocation argument," asserting that some fee payers are being charged too much in relation to others. (Slip opn., p. 22.) CBIA's argument disregards that " 'a regulatory fee, to survive as a fee, does not require a precise cost-fee ratio.' " (Slip opn., p. 23, quoting *California Assn. of Professional Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 950.) Instead, agencies may allocate regulatory fees by any method that makes sense for the particular regulatory program. (See, e.g., *Equilon Enterprises v. State Bd. of Equalization* (2010) 189 Cal.App.4th 865, 886 [upholding the allocation of regulatory fee because there was "a reasonable basis in the record" for the agency's allocation of the fee, and nothing more was required].)

CBIA asserts that "the Board made no attempt" to correlate fees to the actual cost of its activities for each category of dischargers and that the Board failed "to produce any evidence in the record demonstrating that its fees were limited to its costs of the service for which they were charged." (Petition for Review, pp. 8, 9.) Yet CBIA never denies that the Board set its 2011-12 fee schedule based on the Board's budget regarding each category of dischargers, together with reasonable projections for that year's fees from each category. CBIA asserts only that for several years *before*

2011-12, storm water dischargers ended up paying too much in relation to other categories of dischargers. (Slip opn., pp. 22-23.) But as noted by the Court of Appeal, the Board could reasonably decide not to use the 2011-12 fee schedule to adjust for over-collection in earlier years. (Slip opn., p. 24.) CBIA failed to establish that the 2011-12 fee schedule was unreasonable.

B. The Court of Appeal Properly Placed the Burden of Proof on CBIA.

CBIA asserts that the Court of Appeal erred by placing the burden on CBIA to prove its claim that the fees were allocated unreasonably. (E.g., Petition for Review, pp. 8-9.) However, the Court of Appeal properly followed the rule established by *California Farm Bureau Federation v. State Water Resources Control Bd.*, *supra*, 51 Cal.4th at p. 436, that the burden of proof falls on the party who relies on section 3 of Proposition 13 to challenge a regulatory fee. (Slip opn., p. 19.) Proposition 26 does not apply retroactively and therefore is not relevant. (*Brooktrails Township Community Service District v. Board of Supervisors of Mendocino County* (2013) 218 Cal.App.4th 195, 205-206.) Proper placement of the burden of proof is not an unsettled issue.

C. The Court of Appeal Correctly Interpreted Water Code Section 183.

Water Code section 183 enables the Board to manage its heavy workload by authorizing the Board to delegate hearings and investigations to less than a quorum of its members. The board members who conduct those hearings and investigations will necessarily take a variety of actions without the other board members—e.g., in deciding procedural and evidentiary issues. But section 183 includes a proviso that any *final* action resulting from the hearing or investigation requires a majority vote at a meeting of the entire Board:

Any hearing or investigation by the board may be conducted by any member upon authorization of the board, and he shall have the powers granted to the board by this section, *but any final action* of the board shall be taken by a majority of all the members of the board, at a meeting duly called and held.

(Wat. Code, § 183, italics added.)

The Court of Appeal held that the phrase “any final action,” read in context, refers only to actions taken after the Board has delegated authority to one or more of its members. (Slip opn., pp. 7-10.) The court also held that the phrase “final board action” within the legislative history should be interpreted the same way. (Slip opn., pp. 12-13.) Despite the contrary views expressed in Justice Richman’s lengthy dissent, the court’s analysis was correct, and the Board is not aware of any reported appellate decision in conflict. There is no unsettled issue that requires review.

CONCLUSION

CBIA fails to show any grounds for review, and its petition should therefore be denied.

Dated: June 16, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Answer to Petition for Review uses a 13 point Times New Roman font and contains 1,620 words.

Dated: June 16, 2015

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: California Building Industry Assoc. v. State Water Resources Control Board
Case No.: S226753

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On June 16, 2015, I served the attached **ANSWER TO PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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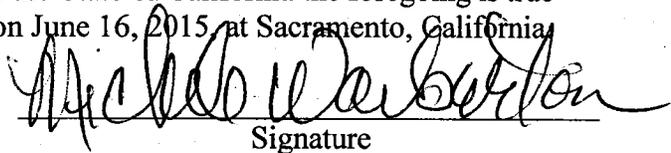
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 16, 2015, at Sacramento, California

Michele Warburton
Declarant



Signature