



# UPDATE: Court Holds Reasonable Use Finding Not Required for Wastewater Discharge Permits

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**UPDATE:** On August 23, 2023 the California Supreme Court, sitting en banc, denied Waterkeeper’s petition for review. The Second District Court of Appeal’s ruling therefore remains the governing law.

In response to a request for modification by the State and Regional Water Boards, the Second District Court of Appeal has limited certain aspects of its prior ruling. The primary ask of the State and Regional Water Boards was that the court either:

1. Omit from the opinion the language limiting the Regional Board’s authority to regulate unreasonable use; or
2. In the alternative, clarify that the court is not deciding, as a general matter, whether regional water quality control boards may regulate the unreasonable use of water *if so authorized by the State Board*.

In response to this request, on June 2, 2023, the Court vacated its original opinion, ordered a rehearing, and issued a new opinion in the case. The court declined to vary its prior ruling limiting unreasonable use, but granted the State Board’s alternative request to clarify in the second opinion that it is expressing no opinion with regard to the State Board’s ability to delegate regulation of unreasonable use to regional boards. The June 2, 2023 opinion states: “We have no occasion to express an opinion on [the question of the State Board’s delegation of regulation of unreasonable use]. Neither in its original briefing nor in its response to the Boards’ modification request, has Waterkeeper identified any such direction or authorization by, or coordination with, the State Board regarding the Regional Board in this case.”

In *Los Angeles Waterkeeper v. State Water Resources Control Board*, the Second District of the California Court of Appeal considered whether the State and Regional Water Boards have an obligation under California Constitution, the California Water Code and/or the California Environmental Quality Act (CEQA) to

review wastewater discharge permits prior to granting approval of the permits. The trial court held that the State Water Resources Control Board (State Water Board) *did* have a duty to evaluate whether the amount of wastewater being discharged was reasonable before issuing a permit. However, the court found that the Regional Water Quality Control Board, Los Angeles Region (Regional Water Board) *did not* have a similar duty, because the reasonability assessment of a discharge is conducted at the state level and the Regional Water Board's authority is limited to assessing water quality. On appeal, the Second District affirmed the judgments of dismissal in favor of the Regional Water Board and reversed the judgments and writs of mandate against the State Water Board (including the award of attorneys' fees). Both courts held that CEQA review was not triggered by the issuance of the permits, because wastewater permits are exempt from CEQA review under the Water Code. This case sheds light on how California courts understand the role of the State and Regional Water Boards with regard to their statutory and constitutional duties.

### **Factual Background and Procedural History**

In 2017, the Regional Water Board renewed permits allowing four publicly-owned treatment works (POTWs) to discharge millions of gallons of treated wastewater daily into the Los Angeles River and the Pacific Ocean. Environmental NGO Los Angeles Waterkeeper (LA Waterkeeper) sought review of the permits before the State Water Board and the State Water Board declined review.

LA Waterkeeper then filed petitions for writs of mandate against both the State and Regional Water Boards, naming the cities that owned the four POTWs as real parties in interest. LA Waterkeeper argued that the Boards have a duty under both the Water Code and article X, section 2 of the California Constitution to prevent the waste and unreasonable use of water and that the Boards violated this duty by failing to evaluate the discharge permits (to see if the quantities discharged were reasonable, whether the water could be recycled or otherwise put to better use, etc.) before approving the permits. LA Waterkeeper further alleged that the Regional Water Board issued the permits without conducting the required CEQA findings.

The Boards demurred to the petitions, arguing that the Constitution and the Water Code imposed no duty, and that wastewater discharge permits were exempt from CEQA under Water Code section 13389.

The trial court overruled the demurrer as to the State Water Board, finding the State Water Board had a constitutional and statutory duty to prevent the waste of water. The trial court found that the large discharges from the POTWs were enough to trigger this duty and that therefore the State Water Board erred in failing to evaluate whether the discharges were reasonable. The trial court clarified that it could not require the State Water Board to fulfill its duty in a particular way, but that mandamus would compel the Board to take *some* action. The court therefore issued four judgments and four writs of mandate directing the State Water Board to evaluate whether the discharges from each of the four POTWs were reasonable.

The trial court sustained demurrer as to the Regional Water Board, finding that the Regional Water Board's duty was not triggered given the relationship between the State and Regional Water Boards. The court explained that the Regional Water Board was only responsible for water *quality* (as in, ensuring the water under its purview is free from pollution) and the Regional Water Board did not have the authority to require the POTWs to recycle more wastewater. With regard to CEQA, the trial court held that the provision of CEQA exempting wastewater discharge permits was meant to mirror federal law, where the entire wastewater discharge permit is exempted from NEPA review.

## **Court of Appeal Analysis**

On appeal, the Second District agreed with the trial court that the Regional Water Board had no duty to evaluate the reasonableness of the POTW discharges because the Regional Water Board's authority is restricted to water quality, not reasonable use.

As to the State Water Board, the court determined that LA Waterkeeper did not adequately plead entitlement to mandamus against the State Water Board and that therefore the trial court should have sustained the Board's demurrer. The court further found that whatever duty the State Water Board has to prevent the unreasonable use of water is "highly discretionary" and that "nothing in [the California Constitution] or the Water Code requires the State Board to take action against any particular instance of unreasonable use or category of unreasonable use." The court of appeal chastised the lower court for categorizing the POTW discharges as "unique" and therefore deserving of review: the Second District found that uniqueness was neither "supported by the language of the Constitution or the Water Code" nor a "workable legal standard." The court of appeal concluded by writing that "[t]he Legislature has opted not to include a reasonable use assessment as part of the wastewater discharge permitting process, and we will not override that determination."

With regard to CEQA, the Second District declined to review whether Water Code section 13389 fully exempted the Regional Water Board from conducting a CEQA analysis prior to issuing wastewater discharge permits. Instead, the court limited itself to the section of CEQA that LA Waterkeeper pleaded (Public Resources Code section 21002) and found that that section does not impose environmental review requirements but instead states a policy related to CEQA's environmental review procedure. The court found that because Water Code section 13389 exempts wastewater discharge permitting from CEQA procedures, Public Resources Code section 21002 did not apply.

The outcome of *LA Waterkeeper* makes clear that regional water boards do not have an obligation to assess the reasonableness of wastewater discharge permits and while the State Water Board has a duty to avoid water waste where possible, it retains a high level of discretion in how it exercises that duty: specific instances of discharge are therefore largely insulated from judicial review. This case also explains that Public Resources Code section 21002 is exempted by Water Code section 13389, although the extent to which local agencies are completely exempted from CEQA analysis when issuing wastewater discharge permits was not fully addressed.