



California Appeals Court Finds in Favor of State Water Board in Dispute Over Wastewater Use

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The Second District Court of Appeal ruled that California's State Water Resources Control Board does not have a mandatory duty to enforce the reasonable use doctrine against wastewater dischargers. In California, a state that relies heavily on recycled water to irrigate agricultural land and replenish water sources, the Second District, in reversing the trial court's decision, likely helped to prevent a wave of litigation that could have had a chilling effect on the state's fast-growing recycled water industry.

Background

In 2017, the Los Angeles Regional Water Quality Control Board (the "Los Angeles Board") renewed wastewater discharge 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. The Los Angeles Board issued these permits over Los Angeles Waterkeeper's ("Waterkeeper") objections. Waterkeeper sought review of these permits before the State Water Resources Control Board (the "State Water Board"), which declined review. Waterkeeper then filed its petitions for writs of mandate against the State Water Board and the Los Angeles Board, naming the cities that owned the POTWs as real parties in interest. (*Los Angeles Waterkeeper v. State Water Resources Control Board*, WL 2237787 (2nd Dist., Feb. 27, 2023).)

Petitions and Trial Court Rulings

Waterkeeper's petitions cited California Constitution Article X, section 2 and Water Code section 100 as imposing a non-discretionary duty on the Los Angeles Board and the State Water Board to make an unreasonable water use determination when issuing wastewater discharge permits. As to the Los Angeles Board, Waterkeeper also alleged that it improperly issued the wastewater

permits without first making findings under the California Environmental Quality Act (CEQA). (Public Resources Code, section 21000 et seq.)

The Los Angeles and State Water Boards each demurred, alleging that the State Constitution and Water Code did not impose any duty to make an unreasonable use determination. The Los Angeles Board further argued that Water Code, section 13389 exempted wastewater discharge permits from CEQA compliance.

The trial court denied the State Water Board's demurrer on the lack of duty argument, noting that the State Water Board had an obligation to evaluate whether the POTWs' large wastewater discharges were reasonable. As to the Los Angeles Board, the trial court sustained its demurrer finding that the Water Code limits a regional board's responsibility relative to water quality issues, i.e., protecting the state's waters from pollution. The trial court also sustained the Los Angeles Board's CEQA exemption argument, holding that statutory and case law exempts wastewater discharge permits from CEQA compliance.

Waterkeeper and the State Water Board proceeded to trial, where the trial court affirmed Waterkeeper's mandatory duty arguments and awarded it \$737,932.84 in attorney fees as a "successful party" under Code of Civil Procedure section 1021.5.

The Second District Court's Decision

The Second District Court of Appeal overturned the trial court's judgment that imposed a non-discretionary duty on the State Water Board to evaluate the POTWs' wastewater discharges for unreasonable use. Interpreting Article X, section 2 and Water Code section 100, the appeals court found that both required the State Water Board to prevent the unreasonable use of water, without mandating when or how it should get involved, and if such were a duty it would best be described as "highly discretionary," not requiring the State Water Board to investigate every such allegation or instance.

The Second District affirmed the trial court's rulings as to the Los Angeles Board's demurrer. A regional board's role is to protect

water quality and does not extend to taking action to prevent waste and the unreasonable use of water. The court also affirmed that wastewater discharge permits are exempt from CEQA.

Having overturned Waterkeeper's petitions, the appeals court reversed the attorney fee award as Waterkeeper was no longer a "successful party."

Key Takeaways

This case could have imposed a time-consuming and expensive obligation on the State Water Board to evaluate every POTWs' wastewater discharge decisions—a "duty" obligation that would likely have resulted in waves of litigation and may well have discouraged a thriving recycled water industry.

Local entities use recycled water in so many beneficial ways, and its use is essential for preserving potable water in the "arid" Western states, California in particular. POTWs provide recycled water for irrigation uses to replace potable water supplies previously used in that manner. POTWs market recycled water for reuse and apply those funds for the development of enhanced wastewater treatment systems and related technology. Recycled water is also used to recharge streams, fisheries, and water-dependent ecosystems. In the future, recycled water can also recharge depleted groundwater basins.

With respect to the language in California Constitution Article X, section 2, the district court's decision brings some definitional meaning to the unreasonable use doctrine that has not garnered much judicial attention up to this point. For more information, contact the author of this article or any member of Frost Brown Todd's [Environmental Practice](#).

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