



Second District Affirms Judgment Upholding Water Code CEQA Exemption, Rejects Plaintiff’s Attempt To Extend CEQA Review And Findings Requirements To Regional Water Board’s Approval Of Waste Discharge Permits

By [Matthew C. Henderson](#) and [Arthur F. Coon](#) on March 27, 2023

On February 27, 2023, the Second District Court of Appeal (Division One) filed its published decision in *Los Angeles Waterkeeper v. State Water Resources Control Board* (2023) ___ Cal.App.5th ___, a case mainly focused on water law but which also has some significant CEQA implications. Briefly put, the petitioner in *Los Angeles Waterkeeper* attempted to bypass a statutory limitation on CEQA review through an action that would, if successful, have resulted in the imposition of additional substantive and procedural environmental review requirements on certain projects for which no EIR is required. As explained below, the Second District rejected this invitation to expand CEQA’s reach.

Factual and Procedural Background

The case involved the Los Angeles Regional Water Quality Control Board’s (“RWQCB”) renewal of wastewater discharge permits for four publicly owned treatment works (“POTWs”) that discharge millions of gallons of treated wastewater into the Los Angeles River and thence into the Pacific Ocean.

Petitioner and appellant Los Angeles Waterkeeper, an environmental advocacy organization, filed suit to challenge the issuance of the permits. Its primary allegation was to the effect that article X, section 2 of the California Constitution and Water Code sections 100 and 275 imposed a duty on the RWQCB and the State Board to prevent the waste of water from the POTWs, which entailed an obligation to analyze whether they could recycle a greater amount of treated wastewater as opposed to discharging it into the river.

The petitioner also brought CEQA claims, arguing that the RWQCB and State Board had a duty to analyze whether there were feasible alternatives to the POTW discharge levels and whether there were cumulative impacts from the four permits. The RWQCB had relied on Water Code section 13389 for

determining its issuance of the waste discharge permits was exempt from CEQA, but petitioner argued the exemption applies only to that portion of CEQA addressing environmental impact reports (chapter 3), and not the portion addressing the underlying policy of CEQA (chapter 1).

The RWQCB and State Board demurred to the CEQA claims, arguing that section 13389 fully exempted the discharge permits from CEQA review. The trial court agreed, notwithstanding that the statute only expressly refers to chapter 3 of CEQA and requirements. The court examined the Clean Water Act's complete exemption from NEPA review for wastewater discharge permits and concluded that Water Code section 13389 was intended to parallel that provision. The trial court also cited case law and section 3733 of title 23 of the California Code of Regulations to support its ruling that the permits were entirely exempt from CEQA irrespective of the statute's only reference to chapter 3. Having also lost on its substantive water law claims against the RWQCB (though not the State Board, although the ruling against the State Board was reversed on appeal), petitioner appealed.

The Court of Appeal's Holding and Analysis

With respect to the CEQA issue, the focus of the Court of Appeal's opinion was on whether chapter 1 of CEQA imposes substantive and procedural requirements or obligations on lead agencies that would be enforceable by mandamus. As the Court put it:

Specifically, Waterkeeper contends that Public Resources Code section 21002, located in CEQA chapter 1, obliges the Regional Board, in Waterkeeper's words, "to make findings as to whether the project has significant and unavoidable impacts, including cumulative impacts resulting from multiple approvals of [waste discharge requirements] for POTW[s], and if so, whether there are feasible alternatives or mitigation measures that would substantially lessen those impacts."

Because section 21002 was the only CEQA provision that petitioner alleged the respondents had violated, the Court limited its review to the specifics of this section, which reads in pertinent part:

"The Legislature finds and declares that it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects, and that the procedures required by this division are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects."

In effect, petitioner argued that section 21002 imposes duties on lead agencies separate and apart from the other requirements of CEQA review – i.e., that, irrespective of an exemption from the requirement to prepare an EIR, a lead agency nevertheless had to analyze and make CEQA findings with respect to a proposed "project." The Court disagreed, relying in part on the language of Water Code section 13389's exemption. That language reads in relevant part: "Neither the state board nor the regional boards shall be required to comply with the provisions of Chapter 3 (commencing with Section 21100) of Division 13 of the Public Resources Code prior to the adoption of any waste discharge requirement...." As the Court noted, Chapter 3 of Division 13 of the Public Resources Code is the portion of CEQA governing EIRs. Thus, as the Court concluded, Water Code section 13389 clearly exempts discharge permits from being subject to review in an EIR.

In rejecting petitioner's argument, the Court made clear that EIRs are how CEQA's policies are actually implemented; the statements of policy on which petitioner relied were not self-executing or independently enforceable. The Court held: "Section 21002 is not itself a directive to conduct environmental review independent of the EIR process. Rather, it is a statement of policy to be carried out through the EIR process. In other words, section 21002 informs the EIR process, but does not impose requirements separate from the EIR process." The Court bolstered this conclusion by looking at the language of Public Resources Code sections 21002.1 and 21081, the latter as applied by *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 134. Both of these statutory provisions speak in terms of applying CEQA policy through the preparation of EIRs, further cementing the conclusion that section 21002 merely sets forth policy rather than substantive requirements and procedures that lead agencies must follow. While petitioner argued that the supposed mandate of section 21002 could be met in the permitting process by making findings as to information already available to the relevant agencies, the Court quickly dismissed that argument by noting that there were no standards under which such efforts could be evaluated apart from the substantive and procedural requirements of Chapter 3 of CEQA itself, which it had just held did not apply. The Court further noted that while environmental considerations were also part of the permitting process itself, that was only the case due to requirements under the Water Code, not CEQA.

The Court also discussed as instructive the case of *County of Los Angeles v. State Water Resources Control Bd.* (2006) 143 Cal.App.4th 985, which held that the substantive environmental review provisions in chapter 3 of CEQA are how the environmental review process is implemented, irrespective of the fact that another chapter of CEQA -- Chapter 2.6 -- sets forth "generalized requirements" for the preparation of EIRs.

Finally, the Court turned to petitioner's argument that the case was analogous to *Pesticide Action Network North America v. Department of Pesticide Regulation* (2017) 16 Cal.App.5th 224, which had held that while Public Resources Code section 21080.5 exempted certified regulatory programs from certain aspects of CEQA review -- namely, the EIR requirements -- the law still imposed the same substantive standards. In rejecting this argument, the Court wrote:

"Certified regulatory programs are exempt from the EIR procedures under CEQA chapters 3 and 4, but only because those programs' own environmental review procedures satisfy the requirements of another section of CEQA, section 21080.5, and are deemed the functional equivalent of EIR procedures. Thus, the Legislature has not exempted certified regulatory programs from CEQA review, but merely provided an alternative method to conduct that review through the programs' own CEQA-compliant environmental review procedures."

This was obviously different than the situation with RWQCB wastewater discharge permits, which are not issued under a certified regulatory program, and which, the Court held, enjoy a complete statutory exemption from CEQA review requirements and procedures.

Accordingly, the Court affirmed the trial court's judgments as to the CEQA claims. (As to the non-CEQA claims that were the primary focus of the opinion, the Court reversed the only part of the judgments as to which petitioner had prevailed by holding the State Board had no constitutional or statutory duty to prevent the POTWs' alleged waste of water that was redressable by ordinary mandamus.)

Conclusion and Implications

While the *Los Angeles Waterkeeper* case at first blush appears to present a fairly discrete issue of interpreting a particular statutory exemption from CEQA, a broader perspective reveals that the Court rejected a proposed methodology for interpreting CEQA and exemptions therefrom that would have led to a significant broadening of CEQA's reach. Had the Court accepted petitioner's argument, projects that are expressly exempt by statute from CEQA's EIR requirements – such as the RWQCB's issuance of waste discharge permits – could still be required to make findings with respect to alternatives and cumulative analyses under CEQA's broad *policy* provisions. Such a result would not only contravene the plain language of the Water Code's exemption and CEQA, as the Court concluded, but would appear to impose new substantive and procedural requirements not expressly contained in CEQA, which CEQA itself plainly prohibits. (Pub. Resources Code, § 21083.1.) So, while the decision does not break new ground, it does serve to delimit CEQA's reach and demonstrates a wholly appropriate judicial refusal to expand CEQA beyond its express legislatively-prescribed limits.

Questions? Please contact [Arthur F. Coon](#) of Miller Starr Regalia. Miller Starr Regalia has had a well-established reputation as a leading real estate law firm for more than fifty years. For nearly all that time, the firm also has written Miller & Starr, California Real Estate 4th, a 12-volume treatise on California real estate law. "The Book" is the most widely used and judicially recognized real estate treatise in California and is cited by practicing attorneys and courts throughout the state. The firm has expertise in all real property matters, including full-service litigation and dispute resolution services, transactions, acquisitions, dispositions, leasing, financing, common interest development, construction, management, eminent domain and inverse condemnation, title insurance, environmental law and land use. For more information, visit www.mslegal.com.