



## **Second District “Waters Down” *Los Angeles Waterkeeper* Waste Discharge Permit CEQA Exemption Opinion After Rehearing At Request Of Water Boards, Narrows And Clarifies Holding With No Change In Judgment Or Result**

By [Arthur F. Coon](#) on June 9, 2023

In a March 27, 2023 post found [here](#), we wrote about the Second District Court of Appeal’s (Div. 1) decision concerning the Water Code section 13389 CEQA exemption for Regional Water Quality Control Board (“RWQCB”) issuance of waste discharge permits, formerly published as *Los Angeles Waterkeeper v. State Water Resources Control Board* (2023) 88 Cal.App.5th 874. After the Regional Board and State Board filed a request for modification of that opinion to clarify certain issues, the Court of Appeal vacated it, ordered rehearing, considered supplemental briefing, and filed a new, superseding published opinion in the case on June 2, 2023.

In the Court’s words: “Having reviewed the additional briefing from the parties, we conclude our original holdings, as well as the reasoning in support of those holdings, were correct. We, however, have made certain modifications to clarify the scope of our holdings as set forth in our Discussion, *post*. In addition to addressing the [Water Boards’] modification request and the responses to that request, we have made minor changes to our original analysis in support of own holdings and added information to our Factual and Procedural Background.” (See p. 7 of 84-page Slip Opn.)

The Court described the gist of the Water Boards’ modification request as “asking that we amend the opinion to avoid what they deemed as unnecessarily deciding issues concerning the Regional Board’s authority to regulate the unreasonable use of water, and to clarify that our holding concerning the CEQA exemption under Water Code section 13389 applies solely to the type of waste discharge permits at issue in this case.” (Slip Opn. at p. 32, fn. omitted.)

With regard to the first, *water-law* issue, the Court summarized its “clarified” reasoning and conclusions as follows:

“Neither the Boards in their modification request nor the other parties in their responses to that request identify any statutory or case authority undercutting our conclusion that the Legislature has empowered the State Board, but not the Regional Board, to regulate whether the POTWs’ discharges constitute an unreasonable use of water. We, however, grant the Boards’ alternative request to make clear that we express no opinion as to whether the State Board may direct or authorize the regional water quality control boards to take action related to preventing the waste or unreasonable use of water in coordination with the State Board’s efforts in this regard. We have no occasion to express an opinion on that question. ....”

(Slip Opn. at p. 53.)

With respect to the second, CEQA-exemption issue that is the primary focus of this blog, the Court explained the Boards’ modification request and clarified the narrowness of its relevant holding as follows:

“The Boards contend in their modification request that the CEQA exemption under Water Code section 13389 applies only to waste discharge permits that are the state equivalent of federal NPDES permits, and not to waste discharge permits issued pursuant to other provisions of the Water Code. Because the waste discharge permits at issue in the instant case are NPDES-equivalent permits, and the parties do not dispute the permits are subject to the Water Code section 13389 exemption, we need not, and do not decide whether the exemption applies to other types of waste discharge permits not at issue in this case.”

(Slip Opn. at p. 66, fn. 18.)

As with its prior decision, the Court disagreed with plaintiff and appellant Los Angeles Waterkeeper’s “underlying premise ... that [Public Resources Code] section 21002 imposes environmental review requirements independent of CEQA’s EIR procedures from which NPDES permits are exempt” because “section 21002 does not impose its own environmental review requirements, but rather, states a policy the Legislature intended the EIR process to effectuate.” Because “section 21002 only has force to the extent an entity otherwise is obligated to prepare an EIR” and “the [NPDES-equivalent] wastewater discharge permits at issue ... are exempt from the EIR requirement, section 21002 is inapplicable, and the Regional Board was not required to comply with that provision. **We therefore need not, and do not, reach the broader question whether Water Code section 13389 provides a complete exemption from CEQA.**” (Slip Opn. at pp. 67-68, *emph. added.*)

“In other words, section 21002[’s statement of policy] informs the EIR process, but does not impose requirements separate from the EIR process” (*id.* at p. 71), and Los Angeles Waterkeeper’s argument that it imposed a “substantive mandate” applicable to the Regional Board’s permitting process here lacked merit. But the Court’s modified opinion nevertheless pared back and “watered down” (if you will) the trial court’s broader conclusion that Water Code section 13389 provides a “complete exemption from CEQA,” prudently leaving issues regarding that statute’s full scope and application *outside* the NPDES-equivalent wastewater discharge permitting process to await decision on another day in a case actually presenting them.



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