Orally Modified

Los Angeles Waterkeeper v. State Water Resources Control Board, et al., BS171009

~~Tentative~~ decision on petition for writ of mandate: granted in part

Petitioner Los Angeles Waterkeeper ("Waterkeeper"), in the consolidated briefing and trial of BS171009 (Burbank), BS171010 (Glendale), BS171011 (Tillman), and BS171012 (Hyperion), petitions for a writ of traditional mandamus directing State Water Resources Control Board ("State Board") to (1) determine whether the ongoing discharge of wastewater from four Publicly Owned Treatment Works ("POTWs") constituted a reasonable and beneficial use of that water and (2) prevent the ongoing waste and unreasonable use of such wastewater.

The court has read and considered the moving papers, oppositions, and reply, and renders the following decision.

A. Statement of the Case

1. Petition BS171009

Petitioner Waterkeeper commenced this proceeding on September 26, 2017, alleging causes of action under the California Constitution Article X, section 2 ("Article X, section 2"), the California Environmental Quality Act ("CEQA"), and the Water Code. The verified Petition alleges in pertinent part as follows.

Respondent Regional Water Quality Control Board, Los Angeles Region ("Regional Board") erred in approving the Waste Discharge Requirements ("WDR" or "permit") and a National Pollutant Discharge Elimination System ("NPDES") permit for Burbank's Water Reclamation Plant ("Burbank plant"). Article X, section 2 places a non-discretionary affirmative duty on the Regional Board to determine whether a water use is reasonable and beneficial and to prevent waste and unreasonable use of all water resources in California. Water Code section 100 ("section 100") also requires the Regional Board to determine whether a water use is reasonable and beneficial and to prevent waste. In approving the WDR and NPDES permit for the Burbank plant, the Regional Board failed to act in a manner required by law and failed to perform a mandatory duty by failing to analyze whether reauthorizing the discharge constitutes a waste and unreasonable use of a water resource.

The Regional Board also violated CEQA by failing to conduct the analysis required, include findings regarding feasible alternatives that could lessen environmental impacts, include findings regarding cumulative impacts of multiple WDR approvals, and then base its findings on substantial evidence.

The State Board failed to act in a manner required by law and failed to perform its mandatory duties pursuant to Article X, section 2 and Water Code sections 100 and 275. Section 100 places on the State Board a non-discretionary affirmative duty to determine whether a water use is reasonable and beneficial and to prevent the waste and unreasonable use of all water resources in California. Water Code section 275 ("section 275") directs the State Board to take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, or unreasonable methods of use.

The State Board failed to perform its duty by failing to determine whether the discharge from the Burbank plant is a reasonable and beneficial use of a water resource and/or whether the

rate of discharge constitutes a reasonable and beneficial use. The State Board failed to take all appropriate proceedings or actions as required by law to prevent the waste, unreasonable use, and unreasonable method of use of water.

2. Petition BS171010

Petitioner Waterkeeper commenced this proceeding on September 26, 2017, alleging causes of action under Article X, section 2, CEQA, and the Water Code. The verified Petition alleges in pertinent part as follows.

The Regional Board erred in approving the WDR and NPDES permit for the Los Angeles and Glendale Water Reclamation Plant ("Glendale plant").[1] Article X, section 2 places a non-discretionary affirmative duty on the Regional Board to determine whether a water use is reasonable and beneficial and to prevent waste and unreasonable use of all water resources in California. Section 100 also requires the Regional Board to determine whether a water use is reasonable and beneficial and to prevent waste. In approving the WDR and NPDES permit for the Glendale plant, the Regional Board failed to act in a manner required by law and failed to perform a mandatory duty by failing to analyze whether authorizing the discharge constitutes a waste and unreasonable use of a water resource.

The Regional Board also violated CEQA by failing to conduct the analysis required, include findings regarding feasible alternatives that could lessen environmental impacts, include findings regarding cumulative impacts of multiple WDR approvals, and base its findings on substantial evidence.

The State Board failed to act in a manner required by law and failed to perform its mandatory duties pursuant to Article X, section 2 and sections 100 and 275. Section 100 places a non-discretionary affirmative duty on the State Board to determine whether a water use is reasonable and beneficial and to prevent the waste and unreasonable use of all water resources in California. Section 275 directs the State Board to take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, or unreasonable method of use.

The State Board failed to perform its duty by failing to determine whether the discharge from the Glendale plant is a reasonable and beneficial use of a water resource and/or whether the rate of discharge constitutes a reasonable and beneficial use. The State Board failed to take all appropriate proceedings or actions as required by law to prevent the waste, unreasonable use, and unreasonable method of use of water.

3. Petition BS171011

Petitioner Waterkeeper commenced this proceeding on September 26, 2017, alleging causes of action under Article X, CEQA, and the Water Code. The verified Petition alleges in pertinent part as follows.

The Regional Board erred in approving the WDR and NPDES permit for Los Angeles' Donald C. Tillman Water Reclamation Plant ("Tillman plant"). Article X, section 2 places a non-discretionary affirmative duty on the Regional Board to determine whether a water use is

[1] Although the plant is owned jointly by Los Angeles and Glendale, for convenience it is referred to as the Glendale plant.

reasonable and beneficial and to prevent waste and unreasonable use of all water resources in California. Section 100 also requires the Regional Board to determine whether a water use is reasonable and beneficial and to prevent waste. In approving the WDR and NPDES permit for the Tillman plant, the Regional Board failed to act in a manner required by law and failed to perform a mandatory duty by failing to analyze whether reauthorizing the discharge constitutes a waste and unreasonable use of a water resource.

The Regional Board also violated CEQA by failing to conduct the analysis required, include findings regarding feasible alternatives that could lessen environmental impacts, include findings regarding cumulative impacts of multiple WDR approvals, and base its findings on substantial evidence.

The State Board failed to act in a manner required by law and failed to perform its mandatory duties pursuant to Article X, section 2 and sections 100 and 275. Section 100 places a non-discretionary affirmative duty on the State Board to determine whether a water use is reasonable and beneficial and to prevent the waste and unreasonable use of all water resources in California. Section 275 directs the State Board to take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, or unreasonable method of use.

The State Board failed to perform its duty by failing to determine whether the discharge from the Tillman plant is a reasonable and beneficial use of a water resource and/or whether the rate of discharge constitutes a reasonable and beneficial use. The State Board failed to take all appropriate proceedings or actions as required by law to prevent the waste, unreasonable use, and unreasonable method of use of water.

4. Petition BS171012

Petitioner Waterkeeper commenced this proceeding on September 26, 2017, alleging causes of action under Article X, ~~CEQA~~, and the Water Code. The operative pleading is the First Amended Petition ("FAP"), filed on November 2, 2018. The FAP alleges in pertinent part as follows.

The Regional Board erred in approving the WDR and NPDES permit for Los Angeles' Hyperion Water Reclamation Plant ("Hyperion plant"). Article X, section 2 places a non-discretionary affirmative duty on the Regional Board to determine whether a water use is reasonable and beneficial and to prevent waste and unreasonable use of all water resources in California. Section 100 also requires the Regional Board to determine whether a water use is reasonable and beneficial and to prevent waste. In approving the WDR and NPDES permit for the Hyperion plant, the Regional Board failed to act in a manner required by law and failed to perform a mandatory duty by failing to analyze whether reauthorizing the discharge constitutes a waste and unreasonable use of a water resource.

The State Board failed to act in a manner required by law and failed to perform its mandatory duties pursuant to Article X, section 2 and sections 100 and 275. Section 100 places a non-discretionary affirmative duty on the State Board to determine whether a water use is reasonable and beneficial and to prevent the waste and unreasonable use of all water resources in California. Section 275 directs the State Board to take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, or unreasonable method of use.

The State Board failed to perform its duty by failing to determine whether the discharge from the Hyperion plant is a reasonable and beneficial use of a water resource and/or whether the rate of discharge constitutes a reasonable and beneficial use. The State Board failed to take all appropriate proceedings or actions as required by law to prevent the waste, unreasonable use, and unreasonable method of use of water.

5. Course of Proceedings

On October 12, 2018, Judge Palazuelos related Petitions BS171009, BS171010, BS171011, and BS171012 and consolidated them for briefing and trial. BS 171009 was designated as the lead case.

On September 6, 2019, the court overruled Respondents' demurrers to the four consolidated Petitions as to the State Board and sustained them as to the Regional Board without leave to amend. The Regional Board was dismissed from the Petitions on October 10, 2019.

B. Standard of Review

A party may seek to set aside an agency decision by petitioning for either a writ of administrative mandamus (CCP §1094.5) or of traditional mandamus. CCP §1085. A petition for traditional mandamus is appropriate in all actions "to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station...." CCP §1085. Traditional mandamus permits judicial review of ministerial duties as well as quasi-legislative and legislative acts. County of Del Norte v. City of Crescent City, (1999) 71 Cal.App.4th 965, 972.

A traditional writ of mandate is the method of compelling the performance of a legal, ministerial duty required by statute. *See* Rodriguez v. Solis, (1991) 1 Cal.App.4th 495, 501-02. Generally, mandamus will lie when (1) there is no plain, speedy, and adequate alternative remedy, (2) the respondent has a duty to perform, and (3) the petitioner has a clear and beneficial right to performance." Pomona Police Officers' Assn. v. City of Pomona, (1997) 58 Cal.App.4th 578, 583-84 (internal citations omitted). Whether a statute imposes a ministerial duty for which mandamus is available, or a mere obligation to perform a discretionary function, is a question of statutory interpretation. AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health, (2011) 197 Cal.App.4th 693, 701.

In the absence of a ministerial duty, traditional mandamus relief is unavailable unless the petitioner can demonstrate an abuse of that discretion. An agency decision is an abuse of discretion only if it is "arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair." Kahn v. Los Angeles City Employees' Retirement System, (2010) 187 Cal.App.4th 98, 106. In applying this deferential test, a court "must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." Western States Petroleum Assn v. Superior Court, (1995) 9 Cal.4th 559, 577. Mandamus will not lie to compel the exercise of a public agency's discretion in a particular manner. American Federation of State, County and Municipal Employees v. Metropolitan Water District of Southern California, ("AFSCME") (2005) 126 Cal.App.4th 247, 261. It is available to compel an agency to exercise discretion where it has not done so (Los Angeles County Employees Assn. v. County of Los Angeles, (1973) 33 Cal.App.3d 1, 8), and to correct an abuse of discretion actually exercised. Manjares v. Newton, (1966) 64 Cal.2d 365, 370-71. In making this determination, the court may not substitute its

judgment for that of the agency, whose decision must be upheld if reasonable minds may disagree as to its wisdom. Id. at 371. A writ will lie where the agency's discretion can be exercised only in one way. Hurtado v. Superior Court, (1974) 11 Cal.3d 574, 579.

The existence and nature of a government agency's statutory or constitutional mandatory duty is an issue of law for the court to decide without deference to the agency where no scientific or technical issue gives the agency an interpretive advantage. Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Board, (2012) 210 Cal.App.4th 1255, 1267.

No administrative record is required for traditional mandamus to compel performance of a ministerial duty or for abuse of discretion where there is no quasi-legislative action.

C. Governing Law

1. The Beneficial and Reasonable Use of Water

Ownership of California's water is vested in the state's residents, but a person or entity can acquire the right to divert water from its natural course for public or private use. Water Code §1478; Light v. State Water Resources Control Bd., ("Light") (2014) 226 Cal.App.4th 1463, 1477. California has a dual system of water rights which distinguishes between "riparian users" and "appropriators". Riparian users possess water rights by virtue of owning the land next to water courses and have historically and presently have the right to take water out of that stream (known as a diversion) for use on their property. Appropriators hold the right to divert such water for use on non-contiguous lands. Id. at 1478. Post-1914 appropriators may possess water rights only through a permit issued by the State Board, but riparian users and pre-1914 appropriators do not need a permit. Id.

Prior to 1928, appropriative water rights holders had to use water reasonably, but riparian water rights holders were not required to avoid unreasonable use that adversely affected appropriators. Herminghaus v. So. Cal. Edison Co., ("Herminghaus") (1926) 200 Cal. 81. Herminghaus essentially held that appropriative water right holders could not compel riparian water right holders to use water reasonably. In 1928, the voters amended the California Constitution to overrule Herminghaus through Article X, section 2, which prohibits all users of water—appropriative, riparian, or otherwise—from wasting or unreasonably using water. Peabody v. City of Vallejo, (1935) 2 Cal.2d 351, 367.

Article X, section 2 provides:

> "…[T]he general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare."
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> "The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water."

"Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

After voters passed Article X, section 2, all water resources of the state must be put to reasonable and beneficial use and not wasted. Water Code §100; Light, *supra*, 226 Cal.App.4th at 1479. "[N]o water rights are inviolable; all water rights are subject to governmental regulation." Light, *supra*, 226 Cal.App.4th at 1487 (citation omitted). The right to water or the use or flow of water from any natural stream or water course is limited to such water as shall reasonably be required for the beneficial use to be served. Id. at 1479. A water use must be both beneficial and reasonable. Article X, §2; Central Delta Water Agency v. State Water Resources Control Board, ("Central Delta") (2004) 124 Cal.App.4th 245, 259, 263-64 (State Board must meet detailed statutory and regulatory requirements to ensure beneficial use in issuing permits to appropriate water). This beneficial and reasonable use doctrine is the principle governing all uses of water resources in California. Joslin v. Mann Municipal Water Dist. ("Joslin") (1967) 67 Cal.2d 132, 137-38.

California courts have never defined what is a reasonable use of water, but they have made findings about unreasonable use. Light, *supra*, 226 Cal.App.4th at 1479-80 (use of water for the sole purpose of flooding land to kill gophers and squirrels is unreasonable, as is flooding for the purpose of depositing sand and gravel in flooded land). In determining whether a water diversion is unreasonable, the relevant factors include the impacts of the diversion on recreation, fish, and habitat. Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist., (1980) 26 Cal.3d 183, 191, 200.

The determination of reasonable use is made on a case-by-case basis, and changes over time. In re Waters of Long Valley Creek Stream System, (1979) 25 Cal.3d 339, 354; Light, *supra*, 226 Cal.App.4th at 1479 (same). "What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time." Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation District, ("Tulare") (1935) 3 Cal.2d 489, 567. Reasonable and beneficial water use "cannot be resolved *in vacuo* isolated from statewide considerations of transcendent importance. Paramount among these [is] the ever increasing need for the conservation of water in this state...." Joslin, *supra*, 67 Cal.2d at 140.

The State Board has concluded that a reasonable use analysis requires an examination and evaluation of the ascertainable facts concerning water usage in view of the increasing need for water conservation within California. Although each case must be evaluated on its own merits, prior court and State Board decisions and several statutes provide guidance in evaluating water

usage. In the Matter of Alleged Waste and Unreasonable Use of Water by Imperial Irrigation Dist., (June 21, 1984) State Water Resources Control Bd. Decision 1600 ("State Board Imperial Decision"), p.23. The State Board has listed seven factors for considering whether a use is wasteful or unreasonable: (1) other potential beneficial uses for conserved water; (2) whether the excess water now serves a reasonable and beneficial purpose; (3) the probable benefits of water savings; (4) the amount of water reasonably required for current use; (5) the amount and reasonableness of the cost of saving water; (6) whether the required methods of saving water are conventional and reasonable rather than extraordinary; and (7) the availability of a physical plan or solution. Id., pp. 24-29.

2. Public Trust Doctrine

In addition to reasonable use, water rights in California are limited by the public trust doctrine. Santa Barbara Channelkeeper v. City of San Buenaventura, (2018) 19 Cal.App.5th 1176, 1185-86. The doctrine's origin is in Roman law, and English common law was applied in California to cases involving public rights to navigation, commerce, and fishing on navigable waters. Id. In 1983, the California Supreme Court held that the doctrine also protects navigable waters, such as Mono Lake, from harm cause by diversion of non-navigable tributaries. National Audubon Society v. Superior Court, ("Audubon") (1983) 33 Cal.3d 419, 437. The State has a broad duty to protect the people's common heritage of streams, lakes, marshlands, and tidelands. Id. As a consequence, parties acquiring rights in water flowing in a stream generally hold those rights subject to the public trust and can assert no vested right to use the water in a manner harmful to the trust. Id; Santa Barbara Channelkeeper v. City of San Buenaventura, *supra,* 19 Cal.App.5th at 1185-86.

3. The Clean Water Act

The federal Clean Water Act was enacted in 1972 to protect the nation's water quality. It does so by prohibiting the discharge of pollutants to waters of the United States without a NPDES permit. 33 U.S.C. §§ 1311, 1342; Building Industry Association. of San Diego County v. State Water Resources Control Board, (2004) 124 Cal.App.4th 866, 872-73. NPDES permits protect water quality by imposing various requirements on the discharger, including limiting the concentration of specific pollutants and requiring monitoring and self-reporting. Waterkeepers Northern California v. State Water Resources Control Board, (2002) 102 Cal.App.4th 1448, 1452.

The goal of the NPDES permitting system is to ensure that the "receiving water" to which discharges are made will remain clean enough to support the beneficial uses designated for that water, such as drinking, swimming, fishing, or providing wildlife habitat. Communities for a Better Environment v. State Water Resources Control Board, (2003) 109 Cal.App.4th 1089, 1092-1093. NPDES permits must be renewed every five years. 33 U.S.C. §1342(b)(1)(B).

States meeting federal requirements may be authorized by the federal Environmental Protection Agency ("EPA") to administer state permit programs in lieu of the NPDES permit program. 33 U.S.C. § 1342(b). After the Clean Water Act's enactment in 1972, California took steps to obtain approval of its state permit program. Water Code §§ 13370-89; County of Los Angeles v. California State Water Resources Control Board, ("County of Los Angeles") (2006) 143 Cal.App.4th 985, 1004-07. The steps included exempting NPDES permitting decisions from CEQA because the Clean Water Act exempts the EPA from complying with the National

Environmental Protection Act ("NEPA"), which is the federal equivalent to CEQA. Water Code §13389; 33 U.S.C. §1371(c). In 1973, California obtained authority from the EPA to administer its permit program in lieu of the NPDES permitting program. 54 Fed. Reg. 40664-01 (Oct. 3, 1989).

4. California's Water Quality Act

The Porter-Cologne Water Quality Control Act ("Water Quality Act") is California's means of compliance with the NPDES permitting program. The Water Quality Act protects the quality of the waters of California, including both surface water and groundwater, through a permitting process that controls the discharge of "waste." Water Code §13000.[2] The term "waste" includes sewage and all other waste substances associated with human habitation or from any producing, manufacturing, or processing operation. Water Code §13050(d). State program requirements shall be construed to ensure consistency with the federal Water Pollution Control Act. Water Code §13372.

The State Board and nine regional water boards are the "principal state agencies with primary responsibility for the coordination and control of water quality." Water Code §13001; California Sportfishing Protection Alliance v. State Water Resources Control Bd., (2008) 160 Cal.App.4th 1625, 1638. The Regional Board has primary responsibility for issuing water quality permits in the Los Angeles region. Waterkeepers Northern California v. State Water Resources Control Board, *supra,* 102 Cal.App.4th at 1452; Natural Resources Defense Council, Inc. v. City of Los Angeles, (2013) 725 F.3d 1194, 1198-99; Water Code §§ 13200(d), 13263, 13377.

a. The Regional Boards

The State Board establishes statewide policy for water quality control (Water Code

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[2] Water Code section 13000 provides:

> "The people of the state have a primary interest in the conservation, control, and utilization of the water resources of the state, and that the quality of all the waters of the state shall be protected for use and enjoyment by the people of the state. Activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.
> ¶The health, safety and welfare of the people of the state requires that there be a statewide program for the control of the quality of all the waters of the state; that the state must be prepared to exercise its full power and jurisdiction to protect the quality of waters in the state from degradation originating inside or outside the boundaries of the state; that the waters of the state are increasingly influenced by interbasin water development projects and other statewide considerations; that factors of precipitation, topography, population, recreation, agriculture, industry and economic development vary from region to region within the state; and that the statewide program for water quality control can be most effectively administered regionally, within a framework of statewide coordination and policy."

§13140) and the regional boards "formulate and adopt water quality control plans for all areas within [a] region." Water Code §13240; City of Burbank v. State Water Resource Control Board, ("City of Burbank") (2005) 35 Cal.4th 613, 619. The regional boards' water quality plans ("basin plans") must address water quality objectives and the beneficial uses to be protected and must establish a program of implementation. Water Code §13050(j). Basin plans must be consistent with "state policy for water quality control." Water Code §13240. City of Burbank, *supra*, 35 Cal.4th at 619.

Regional boards also issue WDRs (permits) for the discharge of wastewater:

> "(a) The regional board, after any necessary hearing, shall prescribe requirements as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge, except discharges into a community sewer system, with relation to the conditions existing in the disposal area or receiving waters upon, or into which, the discharge is made or proposed. The requirements shall implement any relevant water quality control plans that have been adopted, and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241.
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> (b) A regional board, in prescribing requirements, need not authorize the utilization of the full waste assimilation capacities of the receiving waters.
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> (c) The requirements may contain a time schedule, subject to revision in the discretion of the board.
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> (d) The regional board may prescribe requirements although no discharge report has been filed.
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> (e) Upon application by any affected person, or on its own motion, the regional board may review and revise requirements. All requirements shall be reviewed periodically.
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> (f) The regional board shall notify in writing the person making or proposing the discharge or the change therein of the discharge requirements to be met. After receipt of the notice, the person so notified shall provide adequate means to meet the requirements.
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> (g) No discharge of waste into the waters of the state, whether or not the discharge is made pursuant to waste discharge requirements, shall create a vested right to continue the discharge. All discharges of waste into waters of the state are privileges, not rights.
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> (h) The regional board may incorporate the requirements prescribed pursuant to this section into a master recycling permit for either a supplier or distributor, or both, of recycled water...." Water Code §13263.

A regional board's WDR is equivalent to, and serve as, a NPDES permit when issued to implement both the Water Quality Act and the federal Clean Water Act. Water Code §§ 13374, 13377. Permits issued by a regional board must prevent nuisance, which includes anything that is injurious to public health. Water Code §§ 13263(a), 13050(m). Regional boards may require testing to assess the safety of the discharge. Water Code §13267.

In addition to an individual WDR permit, the legislature empowered the regional boards and the State Boards to adopt "general waste discharge requirements ("General WDR") for a category of discharges" under certain circumstances. Water Code §13263(i). General WDRs are region-wide or state-wide generic permit terms that dischargers can elect to use for permitting their discharges rather than initiating an individual WDR permitting process. Water Code §13263(i). When adopting a General WDR, the pertinent board must make findings regarding the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, past, present, and probable future beneficial uses, environmental characteristics, water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area, economic considerations, the need for developing housing, and the need to develop and use recycled water. Water Code §§ 13263(a), 13241.

Waste treatment plant owners have the exclusive right to the treated wastewater created by their plant. Water Code §1210. No permit shall be issued to any person other than the wastewater producer for the appropriation of treated wastewater that has been introduced into the watercourse with the stated intention of maintaining or enhancing fishery, wildlife, recreational, or other instream beneficial use. Water Code §1212.

Pursuant to Water Code section 1211 ("section 1211"), a waste treatment plant must apply for, and ~~a regional~~ board may approve, a request to reduce the level of existing wastewater discharge:

> "(a) Prior to making any change in the point of discharge, place of use, or purpose of use of treated wastewater, the owner of any wastewater treatment plant shall obtain approval of the board for that change….(b) Subdivision (a) does not apply to changes in the discharge or use of treated wastewater that do not result in decreasing the flow in any portion of a watercourse." Water Code §1211.

A party aggrieved by a final decision or order of a regional board may obtain review of the decision in superior court by filing a petition for writ of mandate. Water Code §13330(b). The court shall exercise its independent judgment on the evidence in any case involving the judicial review of a decision or order of the state board or regional board. Water Code §13330(e).

b. The State Board

The State Board was created in 1913 as the State Water Commission and initially was limited to determining if unappropriated water was available and, if so, issuing a permit for its use. Light, *supra*, 226 Cal.App.4th at 1481. The enactment of Article X, section 2 led to an expansion of the State Board's powers. Id. The State Board's authority has steadily evolved "from the narrow role of deciding priorities between competing appropriators to the charge of comprehensive planning and allocation of waters." Id. (citation omitted).

California's policy now is to combine government functions and provide for the State Board's coordinated consideration of water rights and water quality. Water Code §174(b). The State Board has broad authority to control and condition water use, ensuring that it is used consistent with the public interest. Id. (citation omitted). The State Board is responsible to take all appropriate actions before executive, legislative, or judicial agencies to carry out the

constitutional and statutory mandates to prevent the waste and unreasonable use of California's waters. Water Code §§ 275, 1050. The State Board also is responsible for administering California's public trust resources. *See* Water Code §1120.

The State Board "exercise[s] the adjudicatory and regulatory functions of the state in the field of water resources." Water Code §174(a). The State Board functions to provide for the orderly and efficient administration of water resources and has the authority to take all appropriate actions to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in the state. California Farm Bureau Federation v. State Water Resources Control Bd., (2011) 51 Cal.4th 421, 429. *See* Water Code §§ 1825 (cease and desist orders), 1052, 1845 (penalties or injunctive relief), 1241 (forfeiture), 1675 (revocation); Light, *supra,* 226 Cal.App.4th at 1481; Imperial Irrigation Dist. v. State Water Resources Control Bd. ("Imperial Irrigation I") (1986) 186 Cal.App.3d 1160 (administrative adjudication).

"The Board's authority to prevent unreasonable or wasteful use of water extends to all users, regardless of the basis under which the users water rights are held." Light, *supra*, 226 Cal.App.4th at 1482. Hence, the State Board has the authority to enact a regulation governing the reasonable use of water to protect young salmon from abrupt declines in the Russian River caused by appropriators using the water in cold months to spray vineyard and orchards to prevent damage, even though the regulation affected riparian users and pre-1914 appropriators not required to have permits. Id. at 1487.

An aggrieved person may petition the State Board to review any action or failure to act by a regional board. Water Code §13320. The State Board has the authority, but not a duty, to review decisions of regional boards. Water Code §13320(a). The State Board's decision not to review a regional board's action is unreviewable. People v. Barry, (1987) 194 Cal.App.3d 158, 167.

4. Recycled Water

For more than 100 years California, especially Central and Southern California, has lacked sufficient local water supplies to the meet the state's water requirements. The primary method for addressing this problem was to import water from places of abundance to places where it is lacking. In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings, (2008) 43 Cal.4th 1143, 1153-55 (discussing California's importation of water from the Owen's Valley, the Colorado River, and the Sacramento-San Joaquin Delta). Importing water, however, negatively impacted the locales where the water originated. The public has an interest, and the legislature has directed the state to undertake all possible steps to encourage, the development of water "to supplement existing surface and underground water supplies and to assist in meeting the future water requirements of the state..." and "to minimize the impacts of growing demand for new water on sensitive natural water bodies." Water Code §§ 13510, 13512, 13529(c).

One means of alleviating California's water supply problem is to recycle it.[3] Rather than discharging effluent to the ocean or rivers as waste, wastewater treatment plants could treat it to become recycled water and then redirect it for beneficial use.

In enacting the Water Reclamation Law in 1970, the Legislature declared that the people

[3] "Recycled water" is water, which as a result of treatment of waste, is suitable for a direct beneficial use or a controlled use that would not otherwise occur…" Water Code §13050(n). "Reclaimed water" has the same meaning as "recycled water". Water Code §26.

of the state have a "primary interest" in the development of water recycling facilities and stated its intention that the state "undertake all possible steps" to do so. Water Code §§ 13510, 13512; 13560; 23 CCR §2920. The Legislature found that the state has an interest in the development of facilities to recycle water "to supplement existing water supplies" and "to minimize the impacts of growing demand for new water on sensitive natural water bodies." Water Code §13529(c). The Legislature intended that the state "undertake all possible steps to encourage development of water recycling facilities ...." Water Code §13512 (emphasis added). The development of such facilities "for domestic agriculture, industrial, recreational, and fish and wildlife purposes, will contribute to the peace, health, safety and welfare of the people of the state." Water Code §13511.

The Legislature further found that the use of recycled water may help California meet "a substantial portion of the future water requirements of this state." Water Code §§ 13511, 13529(d). As the California Supreme Court stated: "[t]he Legislature enacted the Water Reclamation Law to encourage wastewater reclamation as a means of supplementing existing water supplies." Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist., ("EDF I") (1977) 20 Ca1.3d 327, 342. In 1997, the Legislature set a goal of recycling one million acre-feet of water ("afy")[4] by 2010. Water Code §13529(e). In 2013, the State Board expanded that goal to increase the use of recycled water over 2002 levels by at least one million afy by 2020 and by at least two million afy by 2030.[5]

In 2009, the Legislature declared that it is waste and unreasonable use of water to use potable water when recycled water of adequate quality is available. *See* Water Code §13550. The Legislature also found that specific uses of potable water are a waste or an unreasonable use if suitable recycled water is available. Water Code §§ 13552.2 (residential landscaping), 13552.6 (floor trap priming, cooling towers, and air conditioning), 13553 (toilet and urinal flushing).

The Legislature created a permitting process to ensure that recycled water facilities do not adversely affect water quality. Water Code §13510 *et seq*. Discharges of recycled water without a permit are prohibited. Water Code §13529.2. As necessary to protect the public health, safety, or welfare, a regional board or the State Board may issue a permit known as "water reclamation requirements" (WRR) to an entity that proposes to recycle water in order to protect "the public health, safety, or welfare". Water Code §§ 13523, 13528.5(a). Recycled water may not be used for potable uses, direct (retail distribution systems) or indirect (groundwater recharge), and the

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[4] Effluent discharges are measured in flow rates. These rates vary widely from year to year, and throughout the year, based on precipitation, water use, and conservation. One acre-foot of water is the amount of water required to cover one acre of land with one foot of water, or 325,851 gallons. An afy is a measure of such a flow in a year.

[5] Recycled water must meet certain water quality criteria. Water Code §§ 13520-21. The Department of Public Health ("DPH") initially was charged with adopting uniform regulations -- known as "water recycling criteria" -- specifying the safe uses of recycled water. Water Code §§ 13520, 13521; 22 Cal. Code of Regulations ("CCR") §§60303-309. In July 2014, the Legislature transferred these responsibilities to the State Board. Water Code §174(b); Health & Safety Code §116271. In transferring responsibility to the State Board, the Legislature intended "to provide for coordinated consideration of water rights, water quality, and safe and reliable drinking water." Water Code §174(b).

permit functions to allow non-potable uses of recycled water such as landscape and agricultural irrigation and certain industrial uses such as cooling towers.

As the State Board's counsel argued at the August 8, 2019 demurrer hearing, there are no California statutes creating a duty to recycle water; the pertinent statutes only encourage water recycling facilities and govern how recycled water is used.

D. The Court's Demurrer Ruling for the State Board's Duty

The following is the pertinent portion of the court's ruling on the State Board's demurrer, edited for case and footnote citations and block quotations.

a. Article X, Section 2 and Section 100

Whether a statute imposes a ministerial duty for which mandamus is available, or a mere obligation to perform a discretionary function, is a question of statutory interpretation. AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health, (2011) 197 Cal.App.4th 693, 701. The interpretation of a constitutional provision is the same as a statute. In construing a statute, the court first looks to its language, attempting to give effect to plain meaning and seeking to avoid making any language mere surplusage. Brown v. Kelly Broadcasting Co., (1989) 48 Cal 3d 711, 724. Significance, if possible, is attributed to every word, phrase, and sentence. Orange County Employees Assn. v. County of Orange, (1991) 234 Cal.App.3d 833, 841. The statute must be given a reasonable and commonsense interpretation consistent with the purpose and intent of the lawmakers, practical rather than technical in nature, and which will result in application of wise policy rather than mischief or absurdity. To that end, the court must consider, in addition to the statute's plain meaning, the object it seeks to accomplish, the evils to be remedied, and public policy. Lungren v. Deukmejian, (1988) 45 Cal.3d 727, 735. The statute must be interpreted to promote its general purpose, even if the literal meaning suggests a different reading. Id. at 735. ("[T]he 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose .... Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute").

Waterkeeper argues that the State Board has a mandatory duty to analyze whether the discharge of wastewater in the permits is unreasonable or wasteful. Waterkeeper argues that the plain meaning of Article X, section 2's use of the word "prevented" in the phrase "waste or unreasonable use or unreasonable method of use of water be prevented" shows the State Board's mandatory duty. Waterkeeper argues that "prevented" is a verb, and as such connotes that action must be taken by someone to prevent waste. Opp. at 12.

This plain language argument does not aid Waterkeeper. The sentence is drafted in the passive voice and does not identify who, if anyone, is supposed to prevent waste and unreasonable use. Article X, section 2's plain language does not show that the State Board, as opposed to some person or other public agency, is required to enforce that general statement of policy. *See* Resp. Reply at 7.

Waterkeeper also argues that Article X, section 2 is by its terms self-executing, and therefore the State Board's duty clearly applies when issuing permits. Opp. at 12. Respondents correctly reply that the fact a constitutional provision is self-executing simply means that it can be enforced by third parties without the need for supporting legislation. Rice v. Howard, (1902) 136

Cal.432, 439-40. The existence of a self-executing constitutional provision does not necessarily impose a mandatory duty. Resp. Reply at 7.[6]

Respondents rely on Article X, section 2's purpose to contend that it does not impose a clear and present mandatory duty for the State Board to review the reasonableness of discharges permitted by the Regional Board. They argue that, when appropriately construed, Article X section 2 was intended to accomplish the purpose of changing water rights law to ensure that riparian water right holders were subject to the same reasonable use doctrine as appropriative water right holders. Article X, section 2 prohibits water users from wasting water or using water unreasonably. The State Board enforces this prohibition on water users when it issues or review a water right permit pursuant to Division 2 of the Water Code. Central Delta, *supra,* 124 Cal.App.4th at 245; 23 CCR §§ 697, 698, 855 *et seq*. Dem. at 17-18.

Respondents note that Article X, section 2 says nothing about imposing a mandatory duty on the State Board to investigate or enforce each instance in which a member of the public alleges that a particular user is wasting or unreasonably using water. Article X, section 2 does not mention the State Board. Nor does it identify who, if anyone, should prevent the waste or unreasonable use of water. Since Article X, section 2 is not "clear" who should prevent waste and unreasonable use, it can hardly be said that it is clear the State Board has such a mandatory duty. Even if such a duty were clear, it is not "present" because there is no temporal element when the State Board is required to take action to prevent waste and unreasonable use. Resp. Reply at 17.

According to Respondents, Waterkeeper seeks to transform Article X, section 2 from a prohibition against water rights holders who are wasting water into a new mandatory duty for the State Board to investigate and prevent every instance of a water user's alleged waste or unreasonable use of water. To do so, the court would have to read words into Article X, section 2 that are not present. This the court cannot do. *See* CCP §1858 (construction of statute should not add words that have been omitted). Respondents contend that their construction is supported by the fact that no case has held that the State Board has a mandatory duty to investigate and enforce its violation in the 90 years since Article X, section 2 was adopted. Dem. at 27.

Waterkeeper contends that Respondents' position -- that Article X, section 2's requirement is merely a discretionary enforcement tool that applies only when the State Board issues or reviews water rights permits --ignores the California Supreme Court decision in Audubon, *supra*, 33 Cal. 3d 419 at 443-44, that squarely imposed the constitutional duty on the State Board to ensure comprehensive planning and allocation of all water resources. Opp. at 11.

In Audubon, the plaintiffs filed suit to enjoin diversions of water from Mono Lake. 33 Cal.3d at 419. The Division of Water Resources, predecessor to the State Board (for convenience, referred to herein as State Board), had granted a permit to Los Angeles' Department of Water and

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[6] Real Parties argue that a discharge of wastewater is not a use of water, noting that all of Waterkeeper's cited cases concerned a specific use of water or wastewater. Real Parties Reply at 11-12. The court disagrees. The discharge of wastewater is a use of water, just as allowing the drainage of fresh water into the Salton Sea is a use of water. *See* Elmore v. Imperial Irrigation District, (1984) 159 Cal.App.3d 185 (irrigation district had a mandatory duty to avoid wasting water by allowing fresh water to drain into the Salton Sea). Moreover, as Waterkeeper's counsel pointed out at the September 3, 2019 hearing, a section 1211 petition to reduce the amount of wastewater discharge is a requested change in use.

Power to appropriate virtually the entire flow of four of the five streams flowing into the lake. Id. at 424. Plaintiffs filed suit to enjoin the diversions on the theory that the shores, bed, and waters of Mono Lake are protected by the public trust doctrine. Id. at 425.

The California Supreme Court stated that the lawsuit concerned the relationship of California's appropriative water rights system and the public trust doctrine, which extends to navigable lakes like Mono Lake. Id. at 425. The court noted that Article X, section 2 establishes state water policy, requiring that all uses of water, including public trust uses, conform to the standard of reasonable use. Id. at 443. The State Board's function has evolved from the narrow role of deciding priorities between water appropriators to the comprehensive planning and allocation of waters, and it is required by statute to consider interests protected by the public trust in undertaking planning and allocation of water resources. Id. at 444. The state retains supervisory control over its navigable waters and prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust. Id. at 445. The court held that the public trust doctrine and the appropriative water rights system are parts of an integrated system of water law, and the plaintiffs could rely on the public trust doctrine to seek the State Board's reconsideration of the diversion of waters from Mono Lake. Id. at 452. In so doing, the plaintiffs were not required to argue that the water diversions were not beneficial under the appropriative water rights system. Id.

Respondents argue that Audubon is inapplicable because it merely held that the State Board had authority to reopen water right permits issued to Los Angeles in the 1940's to divert all or nearly all of the tributaries feeding Mono Lake in order to assess whether the diversions were harming public trust resources in Mono Lake. Id. at 440. Respondents contend that Audubon's discussion of the State Board's obligations and duties must be read in the context of the court's discussion of the State Board's authority with respect to water right permits. Resp. Reply at 8. Respondents further argue that the three cases cited by Waterkeeper as "consistently following" its suggested interpretation of Audubon -- Elmore, *supra,* 159 Cal.App.3d at 185, Imperial Irrigation v. State Water Resources Control Board, ("Imperial Irrigation II") (1986) 225 Cal.App.3d 548, and United States v. State Water Resources Control Board, ("United States") (1986) 182 Cal. App. 3d 82 – do not actually do so. Resp. Reply at 8.

Elmore's petitioner was a farmer who alleged that the Imperial Irrigation District, a large water right holder, was wasting water by allowing fresh water to drain into the Salton Sea, which caused the Salton Sea to rise and flood his property. 159 Cal.App.3d at 193. The court agreed that the district "had a clear, mandatory duty to avoid wasting water ...." Id. at 193. Respondents correctly note that the fact that a water right holder has a mandatory duty to avoid wasting water provides no support for Waterkeeper's argument that the State Board has a mandatory duty to prevent the POTWs from wasting or not reusing wastewater. Resp. Reply at 8-9.

Imperial Irrigation II involved the district's same alleged wasteful water practices as in Elmore. The State Board found that the district was wasting water and issued an administrative order requiring the district to take water conservation measures. 225 Cal.App.3d at 552. The court upheld the State Board's authority to investigate and address instances of waste and unreasonable use. Id. at 559-61. Respondents correctly note that Imperial Irrigation II only stands for the legal proposition that the State Board has authority to address waste and unreasonable use and does not address its duty (mandatory or otherwise) to do so. Resp. Reply at 9.

United States concerned the State Board's adoption of a water quality control plan for the Sacramento-San Joaquin Delta, and its revision of water right permits issued to the United States (for the Central Valley Project) and the Department of Water Resources (for the State Water Project) to meet the water quality requirements of the newly adopted plan. In pertinent part, the court stated that, when the State Board adopts a water quality control plan that establishes water quality standards for a body of water, it must set such standards at a level that will allow that water to be used for the beneficial uses (such as swimming, fishing, or municipal use) designated in the water quality control plan. Id. at 110. Respondents note that United States has nothing to do with the State Board's duty under Article X, section 2 to investigate instances of waste or unreasonable use. Resp. Reply at 9.

Respondents also distinguish every case cited by Waterkeeper, with one exception, as a claim that a water user was wastefully or unreasonably using water or violating the public trust, and/or the State Board's authority (but not duty) to prevent a water user from doing do. *See* Audubon, *supra*, 33 Cal.3d 419; Imperial Irrigation II, *supra*, 225 Cal.App.3d at 548; Light, *supra*, 226 Cal.App.4th at 1463 (State Board has power to issue regulations controlling how water may be used by grape growers for frost control); People ex rel. State Water Resources Control Bd. v. Forni (1976) 54 Cal.App.3d 743 (State Board has authority to issue policy statements as to what constitutes an unreasonable use). Resp. Reply at 10.

The exception is Central Delta, *supra*, 124 Cal.App.4th at 245, in which the court did address the State Board's obligations. The appellants challenged the decision of the State Board to issue permits and certify an environmental impact report ("EIR") for the appropriation of water from the San Francisco Bay/Sacramento–San Joaquin Delta Estuary ("Delta") into reservoirs to be constructed on two islands in the Delta for later re-diversion and sale to potential purchasers in amounts unknown. Id. at 252. The court concluded that the Water Code requires that a permit application to impound water in a reservoir must state -- and the State Board must determine -- that an actual, intended beneficial use, in estimated amounts, will be made of the impounded waters. Id. at 262-63. A general statement of potential beneficial use is insufficient, and the State Board does not satisfy its statutory obligations by conditioning a permit on a particular use and in amounts to be specified at some later date. Id. at 261-63.

Respondents correctly distinguish Central Delta as a case addressing the State Board's duties for a water rights permit issued pursuant to Divisions 1 and 2 of the Water Code, not a wastewater discharge permit issued by a regional board pursuant to Division 7 of the Water Code.[7] Central Delta did not turn on Article X, section 2, and was specific to the State Board's statutory duties when issuing water right permits. *See, e.g.*, Water Code §§ 25, 1250. Respondents conclude that Central Delta case is irrelevant to determine the scope of the Regional Board's duties under Article X, section 2. Resp. Reply at 10.

The court agrees with Respondents that the existing case law generally concerns waste by water users and no case addresses the State Board's constitutional duty under Article X, section 2 to prevent waste or unreasonable use in the discharge of wastewater. Nonetheless, Waterkeeper's interpretation of Article X, section 2 is correct. The plain language of Article X, section 2 creates

[7] At the August 8, 2019 hearing, Respondents counsel argued that Water Code section 1050 states that Division 2 (water rights) complies with Article X, section 2. More accurately, Water Code section 1050 states that Division 2 is declared to be in furtherance of Article X, section 2.

a mandatory duty for all responsible agencies to prevent waste or unreasonable use of water. The courts have repeatedly held that both Article X, section 2 and section 100 create a "clear, mandatory duty to avoid wasting water, prevent flooding and provide drainage." Elmore, *supra*, 159 Cal.App.3d at 193; *see also* City of Barstow v. Mojave Water Agency, (2000) 23 Cal.4th 1224, 1236 ("[A]rticle X, section 2 of the California Constitution... mandates that water be put to reasonable and beneficial use."); Imperial Irrigation I, *supra*, 186 Cal.App.3d at 1170-71 (citing Elmore). A public agency can be compelled to act to prevent a waste of water pursuant to this constitutional duty. *See* Elmore, *supra*, 159 Cal.App.3d at 197-98 (irrigation district had a mandatory duty to prevent water from flooded agricultural land to needlessly drain into a saline sea, preventing its use for a beneficial purpose).

Respondents' distinction of the pertinent case law as involving water rights or the State Board's water rights duties is of little moment for two reasons. First, the State Board most certainly is a responsible agency under Article X, section 2 with a duty to prevent waste or unreasonable use. Second, although not on point, the case law provides guidance about the existence of the State Board's duty under Article X, section 2. Contrary to Respondents' argument, the California Supreme Court in Audubon did not merely hold that Article X, section 2 overturned the holding of Herminghouse, *supra,* 200 Cal. At 81, that riparian right holders (as opposed to appropriative rights holders) could use water unlimited by any reasonable use or waste requirements. The Audubon court also explained that the State Board's role in implementing Article X, section 2 has steadily evolved from the narrow role of deciding priorities between competing appropriators to the charge of comprehensive planning and allocation of waters. Id. at 444. The State Board's role of planning and allocation of waters must include wastewater. Waterkeeper correctly concludes that Audubon's holding that the constitutional requirement to prevent waste and unreasonable use is mandatory is consistent with the plain language of Article X, section 2.

The California Supreme Court also has confirmed that Article X, section 2 applies to wastewater reclamation. EDF I, *supra,* 20 Cal.3d at 327. Opp. at 14. In EDF I, the plaintiffs brought an action challenging the East Bay Municipal Utility District's decision not to develop water reclamation facilities and to contract with the United States Bureau of Reclamation for water from a federal project. The plaintiffs alleged that the district's decision not to develop reclamation facilities violated Article X, section 2 and Water Code sections 100 and 13500. 20 Cal.3d at 332. The plaintiffs sought an order to compel the district to undertake a reclamation program that "is required by law." Id. The court noted that the Legislature enacted the Water Reclamation Law (Water Code §§ 13510-12) as a means of supplementing water supplies. Id. at 342-43. *See* Water Code §§ 13522.5-26. These statutes direct the water boards and Department of Health (now DPH) to regulate reclamation of wastewater, promulgate reclamation requirements, and ensure enforcement of said requirements. Id. Consequently, the Legislature intended to vest regulation of wastewater reclamation with the water boards and DPH. Id. at 343.

The EDF I court held that the plaintiffs' contention was a matter properly within the water boards' and DPH's responsibility to regulate wastewater reclamation. Id. at 343. The State Board was in fact exercising these powers by requiring a public utility to study water reclamation and by developing plans for wastewater reclamation throughout the state. Ibid. The question whether economic resources should be devoted to wastewater reclamation or the development of other water supplies is a legislative one, and these issues are far more complex and different in kind than a judicial adjudication of water rights between two users. Id. at 344. As a result, plaintiffs' issue

must be addressed in the first instance by the State Board, which has the expertise and is part of the regulatory scheme. Id. at 344.

Respondents further argue that the State Board does not have a mandatory duty under section 100 to determine whether the POTWs' discharge is a waste or unreasonable use of water. Dem. at 19.

Section 100 largely mirrors the applicable language in Article X, section 2, providing in pertinent part:

> "[T]the general welfare requires that… the waste or unreasonable use of water be prevented….The right to water or to the use or flow of water in or from any natural stream or watercourse in this State is and shall be limited to such water as shall reasonably be required for the beneficial use to be served, and such right does not extend to the waste or unreasonable use of water."

For the same reasons why Article X, section 2 requires the State Board to prevent waste or unreasonable use of wastewater, section 100 also impose this requirement. Thus, the State Board has a duty to prevent waste or unreasonable use of wastewater under Article X, section 2 and section 100. This duty is supplemented by the State Board's statutory duty under section 275. *See post*.

b. Section 275

Section 275 provides:

> "The [Department of Water Resources] and the [State Board] shall take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state."

Respondents note that section 275 states that the State Board "shall take all appropriate proceedings …. to prevent waste, unreasonable use…." (emphasis added). Hence, section 275 provides the State Board with discretion to determine which proceedings, if any, are appropriate to prevent waste or unreasonable use. Respondents acknowledges that the Water Code defines "shall" as "mandatory." Water Code §15. However, the word "shall" must be modified by the word "appropriate". *See* R & P Growers Association. v. Agricultural Labor Relations Board, ("R&P Growers") (1985) 168 Cal.App.3d 667, 679. Section 275 does not require the State Board to take all actions to prevent waste and unreasonable use; it only directs the State Board to take appropriate actions. Whether or not an action is appropriate is inherently a discretionary decision vested in the State Board. Respondents conclude that the only sensible interpretation of section 275 gives the State Board the authority or power to take action and prevent waste and unreasonable use, but not the obligation to do so. Dem. at 28.

Respondents add that to hold otherwise would undermine the State Board's prosecutorial discretion to decide which alleged waste and unreasonable uses of water to investigate and prosecute. Members of the public or the court cannot dictate where a governmental agency with

should direct its prosecutorial efforts, even when a statute says a prosecutor "shall" pursue an investigation and prosecute specified violations. Gananian v. Wagstaffe, (2011) 199 Cal.App.4th 1532, 1540-44. The deference courts show to criminal prosecutors applies equally to administrative agencies' decisions to not pursue prosecution in particular circumstances. Heckler v. Chaney, (1985) 470 U.S. 821, 832. Dem. at 28-29; Resp. Reply at 19.

Respondents argue that no published case interprets section 275 to impose a mandatory duty on the State Board. Rather, every case discussing section 275 speaks in terms of the State Board's "authority" or "power" to do so. *See* California Farm Bureau Federation v. State Water Resources Control Board, (2011) 51 Cal.4th 421, 429 (Section 275 gives the State Board the "authority to prevent waste or unreasonable use of water ..."); Imperial Irrigation I, *supra*, 186 Cal.App.3d at 1170 (section 275 is one of the State Board's powers); Light, *supra*, 226 Cal.App.4th at 1484-85 (State Board has authority to enact regulations to prevent unreasonable use or methods of diversion). Dem. at 28.

Respondents note that, in an analogous circumstance, a federal court has held that the Clean Water Act gives the EPA Administrator the discretion to refuse to investigate despite the fact that the statute provides that the EPA Administrator "shall bring a civil action" against a person in violation of a permit condition. 33 U.S.C. § 1319(a)(3). Dem. at 29. In Sierra Club v. Whitman, (9th Cir. 2001) 268 F.3d 898, plaintiffs argued that the statute mandated that EPA pursue enforcement actions against a permittee when there was incontrovertible evidence of a permit violation. Id. at pp. 900-01. The Ninth Circuit disagreed, finding that the EPA had the discretion not to take enforcement action, notwithstanding the fact that the statute provides that EPA "shall bring a civil action ...." Id. at 901. The court recognized that there is a longstanding presumption that an agency's refusal to investigate or enforce is discretionary unless Congress has indicated otherwise. Id. at 902. "Particularly when used in a statute that prospectively affects government action, 'shall' is sometimes the equivalent of 'may.'" Id. at 904.

The court agrees that section 275 merely confirms the State Board's discretionary authority to prevent waste and unreasonable use and does not by itself create a mandatory duty. The use of the word "shall" in a statute does not necessarily create a mandatory duty. Hagopian v. State, (2014) 223 Cal.App.4th 349, 366. Additionally, the qualifying language of the statute -- the State Board "shall take all appropriate proceedings or actions" (emphasis added) – provides the State Board with discretion to determine whether a proceeding or action is appropriate. R&P Growers, *supra*, 168 Cal.App.3d at 680 (use of the word "appropriate," even when paired with "shall," implies discretion).

Section 275 gives the State Board the discretion to institute all appropriate proceedings to prevent waste and unreasonable use, and it does not require the State Board to take a particular action or initiate a particular proceeding. The word "appropriate" gives the State Board discretion to choose when and where to conduct "proceedings or actions" in executing its duty.

This discretion is not unlimited, however. As Waterkeeper argues, section 275 is not merely a general state policy without a mandate. Section 275 provides that the State Board "shall take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state." §275 (emphasis added). The words "shall take all" and "to prevent" unambiguously impose a mandatory duty to take action where it is appropriate to do so. Guzman

v. County of Monterey, (2009) 46 Cal. 4th 887, 898 (language, function, and purpose of statute must be examined to determine if it creates mandatory duty).[8]

In sum, section 275 reinforces the State Board's mandatory, constitutional and statutory duty to take action in appropriate proceedings to prevent waste or unreasonable use of water. This duty is generalized in nature, and the State Board has discretion to pick and choose which unreasonable use or waste of water to investigate and enforce.

c. Nature of the State Board's Duty

The State Board has a constitutional duty under Article X, section 2, and a statutory duty under section 100, to prevent waste and unreasonable use of water resources, including wastewater. Section 275 underscores this duty by requiring the State Board to take appropriate action to prevent waste and unreasonable use. Given its mandatory duty, does the State Board have a duty to prevent waste or unreasonable use in this case?

All water resources of the state must be put to reasonable beneficial use and not wasted. Art. X, §2; §100. This reasonable use doctrine is the principle governing all uses of water resources in California. Joslin, *supra,* 67 Ca1.2d at 137-38. A water use must be both beneficial and reasonable. Art. X, §2; Joslin, *supra*, 67 Ca1.2d at 143. The determination of what constitutes an unreasonable use of water is determined on a case-by-case basis, and changes over time. Tulare, *supra*, 3 Ca1.2d at 567 ("What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time."). Reasonable water use "cannot be resolved in vacuo isolated from statewide considerations of transcendent importance. Paramount among these [is] the ever increasing need for the conservation of water in this state...." Joslin, *supra*, 67 Ca1.2d at 140.

There is no question that the State Board has the authority to issue a general regulation governing the reasonable use of the POTWs' wastewater. The appellate decision in Light, *supra,* 226 Cal.App.4th at 1463, proves as much. There, the court upheld the State Board's adoption of a general regulation to protect young salmon from abrupt decline in the Russian River levels when water was drained from the river's stream system and sprayed on vineyards and orchards to prevent frost damage. Id. at 1472. The court reasoned that a person's or entity's right to use water from any natural stream or water course is limited to that reasonably required for the beneficial use to be served. Id. at 1479. Under the public trust doctrine, the State Board also has an affirmative duty to take the public trust into account in the planning and allocation of water resources and to protect the public trust where feasible. Id. at 1480-81. As a result, the court held that State Board has broad authority to control and condition water use, insuring use consistent with the public interest, and a power equivalent to the Legislature to enact regulations governing reasonable use of water. Id. at 1484-85.

Although Light concerned the State Board's regulation of reasonable use of water from a natural stream or water course, it provides authority for the State Board to control wastewater.

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[8] Waterkeeper purports to rely on the legislative history and statutory amendments to section 275 by referring to its petitions. Opp. at 19. This is an improper attempt to incorporate by reference and potentially to exceed page limits, and therefore has been disregarded.

"The Board's authority to prevent unreasonable or wasteful use of water extends to all users, regardless of the basis under which the users water rights are held." Id. at 1482. Respondents acknowledge that the State Board has the power to prevent the unreasonable use of wastewater and argue that it does not have a mandatory duty to prevent the POTWs' waste or unreasonable use of wastewater in this case. Instead, the State Board has discretion to decide when to investigate whether a water right holder is alleged to have violated Article X, section 2, and ultimately to prosecute that person/entity. *See* Heckler v. Chaney, (1985) 470 U.S. 821, 832. When the State Board exercises its discretion to take action, it can enforce violations of Article X, section 2 administratively (*e.g.*, 23 CCR §§ 855-860, 4000-07; Imperial Irrigation I, *supra*, 186 Cal.App.3d at 1160), or judicially through the Attorney General. *See, e.g.*, People ex rel. State Water Resources Control Bd. v. Forni, (1976) 54 Cal.App.3d 743. But the State Board's exercise of prosecutorial discretion cannot be compelled. *See* West v. State of California, (1986) 181 Cal.App.3d 753, 764-65 (statute did not create mandatory duty to hold hearing for revocation of contractor's license upon receipt of consumer complaint; licensing board had discretion to try to get contractor to resolve complaint before initiating disciplinary proceeding). Respondents contend that the State Board's discretion includes the decision whether to investigate as a prelude to taking enforcement action against the POTWs. Dem. at 26-27.

Waterkeeper describes this argument as "audacious buck passing". Waterkeeper notes that the California Constitution is the "paramount law of the state" (Krolikowski v. San Diego City Employees' Retirement System, (2018) 24 Cal. App. 5th 537, 553), compliance with the Constitution is non-discretionary (Elmore, *supra*, 159 Cal. App. 3d at 193-97), and this obligation cannot be undermined by statute. Waterkeeper contends that, while the State Board's decision not to review a decision or order of the regional board is admittedly discretionary and unreviewable, the State Board's failure to comply with its constitutional and statutory mandate remains subject to judicial review. Johnson v. State Water Resources Control Bd., (2004) 123 Cal. App. 4th 1107, 1108, 1114. Opp. at 15. Similarly, Respondents' contention that its duty under Article X, section 2, section 100, and section 275 is subject to prosecutorial discretion does not mean it has discretion to ignore its mandatory duty to prevent unreasonable use and is required to conduct a reasonable use analysis as a first step to inform its action. Opp. at 19. Waterkeeper contends that Respondents' argument that its Article X, section 2 duties are "inherently discretionary", has been rejected by courts considering similar issues. *See* Elmore, *supra*, 159 Cal. App. 3d at 193-197 (citing Article X, section 2 as imposing mandatory duties); *see also* Imperial Irrigation I, *supra*, 186 Cal. App. 3d at 1170-71. *See* Opp. at 18.

The permits at issue are not water rights permits; they are permits regulating the discharge of treated wastewater. However, this distinction has no bearing on the State Board's duty to prevent waste and unreasonable use of the wastewater. The POTWs' discharge of wastewater is a use of water. *See ante*, n.6. Resolution of the matter boils down to these questions: When and how does the State Board have a constitutional duty to step in and prevent waste or impose reasonable use requirements? Does the State Board have to do so every time a regional board issues a permit, even when the permit is a discharge permit affecting water quality and not water rights? Does the State Board have a duty to impose reasonable use requirements statewide for all discharges?

Respondents rely on a parade of horribles to answer these questions negatively. According to Respondents, it would be absurd for the State Board to have a mandatory duty to investigate

and take enforcement action every time a member of the public makes a complaint that a water user is wasting water. Taking Waterkeeper's argument to its logical end, the State Board would have a mandatory duty that could be enforced by any member of the public to investigate and prevent any alleged waste of water by any of the State's 39 million residents, anywhere within its 104 million acres of land. The State Board would have a mandatory duty to investigate every complaint levied against neighbor alleged to be wasting water by leaving their sprinklers on overnight. Respondents argue that the court should consider the consequences that will flow from a particular statutory interpretation, and avoid those that lead to "absurd, arbitrary and anomalous results." Com. on Peace Officer Standards & Training v. Superior Court (2007) 42 Cal.4th 278, 290; Tuolumne Jobs & Small Business Alliance v. Superior Court, (2014) 59 Cal.4th 1029, 1037 (statutes should be interpreted to avoid absurd results). Dem. at 27; Resp. Reply at 18.

There is no need to consider Respondents' parade of horribles because the issue is one of degree, and the difference in degree between this case and almost all other circumstances is so large as to be different in kind. The State Board has the discretion to decide the manner in which it complies with its constitutional duty to prevent the waste and unreasonably use of water resources, and this discretion imposes no duty to address unreasonable use in the vast majority of circumstances. The State Board has discretion when and how it will enforce its constitutional duty, and the court may not compel the Board to exercise its discretion in a particular manner. AFSCME, *supra,* 126 Cal.App.4th at 261. But the State Board can be compelled to exercise its discretion.

Even when the State Board actually exercise of discretion, that exercise is not entirely unreviewable as underscored in the recent case of Collins v. Thurmond, ("Collins") 41 Cal.App.5th 879. In Collins, a collection of parents, students, and others sought mandamus against local level defendants alleging equal protection violations against suspect class students in the school district polices regarding discretionary practices for expulsion. Id. at 915. The petitioners also alleged that the state-level agency defendants failure to meet their ministerial duty to monitor the local school district's practices for violations of federal law. Ibid. In reversing the dismissal of the state-level agency claim of equal protection, the court first noted that, while a party may not invoke mandamus to force a public entity to exercise discretionary powers in a particular manner, mandamus is available to compel the agency to exercise those discretionary powers when it fails to do so. Id. at 914 (citation omitted).

The Collins court noted that the manner in which the state provides education to its citizens is highly discretionary and one not broadly amenable to a writ. Id. at 915. Federal courts impose a ministerial duty upon state-level agencies to monitor their school systems for compliance with federal equal protection requirements, and California's acceptance of such oversight duties showed a clear ministerial duty to monitor compliance with federal law. Id. at 917. The manner in which the state-level agencies comply with that monitoring duty is discretionary in nature. Id. at 917. Accordingly, any claim arising from the way in which the state-level agencies implement such a duty must demonstrate an abuse of discretion. Id. at 918.

The question in Collins became to what degree must the petitioners allege the state-level agencies' actions constitute an abuse of discretion? Ibid. The court answered this question first by acknowledging that a ministerial duty to monitor is a broad duty and therefore a petitioner must allege that the monitoring program as a whole is flawed such that its continued use is an abuse of discretion; a mere allegation against a single component of a monitoring program will not suffice.

Id. at 364. However, the petitioners' allegation that the state-level defendants abused their discretion by failing to implement any review of the monitoring program to ensure they were receiving the data necessary to meet their duty was a sufficient "holistic attack". Ibid.

Obviously, Collins addressed a completely different subject – an equal protection monitoring duty – than the State Board's ministerial duty to prevent unreasonable use or waste. But Collins reiterated a significant principle: a mandamus claim may be made for a highly discretionary duty where the agency has abused its discretion. Thus, the State Board can be compelled to exercise its discretion concerning the POTWs' unreasonable use of wastewater, and mandamus will also lie for the exercise of that discretion when it can be exercised only in one way. Collins, *supra*, 39 Cal.App.5th at 361; Hurtado v. Superior Court, (1974) 11 Cal.3d 574, 579.

The State Board's discretion has limits and they are exceeded in this case. The four POTWs release hundreds of millions of gallons of water into the Los Angeles River (sometimes "River") and Santa Monica Bay every day. This level of wastewater discharge into the River, and eventually the Pacific Ocean, is so large that the State Board must do something to prevent waste. As Waterkeeper's counsel argued at the September 3, 2019 hearing, the permits are the trigger for the State Board's duty to act, but there otherwise is no link between the two; Waterkeeper is not contending that the State Board must act as part of the permitting process. The State Board's duty arises from its actual or constructive knowledge of the quantity of discharge allowed by the permits. Yet, the State Board has not even purported to exercise its discretion on the issue.

While the wording of Article X, section 2 applies to all unreasonable and wasteful uses of water, the court need not explore the outer boundaries of the State Board's duty. The State Board's constitutional duty, as underscored by sections 100 and 275, creates a mandatory duty to act in this case. As Waterkeeper explains, the State Board is not required to become the water police that investigates and prosecutes every running sprinkler in California. Opp. at 19. The Regional Board permitted a wastewater use when it approved the WDR permits. Waterkeeper is not seeking enforcement against a water right holder; it is challenging the State Board's failure to exercise its discretion, triggered by the permits issuance, to consider the unreasonable use of wastewater. *See* Central Delta, *supra*, 124 Cal. App. 4th at 253, 259, 262, 264. Prosecutorial discretion cannot eliminate the State Board's mandatory duty.

What is the nature of the action required? The State Board's authority to prevent unreasonable or wasteful use of water extends to all users. Light, *supra*, 226 Cal.App.4th at 1482. The POTWs are water users. The State Board is the state agency in charge of the comprehensive planning and allocation of water (id. at 1481), and has a duty under Article X, section 2 and sections 275 and 100 to comprehensively plan to prevent waste and unreasonable use in the discharge of wastewater.[9]

Admittedly, no court has imposed this planning duty for the discharge permitted in the POTWs' permits. However, the court is not plowing entirely new ground in concluding that the

[9] Respondents note that section 100, adopted in 1943, announced the Legislature's general state policy regarding the use of water. The statute parallels the language in Article X, section 2: "The general welfare requires that the waste or unreasonable use or unreasonable method of use of water be prevented ...." §100. Respondents' argument that section 100 does not impose a mandatory duty on the State Board to prevent waste and unreasonable use is rejected for the same reasons that Article X, section 2 imposes such a duty. *See* Dem. at 28.

State Board's duty. Audubon explained that the State Board's function has evolved from the narrow role of deciding priorities between water appropriators to the comprehensive planning and allocation of waters, and it is required by statute to consider interests protected by the public trust in undertaking planning and allocation of water resources. 33 Cal.3d at 444. Imperial Irrigation II stated that water law is changing, and its evolution has passed beyond traditional concepts of vested rights. 225 Cal.App.3d at 553. Imperial Irrigation II also cited a law review commentator who stated that "California has regained for the pubic much of the power to prescribe water use practices, to limit waste, and to sanction water transfers." Ibid. (citation omitted). "[E]verything is in the process of changing or becoming" in water law." Ibid. (citation omitted). It is not a significant extension, therefore, to conclude that the State Board has a duty to act by planning to prevent the POTWs from unreasonable use of wastewater discharge.

The State Board has a variety of options to address the issue of waste and unreasonable use in the POTWs discharge. It may assess and make findings as Waterkeeper asks, impose a general regulation (Light), or take appropriate enforcement or administrative action. *See* California Farm Bureau Federation v. State Water Resources Control Bd., *supra,* 51 Cal.4th at 429; Water Code §1825 (cease and desist orders); Water Code §§ 1052, 1845 (penalties and injunctive relief); Water Code §1241 (forfeiture); Water Code §1675 (revocation). This is a matter for the State Board's exercise of discretion, but the State Board can be compelled to take some action. *See* Los Angeles County Employees Assn. v. County of Los Angeles, *supra,* 33 Cal.App.3d at 8; Hurtado v. Superior Court, *supra*, 11 Cal.3d at 579. The State Board has not considered the factors surrounding the discharge, and there is no rational connection between its choice not to act and the purpose of Article X, section 2. *See* Ridgecrest Charter School v. Sierra Sands Unified, ("Ridgecrest") (2005) 130 Cal.App.4th 986, 1003. The State Board must take some action in the exercise of its duty to regulate unreasonable use and waste, and to do nothing is an abuse of discretion.

Respondents argue that the State Board is not "doing nothing" with respect to water resources in the Los Angeles River. As Waterkeeper's Petitions allege, the POTWs' discharges in dry months comprise almost all of the Los Angeles' River flow, and that discharged flow supports beneficial recreational uses (*e.g.*, kayaking) and aquatic life uses (*e.g.*, wildlife habitat). *See* Burbank Pet. ¶ 71. If the POTWs reduce their flow by recycling more water, the beneficial uses that those flows support could be impacted. The State Board is currently investigating flow issues in the River, convening a November 2017 public workshop in Los Angeles on the subject: *Los Angeles River Existing and Future Conditions: Instream Flow Needs*. Resp. RJN Ex. A.[10] Respondents contend that the State Board is exercising its authority and discretion to address Los Angeles River flow issues, including discharges from POTWs, through a comprehensive collaborative technical analysis. They argue that Waterkeeper's request for the court to overrule the State Board's implicit determination that the River flow study is the appropriate proceeding should be rejected. Resp. Reply at 20.

[10] The other side of the Article X, section 2 duty is to ensure the beneficial use of water, and the State Board's public workshop shows that the waste and beneficial use of the POTWs' wastewater must be considered together.

The short answer to this argument is that the extent of what the State Board must do to assess the waste and unreasonable use when the POTWs discharge wastewater is a fact issue that must be addressed at trial.[11]

E. Statement of Facts[12]

1. Waterkeeper's Evidence

The vast majority of water supply in the Los Angeles area is imported from the Colorado River, the San Francisco Bay Delta, and the Owens Valley, and the vast majority of this imported water supply is distributed, polluted, treated, and then discharged to the Los Angeles River and the Pacific Ocean.

The four POTWs at issue are part of an integrated network of wastewater treatment, reclamation, and disposal facilities along the Los Angeles River and Santa Monica Bay. The system includes the Tillman, Glendale, and Burbank plants, all located along or immediately adjacent to the Los Angeles River, and the coastal Hyperion plant in El Segundo. AR 5136. The three upstream plants discharge wastewater into the Los Angeles River and solids to the Hyperion plant. AR 5136. The WDR authorizes the Hyperion plant to discharge up to 450 million gallons of wastewater per day (mgd) into the Pacific Ocean, with an average of about 230 mgd. AR 6, 7003. The Tillman plant is authorized to discharge up to 80 mgd into the Los Angeles River, averaging about 35-45 mgd. The Glendale plant is authorized to discharge up to 20 mgd to the River, averaging about 12 mgd. The Burbank plant is authorized to discharge up to 12.5 mgd, averaging about 8.5 mgd, to the Burbank Western Channel (a tributary to the Los Angeles River).

Despite multiple State Board policies encouraging third parties to increase recycled water, statewide 1.28 million afy is annually discharged directly into the Pacific Ocean and other marine waters under permits issued by the State and Regional Boards. AR 821. The State Board admits that California is behind on its recycled water goals of 1.5 million afy by 2020 and 2.5 million afy by 2030. AR 783. The State Board also admits that discharge of wastewater, particularly to marine waters, is not the fullest beneficial use of the resource. *See* AR 821.

The four POTWs are permitted to discharge hundreds of millions of gallons per day of

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[11] Although required only by logic and not by law, the court believes this determination is consistent with its earlier decision in Wishtoyo Foundation v. State Water Resources Board, ("Wishtoyo II") BS163728 in which the court held that the State Board has a constitutional duty under Article X, section 2 to prevent waste, but it did not abuse its discretion in approving a statewide WRR that serves the purpose of regulating the use of recycled water by producers, distributors, and users consistent with criteria for the purpose of ensuring water quality. The WRR was not a water rights permit (it was a water quality permit), the waste treatment plant owners who produce recycled water had the right to use the recycled water, and while the State Board had authority to regulate the use of recycled water to prevent waste, it had no general duty to issue broad-ranging reasonable use requirements for recycled water. Wishtoyo II is distinguishable because, while the State Board could reasonably decide that the general regulation of recycled water usage to prevent waste should be approached cautiously, that is not true for the specific unreasonable use of wastewater here.

[12] The court did not cite statements of fact that it could not verify. However, the statements lacking cites appear to be undisputed.

treated wastewater—both directly into the Pacific Ocean at the Hyperion outfall pipes and into the Los Angeles River. AR 7000, 7002. Numerous beneficial uses have been identified for the wastewater discharged by the POTWs, including landscape and agricultural irrigation, groundwater recharge, seawater intrusion barrier, vehicle washing, and industrial use. AR 2847. While the huge volume of discharge serves the purpose of conveying waste, it serves no other reasonable or beneficial use, either in the Los Angeles River or Santa Monica Bay. AR 821, 7279.

The State Board, the Regional Board, and Glendale all recognize that a beneficial use for the discharged water would be superior to the discharge of the secondary treated wastewater directly into the ocean and tertiary treated water into the Los Angeles River. AR 821, 2765, 7279. Recycled water serves as a hedge against the "effects of long term drought, climate change, and water supply uncertainty." AR 900. The Regional Board has stated that increased recycling will reduce "wasted water", and the State Board believes that recycling is a beneficial use of increasing regional self-sufficiency and decreasing reliance on imported water. AR 821, 7279.

Both Los Angeles and Glendale recognize the water security benefits of water conservation and recycling. AR 2769-70 (Los Angeles study projects that by 2039 additional conservation will supply about 16% of water demand (by eliminating such demand); AR 2766 (Glendale recognizes that recycled water for irrigation fosters conservation). Dr. Mark Gold of UCLA estimates $7-10 billion dollars in net present value of 2016 dollars will be saved in the year 2035 if Los Angeles implements water supply efficiency projects including recycling all of Hyperion's current discharge. AR 2811. Los Angeles has committed to ending such discharge from Hyperion by 2035. AR 20, 188, 324.

The WDRs for the four POTWs do not impose recycling requirements. The Hyperion plant WDR lists both recycling specifications and recycling monitoring specifications as "not applicable". AR 4894, 6159, 6251. The Tillman, Burbank, and Glendale plant WDRs similarly contain no recycling monitoring requirements. AR 4939, 5105, 5272. The Burbank and Glendale plant WDRs contain "recycling specifications," but these provisions are short descriptions of existing storage tanks for recycled water and not requirements to recycle wastewater. AR 5346, 6663.

The Glendale plant WDR includes a wastewater recycling feasibility reporting requirement to the Regional Board, not the State Board. AR 6590, 5223-24, 6786-87. Glendale recently reported that recycled water made up just 7% of its water supply in 2017. AR 2758. Glendale discharges its 7000 afy share of highly treated wastewater (tertiary treatment) from the Glendale plant into the Los Angeles River. AR 2761. Glendale admitted that this discharge could be diverted to meet non-potable demand for recycled water. AR 2761.

The Burbank plant WDR also includes an annual wastewater recycling feasibility reporting requirement. AR 5131-32. Burbank stated in its 2018-19 annual report that 55% of its tertiary treated recycled wastewater from the Burbank POTW is discharged into a tributary of the Los Angeles River. AR 344. Burbank's long-term water supply plan projects that 50% of its highly treated recycled water will continue to be discharged through the year 2040. AR 8088.

In its 2019-2020 annual report, Los Angeles stated that in 2018-2019 it delivered only 12,000 acre-feet of recycled water from all of its POTWs. AR 188.

The cost of reducing the POTWs' discharges to save water is reasonable, as evidenced by Los Angeles' Hyperion plant plans and the Glendale and Burbank projects to increase diversions of treated wastewater from the Los Angeles River to support increased recycling. AR 147-62,

1468, 2811, 2869.

The technology to recycle the water discharged from the POTWs currently exists, as evidenced by the facts that West Basin Municipal Water District ("West Basin")'s recyling program provides tertiary treatment to a portion (37 mgd) of Hyperion's 230 mgd secondary treated effluent and uses the recycled water for irrigation and industrial applications. AR 7005. This is also shown by the fact that Glendale and Burbank both use recycled water for a portion of their water supplies. AR 7870, 2737 (Burbank: 17%), 2758 (Glendale: 7%).

The recent 2018 amendments to the State Board's Recycled Water Policy (sometimes "Policy") encourages recycling, but the amended Policy declines to include mechanisms to enforce mandates. AR 818. The Policy states that mandates are unrealistic and "challenging" without accurate tracking of recycled water use and an estimate of the amount of wastewater available to recycle. AR 818. The new Policy includes a "narrative goal" of minimizing discharge into the Pacific Ocean. AR 822. The Policy concludes that the narrative goal does not "involve a change to the physical environment," so it is unclear that the narrative goal will do anything to prevent waste. AR 822. While the Recycled Water Policy includes requirements that the four POTWs in this case, and other POTWs, report on discharge of wastewater, the purpose of reporting is not to prevent waste or unreasonable use; it is to "potentially update the recycled water goals in the future based on more accurate data." *See* AR 268, 273, 279, 285, 289, 827.

Similarly, the State Board's regulations to ensure a suitably high quality of recycled water for use as Surface Water Augmentation ("SWA") -- the placement of recycled water into existing reservoirs that provide water for treatment and distribution as potable water -- do not require water suppliers to actually use recycled water for SWA. AR 2509. The purpose of the SWA quality assurance regulations is to "adequately protect public health," not to prevent waste and unreasonable use. AR 2456.

The State Board's Los Angeles River Flows Study ("River Flow Study") should answer the question of what level of flow allows for various beneficial uses on the River, including recreation, fishing, and kayaking, and the impact of recycling wastewater on these uses. AR 1450-51, 1454. Even before the River Flow Study is completed, there is ample evidence that the Los Angeles River now experiences much higher base flows than historically, meaning that current discharge levels into the River are well above that needed to support instream beneficial uses. *See* AR 2781 (POTWs are about 90% of dry weather River flow); AR 2802 (historical minimum flows were much lower); AR 2805 (current flow volumes may not be needed to support beneficial uses).

2. <u>State Board's Evidence</u>

Residences and businesses send wastewater down the drain from showers, sinks, toilets, and industrial facilities, and this wastewater carries pollutants and pathogens with it. Prior to the existence of POTWs, untreated wastewater was discharged to rivers, streams, groundwater, and the Pacific Ocean, polluting those bodies of water, causing human health problems for people who used those waters for drinking, bathing or recreation, and impacting the health of wildlife in the waters. To combat these water quality problems, municipalities began constructing POTWs to intercept and treat wastewater before it is discharged. Because of the enormous cost of constructing POTWs, the federal government and states have subsidized their construction with $138 billion in funding since 1987.

There are more than 800 permitted POTWs in California, and they have a design capacity

to treat more than 4.4 billion gallons of influent each day. The Tillman, Glendale, and Burbank plants discharge treated wastewater to the Los Angeles River or its tributaries, and the Hyperion plant discharges treated wastewater to the Pacific Ocean via an outfall five miles off the coast. Each of these facilities recycles some of its wastewater and discharges the remainder:

POTW	Discharge Point	Design Capacity (million gallons per day [mgd])	Average Daily Discharge	Average Daily Recycled Water Production
Burbank WRP	LA River trib.	12.5 mgd	2.17 mgd	2.55 mgd
Los Angeles-Glendale WRP	LA River	20 mgd	8.8 mgd	4.2 mgd
Tillman WRP	LA River	80 mgd	27.5 mgd	6.5 mgd
Hyperion Treatment Plant	Pacific Ocean	420 mgd	230 mgd	37 mgd

AR 4974, 5135, 5136, 5286, 6275, 6276; Wilson Decl., ¶46, Ex. C; Minamide Decl., ¶33.

As required by the Clean Water Act, the Regional Board has permitted the four POTWs for decades, and it most recently updated and renewed their permits in February and March 2017 to address water quality concerns. AR 4890-5058 (Tillman plant), 5059-209 (Burbank plant), 5210-361 (Glendale plant), AR 6154-336 (Hyperion plant). As an example, Hyperion's permit was amended to require Los Angeles to study the adverse water quality effects City's reduced volume of effluent discharge -- due to water conservation and increased water recycling – was causing through increased concentrations of pollutants like ammonia. AR 6182-83, 6288, 6986-88.

The state (first the Department of Water Resources, and later the State Board) has been tracking the use of recycled water for decades. The data collected shows a continual uptick in the amount of recycled water produced statewide: 175,220 afy (1970); 183,941 afy (1977); 266,559 afy (1987); 525,460 afy (2001); 669,000 (2009); and 714,000 (2015). AR 2847-64.

In 1977, the State Board adopted Resolution 77-1, which charted the State Board's policy for water recycling, including planning guidance for wastewater reclamation, regulations, and a grant management program to fund construction of recycling facilities. AR 10156-58.

In 2009, the State Board adopted its first statewide Recycled Water Policy. AR 9517-33. The Policy set goals to increase the use of recycled water over 2002 levels by 1 million afy by 2020 and 2 million afy by 2030, and to increase water conservation in urban and industrial uses from 2007 levels by at least 20% by 2020. AR 9520. The Policy also directed the regional water boards to streamline permitting of recycled water facilities to remove regulatory barriers. AR 9527. The use recycled water to recharge groundwater must be reviewed on a site-specific basis, but the Policy encouraged the expansion of this type of use consistent with the protection of public health and groundwater quality. AR 9529.

In 2013, the State Board amended the Recycled Water Policy to address public health and water quality concerns from chemicals of emerging concern in recycled water. AR 8438-80.

In December 2018, the State Board again amended the Recycled Water Policy. AR 900-03. The amended Policy made recycling goals more robust, increasing the goal from 714,000 afy

in 2015 to 1.5 million afy by 2020 and 2.5 million afy by 2030. AR 562. The State Board also made findings under Water Code section 13550 *et seq*. that it is a waste to use potable water when suitable recycled water is available. AR 564.

In recent years, the State Board and regional boards have moved from voluntary surveys to mandatory reporting. The Regional Board's renewed permits for the four POTWs require each facility to annually "submit a feasibility report evaluating the feasibility of additional recycling, efforts to reduce the amount of treated effluent discharged as authorized by this Order and a recycled water progress report describing any updates to the development of increased recycled water production and/or distribution." AR 4905, 5074, 5223-24, 6267.

In 2018, the State Board required its Executive Director to issue an administrative order to over 800 POTWs statewide requiring them to annually report to the State Board (i) the total volume of influent treated and discharged, (ii) the volume discharged to surface water bodies needed to support beneficial uses, (iii) the volume discharged to the Pacific Ocean, (iv) the volume of water recycled, and (iv) the uses to which recycled water is put. AR 562-64. In July 2019, the State Board's Executive Director issued the required order. AR 264-307.

Waterkeeper filed petitions with the State Board to challenge the renewed permits for the four POTWs. *See* AR 3420, 5362. The petitions asserted that that State Board should independently review whether the POTWs' discharges constituted a waste or unreasonable use. *See, e.g.,* AR 3425. The only fact Waterkeeper asserted in its petitions to the State Board was the fact that POTWs were discharging effluent to the Los Angeles River or Pacific Ocean. *See, e.g.*, AR 3920, 3434, 4403, 5375. The State Board denied Waterkeeper's petitions by operation of law.

The State Board is well aware of the POTWs discharge. In 2015, it reported that POTWs discharge an estimated 1.28 million afy—417 billion gallons per year (1.142 mgd) —of treated wastewater directly to the Pacific Ocean and coastal bays. AR 821. The State Board also reported that POTWs recycled in 2015 an estimated 714,000 afy of wastewater (637 mgd), and set a goal of increasing that amount to 1.5 million afy (1.3 billion gallons per day) by 2020 and 2.5 million afy (2.2 billion gallons per day) by 2030. AR 821.

3. Real Parties' Evidence[13]

[13] The court has not set forth the facts in Real Parties' declarations in detail because they mostly concern Real Parties' water supply demand, their actions to conserve water, and their actions recycle wastewater, not the State Board's actions. While relevant, these actions are not controlling of the State Board's duties.

Real Parties request judicial notice of the following documents attached to the Minamide, Wilson, and De Ghetto declarations: (1) Los Angeles Department of Water and Power, Memorandum of Understanding with the Los Angeles Department of Public Works Bureau of Sanitation Regarding Recycled Water from the Hyperion Water Reclamation Plant, dated March 10, 2020 (Minamide Ex. A); (2) Eric Garcetti, Mayor of City of Los Angeles, Executive Directive No. 25, L.A.'s Green New Deal: Leading by Example, dated February 10, 2020 (Minamide Ex. B); (3) Eric Garcetti, Mayor of City of Los Angeles, Executive Directive No. 5, Emergency Drought Response – Creating a Water Wise City, dated October 14, 2014 (Minamide Ex. C); (4) California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2008-0040, Amending Waste Discharge Requirements for (City of Los Angeles) Los Angeles-Glendale Water

a. Burbank

Burbank's water supplies included imported water from the Metropolitan Water District of Southern California ("MWD"), groundwater from the San Fernando Basin, and recycled water. Wilson Decl. ¶23. Currently, 80% of Burbank's water is imported water and groundwater. The remaining 16% is recycled water. Wilson Decl. ¶23. Burbank's total water demand, including recycled water demand, varies from year to year. Wilson Decl. ¶¶ 13, 15-17.

Reclamation Plant, Order No. R4-2007-0006 (File No. 68-085) and (City of Los Angeles) Donald C. Tillman Water Reclamation Plant, Order No. R4-2007-0008 (File No. 70- 177), adopted on July 10, 2008 (Minamide Ex. D); (5) California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2007-0008 (File No. 70-117), Waste Discharge Requirements for Title 22 Recycled Water Issued to City of Los Angeles (Donald C. Tillman Water Reclamation Plant), as amended January 11, 2007 (also Minamide Ex. D); (6) California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2007-0006 (File No. 68-85), Waste Discharge Requirements for Title 22 Recycled Water Issued to City of Los Angeles (Los Angeles-Glendale Water Reclamation Plant), as amended January 11, 2007 (Minamide Ex. E); (7) California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2011-0035 Amending Order No. R4-2007-0007 (File No. 68-085), Water Recycling Requirements for Title 22 Recycled Water Issued to City of Los Angeles (Los Angeles-Glendale Water Reclamation Plant), adopted on February 3, 2011 (Minamide Ex. F); (8) California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2011-0032 Amending Order No. R4-2007-0009 (File No. 70-117), Water Recycling Requirements for Title 22 Recycled Water Issued to City of Los Angeles (Donald C. Tillman Water Reclamation Plant), adopted on February 3, 2011 (Minamide Ex. G); (9) California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2016-0334 (File No. 97-208), Waste Discharge Requirements and Water Recycling Requirements Issued to City of Los Angeles Department of Public Works, City of Los Angeles Department of Water and Power, Los Angeles County Department of Public Works, Terminal Island Water Reclamation Plant, Harbor Water Recycling Project – Dominguez Gap Barrier Project, adopted on October 13, 2016 (Minamide Ex. H); (10) City of Burbank, 2010 Recycled Water Master Plan, dated October 2010 (Wilson Ex. A); (11) City of Burbank, Burbank Water and Power Potable Reuse Facilities Plan Final Report, dated November 2018 (Wilson Ex. B); (12) Richard Wilson, Assistant General Manager, City of Burbank Water & Power, 2019 Annual Report to State Water Resources Control Board for Wastewater Change Petitions WW0019 and WW0091, dated April 22, 2020 (Wilson Ex. C); and (13) Raja Takidin, City of Glendale, Glendale Water & Power, Glendale Wastewater Petition WW0097 – Annual Report, dated May 13, 2020 (De Ghetto Ex. A).

Waterkeeper does not dispute that these documents are all generally subject to judicial notice if relevant. Waterkeeper also did not object to the authentication of these documents in Real Parties supporting declarations. Waterkeeper opposes the request on the grounds that the documents are irrelevant extra-record evidence that should have been included in the Administrative Record stipulated to by the parties. *See* RJN Opp. As Real Parties correctly note, there is no administrative record for this type of traditional mandamus and the parties' stipulation to the authenticity and admissibility of the "record" does not preclude inclusion of additional evidence through a request for judicial notice. RJN Reply at 3-5. For these reasons, the requests are granted. Evid. Code §452(c).

Burbank owns and operates the Burbank plant, which treats collected wastewater and provides treated water for recycled water uses within the city. Wilson Decl. ¶27. The Burbank plant is part of an integrated network of facilities, known as the North Outfall Sewer, which includes four treatment plants. The upstream treatment plants (the Tillman, Glendale, and Burbank plants) discharge solids to the Hyperion plant. Id. This system also allows biosolids, solids, and excess flows to be diverted from the upstream plants to the Hyperion plant for treatment and disposal. Id.

All of the water treated at the Burbank plant is imported from MWD and is not natural to the region. The maximum treated wastewater design capacity at the Burbank plant is approximately 12.5 mgd (14,001 afy). Wilson Decl. ¶30. On average, the Burbank plant produces approximately 8,000 to 9,500 afy of treated effluent. Id.

The sewer system conveys wastewater to the Burbank plant where it is treated. Some of the tertiary treated wastewater is beneficially reused and is stored in storage tanks. Wilson Decl. ¶29. The wastewater not reused is discharged to the Burbank Channel. Recycled water that is beneficially reused for landscape irrigation percolates into the groundwater basin. Id. Burbank's groundwater is treated and then sold again to retail customers. The sludge generated at the Burbank plant is sent back to the sewer, which conveys the sludge downstream to the Hyperion plant. Id.

Since 2008, Burbank has enacted policies and undertaken conservation efforts with the goal of reducing water usage and increasing conservation, such as its Sustainable Water Use Ordinance. Wilson Decl. ¶¶ 20-22. Burbank has aggressively pursued conservation efforts to reduce its water usage, realizing 45% water savings between 2005–2015. To achieve these water savings, Burbank adopted a conservation rate structure for single-family residential water users, which increases the cost of potable water as usage increases. Wilson Decl. ¶19.

The predominant demand for recycled water is irrigation, but Burbank has been aggressively pursuing conversion of cooling towers for HVAC systems from potable water to recycled water. Wilson Decl. ¶18. Recycled water is produced at the Burbank plant, operated by Burbank's Public Works Department, and is delivered via an independent distribution system. Wilson Decl. ¶14. Burbank re-uses approximately 35% of its treated wastewater as recycled water. This supply serves the reasonable and beneficial non-potable demands of Burbank's customers and inhabitants. Burbank's recycled water supply is often used multiple times. Wilson Decl. ¶24.

Burbank has been undertaking efforts to improve and expand recycled water infrastructure including, among other things, constructing a new pump station at the Burbank plant. Wilson Decl. ¶¶ 34-39, 50-57. Burbank has also petitioned the State Board for approval to used reclaimed water for landscape irrigation, requesting an increase in the use of recycled water in 2018. Wilson Decl. ¶¶ 40-46.

Burbank faces numerous obstacles to reducing its wastewater discharges from the Burbank plant and increasing it use of recycled water. Wilson Decl. ¶58. Such obstacles include the time required for approval, limitations on uses of recycled water imposed by the State, and the cost and economic viability of such projects. Wilson Decl. ¶¶ 59-63.

b. Los Angeles

Los Angeles Sanitation and Environment ("LASAN") is responsible for operating and maintaining Los Angeles' wastewater collection and treatment systems, including the Hyperion, Tillman, Terminal Island, and Glendale plants. Minamide Decl. ¶¶ 6-7.

Hyperion sends on average 35 mgd to West Basin and reuses 35 mgd at the Hyperion plant itself for such uses as cooling water, cryogenic facility, the Hyperion Bioenergy Facility, and high-pressure effluent for wash-downs. Further improvements at the Hyperion plant are being planned to keep the plant on the leading edge of environmental protection. Minamide Decl. ¶¶ 9-10.

LASAN has begun to take steps to effectuate Mayor Garcetti's pledge that Los Angeles will recycle 100% of its wastewater at the Hyperion plant by 2035, which will require significant investment in design, construction, operation, and maintenance of new facilities and infrastructure. Minamide Decl. ¶¶ 11-21, Exs. A, B; AR 147-62.

LASAN has also begun efforts to improve operations and expand the ability to recycle and treat wastewater at the Terminal Island, Tillman, and Glendale plants. Minamide Decl. ¶¶ 22-33. LASAN has also undertaken other projects, including expanded irrigation uses, fill stations, groundwater replenishment projects, satellite treatment options, new treatment technologies such as a membrane bioreactor pilot and soil aquifer treatment, and direct potable reuse ("DPR"), which are in different phases of implementation. Minamide Decl. ¶34.

Recycled water projects include a number of factors that dictate the timing and implementation of a project, including but not limited to the environmental review and approvals, funding, feasibility, physical capability/capacity, and demand (including end-users for the product). Minamide Decl. ¶35.

c. Glendale

Glendale's total water demand, including recycled water demand, varies from year to year. Glendale's recycled water customer demand also varies and is between 1,500 and 2,000 afy, which is approximately 7% of the total demand. De Ghetto Decl. ¶¶ 15-16.

Glendale is co-owner with Los Angeles of the Glendale plant, which is part of an integrated network of facilities, known as the North Outfall Sewer and includes four wastewater treatment plants. De Ghetto Decl. ¶28. The upstream treatment plants (Tillman, Glendale, and Burbank) discharge solids to the Hyperion plant. This system also allows biosolids, solids, and excess flows to be diverted from the upstream plants to the Hyperion plant for treatment and disposal. Id.

Glendale has taken numerous steps to decrease its overall water demands by increasing its water conservation efforts, including adopting water waste prohibition ordinances, installing a complete Advanced Metering Infrastructure ("AMI") system (also referred to as "smartmeters"), providing multiple customer tools to use the AMI data including online and application based tools to monitor and control their water usage, and automated leak alerts which notify a customer of a potential leak on their premises, rebates for water-saving plumbing fixtures, rain barrels, and drought tolerant landscaping training classes and information. De Ghetto Decl. ¶17. Glendale continues to pursue its water conservation efforts and its water use is 18% below 2013 levels. De Ghetto Decl. ¶19.

Glendale was an early user of recycled water to offset the need for imported water supplies. De Ghetto Decl. ¶¶ 33-36. In 2016, Glendale petitioned the State Board for approval of its plans to increase its use of its recycled water supply from the Glendale plant, which was approved in 2019. De Ghetto Decl. ¶¶ 37-41.

Recycled water accounts for 7% of Glendale's current water supply. Recycled water use has been approved to increase in the near future by 400 afy, which will reduce imported water use by the same amount. De Ghetto Decl. ¶25. In the long term, as the State Board approves direct

potable reuse (DPR) regulations and treatment procedures, Glendale could re-use its remaining share of water produced at the Glendale plant. Subject to regulatory approvals, this could more than double the amount of recycled water used to offset imported supplies. De Ghetto Decl. ¶26.

In 2019, Glendale's recycled water demand was only 1,535 afy because the year was wetter than normal. By 2023, Glendale's recycled water demand is projected to reach 2,400 afy, which constitutes approximately 37% of Glendale's share of treated wastewater from the Glendale plant and will serve approximately 10% of Glendale's customers' demands. De Ghetto Decl. ¶43.

Glendale's commitment to recycled water is exemplified by provisions in its Municipal Code and its investment in new recycled water infrastructure and upgrades. De Ghetto Decl. ¶¶ 44-51. Glendale continues to upgrade its wastewater collection system and the Glendale plant to deliver even more of its wastewater to the Glendale plant instead of the Hyperion plant for beneficial use in the area. De Ghetto Decl. ¶¶ 48-49.

Glendale has and continues to face numerous obstacles to reducing its wastewater discharges from the Glendale plant and increase its use of recycled water, including Waterkeeper's opposition to Glendale's increased use of recycled water from Glendale plant, the difficulty and lengthy nature of the regulatory approval process, the lack of demand for recycled water, recent State legislation disincentivizing new recycled water projects, and the cost and complexity of recycled water projects. De Ghetto Decl. ¶¶ 56-72.

E. Analysis

Petitioner Waterkeeper's opening brief seeks traditional mandamus compelling the State Board to (a) analyze the four POTWs discharges consistent with the seven factors set out in its State Board Imperial Decision and (b) issue enforceable requirements and timelines to prevent ongoing waste from the discharges. Pet. Op. Br. at 20. In reply, Waterkeeper retreats from this position and seeks only to compel the State Board to analyze the discharges and consider all relevant factors in sufficient detail to enable effective judicial review. Reply at 13.

1. The State Board's Mandatory Duty to Prevent the POTWs' Unreasonable Use of Wastewater

Both the State Board and Real Party Cities argue that the court should revisit its ruling that the State Board has a mandatory duty to assess the four POTWs' waste and unreasonable use of discharge wastewater under the facts pled in the Petitions. Both oppositions note that the court is not bound by its demurrer ruling. "If the demurrer is erroneously overruled, [the objecting party] is acting properly in raising the point again, at his next opportunity. If the trial judge made the former ruling himself, he is not bound by it." Ion Equipment Corp. v. Nelson, (1980) 110 Cal.App.3d 868, 877. State Board Opp. at 13; Real Parties Opp. at 13-14. Real Parties also note that no previous court has held that the State Board has a mandatory duty to enforce the reasonable use doctrine, or that the reasonable use doctrine imposes a specific duty or a legal requirement on the State Board to investigate the reasonableness of a POTW's discharge of wastewater. Real Parties Opp. at 13. Waterkeeper replies that courts generally refuse to reconsider interim orders "supported by substantially the same showing as the one denied." City and County of San Francisco v. Muller (1960) 177 Cal.App.2d 600, 603–04. Reply at 2.[14]

[14] Waterkeeper suggests that both the State Board and Real Parties were required to make

In arguing that the court should revisit its ruling, the State Board and Real Parties repeat some of their arguments made for the demurrer. Both contend that Article X, section 2 imposes a duty on water users to not waste or unreasonably use water, not on the State Board to prevent water users from wasting water and this constitutional prohibition on preventing waste has only ever been applied to curtail a water user's waste or unreasonable use of water. *See, e.g.*, Joslin, *supra*, 67 Cal.2d at 132. The note that, while the State Board has broad authority to prevent waste and unreasonable use (EDF I, *supra,* 20 Cal.3d at 341-42; Imperial Irrigation II, *supra,* 225 Cal.App.3d at 548), no court has ever interpreted Article X, section 2 or section 100 to impose a mandatory duty for the State Board to ensure that water users comply with their constitutional duty to avoid wasting water. Similarly, they contend that section 275 grants the State Board with the authority to "take all appropriate" actions before executive, legislative or judicial agencies to prevent waste, but no court has ever interpreted it to compel the State Board to action a particular action in a particular case. *See, e.g.*, Gananian v. Wagstaffe, *supra,* 199 Cal.App.4th at 1540-44. Board Opp. at 13-14. *See* Real Parties Opp. at 13-14.

Real Parties add to their previous arguments by noting that Article X, section 2 expressly provides that the Legislature may enact laws in the furtherance the constitutional policy, and the Legislature has not hesitated to do so by directing the State Board to apply the reasonable use doctrine to water appropriation issues. Division 2 of the Water Code governs the State Board's administration of water appropriations and is expressly declared to be in furtherance of Article X, section 2. Water Code §1050. All water appropriations are subject to a prior State Board determination that the use will be reasonable and beneficial. *See* Water Code §1200 *et seq*. The State Board "shall make such investigations of the water resources of the State as may be necessary for the purpose of securing information needed in connection with" whether to permit such appropriations. Water Code §1251. *See* Central Delta, *supra,* 124 Cal.App.4th at 260 (State Board violated Water Code by failing to investigate and evaluate whether the proposed use was reasonable and beneficial prior to issuing a water rights permit). State Board approval in compliance with Article X, section 2 also is required when a POTW petitions to change the place of discharge, place of use, or purpose of use of treated wastewater. Water Code §1211; In the Matter of Treated Waste Water Change Petition WW-20 of El Dorado Irrigation Dist., (1995) WR 95-9, 1995 WL 418673, *16. Real Parties Opp. at 15-16.

Real Parties note that the Legislature further has declared certain water uses beneficial and other uses wasteful and specifically authorized the State Board to prevent such wasteful uses. Water Code §461 (the people's primary interest in the conservation of water resources requires the maximum reuse of reclaimed water in the satisfaction of requirements for beneficial uses of water); 13550 (use of potable water is wasteful if recycled water is available and meets quality criteria); Water Code § 13550(a)(1-4) (State Board may order a water user to use recycled water or to cease using potable water if it determines that recycled water is of adequate quality for the proposed use, is furnished at a reasonable cost, and will not adversely affect downstream water right holders and the environment). Real Parties add that Water Code section 13550 declares only that the water user's use of potable water is unreasonable under specified circumstances, not that the State Board has a duty to require the water supplier to provide recycled water, much less a duty to prevent a

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a motion to reconsider. CCP §1008(b). Reply at 2, n.2. Not so. They may both ask the court to change its mind about the State Board's duty and require proof of the Petition's allegations.

discharger from discharging wastewater. Real Parties Opp. at 16.

Real Parties argue that, in contrast, the entire statutory scheme for the regulation of water quality, including the permitting of discharges of wastewater (Water Code §13260 *et seq.*), is silent with respect to the reasonable use doctrine. The State Board and regional boards are granted broad and extensive powers to regulate discharges of wastewater as necessary to protect the quality of the state's waters, but nothing in the statutory framework imposes a mandatory duty on the State Board to investigate the reasonableness of any discharge of wastewater. The Legislature has not declared that the discharge of wastewater is wasteful, and the Legislature's silence in regulating water quality is telling and meaningful. Real Parties conclude that Article X, section 2 and section 100 must be read in conjunction with these legislative impositions of duty. Real Parties Opp. at 17.

The Legislature's specific regulation of water appropriation through the State Board, and its silence in regulating water quality, have little bearing on the State Board's duty to prevent unreasonable use and waste. The Legislature's regulation of unreasonable use and waste is relevant, and the court's demurrer ruling expressly discussed the Legislature's enactment of sections 100 and 275 in addition to Article X, section 2 as reflective of the State Board's mandatory duty.

Real Parties conclude that, if Article X, section 2 and section 100 impose a mandatory duty on the State Board to prevent all unreasonable uses of water, including wastewater, then the State Board necessarily has a duty to conduct investigations of all wastewater discharges in the state and to prevent the use of potable water when recycled water is available, making superfluous the express duties imposed on the State Board by Water Code sections 1251 and 13550. Real Parties Opp. at 17-18.

This argument is a strawman. The court never ruled on demurrer that the State Board has a duty to investigate all wastewater discharges. The State Board has a constitutional duty under Article X, section 2, and a statutory duty under section 100, to prevent waste and unreasonable use of water resources, including wastewater. Section 275 underscores this duty by requiring the State Board to take appropriate action to prevent waste and unreasonable use. This is a mandatory duty, but not a ministerial one. The State Board has wide discretion to decide the manner in which it complies with its constitutional and statutory duty to prevent the waste and unreasonably use of water resources, and this discretion imposes no duty to address unreasonable use in the vast majority of circumstances. The State Board's duty to act is one of degree, and the difference in degree between this case and almost all other circumstances is so large as to be different in kind. Thus, the express duties in Water Code sections 1251 and 13550 are not superfluous.

Real Parties argue that interpreting Article X, section 2 to impose a mandatory duty on the State Board to evaluate the reasonableness of water discharges would conflict with other constitutional provisions and declared policies authorizing local agencies, such as Real Parties, to manage their water resources in furtherance of Article X, section 2. *See* Article XI, §7 (granting cities broad discretionary power to "make and enforce within its limits all local police, sanitary, and other ordinances and regulations not in conflict with general laws."); Water Code §380 ("[t]he various regions of the state *differ widely* in the availability of water supplies and in the need for water for beneficial uses," "[d]ecisions regarding operations to meet water needs can depend in part upon regional differences," "[m]any water management decisions can best be made at a local or regional level, and "[t]he authority granted by this chapter to local and regional public

agencies... is in furtherance of the policy declared in Section 2 of Article X of the California Constitution."). Real Parties provide evidence that a city's decision to recycle water is informed by a number of highly complex, multi-faceted and technical issues that occurs long before a POTW elects to discharge some or all of its wastewater and seeks a NPDES permit for doing so. *See, e.g.*, Wilson, ¶¶ 56, 61-63; De Ghetto, ¶¶ 62-65, 70-72. Real Parties Opp. at 18-19.

Real Parties fail to explain why the statutory right of local agencies to manage their water resources conflicts with the State Board's mandatory duty to prevent waste and unreasonable use. Real Parties acknowledge that the State Board has the authority to prevent waste and unreasonable use by water users and imposing a duty to do so has little bearing on local agency water resource management.

Both the State Board and Real Parties also argue that a mandatory duty under Code of Civil Procedure section 1085 are not to be conjured out of implied words in a statute. Instead, such a duty is only found where a statute imposes a "clear," usually "ministerial" duty. US Ecology, Inc. v. State of Cal., (2001) 92 Cal.App.4th 113, 137-38. "A statute is deemed to impose a mandatory duty on a public official only if the statute affirmatively imposes the duty and provides implementing guidelines." O'Toole v. Superior Court, (2006) 140 Cal.App.4th 488, 510. Real Parties contend that the broad declarations expressed in Article X, section 2, and section 100 are less amenable to a writ designed to dictate specific conduct.[15] Board Opp. at 14; Real Parties Opp. at 17-18.

The court recognized in its demurrer ruling that the nature of the duties imposed on the State Board by Article X, section 2 and section 100 are general and highly discretionary. But the plain language of Article X, section 2 creates a mandatory duty for all responsible agencies, including the State Board, to prevent the waste or unreasonable use of water. The courts have repeatedly held that both Article X, section 2 and section 100 create a "clear, mandatory duty to avoid wasting water, prevent flooding and provide drainage." Elmore, *supra*, 159 Cal.App.3d at 193; *see also* City of Barstow v. Mojave Water Agency, *supra,* 23 Cal.4th at 1236; Imperial Irrigation I, *supra*, 186 Cal.App.3d at 1170-71 (citing Elmore). A public agency can be compelled to act to prevent a waste of water pursuant to this constitutional duty. *See* Elmore, *supra*, 159 Cal.App.3d at 197-98.

Moreover, the California Supreme Court in Audubon explained that the State Board's role in implementing Article X, section 2 has steadily evolved from the narrow role of deciding priorities between competing appropriators to the charge of comprehensive planning and allocation of waters. Id. at 444. The State Board's role of planning and allocation of waters must include

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[15] Real Parties wrongly cite Collins, *supra,* 41 Cal.App.5th at 915-16, as denying mandamus for constitutional equal access to education and equal protection claims because the manner in which the State discharged its constitutional duty "is a highly discretionary area and one not broadly amenable to a writ designed to dictate specific conduct." Real Parties Opp. at 17/18. In fact, Collins upheld the trial court's denial of mandamus for the equal access claim, but it reversed on the equal protection mandamus claim. Collins, *supra,* 41 Cal.App.5th at 917, 919, 921. Real Parties also cite Kahn v. Los Angeles City Employees' Retirement System, (2010) 187 Cal.App.4th 98, as reversing the trial court's grant of mandamus because there was no specific statutory mandate, but the case was based solely on whether the agency's statutory interpretation was arbitrary and capricious, not its ministerial duty.

wastewater. *See also* EDF I *supra,* 20 Cal.3d at 343-44 (State Board's responsibility to regulate wastewater reclamation included plans for wastewater reclamation throughout the state).

The court stands by its ruling that the State Board has a general, mandatory duty under Article X, section 2 and section 100, as reinforced by section 275, to assess the four POTWs' waste and unreasonable use when they discharge wastewater. This is the key issue in this case, and the court acknowledges that no court has ever so held. If the court is wrong, then no further analysis is required. If the court is correct, the nature and extent of that duty must be examined.

2. Waterkeeper Has Demonstrated Facts Triggering the State Board's Mandatory Duty

The court noted in its demurrer ruling that the State Board does not have a duty to investigate allegations of waste and unreasonable use in the vast majority of circumstances. Dem. Ruling at 26-27. The court concluded, however, that the State Board has a duty in this case because Petitioner alleged that the POTWs collectively discharges hundreds of millions of gallons (mgd) of wastewater each day. Id. at 27.

The State Board correctly notes that "[a] demurrer tests the legal sufficiency of the pleadings...[and] the court accepts that the facts alleged in the pleading are true." Comm. On Children's Television, Inc. v. Gen. Foods Corp., (1983) 35 Cal.3d 197, 213-14. State Board Opp. at 13, n.3. The State Board asks the court to reconsider this issue based on the actual evidence. The State Board disagrees that the mere fact that a POTW is discharging effluent—as those multi-billion dollar pieces of public infrastructure were designed to do—triggers a duty for the State Board to investigate the four POTWs. State Board Opp. at 14-15.

The State Board notes that the only fact asserted by Waterkeeper in its petition to the State Board was that the four POTWs were discharging effluent to the Los Angeles River and Pacific Ocean. *See* AR 3920 (Burbank plant discharges up to 12.5 mgd); AR 3434 (Glendale plant discharges up to 20 mgd); AR 4403 (Tillman plant discharges up to 46 mgd); AR 5375 (Hyperion plant discharges up to 230 mgd). The State Board knows that California's more than 800 POTWs discharge effluent, including the four POTWs at issue. AR 271-307 (State Board order to 836 POTWs). In 2015, the State Board reported that POTWs discharge an estimated 1.28 million afy (417 billion gallons per year), or 1.142 mgd. At the same time, the State Board reported that POTWs recycled an estimated 714,000 afy (637 mgd), setting a goal to increase that amount by 2020 to 1.5 million afy (1.3 billion gallons per day) and by 2030 2.5 million afy (2.2 billion gallons per day). State Board Opp. at 15.

The State Board argues that the facts that POTWs are discharging effluent and that they should increase the amount they recycle are implicit in its statewide POTW recycling goals. It cannot be the standard that a petition to the State Board alerting it to the fact that POTWs are discharging wastewater -- even hundreds of millions of gallons per day – is all that is required to impose a mandatory duty to investigate waste and unreasonable use at those plants. By that rationale, any person could compel the State Board to commence a waste and unreasonable use investigation by making similar assertions for many of the 800 other POTWs in the state. More is required to trigger that duty than Waterkeeper submitted to the State Board. State Board Opp. at 15-16. *See also* Real Parties Opp. at 21-22.

The court disagrees. As Waterkeeper replies (Reply at 2), the State Board confirms the Petitions' factual assertion that the four POTWs collectively discharge on average almost 300 mgd

of treated wastewater into the Santa Monica Bay and the Los Angeles River, and are authorized to discharge more. State Board Opp. at 10. The disposal of such a significant volume of water with no evaluation whether the discharge constitutes a waste and unreasonable use of water violates the State Board's mandatory duty under Article X, section 2 and section 100. This volume of discharge is so great that the Regional Board's issuance of permits triggered the State Board's affirmative duty to prevent waste. *See* City and County of San Francisco v. Muller, *supra,* 177 Cal.App.2d at 603–04. The State Board has the affirmative, mandatory duty to prevent the waste and unreasonable use of this water resource, and that duty is enforceable by traditional mandate. Reply at 3.

The State Board's argument that using the amount of effluent to compel a mandatory duty would allow any person to compel an investigation of the more than 800 other POTWs in the state is incorrect. There is no evidence that any other POTW in the state even remotely comes close to the level of wastewater discharge by the four POTWs. As the court ruled on demurrer, the issue is one of degree, and the difference in degree between this case and any other circumstance is so large as to be different in kind. Dem. Ruling at 21. The four POTWs are unique and there is no evidence that the State Board is at risk of being forced to investigate other POTW discharges.

Waterkeeper additionally argues that the context of the water usage and discharge in the Southern California area served by the POTWs provides further evidence that the State Board's duty to prevent waste is triggered. The Los Angeles area practices "pump and dump" whereby large volumes of water are pumped into the region from Northern California and the Colorado river at significant energy and environmental costs. The water is used once, sent to the four POTWs for treatment, and then discharged into the Los Angeles River (AR 4892, 5062, 5212), and Santa Monica Bay. AR 6157. According to Waterkeeper, the cost and effort of bringing a scarce resource to the Los Angeles basin, using it, and then dumping it is strong evidence that a waste and unreasonable use of water is occurring. AR 3733–4. Reply at 3-4.

Waterkeeper further contends that facts concerning the potential for recycling in the Los Angeles area show that the four POTWs discharge constitutes waste: (a) the wastewater discharged to the Los Angeles River is high-quality, tertiary treated wastewater; (b) excessive discharges into the Los Angeles River harm native species and promote the growth of invasive species; (c) the three upstream POTWs have the potential of recycling an additional 95,772 afy of wastewater without harming beneficial uses; and (d) the geology of the nearby San Fernando Valley makes it ideal for storing recycled water. Reply at 4.

The court need not agree with Waterkeeper on either its pump and dump argument or its argument about the feasibility of recycling and the harm caused by excessive discharge[16] to conclude that the State Board has an initial duty to consider whether and how to prevent waste and unreasonable use of the POTWs' wastewater discharge. These issues raised by Waterkeeper are for the State Board's expert analysis.[17]

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[16] All of Waterkeeper's citations on this issue are to its own briefs in the record and therefore are not supporting facts.

[17] Real Parties argue that enforcement of the reasonable use doctrine at the point of discharge where a POTW has no other use for the wastewater – literally, at the tail end of the pipeline – is the wrong place to incentivize recycled water use. Real Parties Opp. at 21-22. This also is an issue that should be raised initially before the State Board. Moreover, as Waterkeeper replies,

3. The State Board Has Considerable Discretion its Evaluation

Waterkeeper's opening brief argues that "the State Board must take the extra step of imposing binding targets or participation in recycling programs" and seeks to compel the State Board to issue enforceable requirements and timelines to prevent ongoing waste from the POTWs' discharges. Pet. Op. Br. at 11, 20.

Real Parties respond that, even if the State Board has a mandatory duty to prevent the waste and unreasonable use of wastewater, it does not have a mandatory duty to impose statewide reasonable use requirements for all discharges. Real Parties correctly note that the court's demurrer ruling concluded that, while the State Board has a mandatory duty to prevent waste and unreasonable use, "this duty is generalized in nature, and the State Board has discretion to pick and choose which unreasonable use or waste of water to investigate and enforce." Dem. Ruling at 24. Real Parties argue that the court should again reject Waterkeeper's argument that the State Board has no discretion. Real Parties Opp. at 19.

Real Parties attempt to support their position by arguing that the Legislature has comprehensively addressed recycled water and never mandated that wastewater be recycled. The Legislature has encouraged and incentivized the use of recycled water,[18] required water suppliers to critically evaluate their ability to increase the use of recycled water,[19] and regulated recycled water usage.[20] But the Legislature has avoided imposing mandatory quotas on recycled water use, thereby leaving implementation of the state's policy on the use of recycled water to local water supply providers in the best position to make highly complex and technical decisions regarding their water supply needs and compliance with the reasonable use doctrine. *See* Water Code §380. Real Parties contend that no statute mandates the use of recycled water.[21] Real Parties conclude that, given this statutory framework of broad and general declarations encouraging the use of recycled water, no statute commands the State Board to amend its Recycled Water Policy or to

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neither Article X, section 2 nor the Water Code exempts either end of the pipe from the prohibition on wasteful or unreasonable use. Waste is waste, and the act of wasteful use becomes irreversible upon discharge into the Pacific Ocean. Reply at 3.

[18] *See e.g.*, Water Code §§ 13512 (declaring Legislature's intention to take all possible steps to encourage development of water recycling facilities), 13515 (authorizing the State Board to provide loans for the investigation and for development of water reclamation facilities), 13527 (granting priority financial assistant to recycled water facilities), 13560 (encouraging development of potable reuse), and 13577 (establishing statewide recycling goal). *See also* AR 564, 786.

[19] *See e.g.*, Water Code §§ §§ 10004 (directing that California Water Plan include recycled water), 10531 (declaring intention to encourage local water suppliers to diversify their water supply portfolios), 10633 (requiring urban water providers to evaluate the potential for the use of recycled water).

[20] *See e.g.*, Water Code §13523 (regulating use of recycled water as necessary to protect the public health, safety and welfare).

[21] Waterkeeper points out that this assertion is technically incorrect. Water Code section 13550 states that using potable water when recycled water of sufficient quality is available is *per se* waste. Reply at 3. The inference is that recycled water must be used in that instance.

adopt statewide regulations establishing wastewater discharge quotas or mandate recycled water use. Real Parties Opp. at 19-21.

Real Parties explain that there are common sense reasons why the Legislature has refrained from mandating the reuse of wastewater. First, although in this case both the discharger and the water supplier are one – all three Real Parties have both water supply and wastewater divisions – this is not always true; a discharger may have no authority to recycle. Second, only a fraction of the entities with legal authority to recycle have a need for recycled water in their location. *See* AR 5, 803, 819. Third, the demand for recycled water is limited by its permitted uses. When Real Parties' permits were issued, recycled water could only be used for irrigation and replenishment of groundwater supplies.[22] Fourth, recycled water projects are infrastructure intensive and expensive, requiring tertiary or better treatment, separate distribution systems, and infrastructure to prevent cross-contamination. Cities with constrained resources may not be able to fund recycled water projects without grants. *See, e.g.,* De Ghetto Decl., ¶¶ 50-51, 70-72; AR 9098, 9103-04.

Real Parties' discussion of the Legislature's encouragement of recycling without mandating that wastewater be recycled has little bearing on the State Board's duty. The court stands by its statement on demurrer that, while the State Board's duty to prevent waste and unreasonable use is mandatory, this duty is generalized in nature and the State Board has considerable discretion to pick and choose which unreasonable use or waste of water to investigate and enforce. Dem. Ruling at 24.

The State Board's discretion does have limits and they are exceeded in this case. The four POTWs release hundreds of millions of gallons of water into the Los Angeles River and Santa Monica Bay every day. This level of wastewater discharge into the Los Angeles River and the Pacific Ocean is so large that the State Board must investigate the issue. As Waterkeeper's counsel argued at the September 3, 2019 hearing, the POTWs' permits are the trigger for the State Board's duty to act, but there otherwise is no link between the two. The State Board's duty to act is not part of the permitting process and the State Board's duty arises from its actual or constructive knowledge of the quantity of discharge allowed by the POTWs' permits.

In reply, Waterkeeper retracts its opening brief statement and states that it does not seek to define the manner in which the State Board addresses the waste and unreasonable use of water at the four POTWs. Waterkeeper does not dispute that many viable solutions for preventing waste and unreasonable use may exist, depending on what facts are found in evaluating the discharges from these four POTWs. However, the State Board may not do nothing when faced with facts demonstrating waste and unreasonable use. Reply at 5.

The court agrees. The State Board has wide discretion to decide the manner in which it will comply with its constitutional duty to prevent the waste and unreasonably use of water resources. The State Board has discretion when and how it will enforce its constitutional duty, and the court may not compel the Board to exercise its discretion in a particular manner. AFSCME, *supra,* 126 Cal.App.4th at 261. However, the four POTWs are unique in the level of their wastewater discharge into the Los Angeles River and Pacific Ocean and the State Board can

[22] After the POTWs' permits were issued, regulations permitting the use of recycled water to augment surface water supplies were adopted in March 2018. 22 C.C.R. §60320.300 *et seq.*; AR 2452-505. Regulations permitting direct potable reuse (DPR) are not anticipated to be adopted for several years.

be compelled to exercise its discretion in the first instance. Dem. Ruling at 21.

The State Board has considerable discretion in using its expertise to evaluate the POTWs' discharge as a waste and unreasonable use, but it may not avoid exercising this discretion entirely. When it exercises that discretion, the State Board must explain how the discretion was exercised by showing that it has adequately considered all relevant factors and by demonstrating a rational connection between those factors, the choices made, and the purposes of Article X, section 2 and section 100.

4. The State Board Has Not Met Its Discretionary Mandatory Duty

a. The State Board's Admission That It Has Never Conducted a Reasonable Use Analysis

The court's demurrer ruling noted that the State Board must take some action to exercise its duty to regulate unreasonable use and waste; to do nothing is an abuse of discretion. Dem. Ruling at 29. Waterkeeper argues that the State Board has never conducted any reasonable use or waste analysis for millions of gallons per day discharge, or otherwise taken any other steps to prevent waste, because it consistently has contended that it has no duty to do so. Pet. Op. Br. at 8.

In December of 2019, the State Board responded to interrogatories propounded by Waterkeeper. In those responses, the State Board confirmed that it had never conducted any reasonable use or waste analysis of the discharge from any of the four POTWs. State Wat. Resources Control Bd.'s Responses to Petitioner's Special Interrogatories, Set One, ("Interrogatories Set One") No. 11, p. 10; State Wat. Resources Control Bd.'s Responses to Petitioner's Special Interrogatories, Set Two, ("Interrogatories Set Two") No. 11, pp. 9-10; State Wat. Resources Control Bd.'s Responses to Petitioner's Special Interrogatories, Set Three, ("Interrogatories Set Three") No. 11, pp. 9-10. The State Board also conceded that it has no position on whether the POTW discharges are a waste or unreasonable use of that water resource. Interrogatories Set One, No. 7, p. 8; Interrogatories Set Two, No. 7, p. 8; Interrogatories Set Three, No. 7, p. 8.

The State Board's admissions are dispositive. Having performed no analysis and admitting that it has no position on whether the POTWs' discharges are a waste or unreasonable use of wastewater, the State Board has not met its mandatory duty. None of the remaining evidence submitted by the State Board and Real Parties affects this conclusion that the State Board has not met its duty. Nonetheless, this evidence is addressed as follows.

b. Reporting Requirements

The State Board relies on "data gathering and required reporting" to show compliance with its mandatory duty to investigate the POTWs' discharges and recycled water use. The state (first the Department of Water Resources and then the State Board) has been tracking the use of recycled water for decades. The data collected shows a continual uptick in the amount of recycled water produced statewide: 175,220 afy (1970); 183,941 afy (1977); 266,559 afy (1987); 525,460 afy (2001); 669,000 (2009); and 714,000 (2015). AR 2847-64. State Board Opp. at 20-21.

The WDRs issued by the Regional Board in 2017 triggered the State Board's duty to take action to prevent waste and unreasonable use, but the Regional Board did not perform a reasonable use/waste analysis in issuing them. The Hyperion plant's WDR lists both recycling specifications and recycling monitoring specifications as "not applicable". AR 4894, 6159, 6251. The Tillman,

Burbank, and Glendale plant WDRs also contain no recycling monitoring requirements. AR 4894, 4939, 5105, AR 5272. None of the WDRs indicate that the Regional Board considered any relevant reasonableness and waste factors.

The State Board notes that, in recent years, the State Board and regional boards have moved from voluntary surveys to mandatory reporting. The WDRs issued by the Regional Board required each of Los Angeles, Burbank, and Glendale to annually submit a report "evaluating the feasibility of additional recycling efforts to reduce the amount of treated effluent [and] a recycled water progress report describing updates to the development of increased recycled water production and/or distribution." AR 4905, 5074, 5223-24, 6267, 6292. State Board Opp. at 20.

In 2018, the State Board required its Executive Director to issue an administrative order to the state's more than 800 POTWs requiring them to annually report to the State Board (i) the total volume of influent treated and discharged, (ii) the volume discharged to surface water bodies needed to support beneficial uses, (iii) the volume discharged to the ocean, (iv) the volume of water recycled, and (iv) the uses to which recycled water is put. AR 562-64. In July 2019, the State Board's Executive Director issued the order. AR 264-307. State Board Opp. at 20.

The reporting requirement in the four POTWs' WDRs does not fulfill the State Board's duties. No doubt, the feasibility reports are relevant to a reasonableness/waste evaluation, but no evaluation has occurred, and the State Board has never concluded that it cannot perform an evaluation of reasonableness without the feasibility reports.

In fact, the reporting shows that the discharges constitute considerable potential waste. Glendale reported that recycled water made up just 7% of its water supply in 2017. AR 2758. Glendale effectively admits that its discharge of 7000 afy of highly treated wastewater (tertiary treatment) into the Los Angeles River is not the maximum beneficial use for this water. AR 2761. Burbank reported in its 2018-19 annual report that 55% of its tertiary treated recycled water at the Burbank plant is discharged into a tributary of the Los Angeles River, and it projects that 50% of this wastewater will continue to be discharged through the year 2040. AR 344, 8088. Los Angeles stated in its 2019-2020 annual report that in 2018-19 it delivered only 12,000 afy of recycled water from its POTWs out of a potential 250,000 afy, a recycling rate of less than 5% of the discharges authorized. AR 188. Pet. Op. Br. at 13-14.

c. Funding

The State Board notes that it is expensive to build and operate a recycled water facility. Los Angeles estimates that it will cost billions of dollars to complete its project to recycle 100% of the Hyperion plant's wastewater. Minamide Decl. ¶11; AR 9624 (cost of $11 billion to recycle 1.5 million afy). In the past ten years, the State Board has awarded $2.1 billion in grants and loans to help fund local agencies' development of recycled water facilities. AR 26-28. This includes over $250 million for projects in the Los Angeles region (region 4) which will produce an additional 26,000 afy of recycled water. Ibid. Burbank and Los Angeles are among the recipients of this State Board funding. *See, e.g.,* AR 2609, 7880, 7931, 8337. State Board Opp. at 23-24.

The cost of recycling facilities and the State Board's funding efforts are relevant to a reasonable use analysis, but they do not demonstrate that it is preventing waste or unreasonable use of the four POTWs' discharges. The State Board does not require prevention of waste and unreasonable use as a condition of funding of any of these projects. Nothing about the funding shows that the State Board is taking steps to prevent waste or unreasonable use of water discharged

at the four POTWs.

d. The Recycled Water Policy

The State Board relies on its Recycled Water Policy to support its compliance with its mandatory duty. The Policy was initially adopted in 2009, and it set goals for water conservation and the use of recycled water. AR 9517-33. The Policy also directed regional water boards to streamline permitting of recycled water facilities to remove regulatory barriers and encourage the use of recycled water to recharge groundwater, which is reviewed on a site-by-site basis consistent with the protection of public health and groundwater quality. AR 9527, 9529. The State Board amended its Recycled Water Policy in 2013 to address public health and water quality concerns from chemicals of emerging concern in recycled water. AR 8438-80. State Board Opp. at 20.

In December 2018, the State Board again amended the Recycled Water Policy, making its recycling goals more robust by seeking to double the amount of recycled water from 714,000 afy in 2015[23] to 1.5 million afy by 2020, and then 2.5 million afy by 2030. AR 562, 900-03. The State Board made findings consistent with Water Code section 13550 that it is a waste to use potable water when suitable recycled water is available. AR 564. State Board Opp. at 20.

The State Board argues that it and the Legislature have set ambitious statewide recycling goals, which have been consistently ratcheted upwards. While those goals have not yet been achieved, the state is headed in the right direction. The data on 2019 discharge and recycling volumes that is currently being reported will inform the State Board and the public help assess the statewide progress made over the past five years towards the state's 2020 and 2030 numeric recycling goals. State Board Opp. at 27.

The State Board's Recycled Water Policy does not evaluate, and does not prevent, unreasonable or wasteful POTW discharges. The most recent amendments to the Policy declined to include mechanisms to enforce recycling goals, citing the lack of accurate tracking of uses of recycled wastewater and estimates of the volume available to recycle. AR 818. The new Policy includes a "narrative goal" of minimizing discharge into the Pacific Ocean. AR 822. However, the Policy concludes that the narrative goal will not "involve a change to the physical environment," from which Waterkeeper suggests that the narrative goal will not do anything to prevent waste. AR 822. Pet. Op. Br. at 11-12.

In explaining the narrative goal's purpose as "encouraging utilities to consider recycling treated wastewater for beneficial use, rather than disposing of it", the Recycled Water Policy implicitly admits that direct ocean discharge of wastewater fails to use such water to any beneficial use. AR 821. While the Recycled Water Policy includes requirements for the four POTWs to report on discharge of wastewater, the purpose of these requirements is not to prevent waste or unreasonable use, but to "potentially update the recycled water goals in the future." *See* AR 268, 273, 279, 285, 289, 827. The Recycled Water Policy therefore fails to fulfill the State Board's mandatory duty to evaluate and prevent the waste or unreasonable use of discharge from the POTWs.[24] *See* Pet. Op. Br. at 12.

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[23] By comparison, Los Angeles imports about 250,000 afy from Mono Lake tributaries and the Owens Valley. AR 136.

[24] Waterkeeper suggests that the State Board could fulfill its mandatory duty if it exercised its discretion to amend the Recycled Water Policy to include binding targets and timelines, along

e. Regulations

The State Board argues that it has attempted to increase recycled water use by streamlining the permitting of recycled water facilities and the use of recycled water.

Recycled water can transport residual pollutants or pathogens not removed at the POTW and therefore has the potential to impact water quality in receiving waters. Therefore, the use of recycled water generally requires a water quality permit which contains conditions to protect surface or groundwater from potential adverse water quality impacts that using recycled water might cause. *See* Water Code §§ 13522.5, 13524. Reducing the total volume of treated wastewater discharged through increased recycling also can have the unintended effect of increasing the concentration of pollutants like ammonia in the remaining effluent discharged. This phenomenon is occurring at the Hyperion plant, and the Regional Board has required Los Angeles to analyze how it can ensure that reduced effluent discharges do not harm water quality. AR 6183, 7015, 7187-88. State Board Opp. at 26.

Prior to 2014, those recycled water permits were issued *ad hoc* by each of the state's nine regional water quality control boards. During the recent drought, Governor Brown directed the State Board to adopt a single, uniform statewide permit for the use of recycled water to ease the regulatory burden on new recycled water facilities. AR 8400, 8404. The State Board complied and adopted a statewide general permit (WDR) for recycled water facilities to ease that regulatory burden. AR 8400-437. The State Board replaced that permit in 2016 with a different statewide permit (WRR) for recycled water. AR 8000-47. These general recycled water permits are intended to encourage more recycled water production by allowing new facilities to come online faster, with fewer regulatory burdens and uncertainty. AR 8004-05. State Board Opp. at 21-22.

The State Board also has adopted regulations to increase recycled water use by expanding the potential uses of recycled water. To protect public health and water quality from potential adverse consequences of recycled water use, such water can only be used for purposes approved by regulation. Water Code §§ 13521, 13524. Until 2014, those uses were limited to non-potable reuses such as lawn, crop, landscape irrigation, and industrial processes. 22 CCR §60300 *et seq*. This limitation on the potential uses of recycled water made its production less economically feasible, especially in urban areas. State Board Opp. at 22.

In 2010, the Legislature directed DPH, and later the State Board, to investigate the feasibility of authorizing recycled water to be used for potable uses, either indirectly by using recycled water to recharge groundwater or augment surface water reservoirs (indirect potable reuse), or directly by introducing recycled water into a public water system (direct potable reuse). Stats. 2010, ch. 700, § 3 (SB 918); Stats. 2013, ch. 637 (SB 322); Stats. 2014, ch. 3 (SB 104); Stats. 2017, ch. 528, § 4 (AB 574). Expanding the potential use of recycled water to include human consumption creates significant new uses of recycled water, provides POTWs with a significantly expanded market, and provides POTWs with a policy and financial incentive to increase the production of recycled water. In a letter to the Legislature, Waterkeeper described direct potable reuse (DPR) as a "critical strategy" and a "crucial tool to meet our local and state water recycling

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with findings regarding the reasonableness and waste of discharging wastewater into marine waters. Pet. Op. Br. at 12, n.8. The court has no opinion on how the State Board should fulfill its duty.

goals" which can be a "game-changer." AR 7856-57.

The State Board notes, however, that the use of recycled water to augment drinking water supplies raises a host of public policy issues that requires close study before it might be approved. Water Code §13560(d). State Board Opp. at 22-23. DPH and the State Board have devoted substantial resources to those efforts. In 2014, DPH adopted water recycling criteria governing indirect potable reuse of recycled water through groundwater recharge. 22 CCR §§ 60320.100 and 60320.200 *et seq*. In 2018, the State Board adopted regulations governing indirect potable reuse of recycled water through surface water augmentation (SWA). 22 CCR §60320.300 *et seq*. The so-called holy grail of direct potable reuse remains under study. In 2016, based on advice from an expert panel and an advisory group of stakeholders, the State Board determined that it is feasible to use recycled water for direct potable reuse, but concluded that "it presents very real scientific and technical challenges that must be addressed to ensure the public's health is reliably protected at all times." AR 7304-46. The Legislature concurred, extending the State Board's deadline to issue regulations to 2023 and allowing the State Board to extend that deadline by another 18 months if needed. Water Code §13561.2.

In April 2018, the State Board issued a Proposed Framework for Regulating Direct Potable Reuse in California. AR 2408-51. Once regulations authorizing direct potable reuse are issued, the State Board expects the expanded market will provide a significant incentive to POTWs to expand their recycled water production capacity. State Board Opp. at 22-23.

Obviously, the scientific and legal limitations on recycled water use, and the recent expansion of such use through regulation on indirect potable use and a future regulation on direct potable use, are relevant to the State Board's duty to evaluate the reasonableness of the POTWs' discharge. They may well restrict any ability of the POTWs to avoid waste and show the discharge as reasonable. But they are not a substitute for such an evaluation. It is also worth noting that the State Board's 2018 regulation does not require water suppliers to use Surface Water Augmentation to augment raw water supplies in reservoirs (AR 2509) and the projected deadline for a regulation on direct potable reuse does nothing now to prevent unreasonable use. Pet. Op. Br. at 12-13.

f. <u>The River Flow Study</u>

The production of recycled water by its nature also results in a reduction in the discharge of treated wastewater. The reduction in the discharge of treated wastewater can harm the beneficial uses of the surface water that was augmented by treated wastewater. For example, water-dependent species or human uses (such as kayaking) may rely on the treated wastewater flows in the Los Angeles River. Additionally, downstream water right holders may have come to rely on the ability to divert water from a river whose flow is augmented by upstream treated wastewater discharges. To protect against these potential adverse consequences, section 1211 requires wastewater treatment plants to file a petition with the State Board to approve the reduction in flow caused by increased recycling and for the State Board to consider these potential adverse impacts before approving a wastewater facility's decrease in the discharge of treated wastewater. Water Code §§ 1211, 1701, 1701.1, 1701.2.[25] State Board Opp. at 24-25.

[25] The section 1211 change petition process is focused on public trust resources in rivers and consistency with various State Board policies. The process does not apply to discharges at the Hyperion plant because it does not reduce flow in the Los Angeles River. Water Code §1211. AR

In the past half dozen years, the State Board has received a number of section 1211 applications from the four POTWs to reduce their discharges to the Los Angeles River through increased recycling. *See, e.g.*, AR 741-67, 2404-07, 2845-46. The State Board argues that the approval of all these recycling projects could starve the Los Angeles River of the wastewater flows necessary to support its beneficial uses. Waterkeeper itself[26] urged the State Board to not approve any applications for additional recycling on the Los Angeles River until it convened a workshop to discuss, among other things, establishment of a "base flow" for the River and "preservation and enhancement of the (potentially conflicting) beneficial uses of the [R]iver." AR 3413. State Board Opp. at 25-26.

On November 8, 2017, the State Board held an informational session entitled "LA River Existing and Future Conditions: Instream Flow Needs." AR 2681. The Regional Board, Department of Fish and Wildlife, and the cities of Los Angeles, Glendale, and Burbank made presentations. AR 2684-844. Thereafter, the State Board and the Regional Board initiated the River Flow Study at an estimated cost of at least $1.1 million. AR 1465-66. The River Flow Study will characterize the aquatic life and recreation uses in the Los Angeles River, quantify the flows needed to support those uses, model how various flow scenarios would affect those uses, and develop a set of flow recommendations. AR 1459-67. The project is expected to be completed by the end of 2020. The State Board argues that the River Flow Study's recommendations will assist the State Board in assessing the four POTWs section 1211 petitions to ensure that they do not recycle too much water to the detriment of beneficial uses in the river that rely on the existing flows of treated wastewater. State Board Opp. at 26.

The River Flow Study does not demonstrate that the State Board is taking any action to prevent the waste or unreasonable use of wastewater from the POTWs. The River Flow Study concerns the beneficial uses of the POTWs' discharges and is designed to provide insight into the relationship between flows and beneficial uses (wildlife, kayaking, recreation) for purposes of the public trust doctrine and cumulative impacts for CEQA. AR 314. The beneficial use of the discharges is a factor in the reasonableness analysis -- the River Flow Study would provide data for factors one (Other Beneficial Uses) and two (Excess Water Serves Beneficial Uses) of the seven factors in the State Board Imperial Decision-- but it cannot satisfy the State Board's duty to consider waste and unreasonable use in the POTWs' discharges. Waterkeeper correctly argues that even beneficial uses can be wasteful and unreasonable. Joslin, *supra*, 67 Cal.2d at 143 (Article X, section 2 "does not equate 'beneficial use' with 'reasonable use.'"); Audubon, *supra,* 33 Cal.3d at 447; Light, *supra,* 226 Cal.App.4th at 1480 (reasonableness and public trust doctrine both

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682-83, 2406. Section 1211 change petitions qualify as projects subject to CEQA. The municipality proposing the reduced flow change in use is typically the CEQA lead agency and the State Board is a responsible agency.

[26] In 2017, Glendale filed a section 1211 change petition to recycle an additional 3,500 afy. AR 680-81. Contrary to its position in this case, Waterkeeper protested Glendale's request to recycle more water. AR 3412-14. Waterkeeper sued Glendale to prevent it from recycling water and settled the case on the condition that Glendale slow its increased production of recycled water. AR 740.1. The State Board ultimately approved Glendale's request to increase its recycling capacity in the phases proposed by Waterkeeper. AR 680-98. State Board Opp. at 25.

impose potential limit on private uses of water).[27]

The River Flow Study is not a consideration of wastefulness or reasonableness of discharge from the four POTWs and is not an action taken to prevent such waste or unreasonable use.

g. The State Board's Conservation Efforts

The State Board notes that the volume of wastewater discharged or recycled is a function of the volume of wastewater influent received by POTWs. The less water sent down the drain necessarily means that the POTWs will receive less influent and discharge less effluent. In 2018, the Legislature established a goal of reducing indoor water use by 20% and set a target of 55 gallons per day of indoor water use through 2025, thereafter dropping to 52.5 gallons per day. Water Code §§ 10608.20(a)(2), and (b)(2)(A), 10609.4(a). The Legislature also authorized the State Board to adopt new water use efficiency standards. Water Code §10609.4(b). When finalized and implemented, the State Board's water use efficiency standards will result in less indoor water use and consequently less wastewater directed to the POTWs. State Board Opp. at 24.[28]

Conservation of the water supply is laudable and may result in less waste/unreasonable use. It is something the State Board should consider in evaluating the POTWs' discharge, but water conservation is not a substitute for the evaluation of reasonable use, nor for the reduction of waste.

h. Real Parties' Actions

Both the State Board and Real Parties argue that the latter have made progress to reduce their effluent discharges and increase their recycling.

The State Board argues that the three inland POTWs have or plan to increase recycling to such a degree that the overriding present concern is that too much water may be recycled to the detriment of the resources in the Los Angeles River. While progress towards these goals may not be as fast as some might want, the cities' actions and plans for increased recycling align with the State Board's. State Board Opp. at 27.

Real Parties note that, by nature of their populations and location, they operate POTWs connected to some of California's (and the world's) largest wastewater collection and treatment systems. Minamide Decl. ¶6 (LASAN operates and maintains one of the world's largest wastewater collection and treatment systems); De Ghetto Decl. ¶¶ 8-9, 14. It is not unusual that POTWs for large cities would discharge large amounts of effluent. The evidence demonstrates that all Real

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[27] This is an issue committed to the State Board's expertise. Given the state's strong policy of encouraging recycling, it is not at all clear that kayaking, other recreational use, or wildlife use of the Los Angeles River should have any impact on reducing the amount of POTWs' discharge by recycling.

[28] The State Board also provides documents related to economic analysis, historical surveys of water and recycled water use, documents authored by Waterkeeper, documents generated by the County of Los Angeles, and surveys by regional boards in Los Angeles and other regions. None of these documents is specific to the four POTWs, and none shows that the State Board has evaluated and is preventing the waste or unreasonable use of the discharge authorized by the WDRs.

Parites have significantly reduced water demand through conservation and have increased recycled water use when feasible. Real Parties argue that they are in compliance both with the letter and spirit of state law and policy with respect to their discharge of wastewater and their use of recycled water. Real Parties Opp. at 23.

Specifically, Burbank has increased its use of recycled water by approximately 20% since 2016-17, with corresponding decreases in its wastewater discharges. In 2018, Burbank successfully obtained the State Board's approval to decrease its wastewater discharges from the Burbank plant; the State Board found that Burbank's project was "consistent with the purpose and will help California meet the goals of the Recycled Water Policy." Currently, Burbank re-uses approximately 35% of its treated wastewater as recycled water. Burbank's recycled water demand is projected to reach 3,500 afy within the next year, which constitutes between 36-44% of Burbank's treated wastewater. In the future, Burbank expects recycled water to account for 19% of its total water supply. Wilson, ¶¶ 13, 17, 24, 30, 38, 45-46. Burbank also has aggressively pursued conservation efforts to reduce its water usage, realizing 45% water savings between 2005-2015. Wilson Decl. ¶¶ 19, 21. Real Parties Opp. at 23-24.

Glendale meets 7% of its water demands with recycled water. On average, Glendale's share of the wastewater produced by the Glendale plant is 6,000-7,000 afy. With the State Board's 2018 approval of Glendale's wastewater change petition (AR 680-84), Glendale's recycled water demand is projected to reach 2,400 AFY by 2023, which constitutes approximately 37% of Glendale's share of the Glendale plant's treated wastewater. This recycled water will serve approximately 10% of Glendale's customers' demands. De Ghetto Decl. ¶¶ 23-25, 27, 30, 35, 41-43. Glendale has also implemented numerous conservation efforts, including water waste prohibition ordinances, installing a complete "smart-meters" system, and online and application-based tools for customers to monitor and control water usage leak. As a result, Glendale customer demands have decreased 18% since 2013. De Ghetto Decl. ¶ 17-20, 27. Real Parties Opp. at 24.

On top of Los Angeles' level of recycling at all of its POTWs – the Hyperion, Tillman, Glendale, and Terminal Island plants (AR 3392, 3400-37), Los Angeles' Mayor pledged on February 21, 2019 that the city will recycle 100% of its wastewater by 2035. To meet this goal, improvements to the ocean-discharging Hyperion plant will cost in the billions of dollars over the next 15 years. Additional resources and capital commitments will be required for increasing recycling at Los Angeles' other three plants. Minamide Decl. ¶¶ 8-32. Real Parties Opp. at 24-25. By reducing overall demand through conservation and developing recycled water as a local supply, the Cities' have made significant gains in reducing their reliance on imported water. Several notable obstacles have slowed and limited Real Parties' abilities to increase their use of recycled water and reduce their wastewater discharge further, not the least of which is Waterkeeper's own objections and litigation. Real Parties Opp. at 25.

Substantial further expansion in Real Parties' use of recycled water will require direct potable reuse (DPR). Minamide Decl., ¶35; Wilson Decl., ¶ 61; De Ghetto Decl., ¶ 65. Critical knowledge gaps exist for direct potable reuse, and further necessary research is required. AR 7330. Assuming that the State Board adopts regulations, direct potable reuse will open up new abilities to recycle. Los Angeles projects that the Hyperion plant's recycling with the inclusion of direct potable use will be 200,000 afy. AR 188. In 2018, after receiving funding from the State Board, Burbank finalized a plan which studied the feasibility of direct potable reuse in Burbank once regulations are promulgated. Wilson Decl., ¶ 36, Ex. B. Glendale anticipates using its remaining share of

wastewater discharged from the Glendale plant for direct potable reuse. De Ghetto Decl., ¶26. Real Parties Opp. at 25-26.

Real Parties contend that there is no evidence that any of them are wasting water. Waterkeeper's attempt to impose a duty on the State Board to investigate the POTWs' permitted discharge based solely on the volume of such discharge fails to satisfy the good cause standard required by law. Real Parties Opp. at 23.

Real Parties miss the point. The issue is not whether they have taken steps to conserve and recycle water. The issue is whether the State Board has complied with its duty to evaluate the reasonableness/waste of the POTWs' discharge. Real Parties put the cart before the horse when they argue that there is no evidence that they are wasting discharged wastewater. That is the issue the State Board is required to ascertain in the exercise of its expertise. The availability of direct potable reuse is obviously an important factor in the recycling of water and no doubt will be part of the State Board's evaluation. But it is of little use to argue that the POTWs' discharge need not be evaluated for reasonableness because Waterkeeper has not met a good cause standard, a standard that has nothing to do with the State Board's independent duty.

As Waterkeeper argues, without an evaluation whether a waste and unreasonable use is occurring via the discharge at the POTWs, it is impossible to claim that any of Real Parties' efforts prevents waste. The fundamental problem with Real Parties' declarations is that none evaluates whether their discharge of wastewater constitutes a waste and unreasonable use. They also have made no binding commitment to recycle. Los Angeles states that its efforts to eliminate the average daily 230 mgd discharge of treated wastewater into the ocean at the Hyperion plant are proceeding "without a mandate from the state." Minamide Decl., ¶11. Yet, Los Angeles describes this voluntary effort as a "pledge[]" and a "goal" which may be realized 15 years from now. Minamide Decl., ¶ 11, 36. Glendale also hedges that it "could re-use its remaining share" of the discharged wastewater from the Glendale plant at an unspecified point in the future. De Ghetto Decl., ¶26. Reply at 11.

Waterkeeper also points out the Real Parties' declarations demonstrate the painfully slow pace of the voluntary municipal recycling efforts. Burbank projects that recycled water as a percentage of its long-term water supply will increase just 3%. Wilson Decl., ¶¶ 47, 23. Recycled water currently comprises just 7% of Glendale's water supply. De Ghetto Decl., ¶¶ 24–25. Despite the Hyperion plant's discharge of 230 mgd into the Santa Monica Bay, Los Angeles has no operative recycling permits. This huge volume is "lost to the ocean" and "wasted water". De Ghetto Decl., ¶44; AR 6786, 7279.[29] Reply at 12.

Nothing in Real Parties' declarations indicates that the State Board has taken any steps to prevent the waste or unreasonable use of the discharges, or even considered the issue as involving waste or unreasonable use of a water resource. Without State Board action, the waste or unreasonable use of the Hyperion's plant discharge may well continue past 2035. Hoping and encouraging Los Angeles to eventually put discharged wastewater from the Hyperion plant to its

[29] The only reuse of wastewater at the Hyperion plant occurs internally to the Hyperion facility (11 mgd) and contractually to West Basin for recycling under West Basin's permits. AR 7005, 7281, 7870. Thus, 230 mgd (84%) of the 267 mgd of the Hyperion plant's wastewater is discharged directly into the Pacific Ocean. AR 6, 7003. Pet. Op. Br. at 15-16.

fullest beneficial use does not fulfill the State Board's ongoing duty to prevent the waste or unreasonable use of that discharged wastewater. Pet. Op. Br. at 17.

i. Conclusion

As Waterkeeper argues (Pet. Op. Br. at 10-11), the State Board and Real Parties assume that the State Board's mere encouragement of water recycling will prevent wasteful or unreasonable use from the wastewater discharge of the four POTWs. The State Board argues, without citation to evidence, that its strategy for reducing POTW discharges and increasing recycled water has been to address POTWs as a statewide class of dischargers through a combination of carrots and sticks. State Board Opp. at 16. Yet, the State Board admits that California is behind on its recycled water goals (AR 783, 2847), and merely encouraging third parties to increase water recycling is not equivalent to preventing waste or unreasonable use of discharged wastewater. Real Parties' recycling and conservation efforts may or may not be reasonable. That is an issue for the State Board to address and decide.

5. The Required Reasonable Use Analysis

"What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time". Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist., (1935) 3 Cal.2d 489, 567.

What must the State Board do? Waterkeeper argues that the State Board's duty to prevent waste and unreasonable use requires that it (1) conduct an evaluation of the extent of waste and unreasonable use occurring at these four POTWs considering relevant factors, and (2) craft a remedy to prevent such waste and unreasonable use, as constitutionally and statutorily required, that is rationally related to the analysis in the first step. *See* Ridgecrest, *supra*, 130 Cal.App.4th at 1006. According to Waterkeepers, the State Board must articulate a rational connection between the facts found in step one, the solutions proposed in step two, and the constitutional and statutory mandate. *See* id. at 1006. Pet. Op. Br. at 5-6; Reply at 4-5.

Not quite. The first element argued by Waterkeeper is correct. The State Board must evaluate whether waste and unreasonable use is occurring at the four POTWs considering relevant factors. But the second element of remedy presumes that the State Board will find waste and unreasonable use and will impose a remedy. In reply, Waterkeeper admits that it cannot seek a specific remedy and requests that the State Board be compelled to fulfil its Article X, section 2 duty to evaluate the POTWs' discharge and craft a remedy that is based on factual findings and is not arbitrary and capricious. Reply at 9.

The State Board argues that Waterkeeper's entire case hinges on the assumption that the only way the State Board can carry out its duty under Article X, section 2 and section 275 is to conduct a waste and unreasonable use analysis for individual POTWs. Article X, section 2 and section 275 do not specify how waste and unreasonable use is to be prevented, and section 275 is open-ended by stating only that the State Board must only take "all appropriate proceedings" to prevent waste and unreasonable use. *See* R & P Growers Association. v. Agricultural Labor Relations Board, (1985) 168 Cal.App.3d 667. How the State Board prevents waste and unreasonable use is discretionary, and the State Board argues that it has discretion to address potential waste and unreasonable use from classes of dischargers systemically, just as it did, for

example, by adopting regulations for how all vineyards will be permitted to divert water from the Russian River for frost protection. Light, *supra,* 226 Cal.App.4th at 1463. The State Board cites EDF I, *supra,* 20 Cal.3d at 327, for the point that decisions relating to Article X, section 2 and wastewater are best left to the State Board. State Board Opp. at 16-17.

EDF I does not support the State Board. This court's ruling on demurrer (Dem. Ruling at 22) explained that the EDF I plaintiffs sought to compel a municipal utility district to build reclamation facilities under Article X, section 2 and section 100. 20 Cal. 3d at 332. The EDF I court required the plaintiffs to apply to the State Board first before seeking intervention of the court to prevent waste. Id. at 344. Waterkeeper has petitioned the State Board and now seeks judicial mandamus to compel the State Board to evaluate and prevent the ongoing waste and unreasonable use.

The State Board notes that the determination of how to address the potential wasteful and unreasonable discharge of effluent from POTWs is a complicated issue, mixing issues of public health, public financing, and public perception. *See, e.g.*, EDF I, *supra*, 20 Cal.3d at 344 ("whether available economic resources should be devoted to wastewater reclamation or development of other water supplies" is basically a legislative decision appropriately addressed to the State Board).) The State Board argues that Waterkeeper cannot compel it to abandon its carrots and sticks approach and address the four POTWs' potential waste and unreasonable use in the way Waterkeeper prefers. State Board Opp. at 17-19.

The problem with the State Board's argument is severalfold. First, there is no evidence that the State Board has adopted a carrot and stick approach to POTW discharge. Second, the discharge from the four POTWs is so great that it cannot be included in a statewide class of POTWs. These general programs are not based on an understanding of the waste and unreasonable use occurring at the four POTWs and are not aimed at preventing the waste and unreasonable use at the POTWs. Third, the State Board's argument puts the cart before the horse. The State Board cannot reasonably adopt such an approach without conducting an evaluation of the discharge as waste and unreasonable. The State Board admits it has conducted no analysis of the reasonableness of the discharges from the four POTWs, either collectively or individually. Having conducted no analysis, the State Board cannot demonstrate a rational connection between its decision to do nothing to prevent waste and its constitutional and statutory duty to do so. Nor can the State Board demonstrate that is has considered "all [or any] relevant factors." Reply at 7.

Because the State Board has not undertaken to evaluate the extent of the waste and unreasonable use occurring at these four POTWs, it cannot claim to have fashioned solutions to those issues, and thus has not executed its Article X, section 2 duty. Reply at 11.

How must the State Board conduct its analysis? Waterkeeper argues that the State Board explained how to conduct a reasonable use analysis more than 35 years ago:

> "[I]n determining the "reasonableness" of water usage . . . the law requires an examination of the ascertainable facts concerning such water usage and an evaluation of such facts in view of the increasing need for water conservation within California. Although each case must be evaluated on its own merits, prior court decisions, prior decisions of the Board, and several statutes provide guidance in evaluating water usage. . . ." State Board Imperial Decision, p. 23.

The State Board Imperial Decision listed seven factors for considering whether a use is wasteful or unreasonable: (1) other potential beneficial uses for the water; (2) whether the excess water now serves a reasonable and beneficial purpose; (3) the probable benefits of water savings; (4) the amount of water reasonably required for current use; (5) the amount and reasonableness of the cost of saving water; (6) whether the required methods of saving water are conventional and reasonable rather than extraordinary; and (7) the availability of a physical plan or solution. Id., pp. 24-29. Pet. Op. Br. at 4-5.

Waterkeeper contends that application of the State Board Imperial Decision factors demonstrates that the authorized use of hundreds of millions of gallons of wastewater for use as discharge is wasteful and unreasonable. Pet. Op. Br. at 6.

First, numerous beneficial uses for the POTWs wastewater have been identified, including recycling for golf course, landscape, and agricultural irrigation, commercial and municipal use, groundwater recharge, recreational impoundment, and vehicle washing. AR 2847. Virtually any potential beneficial use for recycled water would be superior to discharging secondary treated wastewater directly into the Pacific Ocean and tertiary treated water indirectly via the Los Angeles River. The State Board, the Regional Board, and Glendale recognize this. AR 821 (State Board finding that discharge to ocean should be minimized); AR 7279 (Regional Board conclusion that wastewater discharged and not recycled is wasted water); AR 2765 (Glendale finding that highly treated wastewater discharged to ocean is not maximum beneficial use). Pet. Op. Br. at 6.

Second, while the discharge serves a purpose of conveying waste, the huge volume serves no other reasonable or beneficial use, either in the Los Angeles River or in Santa Monica Bay. *See* AR 821, 7279. Pet. Op. Br. at 6.

Third, the economic, environmental, and other benefits of more efficient water use (including both recycling and conservation) are obvious. Recycled water serves as a hedge against the "effects of long term drought, climate change, and water supply uncertainty." AR 900. Both Los Angeles and Glendale recognize the water security benefits of water conservation and recycling. AR 2769-70 (Los Angeles conservation study projects that by 2039 additional conservation will "supply" about 16% of water demands (by eliminating such demand)); AR 2766 (Glendale recognizes that increased use of recycled water fosters conservation of potable water that would otherwise supply non-potable uses). Dr. Mark Gold of UCLA estimates $7-10 billion dollars in net present value (2016 dollars) will be saved in the year 2035 if Los Angeles implements water supply efficiency projects, including recycling all of the Hyperion plant's current discharge. AR 2811. Pet. Op. Br. at 6-7.

Fourth, Los Angeles has committed to ending such discharge from the Hyperion plant by 2035. AR 20, 188, 324. The State Board admits that such discharge is not the fullest beneficial use of that water resource. *See* AR 821. The River Flows Study should answer the question of what level of discharge would sustain the beneficial uses of the Los Angeles River, does not propose to consider what level of discharge is reasonable or would constitute waste or unreasonable use. *See* AR 1450-59. Even before the River Flows Study is completed, there is ample evidence that the River experiences higher base flows than historically, meaning that current discharge levels are well above that necessary to support beneficial uses of the River. AR 2781, 2802, 2805. Pet. Op. Br. at 7.

Fifth, the cost of reducing the POTWs' discharge is reasonable, as evidenced by Los Angeles' Hyperion plant plans and the Glendale and Burbank project to increase diversions of

treated wastewater from the Los Angeles River to support increased recycling. AR 147-62, 1468, 2811, 2869. Pet. Op. Br. at 7.

Sixth, the technology to recycle the water discharged from the POTWs currently exists, and there is nothing extraordinary about such methods of saving water. Los Angeles does not apparently recycle or distribute any recycled water under its own permits for the Hyperion plant. Los Angeles' discharges of treated wastewater into the ocean from the Hyperion plant (230 mgd) are over five times the volume of wastewater (35-37 mgd) that the city contractually sends to West Basin. AR 6, 7003. West Basin recycles this water under its own wastewater recycling permits and distributes the water to its customers. West Basin's recycling program demonstrates that the technology for recycling secondary treated wastewater is not extraordinary and literally exists next door to the Hyperion plant. AR 7005, 7870. Glendale and Burbank already use recycled water for a modest portion of their water supplies, further demonstrating that the technology exists in general use. AR 2737, 2758. Pet. Op. Br. at 7-8.

Seventh, a physical plan or solution is available as demonstrated by the fact that Los Angeles has committed to ending ocean discharge from the Hyperion plant by 2035. AR 188, 324. It is also shown by Glendale's and Burbank's expansion of their recycled water distribution networks. AR 2745, 2762. Pet. Op. Br. at 8.

The State Board correctly responds that nothing in Article X, section 2 or section 100 requires it to apply the seven-factor analysis from the State Board Imperial Decision. The State Board has issued waste and unreasonable use orders after that decision which have not referred to the seven factors as a hard and fast test that must be used. *See* In the Matter of the Alleged Waste and Unreasonable Use by Hidden Lakes Estates Homeowners Assn., State Board Order WR 2012-0004, 2012 WL 528570 at *6 (noting that seven factors do not apply in every case, but they provide guidance). The State Board has discretion to consider any factors it deems appropriate under the circumstances when undertaking a waste and unreasonable use analysis. The State Board cites Center for Biological Diversity v. Dept. of Conservation, (2018) 26 Cal.App.5th 161 and AIDS Healthcare Foundation v. Los Angeles County Dept. of Health, (2011) 197 Cal.App.4th 693 and People ex rel. Becerra v. Super. Ct. (2018) 29 Cal.App.5th 486 for the point that mandamus will not lie to control how an agency exercises its discretion. Board Opp. at 17-19.

The court agrees, and so it ruled on demurrer that how the State Board performs its evaluation of the four POTWs' discharge, and whether it involves enforcement actions, review of permit conditions, or more general regulatory action or administrative guidance, is within the State Board's discretion. Dem. Ruling at 28 (State Board has "a variety of options to address the issue of waste and unreasonable use in the POTW's discharge"). Whatever the State Board finds in its evaluation, it must explain its reasoning in exercising its discretion.

The court in Ridgecrest, *supra,* 130 Cal.App.4th at 986, addressed this issue. Education Code section 47164, which required that, upon the request of a charter school for the use of school district facilities, the school district had a mandatory duty (with an inapplicable exception) to provide reasonably equivalent and contiguous facilities to the charter school, and the school district had discretion in how it provided such facilities to the charter school. Id. at 1003. The school district granted the petitioner charter school site locations with facilities that were miles apart and did not explain how it addressed the statute's contiguous facility requirement. Id. at 1006.

The school district's failure to explain frustrated review by both the trial and appellate courts. Id. at 1006. The Ridgecrest court noted that a court reviewing an agency action in

mandamus "must ensure that an agency has considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." Id. at 1003. The court held that "[i]t follows that we cannot make this determination in the absence of a statement of reasons by the agency for its decision." Id. at 1006-07. The Ridgecrest court directed the trial court to issue a writ of mandate requiring the school district on remand to provide an explanation "thorough enough, and factual enough, to permit effective review by the courts." Id. at 1006-07. Pet. Op. Br. at 9-10.

Waterkeeper admits that it cannot request a specific remedy where the State Board has not engaged in any analysis of the extent of waste and unreasonable use occurring at these four POTWs. Waterkeeper seeks the State Board's compliance with Article X, section 2, and sections 100 and 275 in regulating the Glendale, Tillman, Burbank, and Hyperion plants. While the State Board has discretion regarding how to prevent waste and unreasonable use, it may not refuse to conduct the necessary analysis at the outset and then claim that it has no further obligations. Dem. Ruling at 27-28. Reply at 5-6.

Waterkeeper states that it would welcome elimination of waste at the POTWs by regulation, as the State Board undertook for irrigators in the Russian River. Light, *supra*, 226 Cal.App.4th at 1463, 1484–5. Whatever means the State Board chooses "must be reasonably necessary to effectuate the purpose of the statute" and not arbitrary, capricious, or without substantial evidence to support the action. Id., at 1495. Thus, while "discharger specific" remedies may be appropriate for the State Board to implement, this issue is beyond the scope of the remedy Waterkeeper seeks. The issue of discharger specific versus more broadly applicable remedies is for the State Board to address in determining how to comply with its mandatory duty, after making the necessary factual findings regarding the scope of waste and unreasonable use. Waterkeeper only requests mandamus compelling the State Board to undertake the necessary analysis to consider all relevant factors, to support crafting a remedy based on the relevant factors. Such analysis would also ensure development of a thorough factual record to allow for judicial review of the action ultimately taken. Ridgecrest, *supra,* 130 Cal.App.4th at 1007. Reply at 9-11.

F. Conclusion

For decades, Californians have been warned of drought or the threat of drought. They have been asked to reduce water usage and many have taken that to heart by, for example, shortening their shower time, using low flow toilets, and reducing lawn sprinkler time. Public agencies have taken steps to compel reduced water usage by consumers – such as Glendale's graduate water rate system for residential usage – and adopting conservation programs. Not long ago, the court had a case in which Los Angeles' Department of Water and Power spent $500 million in rebates for homeowners to plant desert planting in lieu of grass in their yards. The benefits of this expenditure were dubious. The State Board is spending at least $1.1 million on the River Flow Study to ascertain whether beneficial uses of the Los Angeles River (kayaking, other recreation, and wildlife uses) will be adversely affected by reduction of the POTWs' effluent.

Could these monies have been better spent on recycling the POTWs' wastewater discharge? We cannot know until the State Board conducts an evaluation of the reasonableness/waste of the discharges. We do know that the California constitution prohibits unreasonable use of water and that recycling water is a high priority in California. The State Board must conduct an evaluation of the POTWs' reasonable use of their wastewater. In this evaluation,

the relevant factors may include those raised by the State Board and Real Parties of mandatory reporting, the cost of recycling facilities, the scientific and legal limitations on recycled water use, the beneficial uses of Los Angeles River flow, and conservation efforts. Perhaps the State Board will conclude that Real Parties are doing all they can to recycle, or perhaps the State Board will conclude, as Waterkeeper hopes, that the State Board should impose binding targets and timelines on the POTWs. Whatever the conclusion, the State Board must evaluate the reasonableness of the four POTWs discharge of 300 mgd of wastewater.

Waterkeeper's Petitions are granted in part. The State Board must apply its expertise to evaluate the waste/unreasonable use of the four POTWs' discharge. The court will not dictate the precise nature of this evaluation, except that the State Board must consider all relevant factors, develop a factual record to allow for judicial review of its decision, and explain how its discretion was exercised by demonstrating a rational connection between the factors considered, the choices made, and the purposes of Article X, section 2 and section 100.

The clerk is directed to issue separate judgments and writs for each Petition. Waterkeeper's counsel is ordered to prepare the proposed judgments and writs of mandate, including a reasonable return date, serve them on counsel for the opposing parties for approval as to form, wait ten days after service for any objections, meet and confer if there are objections, and then submit the proposed judgments and writs along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for August 20, 2020 at 9:30 a.m.

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