

## Court Upholds "Tributary Rule" But Leaves Open the Possibility of a Future Challenge

*Background – Basins Plans, Beneficial Uses & the "Tributary Rule"* The California Regional Water Quality Control Boards establish water quality standards under the Clean Water Act through the adoption of Basin Plans that identify the "beneficial uses" of the water bodies with their respective jurisdictions. The problem is that it is not possible for the Regional Water Boards to assess each and every water body in California to identify its actual or potential beneficial use – such as for drinking water, for use by wildlife, or for swimming. In the Central Valley Region, for example, there are about 10,000 water bodies covered by the Basin Plan. To address this problem, the Central Valley Regional Water Board adopted a rule, as part of its 1975 Basin Plan, stating any streams not specifically listed in the plan were deemed to have the same beneficial uses of the listed stream, river or lake to which they were a tributary. This "tributary rule" allowed the protection of countless small streams, but forced dischargers to attain a level of water quality protecting many of these streams as if they were used for drinking water, when in fact there was no evidence of such a use. In recognition of this issue, the Central Valley Regional Water Board revised its "tributary rule" as part of its 1995 Basin Plan. The new rule stated that while the beneficial uses of any specifically identified water body *generally* applied to its tributaries, the beneficial uses of unidentified waters would be evaluated on a case-by-case basis. But the U.S. EPA intervened, disapproving the new rule based on the following reasoning: as soon as the 1975 Basin Plan took effect, the tributary rule resulted in the designation of beneficial uses for all unidentified waters in the region; any subsequent changes to those beneficial use designations were subject to a set of procedural and substantive rules under the Clean Water Act – including the requirement to perform a "use attainability analysis" for each water body at issue – which the Central Valley Regional Water Board had not followed. *The Present Dispute over Vacaville's Waste Water Permit* The dispute over the tributary rule came to a head in a case involving the discharge permit for the City of Vacaville's Easterly Waste Water Treatment Plant. [California Association of Sanitation Agencies v. State Water Resources Control Board](#), (August 30, 2012). Applying the 1975 rule, the permit imposed strict effluent limits based on the beneficial uses identified in the Basin Plan for the Sacramento-San Joaquin River Delta, even though there was no evidence the creek supported the beneficial uses of the Delta, which is more than four miles away. The City of Vacaville and the California Association of Sanitation Agencies sued to set aside the discharge permit for the treatment plant. The court of appeal's decision was a mixed bag. It upheld the view of the Regional and State Water Boards that (1) the 1975 tributary rule resulted in a designation of beneficial uses for unidentified water bodies, and (2) any changes to those designations requires a formal amendment to the Basin Plan. The court therefore rejected the claim by plaintiffs that permit limits must be based on beneficial use designations that are supported by site-specific evidence. As the court explained, the tributary rule "is a practical solution to an impossible task." At the same time, however, the court emphasized the plaintiffs had another avenue for relief: petitioning the Regional Water Board to amend its Basin Plan. According to the court, the Regional Board has "an affirmative obligation," on a case-by-case basis, "to determine the factual accuracy of a use previously designated by blanket application" of the tributary rule. In this way, the court harmonized the text in the 1995 Basin Plan, which calls for a case-by-case evaluation, with the view of the U.S. EPA, which posits that this evaluation must occur within the context of a formal Basin Plan amendment rather than a decision on an individual discharge permit. The court therefore ruled in favor of the Regional and State Water Boards, but without prejudice to any rights of the plaintiffs to initiate further proceedings to seek a Basin Plan amendment.

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