Volume 36, Number 4
January 2026

CALIFORNIA WATER LAW & POLICY Reporter™

CONTENTS

CALIFORNIA WATER NEWS

Western U.S. States Miss Deadline Amid Colorado River Negotiations. . 73

The Eastern Tule Groundwater Sustainability Agency Will Not Allocate Water or Charge Extraction Fees for 2026 74

LEGISLATIVE DEVELOPMENTS

California Senate Bill 72, A Bill to Modernize the California Water Plan and Advance Long-Term Water Supply Goas 76

REGULATORY DEVELOPMENTS

U.S. EPA and the Department of the Army Offers Proposed Rule Redefining 'Waters of the United States' 78

New Endangered Species Act Rulemaking Being Proposed by the U.S. Fish and Wildlife Service and National Marine Fisheries Service 79

California Department of Water Resources' Conservative Opening to the Water Year: The State Water Project's Initial Allocation of Ten Percent 81

California State Water Board Recirculates Revised Draft Staff Report and Substitute Environmental Document for Proposed Update to Bay Delta Plan 82

LAWSUITS FILED OR PENDING

Due Process, Agency Power and the California Coastal Commission—State Lawsuit Filed Regarding Public Access to Coastal Areas 85

Continued on next page

EDITORIAL BOARD

Robert M. Schuster, Esq.
Executive Editor
Argent Communications Group

Austin Cho, Esq.
Downey Brand LLP

Derek Hoffman, Esq.
Fennemore Craig

Miles Krieger, Esq.
Best Best & Krieger, LLP

Wesley Miliband, Esq.
Miliband Water Law

Adam Nir, Esq.
Remy Moose Manley, LLP

ADVISORY BOARD

Prof. Brian Gray
U.C. Hasting College of Law

Robert B. Maddow, Esq.
Bold, Polisner, Maddow,
Nelson & Judson

Antonio Rossmann, Esq.
Rossmann & Moore

Scott Shapiro, Esq.
Downey Brand, LLP

Michele A. Staples, Esq.
Jackson Tidus

Amy M. Steinfeld, Esq.
Brownstein Hyatt Farber Schreck

ARGENT COMMUNICATIONS GROUP

WWW.ARGENTCO.COM

RECENT CALIFORNIA DECISIONS

Supreme Court:

California Supreme Court Grants Leave to Amend Complaint to Remove Tax Assessment Claims and Retain Program Management/Facilitation Claims Without Requiring Pay-First-Litigate-Later Compliance 87

Morgan v. Ygreene Energy Fund, Inc., ___Cal.5th___, Case No. S277628 (Cal. Dec. 4, 2025).

District Court of Appeal:

First District Court Affirms the State Water Board's Discretionary Declination of Review Not Quasi-Judicial Action Subject to Judicial Scrutiny 89

Bareilles v. State Water Resources Control Board, ___ Cal.App.5th___, Case No. A171456 (1st Dist. Nov. 17, 2025).

When a "Fee" Becomes a Tax: Groundwater Replenishment Charges under Renewed Constitutional Scrutiny. 90

Howard Jarvis Taxpayers Association v. Coachella Valley Water District, ___Cal.App.5th___, Case No. E081996 (4th Dist. Nov. 26, 2025).

Publisher's Note: Accuracy is a fundamental of journalism which we take seriously. It is the policy of Argent Communications Group to promptly acknowledge errors. Inaccuracies should be called to our attention. As always, we welcome your comments and suggestions. Contact: Robert M. Schuster, Editor and Publisher, 530-852-7222; schuster@argentco.com

WWW.ARGENTCO.COM

Copyright © 2026 by Argent Communications Group. All rights reserved. No portion of this publication may be reproduced or distributed, in print or through any electronic means, without the written permission of the publisher. The criminal penalties for copyright infringement are up to $250,000 and up to three years imprisonment, and statutory damages in civil court are up to $150,000 for each act of willful infringement. The No Electronic Theft (NET) Act, § 17 - 18 U.S.C., defines infringement by "reproduction or distribution" to include by tangible (i.e., print) as well as electronic means (i.e., PDF pass-alongs or password sharing). Further, not only sending, but also receiving, passed-along copyrighted electronic content (i.e., PDFs or passwords to allow access to copyrighted material) constitutes infringement under the Act (17 U.S.C. 101 et seq.). We share 10% of the net proceeds of settlements or jury awards with individuals who provide evidence of illegal infringement through photocopying or electronic distribution. To report violations confidentially, contact 530-852-7222. For photocopying or electronic redistribution authorization, contact us at the address below.

The material herein is provided for informational purposes. The contents are not intended and cannot be considered as legal advice. Before taking any action based upon this information, consult with legal counsel. Information has been obtained by Argent Communications Group from sources believed to be reliable. However, because of the possibility of human or mechanical error by our sources, or others, Argent Communications Group does not guarantee the accuracy, adequacy, or completeness of any information and is not responsible for any errors or omissions or for the results obtained from the use of such information.

Subscription Rate: 1 year (11 issues) $1025.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 201, Galena, IL 61036-0201; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc., a California corporation: President/CEO, Gala Argent; Vice-President and Secretary, Robert M. Schuster, Esq.

California Water Law & Policy Reporter is a trademark of Argent Communications Group.

CALIFORNIA WATER NEWS

WESTERN U.S. STATES MISS DEADLINE AMID COLORADO RIVER NEGOTIATIONS

Efforts to reach a unified plan for managing the Colorado River by the November 11, 2025, deadline have fallen short, leaving the river system—and the 40 million people who depend on it—facing uncertainty.

Background

The Colorado River provides essential water supplies to seven western states and Mexico. The basin is divided into two regions: the Upper Basin (western Colorado, western New Mexico, eastern Utah, southwestern Wyoming, and northeastern Arizona) and the Lower Basin (southern California, southern Nevada, the majority of Arizona, and southwestern Utah). Shortages in water supply on the Colorado River at the turn of the 21st century prompted 18-year federal guidelines for curtailing water allocations triggered by Lake Mead and Lake Powell water.

Deadline Missed

Recognizing continuing drought conditions, the U.S. Bureau of Reclamation and the basin states have been negotiating a new long-term agreement which would apply after the existing guidelines expire at the end of 2026. In June 2025, federal officials set a November 11, 2025, deadline for basin states to submit a shared proposal outlining a post-2026 shortage framework. The Colorado River basin states recently failed to meet the Bureau's deadline.

Negotiations Continue

While the basin states did not submit a formal plan before the stated deadline, they did issue a joint statement acknowledging progress and affirming that they remain committed to finalizing their consensus.

The missed deadline places greater attention on the role of the Bureau of Reclamation, which has indicated it will proceed with review and public comment of its own draft guidelines under National Environmental Policy Act (NEPA) procedures in December 2025. If the states cannot reach consensus on their own alternative agreement, federally imposed guidelines may control. The Bureau aims to have a final decision on longer-term guidelines by the middle of next year.

Disagreements Over Cuts and Allocation

At the heart of the basin states' negotiations are questions about how to fairly reduce water use throughout the basin. Over the past two decades, Colorado River flows have declined to close to 75 percent of 20th-century averages. Reservoir elevations at Lake Powell and Lake Mead remain at historic lows, despite years of conservation efforts.

Key points of disagreement among the basin states include:

- How reductions should be apportioned between the Upper and Lower Basins, especially given differences in historical use, infrastructure, needs, and obligations;
- Which reservoirs should bear the brunt of shortages, and under what curtailment triggers;
- Whether future commitments should be binding or voluntary; and
- The term of the next agreement.

Legal and Administrative Uncertainty

Without an updated agreement, water users across the basin face continued federal influence and control. The Bureau of Reclamation will continue to impose operational guidelines to ensure that water deliveries, infrastructure integrity, and legal obligations are maintained. An extended federal plan could invite litigation by and among the basin states.

Moreover, the lack of a plan makes it difficult for cities, irrigation districts, and tribes to make infrastructure investments, sign long-term water contracts, or plan for emergency drought scenarios. Many agricultural users operate under seasonal allocations, and uncertainty at the interstate level can compli-

cate crop decisions, capital improvements, and water banking programs.

Conclusion and Implications

The next major milestone will likely be the U.S. Bureau of Reclamation's release of its draft Environmental Impact Statement (EIS) in early 2026. This will provide an opportunity for public comment and formal analysis of various alternatives, including voluntary agreements, administrative action, or hybrid approaches.

In parallel, basin states are expected to continue negotiations to avoid a fully federal solution. However, it is unclear when the states intend to meet next to continue negotiations. Any consensus would need to be incorporated into the federal rulemaking process quickly to avoid delays in finalizing these post-2026 guidelines.

Many stakeholders hope the states will still succeed in crafting a durable, flexible framework—one that reduces legal risk, prioritizes reliability, and reflects a shared commitment to water security in the Colorado River Basin.
(Micheline Fairbank, Evan Klouse)

THE EASTERN TULE GROUNDWATER SUSTAINABILITY AGENCY WILL NOT ALLOCATE WATER OR CHARGE EXTRACTION FEES FOR 2026

With all founding member agencies (Terra Bella, Saucelito, Porterville Irrigation District, and Tule East Groundwater Sustainability Agency) having formed their own exclusive Groundwater Sustainability Agencies (GSAs), the Eastern Tule Groundwater Sustainability Agency (ETGSA) reportedly will not be allocating any water for the 2026 water year and will not impose groundwater extraction fees going forward. Existing Basin Safe accounts reportedly will remain accessible for viewing historical data through October 1st, however new trading or transfers will not be processed.

Background

ETGSA's board approved a resolution (Resolution 2025-02) pausing allocations and fees for WY 2026. This affects the period from October 1, 2025, onward for Water Year 2026 as part of the State Water Resources Control Board's (SWRCB) oversight of the Tule Subbasin under the Sustainable Groundwater Management Act (SGMA). SGMA requires groundwater extraction reporting.

Even without imposition of the fees, groundwater extractors still need to measure and report their usage to the State Water Board via the GEARS system by May 1, 2026, for the 2025 period, and annually thereafter. GEARS is the State Water Board's new system taking effect in place of the long-standing eWRIMS system.

Going Forward

Three key components arise from the GSA's actions: (i) no extraction fees, at least for now (Landowners in the ETGSA area will not pay fees for water pumped in WY 2026); (ii) no formal allocation exists, at least for now (the GSA is not setting specific pumping limits like the previous 0.82 AF/acre Tier 1); and (iii) continued monitoring and reporting obligations under SGMA remain active, indicating ongoing management efforts. Ultimately, this decision reflects a pause in direct financial penalties and allocation limits for the upcoming year within the Tule Subbasin's sustainability journey.

Beyond this next year's events, ETGSA reportedly remains committed to a $125 million settlement with the Friant Water Authority for land subsidence damage to the Friant-Kern Canal. In addition, landowners are still encouraged to manage their existing water credits and historical accounts through the Basinsafe portal to receive updates on future policy changes. An important clarification was provided in that the new GSA contact information provided for landowners to reach out regarding their specific jurisdictional questions for water year 2026 a typographical error in the Porterville Irrigation District email that will be corrected.

The Status Quo

With this new development, several data points exist while no new allocations or fees are imple-

mented or imposed. Land Subsidence Management Area compliance shows 384 parcels (23,250 acres) in compliance with well registration and monthly reporting requirements, while 63 parcels (1,958 acres) remain out of compliance. For the 2025 water year, 95% of groundwater extraction fees have been collected, but only 19% of Tier 1 charges totaling over $10 million have been paid, with $12.2 million in outstanding balances remaining. The new tier system bases restrictions on allowable pumping limits rather than observed subsidence amounts, with Tier 4 (red zone, one mile on each side of canal) limited to only native sustainable yield, and progressively higher allowances in Tiers 3, 2, and 1. Technical analysis using InSAR data and regression modeling determined that pumping up to approximately 0.4 acre-feet per acre can occur without causing permanent inelastic subsidence on average across the analyzed sectors. Adaptive management provisions allow for quarterly monitoring and adjustment of pumping restrictions based on observed subsidence response and groundwater level data. Additional monitoring wells are needed throughout the expanded Land Subsidence Management Area to better implement DWR's best management practice of using groundwater levels as management criteria.

Conclusion and Implications

The preliminary implications for the Eastern Tule Groundwater Sustainability Agency electing not to allocate water or collect charges may help mitigate certain challenges while presenting new ones due to the uncollected fees, yet ongoing requirements to comply with SGMA. Challenges exist for avoiding state intervention as well as potential legal liability from individual landowners.
(Wes Miliband)

LEGISLATIVE DEVELOPMENTS

CALIFORNIA SENATE BILL 72, A BILL TO MODERNIZE THE CALIFORNIA WATER PLAN AND ADVANCE LONG-TERM WATER SUPPLY GOALS

Senate Bill (SB) 72, the "California Water for All" bill, authored by Senator Anna Caballero, received unanimous passage through the California Legislature before being signed into law by Governor Newsom on October 1st of this year. The bill directs the Department of Water Resources (DWR) to undertake comprehensive planning and develop long-term water supply targets to be included in future updates of the California Water Plan, as a proactive measure to address concerns over future climate events potential impact on California's water supply. [Sen. Bill No. 72s, (2025-2026 Reg. Sess.].

Background

SB 72 aims to strengthen the California Water Plan, and increase collaboration between government agencies, shareholders, and the public in an effort to shift the state's actions away from reactive measures, and, instead, toward proactive measures that will serve to create a more climate resilient future water supply.

The California Water Plan, mandated by Water Code Section §10005(a), contains California's strategic plan for sustainably managing and developing future water resources. The law requires the Department of Water Resources update the plan every five years and, further, directs DWR to undertake comprehensive planning and analysis to include detailed information and metrics within future Plan updates. SB 72 modernizes the process for updating the Plan by requiring the DWR to take steps to create a forward-looking roadmap for planning for future water supply. Of those requirements, the bill mandates DWR develop a range of water supply targets that consider future scenarios on a 50-year planning timeline. Notably, the Plan has not undergone any significant revisions that directly address future climate unpredictability, or extreme weather events and their potential to create drought conditions or otherwise effect the state's water supply, until now.

Prior to the passage of SB 72, updates to the Plan required "the development of new water storage facilities, water conservation, water recycling, desalination, conjunctive use, and water transfers that may be pursued in order to meet the future water needs of the state." SB 72 adds a requirement that discussion of groundwater recharge programs, water conveyance projects, stormwater capture, and demand management activities also be included. Additionally, SB 72 requires, as part of the upcoming 2028 Plan update, that DWR include an interim planning target of 9,000 acre-feet additional water, water conservation, or water storage capacity to be achieved by 2040.

As part of the subsequent 2033 update to the Plan, SB 72 requires DWR update the interim planning target for 2050; identify future water needs for urban, agricultural, tribal, and other uses; and include discussion of the estimated costs, benefits, and impacts of any project or action recommended which could help achieve water supply targets. Additionally, in all future updates to the Plan, DWR must include discussion of environmental, urban, agricultural needs on a regional basis, a summary of sources that can finance projects or actions within the various strategies, and information as to estimated costs, benefits, and impacts of any project or action recommended to help achieve water supply targets.

To increase transparency and collaboration, and encourage public engagement, the bill requires DWR issue drafts of future updates to the Plan and conduct public workshops that allow interested parties to provide comment. The bill also requires DWR's advisory committee be expanded to include tribal, labor, and environmental justice interests.

Lastly, DWR must report amendments, supplements, and additions included in the updates to the Plan, together with a summary of the department's conclusions and recommendations, to the California Legislature.

Senate Bill 72

SB 72 takes a proactive approach to address concerns regarding the effectiveness of current sustainable management and stewardship strategies, in light of concerns over the uncertainty of future weather events and the impact of those events on the state's water supply which is, currently, heavily reliant on annual snow melt capture. As temperatures rise, more precipitation will be absorbed by dry soils, consumed by plants, or will evaporate, all of which is expected to create a potential for less water to reach streams, rivers, and reservoirs, thereby negatively impacting the state's available water supply. The several components of this bill work together to direct DWR to take measures that aim to create a more consistent, data-driven guide to quantify gaps within the state's watershed levels while identifying effective strategies to manage such gaps through creation of measurable goals and detailed analysis.

As concerns over future uncertainty in climate, and the effect of climate events on the state's water supply have increased in recent years, the Legislature, and the Governor, have taken meaningful steps toward more proactive planning, and SB 72 represents another step toward those efforts. In August of 2022, Governor Newsom released California's Water Supply Strategy: *Adapting to a Hotter, Drier, Future* which provides detailed steps, and goals, for ensuring the availability of future water supply for California. The report also provides guidance to ensure the state has water sufficient to meet its future needs in light of concerns about potential future drought conditions in California. In addition to this report, the state has funded over $8 billion toward the modernization of water infrastructure and management, including enabling emergency drought response, improving water conservation efforts, and enabling projects by local water suppliers to create greater resilience against future droughts.

Following the release of this report, during the 2023-2024 legislative session, Senator Caballero authored SB 366, a previous version of SB 72 which received support in both chambers but was ultimately vetoed by Governor Newsom over concerns about potential costs to DWR and other state agencies that would be required to conduct analysis necessary to produce the information required in future Plan updates. During the 2024-2025 legislative session, the Senator worked with the Legislature, state agencies, and the public to garner support for the bill, ultimately leading to its successful passage this year.

Conclusion and Implications

The directives of SB 72 create ambitious goals that encourage greater data collection and collaboration serving to create a more reliable and climate-resilient future water supply. Ideally, the requirements of SB 72 will allow DWR, and other agencies, to proactively plan for long-term sustainable management and stewardship of the state's water supply, instead of focusing on managing scarcity. At minimum, the bill will provide a mechanism to promote specified and targeted data analysis that includes public input. For more information on this chaptered bill, *see:* https://legiscan.com/CA/text/SB72/id/3271508
(Miles Krieger)

REGULATORY DEVELOPMENTS

U.S. EPA AND THE DEPARTMENT OF THE ARMY OFFER PROPOSED RULE REDEFINING 'WATERS OF THE UNITED STATES'

On November 17, 2025, the U.S. Environmental Protection Agency (EPA) and the Department of the Army proposed a revised definition of "waters of the United States" (WOTUS), a key jurisdictional term under the federal Clean Water Act (CWA), 33 U.S.C., §§ 1251, *et seq*. The proposed rule narrows the scope of CWA jurisdiction by limiting the streams and wetlands that qualify as WOTUS. The promulgating agencies state that the is intended to align with the U.S. Supreme Court's 2023 decision in *Sackett v. Environmental Protection Agency* (*Sackett*), 598 U.S. 651 (2023).

Background

The CWA extends federal jurisdiction to all "navigable waters," which are defined as "waters of the United States, including the territorial seas." (33 U.S.C., § 1362(7).) Because the statute does not further define waters of the United States, different interpretations of the jurisdictional reach of the CWA have been promulgated over the years, and the phrase has been the subject of litigation for decades. (*Sackett*, 598 U.S., at p. 663.)

The definition of WOTUS has consistently encompassed "traditional navigable waters," that is, interstate waters that are navigable-in-fact and used in commerce or are readily susceptible of such use. (*Id.* at p. 664.) The regulatory debate has focused on the outer limits of CWA jurisdiction, particularly when wetlands or other waters not themselves navigable are sufficiently connected to traditional navigable waters to warrant inclusion as WOTUS.

In *Sackett*, the U.S. Supreme Court held that WOTUS includes only wetlands with a continuous surface connection to relatively permanent bodies of water connected to traditional, interstate, navigable waters. Following that decision, the Biden administration promulgated a rule in 2023, revising the WOTUS definition to conform to the Supreme Court's holding. EPA and the Department of the Army explain in their proposed rulemaking that the 2025 rule is intended to further align the regulatory definition with the Supreme Court's articulation.

Proposed Changes to the WOTUS Definitions

The proposed rule removes interstate waters as a standalone category of WOTUS, unless those waters are "relatively permanent, standing, or continuously flowing," and therefore qualify as traditional navigable waters, or otherwise independently meet the WOTUS definition. The proposed rule also adds definitions of key phrases used in *Sackett* and earlier Supreme Court decisions, including *United States v. Rapanos* (*Rapanos*), 547 U.S. 715, 743 (2006).

In line with the plurality opinion in *Rapanos*, the proposed rule defines "relatively permanent" surface waters as those that are standing or continuously flowing year-round, or at least during the wet season. By contrast, ephemeral waters that only exist in direct response to precipitation are not considered relatively permanent. For adjacent wetlands to qualify as WOTUS, there is a two part test, requiring both abutment to a jurisdictional water and, at a minimum, surface water connection during the wet season. The proposed rule does not define "wet season." Instead, it explains the term refers to an "extended period where there is continuous surface hydrology resulting from predictable seasonal precipitation patterns year after year."

Tributary

The proposed rule redefines "tributary" as a body of water with relatively permanent flow, a bed with banks or other high water mark indicators, and connection to a traditional navigable water or territorial sea. The connection can be direct or through one or more waters or features that convey relatively permanent flow. A tributary may include man-made features—such as culverts, ditches, or dams—and non-jurisdictional natural features, like debris piles or boulder fields, so long as the features do not prevent relatively permanent flow.

Jurisdictional Exclusions

The proposed rule also expressly revises several jurisdictional exclusions. It categorically excludes groundwater from the definition of WOTUS, but allows prior converted cropland to revert back to a WOTUS after the cropland has been abandoned for five years, the land has converted to a wetland, and abuts a jurisdictional water. The rule revises the exclusion of certain ditches from the WOTUS definition with a blanket rule that ditches constructed or excavated entirely in dry land are not WOTUS, while maintaining the longstanding interpretation that certain "tidal ditches" and "canals" that provide commercial navigation services to the nation and operate more like other waterbodies will remain jurisdictional. Finally, although the rule does not redefine "waste treatment systems," it affirms the current interpretation by including all associated waste treatment system components.

Conclusion and Implications

The stated purpose of the proposed rule is to provide greater predictability and consistency for regulated entities' determination of whether activities are subject to CWA requirements. Because the most consequential changes to the definition of WOTUS were driven by the Supreme Court's decision in *Sackett*, the extent to which the proposed rule further constrains CWA jurisdiction, and by extension, EPA oversight, remains to be seen.

The proposed WOTUS rule is available at: https://www.epa.gov/system/files/documents/2025-11/updated_definition_wotus_nprm.pdf.
(Sarah Nagle, Austin Cho)

NEW ENDANGERED SPECIES ACT RULEMAKING BEING PROPOSED BY THE U.S. FISH AND WILDLIFE SERVICE AND NATIONAL MARINE FISHERIES SERVICE

In November 2025, the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) (collectively: Services) announced proposed revisions to the federal Endangered Species Act (ESA). The proposed rulemaking emphasizing causal proximity, economic transparency, and species-specific tailoring. By rescinding the 2024 Biden-era "blanket rules" and "compensatory mitigation" requirements, the Services aim to reduce the regulatory burden on infrastructure and energy sectors. However, critics argue these changes introduce administrative inefficiencies and may increase extinction risks by narrowing the scope of federal oversight.

Background

Since 2019, the ESA has been subject to regulatory oscillation, where successive administrations have fundamentally redefined core implementing regulations at 50 C.F.R. Parts 17, 402, and 424. In 2019, the first Trump administration introduced major reforms to Section 4 (listing/critical habitat) and Section 7 (consultation). In 2024, the Biden administration rescinded many of the 2019 changes, re-instating "blanket" protections for threatened species and expanding the "environmental baseline."

Before the recent proposed rulemaking, Section 4 of the ESA regarding species listing and delisting (50 C.F.R. § 424) prevented agencies from taking into consideration possible economic impacts from the listing process. Furthermore, there was broad consideration of impacts in the "foreseeable future." Traditionally under Section 4(d), a blanket rule automatically granted threatened species the same protections as endangered species.

Section 7 of the ESA outlines the procedures for interagency cooperation to ensure that federal actions do not jeopardize the continued existence of endangered or threatened species or results in the destruction or adverse modification of a critical habitat. This imposes an independent duty on all federal agencies to consult with the Services before engaging in any discretionary action that may affect a listed species or critical habitat. *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003). Local agencies are required to consult with federal agencies when there is a federal nexus such as a federal permit or federal funding.

The current administration seeks to reverse the 2024 changes, citing the need for "regulatory certainty" and alignment with the *Loper Bright* standard from

the Supreme Court decision *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), which requires agencies to adhere to the "single, best meaning" of the law rather than a "reasonable" interpretation.

The Proposed Rule

The proposed rule removes the phrase "without reference to possible economic or other impacts" from the listing process. While the ESA still requires listing decisions to be based solely on biological data, this change allows for the concurrent presentation of economic data to provide transparency to the public. The proposal further plans to reinstate a standard where the "foreseeable future" extends only as far as the Services can "reasonably determine that both the future threats and the species' responses to those threats are likely The proposals further aim to simplify the listing/delisting process to three clear paths: (1) extinction, (2) the entity no longer meets the definition of a "species," or (3) the species no longer meets the definition of threatened or endangered.

Under Section 4(d), FWS has the authority to issue regulations "necessary and advisable" for the conservation of threatened species. Historically, FWS used a "blanket rule" that automatically granted threatened species the same "take" protections as endangered species. The FWS will now issue species-specific rules for every newly listed threatened species. This aligns FWS practice with that of NMFS. While this allows for more "tailored" conservation, conservationists argue it creates a massive administrative backlog and leaves species vulnerable during the gap between listing and rule finalization.

Interagency Consultation

Perhaps the most impactful change in the proposed rulemaking is interagency consultation (50 C.F.R. § 402). First, the proposal redefines how federal agencies assess the "effects of the action." The proposed rule clarifies that the environmental baseline refers to the condition of the species without the consequences of the proposed action. Critically, it excludes the impacts of existing infrastructure (*e.g.*, a dam that is already built) from the effects of a new permit for that same infrastructure. To be considered an "effect," a consequence must be "reasonably certain to occur" and meet a "but-for" causation test. The new rule re-inserts factors like temporal and geographic remoteness and causal complexity to limit the scope of federal liability. Moreover, the new rule removes the 2024 provision allowing the Services to require "compensatory mitigation" (offsets) as part of Reasonable and Prudent Measures (RPMs), arguing that the statute only authorizes measures to "minimize" take, not "offset" it.

Surviving "De Novo" Judicial Review

The 2025 proposals appear to rely on a constructionist interpretation of the ESA. By overturning *Chevron*, the Supreme Court signaled that courts should no longer defer to agency "interpretations" of ambiguous statutes. The 2025 rules are designed to survive "de novo" judicial review by arguing that terms like "minimize" (Section 7) and "foreseeable future" (Section 4) have a fixed legal meaning that does not include broader concepts like "mitigation" or "speculative climate modeling.

Conclusion and Implications

The November 2025 ESA proposals represent an effort to date to tether agency action to a narrow, causal, and economically transparent framework. While this provides the "regulatory certainty" long sought by industry, critics may find that it places a heavy burden on the Services to prove that species-specific management can prevent extinction with fewer broad-based federal protections. Final rules are expected in mid-2026. However, given the significant shift in policy, they will almost certainly be met with challenges and opposition. The proposed rulemakings can be found here: https://www.federalregister.gov/documents/2025/11/21/2025-20549/endangered-and-threatened-wildlife-and-plants-listing-endangered-and-threatened-species-and https://www.federalregister.gov/documents/2025/11/21/2025-20551/endangered-and-threatened-wildlife-and-plants-interagency-cooperation-regulations
(Miles Krieger)

CALIFORNIA DEPARTMENT OF WATER RESOURCES' CONSERVATIVE OPENING TO THE WATER YEAR: THE STATE WATER PROJECT'S INITIAL ALLOCATION OF TEN PERCENT

The California Department of Water Resources (DWR) recently announced its initial State Water Project allocation for the new water year at 10 percent. This reflects an early season snapshot rather than a final determination of supply and is an expected stating point. While modest on its face, the allocation carries important operational, contractual, and planning implications for State Water Project (SWP) contractors and for California water management more broadly.

Background

The State Water Project is one of California's two major water delivery systems and supplies water to 29 public water agencies serving approximately 27 million people and 750,000 acres of farmland. Under long-standing contractual obligations, the Department of Water Resources must announce an initial allocation forecast by December 1 of each year, based on early hydrologic conditions and assumptions about the remainder of the water year.

The Purpose and Nature of the Initial Allocation

At this point in the water year, California has typically experienced only the earliest portion of its wet season, and snowpack accumulation, a critical component to the state's water supply, remains highly uncertain. As a result, DWR traditionally assumes dry conditions for the remainder of the year when setting the initial allocation.

Overestimating available supplies early in the season could lead to operational decisions or reliance by contractors that cannot be supported if dry conditions persist. By contrast, a low initial allocation preserves flexibility to increase deliveries later if conditions improve.

Current Hydrologic Conditions and System Storage

The 10 percent initial allocation comes at a time when statewide reservoir storage is reported to be just above average, at approximately 114 percent of typical levels for this time of year. Lake Oroville, the SWP's largest reservoir and a critical component of the project's operational capacity, is also near its historical average for early December 2025.

These storage conditions distinguish the current year from many recent drought years, when initial allocations were driven not only by limited precipitation but also by depleted reservoir storage. However, storage alone does not determine allocation levels. DWR must also consider anticipated inflows, snowpack development, flood control requirements, and environmental obligations, all of which remain uncertain early in the season.

Allocation Methodology and Legal Framework

While the allocation process is administrative in nature, it is grounded in the contractual relationships between DWR and SWP contractors. These contracts establish maximum Table A amounts but make actual deliveries contingent on available water supply. The initial allocation, therefore, does not alter contractual rights but signals DWR's preliminary assessment of supply availability under prevailing conditions.

Comparison to Prior Years and Seasonal Adjustments

Historical experience underscores the provisional nature of the December allocation. In the prior water year, DWR announced an initial allocation of five percent, which ultimately increased to 50 percent by the end of the season as hydrologic conditions improved. Similar patterns have occurred in other years, with allocations rising, or in some cases remaining flat, depending on precipitation, snowpack, and runoff.

DWR updates SWP allocations monthly as additional data becomes available. These updates incorporate observed rainfall, snowpack surveys, and runoff forecasts, with the final allocation typically determined in late spring, often in May or June. This iterative process allows DWR to adjust deliveries in response to evolving conditions while maintaining operational stability.

What this Means for SWP Contractors and Water Planning

For SWP contractors, a 10 percent initial allocation necessitates cautious early-season planning. Urban agencies may rely more heavily on local supplies, groundwater, or stored reserves until allocations increase, while agricultural contractors may delay or adjust cropping and irrigation decisions. Although most experienced contractors anticipate changes to the allocation as the season progresses, the initial figure still informs budgetary, operational, and public communications decisions.

Conclusion and Implications

The 10 percent initial State Water Project allocation is consistent with the Department of Water Resources' long-standing practice of issuing conservative early-season forecasts and should not be viewed as an indicator of how the water year will ultimately unfold. While current storage conditions are relatively strong and the wet season has begun favorably, significant uncertainty remains. As in prior years, the legal and operational framework governing the State Water Project favors flexibility over optimism at the outset of the season, a posture that continues to shape how contractors and regulators approach water supply planning in an increasingly variable climate. As this article went to "print" California has experienced several heavy-rain atmospheric rivers which will most likely change the water allocations from the SWP. (Carson Trigueiro, Darien Key, Derek Hoffman)

CALIFORNIA STATE WATER BOARD RECIRCULATES REVISED DRAFT STAFF REPORT AND SUBSTITUTE ENVIRONMENTAL DOCUMENT FOR PROPOSED UPDATE TO BAY DELTA PLAN

On December 12, 2025, the State Water Resources Control Board (State Water Board) issued a Notice of a Limited Recirculation of its update to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Watershed (Bay-Delta Plan). The December Notice seeks public comments on revisions to the Bay-Delta Plan and the 2023 Draft Staff Report/Substitute Environmental Document (Draft Staff Report). The revisions to the Draft Staff Report include a new, 600-page chapter with supporting appendices, detailing proposed regulatory flow measures and the Healthy Rivers and Landscapes (Healthy Rivers) alternative. Interested parties are invited to provide public comments orally at a public hearing on January 28–30, 2026, or through written comment letters by February 2, 2026. According to the State Water Board, comments on these documents will inform the development of a final version of the Bay-Delta Plan and Staff Report.

Background

The Bay-Delta watershed is formed by the convergence of California's Sacramento and San Joaquin rivers and includes the San Francisco Bay, the Delta, Suisun Marsh, and numerous tributaries. The Bay-Delta is one of "the largest ecosystems for fish and wildlife habitat" in the U.S., provides two-thirds of the State's drinking water, and irrigates the State's most productive agricultural regions. The watershed also serves as the water source for the state's two largest water projects, the U.S. Bureau of Reclamation's Central Valley Project and the California Department of Water Resources' State Water Project.

The Bay-Delta Plan is a water quality control plan adopted by the State Water Board pursuant to the Porter-Cologne Water Quality Control Act (Porter-Cologne). (Wat. Code §§ 13000 *et seq.*) Water quality control plans must designate the beneficial uses to be protected, the water quality objectives that provide for the reasonable protection of those uses, and a program of implementation needed to achieve those objectives. According to the December Notice, the Bay-Delta Plan update will: (1) identify beneficial uses of water in the Bay-Delta; (2) establish flow-based water quality objectives to reasonably protect those beneficial uses; and (3) adopt a program of implementation to achieve the objectives, including monitoring and reporting requirements.

In addition to the requirements of California's Porter-Cologne, the State Water Board must comply with the California Environmental Quality Act (CEQA) in adopting water quality control plans like

the Bay-Delta Plan. A water quality control plan is considered a certified regulatory program under CEQA, for which the State Water Board may adopt a substitute environmental document as the functional equivalent of an EIR. (*City of Arcadia v. State Water Resources Control Board,* 135 Cal. App. 4th 1392, 1421–23 (2006).) The substitute environmental document "may be comprised of a single document or a compilation of documents." (Cal. Code Regs., tit. 23, § 3777 subd. (a).)

The State Water Board adopted the first Bay-Delta Plan in 1978 and subsequently amended it in 1991, 1995, and 2006. Then in 2008, the State Water Board commenced a two-phase process for the next update. Phase I covered changes to the Lower San Joaquin River portion of the Bay-Delta Plan, while Phase II focuses on updating the Sacramento River and the eastern Delta portions.

The Phase II update process has involved numerous iterations of proposed updates to the Bay-Delta Plan and supporting environmental documents. The State Water Board completed a Scientific Basis Report in 2017 to describe the scientific basis for potential updates to Phase II. A Scientific Basis Report Supplement was issued in 2018, as an addendum to account for the possible inclusion of voluntary agreement proposal that would later become the Healthy Rivers alternative in the Bay-Delta Plan. In September 2023, the State Water Board combined these environmental analyses in the Draft Staff Report, evaluating the impacts of the Bay-Delta Plan update based on a variety of scenarios. Following public comments on the 2023 Draft Staff Report, the State Water Board issued a new update to the Bay-Delta Plan in October 2024 for further public comment. The State Water Board then circulated a revised draft Bay-Delta Plan update in July 2025, only to withdraw the pending deadline for public comments in October of that year. According to the December Notice, the State Water Board delayed public comment on the July 2025 document to partially recirculate the Draft Staff Report and revisions to the proposed update to the Bay-Delta Plan itself.

Chapter 13 of the Draft Staff Report

The latest update includes a new Chapter 13 to the Draft Staff Report, adding approximately 600 pages and related appendices to the State Water Board's CEQA documentation. Broadly, Chapter 13 provides additional details on the proposed default regulatory pathway and the voluntary agreement-based Healthy Rivers pathway. These updates to the Draft Staff Report are based on updated models, new information submitted by the Healthy Rivers participants, and revised impact and mitigation conclusions. The State Water Board asserts these changes will improve the evaluation of outcomes, particularly because of the updated modeling on changes to hydrology and water supply, and analysis of their impacts under an adaptive range of 35 percent–55 percent unimpaired-flow scenarios. The State Water Board originally used the Sacramento Water Allocation Model (SacWAM) for these scenarios in 2023. Chapter 13 presents model information based on minor refinements to SacWAM's 2025 iteration and changes to real-time operational parameters.

Chapter 13 includes updated quantitative and qualitative ecological analyses, based on a full 35 percent–75 percent unimpaired-flow scenario range for each pathway. According to the December Notice, the latest update incorporates new habitat data submitted by Healthy Rivers participants, new flow thresholds prompted by public comments on the 2023 Draft Staff Report, and a recently developed Yuba River temperature model.

Chapter 13 also sets out a programmatic analysis framework for identifying and implementing Tribal Beneficial Uses, including cultural and subsistence uses (CUL), in future water quality control plans. According to the update materials, actions taken in furtherance of protecting CUL beneficial uses will overlap with other objectives that target flow and salmonid restoration.

Lastly, Chapter 13 includes minor changes and updated summaries of the mitigation measures identified in the 2023 Draft Staff Report, and adds three new mitigation measures to reduce or avoid impacts for aquatic biological resources, surface water, and recreation.

Conclusion and Implications

The State Water Resources Control Board will hold hearings from January 28–30, 2026, and will collect written public comments on the revised Draft Bay-Delta Plan and Draft Staff Report until February 2, 2026. Comments on these documents will inform

the State Water Board's development of a final draft of the Bay-Delta Plan update and Staff Report, both of which will be made available for public review and comment prior to adoption at a future State Water Board meeting.

The December Notice for the Bay-Delta Plan and Draft Staff Report update is available at: https://waterboards.ca.gov/board_info/calendar/docs/2026/jan/notice-revdrftbdp.pdf.
(Joseph J. Gregory, Austin Cho)

LAWSUITS FILED OR PENDING

DUE PROCESS, AGENCY POWER AND THE CALIFORNIA COASTAL COMMISSION—STATE LAWSUIT FILED REGARDING PUBLIC ACCESS TO COASTAL AREAS

On November 19, 2025, John Levy Jr. et al. filed a petition for writ of mandate and complaint for declaratory and injunctive relief against the California Coastal Commission in San Diego County Superior Court. [*John C. Levy, Jr., et al. v. California Coastal Commission*, Case No. 25CU062487N (San Diego County Super. Ct. Nov. 19, 2025).]

Background

In late 2025, a high-profile dispute between a Carlsbad homeowner, John Levy, and the California Coastal Commission (Commission) reignited long-standing constitutional questions about the scope of administrative enforcement power and the procedural protections owed to property owners. Levy, owner of a coastal property adjacent to the Buena Vista Lagoon, filed suit against the Commission after it imposed fines totaling between $1.4 million and $2.4 million for alleged violations of coastal access and permit conditions. Levy's challenge raises significant concerns regarding due process, separation of functions within administrative agencies, and the limits of quasi-criminal penalties imposed outside the judicial system.

The California Coastal Commission

The Commission emerged from a period of intense public concern over the rapid privatization and development of the state's shoreline. By the early 1970s, expanding residential and commercial projects increasingly limited public access to coastal areas, prompting a statewide political response. In 1972, California voters approved a landmark ballot initiative declaring the preservation and responsible stewardship of the coast to be a fundamental state policy for the benefit of both present and future generations. That initiative established the Commission as a temporary regulatory body and signaled a broad public mandate to prioritize coastal protection over unchecked development.

The initial experiment in coastal governance culminated four years later with the enactment of the California Coastal Act of 1976, which transformed the Commission into a permanent agency and codified its authority to regulate land use within the coastal zone. Under the Act, the Commission was charged with balancing environmental preservation, public access, and economic development, a mandate that necessarily required substantial discretionary authority over permitting and enforcement.

Over the ensuing decades, the Commission has overseen the preservation of open space, safeguarded scenic coastal views, protected agricultural and sensitive ecological lands, and expanded public access to beaches and shoreline resources. Through its administration of coastal development permits and enforcement actions, the Commission has become one of the most powerful land-use regulators in the state.

At the same time, the breadth of that authority has generated persistent controversy, particularly with respect to the Commission's enforcement mechanisms. Critics have long questioned whether the agency's combination of investigative, prosecutorial, adjudicatory, and financial functions comports with constitutional due process principles.

The Lawsuit

In Levy's case, the Commission concluded in October 2025 that he had repeatedly failed to remedy violations on his property, including maintaining unpermitted fencing, locked gates, and recreational improvements that allegedly obstructed public access to the beach and lagoon. The Commission also determined that Levy had not complied with several conditions attached to a coastal development permit (CDP) issued in 1998, such as habitat restoration and wetland buffer maintenance.

As a result, the Commission ordered Levy to pay substantial administrative penalties within 60 days and directed him to remove or open multiple gates,

including a vehicle gate along Mountain View Drive and a pedestrian gate providing access to a lagoon trail. The Commission further warned that continued noncompliance could result in additional fines exceeding one million dollars.

Levy responded by filing this petition for writ of mandate. His lawsuit challenges both the substance of the Commission's findings and the process by which the penalties were imposed. Central to his claim is the argument that the Commission's enforcement framework violates the Due Process Clause of the Fourteenth Amendment by consolidating investigative, prosecutorial, adjudicatory, and financial interests within a single agency.

According to Levy, the Commission acts simultaneously as accuser, judge, and beneficiary of the fines it levies, depriving property owners of neutral decision-making. He further contends that the proceedings lacked basic procedural safeguards, including adequate time to review the extensive evidentiary record. Levy alleges that Commission staff provided him with more than 1,200 pages of reports shortly before his hearing and denied his request for a continuance, effectively preventing meaningful participation in his defense.

Levy also disputes the Commission's authority to impose what he characterizes as punitive, quasi-criminal penalties through informal administrative hearings. Citing the magnitude of the fines, his complaint argues that heightened procedural protections—such as a jury trial or judicial adjudication—are constitutionally required when the government seeks to impose severe financial sanctions.

The dispute over the gates illustrates the complexity of the case. With respect to the Mountain View Drive vehicle gate, Levy maintains that the gate is not located on his property but rather on land owned by The Beach Homeowners Association. He argues that only the HOA, as the landowner, has legal authority to open the gate to the general public. Although the Commission asserts that a public beach access easement accepted by the city of Carlsbad in 2005 requires the gate to be opened, city officials have expressed disagreement, stating in prior correspondence that Levy appears to have substantially complied with his CDP conditions.

A similar disagreement surrounds the pedestrian gate to the lagoon trail. While Levy's 1998 permit required him to offer a public access easement for a trail, the city of Carlsbad has never formally accepted the dedication. Levy argues that absent acceptance, there is no enforceable public right of access and that keeping the gate locked is necessary to prevent trespass and protect private property. The Commission, by contrast, contends that the dedication was effectively accepted and that the locked gate unlawfully restricts coastal access.

Representatives of the Commission have defended the enforcement action as consistent with its statutory mission, emphasizing the importance of protecting public access for all Californians, including individuals with disabilities. The agency has also noted that the fines imposed are well below the statutory maximum, which allows for daily penalties that could have reached tens of millions of dollars.

Conclusion and Implications

Beyond the immediate dispute, the *Levy* litigation highlights broader tensions inherent in administrative enforcement regimes. As agencies increasingly rely on significant monetary penalties to ensure compliance, courts may be called upon to reassess the constitutional boundaries of agency adjudication. The outcome of this case may therefore have implications not only for coastal regulation in California, but also for the procedural limits of administrative power nationwide. The lawsuit is available online at: https://pacificlegal.org/wp-content/uploads/2025/11/Levy-v.-CA-Coastal-Commission_PLF-Petition-for-Writ-of-Mandate_11.19.25.pdf
(Mona Goodarzi)

RECENT CALIFORNIA DECISIONS

CALIFORNIA SUPREME COURT GRANTS LEAVE TO AMEND COMPLAINT TO REMOVE TAX ASSESSMENT CLAIMS AND RETAIN PROGRAM MANAGEMENT/FACILITATION CLAIMS WITHOUT REQUIRING PAY-FIRST-LITIGATE-LATER COMPLIANCE

Morgan v. Ygreene Energy Fund, Inc., ___Cal.5th___, Case No. S277628 (Cal. Dec. 4, 2025).

In *Morgan v. Ygreene Energy Fund, Inc.* the California Supreme Court held that claims seeking to invalidate or halt collection of Property Assessed Clean Energy Program (PACE) assessments must exhaust administrative remedies under the tax-refund process, including the pay-first-litigate-later rule. However, it reversed in part and remanded to allow plaintiffs to amend their complaint to pursue claims limited to program administration that do not challenge the validity or collection of the PACE assessments.

Factual and Procedural Background

The case arises from California's Property Assessed Clean Energy (PACE) program, created in 2008 to promote energy efficiency and renewable energy improvements to real property. Under the program, local governments may finance qualifying improvements—such as solar panels or energy-efficient upgrades—by issuing bonds and recovering repayment through a voluntary special assessment placed on the participating property. These PACE assessments are collected in the same manner and at the same time as property taxes and are secured by a lien that runs with the land. Although authorized by statute, most local governments do not administer PACE programs themselves, instead contracting with private entities to manage marketing, loan origination, and administration.

The plaintiffs, elderly homeowners, entered into PACE financing arrangements administered by private companies such as Ygrene Energy Fund and Renew Financial Group. They allege that these administrators failed to comply with consumer protection laws applicable to lenders and home-improvement sellers, including requirements related to disclosures, licensing, and prohibitions on taking security interests in seniors' homes. Plaintiffs contend they did not fully understand the financial risks of the PACE assessments and seek relief under the Unfair Competition Law and related statutes.

Plaintiffs sought injunctions prohibiting the PACE administrators from initiating or continuing collection of delinquent PACE assessments, orders requiring defendants to return all PACE assessment payments already received, and relief barring collection unless and until local governments remove the assessments from the property tax rolls. They also sought declaratory and injunctive relief requiring defendants to comply with consumer-lending and home-improvement laws, including licensing requirements, disclosure obligations, and joint-check payment rules, and to cease making or servicing PACE loans unless properly licensed. In substance, plaintiffs' remedies would void or suspend the enforceability of the PACE assessments by treating the underlying contracts as illegal and requiring repayment or non-collection of amounts added to property tax bills.

Defendants demurred, arguing that because PACE assessments are treated as taxes under California law, plaintiffs were required to pursue administrative refund procedures before filing suit. The trial court agreed and sustained the demurrers without leave to amend, and the Court of Appeal affirmed, setting the stage for Supreme Court review, as summarized below.

The Supreme Court's Decision

The Governing Rule: Statutory Procedures for Challenging Taxes

The Court began by reframing the issue not merely as one of "exhaustion," but as whether plaintiffs are attempting to bypass the exclusive statutory scheme the Legislature has established for challenging taxes. California law prohibits courts from enjoining the

collection of taxes; instead, taxpayers must "pay first and litigate later" through refund procedures prescribed by statute. This principle applies equally to local taxes and assessments and bars both direct and indirect attempts to restrain tax collection, including declaratory or injunctive relief that would have the same practical effect.

PACE assessments fall within this framework because the Legislature expressly required that they be collected "in the same manner and at the same time" as property taxes, thereby subjecting them to the Revenue and Taxation Code's challenge provisions. The fact that plaintiffs sued private PACE administrators rather than public entities does not alter the analysis; what matters is the nature of the relief sought, not the identity of the defendant.

Application to Plaintiffs' Claims Challenging PACE Assessments

Applying these principles, the Court concluded that plaintiffs requested remedies including orders requiring return of assessment payments, barring future collections, or conditioning collection on removal of assessments from tax rolls, would effectively invalidate or suspend tax obligations. Although framed as consumer-protection relief, these remedies would operate as de facto tax cancellations and therefore must be pursued through statutory tax-refund procedures.

The Court rejected plaintiffs' argument that relief could be limited to restraining only private actors. Their claims depend on treating the PACE assessments themselves as void, which would necessarily interfere with tax collection authorized by statute. Similarly, proposals to convert assessments into unsecured debts or to lift tax liens would directly contradict statutory provisions mandating that PACE obligations be collected as tax liens. As in prior cases involving special taxes and assessments, courts may not permit indirect challenges that would nullify tax obligations outside the statutory framework.

The Court also rejected policy arguments that local governments lack a sufficient fiscal interest in PACE revenues. Even if much of the revenue is passed through to private entities, local governments collect, temporarily hold, and rely on those revenues that could be comingled with general funds, and the Legislature has chosen to treat PACE assessments as taxes for all procedural purposes.

Required Procedures for Challenging PACE Assessments

The Court clarified that plaintiffs are not required to seek an "assessment reduction" under Revenue and Taxation Code section 1603, because that procedure applies to valuation disputes and does not encompass PACE assessments. However, plaintiffs *are* required to pursue the statutory refund process under sections 5096 and 5097 by paying the assessment and filing a refund claim alleging illegality or erroneous collection. Only after exhausting that process may a taxpayer file a refund action in court.

Possibility of Non-Tax Claims Proceeding on Remand

Finally, the Court found that while plaintiffs may not pursue claims that effectively invalidate PACE assessments without following tax-refund procedures, they may be able to amend their complaints to seek relief directed solely at the *administration* of the program rather than the validity of the assessments themselves. For example, requests for prospective injunctions governing how PACE administrators conduct future transactions (*e.g.*, joint-check requirements) might be permissible if they do not undermine the obligation to pay existing assessments. Because plaintiffs were not previously given guidance on this distinction, the Court remanded to permit Plaintiffs' leave to amend accordingly.

Conclusion and Implications

The Court held that claims seeking to invalidate, suspend, or recover PACE assessments must proceed exclusively through the statutory tax-refund process, because such relief would directly or indirectly challenge the legality of a tax. At the same time, the Court left open the possibility that plaintiffs may amend their complaints to pursue narrowly tailored claims addressing how PACE programs are administered, so long as those claims do not undermine the obligation to pay the assessments themselves. The decision thus reinforces the primacy of California's tax-challenge framework while preserving limited space for regulatory or consumer-protection claims that operate independently of tax validity. The Court's opinion is available here: https://www4.courts.ca.gov/opinions/documents/S277628.PDF

(Blaine R. Dyas)

FIRST DISTRICT COURT AFFIRMS THE STATE WATER BOARD'S DISCRETIONARY DECLINATION OF REVIEW NOT QUASI-JUDICIAL ACTION SUBJECT TO JUDICIAL SCRUTINY

Bareilles v. State Water Resources Control Board, ___Cal.App.5th___,
Case No. A171456 (1st Dist. Nov. 17, 2025).

In *Bareilles v. State Water Resources Control Board*, the First District Court of Appeal affirmed the trial court's decision to sustain a demurrer filed by the State Water Resources Control Board (SWRCB) and one of its Regional Water Quality Control Boards (Regional Board). The court held that the SWRCB's decision declining to review plaintiff's untimely petition challenging a regional board's administrative civil penalty order was not an adjudicative decision and therefore was not subject to judicial review.

Factual and Procedural Background

The Porter-Cologne Water Quality Control Act (Act) governs water quality regulation in California. The SWRCB sets statewide water quality standards and oversees nine regional boards, which manage water protection, permitting, inspections, enforcement, and waste discharge regulation in their respective regions. Regional Boards can prescribe waste discharge requirements (WDRs) or waivers, as well as cleanup and abatement orders requiring technical or monitoring reports regarding the discharge and water quality. Failure to comply can result in civil liability imposed through administrative hearings. Under Section 13320 of the Water Code, a party may petition the SWRCB to review such liability within 30 days. However, the SWRCB has the discretion to review such an order beyond that time as well.

Plaintiff owns property in Sonoma County that was burned in a 2020 fire. He obtained a Notice of Emergency Timber Operation to conduct timber harvest activities under a categorical WDR waiver. However, after plaintiff was observed discharging waste in violation of the waiver and regional water quality control plan, the regional board issued an emergency Clean Up and Abatement Order, which compelled plaintiff to submit an interim cleanup and stabilization plan to prevent further waste discharges. However, plaintiff missed the deadline and was issued a notice of violation in March 2022 followed by two similar notices, but he still failed to comply. In March 2023, one year after the initial notice, the regional board issued an administrative civil liability complaint proposing a penalty of over $250,000. Following a hearing in June 2023, the board imposed $276,000 in civil liability and informed the plaintiff he had 30 days to petition the SWRCB for review. Although the plaintiff filed a writ of mandate in superior court in July, he submitted his petition to the SWRCB two months late, in September. The SWRCB declined to exercise its discretion to review the order outside of the statutorily mandated time period, and thus, plaintiff failed to utilize the available administrative remedy.

Plaintiff amended his complaint to add the SWRCB as a party, alleging that it abused its discretion and ability to review all the evidence in the record by refusing to review the order. The state and regional boards demurred, arguing that the plaintiff failed to exhaust his administrative remedies under the Act by missing the 30-day deadline to petition the SWRCB for review. The trial court sustained the demurrer without leave to amend, and plaintiff appealed.

The Court of Appeal's Decision

On appeal, plaintiff argued that the SWRCB's decision declining to review the order was itself subject to judicial review. Plaintiff therefore contended that the trial court erred in sustaining the demurrer on the grounds that it lacked authority to review the SWRCB's refusal. The First Appellate District disagreed.

Under the Act, orders imposing administrative civil liability are only subject to review in limited instances, and the SWRCB's decision declining to review a regional board order is not among them. Prior case law affirms this notion, with courts holding that the Act's plain language and legislative history show that the SWRCB could make discretionary review, and that this discretion was "unreviewable." The language of the Act was even recodified after early

precedential decisions to expressly grant the SWRCB this discretionary authority. Subsequent cases acknowledged this amendment and concluded that courts may only exercise independent judgment when reviewing a regional board's order—not the SWRCB's decision to consider an untimely petition. In light of this precedent, the court found it clear that SWRCB's decision to deny a complaint is simply not subject to judicial review. To state otherwise would render the Act's 30-day deadline for petitioning the SWRCB "superfluous" and would subject the SWRCB to "endless judicial scrutiny."

The court concluded that the SWRCB's decision to decline review did not adjudicate any of Plaintiff's rights and therefore did not require judicial review under California's separation of powers doctrine. Only exercises of quasi-judicial powers are subject to judicial review, and the court determined that the SWRCB's declination of review was not quasi-judicial in nature. Quasi-judicial power refers to an agency's ability to adjudicate the rights of the appearing before it, and an administrative officer's exercise of their own discretion in the performance of their duties does not make that action judicial in nature. By declining to review the order, the SWRCB did not usurp judicial power—it neither determined the plaintiff's rights nor declared law. Had plaintiff timely petitioned the SWRCB, he would have been entitled to judicial review. The SWRCB's discretionary decision not to grant him a hearing did not itself deprive him of that right.

Conclusion and Implications

The First District Court of Appeal's decision in *Bareilles v. State Water Resources Control Board* helps to further demarcate when an agency's action is subject to judicial review. When an agency exercises discretion pursuant to its legislatively granted authority but does not adjudicate a party's rights or declare the law, its action is not quasi-judicial in nature and therefore is not subject to judicial review under California's separation of powers doctrine. Holding otherwise could allow courts to circumvent clear legislative directives and expose state agencies to endless litigation. Here, the State Water Resources Control Board was granted clear discretion to hear untimely petitions, and its decision to decline review did not involve the exercise of quasi-judicial power. As a result, the court sustained defendants' demurrer. The court's opinion was ordered published on *December 16, 2025* and is available online at: https://www4.courts.ca.gov/opinions/documents/A171456.PDF
(Adam Nir)

WHEN A "FEE" BECOMES A TAX: GROUNDWATER REPLENISHMENT CHARGES UNDER RENEWED CONSTITUTIONAL SCRUTINY

Howard Jarvis Taxpayers Association v. Coachella Valley Water District, ___Cal.App.5th___, Case No. E081996 (4th Dist. Nov. 26, 2025).

In November 2025, the California Court of Appeal for the Fourth District, Division Two, issued a published opinion in *Howard Jarvis Taxpayers Association v. Coachella Valley Water District*, affirming trial court rulings that invalidated groundwater replenishment charges imposed by the Coachella Valley Water District and required substantial refunds to ratepayers. The case is the latest in a long-running series of disputes between the Howard Jarvis Taxpayers Association and the Water District over local revenue measures, and it further clarifies how California courts distinguish between permissible regulatory fees and unconstitutional taxes under Propositions 218 and 26.

At issue were "replenishment assessment charges" imposed to fund groundwater replenishment programs in a desert region heavily dependent on groundwater supplies. Although authorized by statute and long treated by the District as fees or assessments, the charges ultimately failed constitutional scrutiny under Prop 218 and 26 because of how they were structured and allocated.

Background

The Nature of the Replenishment Charges

The Water District operates groundwater replenishment programs under the County Water District Law, which authorizes districts to levy replenishment assessments to fund the recharge of groundwater basins. The District divided its service area into three "areas of benefit" and imposed different per-acre-foot charges in each area, with substantially higher charges in the western area than in the eastern area.

Domestic water customers did not see these replenishment charges as a separate line item on their bills. Instead, the District paid the replenishment charges out of its domestic water enterprise fund, meaning the costs were passed through indirectly to customers purchasing potable water. The court concluded that the indirect payment structure was sufficient to demonstrate standing and constitutional injury and therefore to challenge the charges.

Taxes Versus Fees Under Propositions 218 and 26

The constitutional framework governing the case begins with Proposition 218, adopted in 1996, and Proposition 26, adopted in 2010. Together, these measures broadly define "tax" to include almost any levy or charge imposed by a local government, unless the charge fits within one of several narrow exceptions. One key exception applies to charges imposed for a specific government service or product provided directly to the payor, so long as the charge does not exceed the reasonable cost of providing the service and is fairly allocated among payors.

In *Howard Jarvis*, no party disputed that the replenishment charges were "exactions" imposed by a local government and that they had not been approved by voters. The dispositive question was whether the charges fell within the service-fee exception and therefore escaped classification as taxes.

The Court of Appeal's Decision

Aggregate Cost and Allocation Requirements

The Court of Appeal emphasized that the service-fee exception has two distinct components: an aggregate cost requirement and an allocation requirement. The aggregate cost requirement asks whether total revenues from the charge exceed the reasonable cost of providing the service. The allocation requirement asks whether the manner in which costs are allocated bears a fair or reasonable relationship with the burdens imposed on, or benefits received by, each payor.

Although the water District was able to show that, in the aggregate, projected replenishment costs exceeded projected revenues, it failed on allocation. The District justified higher western-area charges on the theory that groundwater replenishment in the west primarily benefited that area and not the eastern area. The court undertook an extensive review of hydrological studies and administrative records and found that the evidence did not support a meaningful barrier to groundwater flow between areas. In fact, the record suggested the basin functioned as a single hydrologic system, undermining the claim that benefits were confined to one area.

Because the District could not demonstrate that the disparate rates fairly reflected differences in benefit or burden, the allocation requirement was not satisfied. As a result, the charges did not qualify for the service-fee exception and were therefore unconstitutional taxes.

Why Classification as a Tax Matters

The distinction between a fee and a tax carries significant legal consequences. If a charge is deemed a tax, it must be approved by voters in accordance with constitutional procedures. Failure to do so renders the charge invalid and exposes the agency to refund liability. In this case, the trial court ordered more than $13 million in refunds, plus interest, for affected ratepayers.

The classification also affects litigation timing and strategy. The court held that replenishment charges are "assessments" subject to California's validation statutes, which impose a short limitations period for challenges. That ruling barred challenges to older charges not timely brought, even though similar charges were later declared unconstitutional. This aspect of the decision highlights the importance of early action when contesting local revenue measures.

Conclusion and Implications

Howard Jarvis Taxpayers Association v. Coachella Valley Water District reinforces that California courts

will look beyond labels and statutory authority to examine the functional realities of local charges. Even longstanding, statutorily authorized fees may be reclassified as taxes if agencies cannot meet the constitutional requirements governing cost recovery and allocation.

For water districts and other special districts, the decision serves as a cautionary reminder that differential rate structures must be supported by substantial evidence linking costs to benefits. For taxpayers and ratepayers, the case affirms the continuing strength of voter-enacted protections against unapproved taxation. The court's opinion is available here: https://www.leagle.com/decision/incaco20251126021
(Darien Key)

CALIFORNIA WATER™
LAW & POLICY Reporter

California Water Law & Policy Reporter
Argent Communications Group
P.O. Box 201
Galena, IL 61036-0201

CHANGE SERVICE REQUESTED

FIRST CLASS MAIL
U.S. POSTAGE
PAID
AUBURN, CA
PERMIT # 108