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WWL

WESTERN 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 complicate 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)

ARTIFICIAL INTELLIGENCE, DATA CENTERS, AND WATER: AN EMERGING FRONT IN WASHINGTON STATE WATER LAW

Artificial intelligence is not usually seen as a water law issue. However, Washington State's December 2025 Artificial Intelligence Task Force Interim Report indicates that AI-driven infrastructure—especially large data centers—is likely to become a new major pressure on the state's water resources. For water law practitioners, the report acts as an early warning: AI development is quickly affecting water availability, water rights, and treaty-protected resources, mainly in central Washington and along the Columbia River.

Data Centers as a Water User

The Task Force report highlights the rapid growth of data centers as a key aspect of the AI economy. Washington has become one of the leading states for data center leasing, with Central Washington experiencing a threefold rise in leasing activity in 2024. Traditionally, the region's attractiveness has stemmed from tax incentives, land availability, and plentiful hydropower. However, the report clearly states that this growth is now "significantly straining the state's energy and water infrastructure."

Data centers are not just passive energy users. Their cooling systems, whether evaporative, hybrid, or chilled water based, require large and often ongoing water supplies. The report points out that these "immense cooling requirements" are putting significant pressure on "limited water resources," a concern directly relevant to water right permitting, consumptive use analysis, and local land-use decisions.

While the report does not specify withdrawal amounts, its framing is notable: water availability is viewed as a fundamental limit on AI-driven economic growth, not just an optional environmental issue.

The Water–Energy Nexus Returns

Water lawyers will recognize a familiar theme: the resurgence of the water–energy connection. Data centers depend heavily on electricity, much of which comes from hydroelectric power in Washington. The report notes that data centers already use nearly six percent of the state's total electricity output, and this share is expected to increase rapidly as AI workloads become more energy-intensive than traditional cloud computing.

This has indirect but significant water effects. Increased electrical demand may require expanding generation, transmission, and related infrastructure—projects that often affect river systems, reservoir operations, and in-stream flow protections. The Task Force explicitly connects future infrastructure needs to "generation, transmission, and water facilities," highlighting the interconnected nature of these systems.

For practitioners, this raises familiar questions: when does incremental industrial demand trigger the issuance of new water rights? How should cumulative impacts be assessed where water withdrawals, hydropower operations, and cooling discharges overlap? And how will agencies reconcile economic development goals with existing water allocations?

Tribal Treaty Rights and Water Infrastructure

Perhaps the most legally significant part of the report is its recognition of tribal concerns. The Task Force notes that new infrastructure projects driven by AI growth "frequently impinge upon treaty-protected resources and sacred cultural sites," especially along the Columbia River. This language places AI infrastructure firmly within Washington's longstanding framework of tribal treaty rights and trust obligations.

The report does not resolve these tensions, but it recognizes them as a key policy challenge. For water attorneys, this underscores that data center siting, water sourcing, and infrastructure expansion will not happen in a legal vacuum. Treaty fishing rights, instream flow protections, and cultural resource considerations are likely to influence both permitting decisions and litigation risk.

Environmental Review and Policy Response

The Task Force stops short of recommending specific water regulations. Instead, it frames the issue as one that requires coordinated policy development. In response to the scale of data center expansion, the Governor established a Data Center Workgroup tasked with assessing impacts on the economy, tax revenue, energy use, and the environment, with recommendations due by December 1, 2025.

This process is likely to intersect with SEPA review thresholds, growth management planning, and agency guidance on industrial water use. The report's emphasis on cumulative strain—rather than isolated project impacts—suggests that future policy discussions may concentrate on basin-wide or regional water availability, rather than project-by-project mitigation alone.

Why Water Lawyers Should Pay Attention Now

The AI Task Force Interim Report is not a water policy document. However, it marks a turning point in how emerging technologies are viewed within Washington's resource limits. By clearly recognizing water availability, cooling demand, and treaty-protected resources as constraints, the report sets the stage for future regulation, legislation, and legal decisions.

Conclusion and Implications

For water law practitioners, the implications are practical and immediate. Data centers might soon become new applicants for groundwater permits, surface water rights, or mitigation water. Local governments could face pressure to approve land-use decisions that depend on uncertain water supplies. Tribes might assert treaty-based objections to infrastructure projects related to AI development. And agencies may be asked to balance economic competitiveness with water scarcity in ways not seen before.

In short, artificial intelligence is no longer just a technology issue. It is quickly becoming a water law issue—one that will test the resilience of Washington's water allocation systems and the legal frameworks that regulate them. For more information, *see:* https://www.atg.wa.gov/news/news-releases/washington-s-ai-task-force-delivers-policy-recommendations-promote-innovation
(Jamie Morin)

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

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, conser-

vationists 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 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 No-

tice, 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)

COLORADO INCREASES REGULATIONS, MEASUREMENT RULES IN THE FACE OF CONTINUING DROUGHT

The State of Colorado recently enacted water measurement rules for two of the four western slope river basins, while rules for the other two basins are in the draft phase. These rules require water users to specifically measure and track diversions, something that may become necessary in the event of a compact call or other basin-wide administration. The rules were promulgated by the Colorado Department of Natural Resources, Division of Water Resources.

Background

Colorado water law operates on a pure prior appropriation system. Junior water rights users are therefore generally curtailed in the face of a downstream call. In Colorado's Front Range, water has been strictly administered for decades. This is because those water divisions (1 – South Platte; 2 – Arkansas; 3 - Rio Grande) are all subject to various interstate compacts. For example, Colorado must deliver a certain amount of South Platte River water to Nebraska. These amounts are often disputed, leading Colorado to require water users to specifically measure and track all diversions. Thus, Water Divisions 1, 2, and 3 all have some version of measurement rules in place.

Contrast that to the four western slope divisions (4 – Gunnison; 5 – Colorado; 6 – Yampa/White; 7 – San Juan/Dolores) where there are some areas that have historically been "free river." Without a call on these streams, there has never been a need for measurement devices on diversions structures or tracking of diversions of any kind. But this is changing. The Yampa River, the main drainage in Division 6, went on call in July this summer, for only the fourth time in history. Division 6's measurement rules, which went into effect January 16, 2024, noted this history:

> In many areas, Water Division 6 has experienced multiple years where unprecedented administrative calls occurred, highlighting the tightening of supplies and increased competition for the limited water resource.

Measurement and tracking of water rights is therefore critical to ensure compliance and administration from the small scale, a local call on a tributary, to the largest possible scale in the event of a Colorado River Compact call.

Division 5 Measurement Rules

Following Division 6, Water Division 7 enacted measurement rules on June 1, 2025. That leaves only Division 4 and 5, who are both in the rule-making

process. The Division 4 rules are in draft form, while the Division 5 rules were filed with the water court in November. The Division 5 Engineers Office will accept comments on the draft rules until December 19. Any party may choose to file a statement of opposition in water court, although the Engineers have a stated to work out issues in the rules through informal negotiations rather than the formal court process.

Each basin's rules differ slightly to account for regional differences, but in general are almost identical on the main measurement requirements. Division 5, where this author lives and frequently practices, therefore provides a helpful overview and example of the state in general.

The measurement rules generally apply to all water rights in the Division, with the exception of exempt wells, surface diversions of less than 15 gallons per minute ("g.p.m.") used for domestic and other exempt well purposes, head stabilization ponds, and other similar structures. The rules do not require specific types of devices, such as Parshall flumes, weirs, staff gages, or specific well meters, but instead require standards of accuracy depending on the size of the diversions. Water rights diverting more than 1 cubic foot per second ("c.f.s.") must be accurate to within five percent, while water rights diverting between 0.25 and 1 c.f.s. must be accurate to within 0.05 c.f.s. The smallest category of water rights, those diverting less than 0.25 c.f.s. or approximately 112 gallons per minute, do not have a set target but instead must meet "an accuracy standard approved by the Division Engineer's Office." Any measurement device installed under the rules must be permanent.

Division 5 is typically controlled by the "Cameo" call near Grand Junction. Because this calling water right is so far downstream, almost the entire division is subject to this call and therefore should measure and track water diversions. But purchase and installation of accurate measuring devices can be a complex and costly endeavor, particularly depending on the age and existing infrastructure. The rules therefore allow for a "phase-in" period after the effective date, currently scheduled to be November 1, 2026, although that may change depending on the water court process and any revisions to the rules. The phase-in deadlines depend on the size of the water right, with larger water rights required to implement measurement sooner. Water rights diverting 5 or more c.f.s. must install measurement within 12 months of the effective date; water rights diverting 2-5 c.f.s. have 24 months, and the smallest less than 2 c.f.s. water rights have 36 months. Reservoirs, which are typically measured with staff gages or other similar devices have a similar schedule: 24 months for reservoirs larger than 5 acre-feet, and 36 months for smaller reservoirs. The rules allow the Division Engineer to grant extensions for up to one additional year, but the water user must show that they have been "diligent in its efforts to comply with the requirements of these Rules, has made substantial progress in complying with the requirements of these Rules, and despite its diligent and good faith efforts has been unable to fully comply with the requirements of these Rules."

Conclusion and Implications

These rules come at a critical time for Colorado, as the start of this winter is continuing a pattern of drought across the state, and the Colorado river basin as a whole. As of December 22, 2025, most basins in Colorado are between 50 and 60 percent of average snowpack, while the San Juan/Dolores basin is only at 49 percent. This equates to the 5th percentile state-wide in expected snowpack. The recent lack of snowfall and warm temperatures, resulting in melting of what little snow is on the ground, has set Colorado on track to have one of the worst winters on record.

This tracks with the federal 2026 water forecast, released on December 15, that projects "sobering" numbers for the upcoming water year. Water year 2025 resulted in river flows at half or less of normal. The possibility of a severely dry year immediately after that raises the possibility of the Bureau of Reclamation being forced to limit outflows from Lake Powell, thereby reducing flows to the Lower Basin or lowering Lake Powell to "deadpool," a critical water level below which releases cannot be made at all. Reduced flows from Lake Powell could then drop the 10-year rolling average in the Colorado River such that a "Compact call" could be triggered. This is a worst-case scenario but one that becomes more realistic with every dry winter and hot summer.

A Compact call is sure to be a contentious affair, but one that Colorado officials are already preparing for. Accurate measurement of all water rights within the state will allow Colorado to accurately determine exactly how much water it uses, and therefore how much it is required to bypass or curtail, in the event of basin-wide or state-wide water cuts.
(John Sittler)

IDAHO DEPARTMENT OF WATER RESOURCES STAFF REPORT IN IRRIGATION DISTRICT CHALLENGE TO ESPA INJURY DETERMINATION AND MITIGATION METHODOLOGY HIGHLIGHTS DIFFICULTY IN BALANCING MITIGATION OBLIGATION FAIRNESS

In the context of the Eastern Snake Plain Aquifer (ESPA)-related senior surface water-junior groundwater delivery call proceedings (Docket No. CM-DC-2010-001), A&B Irrigation District challenged the Idaho Department of Water Resources' determination of the District's mitigation obligations on various grounds. IDWR recently responded to the hearing officer's request for staff memoranda addressing the Department's anticipated testimony and the data and opinions supporting its modeling methods and results. Those staff memoranda issued on December 30, 2025, and highlight the difficulty in parsing out groundwater user mitigation obligations tied to decades of legacy groundwater pumping on the ESPA.

A&B Irrigation District's Challenge

The District is a bit of a unique animal in the context of the ESPA delivery call proceedings because it is both a senior surface water user aligned with the Surface Water Coalition entities, but also a significant groundwater user—groundwater being the source of water used to irrigate a significant portion of District acreage. Consequently, and historically, the District has not been party to the joint mitigation plans submitted by the more traditional groundwater districts; rather, the District has mitigated its groundwater use on its own, individual stipulated mitigation plan (stipulated with the Surface Water Coalition (SWC)) and approved by the Department).

The District's challenge to the Department's 2025 irrigation season as-applied orders (determining the irrigation demand shortfall (IDS) attributable to junior groundwater pumping, and the District's proportionate share of the IDS requiring mitigation) has garnered the attention of the Idaho Ground Water Appropriators, Inc. (IGWA)-member groundwater districts out of concern that precedent from the District proceeding could impact other mitigation plan negotiations and IDWR approvals in the future. Chief amongst the District challenges are its contentions that IDWR should be using transient (as opposed to steady-state) modeling to determine in-season mitigation obligations, and that District-performed conservation activities should off-set District mitigation obligations.

The 2024 stipulated mitigation plan between IGWA member groundwater districts and the SWC relied on steady-state modelling to address legacy pumping obligations rather than transient modelling (which is contrary to A&B Irrigation District's present challenge), but the IGWA member districts also negotiated more district-specific mitigation credits for conservation efforts occurring within district boundaries (which is somewhat aligned with A&B Irrigation District's mitigation obligation off-set arguments). Consequently, the Department's position on the issues from a technical groundwater modeling standpoint as opposed to stipulated/negotiated result standpoint is important to all involved because, at their core, mitigation plans approved by IDWR (whether negotiated and stipulated or purely model-based) are evaluated against ESPAM modeling outputs as a starting point.

IDWR Staff Positions

Mitigation Obligation Determination Modeling

On the question of mitigation obligation determination modeling (*i.e.*, steady-state versus transient), Department staff answered that steady-state modeling continues to be the most equitable and most efficient form or modeling determining mitigation obligations stemming from decades of legacy groundwater pumping effects. Department staff opined that determining mitigation obligations under annual transient model runs would fail to capture surface water reach gain depletions that take multiple years to accrue, but that do accrue and cause measurable depletions that should be mitigated. Department staff also opined that transient modeling would unfairly shift and increase the depletion mitigation burden to those groundwater pumpers located closer to the river whose impacts are more immediately felt as a mere result of proximity.

Mitigation Obligation Offsets

On the question of mitigation obligation offsets (*i.e.*, mitigation obligation reduction credits) for additional entity-specific conservation efforts, Department Staff seemingly opined that such entity-specific off-sets do not exist. Instead, conservation efforts are baked in the cake of the modelling outputs as a whole and are not attributable to (creditable to) any particular entity. In the context of A&B Irrigation District for example, it seeks mitigation obligation reduction credits for having converted approximately 3,574 irrigated acres from groundwater to surface water irrigation. Thus, the District has reduced its groundwater pumping by that acreage and asserts that that reduction in groundwater use should be used to further reduce its share of modeled surface water depletion. Department Staff disagrees.

Double-Counting of Mitigation Credit?

Department Staff considers A&B's position to be an impermissible double-counting of mitigation credit because the effects of additional mitigation/conservation efforts undertaken by any particular entity become part of the modeling background or baseline against which the IDS is calculated. In short shrift, decreased pumping due to conversions leads to increased surface water reach gains which, in turn, lead to a smaller IDS than would otherwise exist in the absence of the conversions. Then, the smaller IDS leads to a smaller proportionate share mitigation obligation.

While the explanation makes sense, perhaps, from a modeling standpoint, it might not make sense from a policy standpoint because it arguably removes at least some of the incentive for any given entity to go above and beyond in its conservation efforts. If the additional conservation efforts of one benefit all—allowing some doing nothing to ride the coattails of those doing more—why would those doing more continue to do more, and why would those doing nothing then offer to do something?

"Soft" Conversions

Beyond the policy debate, Department Staff further noted that A&B Irrigation District's conversions were "soft" conversions—meaning that while the acres were converted to surface water irrigation for the time being, the same acreage also remained capable of groundwater-based irrigation absent some other actions and commitments undertaken by A&B to make the "soft" conversions permanent. Whether this "soft" conversion observation impacted the outcome of the policy/incentive motivation question is unclear. It seems in the context of the staff memoranda that "hard" conversion-based off-sets would also be impermissible mitigation credit double counting based on quotation of, and citation to, prior IDWR orders addressing IGWA requests for mitigation credits for other aquifer enhancement activities.

Conclusion and Implications

For better or worse, the A&B Irrigation District Proceedings will set at least some mitigation planning-based precedents going forward. Ultimately, what those precedents are, remain to be seen. (Andrew J. Waldera)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

Editor's Note: Complaints and indictments discussed below are merely allegations unless or until they are proven in a court of law of competent jurisdiction. All accused are presumed innocent until convicted or judged liable. Most settlements are subject to a public comment period.

Jan. 5, 2025—A tanker was involved in a single-vehicle accident on Highway 139, spilling approximately 220 barrels (roughly 9,250 gallons) of crude oil into West Douglas Creek. The accident occurred between Rangely and Grand Junction, Colorado.

EPA Region 8, in collaboration with the trucking company, Rio Blanco County and BLM, responded to the incident.

Crews are currently on site with vacuum trucks to remove as much oil as possible while minimizing impact to the local ecosystem. The spill has been successfully contained within West Douglas Creek.

The land is managed by the Bureau of Land Management. Currently there have been no changes to access or public land closures. The spill impacted a BLM grazing allotment. The Responsible Party is providing alternative drinking water for the cattle on the allotment.

At this time there is no estimate when cleanup will be complete. A damage assessment will occur after initial cleanup to determine any remaining impacts to natural resources.

Dec. 22, 2025—The U.S. Environmental Protection Agency (EPA) is proposing an updated cleanup plan for groundwater contamination at the Radiation Technology Inc. Superfund site in Rockaway Township, New Jersey. Recent EPA studies show that contaminants left from historic rocket-engine testing are breaking down naturally and remain deep in the bedrock, where they are not reaching nearby homes or Lake Denmark. EPA is proposing long-term groundwater monitoring to make sure contaminant levels keep going down and that the cleanup continues to protect human health and the environment.

The proposed groundwater cleanup builds on decades of work already completed at the site, from 1994 through 2021. During that time, EPA removed contaminated soil and buried waste, demolished unsafe buildings and cleared hazardous materials such as asbestos, polychlorinated biphenyls, or PCBs, and lead-based paint. These actions addressed the areas of highest concern and eliminated ways people could come into contact with contamination. With those risks resolved, the remaining work now centers on groundwater.

Due to its complexity, the EPA's cleanup of the Radiation Technology site has been conducted in phases. EPA selected a groundwater pump-and-treat cleanup in 1994; however, additional EPA studies showed that the site's fractured bedrock prevents that approach from effectively reaching the remaining contamination. EPA's updated plan amends the original groundwater remedy by identifying three small areas where contaminants are embedded deep in fractured rock and cannot be reached by treatment systems. In these areas, EPA proposes recognizing that engineered treatment is not possible. Across the entire site, EPA would continue long-term groundwater monitoring to confirm that conditions continue to improve and that the cleanup remains protective.

EPA is accepting public comments on the proposed cleanup plan for 45 days, beginning on December 22, 2025, and ending on February 5, 2026.

Dec. 11, 2025—The Los Angeles Department of Water and Power (LADWP) has agreed to comprehensively inspect nearly 100 drinking water reservoirs and storage tanks and clean more than 50 of them as part of a consent order with U.S. Environmental Protection Agency (EPA). This action is being taken to address violations of the Safe Drinking Water Act (SDWA). LADWP operates the second largest water system in the country, serving approximately 3.8 million customers in the greater Los Angeles area.

An EPA inspection of LADWP's reservoirs and storage tanks conducted in July 2024 identified maintenance issues, including unprotected openings and inconsistent cleaning and inspection schedules. If left

unaddressed these deficiencies could pose a risk for contamination.

Since EPA's 2024 inspection, LADWP has already inspected and cleaned 13 reservoirs and implemented improvements to its reservoir maintenance program. Under the consent order, LADWP must complete comprehensive inspections of nearly 100 reservoirs by December 31, 2031, take corrective action for any deficiencies identified during each inspection, and conduct interior cleaning of over 50 reservoirs where documentation gaps or extended intervals since last cleaning were identified. These measures will improve the system's long-term reliability and enhance safeguards that protect public health.

Dec. 9, 2025—The U.S. Environmental Protection Agency has signed a consent agreement and final order (CAFO) with E.L. Harvey & Sons, Inc., Trojan Recycling, Inc., Nauset Disposal Holdings, Inc., and Arrowhead Environmental Partners LLC, resolving EPA's claims against the companies for Clean Water Act (CWA) stormwater violations. Between the companies, a total of seven Massachusetts' waste and recycling processing and vehicle maintenance operations facilities were allegedly discharging industrial waste into waters of the United States without required CWA permits. These companies are indirect subsidiaries of Waste Connections U.S. Holdings, Inc.

"Under the Clean Water Act, the federal government, states, and tribes each have an essential role in protecting the quality of our nation's waters by reviewing applications and issuing permits addressing pollutants discharged into our waterbodies," said EPA New England Administrator Mark Sanborn.

Affected waters in the CAFO include the Paskamansett River, Weweantic River, Salisbury Plain River, Hedges Pond, Seine Pond, and Bennetts Brook. In order for certain types of industrial facilities to safely discharge stormwater into these waters, they must obtain authorization under EPA's 2021 Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP).

E.L. Harvey & Sons, Inc., Trojan Recycling, Inc., Nauset Disposal Holdings, Inc., and Arrowhead Environmental Partners LLC have now applied for and received coverage under the MSGP for all seven facilities and agreed to a $170,000 penalty, which is documented in the signed CAFO.

CWA Section 301(a) prohibits the discharge of pollutants to navigable waters unless in compliance with, among other things, a CWA Section 402 National Pollutant Discharge Elimination System (NPDES) permit. For stormwater discharges, facilities can apply for coverage under a general permit.

In states not authorized to administer the NPDES program, such as Massachusetts, EPA's MSGP applies. The MSGP requires facilities to submit a Notice of Intent to be covered under the general permit, prepare and implement a Stormwater Pollution Prevention Plan, conduct inspections, monitoring and sampling, and meet other requirements, all designed to prevent the discharge of stormwater containing pollutants to surface waters.

Nov. 26, 2025—The U.S. Environmental Protection Agency has issued an order directing the Atlantic City Municipal Utilities Authority (ACMUA) to comply with the Safe Drinking Water Act (SDWA)'s Lead and Copper Rule. A 2025 investigation by EPA revealed violations of federal and state drinking water requirements, which include inadequate tap water sampling practices. On October 27, 2025, EPA issued an order requiring the ACMUA to update its lead and copper sampling plans and conduct two consecutive rounds of sampling in 2026, as well as improve monitoring and reporting.

A series of inquiries and inspections between 2022 and 2025 found that the system has not met specific drinking water requirements, including failing to establish proper sampling and reporting practices under the SDWA. In addition to requiring ACMUA to update its sampling plans, the system is also required to conduct follow-up activities if the action levels are exceeded and to notify consumers of their lead monitoring results.

The action was taken in consultation with New Jersey Department of Environmental Protection and after discussion with the ACMUA. EPA is also offering continued technical assistance to the ACMUA to help the water system comply.

Nov. 25, 2025—The U.S. Environmental Protection Agency has completed oversight of the removal of approximately 75,000 gallons of oil and 100,000 tons of oil-contaminated soil from the Dunsmuir Railroad site in Dunsmuir, California and restored 1,400 feet of impacted shoreline along the Sacra-

mento River. EPA's cleanup efforts also prevent additional oil from continuing to seep into the river. The oil-related substances addressed in this removal stem from locomotive-fueling equipment used over a century ago.

The Dunsmuir Railyard, owned and operated by the Union Pacific Railroad Company, has suffered contamination since the early 1900s from leaking oil tanks used to fuel locomotives. In 2019, the California Department of Fish and Wildlife (CDFW) requested EPA's assistance in responding to oil discovered in the upper Sacramento River, and EPA began its investigative work. Notably, investigate work found that the seepage of oil had been occurring for more than a century.

In 2021, EPA began working with CDFW, the Central Valley Water Quality Control Board, and Union Pacific to address the oil at its source and reduce the threats to human health and the environment. EPA worked with project partners to remove the contaminated soil and oil and bring in clean fill. Portions of a previously installed retaining wall were removed, and a special barrier fill was installed to prevent oil from entering the river. In addition, the impacted shoreline was restored, increasing river capacity and creating additional habitat for wildlife.

The site will continue to be regulated by the Water Board, in order to address oil in soil and groundwater in other areas of the railyard.

The Union Pacific Railroad's North Dunsmuir Railyard site is an active railyard that is directly adjacent to the Upper Sacramento River. The railyard has known subsurface oil and diesel fuel contamination and is currently subject to a Cleanup and Abatement Order issued by the California Environmental Protection Agency and Central Valley Water Quality Control Board. Prior to EPA's response actions, oil and oily water surfaced at a retaining wall that lines the site along the Upper Sacramento River and oil was observed discharging into river.
(Robert Schuster)

JUDICIAL DEVELOPMENTS

FIFTH CIRCUIT FINDS RESIDENTS AFFLICTED BY LEAD-CONTAMINATED DRINKING WATER MAY PROCEED WITH DUE PROCESS CLAIMS AGAINST CITY— FORMALIZES STATE-CREATED DANGER THEORY

Sterling v. City of Jackson, ___F.4th___, Case No. 24-60370 (5th Cir. Nov. 17, 2025).

In *Sterling v. City of Jackson, Mississippi*, plaintiffs brought suit claiming that their Fourteenth Amendment Right to bodily autonomy was violated when the City of Jackson (City) knowingly contaminated residents' drinking water with lead and subsequently encouraged them to drink, cook with, and bathe in the toxic water—resulting in them suffering permanent health effects. Though the District Court initially dismissed plaintiffs' claims, the Fifth Circuit Court of Appeals reversed their due process claims against the City and vacated the dismissal of their state law claims.

Factual and Procedural Background

Lead can leach into drinking water when acidic water corrodes the lining of lead pipes. To prevent this, the Mississippi State Department of Health (MSDH) recommends a pH of 8.5, which allows pipes to form a protective oxide layer. However, water from two of the City of Jackson's treatment plants was up to 100 times more acidic than this recommendation. MSDH warned the City as early as 2011 of the high risk of lead contamination. By 2013, the then-mayor was informed of the fact that the lime treatment pump used to reduce water acidity had been clogged for years, leaving the water highly corrosive. Although the mayor was initially receptive towards addressing the blockage, the subsequent administration declined to repair the system and instead switched part of the City's water supply to more acidic surface water. This switch also led to increased stress on the City's treatment plants by increasing water flow, making the City's water even more acidic.

The City neglected to timely inform residents of alarming test results for months on end, leaving MSDH to finally notify the public in January 2016. Even then, the City minimized the severity of the contamination, falsely stating that no lead had been detected and assuring residents that the water was safe to drink. The mayor publicly emphasized that Jackson was "not Flint." The City eventually issued boil notices, which worsened the problem as boiling increases lead concentrations by evaporating away water.

By 2020, the U.S. Environmental Protection Agency (EPA) issued an Emergency Administrative Order identifying numerous Safe Water Drinking Act violations, and warned that Jackson's water system posed an imminent danger to residents. When the City publicly acknowledged the order a year later in 2021, its water had failed to meet EPA minimum standards in four of the prior five years. Conditions continued to deteriorate as water mains burst in 2021 and pumps failed in 2022, making boil advisories and loss of running water increasingly common.

Plaintiffs, representing the residents of Jackson, filed a class action suit against the City and its officials asserting substantive due process claims under bodily integrity and state-created danger theories, along with state law claims. However, the District Court initially granted the Defendants' motion for judgment on the pleadings, holding that plaintiffs failed to state a due process claim against the City and finding that the City officials were entitled to qualified immunity. The court therefore declined supplemental jurisdiction over the state law claims. plaintiffs appealed.

The Fifth Circuit's Decision

To establish their substantive due process claim, plaintiffs had to show deprivation of a protected constitutional right and deliberate indifference by a government actor. The relevant issue was whether the plaintiffs' due process rights were infringed when

the City introduced toxins into the water, delivered that water into people's homes, lied about its safety, and thereby induced residents to drink it and suffer irreparable physical harm. Plaintiffs argued that these actions violated their rights to bodily integrity and to be free from state-created danger.

The court first addressed plaintiffs' bodily integrity claim, analyzing three issues: (1) whether the right to bodily autonomy is a cognizable constitutional right; (2) whether the Defendants acted with deliberate indifference to that right; and (3) whether City officials were entitled to qualified immunity because the right was not clearly established.

Bodily Autonomy

The court held that bodily autonomy is a well-established Fourteenth Amendment right. Cases dealing with a violation of this right possess a consistent theme—when a person does not consent to an intrusion, that intrusion is subject to judicial scrutiny. Plaintiffs alleged that the City knowingly introduced a harmful toxin into residents' bodies without therapeutic benefit and falsely assured them it was safe. The court found these allegations analogous to *Guertin v. Michigan*, 912 F.3d 907, 917–32 (6th Cir. 2019) (*Guertin*), where the Sixth Circuit held that involuntarily exposing individuals to foreign substances through deception is a core violation of bodily integrity. The court further noted that mental coercion, such as deception, is enough to trigger a violation of the Fourteenth Amendment; physical force is unnecessary. Though the City did not force plaintiffs to drink the water, it required them to purchase water it falsely represented as safe. While there is no constitutional right to clean water, the court concluded that once the government elects to provide water, it must do so in compliance with the Constitution. Because the City took affirmative action to provide water it knowingly understood to be harmful and misrepresented its safety, it violated its residents' bodily integrity.

Deliberate Indifference

The court next considered whether the City disregarded an excessive risk to plaintiffs' health or safety. To satisfy this element, plaintiffs had to show the City's conduct "shocked the conscience," either through intent to cause unjustifiable harm or deliberate indifference. The facts indicated that the City knew its water was highly acidic, that lead was leaching into the supply, and that fixing a clogged lime treatment pump could correct the problem—yet it chose not to do so. Instead, the City worsened the risk by switching part of its water source to even more corrosive water. At the same time, the City repeatedly lied to the public about the water's safety and issued boil notices that increased lead consumption. Had residents been told the truth, they could have avoided further harm by ceasing to drink or use the water. The court found these actions conscience-shocking and unsupported by any legitimate governmental interest.

Qualified Immunity

Finally, the court addressed whether the City officials were protected by qualified immunity, which shields officials unless they violate clearly established rights. A right is clearly established only when existing authority makes the unlawfulness of the conduct obvious to *every* reasonable official. The court found no controlling precedent or robust consensus of persuasive authority that would have put City officials on notice that their conduct violated clearly established law. Accordingly, City officials were entitled to qualified immunity and the court dismissed plaintiffs' bodily integrity claims against them.

State-Created Danger

Qualified immunity also barred plaintiffs' state-created danger claim against the City officials. As opposed to bodily integrity claims, which focus on invasions of personal autonomy, the state-created-danger theory hinges on the state actor creating or exacerbating danger. Although the Fifth Circuit had not previously adopted this theory, the court recognized its acceptance in other circuits and formally adopted it, outlining its elements. As such, the court reversed the lower court's dismissal and remanded for further analysis as to the City, but affirmed dismissal as to the individual officials on qualified immunity grounds.

Conclusion and Implications

Because the Fifth Circuit reversed the dismissal of the federal law claims, it also vacated the U.S. District Court's dismissal of the state law claims over

which it could exercise supplemental jurisdiction.

In *Sterling v. City of Jackson*, the Fifth Circuit allowed a class of plaintiffs representing Jacksons' residents to proceed with due process claims against the City for mismanaging its water system and concealing safety risks. While City officials remained shielded by qualified immunity, the Fifth Circuit held that plaintiffs still had a cognizable claim against the City itself. This decision, echoing the Sixth Circuit's ruling in *Guertin* regarding Flint, reinforces that governments may violate residents' due process rights through negligent or deceptive water management. Though the costs of repairing or replacing treatment equipment may be high, the failure to alert residents of these facts and take quick action can be far costlier. The court's opinion is available here: https://www.casemine.com/commentary/us/sterling-v.-city-of-jackson:-bodily-integrity-liability-for-toxic-municipal-water-and-the-fifth-circuit's-formal-adoption-of-the-state%E2%80%91created-danger-doctrine/view (Adam Nir)

CALIFORNIA COURT OF APPEAL 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 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
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