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WESTERN WATER NEWS

COLORADO RIVER BASIN STATES ARE QUICKLY APPROACHING THEIR 2026 DEADLINE FOR MANAGEMENT GUIDELINES

Negotiations over Colorado River water supplies are historically tumultuous and as of recent weeks that trend continues, creating significant uncertainty over allocations going forward. Circumstances of past and present demonstrate significant challenges from drought and overuse, threatening the ability of Colorado River supplies from reaching its natural discharge into the Gulf of California, otherwise known as the Sea of Cortez to which Mexico has water rights. 2026 was negotiated a few years ago for developing a more long-term framework. Time is quickly evaporating with tensions running high.

Background

The Colorado River is a 1,450-mile-long river that flows from the Rocky Mountains through seven U.S. states and into Mexico. The river is a critical water supply source for 40 million people. Stakeholders range from tribes, municipal and domestic uses, agriculture, and ecosystems. Thirty federally-recognized Tribal Nations are involved as well as approximately 5.5 million acres of farmland. Some habitats in the ecosystem include native species that are not known to exist anywhere else on Earth.

Its name translates from Spanish to "colored reddish," purportedly due to the river's high silt content, a characteristic that contributed to the formation of the Grand Canyon. Given federal, state, tribal jurisdictional topics, the identification, implementation, and enforcement of rights is fiercely complex on the Colorado River. Despite those complexities, the body of legal authorities governing the river is commonly referred to as the Law of the River.

Law of the River

The "Law of the River" is a collection of federal laws, interstate compacts, court decrees, treaties, and contracts that dictate the complex allocation of Colorado River water to the Colorado River Basin states (California, Nevada, Arizona, Utah, Wyoming, Colorado, New Mexico) and Mexico. Key components include the 1922 Colorado River Compact, the 1928 Boulder Canyon Project Act, the 1944 U.S.-Mexico Treaty, and the 1963 Supreme Court decision in *Arizona v. California* (373 U.S. 546), which together determine which entities receive how much water from the river system.

Seven states claim 15 million acre-feet (MAF) annually, while actual flow averages approximately 12.5 MAF since 2000.

Pending Efforts for Improved Methodologies

Several years ago, a deadline was set for October 1, 2026, as an absolute last-chance deadline to implement a new plan. If an agreement is not reached, the federal government will likely intervene.

A combination of various factors contributed to the challenging circumstances on the Colorado River. In its simplest form are climatological shifts with snow and rain fall as well as increased demands.

The United States Bureau of Reclamation (Reclamation) is developing new operational guidelines for Lake Powell and Lake Mead post-2026. Updated hydrology datasets are being used to better reflect climate change impacts and long-term drought conditions.

Traditional water management methods consist of: (i) Index Sequential Method: Previously relied on historical hydrology to simulate future scenarios; (ii) Stress Test Period: Since 1988, drier conditions have reduced average flows, prompting more targeted planning; and (iii) Natural Flow Decline: Average flow at Lees Ferry dropped from 14.8 to 12.4 million acre-feet/year over recent decades.

A new approach being developed is referred to as the "Super Ensemble." This approach combines four hydrology methods: (i) Observed history; (ii) Paleo hydrology (tree ring data); (iii) Global Climate Models (GCMs); and (iv) Statistical adjustments for climate change. Other valuation metrics being used are: (i) Robustness: Measures how well a strategy performs across many scenarios and (ii) Vulnerability: Identi-

fies conditions where outcomes fall below acceptable thresholds. For example, Lake Mead elevation staying above 1050 feet is considered a desirable outcome. Ultimately, the approach seeks to produce 400 traces of possible 30-year futures, capturing a wide range of wet and dry conditions.

Reportedly, experts favor this management-friendly approach over probabilistic risk models because the broader range of scenarios will likely make future projections appear less robust than past models. However, differences in risk tolerance between Upper and Lower Basin states may complicate consensus-building.

Pending Negotiations

Negotiators reportedly propose 1.5 MAF in cuts, while conservationists argue at least 5 MAF is needed. The delta in rights and average flows is approximately 2.5 MAF since 2000. While the numbers being negotiated remain in flux, implementation measures being contemplated, or advocated by some interests, include: (i) halt new dams and diversions; (ii) mandate water use reductions across all basin states; (iii) improve water accounting and transparency; (iv) prioritize potable water access for Tribal Nations; (v) invest in municipal reuse; (vi) protect endangered species; and (vii) promote more sustainable agriculture.

Conclusion and Implications

Numerous agencies and stakeholders are working hard toward the next iteration of a solution on the Colorado River. The importance is massive and obvious. The outcomes are uncertain. Critical for avoiding or at least limiting long, costly, and uncertain legal disputes is ensuring open communication to try to limit misperceptions or misunderstandings, coupled with doubling down efforts to identify negotiated allocations with creative solutions and methodologies as described above. The stakes are too big to allow a failed process, thus if negotiations fail, the federal government will likely step in and impose management rules of its own.
(Wes Miliband)

LEGISLATIVE DEVELOPMENTS

CALIFORNIA ASSEMBLY BILL 823: A BILL TO BAN MICROPLASTICS IN PERSONAL PRODUCTS AND CLEANING PRODUCTS PASSES THE SENATE AND MOVES TO GOVERNOR'S DESK FOR SIGNATURE

California Assembly Bill 823, authored by Assemblymember Tasha Boerner (Encinitas), received a passing 39-0 vote on the floor of the Senate on September 3, 2025, and, after previously passing through the California Assembly earlier this year, the bill now moves forward in the legislative process toward Governor Newsom's office for signature into law. If signed by the governor, AB 823 would ban the sale of microplastics in the form of plastic microbeads used as an abrasive in "leave-on" personal care products and cleaning products, as well as personal care products containing plastic glitter. To become law, the governor must sign by the legislation by October 13, 2025. The ban on personal care products and cleaning products would go into effect January 1, 2029, with the ban on products containing plastic glitter going into effect one year later, on January 1, 2030. This law would build on the current regulatory scheme which currently bans the use of plastic microbeads in "rinse off" personal care products.

Background

In 2015, California created several new laws in response to growing concerns around microplastics. Assembly Bill 888 banned the use of microbeads in personal care products, but focused only on "rinse off" products, as described above; Senate Bill 1263 required the California Ocean Protection Council to implement strategies to lessen impacts from microplastics on marine life and ocean; and Senate Bill 1422 required the California State Water Resources Control Board (SWRCB) to define microplastics by 2020, and implement a method for measuring the presence of microplastics in drinking water. As a result of the SB 1422, by 2022 the SWRCB published the Policy Handbook Establishing Methods of Testing and Reporting Microplastics in Drinking Water (*Policy Handbook Establishing Methods of Testing and Reporting Microplastics in Drinking Water*, 2022), which established further technology to monitor and track microplastics in drinking water supplies, while also providing a verifiable method for testing.

Parallel to California's in 2015, federal lawmakers passed the Microbead-Free Waters Act of 2015 was passed which created federal law prohibiting the manufacture, packaging, and distribution of cosmetics containing plastic microbeads in rinse-off products. Over the past decade, efforts continue to develop in response to continued research and analysis of the prevalence of microplastics in our everyday environment, with introduction of The Microplastics Safety Act, bipartisan bill in July of this year, directing the Food and Drug Administration to conduct a study focusing specifically on human health impacts of exposure and ingestion of microplastics. This study would be the first to specifically focus on these types of impacts.

AB 823

AB 823 directly reflects efforts amongst California lawmakers to continue driving advances in technology, and encourage industry shifts manufacturing toward creating products responsive to microplastic concerns. Over the past decade, these legislative efforts have evolved at both federal, and state, levels to respond to evolving concerns around microplastics, and AB 823 provides a vehicle to continue that evolution. As research surrounding microplastics has exponentially developed in recent years, microplastics have been defined in varying ways. Broadly, the term refers to plastic particles which are 1) intentionally manufactured in small sizes and to be used in specific products, such as microbeads, in personal care products or abrasives in cleaning products, or 2) the result of degradation of larger plastic materials. The Environmental Protection Agency describes microplastics as ranging in size up to 5 millimeters, equivalent to the size of a pencil eraser, or as small as one nanometer.

For purposes of AB 823, the regulation of microplastics includes only those microplastic particles, or microbeads, which are intentionally included in certain personal care products and cleaning products. The legislation aims to build upon the current legal framework which bans the sale of microbeads used as an abrasive in "rinse-off" personal care products such as facial scrubs, body washes, or similar items intended to be rinsed off with water. AB 823 would ban the sale of microbeads used as an abrasive in "leave-on" personal products, such as sunscreen, lotions, or other items intended to be used in a manner that is not rinsed off with water. The ban would also include personal care products containing plastic glitter which, also departs from current federal law, as well as other state laws. Inclusion of plastic glitter, specifically, generated industry push back in an earlier version of the legislation, resulting in an amendment that would provide an additional timeframe before the ban of personal products containing glitter took effect. This extension of time was added in response to concerns from certain industry groups about the need for research and development to create alternative products that would comply with the new law.

AB 823 reflects growing concerns over potential harmful health effects as a result of the prevalence of microplastics in drinking water, food, and other products. While several steps have been taken at both state, and federal, level to create laws responding to these growing concerns, AB 823 would be the first law to ban microbeads, and plastic glitter, in certain personal care products. In recent years, increasing awareness and concerns have developed as a result of developing research that indicate microplastics may be increasingly present, not only in oceans and waterways, but in the surrounding environment and in everyday products, increasing the potential for these microplastics to be ingested, inhaled, or otherwise absorbed into the human body. As a result, efforts to address the issue of microplastics has shifted from concerns of potential presence of microplastics, not only, in drinking water supplies, but toward presence of microplastics in food, beauty products, and other products, generating interest in the issue beyond environmental concerns, to a broader human health focus.

Conclusion and Implications

If signed, AB 823 would expand California's current regulatory framework in response to growing concerns surrounding microplastics, and potential negative effects on both environment, and human health. The law would create a structure more stringent than both federal law, and other state laws. However, this regulatory expansion could provide beneficial to creating a standard to which other states may draft laws to similarly expand their current legal frameworks and may also generate a shift in larger industry trends by requiring a change in current manufacturing of personal care products. Continued, increased technological advancements may also result. For more information, *see:* https://legiscan.com/CA/text/AB823/id/3131841
(Miles Krieger, Steve Anderson)

REGULATORY DEVELOPMENTS

CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE RELEASES WESTERN JOSHUA TREE CONSERVATION PLAN

On August 13, 2025, the California Department of Fish and Wildlife (CDFW) issued the Western Joshua Tree Conservation Plan (Plan). The Plan serves as a comprehensive blueprint for managing, conserving, restoring, and otherwise protecting western Joshua trees through a mix of regulatory, voluntary, and collaborative strategies.

Background

The Plan implements the Western Joshua Tree Conservation Act (WJTCA), passed in July 2023. The Act requires CDFW to prepare a conservation plan for the *western Joshua tree* (*Yucca brevifolia*), with collaboration among tribes, local governments, and the public. The Plan does not impose new statutory mandates; its management actions may be voluntarily adopted by project proponents and land owners, or incorporated into project approvals by local, state, and federal agencies that approve projects and management plans in the tree's habitat.

Purpose and Scope of the Plan

Joshua trees are particularly vulnerable to shifts in habitat and environmental stresses. They are slow-growing, long-lived, reproduce slowly, dependent on specific pollinators (yucca moths) and seed dispersal by small mammals.

The Plan marks one of the first times in California that a species that is currently abundant but projected to lose habitat has been protected proactively under a law meant to deal with climate change.

Threats prompting the issuance of the Plan urgency include climate change (future habitat loss under warming trends), wildfire, invasive species, and land-use pressures from development, in particular housing, infrastructure, and renewable energy projects. While the Joshua tree is currently abundant in many areas, models predict much of its suitable habitat will decline sharply by end of the century.

Core elements of the Plan include: (1) avoidance and minimization of impacts, (2) relocation guidelines and protocols, (3) mitigation and permitting framework, (4) land conservation and management, (5) tribal co-management and traditional knowledge, (6) research monitoring and adaptive management, and (7) public education, awareness and outreach.

Avoidance and Minimization of Impacts

The Plan provides guidance on how development projects should avoid harming trees or habitat, or at least minimize such harm, including siting large development projects in lower-conflict areas.

Relocation Guidelines and Protocols

The Plan includes rules for relocating Joshua trees, if necessary, as a condition of permits (incidental take permits). It allows for short-distance moves (*e.g.*, less than 2.5 km) into "future suitable habitat" if certain requirements are met.

Mitigation and Permitting Framework

When Joshua trees are removed or potentially harmed in projects, mitigation will be required including fee payment, habitat acquisition/conservation, or habitat restoration. The Plan also provides for local governments to obtain delegated permitting authority under certain conditions.

Land Conservation and Management

The Plan requires identification of priority conservation areas where trees are currently healthy, where future habitat is projected to be viable, where threats (fire, invasive plants, *etc.*) are lower, where pollinators (e.g., moths) and seed-dispersing animals are present. The Plan calls for strategic land acquisitions or protections to safeguard such areas.

Tribal CoManagement and Traditional Knowledge

The Plan mandates collaboration with California Native American Tribes, including in implementa-

tion and decision-making. In addition, traditional ecological knowledge is to be leveraged and relocation onto tribal lands may be an option if requested.

Research, Monitoring, Adaptive Management

The Plan establishes monitoring to track the health of Joshua tree populations and habitat trends over time and may be amended as necessary. Starting in 2026, and at least every two years thereafter, CDFW will review status of the species and the effectiveness of the Plan, with a public meeting held before August 31.

Public Education, Awareness, and Outreach

The Plan includes efforts to educate the public about threats and conservation of the western Joshua tree.

Plan Implementation

While the Plan does not create new statutory mandates by itself, it provides management actions, guidelines, and a framework that may be incorporated by CDFW, local, state, or federal agencies, or voluntarily by landowners or other stakeholders. Permitting and mitigation obligations stem from the WJTCA: If a project impacts Joshua trees, certain "incidental take" permits may be required, with associated mitigation or relocation, and payment of fees. Projects can pay into a mitigation fund and those funds are to be used for habitat acquisition, conservation or restoration. Local agencies may in some cases assume permitting authority under delegated arrangements.

Innovations and Unprecedented Features

The Plan is notable for explicitly planning for future climate scenarios; projecting where Joshua trees may thrive under warming and protecting land accordingly. The Plan also contains unique structured comanagement and tribal involvement that is more explicitly built in than many prior conservation plans.

Points of Controversy

Some in the development community expressed concern that mitigation fees and permitting burdens could increase costs or impede housing and infrastructure projects. Concerns were raised about fairness of fee structures, particularly for smaller landowners or low-income households; the Plan acknowledges potential disproportionate effects and includes adjustment processes.

Also, some stakeholders raised issues regarding delays or challenges introduced by the relocation guidelines. Such issues of concern include setting thresholds for when relocation is required, capacity, survival of relocated trees, and the practical limits for moving trees.

Outcomes and Targets

A key goal of the Plan is to identify priority conservation lands — areas that are likely to have healthy Joshua tree populations now and in a future climate — and to protect a substantial portion of those. The Plan aims to permanently protect 70 percent of these priority lands by 2033. The Plan emphasizes fire risk reduction through reducing invasive grasses, managing wildfire response, rehabilitating burned areas with native species, and protecting existing trees from fire damage.

Conclusion and Implications

The Plan's success will turn on many factors, including the effectiveness of calculating, collecting and use of mitigation fees. Other key measurements will be the success of relocation efforts and whether trees that are moved survive and thrive. Whether delegated permitting to local governments maintains conservation standards is certain to be watched along with whether enforcement efforts ensure that projects comply with avoidance, minimization, permitting, and mitigation requirements.

Given the unprecedented nature of the Plan, one can expect future amendments in response to new science, changing conditions and the practicality of compliance.

(Todd Williams, Darien Key)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD TO SET 2025-2026 WATER RIGHTS FEES

The California State Water Resources Control Board (State Water Board) recently issued a Notice of Proposed Emergency Rulemaking regarding Water Rights Fees for Fiscal Year 2025-26. (fy2526-wrfees-nper.pdf.) The proposed rule includes amendments to Division 3 of Title 23 of the California Code of Regulations and provides details on the proposed emergency regulations, fee schedules, and administrative procedures.

Background

California's emergency rulemaking process is an accelerated path to adopting regulations in response to immediate public harm, requiring agencies to submit a finding of emergency and a finding of necessity to the Office of Administrative Law (OAL) for review and potential filing. The process involves an agency's finding of an emergency, a brief public notice and comment period, and the OAL's ten-day review of the agency's finding of emergency and 30-day review of the regulation itself for compliance with the Administrative Procedure Act (APA).

The California Water Code provides authority and parameters around the State Water Board adopting emergency regulations to revise and establish fees for the Water Rights Fund (WRF) to support water rights program activities. The regulation must duly be deemed necessary for the immediate preservation of public health, safety, and welfare.

State Water Board water rights fees fund the administration and enforcement of water rights programs, which include issuing permits, managing water quality, and ensuring sustainable water use. These fees provide the State Water Board and Department of Tax and Fee Administration with resources to operate these programs, supporting everything from the Sustainable Groundwater Management Act initiatives to stream gauging and data modernization projects. The significance lies in providing stable funding for managing the state's limited and complex water resources, ultimately aiming to balance human needs with ecosystem health.

The Proposed 2025-2026 Fees

The Notice purportedly seeks to provide: (i) clarification of fees for splitting applications requesting authorization to divert 40,000 acre-feet or more per year; (ii) adjustment of fee caps for change petitions involving transfers based on the California Consumer Price Index; (iii) updates to references from the Board of Equalization to the California Department of Tax and Fee Administration; and (iv) temporary suspension of water quality certification fees during the Federal Energy Regulatory Commission pre-licensing phase under specific conditions.

The proposed filing fees for water right applications are tiered based on the volume of water requested for diversion, ranging from $5,000 to $811,000. Additional surcharges apply for certain applications that the State Water Board deems complex. Reduced fees are available for specific temporary permits and projects meeting environmental criteria.

In summary form, the proposed fees are as follows:

- Petition Fees: Fees for petitions to change water rights terms, extensions of time, or temporary changes range from $850 to $695,052, depending on the type and scope of the petition. Fees for petitions related to treated wastewater or state-filed applications are also specified.

- Annual Fees for FERC Licensed Hydroelectric Projects: Fees are calculated based on the installed generating capacity of the hydroelectric facility, with specific provisions for pausing fees during inactive periods.

- Administrative Procedures: Annual fees are assessed based on the fiscal year and are due 30 days after notice. Fee payers can file petitions for reconsideration, but interest and penalties may accrue if payment is postponed.

The California Department of Tax and Fee Administration is responsible for collecting fees and expenses. The regulation does not impose mandates

on local agencies or school districts. Increased costs due to fee cap adjustments are reportedly unlikely to significantly impact state or local agencies.

Conclusion and Implications

The establishment of these water rights fees does not typically catch the news wires in the ways of other topics. Yet the process, and ultimately the fees, are very impactful to water right holders of all types and magnitudes around the state. An "emergency" process is much more swift and less likely to be know by those impacted. On the other hand, modification and implementation of the water rights fees, as this Notices demonstrates, emphasizes the importance of timely fee collection to ensure the continued administration of water rights programs critical to California's economy, environment, and public health. (Wes Miliband)

IDAHO WATER RESOURCES BOARD HEARING OFFICER ISSUES IMPORTANT EVIDENTIARY RULING IN ANDERSON RANCH DAM RAISE MATTER

On September 26, 2025, the hearing officer presiding over the administrative contested case proceedings involving the Idaho Water Resources Board's (Board) Application for Permit No. 63-34753 (Application) issued an order addressing an evidentiary question of first impression in the context of the Board and the United States Bureau of Reclamation's (BOR) joint project proposing to raise Anderson Ranch Dam on the South Fork of the Boise River. The dam raise project seeks to increase the storage capacity of the existing reservoir by approximately 30,000 acre-feet with the Board owning the storage water right associated with the project.

The Effect of House Bill 584 (2022)

In the ordinary course, applicants bear the burden of proof on the statutory evaluation criteria of Idaho Code Section 42-203A(5). Those application evaluation criteria require the Director of the Idaho Department of Water Resources (IDWR) to consider whether: (a) the application risks injuring existing water rights; (b) the application seeks use of a source that is insufficient to meet the needs applied for; (c) the application is made in good faith and not for speculation or delay; (d) the applicant has sufficient financial resources to develop the water right; (e) the application conflicts with local public interest; (f) the application is contrary to the conservation of water resources; and (g) the application adversely affects the local economy of the source watershed.

In March 2022, Idaho Governor Little signed House Bill 584—"An Act Relating to Anderson Ranch Dam"—into law. The Bill provides that the Idaho Legislature, having appropriated funds enabling the Board to help BOR complete the Anderson Ranch Dam raise project, affirmatively found that the Board's pending storage water right application was made in good faith and not for speculative purposes, that the application is in the public interest, that the application is consistent with the conservation of water resources, and that the application will not adversely affect the economy of the source watershed. Consequently, the enactment provides that for purposes of Idaho Code Section 42-203A(5):

> . . .the director of the Department of Water Resources is not required to make findings related to these [statutory] criteria when evaluating the board's water right application.

At the Idaho Water Resources Board

After the Application encountered various protests subjecting it to administrative contested case proceedings before IDWR, the Board filed a motion seeking to limit the scope of the proceedings based on the findings of the Bill. The Board contended that the Idaho Legislature conclusively removed from consideration all of the statutory application evaluation criteria but three: (a) the injury criterion, (b) the sufficiency of the source for purposes of the storage water use criterion, and (d) the applicant financial wherewithal criterion. Others disagreed under a variety of legal arguments, chief amongst them that the Bill did not divest the Director from considering the statutory criteria, only that the Bill made the Director's

review of the statutory criteria optional/discretionary (*i.e.*, that the Director "is not required to" make such findings).

Ultimately, the hearing officer granted the Board's motion in part. The hearing officer agreed that the Bill did not preclude or divest the Director of his authority to consider the statutory criteria referenced in it. Rather, based on the plain language of the Bill, the Director still has the discretion to consider all of the application evaluation criteria of Idaho Code Section 42-203A(5). However, the hearing officer in an exercise of the discretion afforded by the Bill decided that he would adopt the Legislature's findings, thereby limiting the pending proceedings to the presentation of evidence regarding, and the consideration of, the injury, source sufficiency, and financial wherewithal criteria only.

Conclusion and Implications

The Bill poses potentially interesting questions given the traditional separation of powers between the executive, legislative, and judicial branches. The Director of IDWR is an executive branch appointment, and under the Bill the Legislature effectively substituted its judgment for that of the Director. The Bill further narrowed the administrative record subject to later judicial review should there be any. While it is not unusual for the Legislature to legislate around what considers bad judicial precedent on the back end for public policy reasons, it seems unusual for the Legislature to assert itself on the front end of the process.

Some raised constitutionality arguments against the Board's motion. However, the hearing officer held that deciding the constitutionality of the Bill was beyond the scope of his authority as provided by administrative rule. *See:* IDAPA 37.01.01.413 ("A hearing officer in a contested case has no authority to declare a statute unconstitutional."). The hearing officer further noted other instances where the Board (and its functions) have received different (or "special") treatment under the law.

Whether the hearing officer's decision is challenged further remains to be seen.
(Andrew J. Waldera)

NEW MEXICO ENVIRONMENTAL DEPARTMENT WATER-RELATED UPDATES

Recently, the New Mexico Environmental Department announced a series of water resource-related updates. Those updates are addressed below.

Sept. 26, 2025—Los Alamos National Laboratory and the National Nuclear Security Administration (NNSA) informed the New Mexico Environment Department that they have completed treatment of four flanged tritium waste containers.

NNSA stated no significant emissions were released during the treatment process. NNSA monitored the total emissions to be around 0.005 millirems. For comparison, the exposure an individual receives during a round-trip cross-country flight is approximately 3.7 millirems.

NMED staff performed on-site air monitoring during all treatment events and will publish its own data after verification, taking around 30 days.

The four containers containing the radioactive isotope tritium and lead were originally packaged at LANL's Weapons Engineering Treatment Facility (WETF) in 2007. These four containers were later designated as mixed waste and stored on the outskirts of LANL's property instead of being treated at the time the waste was generated.

In June 2019, NNSA requested a temporary authorization to depressurize the containers on-site, as the possibility of said pressure prevented the containers from being transported to a final disposal site. The NMED issued a temporary authorization permitting NNSA to depressurize the four containers at Technical Area 54 (TA-54) on Sept. 4, 2025, after LANL and NNSA completed multiple additional requirements placed on them by the Department in June 2025.

Depressurization of the containers began on Sept. 16 and ended on Sept. 23, 2025.

Sept. 18, 2025—The New Mexico Environment Department and the New Mexico Department of

Health hosted a domestic well water testing event in Española on Saturday, September 27, 2025. Testing was available in Española at the Española Centennial Celebration, located at 101 Calle de las Españolas in Española. Well water tests typically cost about $150 but were be free to the first 100 participants or while supplies last. Participants brought their water sample to the event for it to be tested. Test results will be mailed to the households following the event within two to three weeks. Residents were advised to use these guidelines to ensure their sample is collected correctly:

- Let the water run for two to three minutes before collecting the sample.

- Fill a clean glass or plastic container without any odors with at least a quart or liter of your well

- If the home has a whole house filtration system, collect the water at the well head prior to any filtration or softener systems, if possible.

- Fill the container with water as close to the time of testing as possible. Along with the water sample, residents should bring basic information known about the well such as well depth, depth to water, well casing material (such as steel or PVC), well latitude and longitude and distance from the well to the nearest septic tank or leachfield system. If well owners are unable to attend the event but would like to have their water tested, they may have a sample brought to the event by a family member or neighbor, provided the container is clearly labeled and has the owner's name, phone number, address and well information attached. Only water that comes from homes that rely on private wells for drinking water will be tested.

Sept. 3, 2025—The New Mexico Environment Department is highlighting the ongoing success of its Enforcement Watch initiative, a transparency-focused program that provides the public with consistent and timely information about the Department's enforcement actions across environmental protection, public health, and worker safety programs. By making enforcement data accessible, Enforcement Watch reinforces NMED's commitment to New Mexico residents for accountability and regulatory compliance statewide. Launched in May 2023, Enforcement Watch shares monthly updates on enforcement actions and their resolutions. These updates are broadly divided into two categories:

- Active Matters: Alleged violations of state regulations, rules, permits, or licenses that are currently under investigation or pending resolution.

- Resolved Matters: Cases that have been adjudicated in court or administratively resolved, including the full payment of any civil penalties. August Program Spotlight: Methane Alert and Response System (MARS) The New Mexico Environment Department (NMED) and the Energy, Minerals and Natural Resources Department (EMNRD) are making strides in implementing some the country's most comprehensive methane emission rules.

The agencies took action to drastically reduce New Mexico's greenhouse gas emissions by 2035 under Gov. Michelle Lujan Grisham's executive Order on Addressing Climate Change and Energy Waste Prevention. A key part of this initiative is to curb methane emissions, which are known for their ability to trap heat in the Earth's atmosphere and exacerbate climate change's worst effects.

Aug. 27, 2025—The New Mexico Environment Department and the Office of the State Engineer are offering millions of dollars in funding opportunities to those looking to develop brackish water projects in New Mexico as part of the Strategic Water Supply Program. Counties, municipalities, political subdivisions, state agencies, and state institutions of higher education, are all eligible to submit grant proposals for innovative projects focused on exploring, producing, or treating brackish water in the state. Proposals may include constructing brackish water treatment facilities, researching effective recovery methods, and implementing cutting-edge treatment technologies.

To be considered for funding, projects must:

- Explore, produce, or treat brackish water.

- Enhance the state's freshwater resources.

- Aligns with local, state, or tribal economic development goals.

• Comply with water quality and other permitting requirements.

The New Mexico Environment Department (NMED), in collaboration with the Office of the State Engineer and the Strategic Water Supply funding review team, will review proposals and post the results on the website.

Conclusion and Implications

For more information on announcements from the New Mexico Environmental Department, *see:* https://www.env.nm.gov/news-releases/
(Robert Schuster)

THE STEAMFLOW RESTORATION ACT: WASHINGTON STATE DEPARTMENT OF ECOLOGY'S IMPLEMENTATION ACTIONS

Since its adoption in 2018, the Washington State Department of Ecology (Ecology) has been implementing the Streamflow Restoration Act (Act) and related grant programs. The Act aims to mitigate the effects of domestic permit-exempt groundwater withdrawals on senior water rights and instream flows.

Background

In Washington, landowners in many areas may develop groundwater for new residential uses under the statutory exemption without first obtaining a permit from Ecology. See RCW 90.44.050. Under the Water Resources Act, Ecology is authorized to set instream flow levels by rule to protect fish and other instream resources. Chapter 90.54 RCW. An instream flow set by rule enjoys a priority date as of its adoption and may not be impaired by later groundwater withdrawals. In certain basins, the cumulative effect of these permit-exempt withdrawals on instream flows has become a concern.

In 2016, the Washington Supreme Court held that new groundwater uses could not impair a preexisting instream flow rule. In response, the Legislature enacted the Streamflow Restoration Act in 2018, establishing new permitting requirements and watershed planning obligations for fifteen watersheds with instream flow rules. The Act requires watershed plans to (1) evaluate the impacts of permit-exempt groundwater withdrawals over a 20-year planning horizon (2018–2038), and (2) identify projects to provide net ecological benefits to offset those impacts. The Legislature also created the Streamflow Restoration Grant Program to fund streamflow restoration and enhancement projects.

The Streamflow Restoration Act

Codified in part at Chapter 90.94 RCW, the Act imposed additional watershed planning, withdrawal restrictions, and project development. It divided the fifteen watersheds into two categories based on whether they already had a watershed plan under Chapter 90.82 RCW. Seven watersheds with existing plans were required to convene planning units and update their plans by a statutory deadline. The Act required counties to collect a $500 fee from new permit-exempt domestic groundwater users and to limit withdrawals to 3,000 gallons per day (gpd). All but one of those planning units with an existing watershed plan completed the task; the Nooksack (WRIA 1) did not. In that basin, Ecology adopted an amended instream flow rule to address permit-exempt groundwater uses as required by RCW 90.94.020(7)(a).

For the other eight watersheds—those without prior watershed plans—the Act required the development of new "watershed restoration and enhancement plans." In those basins, where instream flow rules were adopted before 2001, local governments must collect the same $500 fee and limit new withdrawals to 950 gpd.

Ecology's Actions

Nearly eight years after enactment, plans have been completed in all 15 watersheds. In September 2025, Ecology announced its intent to initiate rulemaking in five watersheds that were not able to locally approve the plans by the deadline set by statute — Snohomish, Cedar-Sammamish, Deschutes, Kennedy-Goldsborough, and Kitsap. Under RCW

90.94.030(3)(h), Ecology is required to initiate rulemaking to incorporate recommendations for streamflow restoration. The proposed rules would incorporate specific elements of the Streamflow Restoration planning process and may regulate permit-exempt groundwater use for future domestic purposes. Ecology is currently conducting public outreach and developing draft rule language, which it intends to file in November 2025, followed by a formal comment period in early 2026.

Conclusion and Implications

Although no draft language has been filed, Ecology may follow the model of its Nooksack River rule amendment, which limits new indoor domestic use to 500 gpd and restricts outdoor irrigation to one-twelfth of an acre.

More information on Ecology's Streamflow Restoration Watershed Planning is available at: https://ecology.wa.gov/water-shorelines/water-supply/improving-streamflows/watershed-planning

Ecology's amendment of five administrative rules coincides with the opening of its sixth round of Streamflow Restoration Grant funding. Ecology announced it will accept applications from January 15, 2026, through March 17, 2026. To date, Ecology has awarded approximately $130 million in grants to tribal governments, public agencies, and nonprofit organizations to implement projects that improve streamflows and aquatic resources.

More information on the grant program is available at: https://ecology.wa.gov/about-us/payments-contracts-grants/grants-loans/find-a-grant-or-loan/streamflow-restoration-implementation-grants
(Jamie Morin)

PENALTIES & SANCTIONS

RECENT PENALTIES, SANCTIONS AND EPA NEWS

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.

Sept. 30, 2025—The U.S. Environmental Protection Agency (EPA) has finalized its plan to clean up contaminated groundwater associated with the Former Manufacturing Plant area of the Sherwin-Williams/Hilliards Creek Superfund Site in Gibbsboro, Camden County, New Jersey. The decision marks the next step in EPA's comprehensive effort to clean up the site, and protect human health, building on a soil cleanup that is already underway. Previous operations at the former paint manufacturing plant area contaminated the groundwater with lead, arsenic, polychlorinated biphenyls (PCBs) and other hazardous materials.

The cleanup plan, formally known as a Record of Decision, calls for injecting organic materials and nutrients underground to stimulate naturally occurring bacteria that break down harmful chemicals in groundwater over time. EPA will also work with the State of New Jersey so that groundwater use is restricted until it meets standards and will conduct regular testing to monitor progress and ensure water quality improves.

This action complements EPA's 2020 soil cleanup plan, which is currently underway. That work involves removing contaminated soil and recovering trapped liquid chemicals, reducing the amount of pollution reaching the groundwater and supporting the long-term success of the groundwater remedy.

EPA finalized the groundwater plan after a 30-day public comment period and a public meeting on August 7, 2025, at the Gibbsboro Senior Center, where residents shared feedback and recommendations.

Sept. 26, 2025—The U.S. Environmental Protection Agency (EPA) announced settlements with Grove Farm Company, Inc. and The Gas Company, LLC (doing business as Hawaii Gas) to close a total of eight illegal large-capacity cesspools and other cesspools in Lihue, Kauai. EPA banned large-capacity cesspools nationally in 2005 as these systems can contaminate drinking water sources and threaten public health.

Grove Farm will close seven large-capacity cesspools by connecting two properties to the sewer system and installing individual wastewater systems at a third property. The company will also pay a $58,716 penalty and close six additional smaller cesspools. Hawaii Gas has closed one large-capacity cesspool and will close two additional smaller cesspools, installing approved septic systems in their place. In addition, Hawaii Gas will pay a $45,840 penalty.

On December 7, 1999, EPA issued a nationwide ban on large-capacity cesspools under the Safe Drinking Water Act. Large-capacity cesspools serve multiple residential units or have the capacity to serve 20 or more persons per day. The deadline for closure of these illegal large-capacity cesspools was April 5, 2005.

In the 20 years since the federal ban, EPA has ordered the closure of over 3,900 illegal cesspools in Hawai'i and assessed approximately $5.6 million in penalties. Currently, there are over 1,000 large capacity cesspools still remaining in Hawai'i. These illegal cesspools collect and release untreated raw sewage into the ground, where disease-causing pathogens and harmful chemicals and pharmaceuticals can contaminate groundwater, streams, and the ocean.

The Grove Farm Settlement

Grove Farm owns three properties in Lihue, Kauai, which have bathrooms that are served by unlawful large-capacity cesspools. The locations are:

Four cesspools that serve the Hanamaulu Shops, located at 3-4051 Kuhio Highway, Lihue.

Two cesspools that serve a motorsports dealership, located at 3-1878 Kaumualii Highway, Lihue.

One cesspool that serves the Puhi Building, located at 3-1866 Kaumualii Highway, Lihue.

In addition to the cesspool closures, as part of the settlement Grove Farm will perform a Compliance Audit of all its landholdings in the State of Hawai'i to identify and close all large-capacity cesspools. Grove Farm will also connect six small capacity cesspools associated with single-family homes adjacent to the Puhi Building to the sewer line at a minimum cost of $96,000. Connecting these residences to sewer will allow for the treatment of sanitary wastewater and mitigate the environmental risk posed by cesspools.

Hawaii Gas

Hawaii Gas owns and leases a commercial gas products storage and showroom/sales area at 3990 Rice Street, Lihue, which was served by one large-capacity cesspool.

As part of this settlement, Hawaii Gas has closed the large-capacity cesspool at the Rice Street building. Hawaii Gas will alsoreplace two small capacity cesspools associated with homes in Waialua with approved septic systems, at a cost of no less than $115,000.

Sept. 25, 2025—The U.S. Environmental Protection Agency (EPA) announced a removal action decision that will protect the Little Colorado River from uranium contamination by safely moving mine waste from two abandoned uranium mines and a portion of a third into an on-site repository one mile from the river.

The Section 9 Lease Mine Site is located in Coconino County, Arizona, and is adjacent to the Little Colorado River in the Cameron Mining District near the Navajo Nation Indian Reservation. EPA coordinated closely with the State of Arizona's Department of Environmental Quality to ensure the protection of public resources and the consideration of local stakeholder priorities.

The removal design process is estimated to commence in 2026 and will safely remove and relocate waste to the repository, while protecting human health and the environment from ionizing radiation caused by historic mining activities. Once removal is complete, the former mine areas will be restored to natural conditions, protecting the river's critical habitat and important cultural resources. The new repository may also serve as a regional repository for waste from other abandoned uranium mines in the Cameron Mining District, streamlining future clean-up efforts in the region.

Sept. 22, 2025—The U.S. Environmental Protection Agency (EPA) announced a final rule establishing federal water quality standards for 38 miles of the Delaware River between Philadelphia, Pennsylvania, and Wilmington, Delaware. This final rule will improve water quality and support locally and regionally significant fish populations—including Striped Bass, American Shad, and endangered Atlantic Sturgeon and Shortnose Sturgeon—to benefit Americans who commercially or recreationally fish the Delaware River and Delaware Bay.

Several commercially and recreationally important fish species live and spawn in the Delaware River between Philadelphia and Wilmington, Delaware. Ensuring that these oxygen-sensitive fish have adequate water quality to support their reproduction and growth will protect and increase their populations. In turn, a more productive fishery will bolster commercial and recreational fishing and associated industries, supporting job growth and ecotourism.

Water quality standards describe the desired condition (i.e., use) of a water body and the means by which that condition will be protected or achieved. Water bodies can be designated for people-centered uses such as fishing, recreation (e.g., swimming and boating) and scenic enjoyment, as well as for aquatic and wildlife uses. Water quality standards provide a regulatory basis for many actions under the Clean Water Act, including the development of water quality-based effluent limits in National Pollutant Discharge Elimination System (NPDES) permits for point source dischargers.

This final rule will help protect sensitive aquatic species in the Delaware River, including the federally endangered Atlantic Sturgeon and Shortnose Sturgeon. In these federal water quality standards, EPA has established aquatic life protection and propagation as an achievable "designated use" with corresponding dissolved oxygen water quality criteria to protect this use in the Delaware River.

EPA's rule better aligns water quality standards in this urbanized portion of the Delaware River with Clean Water Act standards that already exist upstream and downstream to support more cohesive water quality management. Consistent with the tenet of

cooperative federalism, the rule does not preclude the Delaware River Basin Commission or the states from revising their aquatic life designated uses or dissolved oxygen criteria in the future.

Learn more about EPA's final rule.

Sept. 16, 2025—The U.S. Environmental Protection Agency (EPA) announced grant funding totaling more than $3 million for three projects to reduce lead in drinking water in Tribal communities.

The three projects announced today are funded under the Safe Drinking Water Act's Reducing Lead in Drinking Water Tribal Grant Program. EPA will provide funding via interagency agreements with the Indian Health Service (IHS). The agency anticipates awarding federal grants to the following recipients after legal and administrative requirements are satisfied:

- City of Anadarko (Oklahoma) Lead Water Main Replacements—$1 million to identify and inventory several water mains and replace those lined with lead, which will lower the risk of drinking water-related lead exposure and protect the community's health.

- Mescalero Apache Tribe (New Mexico) Community Water Storage Tank Rehabilitation —Over $1 million to rehabilitate and operationalize the old water storage tank, by removing lead paint, addressing any deficiencies with steel and welds, repainting, and bringing back online.

- White Mountain Apache Tribal Utility Authority (Arizona) Storage Tank Rehabilitations —$984,000 to rehabilitate three degrading steel water storage tanks by removing lead paint, which will improve the health of the community.

On July 17, EPA Administrator Lee Zeldin reaffirmed the EPA Policy for the Administration of Environmental Programs on Indian Reservations (EPA Indian Policy), which contains nine fundamental principles to guide EPA's work with Tribes. On July 31, the agency made $1 million in grant funding available for Tribes to develop underground injection control programs that protect sources of drinking water while supporting industry and energy projects. Additionally, this year EPA made $202 million available to improve drinking water and wastewater infrastructure for American Indian Tribes and Alaska Native Villages through the Clean Water Indian Set Aside and Drinking Water Infrastructure Grants. The agency also awarded $49 million in funding for technical support for small, rural and Tribal communities working to make wastewater infrastructure improvements through Water Technical Assistance.

Sept. 10, 2025—The U.S. Environmental Protection Agency (EPA) announced a final rule approving the State of Arizona's request to administer all classes of underground injection wells under the Safe Drinking Water Act (SDWA). This action recognizes that Arizona is best positioned to protect its underground sources of drinking water while bolstering economic growth and energy dominance. It supports EPA's Powering the Great American Comeback Initiative, which prioritizes clean and safe water for every American, restoring American energy dominance, and advancing cooperative federalism.

After conducting a comprehensive technical and legal review, EPA determined that the State of Arizona's Underground Injection Control (UIC) program meets all requirements for approval, and the state will implement and enforce the program consistent with SDWA. EPA's approval of the State's UIC program primacy application will allow the Arizona Department of Environmental Quality (ADEQ) to authorize underground injection for all underground injection wells under SDWA and ensure compliance with UIC program requirements.

EPA's final approval includes state permitting for Class VI wells for underground storage of carbon dioxide—a focus of American energy companies. Today's approval marks the fifth time a state has received primacy for Class VI wells since 2018 and the fourth approval under President Trump's leadership.

EPA will oversee Arizona's administration of its UIC program and will remain the permitting authority for all well classes on Indian lands within the State, except for Class II wells on Navajo Indian lands for which EPA has granted the Navajo Nation primacy.

Sept. 11, 2025—The U.S. Environmental Protection Agency (EPA) announced an agreement with the Midcoast Regional Redevelopment Authority (MRRA) addressing an August 2024 accidental release of 1,450 gallons of firefighting foam that

contained per-and polyfluoroalkyl substances (PFAS) from a fire suppression system hangar at the Brunswick Executive Airport in Brunswick, Maine. The aqueous film-forming (AFFF) foam reached several local waterbodies, including the Androscoggin River, Harpswell Cove, Merriconeag Stream, and Mare Brook.

As of the date of EPA's order, MRRA has proactively removed all PFAS-containing AFFF from the facility's fire suppression system. Under the agreement being announced today, MRRA will take a number of actions to further eliminate the possibility of a similar incident in the future, including ensuring the proper cleanup of AFFF from its fire suppression system while also assuring that the facility meets applicable fire codes. A detailed summary of the work MRRA will perform can be found in the order, which is available from EPA upon request.

In April, EPA Administrator Zeldin announced a long list of actions to combat PFAS contamination that included in part the designation of an agency lead for PFAS, the development of ELGs for certain PFAS to reduce discharges to waterways including upstream of drinking water systems, and initiatives to engage with Congress and industry.

During President Trump's first term, EPA convened a two-day National Leadership Summit on PFAS in Washington, D.C. that brought together more than 200 federal, state, and local leaders from across the country to discuss steps to address PFAS. Following the Summit, the agency hosted a series of visits during the summer of 2018 in communities directly impacted by PFAS. EPA interacted with more than 1,000 Americans during community engagement events in Exeter, New Hampshire, Horsham, Pennsylvania, Colorado Springs, Colorado, Fayetteville, North Carolina, and Leavenworth, Kansas, as well as through a roundtable in Kalamazoo, Michigan, and events with tribal representatives in Spokane, Washington.

In 2019, the Trump EPA announced the PFAS Action Plan (pdf) (2.2 MB). This historic Plan responded to extensive public interest and input the agency received and represented the first time EPA built a multi-media, multi-program, national communication and research plan to address an emerging environmental challenge like PFAS. EPA's Action Plan identified both short-term solutions for addressing these chemicals and long-term strategies that will help provide the tools and technologies states, tribes, and local communities need to provide clean and safe drinking water to their residents and to address PFAS at the source—even before it gets into the water.

Aug. 28, 2025—The U.S. Environmental Protection Agency Region 5 Administrator Anne Vogel and Ohio Gov. Mike DeWine joined Reps. Emilia Sykes and Shontel Brown, Akron Mayor Shammas Malik, Cuyahoga Falls Mayor Don Walters and other project partners to kick off the long-anticipated cleanup at Gorge Metro Park in Cuyahoga Falls, Ohio.

The cleanup under the Great Lakes Legacy Act is one of the largest of its kind and will make significant progress toward restoring beneficial uses of the river to the communities of Northeast Ohio and closer towards delisting the Area of Concern.

EPA estimates more than 850,000 cubic yards of sediment will be dredged from the dam pool behind Gorge Dam on the Cuyahoga River. After the material is removed it will be transported, stabilized, and placed in a specially constructed placement area within the park.

The project is expected to take place over the course of two construction seasons. Following completion of the sediment remediation work, the dam will be removed in a subsequent project.

For more information on the project, please see EPA's Cuyahoga Gorge Dam GLLA Cleanup website.

The project is funded by the Great Lakes Restoration Initiative and project partners through a cost-sharing agreement. Non-federal partners on this project are the Northeast Ohio Regional Sewer District, the City of Akron, FirstEnergy/Ohio Edison, and Ohio EPA. Additional financial and technical support comes from Summit Metro Parks, City of Cuyahoga Falls, Ohio Lake Erie Commission and Summit County.
(Robert Schuster)

JUDICIAL DEVELOPMENTS

U.S. DISTRICT COURT DIRECTS U.S. FISH AND WILDLIFE SERVICE TO COMPLETE REVIEW OF PETITION FOR ESA LISTING OF WHITE STURGEON AS "THREATENED" WITHIN NINE MONTHS

San Francisco Baykeeper, et al. v. United States Fish and Wildlife Service, et al., ___F.Supp.4th___, Case No. 25-cv-01360-LJC (N.D. Cal. Sept. 3, 2025).

On September 3, 2025 the United States District Court for the Northern District of California rejected arguments as to infeasibility on the part of the United States Fish and Wildlife Service (USFWS) to complete review of a petition to list the San Francisco Bay Estuary population of the White Sturgeon as "threatened" and held that the agency must comply with mandatory deadlines set forth under the Endangered Species Act (ESA) by providing a finding on the petition, no later than June 3, 2026.

Background

According to a February 2, 2025 complaint filed in the United States District Court for the Northern District of California by the San Francisco Baykeeper, the California Sportsfishing Protection Alliance, Restore the Delta and Friends of the River, the San Francisco Bay Estuary population of the White Sturgeon is in increasingly critical decline prompting the need for protection and conservation provided with designation as a "threatened" species under the federal Endangered Species Act (ESA). The white sturgeon are only known to spawn in the San Francisco Bay watershed, making this specific population of certain concern, and subject of a petition to list the species as threatened under the ESA which submitted to the USFWS by the San Francisco Bay Keeper et al, on December 6 2023. According to the petition, the population of the white sturgeon has declined significantly over recent decades, with a heightened decrease in population in 2021 and 2022 as a result of algal blooms. The groups contend that the 2021 and 2022 blooms, compounded with overharvest and diversion of fresh water flows needed for reproduction have contributed the increasingly rapid decline of the species.

As is noted by the court, the ESA provides detailed timetables in which a petition must be answered. Broadly, a response must be provided to a petition, first, through a finding within the first 90 days, after receiving the petition, which specifies whether the petition presents substantial scientific information indicating that the petitioned action is, or is not, warranted. A subsequent, more detailed, finding must be made 12 months after the petition is received. These findings must be published in the Federal Register to as to apprise all interested parties as to the decision. 16 U.S.C. § 1533(b)(3)

On October 8, 2024, the USFWS responded to the December 2024 petition by publishing the agency's 90-day finding which included a determination that the petition provided substantial information to indicate that the petitioned action "may be warranted." The agency further provided that status review of the species to determine whether the actions petitioned are warranted would be initiated. Subsequently, on December 6, 2024, upon the 12-month deadline, the USFWS did not provide the subsequent, requisite finding or results of the status review to which the previous finding stated would be initiated. In response, on December 9, 2025 the San Francisco Baykeeper, et al. submitted a Notice of Failure to Issue a 12 Month finding, and subsequently filed for declaratory judgment, and injunctive relief compelling the USFWS to issue the 12-month finding, in the United States District Court for the Northern District of California.

On September 3, the court issued its decision, rejecting the USFWS claims of infeasibility to complete the mandated, statutory review, and directed the agency to provide the 12-month finding within nine months from the date of the court decision.

The District Court's Decision

The San Francisco Baykeeper allege that the USFWS violated the ESA through failure to make a timely 12-month finding, pursuant to 16 U.S.C. §

1533(b)(3)(B), and in response the groups' petition which requested listing the San Francisco Estuary population of the White Sturgeon as a threatened species under the ESA. The groups further contend that this unjustified delay in providing full protections of the ESA to the white sturgeon population has caused additional harm, as the species continue to decline throughout this extended decision-making process. The court rejected arguments set forth by USFWS, stating that the agency "disregarded the ESA's firm deadlines" and directed the agency to comply with the those deadlines through expediting review, and producing the requisite 12 month finding no later than nine months from the date of the court's decision.

In assessing the ESA claim, the court first examined the statutory language detailing the timelines required for consideration of petitions to designate a species as endangered or threatened. In doing so, the court stated:

> . . .an agency must consider petitions "solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account" conservation efforts by other government entities. 16 U.S.C. § 1533(b)(1)(A).

The court addressed the evidence offered regarding the "lifecycle and recent decline" of the white sturgeon population in the San Francisco Estuary in which it finds to be straightforward in indicating that the species has significantly declined in recent decades, with "sharp decreases" in 2021 and 2022. However, citing *Nat. Res. Def. Council v. Kempthorne*, 506 F.Supp.2d 322, 359 (E.D. Cal. 2007), the court pointed out that, while an agency may have some discretion in determining how a review may be conducted, namely that the discretion may be used in assessing the requisite "best scientific and commercial data available" as well as other general conversation efforts, an agency has no discretion, or authority, to extend statutorily provided timeframes which mandate when the review must be finalized.

The court noted, an agency must show evidence sufficient to meet the "especially high burden of showing infeasibility" to delay, or extend, the statutorily mandated deadlines, and provides examples that would likely meet this burden, such as demonstration of budgetary or staffing demands which the agency cannot meet, that conducting the review would unduly jeopardize implementation of other programs, or that the agency needs more time to sufficiently evaluate complex, technical issues related to the review. *Nat. Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 999–1000 (9th Cir. 2000), The court rejected the USFWS' arguments that such delay was permissible and ruled that the USFWS failed to conclusively provide evidence that this burden had been met.

In analyzing the defenses set forth by the USFWS, the court first addressed documents provided demonstrating a comprehensive schedule of deadlines for review of the petition concerning the white sturgeon, as well as several other pending petitions before the agency. With this schedule, the agency additionally provided a declaration stating that creating an expedited deadline for review for the white sturgeon petition only, would disrupt the USFWS's ability to resolve all petitions on scheduled. The court rejected this information, stating that any impediments to the review process were of the agency's own making, and thereby irrelevant. Thus, the court found the evidence offered to be inconclusive to meet the high burden required to show infeasibility of expedited review.

The court further rejected the USFWS additional defense that a current hiring freeze imposed by presidential memorandum has forced significant staff reduction, and created potential for further, future reduction, both amounting to a scenario to which the agency lacked the resources necessary to produce the 12-month finding. The court similarly rejected this claim, finding that insufficient evidence had been provided to support this argument.

Conclusion and Implications

In accordance with this holding, the U.S. Fish & Wildlife Service is subject to the mandatory deadlines for petition review, and has no discretion to extend these deadlines, without a clear showing of infeasibility to do so, a burden which has not been met in this instance. Thus, the USFWS must provide a determination as to the petition for "threated status" within nine months from the date of the decision. This decision could impact other agency's which face staffing and resource limitations in light of recent hiring freezes, and staff reductions, though the decision

makes it clear that any such agency would be required to meet a heavy burden in demonstrating such need to any extension statutorily defined decision-making process. The court's findings of fact and conclusion of law is available here: https://www.courthousenews.com/wp-content/uploads/2025/09/sf-baykeeper-v-fws-finding-of-fact.pdf
(Miles Krieger, Stever Anderson)

CALIFORNIA SUPREME COURT REPLACES *GREYHOUND* DEFERENCE FOR PUBLIC UTILITIES COMMISSION'S INTERPRETATION OF ITS CODE WITH LESS DEFERENTIAL *YAMAHA* STANDARD

Center for Biological Diversity v. Public Utilities Commission, ___Cal.5th___, Case No. S283614 (Aug. 7, 2025).

In its opinion in *Center for Biological Diversity v. Public Utilities Commission* the California Supreme Court overturned the First Appellate District's application of the highly deferential *Greyhound* standard of review to the Commission's decision lowering compensation for "customer-generators," with instruction to review the matter anew under the less-deferential *Yamaha* standard, consistent with significant legislation from the late 1990's.

Background

On August 7, 2025, the California Supreme Court issued its decision in *Center for Biological Diversity, Inc. v. Public Utilities Commission* (Cal., Aug. 7, 2025, No. S283614), 2025 WL 2253765). In this landmark ruling, the Court rejected decades of heightened deference afforded to the Public Utilities Commission ("CPUC") under *Greyhound*, opting instead to bring the agency under a more flexible, case-specific standard of review.

Context and Legislative History

California has long encouraged homeowners with solar panels to export excess energy to the state's energy grid. These "customer-generators" are compensated through a Net Energy Metering program overseen by the CPUC. In 2013, the California Legislature passed Public Utilities Code § 2827.1, directing the CPUC to adopt a *successor tariff* (to the previous NEM regime) intended to compensate customers who generate electricity (*e.g.* through rooftop solar) and export the excess to the grid.

In 2022, the CPUC adopted the successor Net Energy Metering 3.0 (NEM 3.0) program, slashing the compensation paid to customer-generators. The Center for Biological diversity and other environmental groups sued, arguing that the new program violated PUC § 2827.1 by failing to ensure that customer-generated renewable energy continues to grow sustainably and by failing to account for all of the benefits of renewable energy.

At the Court of Appeal

The Court of Appeal upheld the CPUC's interpretation of § 2827.1 under the *Greyhound* standard.

But beyond solar policy, the case gave the California Supreme Court a chance to reexamine a core question in administrative law: What standard governs judicial review of agency statutory interpretations?

The Greyhound Standard

As mentioned above, the Court of Appeal had applied the highly deferential *Greyhound* standard to its review of CPUC's decision, which is different to the interpretation standard used for other agencies. Under *Greyhound*, courts would uphold an agency's interpretation of a statute as long as it was "reasonably related to the statutory purposes and language." (*Greyhound Lines, Inc. v. Public Utilities Commission*, 68 Cal.2d at pp. 406, 410 (1968).)

This meant that courts would not second-guess an agency's legal interpretations as long as they were plausible, even if a court believed a different interpretation would be better. In short, under *Greyhound*, the CPUC received significant deference for its decisions. This standard closely resembled the federal *Chevron* deference framework, which was recently overturned in *Loper Bright v. Raimondo*. (*Loper Bright Enterprises v. Raimondo* (2024) 144 S.Ct. 2244.)

The California Supreme Court's Decision—New Standard Emerges

The Court held that the "unique deferential" *Greyhound* standard differs from the standard generally applicable to agencies' statutory interpretations, and that the standard is no longer appropriate for evaluating CPUC's statutory interpretations. Instead, the court reaffirmed and adopted the more general approach established in *Yamaha Corp. of America v. State Bd. of Equalization*, 19 Cal.4th 1, 78 (1998).

Under the *Yamaha* standard, courts retain ultimate interpretive authority but may give respectful consideration to an agency's interpretation based on several factors, including:

- The consistency of the interpretation;
- The agency's expertise in the subject matter;
- Whether the interpretation was adopted formally (*e.g.*, via quasi-legislative rulemaking) or informally (*e.g.*, staff guidance); and
- Whether the statutory language is ambiguous.

The *Yamaha* Court distinguished between quasi-legislative regulations (which may be entitled to judicial deference) and statutory interpretations, which are subject to independent judicial review. For example, a formal regulation interpreting a technical statute within the agency's subject area may warrant some deference, while an informal memorandum interpreting a statute would not.

Conclusion and Implications

The California Supreme Court's decision in *Center for Biological Diversity* marks a major shift in how courts evaluate the CPUC's statutory interpretations. While the Court preserved the limited use of *Greyhound* deference for rate-setting decisions involving water corporations governed by Public Utilities Code § 1757.1, it brought the CPUC in line with other state agencies by applying the *Yamaha* framework.

Courts will now independently interpret statutes and afford deference to the CPUC's interpretation only if it is persuasive-based on factors such as the agency's expertise, the consistency of its interpretation, and the formality of its adoption.

Although this decision may not significantly change how most state agencies are reviewed—since *Yamaha* already governs them—it could lead to increased litigation against CPUC decisions by stakeholders. More broadly, the *Center for Biological Diversity* decision reflects a judicial trend toward limiting agency autonomy in statutory interpretation. It aligns with the U.S. Supreme Court's 2024 decision in *Loper Bright Enterprises v. Raimondo*, which overturned the federal *Chevron* doctrine. Together, these decisions signal a shift away from strong agency deference and toward a model of judicial textualism and control. (Christina Suarez, Derek Hoffman)

COLORADO COURT OF APPEALS INTERPRETS THE 2019 AMENDMENT TO COLORADO'S DITCH RIGHT-OF-WAY STATUTE

Baker v. Safadi-Chamberlain, 25 COA 63 (Colo.App. 2025).

The Colorado Court of Appeals recently interpreted, for the first time, the 2019 amendment to Colorado' ditch right-of-way statute. This decision clarifies that, while a ditch owner has a general right to pipe an open ditch, this right is not absolute and hinges on the ditch owner's ability to prove that the proposed piping increases the efficiency of the ditch.

Colorado's system of ditch rights has been a key component of Colorado water law, as it shapes how water users access, deliver, and maintain water supplies. In Colorado, an individual who owns a water right is:

> . . .entitled right-of-way through the lands which lie between the point of diversion and point of use or proposed use for the purpose of transporting water for beneficial use in accordance with said water right. C.R.S. § 37-86-102.

Since its 1861 enactment, the ditch right-of-way statute, codified at C.R.S. § 37-86-103, has remained largely unchanged, leaving unresolved questions regarding the scope of rights and responsibilities between water rights owners in a shared ditch structure.

In 2019, the Colorado General Assembly amended section 37-86-103 to expand upon the rights of a ditch easement holder. Until recently, however, courts had not weighed in on the scope of these amendments. The Colorado Court of Appeals' July 2025 decision in *Baker* represents the first judicial interpretation of this new language pertaining to piping a ditch, holding that the statute grants a right to pipe a ditch only when doing so improves the ditch's efficiency.

Background

Before the 2019 amendment, section 37-86-103 simply read, "Extent of right-of-way. Such right-of-way shall extend only to a ditch, dike, cutting, pipeline, or other structure sufficient for the purpose required."

The 2019 amendment expanded upon this language, adding:

> Unless inconsistent with the terms upon which the right-of-way was created, and not to be construed as a limit on any other rights in a ditch or ditch right-of-way that have been created or arisen by law, a ditch right-of-way includes the right to construct, operate, clean, maintain, repair, and replace the ditch and appurtenant structures, to improve the efficiency of the ditch, including by lining or piping the ditch, and to enter onto the burdened property for such purposes, with access to the ditch and ditch banks, as the exigencies then existing may require, for all reasonable and necessary purposes related to the ditch.

Baker and Safadi-Chamberlain, along with several neighbors, own water rights through the North Poudre Irrigation Company. Their water was historically delivered through a private, open ditch. In 2019, a group of owners piped a portion of the ditch upstream of Safadi-Chamberlain's property, significantly reducing travel time for deliveries and improving efficiency. Before the project, it took water approximately five hours to travel from the canal to Safadi-Chamberlain's property. After the project, it took water roughly thirty minutes.

In 2022, Baker sought to extend piping through the portion of the ditch on Safadi-Chamberlain's property. Safadi-Chamberlain objected, citing both practical and personal concerns, including aesthetics and her ability to flood irrigate.

At the District Court

Baker filed a declaratory judgment action seeking to pipe the ditch, arguing that the 2019 amendments to section 37-86-103 granted him this right. The District Court conducted a one-day bench trial that involved expert testimony from both sides. Baker's expert testified that piping the ditch would generate enough water pressure to remove the need to have a pump, and it would reduce water lost through seepage. His expert testified that leaving the ditch unpiped would eliminate whatever water pressure had built up through the piped portion. Ultimately, Baker argued that he wanted to maintain the efficiency from the 2019 piping project, and his expert testified that piping the ditch would do just that.

Safadi-Chamberlain also presented an expert witness who testified that the clay soils of the ditch made water loss through seepage negligible, and the amount of water would be the same or less than the amount delivered through the open ditch if it were piped. Safadi-Chamberlain also argued that piping the ditch would ruin the aesthetics of her property and make it so that she would be unable to flood irrigate her property.

The District Court ruled in favor of Safadi-Chamberlain. Baker appealed, arguing that the amendments grant him an unfettered right to pipe.

The Court of Appeals' Decision

The Court of Appeals affirmed the trial court, albeit on slightly different grounds, holding as a matter of first impression that the 2019 amendment does not grant an unfettered right to pipe a ditch. Rather, the owner of water rights in a shared ditch structure has the right to pipe a ditch only when it improves ditch efficiency. The court relied on second clause of the added language in the amendment, "to improve the efficiency of the ditch, including by lining or piping the ditch." The court found that this clause is limited by its own terms to actions that improve the efficiency of the ditch.

The court did not disturb the factual findings made by the District Court at the bench trial and thus upheld the findings, agreeing with Safadi-Chamberlain's

expert that piping the ditch through her property would not improve the efficiency of the ditch.

Conclusion and Implications

The ditch right-of-way statute prior to its amendment was notoriously vague. Since many ditch structures in Colorado are shared, this created uncertainty regarding a ditch easement holder's authority to pipe a ditch against opposition from other water rights owners in the shared ditch structure. Individuals or entities seeking to pipe a ditch would thus have to turn to filing a declaratory judgment action, such as an action under *Roaring Fork Club, L.P. v. St. Jude's Co.*, 36 P.3d 1229, 1239 (Colo. 2001) (authorizing servient estate owners to make changes on an easement, provided such changes do not significantly lessen the utility of the easement, increase the burdens on the owner of the easement in its use and enjoyment, or frustrate the purposes for which the easement was created). However, it was generally understood that a ditch owner had a right to pipe their ditch. The 2019 amendment was therefore more of a clarification of the existing law and understanding, rather than entirely new law. This decision further clarifies the judiciary's understanding of the new law, which arguably is a more restrictive reading than the historic practice.

Interestingly, it is generally well-accepted in Colorado water circles that piping a ditch always improves the efficiency of the ditch. The seepage and evaporation loss from a pipeline is zero, which is always less than even the most efficient ditches. Pipelines can also increase water pressure to allow more efficient irrigation via high pressure sprinklers. Pipelines can suffer from other issues such as costly repairs and blockages, but it is generally not disputed that it is more efficient than an open ditch.

The decision in *Baker v. Safadi-Chamberlain* therefore marks an important development in Colorado ditch easement law. Not only is efficiency a prerequisite to piping under the 2019 amendment, but the party wishing to pipe the ditch must prove more than nominal gains in efficiency to prevail. By clarifying the scope of the 2019 amendment, the Court of Appeals provided important direction for water users, attorneys, and courts navigating competing interests in shared ditches.
(Lauren Hoover, John Sittler)

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