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WESTERN WATER NEWS

CALIFORNIA INDIAN TRIBE RECLAIMS TULE RIVER LAND

On October 29, 2025, in a historic milestone, Governor Gavin Newsom announced the return of 17,030 acres of ancestral land to the Tule River Indian Tribe.

Background

For thousands of years, the ancestors of the Tule River Indian Tribe lived among the rivers, oak woodlands, and rugged slopes of the southern Sierra Nevada. Their deep relationship with this landscape—marked by stewardship, cultural tradition, and spiritual connection—was profoundly disrupted as Native communities were displaced across California.

Now, in a landmark moment for both tribal sovereignty and statewide conservation efforts, the Tule River Indian Tribe is reclaiming 17,000 acres of its ancestral territory, marking the largest recorded land return in the Sierra Nevada foothills and the Central Valley region.

Reclaiming the Land

Governor Gavin Newsom announced the restoration of the property—two former cattle ranches in rural Tulare County—following a coordinated effort between the nonprofit Conservation Fund, state agencies, philanthropic partners, and tribal leadership. The Conservation Fund originally purchased the land and, with financial support from the state, facilitated its transfer to the tribe. This newly returned property lies along the southern edge of the Tule River Reservation, expanding the tribe's direct stewardship of a landscape that once stretched across the Tule River basin and the broader foothill region home to Yokut-speaking peoples.

A ceremony featuring tribal elders, state representatives, and community members commemorated the transfer and celebrated the reintroduction of tule elk, a keystone species long absent from these foothills. For tribal members, the day held profound significance—an acknowledgment that the state is taking steps to repair historic harms while entrusting the tribe once again with care of its homelands.

Governor Newsom emphasized this in his remarks, noting that the ecological systems of California reflect the loss of their earliest caretakers. He described the land return as an essential move toward healing the relationship between the state and tribal nations, as well as restoring the ecological knowledge and stewardship practices that nurtured these landscapes for millennia.

The return also aligns with California's broader conservation commitments, including the "30x30" initiative, which aims to conserve 30 percent of the state's lands and coastal waters by 2030. Tribal land management, rooted in cultural burning, resource gathering, and ecological balance, has increasingly been recognized as essential to achieving meaningful conservation outcomes. The Tribal Nature-Based Solutions grant program—established under the Governor's directive for agencies to collaborate directly with tribes—provided a key portion of the project's funding alongside grants from the Wildlife Conservation Board and private donors.

Tribal Council Chairman Leister "Shine" R. Nieto Jr. highlighted the cultural and ecological importance of the return, describing it as the embodiment of true land restoration. Regaining these acres, he explained, will allow tribal members increased access to traditional foods, medicinal plants, and sacred sites. It will also reinforce environmental stewardship practices, encourage wildlife recovery, and strengthen generational connections to the land. The tribe envisions the Yowlumne Hills area as a place for healing, gathering, and cultural continuity.

Historically, the Tule River Reservation encompassed over 91,000 acres, though contemporary boundaries include approximately 55,000 acres of forest and rangeland. The returned property, which forms a natural bridge between Giant Sequoia National Monument, the reservation, and wetlands of the San Joaquin Valley, enhances the tribe's capacity to protect important wildlife corridors, safeguard watersheds, and restore ecological balance across a region facing increasing climate pressures.

Tule Elk

A central component of the restoration is the reintroduction of tule elk—an animal of cultural importance and ecological significance. The tribe, working with the California Department of Fish and Wildlife (CDFW), is bringing elk back to the foothills after decades of absence. Their presence will contribute to the revitalization of the area's ecological community, which has recently also seen the return of gray wolves. Last year, the tribe and CDFW worked together to reintroduce beavers to the region as part of an effort to restore natural water systems and support biodiversity. Their collaborative work also assists in the recovery of the California condor, further cementing this land return as a model of tribal-state ecological partnership.

State officials echoed the importance of these efforts. California Natural Resources Agency Secretary Wade Crowfoot emphasized that the project represents an intersection of cultural resilience, wildlife restoration, and environmental justice. The return of tule elk, he said, demonstrates what is possible when tribal leadership guides conservation work and when the state invests in strategies rooted in Indigenous stewardship systems.

Other Potential Benefits

Beyond cultural restoration, the land return carries significant benefits for regional communities. The protection and revitalization of the area's watersheds are expected to improve groundwater recharge, reduce flood risks, and secure more reliable water supplies for downstream communities—many of which are disadvantaged and reliant on vulnerable water systems. Enhancing the ecological health of the foothills and valley lands will support agriculture, wildlife habitat, and climate resilience across a broad landscape that extends far beyond tribal borders.

Conclusion and Implications

In reclaiming more than 17,000 acres of ancestral land, the Tule River Indian Tribe is not simply recovering territory—it is reclaiming its role as a steward of ecosystems that have sustained generations. The return marks a commitment to healing both land and community, strengthening sovereignty, restoring cultural heritage, and renewing a relationship with place that has existed since time immemorial. For more information, *see:* https://www.gov.ca.gov/2025/10/29/tule-river-indian-tribe-of-california-reclaims-over-17000-acres-and-reintroduces-tule-elk-on-ancestral-land/
(Mona Goodarzi)

IDAHO WATER USERS TRACKING LATEST DRAFT WOTUS RULE THROUGH PUBLIC COMMENT

On November 20, 2025, the U.S. Army Corps of Engineers and the United States Environmental Protection Agency published the latest in a long line of proposed rules defining "waters of the United States" under the Clean Water Act in the Federal Register. The agencies issued the newly-proposed rule in response to the United States Supreme Court's 2023 decision in *Sackett v. EPA*, a jurisdictional wetlands case originating from north Idaho. The current public comment deadline is January 5, 2026. (See related coverage the proposed new rule on WOTUS at page 32 of this issue of *Western Water Law & Policy Reporter*)

Typically, Idaho water users would be most interested in any proposed rule's treatment of irrigation conveyance and drainage ditches. Those interests remain. But water user interests and scrutiny are diversifying as they contemplate issues and implement programs like managed large-scale aquifer recharge, recycled water treatment and reuse for irrigation, and land application of other forms of wastewater all in an effort to develop alternative water supplies in the face of ongoing (and significant) population growth, climate change, and regional ESA-related anadromous fish issues. The proposed rule is being viewed through a wider lens in hopes of avoiding unintended consequences that might hinder progressive thinking and approaches.

A Closer Look

For example, how are "ponds" treated under the proposed rule? Many agricultural irrigation regulation and storage ponds contain water year-round. These are "working" ponds dug to regulate irrigation water

flows and to recapture runoff for additional irrigation use—promoting multiple uses of the water first diverted. The proposed rule implicates ponds that are at least seasonally "wet," or at least wet during the rainy/wet season. The only limit trimming jurisdiction appears to be adjacency of any given pond to traditionally navigable waters. This helps, but there are a lot of agricultural ponds and managed aquifer recharge infiltration basis across Idaho seemingly ensnared by the proposed rule.

How about "waste treatment systems" like dairy lagoons and other water treatment and impoundment cells/lagoons? The proposed rule defines these "systems" as :

> . . .all components of a waste treatment system designed to meet the requirements of the Clean Water Act, including lagoons and treatment ponds (such as settling or cooling ponds), designed to either convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

As a positive development, it appears that the proposed rule exempts such facilities from CWA jurisdiction.

Groundwater treatment is also topic of interest in light of the United States Supreme Court's Maui decision (*County of Maui v. Hawai'i Wildlife Fund*). In Idaho, groundwater jurisdiction also implicates managed aquifer recharge and, potentially, the irrigation canals and ditches used to convey that water to the recharge basins where recharge is not performed via ditch seepage only. The proposed rule seems to reject the Maui decision, removing groundwater from CWA jurisdiction other than in cases (like irrigation drains) where shallow groundwater surfaces and flows adjacent to/into traditionally navigable waters. While the proposed rule provides some direction and relief in the context of groundwater interface, it still suggests that many irrigation facilities (drains in particular) are still jurisdiction.

Finally, the proposed rule continues to find that irrigation ditches are not jurisdictional. While positive for Idaho water users on its face, the proposed rule's definition of "ditches" leaves a lot to be desired. The proposed rule defines exempted ditches as constructed or excavated channels used to convey water where/when excavated entirely in dry land. This is a start, but as an exemption it falls well short of the mark in Idaho where irrigation water delivery ditches and drainage ditches traverse river and stream bottom lands where water is diverted for conveyance to its ultimate place of use, and discharged back to the river/stream for drainage purposes.

Conclusion and Implications

It is likely fair to say that Idaho water users were hoping for bolder and brighter lines, and broader exemptions from the current Trump administration. It will be interesting to see to what extent, if at all, the public comment opportunity will shape the outcome of the final rule going forward. Regardless, the review and scrutiny of these regulatory proposals by Idahoans extends far beyond the more traditional and historical "silo" of "ditches."
(Andrew J. Waldera)

REGULATORY DEVELOPMENTS

U.S. EPA AND THE ARMY CORPS OF ENGINEERS ANNOUNCE PROPOSED RULE FOR DEFINING "WATERS OF THE UNITED STATES" FOR CLEAN WATER ACT'S "REACH"

On November 17, 2025, the U.S. Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) announced a proposed rule to help define "Waters of the United States" (WOTUS) under the federal Clean Water Act.

The Proposed Rule for WOTUS

U.S. Environmental Protection Agency (EPA) Administrator Lee Zeldin, together with Assistant Secretary of the Army for Civil Works Adam Telle announced a proposed rule that would establish a "clear, durable, common-sense definition of "waters of the United States" (WOTUS) under the Clean Water Act."

The proposal follows the U.S. Supreme Court decision in *Sackett* and delivers on the Trump administration's:

> . . .commitment to protect America's waters while providing the regulatory certainty needed to support our nation's farmers who feed and fuel the world and advance EPA's Powering the Great American Comeback initiative.

The agencies developed this proposed rule using input from multiple sources, including a pre-proposal recommendations docket, information from nine public listening sessions, and consultation comments from states, tribes, and local governments. Key proposed revisions include:

- Defining key terms like "relatively permanent," "continuous surface connection," and "tributary" to appropriately delineate the scope of WOTUS consistent with the Clean Water Act and Supreme Court precedent;

- Establishing that jurisdictional tributaries must connect to traditional navigable waters either directly or through other features that provide predictable and consistent flow;

- Reaffirming that wetlands must be indistinguishable from jurisdictional waters through a continuous surface connection, which means that they must touch a jurisdictional water and hold surface water for a requisite duration year after year;

- Strengthening state and tribal decision-making authority by providing clear regulatory guidelines while recognizing their expertise in local land and water resources;

- Preserving and clarifying exclusions for certain ditches, prior converted cropland, and waste treatment systems; Adding a new exclusion for groundwater; and

- Incorporating locally familiar terminology, such as "wet season," to help determine whether a water body qualifies as WOTUS.

In addition, the limitation to wetlands that have surface water at least during the wet season and abut a jurisdictional water will further limit the scope of permafrost wetlands that are considered to have a continuous surface connection under the proposed rule. These proposed changes are intended to provide clarity and consistency to the continuous surface connection definition.

When finalized, the rule will:

> . . .cut red tape and provide predictability, consistency, and clarity for American industry, energy producers, the technology sector, farmers, ranchers, developers, businesses, and landowners for permitting under the Clean Water Act.

EPA Administrator Explains More

EPA Administrator Zeldin stated that:

> When it comes to the definition of 'waters of the United States,' EPA has an important

> responsibility to protect water resources while setting clear and practical rules of the road that accelerate economic growth and opportunity. . . . We heard from Americans across the country who want clean water and a clear rule. No longer should America's landowners be forced to spend precious money hiring an attorney or consultant just to tell them whether a Water of the United States is on their property. EPA is delivering on President Trump's promise to finalize a revised definition for WOTUS that protects the nation's navigable waters from pollution, advances cooperative federalism by empowering states, and will result in economic growth across the country.

A "Durable, Consistent and Clear Definition" of WOTUS

EPA has represented the importance of defining WOTUS as it influences Clean Water Act implementation, including whether farmers, landowners, and American businesses must secure permits before they can pursue projects that might impact surface water quality.

EPA further stated the need to:

> Having a durable, consistent, and clear definition of WOTUS is essential to lowering costs for Americans and accelerating economic growth while protecting human health and the environment.

EPA under the Trump administration claims that: Under the Biden Administration, EPA and the Army's Amended 2023 definition of WOTUS failed to faithfully implement the Supreme Court's holding *in Sackett v. Environmental Protection Agency*.

EPA and the Corps issued a memo in March 2025, clarified the limits on federal jurisdiction over adjacent wetlands. This proposed rule is the next step toward establishing a common-sense, durable definition.

The Trump Administration Seeks to "Fully Implement" WOTUS as Guided by the U.S. Supreme Court

The agency's proposed definition of WOTUS would:

> . . .fully implement the court's direction by focusing on relatively permanent, standing or continuously flowing bodies of water—such as streams, oceans, rivers, and lakes—and wetlands that are connected and indistinguishable from such waterbodies.

The proposed rule would seek to:

> . . .accelerate economic prosperity by revising, for example, exclusions for certain ditches, prior converted cropland, and waste treatment systems and by adding an exclusion for groundwater.

The proposal also takes into account seasonal and geographic variability by including waters that flow uninterrupted throughout the wetter months in the proposed definition of "relatively permanent" waters, based on pre-proposal feedback.

EPA has taken the position that the proposed definition of WOTUS would protect water quality by affirming federal protections where appropriate and supporting the role of states and tribes as primary regulators managing their own land and water resources.

Conclusion and Implications

EPA and the Corps have stated that "Cooperative federalism has been a cornerstone of Clean Water Act implementation and the agency's proposed WOTUS rule at last fulfills that commitment to real, shared federal and state responsibility. The proposed rule was informed by input from a pre-proposal recommendations docket and consultation comments from states, tribes, and local governments."

The proposed rule will be published in the *Federal Register* and open for public comment for 45 days. EPA and the Army will host two hybrid public meetings. Details about commenting either in writing or during a public meeting can be found on EPA's website. The agencies look forward to reviewing public comment while working to expeditiously develop a final rule. The proposed rule is available online here: https://www.epa.gov/wotus
(Robert Schuster)

EPA GRANTS TEXAS PRIMACY OVER CLASS VI UNDERGROUND INJECTION CONTROL PROGRAM, BOLSTERING FEDERALIST APPROACH TO THE PROTECTION OF UNDERGROUND WATER

On November 14, 2025, the U.S. Environmental Protection Agency (EPA) approved Texas' application for primary enforcement responsibility (primacy) for Class VI Underground Injection Control (UIC) wells under section 1422 of the Safe Drinking Water Act (SDWA). This rule grants the Texas Railroad Commission authority to regulate and enforce compliance for UIC Class VI permits for geologic carbon sequestration wells.

Background

Class VI wells are used for geologic sequestration, the process of injecting carbon dioxide (CO_2) into deep rock formations for long-term underground storage. The "capture" of this CO_2 serves to mitigate its release by industrial sources into the atmosphere, limiting their contribution to climate change. These wells are regulated under a permitting framework outlined by the SDWA, which requires the EPA to develop minimum requirements for state UIC programs to safeguard the public drinking water supply of the United States from the effects of carbon injection. When evaluating a Class VI well permit, an agency must consider several requirements, including:

- Site characterization and evaluation to identify all potential pathways for fluid movement and ensure the project area can contain the injected CO_2;
- Well construction requirements that would ensure the injection well will not leak CO_2;
- Testing and monitoring throughout the project's lifespan, including after injection has ended; and
- Reporting of these testing results to the relevant permitting authority to ensure the well is still operating in compliance with all permit requirements.

Under SDWA section 1421, the EPA establishes the minimum requirements states must meet to obtain UIC primacy, set out in 40 CFR parts 144–146. These regulations include permitting requirements, performance standards, and the basic elements all UIC programs must contain. SDWA section 1422 dictates that applicants must demonstrate they have adopted and will implement these regulations.

The applicant, the Texas Railroad Commission (RRC), has adopted and implemented regulations regarding carbon capture since 2012. The RRC proposed additional amendments to these regulations in 2022 and 2023, with the purpose of developing and submitting a program revision application to receive primacy for the Class VI UIC program. The RRC modified its proposed amendments based on feedback obtained during the public participation process and issued its ultimate response to comments and notice of adoption in the Texas Register in 2023. Texas then submitted its application for primacy over Class VI wells in February of 2025. This application, upon approval, would replace the current Federal UIC requirements Texas must abide by with those promulgated by the RRC.

EPA's Evaluation

The EPA conducted a comprehensive review of Texas' application and determined it met all the regulatory requirements for Class VI UIC primacy under the SDWA and the EPA's implementing regulations. The application included a proper program description, an Attorney General's statement confirming the RRC's legal authority, an adequate MOA addendum between the EPA and the State concerning the administration and enforcement of the program and sufficiently indicated that the permitting provisions and technical criteria and standards required under 40 CFR parts 124 and 144 through 146 were met.

The EPA published its proposed approval in the Federal Register on June 17, 2020, opening a 45-day public comment period and holding a public hearing. More than 7,500 comments were submitted, with commenters ranging from individual citizens to potential Class VI permittees. The Governor of Texas provided a comment in support of primacy as well. Supporters emphasized the application's consistency with federal requirements and the RRC's prior UIC experience, while opponents questioned the RRC's capacity to administer the program, citing past chal-

lenges with inspections and enforcement for other well classes.

Conclusion and Implications

Texas now joins five other states with primacy over Class VI wells. Of the six existing approvals, five were granted under the Trump administration—reflecting the EPA's current emphasis on federalist principles in regulating injection wells. Also of note is that the application's technical and legal review was streamlined with the assistance of funding provided to the EPA via the Federal Permitting Improvement Steering Council. This highlights the Trump administration's attempt to streamline processes for issuing permits and reviewing such applications for primacy as well. As such, it is likely that the list of states granted primacy over Class VI wells will grow over the coming years. The EPA's final decision was published in the Federal Register on November 14, 2025 and can be located here: https://www.govinfo.gov/content/pkg/FR-2025-11-14/pdf/2025-19898.pdf
(Adam Nir)

U.S. BUREAU OF RECLAMATION ADOPTS UPDATED LONG-TERM OPERATIONS PLAN FOR CALIFORNIA'S CENTRAL VALLEY PROJECT AND STATE WATER PROJECT

In December 2025, the U.S. Bureau of Reclamation (Reclamation) adopted an updated long-term operations plan for the Central Valley Project (CVP) and State Water Project (SWP) that is intended to implement Executive Order 14181 signed by the President of the United States.

Background

The Central Valley Project (CVP) spans roughly 400 miles from the Cascade Mountains near Redding in the north to the Tehachapi Mountains near Bakersfield in the south. CVP facilities include reservoirs on the Trinity, Sacramento, American, Stanislaus and San Joaquin rivers. In particular, the CVP takes water from the Trinity River and stores it in Clair Engle Lake, Lewiston Lake, and Whiskeytown Reservoir. The water is then diverted through a system of tunnels and powerplants into the Sacramento River for the Central Valley. Additionally, water is stored in Shasta and Folsom Lakes. In total, the project consists of 20 dams and reservoirs, 11 power plants, and 500 miles of major canals, as well as conduits, tunnels and related facilities. System wide, the CVP manages approximately 9 million acre-feet of water, delivers roughly 7 million acre-feet of water annually to various CVP contracts, and generates 5.6 billion kilowatt hours of electricity annually. The CVP was initially designed to protect the Central Valley from substantial water shortages and floods. However, the CVP is operated today in ways that increase the Sacramento River's navigability, provides domestic and industrial water supplies, generates electric power, and helps regulate environmental conditions.

The State Water Project (SWP) is a water storage and delivery system comprised of reservoirs, aqueducts, power plants, and pumping plants spanning more than 700 miles from northern to southern California. According to DWR, the SWP supplies water to more than 27 million people across California and irrigates roughly 750,000 acres of farmland. The SWP is capable of delivering roughly 4.2 million acre-feet of water per year. However, the amount of water available to water contractors varies each year because supply is impacted by variability in precipitation and snowpack, operational conditions, as well as environmental and other legal constraints.

The Record of Decision (ROD), developed under the framework of the National Environmental Policy Act (NEPA), adopts an updated LongTerm Operation Plan for these critical water systems. The ROD provides a summary of the submitted alternatives, information, and analyses in the final environmental impact statement, together with other relevant material in the record.

On January 24, 2025, President Trump issued Executive Order 14181 "Emergency Measures To Provide Water Resources In California and Improve Disaster Response In Certain Areas." A Presidential Memorandum titled "Putting People Over Fish" was signed four days before the Executive Order and references a reliable water supply, but the specific direction to the CVP is found in Executive Order 14181. The newly

adopted ROD implements initial actions in response to Executive Order 14181.

The Record of Decision

The ROD considers various "actions" related to the operation of the CVP and the SWP. The actions being considered are for the purpose of: (1) meeting requirements under federal and state law; (2) satisfying Reclamation's contractual obligations and agreements, including with CVP water users; and (3) implementing CVP fish and wildlife project purposes and meeting federal trust responsibilities to Tribes, including those in the Central Valley Project Improvement Act (CVPIA). Operation of the CVP and SWP serves multiple purposes, including river regulation/flood control, improvement of navigation; irrigation uses, domestic uses, and fish and wildlife mitigation, protection, and restoration; power generation; and fish and wildlife enhancement. Operation of the CVP and SWP also provides recreation and water quality benefits.

Action 5

After considering four alternative actions and a no-project alternative as contemplated by NEPA, Reclamation decided to implement "Action 5." Action 5 modifies components included in the "preferred alternative" of a previously issued environmental impact statement for long-term operations of the CVP in 2024. The preferred alternative in that ROD was Alternative 2, which was analyzed as the Proposed Action in certain biological opinions issued by the United States Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) in 2024.

Further, Action 5 is intended to respond to Section 2 of Executive Order 14181 by operating the CVP to deliver more water to high need communities, including by increasing storage and conveyance and coordinated operations of federal and state facilities.

In addition, Action 5 removes the Delta Smelt Summer and Fall Habitat Action (Fall X2) and the Early Implementation measure of the Delta export reduction of the Healthy Rivers and Landscapes (HRL) Program, formally Voluntary Agreements from Alternative 2 (section 5.9 of Action 5, Spring Delta Outflow). Action 5 also updates Alternative 2 Delta operating criteria and governance. Removal of Fall X2 is based upon the USFWS 2024 LTO Biological Opinion determination that Fall X2 is not anticipated to have observable effects on Delta smelt survival.

According to Reclamation, the Early Implementation measure removal is due to a lack of necessary processes and progress to develop data and a program that could assist with determining whether and how to implement the HRL Program. Updates to Delta operating criteria include conditions for Old and Middle River management at no more negative than 5,000 cubic feet per second (cfs), and a stormflex action of 6,500 cfs. Under Action 5, the governance structure was revised to support actions that restrict water supply to those that provide a material benefit to listed species by using predictive tools for realtime assessment of environmental conditions.

According to the ROD, under Action 5, annual CVP deliveries may increase by up to 180,000 acre feet (AF) beyond amounts contemplated in Alternative 2, and SWP may increase by up to 220,000 AF compared to Alternative 2.

Conclusion and Implications

The updated LTO for the CVP and SWP appear to respond to certain mandates from Executive Order 14181 by adapting the preferred alternative in the prior LTO, which in turn was based on biological opinions from USFWS and NMFS. It remains to be seen whether the updated LTO will be challenged in court and, ultimately, whether it will be implemented. The Record of Decision for Updated Long-Term Operations Plan is available here, https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=57167
(Miles Krieger)

COLORADO WATER CONSERVATION BOARD APPROVES USE OF SHOSHONE RIGHTS AS PART OF INSTREAM FLOW PROGRAM

In a first-of-its-kind decision, the Colorado Water Conservation Board (CWCB) recently voted to accept the Shoshone power plant water rights as part of the state's instream flow program. Although the project still faces economic and legal hurdles, once finalized the purchase and implementation will arguably be one of the most consequential water rights transfers in Colorado history.

Background

The Shoshone power plant water rights consist of a 1905 water right for 1,250 cubic feet per second (c.f.s.) and a 1956 water right for 158 c.f.s. These water rights have historically been used for hydropower generation at the Shoshone generating plant in Glenwood Canyon, just east of the town of Glenwood Springs in western Colorado. These water rights have become a critical piece of western slope water rights administration because they are senior, relatively large, and non-consumptive, meaning that use of the water does not diminish the Colorado River except for the small reach between the plant's inlet and outlet. The annual "Shoshone Call" has therefore limited upstream development while protecting downstream water rights and the natural environment by ensuring that a specific amount of water always flows through the plant.

In 2023 the Colorado River Water Conservation District (River District) entered into a contract with Xcel Energy, current owner of the plant and water rights, to purchase the Shoshone power plant rights for $98.5 million. *See Colorado River Water Conservation District Completes Landmark Purchase of Large-Scale Water Rights*, 28 W. Water L. & P'lcy Rptr. 75 (Feb. 2024). The River District and its many western slope constituents and allies value the Shoshone water rights for their resulting positive effects on other western slope water rights, including the Grand Valley Canal Project near Grand Junction which is the other major call on the Colorado River. The Shoshone plant's nonconsumptive use also leaves water in the river which benefits the riparian habitat and natural environment, as well as supporting western Colorado's multi-billion-dollar outdoor recreation industry.

Given that the plant has been in operation for more than 120 years, it is possible that Xcel could choose to shut down the plant or otherwise sell that water in the future. Several Front Range water suppliers would likely jump at the chance to purchase that water to support their transmountain diversions to their service areas in the various large Front Range cities. To prevent this occurrence and ensure this water stays on the western slope, the River District's purchase includes a permanent lease back to Xcel for as long as the Shoshone plant remains operational. When the plant eventually closes and the lease terminates the River District will assume full control of the water rights.

But the current decrees for the Shoshone water rights do not include any decreed uses that would allow the River District to operate the water rights without the power plant. The River District therefore proposed to "donate" the water rights to the CWCB who would include them under its instream flow program. In Colorado, only the state may own water rights for instream flow purposes and the protection of the environment. In practice, the CWCB holds many instream flow rights that allow the CWCB, when streamflows drop below the decreed level, to place a call on upstream junior water rights to curtail those rights and ensure a minimum amount of water is left in the stream for environmental and habitat protection purposes. CWCB approval was therefore a condition of the 2023 purchase contract.

The CWCB began its decision-making process in May 2025 during which four Front Range entities submitted the required notice to request a hearing to state their objections to the River District's purchase and subsequent transfer of water rights to the CWCB. Those entities stated that they do not necessarily oppose the purchase in general, but they are concerned with the quantification of the Shoshone water rights and how those rights will be used in an instream flow capacity. The CWCB then held the hearing in mid-September.

Colorado Water Conservation Board Approval

The hearing was contentious with testimony for and against CWCB's acquisition of the Shoshone wa-

ter rights almost perfectly split down the Continental Divide. The first issue centered on management authority. Several western slope governments, which are providing funding for the purchase, insist that the River District must retain the power to co-manage the water rights with the CWCB. *See Colorado River Water Conservation District Encounters Financial, Legal Hurdles in Landmark Water Rights Purchase*, 29 W. Water L. & P'lcy Rptr. 183 (July 2025). The CWCB serves the entire state, not just the western slope, so these entities were concerned that, without River District input, the CWCB may choose to operate the water rights and place calls in a way that did not mimic the historic patterns and instead gave more deference to the Front Range. The Front Range entities argued that Colorado law gives the CWCB exclusive authority over instream flows water rights and thus any input by the River District would be contrary to law. As one example, the City of Aurora noted that the majority of its transmountain diversion is curtailed during a Shoshone call. In the event of a water shortage or other crisis the CWCB could elect to remove the call in the interests of statewide welfare. But as drafted the River District retains veto power over operational changes and therefore may wish to keep the call on to benefit its western slope constituents.

The CWCB ultimately agreed with the River District, concluding that a co-management regime is legally allowed, particularly since the River District is essentially donating the rights to the state and foregoing any consumptive use. The CWCB therefore unanimously voted to approve adding the Shoshone water rights to the instream flow program. The Shoshone water rights are by far the largest single instream flow rights in the CWCB's portfolio as well as arguably being the most consequential in terms of the number of potential affected water users and effects on the natural environment.

Issues Ahead

The River District still faces financial uncertainty in the $98.5 million purchase. *Id.* In January 2025 the U.S Bureau of Reclamation awarded a $40 million grant to the project, bringing total allocated funding to $95 million. But the Trump administration immediately froze federal spending leaving those grant funds in limbo. Colorado's Democratic senators both oppose the freeze, while western slope Republican representative Jeff Hurd recently publicly urged the release of funds to support water operations in his district. Without that significant contribution the River District may be forced to seek additional funding sources or renegotiate the purchase with Xcel.

After the River District solves the funding question, the next step will be a joint water court application on behalf of Xcel, the River District, and the CWCB. This water court case will request a change in the Shoshone water rights to add instream flows as a beneficial use, thereby allowing the CWCB and River District to use the rights to place a call after the Xcel power plant is retired. This case, like many change cases, is expected to be time-consuming and contentious. Specifically, Colorado water law generally only allows users to change the historic use of their water rights, a number that the Front Range argues has so far been overstated. CWCB is similarly concerned that the resulting change case could leave the CWCB with much less instream flow water than they believe they are receiving. The co-management authority, discussed above, is also likely to come up at water court and require resolution from the water judge.

Conclusion and Implications

With the CWCB's approval the River District accomplished one more step as it continues with its historic purchase. Although funding and legal challenges still remain, the CWCB approvals provide the project with a needed boost and momentum while illustrating creative new methods for water use in Colorado. The state's limited water availability means that conservation entities, and really all new water users, must acquire old, expensive, senior water rights to further their water use goals. The River District's purchase, leaseback, and arrangement with the CWCB may provide a model for future water use in Colorado.
(John Sittler)

WASHINGTON DEPARTMENT OF ECOLOGY PROPOSES NEW INTERPRETIVE POLICIES ON WATER RIGHTS CHANGES AND CONSUMPTIVE USE

The Washington State Department of Ecology (Ecology) has released two proposed policy statements for public comment addressing (1) development schedules for water right changes and transfers (Policy 1280) and (2) the definition of consumptive and nonconsumptive water use (Policy 1020). Although targeted to Washington's water rights program, these proposals raise broader questions of how agencies use interpretive statements to shape regulatory practice, and how such statements interact with statutory authority and existing rules.

Washington's Administrative Procedure Act expressly authorizes state agencies to adopt interpretive and policy statements. RCW 34.05.230. These statements are intended to "advise the public of [the agency's] current opinions, approaches, and likely courses of action" but are "advisory only." RCW 34.05.230(1). Washington courts have repeatedly emphasized that interpretive rules are not entitled to binding deference. *Ass'n of Washington Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 447, 120 P.3d 46 (2005). See *also Port of Tacoma v. Sacks*, 19 Wn. App. 2d 295, 304, 495 P.3d 866 (2021). Ecology's Water Resources Program currently maintains more than three dozen such nonbinding documents, ranging from guidance to interpretive statements.

Policy 1280: Development Schedules for Water Right Changes

Ecology first adopted a policy on development schedules for changes and transfers in 2009 and revised it in 2014. The stated purpose of the policy is to:

> . . .describe the process and criteria for setting development schedules for water right changes and transfers, including evaluating requests for extensions and how they differ from development schedules for new water right permits. Policy 1280, at 1.

Traditionally, when Ecology approves a change application, the agency includes a development schedule requiring construction of necessary facilities and completion of required permits before issuing a superseding water right certificate. This structure mirrors the approach taken for new water right permits and ensures that the changed use is timely perfected.

Ecology's proposed revision marks a significant shift. The draft policy indicates that Ecology's "standard approach" will now be to issue superseding certificates without imposing a development schedule. While the policy states that Ecology retains discretion to include such schedules, the presumption moves toward immediate issuance of a superseding certificate upon approval of the change. Projects involving housing and other long-term construction often require multi-year development schedules to provide the time for multiple local permits, and exposure to economic cycles that delay buildout. Without a development schedule, change applicants and local governments may face greater uncertainty regarding the timing and reliability of water availability for planned domestic uses. Stakeholders have raised concerns that removing development schedules from change authorizations could:

- Complicate long-term planning for municipal and quasi-municipal users.

- Increase risk that water authorized for future domestic uses may become unavailable if unused water is later questioned as relinquished.

- Introduce inconsistency between change authorizations and new-permit procedures, where development schedules remain mandatory.

Policy 1020: Redefining Consumptive and Nonconsumptive Use

Ecology has also proposed significate changes to its definition of consumptive and nonconsumptive uses for new water rights and changes or transfers of water rights through a policy statement. The existing policy has been in place since 1991 (revised in 1996) and purports to "expand upon" definitions adopted by rule in chapter 173-500 WAC, originally promulgated in

1976. Ecology's existing rule defines:

- Consumptive use is as a "use of water whereby there is a diminishment of the water source." WAC 173-500-050(5).

- Nonconsumptive use as a use involving no diversion or "no diminishment of the source." WAC 173-500-050(9).

The existing policy defines "diminishment" to include reductions in quantity, quality, rate of flow, or availability. POL 1020 (1996), at 1.

The draft revision introduces new, mandatory elements for determining whether a use is consumptive. According to the Public Review Draft (Publication 25-11-104), a use is consumptive if the water is: (1) not returned to the original source at the time of diversion; (2) not returned at the point of appropriation; or (3) associated with water-quality reductions, including temperature changes. These additions substantially expand the concept of diminishment beyond the rule text, using temporal, and locational criteria not present in existing statutes or regulations.

Conclusion and Implications

The Department of Ecology was accepting comments on both policies through December 5. The agency has not indicated whether it will publish a formal response to comments before finalizing the revisions. Given the significance of these changes, stakeholders, including municipal water suppliers, irrigators, water banks, tribal governments, and environmental groups, are expected to weigh in on the impacts to water-right administration and consistency with existing statutory frameworks. Ecology's proposed policies raise significant questions about whether the agency can add requirements not in statute, amend or "expand upon" rules without rulemaking.
(Jessica Kuchan)

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.

Nov. 26, 2025—The U.S. Environmental Protection Agency (EPA) 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.

"Ensuring that water systems provide safe drinking water to consumers is fundamental to EPA's mission," said EPA Regional Administrator Michael Martucci. "In this instance, we have collaborated with our counterparts in New Jersey to identify violations and establish a definitive course of action for Atlantic City's public utility to meet its obligations under the law."

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 (EPA) 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 Sacramento 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.

Nov. 18, 2025—The U.S. Environmental Protection Agency (EPA) and U.S. Department of Justice (DOJ), working in conjunction with the Pennsylvania Department of Environmental Protection (PADEP), announced a proposed consent decree with Hanover Foods Corporation. Under the proposed settlement, Hanover Foods would pay a $1.15 million civil penalty and take a series of actions to address alleged violations of the Clean Water Act at its wastewater treatment facility in Hanover, Pennsylvania.

As alleged in a complaint filed with the proposed consent decree, Hanover Foods failed to comply with a state-issued National Pollutant Discharge Elimination System (NPDES) permit to operate its wastewater treatment facility in Hanover. NDPES permits are required if wastewater is being discharged into a water of the United States.

At this facility, Hanover Foods industrially processes foods, including beans and vegetables, for canning and fresh packing. Hanover Foods treats industrial waste associated with these operations before discharging wastewater into Oil Creek, which eventually flows into the Susquehanna River and then the Chesapeake Bay. Since 2016, Hanover Foods violated its NPDES permit on more than 600 occasions by exceeding its permit limits for pollutants including suspended solids, ammonia nitrogen, and phosphorus. In addition, environmental inspections identified numerous alleged violations of operations and maintenance requirements at Hanover Foods' facility.

Under the terms of the proposed consent decree, Hanover will install new equipment and take other measures to prevent violations of its permit limits for certain nutrients and for temperature. Excessive nutrients and high temperatures can be harmful to aquatic life, including fish, shellfish, and underwater grasses that support aquatic ecosystems.

In addition to upgrades made while this case was under investigation, Hanover Foods will upgrade its wastewater treatment system, closely monitor compliance with its discharge permit, report any violations, identify their root causes, and take corrective action to address them. The upgrades include installation of a permanent boiler to maintain proper temperatures in its treatment process, implementation of spare-parts programs to avoid equipment downtime, and improvements to Hanover's operations and maintenance program, including additional monitoring and tracking requirements.

EPA investigated this case and worked closely with the PADEP.

The proposed consent decree was lodged in the U.S. District Court for the Middle District of Pennsylvania and is subject to a 30-day public comment period and final court approval. The consent decree and information on how to submit a public comment are available on the Justice Department's Proposed Consent Decree webpage.

Nov. 10, 2025—The U.S. Environmental Protection Agency released a proposal to improve the scope of its perfluoroalkyl and polyfluoroalkyl substances (PFAS) reporting regulations under the Toxic Substances Control Act (TSCA) to make them more practical and implementable and reduce unnecessary, or potentially duplicative, reporting requirements for businesses while maintaining the ability to obtain important use and safety information on PFAS.

In October 2023, the Biden administration EPA finalized a one-time PFAS reporting and recordkeeping regulation under TSCA section 8(a)(7) that requires manufacturers (including importers) of PFAS in any year between 2011-2022 to report data to EPA related to exposure and any existing environmental and health effects. The rule exemplifies regulatory overreach by imposing a nearly billion-dollar compliance burden on industry without establishing any clear framework for utilizing the collected data or demonstrating how it advances environmental protection goals. The rule's lack of practical implementation standards, evidenced by significant IT system failures and administrative delays, represents poor regulatory design that unnecessarily burdens small businesses and importers while failing to achieve meaningful environmental outcomes.

The proposed changes to improve reporting regulations will support Administrator Zeldin's "Powering the Great American Comeback" initiative by reducing regulatory reporting burdens and providing greater regulatory certainty to industry, resulting in a net reduction in cost while ensuring that EPA receives the PFAS data that are most relevant to the agency. These proposed changes will also deliver on EPA

Adminstrator Zeldin's commitment to "implement [TSCA] section 8(a)7 to smartly collect necessary information, as Congress envisioned and consistent with TSCA, without overburdening small businesses and article importers."

The exemptions and modifications that EPA is proposing would maintain important reporting requirements on PFAS while exempting reporting on activities that manufacturers are least likely to know or reasonably determine. The proposed exemptions are:

- PFAS manufactured (including imported) in mixtures or products at concentrations 0.1% or lower;
- Imported articles;
- Certain byproducts;
- Impurities;
- Research and development chemicals; and
- Non-isolated intermediates.

The agency is also proposing technical corrections to clarify what must be reported in certain data fields and to adjust the data submission period.

Oct. 22, 2025—Under the authority of the Clean Water Act, U.S. Environmental Protection Agency (EPA) is announcing an Order issued to the Cabras Marine Corporation to improve deficient operations and maintenance of their ship repair facility in Guam. Under the agreement, Cabras Marine will make various facility improvements to protect Apra Harbor.

Cabras Marine operates a ship repair and maintenance facility located on Apra Harbor. On February 6, 2025, EPA conducted an inspection at the facility and found sand blast debris spilling out of the containment structure, with potential release of the debris into the stormwater and Apra Harbor. Additionally, there was a large accumulation of oily and hazardous waste materials, such as oxidizers and flammable materials, improperly labeled and incompatibly stored together. This practice posed a fire risk. During the investigation, EPA identified the buildup and improper storage of waste material as an ongoing issue for the facility since as early as 2017.
Under the Administrative Order on Consent being announced today, Cabras Marine has agreed to:

- Remove and properly dispose of all accumulated oily waste and hazardous waste.
- Construct new storage units to safely store the accumulating hazardous waste, with proper labeling and organization, and install a secondary containment system for spill prevention.
- Conduct inspections of the facility at least twice a month.
- Conduct worker training on proper storage, containment, and handling of hazardous waste.
- Complete a technical evaluation for the collection, storage and disposal of the ships oily wastewater (bilge).

Cabras Marine Corporation can continue daily operations at the facility as it follows the order. (Robert Schuster)

JUDICIAL DEVELOPMENTS

NINTH CIRCUIT AFFIRMS CWA CITIZEN SUITS MUST BE FORWARD-LOOKING—ENVIRONMENTAL GROUP'S CLAIMS MOOTED BASED ON DISCHARGER'S SUBSEQUENT RECEIPT OF NPDES PERMIT

Coastal Environmental Rights Foundation v. Naples Restaurant Group, LLC, *Unpub.*, Case No. 23-55469 (9th Cir. Nov. 5, 2025).

In the *unpublished* opinion in *Coastal Environmental Rights Foundation v. Naples Restaurant Group, LLC*, the Ninth Circuit Court of Appeals mooted an environmental group's request for injunctive and declarative relief. These petitioners had challenged a restaurant owner's launch of fireworks over Alamos Bay without a pollutant discharge permit. However, the restaurant group subsequently obtained one, ensuring that future fireworks events would not violate the Clean Water Act. The Ninth Circuit further widened a Circuit Court of Appeals split regarding civil penalties for Clean Water Act violations, siding with the Eighth Circuit in concluding that a request for civil penalties does not overcome mootness when it is absolutely clear that the alleged violation is not reasonably expected to recur.

Factual and Procedural Background

The Naples Restaurant Group, LLC (Naples) hosts an annual Fourth of July fireworks event at its restaurant, launching hundreds of fireworks from a barge in Alamos Bay. Until May 2023, Naples conducted the event without a National Pollutant Discharge Elimination System (NPDES) permit for pollutant discharges from the fireworks into the Bay. The Coastal Environmental Rights Foundation (CERF) filed a Clean Water Act citizen suit against Naples, seeking declarative and injunctive relief barring future unpermitted launches.

In April 2023, the U.S. District Court found in favor of Naples, finding that aside from a single firework falling into Alamitos Bay, CERF offered no evidence of similar or ongoing discharges. CERF appealed. However, in the following month, the Los Angeles Region Regional Water Quality Control Board (Regional Board) began issuing a general NPDES permit that authorized discharges from public fireworks displays into United States waters of the Los Angeles Region. Naples obtained one the following June.

Because the potential discharge from the fireworks event was no longer "unpermitted," the Ninth Circuit held that the case was moot. CERF then petitioned for a rehearing based on the fact that Naples had failed to pay its annual permitting fee, citing an unpaid November 2023 invoice. The Ninth Circuit thus remanded the matter back to the District Court to determine (1) whether Naples had continuously paid the annual fee and (2) whether it was absolutely clear that Naples's alleged violations were not reasonably likely to recur. The District Court answered both in the affirmative.

The Ninth Circuit's Decision

The Clean Water Act prohibits the discharge of any pollutant into the navigable waters of the United States unless authorized via an NPDES permit issued by the Environmental Protection Agency (EPA) or a state with EPA approval. In assessing mootness, the Ninth Circuit relied on *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987) and *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000) (*Laidlaw*) for guidance. These cases emphasize two principles: (1) civil penalties must serve to deter future violations—they cannot be used to remedy wholly past violations, and (2) to establish mootness, a hefty burden is placed on the defendant to show that it is "absolutely clear" that past violations could not reasonably be expected to recur. The Ninth Circuit concluded that when no reasonable possibility of such future violation exists, civil penalties lose their deterrent effect and thus become moot. It then applied these principles to CERF's requests for declaratory and injunctive relief, civil penalties, and attorneys' fees.

Declaratory and Injunctive Relief

CERF sought a declaration that Naples violated the Clean Water Act and an injunction preventing further discharges without a permit. The court concluded that Naples met its burden in showing that its NPDES permit expressly authorized discharges from public fireworks displays, and thus, its firework event could not result in a violative discharge of pollutants into Alamos Bay. Additionally, Naples showed that it had a demonstrated record of regulatory compliance. Naples previously launched fireworks without a permit simply because it was not required at that time and promptly obtained one once it was able to. Because Naples's future discharges were permitted, and CERF could not seek injunctive relief for its past violations, this requested relief was moot.

Civil Penalties

CERF argued that civil penalties kept the controversy alive, even if it was clear that Naples would not release unpermitted discharge again. The court wrestled with the contentious issue as to whether civil penalties should be treated differently from injunctive relief for mootness purposes. Though most circuits differentiate between the two and find that this relief can overcome a showing of mootness, the Ninth Circuit departed from this approach, siding instead with the Eight Circuit, which holds that plaintiffs lack standing to pursue civil penalties for past violations because such penalties do not redress the plaintiff's injury. Although civil penalties can remain available to deter future violations, this is not the case when the alleged violation cannot reasonably be expected to recur. The Ninth Circuit found the Eighth Circuit's approach more persuasive, noting that it had addressed similar cases related to unpermitted discharge and had done so after *Laidlaw*, interpreting *Laidlaw* to apply the same mootness standard for civil penalties and injunctive relief under the Act. Therefore, because CERF's claim rested solely on an action that was not reasonably expected to recur, CERF's claim for civil penalties was moot.

Attorneys' Fees

Finally, the court held that a request for attorneys' fees cannot revive an otherwise moot case. Because Naples's alleged violation of the Act could not reasonably be expected to recur, the case was moot.

Conclusion and Implications

The Ninth Circuit's decision upholds the notion that citizen suits under the Clean Water Act are forward-looking and do not exist to redress past harm. Thus, once a defendant obtains an NPDES permit authorizing the challenged discharge, claims for declaratory and injunctive relief become moot. Further, the court also clarified that civil penalty claims are moot when it is absolutely clear the alleged violations are not reasonably likely to recur, consistent with the act's deterrence goals and Article III standing requirements. It is important to note, however, that the opinion is *unpublished*, meaning the court's decision is not precedential nor binding. U.S. district courts may continue to look to the majority of Circuits for authority on the relationship between civil penalties and mootness. The Ninth Circuit's opinion is available at: https://cdn.ca9.uscourts.gov/datastore/opinions/2025/11/05/23-55469.pdf.
(Adam D. Nir)

CALIFORNIA COURT OF APPEAL ADDRESSES THE TULARE LAKE SUBBASIN IN TWO SEPARATE DECISIONS

Kings County Farm Bureau v. State Water Resources Control Board, ___Cal.App.5th___, Case No. F088720 (5th Dist. Oct. 29, 2025); *State Water Resources Control Board v. The Superior Court of Kings County*, ___Cal.App.5th___, Case No. F088909 (5th Dist. Nov. 24, 2025).

The Kings County Farm Bureau (Farm Bureau) is in a legal battle with the State Water Resources Control Board (State Water Board) regarding enforcement of the Sustainable Groundwater Management Act (SGMA) involving the Tulare Lake Subbasin. The Farm Bureau sued to challenge the state's decision to place the subbasin on probation, contending that the State Water Board acted unfairly and inconsistently. A recent appellate court ruling overturned a preliminary injunction against the state, but the Farm Bureau reportedly will pursue an appeal of that decision to the California Supreme Court. The case is *Kings County Farm Bureau v. State Water Resources Control Board* with a published opinion issued on October 29, 2025 by the Fifth District Court of Appeal (https://courts.ca.gov/opinion/published/2025-10-29/f088720).

A related case is involved in which the State Water Board appeals the trial court's rulings on the State Water Board's demurrer that sought to challenge the Farm Bureau's case at its inception. This related case is discussed below. The case is *State Water Resources Control Board v. The Superior Court of Kings County* with a published decision on November 24, 2025 by the Fifth District Court of Appeal (https://law.justia.com/cases/california/court-of-appeal/2025/f088909m.html). The Court of Appeal found in favor of the State Water Board on some of the issues.

Background

The Tulare Lake Subbasin is located in the southern part of California's San Joaquin Valley, primarily within Kings County. It is part of the larger Tulare Lake Hydrologic Region and is south of the Kings and Kaweah rivers and north of the Kern River.

Enacted in 2014 and taking effect on January 1, 2015, SGMA mandates sustainable groundwater management through locally developed plans for over-drafted basins, subject to state oversight. The Tulare Lake groundwater subbasin was designated as a high-priority basin, requiring local agencies to form Groundwater Sustainability Agencies (GSAs) and submit a Groundwater Sustainability Plan (GSP) to the Department of Water Resources (DWR).

Five groundwater agencies developed a single groundwater plan for the Tulare subbasin. DWR found the submitted GSP for the Tulare subbasin inadequate in 2020 and again in 2023, leading the State Water Board to designate the basin as probationary during April 2024. The Farm Bureau filed a writ of mandate and complaint in May 2024, alleging multiple legal violations.

The Court of Appeal's Decision in *Kings County Farm Bureau v. State Water Resources Control Board*

The Farm Bureau filed a petition for a writ of mandate and complaint against the State Water Board, alleging the probationary designation was improper and exceeded the State Board's authority.

The Farm Bureau raised multiple claims, including improper notice, exceeding authority, and violations of constitutional and statutory provisions. The trial court issued a preliminary injunction barring the State Water Board from enforcing the probationary designation and related requirements, such as groundwater monitoring, reporting, and fees. The trial court found the Farm Bureau likely to succeed on several claims, including the "good actor exclusion" claim, exceeding authority, notice violations, and underground regulation claims.

The appellate court found that the trial court abused its discretion in granting the broad preliminary injunction. It determined that the Farm Bureau was likely to succeed only on the "good actor exclusion" claim, which challenges the State Water Board's decision not to analyze exclusion requests from two GSAs. The other claims were found to lack merit. The appellate court concluded that the injunction was overly broad and not tailored to the harm at issue, as the valid claim only applied to specific portions of the Tulare subbasin.

The appellate court upheld the trial court's finding that the Farm Bureau would suffer substantial harm

from the immediate compliance requirements during the irrigation season, including high costs, operational disruptions, and potential economic losses. However, it noted that the trial court's balancing of harms might change if the scope of the injunction is narrowed. The appellate court upheld the trial court's decision to impose a nominal $1 undertaking, as the State Water Board failed to provide sufficient evidence of actual damages caused by the injunction.

The appellate court reversed the trial court's preliminary injunction and remanded the case for further proceedings to determine whether a narrower injunction may be appropriate. The State Water Board's petition for writ of supersedeas was denied as moot due to the reversal of the injunction. Costs were awarded to the State Board.

The Court of Appeal's Decision in *State Water Resources Control Board v. The Superior Court of Kings County*

The Court of Appeal is reviewing a case involving the State Water Board and the Farm Bureau regarding the trial court's rulings on the State Water Board's demurrer. The court overruled the demurrer for the sixth, seventh, and ninth causes of action from the Farm Bureau's complaint. The sixth cause of action alleges underground regulations that violate the Administrative Procedure Act (APA). The seventh cause of action claims the extraction fees imposed are unlawful. The ninth cause of action seeks general declaratory relief regarding the legality of the probationary designation.

The sixth cause of action addresses alleged underground regulations by the State Water Board that violate the APA. The Farm Bureau identifies seven specific regulations it claims were not adopted according to APA requirements. The State Water Board argues it is exempt from the APA under Water Code section 10736, which the trial court rejected.

The court emphasized the importance of determining legislative intent through statutory language and context. Courts examine statutory language for its plain meaning and context within the entire statutory framework. If the language is clear, it is generally followed unless it leads to absurd results. Ambiguities in statutes allow for consideration of legislative history and public policy to clarify intent.

The court concluded that the State Water Board's actions under Water Code sections 10735.2 and 10735.8 are exempt from the APA. The court interprets the legislative intent as granting a broad exemption from the APA for actions taken under the specified sections.

The court also found that declaratory relief is not appropriate for reviewing administrative decisions made by the State Water Board, by reasoning that the Legislature has provided a specific remedy through writ of mandate for reviewing such decisions. Ultimately, the Court of Appeal ordered the trial court to vacate its previous ruling and grant the State Water Board's demurrer without leave to amend for specific causes of action.

Conclusion and Implications

The Fifth District Court of Appeal's decisions provide judicial direction regarding implementation and enforcement issues arising under SGMA. Key takeaways are: (1) the State Water Board must provide notice to groundwater extractors before designating a subbasin as probationary and the "good actor exclusion" may be requested as part of the hearing; (2) adequate factual showings that at least portions of a basin or subbasin require those portions be excluded from a probationary designation; and (3) the State Water Board has "broad authority to act" after a subbasin is designated as probationary.
(Wes Miliband)

CALIFORNIA COURT OF APPEAL FINDS THE DELTA REFORM ACT DOES NOT REQUIRE DWR TO SUBMIT A CERTIFICATION OF CONSISTENCY BEFORE ENGAGING IN PRECONSTRUCTION GEOTECHNICAL WORK

Tulare Lake Basin Water Storage District v. Department of Water Resources, 115 Cal.App.5th 342 (2025).

In *Tulare Lake Basin Water Storage District v. Department of Water Resources* the California Court of Appeal reversed a District Court decision granting a preliminary injunction barring the California Department of Water Resources from performing preconstruction work before obtaining project certification from the Delta Stewardship Council. In doing so, the court held that, unlike the California Environmental Quality Act (CEQA), the Delta Reform Act does not incorporate CEQA's whole-of-the-action requirement or its prohibition on piecemealing.

Factual and Procedural Background

The Delta watershed is "at the core" of California's State Water Project and Central Valley Project, which deliver water to millions of Californians. Long-standing conflicts over Delta water created supply uncertainties. To address it, the Legislature enacted the Delta Reform Act (the Act) in 2009 and created the Delta Stewardship Council (Council) to adopt and implement the Delta Plan, which serves two "coequal" goals: ensuring a more reliable water supply and "protecting, restoring, and enhancing" the Delta ecosystem. The Council does not exercise direct review or approval authority over covered actions. Rather, agencies self-certify consistency with the Delta Plan, and the Council provides appellate review of any challenges.

The Department of Water Resources (DWR) sought to begin preconstruction geotechnical work in the Sacramento–San Joaquin Delta and Suisun Marsh for the Delta Conveyance Project, a proposed water tunnel intended to improve water conveyance and environmental protection. In 2023, DWR certified and approved the Project's final EIR, which included preconstruction geotechnical work consisting of soil borings and cone penetration testing, groundwater testing and monitoring, and trenching at various locations within the project area. The EIR noted that the geotechnical work would inform the development of the Project and collect data to satisfy mitigation and monitoring requirements.

Shortly thereafter, multiple municipal, tribal, and public interest entities (Plaintiffs) challenged the Project under CEQA, with several also filing a motion for preliminary injunction to halt the geotechnical work until DWR complied with the Delta Reform Act. Specifically, the Plaintiffs argued that the preconstruction geotechnical work was an inseverable portion of a "covered action," and therefore constituted its implementation, requiring a certification of consistency under section 85225 of the Act. Under that section, an agency attempting to undertake a covered action must prepare a certification of consistency.

Though DWR conceded that the Project itself was a covered action, it argued that the preconstruction was necessary to inform DWR's ultimate design of the project rather than an outright initiation of the action. If DWR were enjoined from performing this work, it would be precluded from gathering the necessary data it needed to prepare a certification of consistency. DWR also emphasized that CEQA and the Delta Reform Act are two separate regulatory schemes with different scopes, and a CEQA "project" becomes a covered action only if it implicates Delta Plan provisions—something the geotechnical work was needed to evaluate.

The District Court granted the preliminary injunction, concluding that the Plaintiffs had a strong likelihood of success on the merits based on its interpretation equating "covered action" with CEQA's definition of "project." Because the geotechnical work was a key component of the Project, the court deemed it part of the covered action. As a result, DWR approved a proposal for a more limited set of preconstruction geotechnical tasks and submitted a certification of consistency for this modified work to the Council. Although the plaintiffs appealed the certification, the Council dismissed it, concluding that the preconstruction work was indeed not a covered action.

The Court of Appeal's Decision

On appeal, the Court of Appeal for the Third Appellate District reviewed whether the Act's certification of consistency requirement incorporates CEQA's whole-of-the-action rule and prohibition on piecemealing, thus preventing DWR from treating the preconstruction geotechnical work as distinct from the tunnel project. The court concluded it did not—the definition of a "project" under CEQA is not the same as a "covered action" under the Delta Reform Act because the statutes serve different purposes.

While CEQA requires review of the whole of an action to ensure an EIR informs the public and decisionmakers of all reasonably foreseeable environmental effects, a certification of consistency is not itself an informational planning document. Rather, it is prepared and submitted after project approval, but before the agency initiates implementation. The court also found no indication that the Legislature intended to incorporate CEQA's whole-of-the-action requirement and piecemealing prohibition into the Act's consistency certification requirement.

In reaching its decision, the court relied upon guidance from the Council concluding that the scope of a CEQA project is not coextensive with the scope of a covered action. Where the Delta Reform Act and Council regulations intend to incorporate CEQA provisions, they do so expressly, and nothing in those authorities incorporates the whole-of-the-action concept into the definition of "covered action." Although a covered action must be a "plan, program, or project" as defined by Public Resources Code section 21065, it must also satisfy the Act's four additional requirements. The Act does not require all related activity to be certified in a single consistency determination.

Though the plaintiffs argued that the Council's analysis was merely advisory, the court believed its statutory interpretation aligned with the Legislature's intended purpose. The Legislature dictated that decisions made under the Act must be supported by the "best available science," and the record supported the conclusion that the preconstruction geotechnical work would assist the Council in doing so by allowing DWR to provide more detailed findings for review.

Conclusion and Implications

The Court of Appeal concluded that the Department of Water Resources was thus not required to submit a certification of consistency prior to engaging in the preconstruction geotechnical work. The Plaintiffs could not demonstrate a reasonable probability of prevailing on the merits. The decision clarifies what constitutes a "project" under the Delta Reform Act and denotes a clear distinction between the aims of the Act and CEQA. The court's opinion is available at: https://www4.courts.ca.gov/opinions/documents/C101878.PDF.
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