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LAND USE NEWS

DATA CENTER MORATORIA PROGRESS ACROSS THE NATION AND BECOME POLITICAL FODDER FOR MIDTERM CAMPAIGNS

We previously addressed in the May 2026 issue of the *California Land Use Law & Policy Reporter* the fledgling efforts in California and across the country to oppose the development of new data centers. Since then, the movement has become the defining issue in midterm election races across the country.

Many data center opponents express concern with the impacts data centers can have on the surrounding community. Some of these impacts pertain to utility strain (water and electricity), environmental impacts stemming from utility usage, as well as noise and air quality impacts from the use of diesel generators during power outages, and few community benefits (e.g. permanent jobs, sales tax revenue, etc.) despite the size of the facilities.

Data Center Development Moratoria Become Political

Since our May 2026 issue, the following California counties (governing the unincorporated areas) and cities have adopted data center moratoria:

- County of Imperial (temporary—struck down, *see below*);
- County of Tulare (to October 2026);
- City of Baldwin Park (to March 2027);
- City of Coachella (permanent);
- City of El Monte (to March 2027);
- City of Imperial (expired July 2026);
- City of Indio (to October 2026);
- City of Montebello (expired March 2026);
- City of Monterey Park (permanent);
- City of Patterson (to July 2027);

While California has not adopted a statewide ban, New York State has adopted a temporary one-year moratorium, with other states considering similar restrictions.

Data center concerns have come to the fore in the Texas races for governor and U.S. Senate. The Democratic nominees running for governor and Senate in Texas have called for regulations to protect communities and end public incentives for data centers. The issue has become so salient in Texas that incumbent Republican Governor Greg Abbott (running for re-election) paused statewide the processing of new data center permits until state regulators have an opportunity to audit each project and for the state to develop guidelines. Questions over data center development have also seeped into races in Florida, Michigan, Ohio, Pennsylvania, and Wisconsin. At least 16 municipalities across the nation will consider data center regulation ballot measures by the end of the year.

Urgency Ordinances

Government Code 65858

Generally, Government Code section 65858 allows a locality to adopt an "urgency" ordinance to "protect the public safety, health, and welfare" from uses "that may be in conflict with a contemplated general plan, specific plan, or zoning proposal" that the locality is considering. A legislative body cannot adopt an urgency ordinance unless it can make findings that "there is a current and immediate threat to the public health, safety, or welfare," and that the approval of entitlements for the use in question would constitute such a threat. (Gov. Code, § 65858(c).)

Urgency ordinances are always temporary and expire after 45 days from adoption. Some of the moratoria adopted by various California municipalities are or began as urgency ordinances, with some cities subsequently adopting longer-term ordinances.

Imperial County's Moratorium Ruled Unlawful

In an August 21, 2026, tentative decision by Imperial County Superior Court Judge Jeffrey B. Jones (*Imperial Valley Computer Manufacturing, LLC v. County of Imperial, et al.*, Case No. ECU004800), the court found that the county's urgency ordinances failed to meet state law requirements.

Judge Jones in Imperial County concluded that the county's urgency ordinance failed to make the

necessary findings that data centers posed a current and immediate threat to public health, safety, or welfare. The court explained that the ordinance must establish a causal connection between approving the projects and the claimed threats.

While the court accepted the findings contained in a second urgency ordinance adopted by the County, it still found that the ordinance failed to establish the connection between data center uses and the specific threats to health, safety, or welfare. Data centers' incompatibility with proposed regulations is not enough to establish such a threat.

While Judge Jones ordered the county to stop enforcing the moratorium, the court did not rule on whether the county must process the petitioner's project or even which ordinances would apply to the petitioner's project, which would otherwise be the largest data center in the state.

Conclusion and Implications

The data center backlash, which has united interest and community groups from across the political spectrum, apparently caught major tech companies off guard. Tech companies including Amazon and Anthropic, and Northern California utility Pacific Gas & Electric have spent millions of dollars lobbying the California Legislature during this year's session. Though, admittedly, these expenditures are not itemized per proposed legislation, the scope of lobbying included at least some bills pertaining to data center regulation.

In any case, land use and California Environmental Quality Act practitioners represent data center developers should be aware of the political challenges they face when evaluating sites. Project proponents should prepare for a vocal and well-funded opposition, especially when the application status approaches the environmental review stage. Finally, these projects should expect to provide significant community benefits (e.g. workforce commitments, infrastructure investments, etc.) to assuage community concerns. Practitioners representing municipalities considering data center bans, should ensure that urgency ordinances make the requisite findings that link the proposed uses to specific health and safety threats. (Braeden Mansouri)

LEGISLATIVE DEVELOPMENTS

SENATE BILL 79, THE ABUNDANT AND AFFORDABLE HOMES NEAR TRANSIT ACT: A VIEW TWO MONTHS IN

September 1, 2026, marks two months since the much-discussed Senate Bill 79, the "Abundant and Affordable Homes Near Transit Act," (SB 79) took effect.

Codified under Government Code §§ 65912.155–65912.162, SB 79 makes qualifying housing developments of five units or more a permitted, by-right use on residential, mixed-use, or commercial sites within a half-mile (or quarter-mile in smaller cities) of a qualifying transit stop, regardless of local land use regulations. The statute applies to jurisdictions in "urban transit counties" with 15 or more passenger rail stations, which currently includes the Los Angeles County, Orange County, San Diego County, Alameda County, San Francisco County, San Mateo County, Santa Clara County, and Sacramento County. Under SB 79, housing development projects that meet minimum affordable unit and density requirements qualify for state-mandated allowances for project height (ranging from 55–95 feet), density (ranging from 80–160 dwelling units/acre), and floor area ratio (ranging from 2.5–4.5), scaled to a site's distance from a transit stop and the transit stop's statutory tier. Cities may not impose any local development standards that would physically preclude a qualifying project from building under SB 79.

Prior to SB 79's enactment, nearly every local jurisdiction that weighed in on the bill opposed it, characterizing the bill as an erosion of local land use and planning power. However, local jurisdictions are not entirely without recourse under the statute. SB 79 provides local jurisdictions with some avenues to soften the law's reach through the adoption of local ordinances exempting certain sites that meet statutory standards or by enacting alternate land plans that achieve a similar result to SB 79—both of which are subject to review and approval from the Department of Housing and Community Development (HCD). In the two months that SB 79 has been in effect, there have been a wide array of local government responses sparking varied reactions from HCD and organizations advocating for housing development.

No Response: Let SB 79 Go into Full Effect

There is no requirement that local jurisdictions adopt an implementing ordinance for SB 79. If a jurisdiction takes no action, SB 79 simply goes into effect, with all qualifying properties within the applicable distance of a transit stop subject to SB 79's upzoning. While many Bay Area jurisdictions have enacted ordinances impacting the applicability of SB 79, the City of Berkeley has taken no action. The City's Planning Commission reviewed options for alternative compliance in April 2026, but has not implemented any ordinances or policies related to SB 79. Similarly, the City of Sacramento's Planning and Design Commission reviewed various options for compliance prior to the effective date of SB 79, but as of yet has taken no action, and allowed SB 79 to apply to the City in full.

Deferral: Upzone Properties to Delay the Application of SB 79

Under Government Code section 65912.161(b)(1), a jurisdiction can adopt an ordinance to defer the application of SB 79 to qualifying sites until one year after adoption of its seventh-cycle housing element. A site qualifies under section 65912.161(b)(1)(A) if it already permits at least 50 percent of the density and floor-area-ratio standards that would be allowed under SB 79. A locality can thus upzone areas enough to clear the threshold and thereby defer SB 79 on those sites for years.

Los Angeles has taken just this approach, utilizing an SB 79 implementation ordinance and a Low-Rise Ordinance upzoning single-family and lower-density parcels near transit stops to clear the 50-percent threshold. The Council adopted both on June 23, 2026, prior to SB 79's effective date. Los Angeles's seventh cycle housing element is due to HCD by April 2030, so the ordinances effectively defer full application of SB 79 until at least 2031. While HCD provided Los Angeles with preliminary guidance on the implementation of SB 79, it has not yet weighed

in on the City's upzoning ordinances or their associated deferral of SB 79.

Permanent Exemption: Adopt an Ordinance Exempting Industrial or Non-Pedestrian Areas from SB 79

SB 79 allows two categories of transit-adjacent sites to be permanently exempted from the statute. The first, under section 65912.160(e)(2), is the industrial employment hub exemption, covering contiguous areas of at least 250 acres where parcels are primarily dedicated to industrial use and housing is not permitted. San Jose enacted an ordinance excluding several designated employment areas under this provision, and HCD found it in substantial compliance in a June 4, 2026, letter—the only such approval issued to date.

The second permanent exemption, under section 65912.160(e)(1), lets a jurisdiction exempt an area within a half-mile of a transit stop where it makes findings, supported by substantial evidence, that no walking path of less than one mile connects that location to the stop. So far, San Diego has made the most extensive use of this exemption, excluding areas more than a one-mile walk from a qualifying trolley or bus stop citywide. That exclusion is now the subject of litigation: Californians for Homeownership filed suit against the City in San Diego County Superior Court (Case No. 26CU043967C), alleging it improperly excludes areas based on sidewalk gaps the City itself failed to maintain, with inconsistent supporting maps. No HCD compliance letter on San Diego's ordinance has issued to date.

Alternate Scheme: Adopt a Transit-Oriented Development Alternative Plan

The most involved of SB 79's local-modification tools is the transit-oriented development alternative plan (TODAP), authorized under Government Code section 65912.161(a). Rather than exempting or deferring specific sites, a TODAP redistributes SB 79's required density across a jurisdiction's transit-oriented development zones, provided the plan maintains the same net-zoned capacity, in units and residential floor area, that SB 79 would have produced. A TODAP generally cannot cut a site's density by more than 50 percent of the SB 79 standard, nor cut any TOD zone's capacity by more than 50 percent, except for fire-hazard zones, sea-level-rise-vulnerable sites, and historic resources. A TODAP remains effective until the end of a jurisdiction's housing element cycle and must be resubmitted after a housing element has been updated for a new cycle.

San Francisco offers the clearest example of an approved TODAP. The City adopted a citywide TODAP with an implementing ordinance, relying, in part, on recent upzonings enacted as part of the City's Family Zoning Plan. HCD found in a July 1, 2026, letter that the ordinance and TODAP satisfy the TODAP requirements of section 65912.161(a) and the industrial-hub exemption under section 65912.160(e)(2). The plan covers the entire city, with covered parcels exempt from SB 79's default standards until roughly January 2032. However, a coalition of pro-housing groups has since sued the City arguing its industrial employment hub designations were improper, and asking the court to invalidate the TODAP in its entirety. (San Francisco County Superior Court Case No. CPF-26-520062).

Beverly Hills presents a more contested example. The City Council adopted an initial TODAP on January 21, 2026. HCD rejected the plan in a May 8, 2026, letter, finding that the plan would result in lower average unit sizes, and that the City had improperly calculated its housing capacity. The City Council adopted an amended TODAP that remains pending HCD review, with no confirmed final approval.

Conclusion and Implications

The first two months of SB 79's application have provided insight into what might be expected in the future. Jurisdictions have pursued a range of creative strategies to defer or avoid the law's application, from Los Angeles's upzoning-to-defer to San Francisco's broader exclusions built around TODAPs—many of which have resulted in higher density, at least on paper. Whether these approaches ultimately hold up remains uncertain: several are still awaiting HCD review, and others are already being challenged in court. SB 79 creates significant potential for upzoning, through both its application and jurisdictions' attempts to avoid its application, but time will tell how effective it proves at actually delivering new housing units.

(Niran Somasundaram)

LAWSUITS FILED OR PENDING

CALIFORNIA ATTORNEY GENERAL SUES FIVE CITIES FOR FAILING TO COMPLY WITH STATE HOUSING ELEMENT LAW

On July 16, 2026, California Attorney General Rob Bonta and the Department of Housing and Community Development (HCD) filed five separate writ petitions against the Cities of Calexico, Costa Mesa, Half Moon Bay, Ridgecrest, and Turlock for failing to comply with the state's Housing Element Law. The enforcement actions contend each city has failed to prepare a legally compliant housing element that accommodates their share of the state's housing needs for the sixth planning cycle.

Background

California Housing Element Law

California's Housing Element Law requires every city and county to update its general plan's housing element every eight years. The element serves as a local roadmap for building housing. The element must analyze existing and projected housing and economic needs, and identify related goals, policies, objectives, financial resources, and programs for preserving, improving, and developing housing. As part of this, elements must adopt plans and regulatory systems that encourage and do not unduly constrain housing development, especially for lower-income households and workforce housing. This requires the element to identify existing local development constraints and explain how the city/county will remove them to meet its share of housing needs.

Before each planning cycle, the State Department of Housing and Community Development (HCD) develops the Regional Housing Needs Allocation (RHNA) for that given period, which identifies the number of dwelling units jurisdictions should strive to develop for various income levels. HCD calculates RHNA estimates by coordinating with regional planning bodies or "councils of governments" (COG) to assess local demographics and housing needs.

Once HCD sets RHNA figures, each COG must allocate them to the region's cities and counties to meet local and statewide housing needs for prescribed income levels. Each local government must then prepare a housing element that identifies an adequate number of sites that can accommodate its fair share of assigned RHNA numbers. These sites must be physically suitable and available for residential development during the planning period. If there are not enough sites available, the element must commit the city/county to identifying and rezoning additional sites within three years. Finally, the element must accommodate any unmet portion of the jurisdiction's outstanding RHNA from the prior planning period.

HCD's Enforcement Authority

Before adopting their updated housing elements, cities and counties must submit a draft to HCD to review and certify that it substantially complies with the Housing Element Law.

In 2017, the Legislature expanded this authority by passing AB 72, which granted HCD authority to review and revoke the housing element compliance status of any local government whose actions or inaction contravene adopted housing element policies/programs or RHNA obligations. The bill also authorized HCD to notify the Office of the Attorney General of California (AG) that the local jurisdiction is in violation of State law. Before doing so, HCD must provide the local government with written findings about its legal noncompliance and provide at least two meeting opportunities, which the locality must respond to within 30 days.

The California Attorney General's Lawsuits

The State is currently in the middle of its sixth housing element update and planning cycle (Sixth Cycle). Although the Sixth Cycle is nearly halfway over, five cities—Calexico, Costa Mesa, Half Moon Bay, Ridgecrest, and Turlock—have yet to certify a legally compliant housing element. As such, the AG and HCD filed five separate petitions for writ of mandate that allege each city has failed to act in the manner required by the Housing Element Law.

The petitions seek writs of mandates ordering the cities to adopt compliant housing elements and complete necessary RHNA rezoning within 120 days to ensure they meet their RHNA goals. The petitions also request declarations that the cities are not in substantial compliance with the Housing Element Law. As detailed below, both causes of action explain how the cities know they are currently noncompliant with the Law because they lack certified housing elements that are long overdue, despite numerous opportunities and warnings from HCD. The petitions thus emphasize the State's beneficial interest in the issuance of the requested writs and declarations given the AG's and HCD's authority and mandate to enforce local jurisdictions' compliance with Housing Element Law.

The City of Calexico

Calexico was required to adopt a compliant Sixth Cycle housing element by October 15, 2021. The City submitted an initial draft element to HCD for review on September 30, 2021. HCD issued written findings on November 29, 2021, which identified multiple revisions the City needed to make before its element could be certified as legally compliant. The City submitted a revised draft on July 13, 2022, and HCD issued a second set of incompleteness findings on September 9, 2022. Since then, the City has not submitted a revised draft to HCD for review. HCD issued a notice of violation on July 20, 2023, after which it met with City staff on October 4, 2023, April 23, 2025, and May 13, 2026. A revised draft remains outstanding.

The City of Costa Mesa

Costa Mesa was required to adopt a compliant Sixth Cycle housing element by October 15, 2021. The City submitted an initial draft element to HCD for review on October 6, 2021. HCD issued written findings on December 3, 2021, which identified multiple revisions the City needed to make before its element could be certified as legally compliant. The City submitted a revised draft on February 4, 2022, and HCD issued a second set of incompleteness findings on Aril 5, 2022. The City submitted a revised draft on November 23, 2022, which HCD deemed incomplete on January 20, 2023. On March 10, 2023, the City submitted a subsequent revised draft, to which HCD replied on May 9, 2023, explaining that the housing element could not be deemed substantially compliant until the City completed its required RHNA rezoning actions. HCD followed up with a letter of inquiry on April 30, 2025, regarding the City's failure to submit the required rezones for HCD's review. HCD subsequently issued a notice of violation on August 22, 2025, and has met with City staff on numerous occasions since September 2025. To date, the City has not completed the rezoning required in its adopted housing element.

The City of Half Moon Bay

Half Moon Bay was required to adopt a compliant Sixth Cycle housing element by January 31, 2023. The City did not submit an initial draft element to HCD for review until May 30, 2023. HCD issued written findings on August 30, 2023, which identified multiple revisions the City needed to make before its element could be certified as legally compliant. HCD subsequently sent the City a letter inquiring about its timeline for submitting an updated draft element and provided an April 1, 2024, deadline. The City responded and submitted a revised draft on September 5, 2024. HCD issued a second set of incompleteness findings on November 5, 2024. The City submitted a revised draft on March 21, 2025, which HCD deemed incomplete on May 20, 2025. The City adopted a housing element on November 4, 2025, which it then submitted to HCD for review on December 8, 2025. HCD replied on February 2, 2026, explaining that the element could not be deemed substantially compliant until the City completed its required RHNA rezoning actions and submitted both the rezones and revised element to HCD for approval. On March 9, 2026, a City consultant informed HCD that the rezoning would be completed by October 2026. HCD issued a notice of violation on March 24, 2026, after which it met with City staff on April 7 and 10, May 9, and June 10, 2026.

The City of Ridgecrest

Ridgecrest was required to adopt a compliant Sixth Cycle housing element by June 30, 2023. The City submitted an initial draft element to HCD for review on October 23, 2023. HCD issued written findings on January 17, 2024, which identified multiple revisions the City needed to make before its element could be certified as legally compliant. The City submitted a

revised draft on November 23, 2025, which HCD deemed incomplete on January 2, 2026. Since then, the City has not submitted a revised draft to HCD for review. HCD issued a notice of violation on March 24, 2026, after which it met with City staff on March 24, April 7 and 9, 2026. A revised draft remains outstanding.

The City of Turlock

Turlock was required to adopt a compliant Sixth Cycle housing element by December 31, 2023. On May 13, 2024, HCD sent a letter inquiring about the City's failure to submit a draft element for review. The City responded on June 4, 2024, explaining it would submit a draft by September 17, 2024, which it would then adopt by December 31, 2024. HCD replied on June 27, 2024, requesting a specific timeline for obtaining compliance and expressing concerns about the December 31, 2024 adoption date. The City and HCD corresponded about the element submission and review process until the City submitted an initial draft for review on January 31, 2025. HCD issued written findings on April 30, 2025, which identified multiple revisions the City needed to make before its element could be certified as legally compliant. On June 19, 2025, HCD issued a notice of violation due to the City's noncompliance with homelessness provisions and other housing element requirements. The City replied on July 2, 2025, with a timeline for submitted a revised draft. On September 18, 2025, the City submitted a revised draft, which HCD deemed incomplete on November 17, 2025. On March 24, 2026, HCD issued a notice of violation, after which it met with City staff on April 10 and 16, and June 22, 2026. The City submitted a subsequent revised draft on May 5, 2026. HCD deemed the element statutorily sufficient, but could not be certified as substantially compliant with the law until the City completed its necessary rezones. To date, the City has not completed the rezoning required in its adopted housing element.

Conclusion and Implications

The five petitions mark a coordinated effort between the Attorney General, HCD, and the Governor to achieve statewide compliance with the Housing Element Law. The Sixth Cycle sets an ambitious goal that requires local governments to plan for approximately 2.5 million additional homes throughout California. While two-thirds of the State's jurisdictions are or will soon be in compliance with the Law, the above five actions highlight the consequences for not timely preparing and adopting a housing element that HCD certifies as substantially compliant. The petitions come on the heels of a similar suit filed by the State against the City of Huntington Beach, where a May 2026 Superior Court decision ordered the city pay $160,000 in penalties with fines climbing to $50,000 a month until it reaches compliance. These latest lawsuits thus add to the Justice Department's growing list of enforcement proceedings that seek to ensure local governments meet their legal obligations to facilitate more housing for all income types.

The complaints are available at:

Calexico – https://oag.ca.gov/system/files/attachments/press-docs/calexico.pdf

Costa Mesa – https://oag.ca.gov/system/files/attachments/press-docs/costa-mesa.pdf

Half Moon Bay – https://oag.ca.gov/system/files/attachments/press-docs/half-moon-bay-complaint.pdf

Ridgecrest – https://oag.ca.gov/system/files/attachments/press-docs/ridgecrest.pdf

Turlock – https://oag.ca.gov/system/files/attachments/press-docs/turlock-complaint-002.pdf

(Bridget K. McDonald, Sara Helms)

RECENT FEDERAL DECISIONS

SCOPING DOES NOT EQUAL WAIVER: NINTH CIRCUIT REVIVES HFRA CHALLENGE

Alliance for the Wild Rockies v. Higgins,
___F.4th___, Case No. 24-1500 (9th Cir. July 16, 2026).

In *Alliance for the Wild Rockies v. Higgins* the United States Court of Appeals for the Ninth Circuit issued a published opinion on July 16, 2026, reversing summary judgment for the United States Forest Service (Forest Service) and remanding. The case concerns the decision to treat the Hanna Flats Good Neighbor Authority Project in the Idaho Panhandle National Forests as a collaborative restoration project categorically excluded from full National Environmental Policy Act (NEPA) review under the Healthy Forest Restoration Act (HFRA or Act). The appellate issue was whether Alliance forfeited its challenge by failing to argue during HFRA scoping that the project fell outside the statutorily defined wildland-urban interface. The majority held that no statute or regulation-imposed issue exhaustion and declined to create such a requirement for this process and claim.

Background

The Project and the Administrative Record

Beginning in 2016, the Forest Service developed the Hanna Flats Project with state participants, landowners, and conservation groups to address insect or disease infestation, hazardous fuels, and wildfire risk. The agency issued a Scoping Notice seeking public feedback and stating that the project area lay entirely within the wildland-urban interface defined by Bonner County. The notice also indicated that the agency might use HFRA's categorical exclusion from NEPA review.

Alliance submitted extensive comments but did not contend that the project fell outside HFRA's wildland-urban-interface definition. The Forest Service later issued a Decision Memo invoking 16 U.S.C. § 6591b(a) and concluding that the project satisfied the categorical exclusion. Alliance sued to enjoin the project.

A Protracted Procedural History

The litigation produced multiple District Court rulings and earlier Ninth Circuit appeals. The first federal District Court found that the Forest Service had not shown the project fell within the statutory interface and remanded without vacatur. The agency then issued a Supplemental Decision Memo, prompting a second action and a preliminary injunction.

In *Alliance for the Wild Rockies v. Petrick*, 68 F.4th 475 (9th Cir. 2023), the Ninth Circuit held that Alliance's comments had not alerted the Forest Service to the specific interface objection. It nevertheless remanded for the District Court to decide whether comments were legally required to preserve the issue. The prior panel also held that HFRA's statutory definition, not Bonner County's broader definition, controlled. After remand, the Forest Service withdrew the supplemental memorandum and reinstated its initial Decision Memo. The District Court then deemed the objection forfeited and granted summary judgment for the Forest Service.

The Ninth Circuit's Decision

No Statutory or Regulatory Exhaustion Requirement

The Ninth Circuit distinguished exhaustion of administrative remedies from issue exhaustion, also known as administrative waiver. Issue exhaustion requires a party to present a specific contention to the agency before seeking judicial review. Although Congress required administrative review and issue exhaustion for many HFRA projects, it excluded collaborative restoration projects from that review process. The Forest Service conceded that no other statute or regulation required issue exhaustion here.

The majority therefore asked whether to impose exhaustion judicially. That inquiry depends on both

the characteristics of the administrative process and the nature of the claim. The court concluded that HFRA scoping resembled the informal, non-notice-and-comment process addressed in *Alaska Survival v. Surface Transportation Board*, 705 F.3d 1073 (9th Cir. 2013), rather than formal notice-and-comment rulemaking.

Why HFRA Scoping Did Not Support Waiver

The court characterized scoping as an early, open, collaborative process used to obtain feedback while a project remains under development. HFRA did not require interested parties to comment, prescribe formal procedural guardrails, require briefs, or notify participants that failing to raise an issue would bar later judicial review. The Forest Service's notice and cover letter invited feedback but did not state that comments were required to preserve claims. Because participants were not responsible for developing legal issues adversarially, the majority found little justification for judicially imposed issue exhaustion.

The court also distinguished NEPA alternatives claims governed by *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council and Department of Transportation v. Public Citizen*. Those decisions require commenters to identify alternatives or concerns that an agency cannot reasonably evaluate unless presented. Alliance instead alleged that the Forest Service exceeded its statutory authority by applying the wrong legal definition. The agency had an independent obligation to apply HFRA correctly, and the Scoping Notice did not clearly disclose that Bonner County's definition would supply the legal basis for the exemption.

The Dissent and the Limits of the Holding

Judge Ryan D. Nelson dissented. He viewed administrative waiver as the general rule in informal rulemaking and concluded that Alliance had ample notice and opportunity to challenge the exemption. In his view, the majority improperly imported an adversariness analysis from Social Security adjudications into rulemaking and created uncertainty for agencies and reviewing courts.

The majority did not reach the exemption's merits. It reversed only the forfeiture ruling and remanded for the District Court to apply HFRA's statutory definition under the APA's arbitrary-and-capricious standard.

Conclusion and Implications

For California practitioners, *Higgins* is controlling Ninth Circuit authority in federal administrative litigation and is directly relevant to Forest Service projects within California. The decision limits judicially imposed issue exhaustion where scoping is informal and non-adversarial, no statute or regulation requires preservation, and the claim concerns statutory compliance rather than information or alternatives commenters were expected to supply.

The decision does not eliminate preservation requirements generally. Issue exhaustion remains significant in formal notice-and-comment proceedings, administrative processes with express objection rules, and NEPA claims involving alternatives or factual concerns never presented to the agency. Project opponents should continue to raise all reasonably apparent objections during scoping to build the record and avoid waiver disputes. Agencies should identify the legal definitions and statutory predicates supporting categorical exclusions and state clearly when failure to comment may affect later review. *Higgins* provides a narrower path around forfeiture, but it does not replace careful administrative participation. The court's published opinion is available here: https://cdn.ca9.uscourts.gov/datastore/opinions/2026/07/16/24-1500.pdf.

(Darien Key)

NINTH CIRCUIT AFFIRMS ENDANGERED SPECIES ACT APPLIES TO U.S. BUREAU OF RECLAMATION'S OPERATION OF THE KLAMATH PROJECT

Yurok Tribe v. U.S. Bureau of Reclamation, 179 F.4th 663 (9th Cir. 2026).

In Yurok Tribe v. U.S. Bureau of Reclamation, decided by the U.S. Court of Appeals for the Ninth Circuit, the court reviewed whether the U.S. Bureau of Reclamation (Reclamation) has authority to operate the Klamath Project in compliance with the federal Endangered Species Act. They further reviewed whether the U.S. District's Court's preemption determination was a "judicial taking" and whether the Colorado River abstention doctrine applied to this matter.

Background

The Klamath Project is a large water management project in northern California and southern Oregon which supplies water for irrigation as well as several national wildlife refuges. It is managed and operated by Reclamation. Recently, in response to new endangered species listings and consecutive critically dry years in the Klamath Basin, Reclamation completed Endangered Species Act (ESA) consultation with the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (FWS) (together: Federal Appellees). This resulted in requirements that Reclamation maintain water levels in Upper Klamath Lake and provide minimum stream flows in the Klamath River.

Procedural History

This appeal arises out of a complex procedural history. This case commenced in 2019 when the Yurok Tribe and other plaintiffs challenged Reclamation's 2019 ESA consultation. The Klamath Irrigation District and Klamath Water Users Association (together Appellants) intervened.

During this litigation, Klamath Irrigation District also filed a suit in Oregon state court compelling the Oregon Water Resources Department (OWRD) to enjoin Reclamation's release of water from Upper Klamath Lake for non-irrigation purposes. In response to the lawsuit, OWRD issued an order directing Reclamation to cease water distribution for ESA compliance purposes. NMFS and FWS filed a crossclaim in this action seeking declaratory relief that Reclamation has authority to operate the Klamath Project in compliance with the ESA. The District Court granted the agencies' summary judgment determining that the ESA applied to Reclamation's operation of the Klamath Project and that the OWRD order was preempted and unenforceable. OWRD subsequently withdrew the order.

The Klamath Irrigation District and the Klamath Water Users Association appealed. During this appeal, following the change of Presidential Administrations, the Federal Appellees withdrew their earlier legal position and moved to dismiss for lack of jurisdiction because of mootness and moved to vacate the district court's judgment. The Appellants also moved to dismiss the case and vacate the District Court's judgment. The Ninth Circuit denied the motions concluding that the declaratory relief on whether the ESA applied to the Klamath Project would give the parties meaningful relief and presented a live controversy for the court's decision.

The Ninth Circuit's Decision

The ESA applies to Reclamation's Operation of the Klamath Project

The Ninth Circuit held that case law requires the determination that Reclamation's operation of the Klamath Project is subject to compliance with the ESA. The court pointed to Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, a 1999 case in which the Ninth Circuit ruled on this very issue. Despite contentions from Appellants that the Patterson opinion is mere dicta and has been superseded, the court held that Patterson's holding, that the Bureau of Reclamation has authority over the Klamath Project and must comply with the ESA in its operation, is good law. This was because the reasoning in Patterson was integral to the decision and may not be considered mere dicta.

Further, the Ninth Circuit held that more recent cases, including the Supreme Court case, Nat. Ass'n

of Home Builders v. Defs. Of Wildlife, 551 U.S. 644 (2007), and the Ninth Circuit decision in Nat. Res. Def. Council v. Haaland, 102 F.4th 1045 (2024), do not affect the Patteson holding. Appellants argued that Reclamation did not have "discretion" to act for the benefit of protected species, and thus, under these more recent cases, the ESA implementing regulations do not apply. The court disagreed with this interpretation of Home Builders and Haaland. Home Builders held that Section 7(a)(2) of the ESA applies only to discretionary agency actions and does not apply to actions that an agency is required to undertake by a conflicting federal statute. The court stated that the baseline assumption in Home Builders was that Section 7(a)(2) applies to an "agency action," to which the conflicting statute rule is a narrow exception. Here, there was no conflicting statutory mandate and thus Home Builders did not apply to this case, nor did it affect Patterson's holding.

Under Haaland, the court held that the terms of the executed water supply contracts at issue in that case did not give the Bureau of Reclamation sufficient discretion to require reinitiation of consultation when implementing the renewed settlement contracts. However, nothing in Haaland ever asserted that the Bureau of Reclamation did not have to comply with the ESA in its operation of the Central Valley Project. Additionally, here the Bureau has ongoing obligations under its water supply contracts and maintains discretion to implement ESA actions. The court thus held that Haaland did not affect the Patterson holding either.

The District Court's Ruling was Not a Judicial Taking

Appellants further contended that the District Court's ruling that the OWRD order was preempted was a judicial taking of Klamath Irrigation District's property interests in its water rights. The court notes that four Supreme Court justices have recognized that a state court may cause a "judicial taking" if, as a matter of adjudicating state-law property rights, it "declares that what was once an established right of private property no longer exists." (Stop the Beach Renourishment, Inc. v. Florida Dep't of Env't Prot., 560 U.S. 702, 715 (2010) (plurality opinion).) The Ninth Circuit questioned whether "judicial takings" claims are available since such a claim has not been recognized by a majority of Justices. But, even if it were to be a valid claim, the Ninth Circuit determined that the ESA question in this action did not adjudicate property rights; no water rights were adjudicated in this action. Thus, there was no possible "judicial taking."

The Doctrine of Prior Exclusive Jurisdiction and Colorado River Abstention Did Not Apply

Lastly, the Appellant contended that the federal courts did not have jurisdiction over this crossclaim action under the doctrines of prior exclusive jurisdiction and Colorado River abstention. The Ninth Circuit found these claims to be without merit.

The Klamath Irrigation District emphasized that if "a state or federal court has taken possession of property, or by its procedure has obtained jurisdiction over the same, then the property under that court's jurisdiction is withdrawn from the jurisdiction of the courts of the other authority as effectually as if the property had been entirely removed to the territory of another sovereign." (Sexton v. NDEX West, LLC, 713 F.3d 533, 536 (2013) (internal quotation marks and citations omitted).) The Ninth Circuit held that the doctrine of prior exclusive jurisdiction, however, does not apply here because the question of this action does not involve the adjudication or administration of any provisionally determined water rights. The state court reviewing the Klamath Basin Adjudication did not determine the Bureau's ESA obligations, nor does the state court have jurisdiction over the federal question whether ESA applies. The Ninth Circuit thus held that the prior exclusive jurisdiction doctrine did not apply.

Similarly, the Colorado River abstention argument was also rejected. Under the doctrine of Colorado River abstention, a federal court may decline to adjudicate federal water rights claims as against other claimants, where relative rights in a common source are being comprehensively adjudicated in a state-court McCarran Amendment proceeding. (Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 809–21. (1976)) The current matter does not involve establishment or adjudication of federal water rights claims, and the ESA issue here was not adjudicated in the Klamath Basin Adjudication. The Ninth Circuit held there was no reason for the District Court to have abstained in this matter.

The Dissent

Circuit Judge Ryan Nelson dissented to the majority's analysis of whether the ESA applies to the Klamath Project in this action. The dissent found that Patterson is irreconcilable with Home Builders and Haaland. Judge Nelson asserted that mere control of the Klamath Project is insufficient to establish the applicability of ESA section 7 obligations following Home Builders and Haaland. Instead, new precedent requires the court to ask whether there is sufficient discretion to act on behalf of endangered or threatened species despite Congressionally mandated action. Judge Nelson stated, here, the Congressionally mandated action is the congressionally authorized and approved water contracts. Accordingly, the majority failed to properly grapple with the implications of Home Builders and Haaland and alternatively the dissent found that Reclamation's contracts here impose non-discretionary duties. Judge Nelson would, therefore, remand for proper analysis under Haaland including review of the terms of the contracts. Under the proper legal analysis, the dissent found that no statutory provisions or contracts provide the agency with discretion sufficient to trigger the ESA.

Conclusion and Implications

In the end, the Ninth Circuit held:

> Following Ninth Circuit precedent in Patterson and its progeny, we affirm the district court's holding that the ESA applies to the Bureau of Reclamation's operation of the Klamath Project. We therefore affirm the district court's ruling in phase one. We also hold that the district court's ruling did not constitute a 'judicial taking' and that the district court had jurisdiction to decide the crossclaim.

The Ninth Circuit held that the lower courts had not adjudicate any water rights, so no judicial taking had taken place, and the lower courts had jurisdiction to decide the Endangered Species Act's ESA's applicability to the Klamath Irrigation Project.

The Ninth Circuit's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2026/06/17/23-15521.pdf.
(Sara Helms, Bridget McDonald)

DISTRICT COURT DENIES PRELIMINARY INJUNCTION OVER SHASTA DAM OPERATIONS, UPHOLDING U.S. BUREAU OF RECLAMATION'S WATER PLAN

San Francisco Baykeeper v. U.S. Bureau of Reclamation,
___F.Supp.4th___, Case No. 2:26-cv-00671-JLT-EPG (E.D. Cal. Aug. 3, 2026).

The U.S. District Court for the Eastern District of California denied three environmental organizations' request for a preliminary injunction requiring the U.S. Bureau of Reclamation (Reclamation) to modify its 2026 operations of Shasta Dam and Reservoir. The court classified the requested relief as a mandatory injunction and concluded that the plaintiffs failed to satisfy the heightened standard applicable to such relief.

Background

On March 2, 2026, San Francisco Baykeeper, the Center for Biological Diversity, and Friends of the River filed suit against Reclamation, the National Marine Fisheries Service, and several federal officials. The broader lawsuit alleges that the federal defendants violated the federal Endangered Species Act and Administrative Procedure Act in connection with Reclamation's operation of the Central Valley Project. Among other allegations, the plaintiffs contend that Reclamation failed to comply with protective measures and incidental-take limits established by the National Marine Fisheries Service's (NMFS's) 2024 Biological Opinion (BiOp) for winter-run chinook salmon, Central Valley steelhead, and North American green sturgeon.

The preliminary-injunction motion addressed a narrower issue: Reclamation's operation of Shasta Dam and Reservoir during the summer and early fall

of 2026. Keswick Dam prevents winter-run chinook salmon from reaching their historic upstream spawning habitat. Consequently, the survival of eggs deposited downstream depends substantially on Reclamation's release of sufficiently cold water from Shasta Reservoir. The 2024 BiOp established a "Shasta Framework" for managing water temperature and reservoir storage while accounting for fish protection, water-delivery obligations, flood control, and other authorized project purposes.

In the framework, Reclamation designated 2026 as a "Bin 2A" year based on projected end-of-April and end-of-September reservoir storage. The plaintiffs argued that the high end-of-April storage level required Reclamation to treat 2026 as a more protective Bin 1 year and preserve at least 2.4 million acre-feet of water through September unless achieving that target was impossible. Reclamation responded that the framework uses both April storage and projected September storage to make the initial classification and that the forecasts therefore supported its Bin 2A designation.

The plaintiffs sued Reclamation under sections 7 and 9 of the Endangered Species Act and the Administrative Procedure Act, alleging that Reclamation was operating outside the 2024 biological opinion's Shasta Framework. The plaintiffs then sought emergency relief requiring Reclamation to reduce releases from Shasta Reservoir, prepare a new operating plan, and operate consistently with the plaintiffs' interpretation of the Bin 1 requirements. The court denied the plaintiffs' request for a temporary restraining order on July 9, 2026, and subsequently denied their motion for a preliminary injunction.

The District Court's Ruling

Although the order is not a final ruling on the merits, it indicates that the court views Reclamation's interpretation of the Shasta Framework as better supported by the governing documents. The court expressly stated that the plaintiffs did not appear likely to succeed on the claim advanced in the motion and failed to make the stronger showing required for a mandatory injunction.

In its ruling, the District Court first rejected the plaintiffs' argument that the requested injunction would merely preserve the status quo. The proposed relief would have required Reclamation to conduct new modeling, prepare and implement a new temperature-management plan, and materially change its reservoir operations. Because the requested order would compel affirmative action, the court treated it as a mandatory injunction. The plaintiffs therefore had to demonstrate that the law and facts clearly favored their position, not merely that they were likely to prevail.

Second, the court found Reclamation's interpretation of the 2024 BiOp more persuasive. Although language in Table 25 of the BiOp supported the plaintiffs' position, the court concluded that the underlying Proposed Action, decision tree, and operational modeling supported using both projected April and September storage to determine the applicable Bin. The court suggested that Table 25 may have inaccurately summarized the end-of-April storage ranges described in the Proposed Action. The court used the interpretive framework from Kisor v. Wilkie as guidance but did not ultimately rely on agency deference. The Court directly addressed the interpretations of the BiOp, and underlying data to support and, in doing so, made clear that the decision was not based on any level of agency-deference but, instead, based on a finding that Reclamation's position was more factually supported and, therefore, did not assess questions of deference.

Conclusion and Implications

The ruling leaves Reclamation's 2026 Shasta operations unchanged by the requested federal injunction. It does not, however, finally approve those operations or resolve the plaintiffs' broader allegations concerning incidental take, reinitiation of ESA consultation, or the validity and application of the 2024 BiOp.

Legally, the decision underscores the high threshold plaintiffs face when seeking mandatory injunction against federal agency operations, particularly when relying on narrow claims regarding BiOp framework, and addresses the importance of a fact-based assessment, while declining to address to questions of agency deference. The court's order is available here: https://www.courthousenews.com/wp-content/uploads/2026/08/baykeeper-injuction-denied-ruling.pdf. (Stephanie Cook, Miles Krieger)

RECENT CALIFORNIA DECISIONS

USE, NOT RISK—CALIFORNIA SUPREME COURT CLARIFIES CEQA'S CLASS 1 EXEMPTION

Sunflower Alliance v. Department of Conservation et al.,
Reabold California, LLC, Real Party in Interest and Appellant, 105 Cal.App.5th (Cal. 2026).

Sunflower Alliance v. Department of Conservation et al., Reabold California, LLC, Real Party in Interest and Appellant was decided by the California Supreme Court on June 25, 2026. The Court held that "negligible or no expansion of existing or former use" in the California Environmental Quality Act's (CEQA) Class 1 categorical exemption refers to the nature or degree of a change in use, not to the environmental risk created by that change. It reversed the First District Court of Appeal and remanded for reconsideration under the correct standard.

Background

The Proposed Conversion and Agency Approval

Reabold proposed to reopen the Ginochio Well in the Brentwood Oil Field. The well was constructed in 1963, used for oil and gas extraction until 1984, and later plugged. Reabold sought approval from the California Department of Conservation's Geologic Energy Management Division, or CalGEM, to convert it into a water injection well for treated wastewater from nearby oil operations.

Reabold's active wells produced approximately 300 barrels, or 12,600 gallons, of wastewater each day. The company proposed injecting approximately 10.95 million barrels into an exempt aquifer over 20 years rather than trucking the wastewater offsite.

CalGEM and water regulators initially raised concerns about fluid migration into usable groundwater. The record identified a nearby fault, abandoned wells that could act as conduits, and active water wells drawing from overlying aquifers. After further technical submissions, CalGEM imposed conditions requiring pressure testing, reporting, and recalculation of the zone of endangering influence if actual conditions exceeded estimates.

CalGEM then issued a project approval letter and notice of exemption. It concluded that the project qualified under CEQA Guidelines section 15301 because it involved a minor alteration of an existing well and a negligible expansion of former use. It also found that the unusual circumstances and cumulative impacts exceptions did not apply.

At the Trial Court and Court of Appeal

Sunflower Alliance petitioned for a writ of mandate, arguing that converting a plugged extraction well into an active wastewater injection well was not a negligible expansion of use. The Contra Costa County Superior Court agreed, concluding that injecting wastewater was materially different from extracting oil and gas, and directed CalGEM to set aside the notice of exemption.

The Court of Appeal reversed. It treated the relevant inquiry as whether the changed use created more than a negligible risk of environmental harm. Because regulators had concluded that the wastewater would remain confined and the risks were negligible, the court held that the project fit within Class 1.

The Supreme Court's Decision

The Supreme Court rejected that risk-based interpretation. Section 15301 requires an agency to compare the nature and scope of the proposed use with the facility's existing or former use.

The Court also rejected Sunflower Alliance's argument that any new use necessarily falls outside Class 1. A new use may qualify, but only when the change in the nature or degree of use is itself negligible. The examples in section 15301, including adding bicycle lanes to an existing street and converting a residence to office use, show that some changes in use remain within the exemption.

Reasoning and CEQA's Review Structure

The Court emphasized that categorical exemptions reflect determinations by the Secretary of the California Natural Resources Agency that specified classes of projects typically do not have significant environmental effects. A lead agency or reviewing court may not replace the text of an exemption with its own assessment that a particular project appears environmentally benign.

A contrary rule would collapse CEQA's separate analytical stages. The exemption inquiry precedes the detailed review that may result in a negative declaration, mitigated negative declaration, or environmental impact report. Treating low environmental risk as the Class 1 test would require an abbreviated environmental review at the exemption stage without the public participation and disclosure safeguards associated with formal CEQA review.

Environmental effects remain relevant when an exception is asserted, particularly the unusual circumstances exception. That inquiry is distinct and requires both unusual circumstances and a fair argument that those circumstances may cause a significant environmental effect.

Issues Left Open

The Supreme Court did not decide whether substantial evidence supports CalGEM's determination that this well conversion is a negligible change in use. That issue returns to the Court of Appeal. The Court also declined to decide whether CalGEM's conditions were permissible regulatory requirements or impermissible mitigation measures used to secure an exemption.

Justice Kruger concurred, emphasizing that "negligible" is a relative term requiring a frame of reference. She suggested that agencies and courts may use the examples in section 15301 as benchmarks. Her concurrence recognized a limited role for environmental considerations while agreeing that environmental risk cannot be the sole test.

Conclusion and Implications

The decision clarifies that the threshold Class 1 inquiry is functional. Agencies must identify the former or existing use, define the proposed use, and determine whether the change in nature, intensity, duration, or operational scope is negligible. Evidence that a project is well regulated or unlikely to cause harm does not independently establish eligibility for the exemption.

Project proponents should build an administrative record that directly compares former and proposed uses rather than relying primarily on technical evidence of environmental safety. Because the Court remanded without deciding the exemption's ultimate applicability, further proceedings may provide additional guidance on when a new use is sufficiently analogous to a former use to qualify as negligible under section 15301. The Supreme Court's opinion is available online at: https://www4.courts.ca.gov/opinions/documents/S287414.PDF.
(Darien Key)

BUILDER'S REMEDY MEETS ITS MATCH IN THE COASTAL ACT—SECOND DISTRICT COURT ADDRESSES HOW THE BUILDER'S REMEDY INTERACTS WITH COASTAL REGULATION

New Commune DTLA LLC v. City of Redondo Beach,
___Cal.App.5th___, Case No. B337897 (2nd Dist. July 30, 2026).

On July 30, 2026, the Second District Court of Appeal published its decision in *New Commune DTLA LLC v. City of Redondo Beach*, the first published appellate decision to squarely address how the builder's remedy provisions of the Housing Accountability Act (HAA), Gov. Code § 65589.5, interact with the requirements of the Coastal Act and a Coastal Commission–certified Local Coastal Program (LCP). While many housing law cases over the last few years have underscored the supremacy of state housing laws over contradictory local laws, the New Commune case asked a court to address a more complex situation. As the opening of the opinion notes, the case involves a clash of "two statutory schemes that promote state policies over the interests of local governments." The Court of Appeal's holding sig-

naled that while the Builder's Remedy may triumph over local land use regulations, it cannot be used to evade land use regulations enacted under a state law scheme.

Background

New Commune DTLA, LLC applied to the City of Redondo Beach for permits to build a 30-unit condominium project, including six affordable units, on a parcel within the City's coastal zone. The City lacked an HCD-certified housing element at the time the application was submitted, which the parties agreed triggered the HAA's builder's remedy provisions. However, the City's LCP, certified by the Coastal Commission, designated the parcel only for public access uses, coastal-recreational facilities, and boating- and fishing-related services; residential uses were not permitted. After HCD later certified the City's housing element, the City notified the developer it would not process the application without an application for an LCP amendment because it proposed uses not permitted under the LCP. The developer petitioned for a writ of mandate to compel approval, citing the Builder's Remedy limitations on the power of cities to deny housing projects that fail to comply with local land use regulations. The Los Angeles Superior Court denied the petition, and the Court of Appeal affirmed.

The Court of Appeal's Decision

The Court of Appeal noted that HAA specifies circumstances under which a city may deny a Builder's Remedy project. One of these circumstances, under Gov. Code § 65589.5, subd. (d)(3), is when (1) denial is required to comply with a specific state law, and (2) no feasible method exists to comply with that law short of denial. The court held the City satisfied both prongs.

On the first prong, the court explained that a certified LCP under the Coastal Act "embodies policies that are 'not solely a matter of local law but embody state policy.'" (Opn. at p. 6). In particular, the court notes that the Coastal Act requires formal amendment of an LCP, including Coastal Commission review, for any action that authorizes a use of land that is not permitted or conditionally permitted in the LCP. Accordingly, the court determined that the City was required to deny the project under the Coastal Act absent an LCP amendment. The court distinguished the project's non-conformity with LCP use provisions from a hypothetical project's non-conformity with development standards under an LCP—leaving open the possibility that the Builder's Remedy could operate to authorize projects that comply with use restrictions under an LCP, but fail to conform with more traditional development standards, such as heights or setbacks.

On the second prong, because the developer never sought an LCP amendment, the court reasoned that denial was the only legally feasible option. (Opn. at p. 8.) The court also invoked the HAA's own savings clause, quoting it for the proposition that nothing in the statute "shall be construed to relieve" a local government of its obligations under the Coastal Act. (Gov. Code, § 65589.5, subd. (e); Opn. at p. 8.)

Conclusion and Implications

The result in *New Commune* is notable when set against the last decade's housing-streamlining case law, in which California courts have generally read the HAA's pro-housing provisions expansively against local discretion. *New Commune* signals that courts may be hesitant to extend that same expansive reading where doing so would reach into a competing statewide regulatory scheme administered by a separate agency. The opinion acknowledges the "friction in this conclusion," especially given the HAA's goal of providing affordable housing, but ultimately the court was not comfortable with an interpretation that would effectively strip the Coastal Commission of the power to review and approve LCP land use changes provided under state statute. (Opn. at p. 8.)

That said, *New Commune* is likely not the last word on this issue. The Court of Appeal was not asked to decide whether the HAA could override the Coastal Act on more sympathetic facts, for instance, a project proposed on a residentially designated parcel that deviates from technical development standards, which the court itself flagged as potentially distinguishable. For now, *New Commune* stands as the most significant rebuke that a court has provided to the Builder's Remedy, demonstrating that while it may be a powerful tool in an applicant's arsenal, it has its limits. The court's opinion is available online at: https://www4.courts.ca.gov/opinions/documents/B337897.PDF.

(Niran Somasundaram)

SECOND DISTRICT COURT FINDS COUNTY "DECLINED TO ACT" UNDER THE COASTAL ACT GIVING THE COASTAL COMMISSION INDEPENDENT ENFORCEMENT JURISDICTION

Sable Offshore Corp., et al., v. California Coastal Commission, ___Cal.App.5th___, Case No. B347601 (2nd Dist. June 17,2026).

On June 17, 2026, the California Court of Appeal, Second Appellate District affirmed a preliminary injunction enforcing a California Coastal Commission (Commission) cease and desist order against Sable Offshore Corp. (Sable) and Pacific Pipeline Company (Pacific). The legal dispute centered on whether the Commission possessed statutory authority under the Public Resources Code section 30810 to intervene when Santa Barbara County returned pipeline clearance applications without taking formal action, claiming the proposed repair work was covered by existing 1986 permits. The appellate court held that a local government's explicit refusal to process or act upon permit applications constitutes "declining to act" under the Coastal Act, thereby triggering the Commission's independent enforcement jurisdiction. The decision clarifies the scope of state regulatory authority over coastal infrastructure, establishing that local determinations to forego new permit reviews do not preempt state-level enforcement actions intended to prevent potential environmental harm and distinguishing between local "action" and "decision."

Background

The litigation in Sable Offshore Corp.arises from infrastructure originally approved in 1986 under the California Coastal Act. In 1986, Santa Barbara County issued multiple Coastal Development Permits (CDPs) authorizing the construction of the Las Flores Pipelines within the coastal zone. Construction of the onshore crude oil pipelines was completed in 1990, and the system was operational until it shutdown following the 2015 Refugio Beach oil spill.

In 2024, Sable and Pacific acquired the Last Flores Pipelines and conducted maintenance and repair activities across 121 designated anomaly sites in unincorporated Santa Barbara County. On September 27, 2024, after requesting that Santa Barbara take enforcement action, the Commission issued a notice of violation directing Sable to cease unpermitted maintenance work. This was followed on November 12, 2024, by an Executive Director cease and desist order issued pursuant to Public Resources Code section 30809, which ordered Sable to submit a complete CDP application to the County for both prospective and post development.

In late 2024, Sable submitted zoning clearance applications to Santa Barbara County. On February 12, 2025, the County notified Sable that it would return the applications without taking action, determining that the repair work was already authorized by the original 1986 CDPs. The Commission subsequently issued a second executive cease and desist order on February 18, 2025, prompting Sable to file a verified complaint for declaratory and injunctive relief. On April 10, 2025, the Commission formally issued a statutory cease and desist order under Public Resources Code section 30810, alongside a restoration order and administrative penalties. Following observed construction activities, the Commission filed a cross-complaint and sought injunctive relief, culminating in a June 10, 2025, trial court order granting a preliminary injunction against Sable, which Sable appealed

Issues on Appeal

The primary legal issue was whether the Commission possessed statutory jurisdiction under Public Resources Code section 30810, subdivision (a)(2), to issue a cease and desist order enforcing local coastal program requirements. Under section 30810, the Commission is authorized to issue enforcement orders if a local government "declines to act, or does not take action in a timely manner, regarding an alleged violation which could cause significant damage to coastal resources." Sable argued that the Commission lacked jurisdiction because Santa Barbara County had taken affirmative action by reviewing the 1986 permits and formally deciding that no new CDPs were required.

The Court of Appeal's Decision

The appellate court rejected Sable's construction of the statute, holding that equating a local government's decision to forego permit action with "taking action" would render section 30810 self-negating. The court noted that the statutory interpretation requires harmonizing the provision of the Coastal Act to effectuate legislative intent, which mandates liberal construction to protect coastal resources. The court noted that Santa Barbara County expressly communicated to both Sable the Commission that it was returning the applications without taking action on a permit or development application. By deliberately choosing not to intiate permit proceedings or enforcement mechanisms, the County "declined to act," thereby satisfying the statutory prerequisite for Commission intervention.

The court further reviewed the 1993 legislative amendments to section 30810, noting that the Legislature intentionally expanded the Commission's enforcement authority to allow state intervention when local agencies fail or refuse to address chronic or potential costal violations. The majority distinguished the California Supreme Court's decision in Shear Development Co., LLC v. California Coastal Commission, explaining that Shear addressed appellate jurisdiction over permit decisions under section 30603, not section 30810, which governs independent state enforcement action.

The court also addressed procedural, equitable, and due process arguments, finding that 30803 mandates the issuance of a preliminary injunction after a prima facie showing of a Coastal Act violation and finding that the trial court provided sufficient opportunity for briefing.

Associate Justice Yegan dissented, arguing that the Commission lacked jurisdiction because Santa Barbara County had in fact acted through its interpretation of the perpetual maintenance provisions of the comprehensive 1986 CDP. The dissent argued that the original 1986 permit contemplated ongoing repairs for the operational life of the pipeline, and that the County's formal determination of permit compliance did not constitute a declination to act.

Conclusion and Implications

The Second District Court of Appeal's decision reinforces the primacy of state regulatory authority under the California Coastal Act. By holding that the local government's refusal to process permit applications constitutes "declining to act," the ruling establishes that local determinations of permit exemption cannot be used to insulate development activities from state-level enforcement. The decision confirms that the Coastal Commission retains direct statutory authority under section 30810 to independently evaluate alleged unpermitted development and issue binding enforcement orders whenever local jurisdictions elect not to exercise regulatory oversight.

For infrastructure owners and operators within California's coastal zone, the decision highlights the necessity of obtaining explicit regulatory consensus from state authorities, rather than relying solely on local agency interpretations of historical permits. The ruling further confirms that mandatory statutory injunctions under section 30803 bypass traditional equitable balancing tests, prioritizing prima facie statutory compliance. Ultimately, the opinion strengthens the Coastal Commission's enforcement mechanisms, ensuring that state environmental policies prevail over local administrative passive decisions when it comes to protecting coastal resources. The court's opinion can be found here: https://www4.courts.ca.gov/opinions/documents/B347601.PDF. (Miles Krieger)

FOURTH DISTRICT COURT HOLDS THAT AN AGREEMENT NOT DIRECTLY RESULTING IN A CHANGE TO THE ENVIRONMENT IS EXEMPT FROM CEQA

The Protect Our Communities Foundation v. City of San Diego,
121 Cal.App.5th 449 (4th Dist. 2026).

On May 26, 2026, the Fourth District Court of Appeal issued a *partially* published decision in the case *The Protect Our Communities Foundation v. City of San Diego*. There, the nonprofit "Protect Our Communities Foundation" challenged the City of San Diego's (City) award of gas and electric franchises to San Diego Gas & Electric Company (SDG&E). Among several claims, Protect Our Communities alleged that the City's approval of the franchises and associated agreements violated the state constitution, the City Charter, and the California Environmental Quality Act (CEQA). The Court of Appeal's decision with respect to Protect Our Communities' CEQA allegation is unpublished.

Background

Since at least 1920, SDG&E has been the electricity and natural gas provider in the City. In 1970, the City entered into 50-year franchise agreements with SDG&E, set to expire in 2020. In anticipation of that expiration date, the City solicited bids for new franchise agreements. After two rounds of bidding, the City found SDG&E to be the sole bidder.

After some negotiation, the City and SDG&E agreed to the terms of the franchise agreements, which the City then put before the City Council for approval. The City concluded that award of the franchises constituted a "fiscal and administrative activity of a government that will not result in a direct or indirect physical change in the environment" and that award of the franchises was, therefore, not subject to CEQA. The City cited to Section 15060(c) of the CEQA Guidelines (contained in Title 14 of the California Code of Regulations). Specifically, Section 15060(c) states that, after an application is deemed complete and during a preliminary review of a project to determine whether the activity is subject to CEQA, that an activity is not subject to CEQA if it "will not result in a direct or reasonably foreseeable indirect physical change in the environment."

The City approved the proposed agreements in June of 2021. The City later filed a notice of exemption with the San Diego County Clerk, reflecting the City Council's conclusion that the approval of the franchise agreements was exempt from CEQA. Protect Our Communities filed suit the following month, alleging several causes of action, including the purported CEQA violation.

The Court of Appeal's Decision

What is a "Project" under CEQA?

In evaluating Protect Our Communities' claim, the trial court concluded that the ordinances were a project for the purposes of CEQA "because they allowed SDG&E to construct, maintain, and use pipes, poles, wires and appurtenances to distribute gas and electricity, and therefore it was reasonably foreseeable that the ordinances could result in new construction causing environmental change." However, the trial court also concluded that the ordinances were categorically exempt from environmental review under the "existing facilities" exemption.

The first step in conducting a CEQA analysis is to determine whether an activity is subject to CEQA in the first place ("i.e., whether the proposed activity [is] a 'project'). Public Resources Code section 21065 explains that a "Project" (as is defined in CEQA) is an "activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." Courts have explained that reasonably foreseeability requires a "clear link between the activity and change." Otherwise, an activity will not cause a physical change in the environment if that connection is too week or speculative.

The CEQA Guidelines, however, expressly excludes from the definition of a project the "creation of government funding mechanisms or other government fiscal activities, which do not involve any commitment to any specific project which may result

in a potentially significant physical impact on the environment." (CEQA Guidelines, § 15378(b)(4).) Additionally, the Guidelines defines "approval" as "the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person." (CEQA Guidelines, § 15352(a).)

Applying these definitions, the Court of Appeal in *The Protect Our Communities* reasoned that the franchise approvals did not authorize any new development, establish new land uses, or encourage any population growth. Rather, they "merely establish a funding and administrative structure" without authorizing any particular development or construction. Moreover, any subsequently proposed development will be subject to its own development approvals and, consequently, its own CEQA approvals (as applicable).

Conclusion and Implications

While the decision in *The Protect Our Communities* seems straightforward to CEQA practitioners, it should provide assurances to municipalities and any party seeking to enter into a contract with a municipality that the mere act of entering into an agreement does not necessarily trigger CEQA review. Such exempt agreements must not result in any directly foreseeable physical changes to the environment. This could limit the threats posed by neighborhood groups and other opponents seeking to slow or stop agreements between a municipality and private entities. The court's *partially* published opinion is available here: https://www4.courts.ca.gov/opinions/documents/D083588.PDF.
(Braeden Mansouri)

LEGISLATIVE UPDATE

This Legislative Update is designed to apprise our readers of potentially important land use legislation. When a significant bill is introduced, we will provide a short description. Updates will follow, and if enacted, we will provide additional coverage.

We strive to be current, but deadlines require us to complete our legislative review several weeks before publication. Therefore, bills covered can be substantively amended or conclusively acted upon by the date of publication.

California Environmental Quality Act

AB 1699 (Rogers)—This bill was ordered to third reading on August 24, 2026. This bill would establish the Good Fire Act to extend the Prescribed Fire Liability Pilot Program and facilitate continued beneficial burning to meet the State's forest treatment goals. Among other things, this bill includes an exemption from the requirements of the California Environmental Quality Act (CEQA) for actions taken by CAL FIRE to assist in implementation of prescribed fire or cultural burning projects that do not otherwise require environmental review.

AB 2234 (Papan)—This bill was ordered to third reading on August 26, 2026. This bill would change the definition of "geothermal exploratory projects" under CEQA to include:

> . . .equipment and activities necessary to establish interconnectivity between wells and reservoirs whose chief and original purpose is to evaluate the presence and characteristics of geothermal resources before commencement of a geothermal field development project.

The bill would further specify that wells can be located within one half mile from a commercial scale geothermal development well, as measured from all points along the wellhead location and well course, including the bottom of the well. The bill further creates geothermal technology pilot projects and requires the Geologic Energy Management Division (CalGEM) to be the lead agency for a geothermal technology pilot project, though CalGEM may delegate its lead agency status to a county in certain circumstances, as specified.

AB 2410 (Ellis/Gallagher)—This bill was re-referred to the Committee on Natural Resources and Water on June 24, 2026. The bill would exempt critical fuels reduction projects, as defined, done in communities in high fire threat districts or very high fire hazard severity zones from the requirements of CEQA, so long as the reduction meets one of the listed criteria defining a critical fuels reduction project. The bill includes a sunset date of January 1, 2030.

AB 2569 (Hart)—This bill was held under submission on May 14, 2026. The bill would revise the definitions of "environment" and "significant effect on the environment," to include impacts on "people," as specified. Specifically, the term "environment" would include the health and safety of people affected by the physical conditions at the location of the project and the term "significant effect on the environment" would include exposure of people, either directly or indirectly, to a substantial existing or reasonably foreseeable natural hazard or adverse condition of the environment. The bill would also require that an Environmental Impact Report include a statement on any significant effects that may result from locating a proposed project near, or attracting people to, existing or reasonably foreseeable natural hazards or adverse environmental conditions.

SB 887 (Padilla)—This bill was ordered to third reading on August 21, 2026. As amended, this bill would define "data center" to include a facility, or part of a facility, that houses computing infrastructure, including graphics and central processing units, servers, storage devices, networking equipment, and associated power and cooling systems, for the primary purpose of processing, storing, or distributing electronic data. The bill would specify that data centers as defined are not ministerial projects that would be exempt from the requirements of CEQA. Nor would data centers be eligible for use of other categorical exemptions under CEQA. The bill provides; however,

that the Jobs and Economic Improvement Through Environmental Leadership Act of 2021, which allows for certain CEQA streamlining benefits, would apply to data centers, subject to certain conditions.

SB 954 (Blakespear)—This bill was passed and ordered to the Senate on August 26, 2026. This bill would revise the definition of "natural and protected lands" under CEQA to include habitats for protected species identified as candidate, sensitive, or species of special status by State or federal agencies, thereby excluding such lands from a number of CEQA exemptions. This bill would also exempt projects consisting exclusively of a family day care home, as defined, if those homes are not located in an area zoned for industrial use or within 3,200 feet of a facility that actively extracts or refines oil or natural gas. The bill would also revise the exemption for advanced manufacturing facility projects to require those projects meet certain specified requirements.

SB 1085 (Durazo)—This bill was passed and ordered to the Assembly on August 26, 2026. This bill would extend the requirements of SB 610 (2001) and SB 221 (2021), often referred to as the "show me the water" bills, which require identification of a public water supply and preparation of a water supply assessment as part of preparation of an Environmental Impact Report (EIR) or Negative Declaration/ Mitigated Negative Declaration (ND/MND). This bill would apply those requirements to projects that rely on a CEQA exemption or ministerial approval process intended to streamline permitting for housing, commercial, and industrial development projects. The bill would require a local agency to identify any water system whose service area includes the project site and any water system adjacent to the project site that is a public water system that may supply water for the project at the time it determines whether CEQA applies, and if the local agency is not able to identify any public water system, a water supply assessment must be prepared.

SB 1326 (Wahab)—This bill was held under submission on August 13, 2026. The bill would modify the definition of tribal cultural resource to, among other things, include a site, feature, place, cultural landscape, sacred place, or object with cultural value to a California Native American tribe that is identified by the Native American Heritage Commission as a sacred place, as provided, or included in a local tribal register. The bill would also revise and recast existing provisions of CEQA that require public agencies to avoid damaging effects to tribal cultural resources when feasible and provide avoidance and minimizations measures for consideration to instead require a public agency to adopt mitigation measures to avoid or minimize the significant adverse impacts to tribal cultural resources. The bill would require avoidance and preservation of the resource in place to be considered when requested by the consulting California Native American tribe, and if avoidance and preservation are determined to be infeasible, the bill would require the lead agency to demonstrate and document the basis for that determination with substantial evidence and to incorporate other measures to avoid or minimize significant adverse impacts to the resource. The bill would authorize the consulting California Native American tribe to identify culturally appropriate mitigation measures, which the bill would require the lead agency to consider and incorporate, to the extent feasible, in developing mitigation and treatment measures. This bill would also require the lead agency, if it elects not to use tribal methods and standards or tribal traditional knowledge in the identification of, and the adoption of avoidance, mitigation, and treatment measures for, tribal cultural resources, to explain its decision, supported by substantial evidence, in the environmental documents for the project.

Density Bonus Law

AB 2433 (Alvarez)—This bill was ordered to third reading on August 24, 2026. This bill aims to ensure that projects receiving a density bonus deliver affordable units as part of the project. As amended, the bill would revise and recast the provisions of Density Bonus Law to require a density bonus, incentive, or concession, or waiver or reduction, on sites that are the subject of one housing development application, as specified. If the local government notifies the applicant that the application is deemed complete, this bill would require the city or county to provide the applicant with a determination that the project is eligible for a density bonus. The bill would make revisions to the calculations related to incentives or concessions available to an eligible project. As revised, the bill would no longer provide that a hous-

ing development that satisfies the requirements for the existing CEQA exemption for housing projects consistent with applicable general plan and zoning requirements is a use by right and subject only to ministerial review.

Planning and Zoning Law

AB 1751 (Quirk-Silva/Wicks)—This bill was sent to engrossing and enrolling on August 26, 2026. The bill, called the "Missing Middle Townhome Ownership Act," would establish a new streamlined, ministerial approval process for townhome development projects on residentially zoned lots that meet specified objective planning standards. The bill would define "townhome" as a single-family dwelling unit of no more than three stories that shares a common wall or is separated from neighboring units by an air gap, and would define "townhome development project" to mean a housing development project consisting entirely of residential dwelling units that satisfy this definition of townhome and meets specified floor area requirements and includes no more than 150 units. The bill would authorize a local agency to disapprove a townhome housing development project only if it makes written findings that the proposed townhome project would have a specific, adverse impact on public health and safety for which there is no feasible method to satisfactorily mitigate or avoid the impact. The bill would authorize a local agency to adopt an ordinance to implement its provisions and would provide that the adoption of such an ordinance is not a project under CEQA.

AB 1997 (Lee)—This bill was sent to engrossing and enrolling on August 25, 2026. As amended, this bill would require a lead agency to approve or disapprove a housing development project where 90 percent of the units are affordable to very low or extremely low-income households within 30 days of certifying an Environmental Impact Report. The bill would require that, prior to the application being deemed complete, the lead agency must have received written notice from the applicant that an application is being made for an allocation or commitment of financing, tax credits, bond authority or other financial assistance from a public agency or federal agency, and that there is prior confirmation that the application has been made prior to certification of the EIR.

AB 2074 (Haney)—This bill was ordered to third reading on August 24, 2026. As amended, this bill would require major transit cities, as defined, to designate one or more regional transit hub districts, as specified. The bill would require a downtown housing development, as defined, to be an allowed use by right within a regional transit hub district and would prescribe requirements for downtown housing developments, including requiring specified labor standards and requiring the developments to be eligible for streamlined ministerial approval. The bill would also require the California Housing Finance Agency to conduct a housing construction loan and financing study by March 1, 2028.

AB 2601 (Lee)—This bill was ordered to third reading on August 24, 2026. This bill would require that an application for a proposed housing development containing no more than 2 residential units within a single-family residential zone be eligible for concurrent processing with an application for a parcel map for an urban lot split. The bill would authorize a local agency to condition issuance of building permits, grading permits, or certificates of occupancy for a proposed housing development on the applicant first obtaining approval and recording a parcel map for eligible parcels pursuant to the existing urban lot split provisions. The bill would also allow the primary dwellings in an urban lot split under these provisions to be developed or converted to condominiums upon request of the applicant, or, if the housing development includes an existing unit, allow the applicant to request a condominium conversion for that unit pursuant to state and local law.

AB 2676 (Gallagher)—This bill was re-referred to the Committee on Housing on June 24, 2026. This bill would amend the Housing Crisis Act of 2019 to expand the prohibition against enacting a development policy, standard, or condition that has the effect of imposing or enforcing a moratorium on housing development within all or a portion of the jurisdiction of a county or city where housing is an allowable use to also prohibit these policies, standards, or conditions within the sphere of influence of a city. The bill would define "moratorium or similar restriction or limitation on housing development" to include, but not be limited to, the electorate of a county or city subject to these provisions from exercising its

referendum power in a manner that has the effect of extending an existing moratorium or similar restriction or limitation on housing development. The bill would also prohibit a county or city subject to these provisions from enforcing an initiative or referendum imposing a moratorium or other similar restriction on or limitation of housing development until the initiative or referendum receives approval from the Department of Housing and Community Development (HCD). The bill would provide that if HCD denies approval of the initiative or referendum, as specified, the initiative or referendum would be deemed void. This bill would also revise the definition of "reducing the intensity of land use" to mean any action that would individually or cumulatively reduce the site's residential development capacity, including reductions to height, density, or floor area ratio, new or increased open space or lot size requirements, new or increased setback requirements, minimum frontage requirements, or maximum lot coverage limitations. This bill would also provide that an action brought to enforce its provisions is subject to a three-year statute of limitations and that the bill's provisions apply retroactively to any pending action or proceeding.

SB 677 (Wiener)—This bill was re-referred to the Committee on Local Government on August 26, 2026. As amended, the bill would prohibit an interested person from filing an appeal of a subdivision map decision related to a housing development project if the site of the project is located entirely within a city that contains an urban area or within an urban area in a county with a population greater than 250,000 people. The site must also have been previously developed with an urban use or must be substantially surrounded by urban uses, and meet other specified requirements.

SB 1014 (Grayson)—This bill was ordered to engrossing and enrolling on August 26, 2026. This bill would require cities and counties to disclose all infrastructure requirements (such as sidewalks and sewers) within 30 days of submittal of a housing application and would prohibit the local agency from adding new requirements more than 30 days after submission of a permit application unless certain specified circumstances are met.

SB 1116 (Caballero)—This bill was ordered to engrossing and enrolling on August 26, 2026. This bill would streamline the construction of smaller, lower-cost "starter" homes for home ownership. The bill would amend existing planning and zoning requirements for certain housing development projects to require that height limits apply exclusively to the physical height of a building rather than the number of floors. The bill would also prohibit imposition of specified front or internal setbacks or a standard that would have the effect of physically precluding the construction of up to the number of units allowed for by minimum lot sizes. The bill would also require that provisions related to ministerial approval of housing developments on certain subdivided lots be interpreted liberally in favor of producing the maximum number of total housing units.

SB 1117 (Cervantes)—This bill was ordered to engrossing and enrolling on August 25, 2026. This bill would amend Planning and Zoning law requirements for accessory dwelling units to make it less costly to build ADUs by removing the ability to impose impact fees on ADUs over 750 square feet. Specifically, the bill provides that any impact fees charged for an ADU with more than 750 square feet of interior livable space shall be charged only on the area in excess of 750 square feet of interior livable space, instead of the entirety of the ADU.

Sustainable Communities Strategies

SB 1087 (Cabaldon)—This bill was ordered to third reading on August 21, 2026. The bill would make numerous changes to existing Regional Transportation Plan/Sustainable Communities Strategy (RTP/SCS) guidelines and requirements, including how greenhouse gas emissions (GHG) reduction targets are set, the timeline for updating the plans, and how GHG reduction strategies are evaluated. It would also extend GHG reduction targets to 2045 and make changes to certain transportation funding programs to support implementation of the strategies. As amended, this bill would no longer include an exemption for the preparation and adoption of RTPs/SCSs from the requirements of CEQA.

California Coastal Act

AB 1740 (Zbur)—This bill was ordered to engrossing and enrolling on August 25, 2026. As amended, the bill would require the City of Santa Monica to submit a complete local coastal program to the Coastal Commission by January 1, 2029. The bill would further streamline active transportation measures in the Coastal Zone.

SB 963 (Laird)—This bill was approved by the Governor and chaptered on July 16, 2026. This bill would set certain time limits for the California Coastal Commission to identify and review necessary information and hold a de novo and public hearing when a coastal development permit issued by a local jurisdiction is appealed to the commission and the commission determines a substantial issue exists, as provided.
(Amy Higuera)

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