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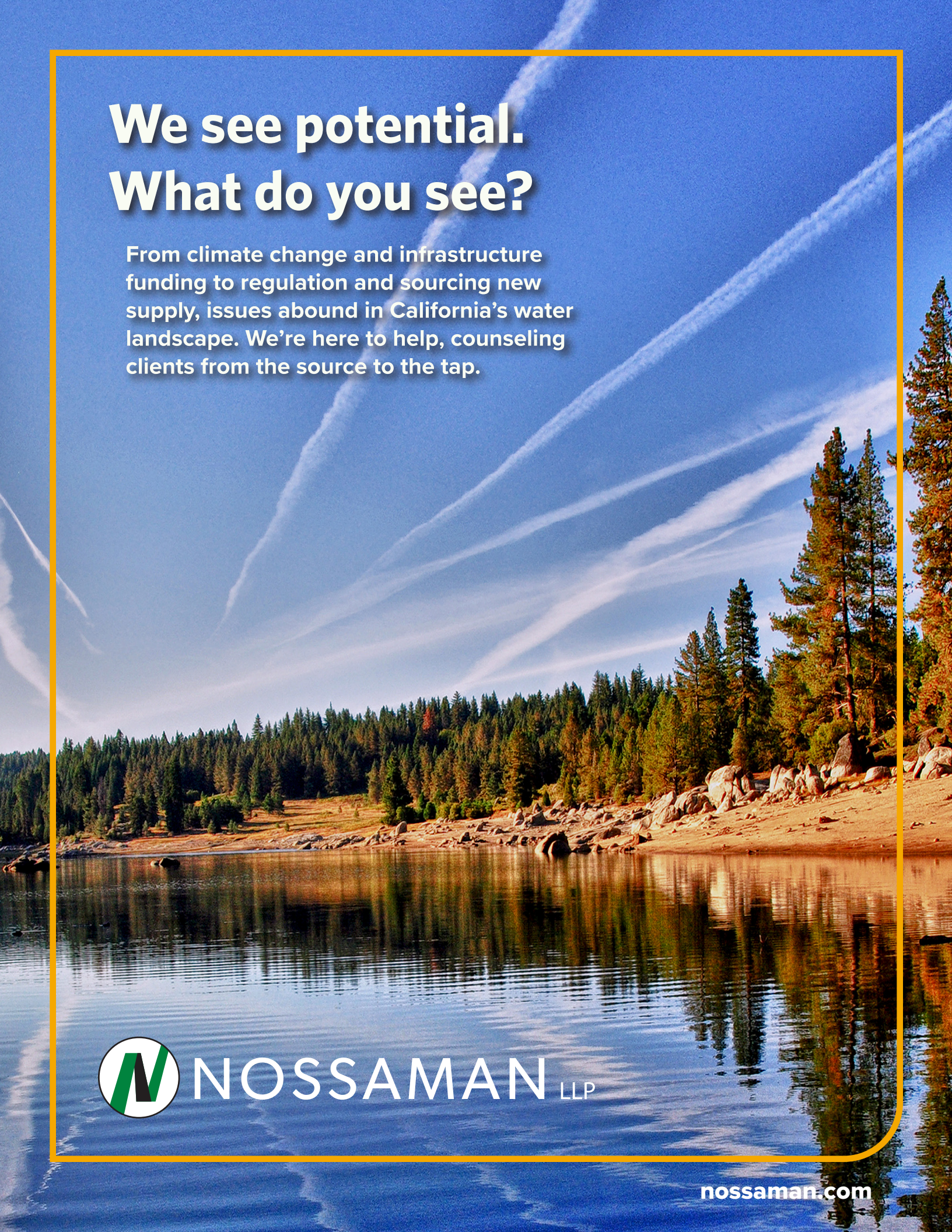
California Water Views

2026 Outlook


We see potential.
What do you see?
From climate change and infrastructure funding to regulation and sourcing new supply, issues abound in California's water landscape. We're here to help, counseling clients from the source to the tap.
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California Water Views

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California Water Views

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Ashley Walker provides legislative and regulatory advocacy, as well as grant funding solutions for a variety of clients across California. She specializes in representing clients in the water, local government and education industries. Ashley has nearly two decades of experience providing guidance and implementing advocacy strategies with clients as they navigate the complex state budget and legislative process to achieve their goals.

Inverse Condemnation Exposure for California Water Suppliers May Be Expanding

By Brad Kuhn & Jillian Friess Leivas

For decades, California water suppliers operated under a shield from inverse condemnation claims associated with delivery of water to their customers. Courts had rejected homeowners' claims associated with pipe corrosion or pinhole leaks, reasoning that all customers bore the same burden — so no one was "singled out" — and that homeowners had "invited" the water by choosing to use the service.[1]

However, over the last few years, a narrow crack in that shield from inverse condemnation claims may be widening. In several unpublished decisions, courts have allowed property owners to assert claims for damages where they suffered "disproportionate" damage compared to others. These decisions have the potential to further expand inverse condemnation liability for water suppliers.

***Shehyn v. Ventura County Public Works Agency*: Individual Owner "Singled Out"**

In *Shehyn v. Ventura County Public Works Agency* (2025)[2], a property owner at the end of a branch line in the district's water system alleged that the amount of sediment in his water was "vastly and grossly disproportionately greater than other properties" served by the district, and that the excess sediment damaged his irrigation pipes and orchard. Because the owner was seeking compensation for bearing a disproportionate amount of the externalized costs of a public improvement resulting from an inherent risk presented by the deliberate design, construction, or maintenance of the public improvement, the Court held that the owner presented a claim for inverse condemnation, and the "invited" water theory was not a brightline bar to liability.

***Micheli v. City of Fresno*: Thousands Can Be "Singled Out"**

The narrow crack in the inverse condemnation shield from Shehyn may have expanded after another decision (unpublished), *Micheli v. City of Fresno* (2026), expanded the definition of "singled out." In *Micheli*, the City of Fresno constructed a facility to treat and deliver surface water to thousands of northeast-area residents, who alleged the new water corroded their galvanized iron plumbing. The trial court dismissed their inverse condemnation claim under *Williams* – that the homes were not "singled out" and that the plaintiffs had invited the water into their homes. The Court of Appeal reversed, dismantling both pillars of the *Williams* defense.

On the "singled out" requirement, the court held that northeast-area residents *were* singled out because only their neighborhoods received the new supply — extending the doctrine to thousands of customers, so long as they can be distinguished from other ratepayers. On the "invited water" defense, the court reasoned that residents "did not consent to water that was improperly treated" and they lacked realistic alternatives to their municipal supply.

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Importantly, the court distinguished between deliberate infrastructure decisions and negligent operations, noting that failing to comply with corrosion control standards would potentially fall in the category of negligence rather than takings. But where an agency affirmatively changes its water source or treatment methodology and that decision causes property damage, *Micheli* opens the door to inverse condemnation liability.

What This Means for California Water Suppliers

While these decisions were not final adjudications on the merits (and *Micheli* remains unpublished), California water suppliers should be cognizant of several potential ramifications flowing from recent inverse condemnation case law. The "invited water" defense may no longer be reliable given *Micheli's* recognition that customers lack meaningful alternatives to water supply. The "singled out" requirement is broader than assumed — delivering changed water to a defined service area, even one with thousands of connections, may be sufficient.

These recent decisions, while not necessarily precedent setting, have implications for California water suppliers that may be substantial. Proactive risk assessment, robust compliance programs and thoughtful infrastructure planning are more important than ever to minimize potential inverse condemnation liability for water suppliers.

Navigating the 2026 Funding Opportunities Under Prop 4 for Water Providers

By Willis Hon & Ashley Walker

With the passage of Proposition 4 (Prop 4) in November 2024, California voters authorized a historic $10 billion climate bond, dedicating $3.8 billion explicitly to safe drinking water, drought preparedness and flood resilience. As we move into the second quarter of 2026, the initial waves of that funding are actively being deployed. For water providers across the state, preparing for funding to be released and how to access those funds, is critical for advancing critical water infrastructure and climate resilience projects.

Here is an overview of the latest Prop 4 developments and what they mean for California water providers navigating the current funding landscape.

I. THE 2025-2026 SPENDING PLAN: A $1.2 BILLION INJECTION

The 2025-2026 State budget package authorized the expenditure of approximately $1.2 billion — roughly one-third of the total Prop 4 water resilience allocation. Driven in part by the need to offset General Fund reductions amidst the State's projected $12 billion deficit, this bond funding has become the primary vehicle for sustaining critical state water programs.

Funding has been slow to be released, as Prop 4 included a requirement to comply with the Administrative Procedures Act (APA). Previous "water bonds" have not included this same requirement. The legislature took early action in 2026 to pass a budget bill that exempts Prop 4 allocations in FY 2025-26 from APA requirements. There is an effort in the legislature, through AB 35 (Alvarez), to provide this same exemption to all Prop 4 allocations.

Key funding allocations actively rolling out on a competitive grant basis include:

- **Dam Safety and Climate Resilience Local Assistance ($232 Million):** Administered by the Department of Water Resources (DWR). For public agencies managing aging infrastructure, these funds are essential for structural upgrades and regulatory compliance.
- **Water Quality and Safe Drinking Water ($183 Million):** Managed by the State Water Resources Control Board (SWRCB), these funds are flowing toward local assistance programs to address contamination, treat drinking water and update local distribution networks.
- **Water Use and Recycling ($153 Million):** Administered by the SWRCB, these funds are intended to improve drought resilience by covering water recycling facilities, municipal wastewater treatment and groundwater recharge projects.
- **Flood Control Subventions ($123 Million):** DWR is distributing these funds to local public agencies to improve flood protection infrastructure and support multi-benefit floodplain restoration.

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- **Integrated Regional Water Management (IRWM):** Prop 4 directed $100 million to DWR for IRWM efforts. While only $500,000 was released in the 2025-26 FY for initial program development and technical assistance, agencies should prepare for the broader release of $3 million in the upcoming 2026-2027 cycle and the remaining $96 million in subsequent years.

II. PROPOSED 2026-2027 SPENDING PLAN

Looking ahead, the Governor's proposed 2026-2027 State budget package includes $2.1 billion in proposed Prop 4 spending for next fiscal year, including approximately $792 million specifically for water-related programs.

Unlike the Governor's initial 2025 2026 proposal, in general, the budget does not propose a multiyear spending plan for Prop 4. Instead, the administration indicates that — in response to feedback from the Legislature — it will submit programmatic bond funding proposals on a year by year basis. The administration also proposes a new budget control section aimed at reducing the administrative burdens associated with implementing large scale or state administered Prop 4 funded projects. This gives the Legislature more oversight — but also introduces some uncertainty for long-term planning. It will be interesting to see how the proposed budget evolves through the State's budgetary process this year.

The Governor's proposal represents a starting point for debate and discussion between the administration and the Legislature regarding the Prop 4 spending plan. This debate includes how much funding will be appropriate in the next fiscal year, and for what programs included in Prop 4. The Governor's office will release the May budget revise in mid-May, and the final enacted budget must be passed by the Legislature by June 15, according to the California Constitution. The Governor must sign the budget by June 30.

III. STRATEGIC CONSIDERATIONS FOR PUBLIC AGENCIES

For public agencies preparing to pursue this funding, several strategic realities are key to consider:

A. The 40% Disadvantaged Community Mandate

Prop 4 strictly mandates that at least 40% of the funds must directly benefit low-income communities or those most vulnerable to climate impacts. It's important to note that the project does not need to be located directly within a low-income community, but applicants must prove the project does benefit a disadvantaged community. Applications that can quantifiably demonstrate direct benefits to these communities — whether through improved drinking water access, reduced flood risk, or modernized sanitation infrastructure — are being highly prioritized by both SWRCB and DWR.

B. Offsetting General Fund Cuts

Because Prop 4 funding is partially replacing General Fund support for programs like water recycling and dam safety, the competitive landscape is dense. Water systems must ensure their project proposals are shovel-ready and perfectly aligned with the statutory requirements, as these dollars are pulling double-duty to maintain existing commitments.

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C. Navigating Complex Permitting and Environmental Law

Securing the funding is only the first hurdle. Executing these heavily funded capital projects requires strict adherence to environmental regulations. Whether you are dealing with complex water quality or endangered species permitting, CEQA compliance for a new treatment facility, or navigating shifting water rights landscapes, having a strong legal and regulatory strategy is essential to prevent project delays once bond dollars are awarded.

IV. LOOKING AHEAD

As DWR and SWRCB continue to finalize and execute their grant solicitations, now is the time for water providers to assess their capital improvement plans, solidify project feasibility studies and prepare competitive grant applications.

Design Immunity and Alternative Delivery Projects

By Jill Jaffe & Cristina Mendez

In California, if certain statutory requirements are met, public entities can be afforded immunity from liability arising from the design of a public works project. However, public entities should be aware that the rise of alternative delivery methods may impact the availability of the design immunity defense.

Traditional Design Immunity

California's design immunity doctrine, codified in California Government Code section 830.6 ("Section 830.6"), shields public entities from liability for injuries arising out of alleged defects in the design of water infrastructure projects — such as pipelines, pump stations, stormwater systems, flood control channels and treatment facilities — when three elements are satisfied: (1) a causal relationship exists between the approved design and the claimed injury; (2) the plans or specifications were approved in advance of construction by the entity's governing body or an authorized employee exercising discretionary authority; and (3) substantial evidence supports the reasonableness of the design at the time of approval, even if subsequent conditions or alternative designs might appear safer in hindsight.[1] In the context of water infrastructure, this immunity extends to specific engineering features reflected in the approved plans, including hydraulic capacity, pipe alignment and materials, channel geometry, flow control structures and related safety measures. However, design immunity may be lost if the public entity becomes aware that changed physical conditions — such as increased flow demands, deformation, erosion, sedimentation, or system degradation — have rendered the design dangerous. In the event of changed conditions, the design immunity still applies for a reasonable period of time to allow the public entity to take reasonable corrective action, including providing appropriate warnings, obtaining funding for remedial work and performing such remedial work.[2]

Alternative Delivery Design Immunity

In an alternative delivery model, the application of design immunity is more complex due to the blending of design responsibilities between the public entity and private actors. Considering these shared responsibilities, a public entity should ensure that it retains enough involvement in the design process in its alternative delivery contracts such that it will maintain design immunity under Section 830.6.

In many alternative delivery projects, the developer is responsible for both the design and construction of the project, which can improve efficiency, minimize design defect risks for the public entity and streamline the design process. As such, making the developer responsible for both the design and construction should significantly shorten the typically lengthy design phase. While more efficient, this expedited process could lead to a sparser record regarding the design process. This result can be addressed via contract provisions requiring the submission of

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such records to the public agency owner. In order to maintain design immunity under Section 830.6, particularly for complex projects, a public entity should consider requiring developers to submit written design decision logs documenting alternatives considered and reasons for selection or rejection. A public entity should also consider requiring the preservation and and possible submission of turnover, interim and final design communications, calculations and models.

Another advantage of alternative delivery projects is the ability of a developer to quickly institute design changes in order to optimize efficiency during the construction phrase. In traditional models, a design change could involve a lengthy request for change order process and subsequent change order negotiations. By contrast, the developer in an alternative delivery project is less likely to seek permission for design changes or submit a change order request (or contingency payment request) for design changes, unless those changes will materially impact price, scope or schedule. As such, without contract language governing such design changes, a developer may implement a design change during the construction phase without obtaining express prior approval from the public entity owner. In those cases, the public entity may be unable to show that a public official or city engineer approved the design change in advance of construction — a showing necessary to establish the "discretionary approval" element of design immunity. Again, this result can be addressed via contract provisions requiring owner approval of any changes affecting function, safety, or performance — even those without schedule or cost impacts — that would constitute a "design change."

In sum, to preserve design immunity, a public agency should stay meaningfully involved in the design process and preserve a record showing discretionary, reasonable approval of any design changes made throughout the course of the project. In addition, a public agency should consider contract provisions that require a developer to keep a thorough record of any design-related decisions, including rejected design features and minor design changes, even if such decisions do not require a change order. With sufficient involvement and clear recordkeeping, a public agency can preserve design immunity under Section 830.6 while benefiting from the efficiencies of alternative delivery projects.

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[1]*See Stufkosky v. Dep't of Transportation (2023) 97 Cal.App.5th 491, 496.*

[2]*See Hampton v. County of San Diego (2015) 62 Cal.4th 340, 347.*

Learning Resources v. Trump: Limited Relief for Water Infrastructure Costs

By Christopher Luehs & Jill Jaffe

If you have been following water infrastructure construction news over the past year, you have certainly been keeping up to date on the tariffs implemented by President Donald Trump and wondering how these tariffs have affected, and will affect, the price of water infrastructure projects throughout the United States. And you may have also been wondering — is all of this legal? On February 20, 2026, the Supreme Court of the United States responded with a no, at least to a portion of that question in *Learning Resources v. Trump*[1].

Learning Resources v. Trump was initiated by two family-owned businesses (Plaintiffs) that design and distribute educational products across the United States. Most of these businesses' production is outsourced overseas, including to China. As part of President Trump's sweeping executive orders issued shortly after he re-assumed office in early 2025, the President imposed tariffs on imports from foreign counties, including goods from China. Some of the goods affected by these tariffs included semiconductors and computer products, autos and auto parts, commercial vehicles, steel, aluminum, copper, timber, lumber and other derivative products including furniture and fixtures. In imposing some of the tariffs, the President invoked the International Emergency Economic Powers Act (IEEPA), a 1977 federal law which allows the President to regulate international commerce after declaring a national emergency in response to an "unusual and extraordinary threat" to the United States from a foreign source. Specifically, the President indicated these tariffs were a response to the "threat" on the United States resulting from fentanyl trafficking and trade imbalances coming from foreign nations, including Canada, Mexico and China. Plaintiffs sued the Trump Administration, arguing that the IEEPA does not permit the President to unilaterally impose tariffs and, as a result, tariffs imposed in reliance on IEEPA were unconstitutional.

The Supreme Court agreed, finding that the President's ability to "regulate the importation" of goods during a national emergency under the IEEPA does not extend to the imposition of tariffs or any other taxing authority, which is solely held by Congress. While this may seem like good news for the water infrastructure projects that regularly incorporate foreign goods and materials, the Supreme Court's decision did very little to lower the increasing costs of these projects resulting from the President's tariffs because most materials used in water infrastructure projects remain covered by tariffs imposed on federal laws other than IEEPA.

Importantly, the decision did not affect tariffs that have been imposed on construction materials such as steel, aluminum and auto parts, or the global baseline tariffs on all imported goods, which were all justified based on other federal laws. Therefore, steel, aluminum and copper are all still

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subject to 50% tariffs and tariffs on timber and lumber remain at 10% across the board. The only construction-specific materials and goods subject to the IEEPA tariffs were specialty equipment, HVAC equipment and electrical systems and fixtures, which should all see price decreases.

Most crucially for project owners who may have already overpaid for materials which were affected by now vacated IEEPA tariffs, the Supreme Court did not reach the issue of reimbursement. Since the Supreme Court's decision in *Learning Resources*, 2,000 importers have filed lawsuits seeking refunds for sums paid as a result of the illegal IEEPA tariffs. Recently, in *Atmus Filtration, Inc. v. United States*, the Court of International Trade ordered the United States Customs and Border Protection to develop a process for issuing refunds to affected importers, though the Trump Administration is likely to appeal. While the establishment of a process for refunds may benefit affected importers, project owners who indirectly incurred these price increases may have no recourse, as the tariff was not paid by them directly. Moving forward, and given the remaining uncertainty regarding the tariffs left unaffected by the *Learning Resources* decision, it is advisable that those constructing, operating and maintaining water infrastructure projects work reimbursement language into procurement contracts, even if at a discounted split with the material distributor, in order to potentially recover costs in the event other, more relevant, tariffs on construction goods and materials are struck down by courts in the future.

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[1] *Learning Resources, Inc. v. Trump, 146 S.Ct. 628 (2026)*

Tapped Out: Strategies for Water Affordability

By Lori Anne Dolqueist

In 2012, California was the first state to recognize in statute a human right to water. As set forth in Section 106.3 of the California Water Code, it is the "established policy of the state that every human being has the right to safe, clean, affordable and accessible water adequate for human consumption, cooking and sanitary purposes." As high utility bills are the subject of headlines and political debates, the affordability aspect of the human right to water is coming under greater scrutiny.

There are a variety of factors that contribute to increased water rates. California's water infrastructure, the complex system of pipelines, wells, dams, reservoirs, pumping stations and treatment plants necessary to provide safe and clean drinking water is aging, making it more prone to leaks and breaks. Climate change is leading to more severe shifts between drought and flood, requiring more capacity for capture and storage. The investment needed to modernize water infrastructure and make it better suited for future needs is reflected in higher rates.

At the same time, emerging contaminants and more stringent water quality regulations are also increasing the cost of providing water service. PFAS (known as "forever chemicals") has been found in nearly half of the tap water in the United States. These chemicals, linked to cancers, immune issues and developmental delays, do not easily break down, allowing them to accumulate in the body and persist in the environment. Public water systems must complete initial monitoring for PFAS by 2027 and implement expensive treatment solutions by 2029. The cost of the facilities, chemicals and labor needed to address PFAS and other contaminants leads to higher water rates.

Water providers are also subject to many of the higher costs that are also affecting their customers. It takes a great deal of energy to run a water system and water utilities have seen their energy bills skyrocket over the last year. Just like their customers, water utilities have also experienced pain at the pump, as the cost of the gas needed for their trucks and other vehicles has gone up substantially. All of these increased costs must be recovered through water rates.

The affordability of water should also be considered in comparison to the alternative to tap water – bottled water. On average, tap water costs less than penny a gallon. A gallon jug of bottled water costs approximately $1-2 but buying that same amount in the much more common smaller bottles can cost approximately $7 per gallon. Customers may turn to bottled water for convenience, taste, or because of concerns about the safety of their tap water. Purchasing bottled water can be a significant financial burden but it is one that customers may consider to be unavoidable if they do not trust the quality of their local tap water. In considering the affordability of water quality investments,

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particularly those affecting the taste, color and odor of tap water, water providers must evaluate the impact on customer bills if the investments are made, as well as the potential for customers to strain their household budgets by buying bottled water if the water quality is not improved.

Average water bills vary considerably across California. Factors such as the source of water, geography and the size of the system all contribute to this variability. There is also not a single definition of what constitutes "affordable" with respect to water. It is generally agreed, however, that 600 cubic feet per household per month represents essential water service. This amount is considered to be sufficient to cover essential indoor usage for consumption, cooking and sanitary purposes. Most efforts are focused on the affordability of this essential usage. Water used for outdoor purposes, such as landscaping or pools, is considered discretionary and is often subject to higher unit prices to encourage efficient use.

The State Water Resources Control Board (SWRCB) assesses affordability based on the water bill as a percentage of median household income and also looks at what it classifies as an "Extreme Water Bill" – drinking water charges that meet or exceed 150% of statewide average drinking water customer charges. The California Public Utilities Commission (CPUC) uses three metrics to assess the affordability of utility service, including water service. First is the affordability ratio, which quantifies the percentage of a representative household's income that is required to pay for an essential utility service, after non-discretionary costs such as housing and other essential utility services are removed from the household's income. Second is hours at minimum wage, which describes the work necessary for a household earning minimum wage to pay for essential utility service. Third is a metric that examines the socioeconomic characteristics of service areas based on the CalEnviroScreen a mapping tool.

Application of these metrics and others demonstrate that although water service remains generally affordable for most customers – and relatively underpriced considering the value and true cost of providing service – many economically disadvantaged households struggle to pay their water bills.

Smaller water systems often have higher rates because the cost of providing water service, much of which consists of fixed costs that do not change based on the volume of water produced, are spread over a small customer base. Regulatory policies that encourage larger water providers to purchase smaller systems can make water more affordable for these customers. Tiered rate designs, in which the first, or lowest, tier is intended to represent essential use, may help customers manage their bills. Under such rate designs, the rate for essential indoor water use is lower than the rate for discretionary use, which would fall into the higher tiers. The Water Shutoff Protection Act, which went into effect in February 2020, provides protection against disconnection for customers with delinquent water bills, and requires water providers to offer options such as payment plans, amortization of unpaid balances, or temporary deferrals. Nonetheless, many households need additional assistance.

In December 2020, Congress established the first national water assistance program, the Low Income Household Water Assistance Program (LIHWAP). LIHWAP was a federally funded program that helped low-income households pay

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residential water and sewer bills and manage their residential water utility costs. California water customers were allocated approximately $116 million through this program. LIHWAP ended in March 2024. In August 2025, the House of Representatives introduced the bipartisan LIHWAP Establishment Act, but it has not yet been passed.

With the end of the national LIHWAP program, the burden to fund low-income assistance programs falls on local ratepayers and taxpayers. Most large investor-owned water utilities (those with more than 10,000 customers) regulated by the CPUC have had low-income support programs for decades. These programs vary in execution, but most offer either flat dollar discount or a percentage discount on essential water use to eligible households. To increase participation in these programs, the CPUC has authorized investor-owned electric utilities to share data from their customer assistance programs with water utilities where their service areas overlap. This means that customers already enrolled in energy low-income assistance programs automatically qualify for water low-income assistance programs, making it significantly easier for these customers to get the assistance that they need. These programs are funded through rates which, while generally successful, can be concerning in disadvantaged service areas. In such areas, the majority of the customers may qualify for the customer assistance program and the minority of customers who don't qualify, whose household income may not be much higher than the qualifying level, shoulder the burden of the cost of these programs.

It is even more challenging for municipal water providers to offer customer assistance programs. California Proposition 218, a ballot measure passed in 1996, restricts water affordability efforts by requiring public water rates to be strictly based on the cost of service. Therefore, public water providers cannot use rate revenues to support customer affordability programs. Instead, public water agencies must use non-rate revenue such as grants, property taxes, or enterprise funds to finance customer assistance programs.

In 2019, the SWRCB published a draft proposal for a statewide low-income water rate assistance program. The program was never implemented, perhaps due to the estimated annual price tag of more than $600 million. It may be time to revisit such efforts, however, since the current patchwork of policies and programs fall short of ensuring the human right to affordable water to all in California.

WOTUS Snapshots: Sailing Shifting Seas

By Rebecca Hays-Barho, Mary Lynn Coffee & Jennifer Seely

In life, only three things are certain: death, taxes and ever-changing administration of the federal Clean Water Act (CWA). In the following pages, we provide an overview of actions taken under President Trump's second administration since our last WOTUS update and describe what project proponents might expect in the coming months and years. As is perennially true with WOTUS, we expect litigation to follow any final action taken by federal agencies.

Early 2025 Developments

Expediting Permitting for Energy Projects

Last year, Executive Orders issued by President Trump directed federal agencies to identify ways to expedite permitting for energy supply, including by using CWA emergency permitting provisions, identifying ways to eliminate delays associated with permit processing more generally and taking advantage of general permits like the nationwide permitting program (NWP) under the CWA and permits by rule.

Reconsidering the Definition of WOTUS

In March 2025, the U.S. Army Corps of Engineers (Corps) and Environmental Protection Agency (EPA) issued a guidance memorandum on how the agencies should implement the U.S. Supreme Court's decision in *Sackett v. EPA* (in which the U.S. Supreme Court narrowed the scope of WOTUS jurisdiction as it relates to wetlands). The guidance memorandum set forth a two-part test for determining whether a wetland (or other feature) is a WOTUS:

1. Is the water body adjacent to the subject wetland a traditionally navigable water or a relatively permanent water connected to a traditionally navigable water?

2. If yes, does the wetland have a continuous surface connection to that water body (i.e., does the wetland directly abut the water where it is difficult to determine where the water ends and the wetland begins)?

Where drought, low tide, or other circumstances cause temporary interruptions to surface connections, the guidance instructs the agencies to use case-by-case judgment.

No End Result Requirements Allowed for NPDES Permits

On March 4, 2025, the U.S. Supreme Court issued its opinion in *City and County of San Francisco v. Environmental Protection Agency*, dealing with limits on the EPA's authority in administering the National Pollutant Discharge Elimination System (NPDES) under CWA Section 402. In this case, the Court held that "end-result" requirements routinely imposed by the EPA in connection with NPDES permits (e.g., requirements relating to attaining conditions in receiving waters rather than controlling constituents in effluent from the discharging facility) are not permissible under the CWA. This pivotal opinion has significant implications for how NPDES permits are administered across the country.

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In the majority opinion, the Supreme Court held that the CWA does not authorize the EPA to include "end-result" provisions in NPDES permits. The majority opinion explained that the enforcement responsibility for determining and implementing steps to achieve water quality standards falls within the EPA's mandate and cannot be shifted onto permittees through general outcome-based language.

In California, where the NPDES permitting program is delegated to the state's water boards, the State Water Resources Control Board has promulgated guidance in the form of a memorandum from its Office of Chief Counsel that counterintuitively limits the application of the Supreme Court's holding to NPDES permits for point-source discharge NPDES permits and precludes its application to stormwater NPDES permits, 401 certifications and water quality permits (called Waste Discharge Requirements) issued under California's Porter Cologne Water Quality Control Act.

New WOTUS Definition Proposed

On November 17, 2025, EPA and the Corps published a proposed rule titled "Updated Definition of 'Waters of the United States'" to revise the current regulatory definition of WOTUS (Proposed WOTUS Rule). EPA and the Corps have issued five separate definitions of WOTUS since 2015, as detailed in our previous article. The Proposed WOTUS Rule would add or change definitions of key terms, remove certain interstate waters from WOTUS, simplify or modify certain exclusions for waste treatment systems, cropland and ditches and expressly exclude groundwater from WOTUS.

Drawing from the *Sackett* decision, the Proposed WOTUS Rule provides definitions for two key terms which relate to whether certain bodies of waters would qualify as WOTUS:

- *Continuous surface connection* means "having surface water at least during the wet season and abutting (i.e., touching) a jurisdictional water."
- *Relatively permanen*t means "standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season."

One can portend that aspects of these definitions, such as what constitutes "wet season" will be the subject of great interest, debate and litigation.

The current Unified Agenda anticipated the EPA and Corps would publish a final rule in January 2026. Until that actually occurs, a patchwork of regulatory regimes apply as a result of broad injunctions issued by federal courts with respect to prior versions of the definition. The WOTUS definition issued (and later amended) under the Biden administration is the operative definition in 24 states including California, Washington, Arizona, Colorado, Maryland and New York, while the regulatory regime that was in place prior to 2015 applies in the remaining 26 states, including Texas, Alaska and Virginia.

As a result of *Trump v. CASA* (2025), in which the U.S. Supreme Court ruled that universal injunctions exceed judicial authority unless necessary for complete relief, it is unlikely that a federal court would issue a far-reaching injunction against any forthcoming WOTUS

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definition; however, it is possible there could be an injunction reaching areas within the jurisdiction of one or more circuit courts or that a court could vacate the final rule — which would likely have nationwide effect.

Reissuance of Nationwide Permits

CWA section 404 (Section 404) requires that activities resulting in dredge or fill within WOTUS obtain authorization from the Corps, even as the definition of WOTUS keeps changing. Many projects comply with Section 404 through the Corps' NWP program.

On January 8, 2026, the Corps finalized 57 NWPs under CWA section 404, replacing 56 NWPs that were set to expire in March 2026 and issuing one new NWP (activities to improve passage of fish and other aquatic organisms), and also reissued NWP general conditions and definitions with some modifications. The NWPs went into effect on March 15, 2026, and will expire on March 15, 2031. The Corps regional divisions will finalize any regional conditions for the NWPs, and will determine which conditions for water quality certifications issued by States, Tribes and EPA will be incorporated as NWP conditions for those regions. On March 16, 2026, the Corps published a notice seeking public comment for potential future modifications to the NWPs to improve efficiency. That comment period closes on May 15, 2026.

As discussed below, NWP general conditions require that a proposed activity obtain a CWA section 401 (Section 401) certification from a state, tribe, or EPA affirming that the proposed activity will not violate water quality standards. In California, the State Water Board issues general 401 certifications for some of NWPs. Most recently, the State Water Board granted general 401 certification to 19 of the 2026 NWPs, which took effect on March 15, 2026 and are subject to certain terms and conditions.

The 19 California-certified NWPs are as follows: NWPs 1 (Aids to Navigation), 3(a) (Maintenance), 4 (Fish & Wildlife), 5 (Scientific Measurement), 6 (Surveys), 9 (Anchorage Area Structures), 10 (Mooring Buoys), 11 (Temporary Recreational Structures, 12 (Oil or Natural Gas Pipeline Activities), 13 (Bank Stabilization), 14 (Linear Transportation Projects), 20 (Oil or Hazardous Substance Response), 22 (Vessel Removal), 28 (Marine Modification), 32 (Completed Enforcement Actions), 36 (Boat Ramps), 54 (Living Shorelines), 57 (Electric Utility and Telecommunications) and 58 (Utility Line Activities for Water and Other Activities).

401 Certification Proposed Rule

Section 401 requires that any project seeking federal permits or licenses that could result in discharge of pollutants into WOTUS must obtain a water quality certification from the state or tribe in which the discharge originates. The water quality certification affirms that the proposed discharge will comply with the standards established in other parts of the CWA (e.g., effluent limitations, standards of performance, water quality standards and implementation plans).

How states, tribes and other jurisdictional authorities have implemented Section 401 certification has been subject to litigation and scrutiny over the years, and the EPA has reviewed and revised its Section 401 implementing regulations multiple times over

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several administrations. Most recently, in 2023, EPA issued revised Section 401 implementing regulations, which are still the subject of litigation. Issues in the litigation serve as topics for the new proposed rulemaking, including the latitude states have to impose certification conditions related to environmental concerns that are only indirectly related to water quality, as well as the flexibility certifying agencies have to take longer than one-year to act on a certification request.

On January 15, 2026, EPA published a proposed rule titled "Updating the Water Quality Certification Regulations" to implement changes to the Section 401 certification process (Proposed Section 401 Regulations) which would, among other things:

- Narrow the scope of states' certification authority to prohibit imposition of conditions unrelated to water quality-related conditions on regulated discharges;
- Adopt a mandatory one-year deadline for certifying authorities to act on a certification request; and
- Prohibit imposition of conditions relating to general environmental protection.

If the rule is finalized as proposed, states and tribes would be constrained in what requirements they could impose through the Section 401 certification process, and in taking longer than one year to issue certifications.

Pursuant to the September 2025 Unified Agenda, the regulated community was anticipating that the rule would be finalized by January 2026 but there appears to be some delay, perhaps in part due to concerns about its defensibility. On April 8, 2026, eleven U.S. senators including California's Alex Padilla sent a letter to EPA opposing the proposed rule.

Vacatur of Florida's Delegated 404 Program

Section 404(g) authorizes states and tribes to administer the Section 404 permitting program within their jurisdictions where those states have been approved by EPA to do so. While 47 states and at least 84 tribes administer NPDES permitting under Section 402, only three states have been delegated authority under Section 404 (Florida, Michigan and New Jersey). In April 2026, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) affirmed a decision by the district court to vacate EPA's approval of Florida's application to administer Section 404 within that state on the basis that EPA's approval violated section 7 of the federal Endangered Species Act (ESA).

ESA section 7 (Section 7) requires federal agencies to ensure that actions they authorize, fund, or carry out do not jeopardize ESA-listed species or result in destruction or adverse modification to designated critical habitat (Ad Mod). This determination is made in consultation with the U.S. Fish and Wildlife Service (USFWS) and/or National Marine Fisheries Service (NMFS) (collectively, the Service). Where an activity will adversely affect a listed species or critical habitat, but will not result in jeopardy or Ad Mod, the Service will issue a biological opinion (BiOp) describing, among other things, measures the agency must implement to reduce adverse effects. Where "take" of listed species will occur in connection with the activity subject to consultation, the Service will issue an incidental take statement (ITS), which authorizes take that occurs in connection with the activity under consultation.

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Prior to EPA's approval of Florida's application for Section 404 delegation, EPA and USFWS engaged in Section 7 consultation, which resulted in USFWS issuance of a BiOp and ITS. The ITS authorized "take" associated with activities conducted by permittees under the delegated 404 program, and relied on a "technical assistance" program. Through that program, applicants for Florida's delegated Section 404 permitting program would provide information concerning their activities' effects on listed species and critical habitat and the State of Florida would review the information and determine whether additional measures should be implemented to avoid adverse effects. USFWS had the option (but not the requirement) to weigh in.

In 2024, the U.S. District Court for the District of Columbia held that the technical assistance process established by the BiOp was not a lawful substitute for the procedures and remedies enumerated in the ESA. On March 27, 2026, the D.C. Circuit upheld that decision in Center for *Biological Diversity v. Zeldin* (2026).

States including California, Arizona and Alaska have explored the option of assuming Section 404 program delegation in the past, but have never formally submitted an application to the EPA. If they or any other state choose to seek Section 404 delegation in the future, the holdings in Center for *Biological Diversity v. Zeldin* may result in greater project-level scrutiny under the ESA.

Looking Ahead: Federal Legislation, ESA Compliance and Litigation

Federal Legislation

While Congress recently has focused on streamlining federal environmental permitting and reducing unnecessary delay and red tape, no major federal legislation affecting CWA administration is currently pending. However, one pending House bill (H.R. 5566), introduced in September 2025 by Rep. Carbajal (D-CA), would extend sunset dates for three programs related to funding for drinking water infrastructure and publicly owned treatment works from 2026 to 2031. The bill would affect CWA sections 223(g)(1), 1459A(1) and 1459F(f)(1), and was referred to two committees and one subcommittee but has not moved since December 2025.

ESA

Projects needing "take" authorization have often used the consultation process established by Section 7 (see above for additional details concerning ESA consultation generally). This is because Section 7 contains statutory deadlines for agencies to make decisions (e.g., 135 days), while the ESA Section 10 permitting process for projects with no federal nexus contains no statutory deadlines and frequently takes more than two years (and sometimes upward of a decade). Project proponents frequently have used the Section 404 permitting process – including specifically the NWP process – as a trigger for obtaining "take" authorization through Section 7, as Section 7 applies only where there is a federal nexus.

One of the implications of the Supreme Court's decision in *Sackett* is potentially limiting the opportunity for project proponents to utilize Section 7 for ESA "take" authorization in an expedited manner (and related limitation for project opponents to challenge final agency actions — i.e., verification of a project's use of a NWP or USFWS's issuance of a BiOp and/or ITS). Should the Corps and EPA adopt and implement a final definition of WOTUS in a form substantially

similar to the Proposed WOTUS Rule, this circumstance would become even more common. Project proponents — particularly those located in the arid west — should ensure project planning includes a strategy for ESA compliance, where necessary.

Litigation

When and if finalized, there is a virtual certainty that any WOTUS definition and revised 401 certification rules will be challenged in multiple federal courts, which will create continued uncertainty for project planning and implementation. Project proponents should work closely with their qualified consultants and attorneys on permitting strategies, with particular consideration of each project's unique attributes.

Looking Ahead at California's Shifting Wildfire Liability Landscape

By Willis Hon & Brad Kuhn

California's legal and regulatory landscape for wildfire liability is on the precipice of a potential massive shift. As mandated by Senate Bill 254 (Becker, 2025) (SB 254) from last year, both the California Public Utilities Commission (CPUC) and the California Earthquake Authority (CEA) released critical reports recommending significant modifications to the State's wildfire liability regime. The consensus across both agencies is stark: the current trajectory of utility liability and the corresponding financial burden on California ratepayers is unsustainable.

Here is a look at the groundbreaking recommendations from the SB 254 reports and other significant wildfire legislation introduced for the 2026 legislative session, which could fundamentally alter wildfire liability in California.

I. SB 254 REPORTS: A FUNDAMENTAL OVERHAUL OF WILDFIRE LIABILITY

Pursuant to Executive Order N-34-25 issued by Governor Newsom and SB 254, the State was tasked with evaluating alternative structures to equitably socialize the risks of natural catastrophes. The resulting CPUC and CEA reports (collectively, "SB 254 Reports") tackle the issue from multiple angles, but their most notable proposals target the legal doctrines that govern utility liability in the State of California:

- **Reassessing Inverse Condemnation Strict Liability:** For decades, under Article I, Section 19 of the California Constitution, public agencies and investor-owned utilities (IOUs) have been targeted for recovery of property damages if their equipment ignites a fire — regardless of whether they were negligent. More recently, lawsuits have also targeted water utilities under a theory of "failure to protect" – essentially, that the water utilities should be responsible for property damage if their public facilities fail to provide adequate water to stop the spread of wildfires. Because such facilities serve a public use, courts have historically reasoned that the costs of damages should be socialized among ratepayers. The CEA report introduces a recommendation to change this: proposing an amendment to the State Constitution to significantly modify inverse condemnation for wildfires. Shifting to a fault-based (negligence) standard would align California with the rest of the nation, potentially stabilizing utility credit ratings and halting the soaring costs currently borne by ratepayers.
- **Modifying and Harmonizing Damages:** Acknowledging that modifying the State Constitution via voter approval would face fierce litigation and political hurdles, the SB 254 Reports also offer alternative liability reforms. Key proposals to moderate utility

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exposure include capping Additional Living Expenses to standard timeframes (e.g., a five-year maximum), eliminating punitive damages against IOUs to match the protections currently afforded to publicly owned utilities, potentially limiting or prohibiting recovery of attorneys' fees and removing insurance subrogation. The CEA report states that eliminating insurance subrogation alone could slash total utility settlement payments by an estimated 35% to 40%, substantially lowering the costs ultimately passed onto ratepayers.

- **Transitioning from a "Wildfire Fund" to a "Catastrophe Fund":** The CPUC report emphasizes that while utility equipment accounts for roughly 6% of annual ignitions, the overwhelming majority of catastrophic fires stem from climate change, historical land-use policies and vegetative fuel buildup. To more equitably socialize this risk, the CPUC recommends expanding the existing, narrowly-tailored Wildfire Fund into a broader "Catastrophe Fund." This would widen the contributor pool beyond just electric ratepayers to include local governments, publicly owned utilities and non-ratepayer sources like Cap-and-Invest proceeds and the State's General Fund.

II. BEYOND SB 254: PROACTIVE MITIGATION IN THE 2026 LEGISLATIVE SESSION

While the SB 254 Reports tackle the legal and financial mechanics of post-wildfire recovery, the California Legislature is also expected to advance numerous bills this year addressing wildfire issues, some of which should be closely monitored by water providers. For example, Assembly Bill 2013 (Bennett) (AB 2013) introduces new emergency preparedness obligations for community water systems operating in wildfire-prone areas. Under AB 2013, water suppliers serving more than 100 customers in designated moderate, high, or very high fire hazard severity zones must develop and file an annex to their disaster preparedness plans. The annex must include a comprehensive assessment of system resilience during extreme weather, red flag warnings and major power outages like Public Safety Power Shutoffs.

Under AB 2013 as currently written, water systems will be required to inventory their pumps, identify those lacking emergency backup generation and establish operational plans regarding minimum water tank levels to balance continuous customer service with the sudden, high-capacity flow demands of firefighting operations. Crucially, compliance pathways will vary depending on the provider. CPUC-regulated water utilities will be expected to integrate these new resilience assessments into their existing CPUC emergency response filings. Meanwhile, public water agencies and municipal districts will need to submit their plans to county emergency authorities.

Additionally, as the Legislature reviews and evaluates the SB 254 Reports, it possible one or more of the specific proposals and recommendations therein could be introduced as legislation. Governor Newsom's proposed 2026 – 27 budget reflects a cautionary approach thus far. While revenues have improved over the previous year, the state is still solving for a $2.9 billion deficit and prioritizing the replenishment of its reserves as a "Rainy Day Fund." These budget constraints will almost certainly have a direct impact on the implementation of recommendations contained in the SB 254 Reports, likely leaving local agencies and utilities to continue to shoulder the financial burden of wildfire response and resilience for now.

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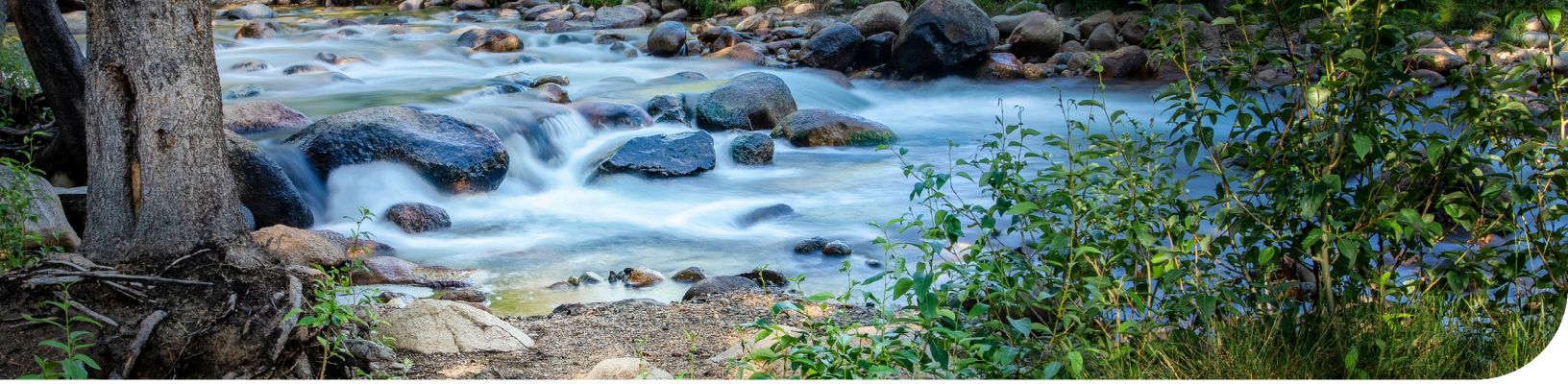
III. LOOKING AHEAD

The primary message from both the CPUC and the CEA is clear: California cannot solve its climate-driven wildfire crisis squarely on the backs of utility ratepayers. The transition away from strict inverse condemnation liability would be a paradigm shift for public agencies and IOUs in California.

We will continue to closely monitor the progress of these agency recommendations and the evolving legislation throughout the 2026 session, keeping you informed on how these shifts may impact public agencies and IOUs across the state.



Implementing California's Sustainable Groundwater Management Act (SGMA)

By Ashley Walker

California's Sustainable Groundwater Management Act (SGMA) continues to evolve, in practice, from a framework-setting statute into an actively implemented regulatory structure. Over the past few years, the State Water Resources Control Board (State Water Board) and the Department of Water Resources (DWR) have shifted into a pivotal period of policymaking. As Groundwater Sustainability Agencies (GSAs) move from their plan development phase into measurable outcomes, state oversight has intensified — both procedurally and politically.

Under SGMA, DWR is tasked with conducting technical evaluations of Groundwater Sustainability Plans, including ongoing assessments of plan adequacy and their incorporation of updated data. Recent probationary determinations indicate that State agencies expect demonstrable progress, particularly in critically over-drafted basins.

At the same time, the State Water Board, which is charged with determining and managing GSA's probationary designations, has continued to expand its role as an enforcement backstop under SGMA. The Board's SGMA probationary process and policies have been developed during this first round of probationary designations, signaling a move toward more assertive intervention. These actions may impose procedural consequences, including mandatory reporting requirements, potential extraction fees and the development of interim plans managed by Board staff. The Board's most recent action, denying eight GSA requests for exclusion from probationary reporting and fees in the Tule Subbasin, has sparked discussion about consistency and coordination.

Politically, SGMA implementation continues to be a point of tension across California's water sector. Key stakeholders in the agriculture community, members and representatives of disadvantaged communities and urban water users continue to express competing priorities, especially as sustainability measures are now being translated into concrete implementation requirements such as pumping restrictions and land fallowing. Legislative interest in SGMA oversight has also increased, with ongoing discussions regarding equity, funding mechanisms, subsidence and the long-term viability of groundwater-dependent regions.

As we look ahead, the tension between state enforcement authority and local control will remain a contentious part of SGMA implementation. As deadlines approach and scrutiny intensifies, GSAs will need to navigate an increasingly complicated regulatory environment while balancing local needs with statewide mandates.

California Water Views

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