2026
CEQA & REGULATORY UPDATE EVENT

FEDERAL ENVIRONMENTAL REGULATORY UPDATE



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NEPA Update

National Environmental Policy Act Update

NEPA Basics:

- Triggered when federal agency proposes a major federal action that may affect the human environment.
- Levels of analysis – Categorical Exclusion (CatEx), Environmental Assessment/Finding Of No Significant Impact (EA/FONSI), Environmental Impact Statement/Record of Decision (EIS and ROD)
- Procedural, not substantive, statute requiring disclosure and identification of mitigation, but does not require implementation of mitigation.
- NEPA clearance must be completed before federal permit or other federal action can be authorized.

National Environmental Policy Act Update

NEPA and the Council on Environmental Quality

- CEQ issued “regulations” to implement NEPA, codified at 40 C.F.R. Parts 1500 to 1508, pertaining to process, contents of NEPA documents, range of alternatives, etc., and used for over 40 years

- Court of Appeals for the DC Circuit in *Marin Audubon Society v. FAA* (2024) finds the CEQ regulations are “ultra vires” (void because beyond CEQ’s authority to promulgate)

- District Court for District of North Dakota in *Iowa v. Council on Environmental Quality* (2025) concurs (“NEPA gives CEQ authority to promulgate non-binding guidelines, but CEQ may not issue rules that have the force and effect of law.”)

National Environmental Policy Act Update

NEPA and the Council on Environmental Quality

- Executive Order 14154 (“Unleashing American Energy”) directs CEQ to rescind NEPA “regulations”
- CEQ rescission of NEPA “regulations” effective January 8, 2026, meaning that the regulations are no longer in the C.F.R.
- Practical effect #1? Each federal agency revisiting their own NEPA implementing regulations to potentially bolster, amend, etc. (E.g., Army Corps)
- Practical effect #2? The *Loper Bright* Supreme Court decision likely to play a prominent role going forward.

National Environmental Policy Act Update

NEPA Amendments

- BUILDER Act (Fiscal Responsibility Act of 2023) (streamlines NEPA review of infrastructure, energy, and commercial projects; deadlines of two years for an EIS and one year for an EA, etc.)
- One Big Beautiful Bill Act of 2025 (project sponsors allowed to pay a fee in exchange for accelerated review deadlines)
- Proposed Standardizing Permitting and Expediting Economic Development Act (amendments to NEPA limiting review to immediate, proximate causal effects, etc.)
- Proposed Bipartisan American Affordability and Jobs Act (BAAJA) (amendments to NEPA making changes to process, scope of review, judicial review)

National Environmental Policy Act Update

Other NEPA Updates

- *Seven County Infrastructure Coalition v. Eagle County* (2025) (unanimous Supreme Court decision holding that NEPA requires agencies to focus only "on the environmental effects of the project at issue," not other, separate projects)

- Agencies updating NEPA regulations:
  - Department of the Interior
  - Federal Energy Regulatory Commission
  - Department of Energy
  - Army Corps of Engineers
  - Department of Agriculture
  - Federal Highway Administration, Federal Railroad Administration, and Federal Transit Administration

National Environmental Policy Act Update

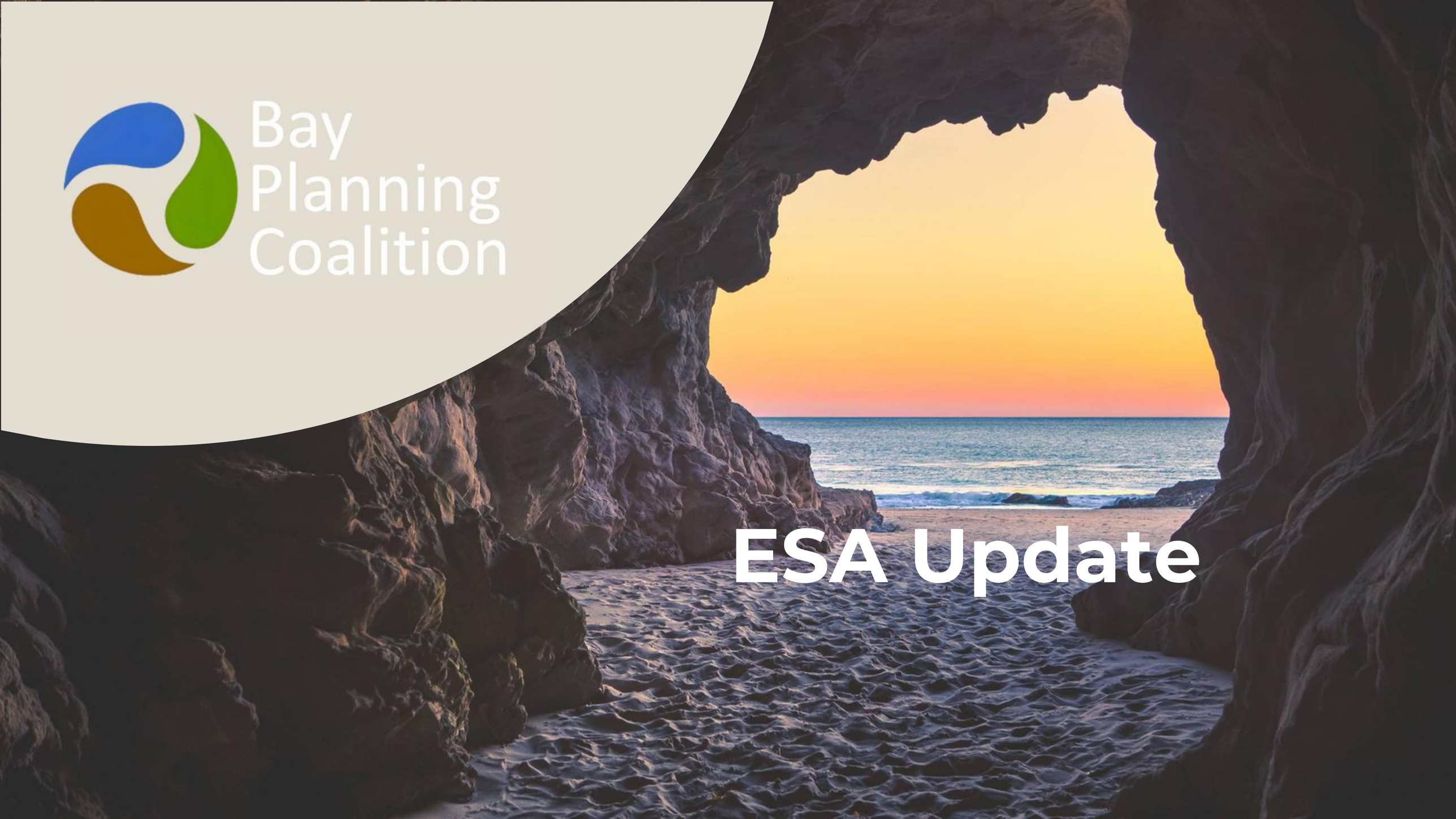
Bay Area Considerations

- Federal Funding: HUD (CDBFG, HOME, National Housing Trust Fund), FTA transit grants, or federal highway grants

- Federal permits: E.g., Army Corps of Engineers (Clean Water Act Section 404, Section 408 Permission, Rivers and Harbors Act Section 10)

- Regional Sectors:
  - wastewater and water infrastructure
  - Public transit expansions
  - Major energy or port projects
  - Affordable housing developments

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ESA Update

Endangered Species Act Update

ESA Basics

- Administered by Fish and Wildlife Service (terrestrial and freshwater species) and National Marine Fisheries Services (marine species)
- Species listed as “endangered” or “threatened”; critical habitat designation
- Section 9 prohibits unpermitted “take” (killing, capturing, or harming) of endangered species
- Incidental take authorized pursuant to:
  - Section 10 Incidental Take Permit/Habitat Conservation Plan (no federal nexus)
  - Section 7 Incidental Take Statement/Biological Opinion (federal nexus; e.g., Army Corps Section 404 permit)

Endangered Species Act Update

Harm Rule

- Rescinds the definition of “harm” in the ESA regulations, effective as of September 14, 2026
- Long standing debate over the meaning of “harm”; see, e.g., *Babbitt v. Sweet Home Chapter Communities for a Great Oregon* (1995).
- Practical effect is that habitat modification or degradation is no longer considered “take” under the ESA.
- Creating permitting strategy uncertainties for projects involving unoccupied habitat for listed species

Endangered Species Act Update

Fish and Wildlife Service Guidance re "Harm Rule"

- Brian Nesvik, Director of the US Fish and Wildlife Service, *Scope of the Endangered Species Act's "Take" Prohibition Following the Harm Rule*

- Ostensibly to assist the Service with implementing the Harm Rule, but goes beyond that:

    - Suggests that the Service will only identify as "take" affirmative acts that are directed intentionally and immediately at listed species.

    - "Did the actor intend to act on the animal itself? This factor guides interpretation and application of the ESA's 'take' prohibition."

Endangered Species Act Update

Ramifications of and Responses to the “Harm Rule”

- Anecdotal evidence that the Service is delaying or stopping the processing of Section 10 incidental take permits and Section 7 incidental take statements.

- Project proponents now having to re-evaluate ESA permitting approaches where the only impact is habitat modification or degradation

- Potential AB 1319 trigger and the possibility of “provisional candidate species” designations by the California Department of Fish and Wildlife

Endangered Species Act Update

Endangered Species Committee (aka the “God Squad”)

- Voted on March 31, 2026, to grant an exemption from ESA Section 7 agency consultation requirements for oil and gas leasing activity in the Gulf of Mexico
- First time such an exemption had been granted in more than 30 years, when the God Squad last convened in 1992 (pertaining to certain timber sales in Oregon)
- Exemption based on reasons of national security
- Litigation pending

Endangered Species Act Update

The Endangered Species Act/Clean Water Act Problem

- *Sackett v. Environmental Protection Agency* (2023) narrowed the Army Corps' jurisdiction over aquatic features by restricting the definition of "waters of the United States"

- Be careful what you wish for:

    - Without a federal nexus, projects needing take authorization must use Section 10 instead of Section 7

    - Without a Section 404 permit, the Regional Water Quality Control Board issues "waste discharge requirements" for fill of "waters of the state"; no Section 401 Water Quality Certification

Endangered Species Act Update

Bay Area Considerations

- Projects around the Bay often trigger Section 404, Section 408, or RHA Section 10 permitting, and thus, the ESA Section 10 vs. Section 7 issue may be less of a concern, putting aside the Harm Rule issue.

- But for those upland projects or projects not along the Bay, keep in mind this concern.

- Harm Rule may be a real issue, given that projects around the Bay may result in impacts to unoccupied habitat, causing project proponents uncertainty as to permitting strategy.

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Waters and Wetlands Update

Clean Water Act / WOTUS Update

Clean Water Act Basics:

- Prohibits the discharge of pollutants into “navigable waters,” defined as “waters of the United States” (WOTUS), without a permit
- WOTUS is the jurisdictional trigger for the key federal programs:
  - Section 404 – dredge and fill permits (Army Corps)
  - Section 402 – NPDES discharge permits (EPA / delegated states)
  - Section 401 – state water quality certification for federal permits
- If a feature is not WOTUS, no federal permit is required – but state law may still apply
- A federal permit is also the “federal nexus” that triggers NEPA review and ESA Section 7 consultation

Clean Water Act / WOTUS Update

Key Case Law – *Sackett v. EPA* (2023):

- Before *Sackett*: Justice Kennedy's "significant nexus" test from *Rapanos v. United States* (2006) extended federal reach to many intermittent streams and isolated wetlands
- *Sackett v. EPA*, 598 U.S. 651 (2023): WOTUS limited to:
  - "Relatively permanent" waters (standing or continuously flowing – rivers, lakes, oceans)
  - Wetlands with a "continuous surface connection" – indistinguishably part of those waters
- "Significant nexus" rejected; ephemeral streams and wetlands separated by uplands, berms, or levees may fall outside federal jurisdiction
- Court did not provide a full regulatory framework – left the agencies to implement
- Patchwork: amended 2023 Rule applies in California and 23 other states + D.C.; pre-2015 regime (as limited by *Sackett*) elsewhere

Clean Water Act / WOTUS Update

Federal Actions Since January 20, 2025:

- March 12, 2025 – EPA/Army joint field memo: “continuous surface connection” means “abutting (or touching)” a jurisdictional water; announced public process (“WOTUS Notice: The Final Response to SCOTUS”) and listening sessions
- November 17, 2025 – Proposed Rule (published Nov. 20, 2025; comments closed Jan. 5, 2026) – first comprehensive rule to codify *Sackett*
- September 2026 – Supplemental Proposal (published Sept. 9, 2026; comments closed Oct. 9, 2026) – “perennial” water alternative, after ~220,000 comments on 2025 proposal
- Next: final rule expected; Agencies may adopt 2025 approach, supplemental alternative, or a combination
- Litigation is virtually certain once a final rule is issued

Clean Water Act / WOTUS Update

Proposed WOTUS Rule vs. Supplemental Proposal:

Issue	Nov. 2025 Proposed Rule	Sept. 2026 Supplemental Proposal
"Relatively permanent" waters	Standing or continuously flowing year-round or at least during the "wet season" (undefined)	Must be "perennial": water every day of year under ordinary conditions, or continuous year-round surface flow (2020 NWPR)
Flow interruptions	Not addressed	Drought/anomalous events disregarded; ordinary dry period allowed only once per year, ≤ 30 consecutive days
Wetlands – "continuous surface connection"	(1) Abut a jurisdictional water and (2) surface water at least during wet season	Perennial surface water continuously connected to the jurisdictional water; alternative limits to portion "indistinguishably part of" it
Other key changes	No interstate-waters category; groundwater excluded; broader ditch, prior converted cropland, and waste treatment exclusions	Limited to these definitions – rest of 2025 proposal remains on the table

Clean Water Act / WOTUS Update

California's Response – "Waters of the State":

- Porter-Cologne Water Quality Control Act still regulates discharges to "waters of the state," including non-WOTUS wetlands and streams
- State Water Board wetland definition and dredge-and-fill procedures (2021); AB 2875 (2024) – no net loss / long-term net gain policy
- Fewer 401 certifications → more state-only Waste Discharge Requirements (WDRs), typically a 3+ month public process
- SB 601 (Allen) – would create "nexus waters" (waters of the state that are not WOTUS) and apply federal-style standards and permitting:
  - Citizen suits; federal standards as of January 19, 2025; expanded civil and criminal penalties
  - Passed Senate (23–12); held in Assembly committee Aug. 13, 2026

Clean Water Act / WOTUS Update

Bay Area Considerations:

- Fewer federal 404 permits for features lacking perennial flow or a perennial surface connection – but Regional Board WDRs still required
- Bay shoreline projects: tidal waters and Bay-abutting wetlands likely remain WOTUS; diked baylands and seasonal wetlands behind levees or berms are at risk of losing federal status
- Loss of federal nexus affects strategy: no 401 certification; ESA Section 10 instead of Section 7; NEPA may not be triggered
- Expect site-specific jurisdictional disputes (berms, culverts, ditches, tide gates) and continued litigation
- Plan for state and local layers: Porter-Cologne WDRs, CDFW, BCDC, local grading approvals

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Air Quality/ Clean Air Act

Greenhouse Gas Emissions: EPA Endangerment Finding Endangered

- EPA's 2009 Endangerment Finding was the prerequisite for EPA's regulations of GHG emissions under the Clean Air Act. EPA concluded that six greenhouse gases endangered public health and welfare by contributing to climate change.
    - The Endangerment Finding followed SCOTUS' holding in *Massachusetts v. EPA* (2007), that the CAA "unambiguously" authorizes "EPA to regulate greenhouse gas emissions from new motor vehicles" provided that the agency determines such emissions contribute to climate change.
    - In fact, SCOTUS held that "EPA can avoid taking further action [to regulate GHG emissions] only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion …"
    - The authority conferred by *Massachusetts*, and elucidated in the Endangerment Finding, has been relied upon by three successive administrations to regulate GHG emissions under the CAA.
- On February 12, 2026, EPA announced a Final Rule rescinding the 2009 Endangerment Finding. This will terminate the agency's regulation of GHGs under the CAA.

Greenhouse Gas Emissions:
EPA Endangerment Finding Endangered

EPA's justification for its Final Rule rescinding the 2009 Endangerment Finding consisted of:

1. An assertion that the 2009 Endangerment Finding (and subsequent regulations) **exceeded EPA's statutory authority** because the CAA is best read as limiting the definition of air pollution to threats to public health or welfare via local or regional exposure. In supporting these arguments,
   - EPA cites to *Loper Bright*, stating that the agency "can no longer rely on statutory silence or ambiguity to expand our regulatory power. … EPA reached contract conclusions in the Endangerment Finding by redefining key statutory terms and misconstruing … *Massachusetts* …".
2. Citing to the major questions doctrine, Congress did not clearly authorize EPA to prescribe emission standards for GHG emissions. As a result, "**nothing in the statute clearly authorizes the Administrator to assert the power to resolve this major question** by prescribing emission standards, let alone by mandating a shift toward EVs …"
3. **Regulating GHGs under the CAA is futile**. EPA used a methodology to estimate the effects of future emissions from the domestic motor vehicle sector on global mean surface temperature (GMST) and global sea level rise (GSLR).

Greenhouse Gas Emissions: EPA Endangerment Finding Endangered

The recission of the Endangerment Finding faces multiple suits in the D.C. Circuit (now consolidated), including (but not limited to):

- *Massachusetts v. EPA* (Case No. 26-1061). Filed by a coalition of AGs (and other gov't entities), seeking to vacate the rule and reinstate the Endangerment Finding.
- *American Public Health Assoc. v. EPA* (Case No. 26-01037). Filed by a coalition of health, environmental, and social justice nonprofits, raising a number of statutory arguments under the APA and CAA.
- *Venner v. EPA* (Case No. 26-01038). Filed by a group of 18 youth, arguing that action violates their constitutional rights, including to life, liberty, and the free exercise of religion.
- In April 2026, the court granted intervention to several coalitions of trade associations and states (as defendants).

The final recission rulemaking is also being challenged administratively:

- April 15, 2026: a coalition of environmental and health groups – many of whom are also plaintiffs in the D.C. Circuit litigation – filed a Petition for Reconsideration of the Recission of the GHG Endangerment Finding.
- April 16, 2026: a coalition of twenty-four state AGs and other governmental entities filed a similar petition.

Greenhouse Gas Emissions: Preemption

EPA recognized that recission of the Endangerment Finding threatened to undermine preemption as a defense to state regulation and/or state common law claims filed against private industry. In its final rulemaking, EPA sought to shield preemption arguments:

1. Even without an endangerment finding or associated GHG standards, EPA asserted that state emission standards for vehicles remains pre-empted by CAA section 209(a) because new vehicles "would remain subject to Title II of the CAA."
2. EPA asserted that its recission does not disturb the SCOTUS holding in *American Electric Power Company (AEP) v. Connecticut* that "the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants."
3. And, more broadly, EPA asserted that the CAA "continues to preempt state common-law claims and statutes that seek to regulate out-of-state emissions, independently of CAA section 209(a)'s express preemption provision for mobile-source emissions."

DOJ has continued to argue federal pre-emption in state court, including in cases filed in Michigan and Hawaii, and in amicus briefing before SCOTUS involving the Colorado Supreme Court's decision to allow Boulder to bring state common-law claims against private industry.

California Waiver Litigation

In the CAA, Congress generally preempted state governments from adopting their own air pollutant emissions standards for new motor vehicles and new motor vehicle engines.

Reaching as far back as the passage of the precursor to the CAA in 1967, Congress provided an exemption – i.e., a waiver process – for the State of California.

- Congress initially provided California with the federal preemption waiver authority because the state had "demonstrated compelling and extraordinary circumstances sufficiently different from the Nation as a whole to justify standards on automobile emissions which may, from time to time, need to be more stringent than national standards."

Under CAA section 209, California can apply to EPA for a waiver from the federal preemption, and EPA must grant the waiver absent certain disqualifying conditions.

As of 2025, California had used this waiver authority to receive more than 100 federal preemption waivers for new and amended state-level vehicle emissions standards.

California Waiver Litigation

Historically, EPA treated waivers as adjudicatory orders, which the U.S. Government Accountability Office has characterized as "case-specific, individual determination[s] of a particular set of facts."

In response to political headwinds, CARB withdrew two requests for EPA waivers in January 2025: (i) Advanced Clean Fleets rule, and (ii) In-Use Locomotive rule.

In February 2025, EPA reclassified waivers as "rules," saying they could be overruled via a disapproval resolution, per the Congressional Review Act.

Since the reclassification, EPA transmitted multiple waivers to Congress for CRA review, including vehicle emission waivers (and EV mandates), commercial harbor craft amendments, and the ocean-going vessels at berth rule.

California challenged EPA's approach in *California v. EPA* (D.D.C., Case No. 26-cv-2185). In September 2026, the Court issued an order granting a preliminary injunction and ordering EPA to take all steps to "restore the *status quo*."

The case is now on appeal to the D.C. Circuit (Case No. 26-5330) with an opening brief filed on October 30 by Intervenor-Defendants-Appellants.

Clean Air Act:
Challenges to Citizen Suit Authority

Courts have found that citizen suits play a critical role in the federal environmental regulatory scheme. *See, e.g., Sierra Club v. Chevron*, 834 F.2d 1517 (9th Cir. 1987) ("Our review of the legislative history indicates only that citizen suits … perform an important public function.").

As an example, the legislative history for the ESA noted: "It is the Committee's intent that enforcement of these control provisions be immediate, that citizens should be unconstrained to bring these actions, and that the courts should not hesitate to consider them." S.Rep. No. 414, 92d Cong., 2d Sess.

Yet, it has long been recognized that citizen suit authority is not unlimited:

- In *Gwaltney*, SCOTUS held that citizen suits must make a good-faith allegation of continuous or intermittent *ongoing* non-compliance.

- The "diligent prosecution bar," precludes citizen suits where EPA or a State "has commenced and is diligently prosecuting a civil action…" In part, the bar is effectuated via notice requirements as a precondition to filing.

Clean Air Act:
Challenges to Citizen Suit Authority

The current administration's evolving view on the constitutionality of citizen suits is crystallized by its intervention and motion to dismiss in *NAACP et al. v. x.AI Corp. et al.*, No. 3:26-cv-00074 (N.D. Miss.):

- NAACP's complaint alleged that xAI is operates dozens of combustion turbines at a data center without required permits and in violation of emissions standards.
- United States argued for dismissal, citing Article II of the Constitution, and taking the position that Executive prosecutorial discretion means that EPA has the inherent power to block citizen suits that seek to proceed where EPA has decided not to proceed.
- As such, the DOJ asserts a unilateral right to dismiss citizen suit where the government "has determined that dismissal … accords with federal policy, national security, and the public interest."

On October 19, 2026, the Court granted the United States' intervention but denied the motion to dismiss. The Court found that the diligent prosecution bar protects the executive interest and that the structure of the citizen suit provision in the CAA did not raise other constitutional issues.

We expect these issues to be resolved by the Fifth Circuit and/or SCOTUS along with other recent actions where private defendants are challenging the constitutionality of citizen suit provisions.

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Coastal Zone Management Act & NHPA Section 106

Coastal Zone Management Act
(16 U.S.C. §§ 1451-1466)

Enacted in 1972, established a national framework for states to consider and manage coastal resources and for federal assistance.

1) States may develop Coastal Management Programs (CMP), approved by Secretary of Commerce and reviewed every 5 years:
   - State is eligible for federal financial assistance; and
   - State may perform consistency determinations.

2) California approved CMP, includes:
   - California Coastal Commission
   - California Coastal Conservancy
   - Bay Conservation & Development Commission

3) Federal actions with “reasonably foreseeable effects” on coastal resources subject to state-level review for CMP consistency (16 U.S.C. § 1456).

Coastal Zone Management Act

On June 26, 2026, Trump Administration initiated out-of-cycle review of California's CMP:

1) Citing “pattern of jurisdictional and regulatory overreach,” NOAA issued 92-page draft evaluation in October 2026:
   - Preliminary finding of “non-adherence.”
   - California coastal authorities have demonstrated “unjustified hostility and political bias against offshore drilling opportunities, oil and gas projects broadly, and SpaceX’s launch activities.”
   - California CZMA agencies have until November 16 to demonstrate intent to comply with 18 corrective actions.

2) Implications for California and Bay Area:
   - No more State consistency reviews; and
   - Loss of federal funding for California’s CMP.

National Historic Preservation Act
Section 106

Requires federal agencies to consider effects on historic properties from projects they carry out, approve, or fund.

- Consult with the State Historic Preservation Officer, Tribal governments, local governments, and the public;
- Conduct surveys and evaluate effects and ways to avoid, minimize, or mitigate; and
- Develop Memorandum of Agreement or Programmatic Agreement.

On July 24, 2026, ACHP voted to proceed with Rulemaking, which would (among other things):

- Render most consultations optional – Tribal consultations remain mandatory only in limited circumstances;
- Narrow what counts as an “undertaking”;
- Create carve-outs or exclusions (akin to NEPA); and
- Reduce scope of consideration.