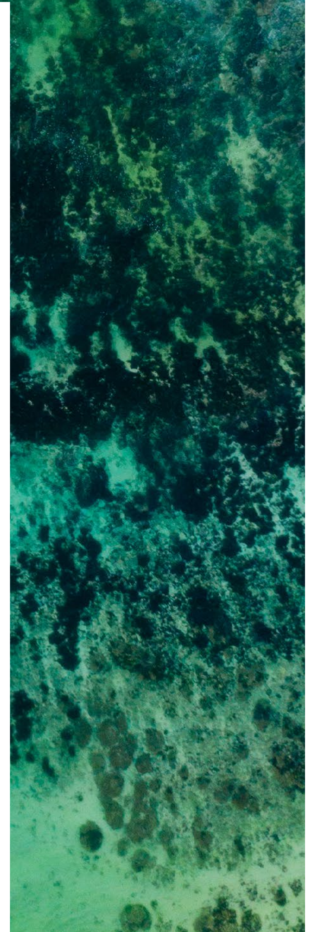

2023

Land Use, Environmental, & Natural Resources

Update

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Allen Matkins

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Introduction

With the first quarter of 2023 now under our belts, we thought it timely to issue an update on recent and upcoming developments of particular interest to our clients involving environmental, energy, land use, and natural resource issues.

As can be seen in the following assortment of articles, regulation affecting these issues remains very active and the source of significant debate in Sacramento and Washington, D.C.

In California, there are few more controversial issues than housing; new legislation enacted in late 2022 and a series of bills proposed in the recently commenced legislative session prove this abundantly. Much of the recent and newly proposed legislation is aimed at existing state and local environmental land use laws that some think inhibit housing production.

At a national level, just earlier this month, President Biden proposed the most aggressive rules ever to regulate emissions from vehicles ranging from passenger cars to freight trucks. This regulatory effort, if successful, will undoubtedly push us further toward the electrification of transport, at least partially in the name of reducing greenhouse gas emissions.

Beyond these specific policy areas, legislators and regulators are wrangling dozens of other topics. While we do not (and cannot) address every single issue in this update, we do consider the ones of most interest to our clients.

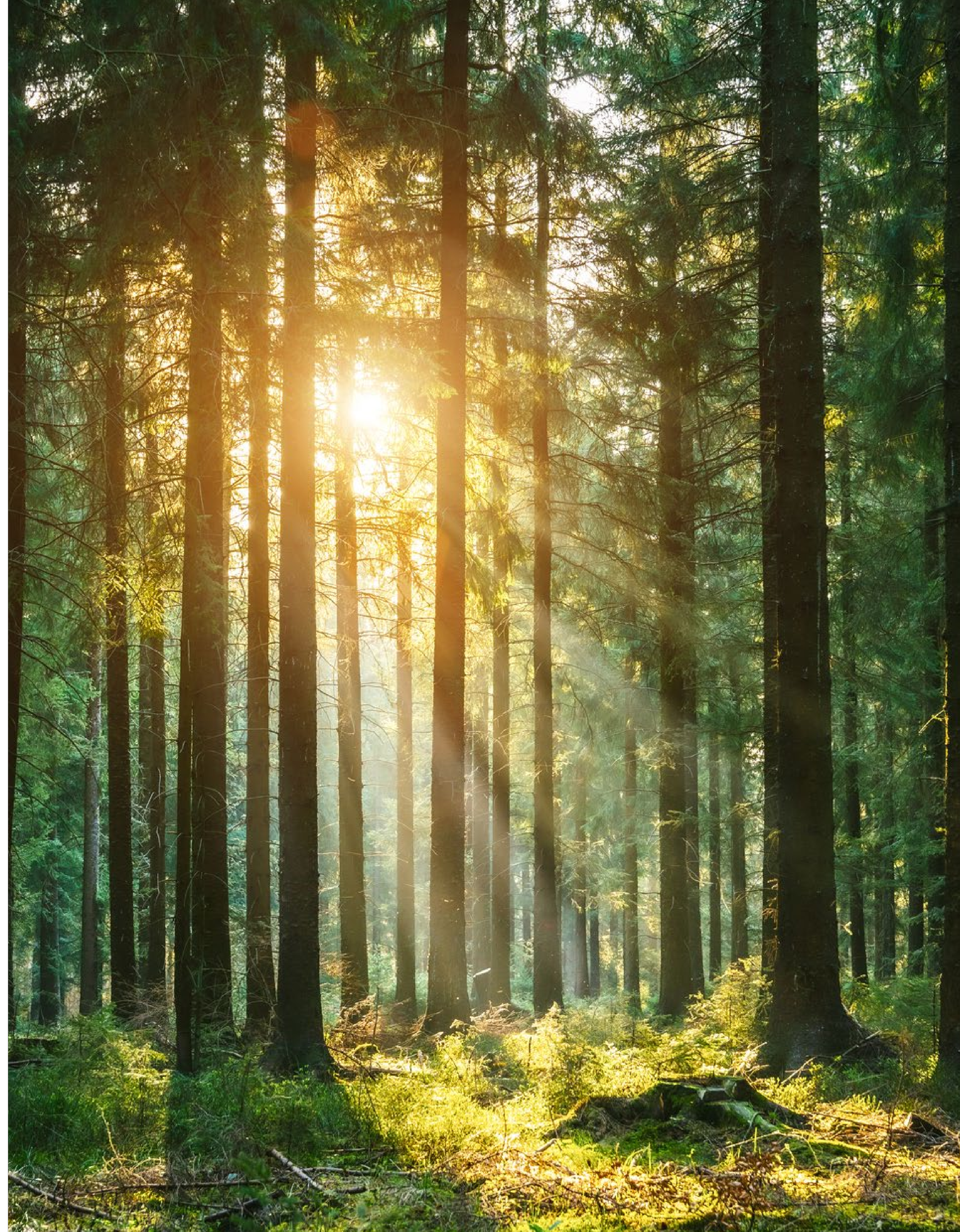
In this publication, we provide a multi-media update on California water policy, apprise our readers of the newest developments on the regulation of PFAS compounds, and also address environmental, social, and governance (ESG) activities increasingly undertaken by (and possibly soon-to-be required of) large companies and organizations.

Our attorneys are regularly a critical part of the most complex transactions involving contaminated property around the country. In 2023, we will continue to advise our clients on these matters, including the "Phase I ESA" standard for performing environmental due diligence on commercial, industrial, and retail properties which was just approved by the U.S. EPA.

With the aforementioned electrification of transport mentioned above, we also highlight one of the energy sources that will fuel such transport in the Golden State: offshore wind. As offshore wind development projects are a key priority, land-based solar and wind projects at utility and community scales continue to be a key component of the energy transition.

As in prior years, we look forward to continuing to offer more detailed accounts of new decisions and policies as they arise, including in our weekly newsletters – **California Environmental Law & Policy Update**, **Renewable Energy Update**, and **Sustainable Development & Land Use Update**. In the meantime, we hope you will find these articles to be of interest. Please contact us to learn more or if you need help in navigating the various rules and regulations applicable to your projects or properties.

Environmental



U.S. EPA and California Move Towards Comprehensive PFAS Regulation

In last year's update, we provided an overview of federal and California regulatory actions designed to protect public health and the environment from the impacts of per- and polyfluoroalkyl substances (PFAS). These actions affected a wide variety of stakeholders within the regulated community, including owners of PFAS-contaminated properties, water purveyors, sellers of products containing PFAS, and industries that utilize PFAS in their operations. Since that update, there have been significant developments, especially at the federal level, where the U.S. Environmental Protection Agency (EPA) has proposed several rules and regulatory actions involving PFAS under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), the Clean Water Act (CWA), the Safe Drinking Water Act (SDWA) and the Toxic Substances Control Act of 1976 (TSCA). Some of these developments indicate a shift in the regulatory posture from non-enforceable advisories to more mandatory compliance mechanisms.

Meanwhile, California's Legislature recently enacted and the Governor signed into law two bills pertaining to PFAS. **AB 1817** (Ting) prohibits the manufacture, distribution, or sale within the state of any new textile article containing certain PFAS beginning January 1, 2025. **AB 2771** (Friedman) prohibits the manufacture, distribution, or sale of any cosmetic product in the state with "intentionally added" PFAS, also beginning on January 1, 2025.

PFAS BACKGROUND

PFAS are a large group of synthetic chemical substances that have been used in a variety of commercial, industrial, and military applications for decades. Industries that utilize PFAS in their operations, and are therefore most likely to be affected by PFAS regulation, include oil and gas operations, waste management, metal coating/metal machinery manufacturing, plastics and resins, chemical manufacturing, mining, electronics, printing, and aviation. Common applications include nonstick cookware, water-repellent clothing, stain-resistant fabrics and carpets, cosmetics, firefighting foams, and products that resist grease, water, and oil. There are thousands of different PFAS compounds used in commerce today, some of which are more widely studied than others. PFAS molecules have a chain of linked carbon and fluorine atoms. Because the carbon-fluorine bond is one of the strongest bonds in chemistry, PFAS do not easily break down in the environment and slowly accumulate in humans, animals, and the environment, earning PFAS the moniker "forever chemicals." Humans are exposed to PFAS in a variety of ways, including direct contact through occupational exposure or use of PFAS-containing products, ingestion of contaminated drinking water and food, and inhalation of airborne contaminants. EPA has cited scientific research that suggests high levels of exposure to certain PFAS may lead to adverse health effects, including developmental effects and increased risk of some cancers.

FEDERAL REGULATION

Proposed CERCLA Regulation

On September 6, 2022, EPA published in the *Federal Register* a proposed rule to designate two widely used and heavily-studied PFAS compounds – perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) – as "hazardous substances" under CERCLA, also known as the Superfund law. CERCLA authorizes the federal government to investigate, remove and remediate releases of hazardous substances to the environment, and it imposes liability for the costs of such activities on "potentially responsible parties" including current owners and operators of sites where the releases occurred, past owners and operators of sites where disposal of hazardous substances occurred, persons who arranged for the disposal of a hazardous substance at a site, and persons who transported a hazardous substance to a site. CERCLA liability is strict – i.e., liability arises without fault – and liability to the government and non-liable private parties is generally joint and several, so that each individual liable party can be held responsible for all of the investigation, removal, and remediation costs.

According to EPA, the designation of PFOA and PFOS as "hazardous substances" will become final in August 2023, though litigation intended to block enforcement of the designation is a strong possibility.

Designating PFOA and PFOS as "hazardous substances" would have far-reaching consequences in California which has approximately 12,000 known PFAS-contaminated sites, second only to Colorado, which has 21,400 sites. Nationwide, it would induce federal, state, and local agencies to require investigation, and potentially, cleanup; cause EPA to designate new Superfund sites; extend the scope of investigation at existing Superfund sites; necessitate the re-opening of closed sites; and expose "potentially responsible parties" to vast liability. Businesses that use PFOA or PFOS would be subject to new reporting rules and regulations. Testing for PFOS and PFOA releases to the environment is likely to become a routine practice in real estate sale and leasing transactions, as is allocating liability risks associated with these compounds. Lenders, in particular, will likely structure loan documents to avoid potential exposure to liabilities arising out of the designation, and environmental insurers, which already often exclude coverage for cleanup costs associated with PFAS compounds, are likely to expand this practice, particularly for PFOS and PFOA.

Addressing PFAS under the Clean Water Act

EPA is also proposing to address PFAS contamination in the nation's waterways under the Clean Water Act (CWA). On December 5, 2022, EPA announced the availability of Effluent Guidelines Program Plan 15 (Plan 15). Under the CWA, EPA publishes Effluent Limitations Guidelines and Standards (ELGs), which are national wastewater discharge standards applicable to discharges from industrial facilities and developed for specific industries based on the performance of demonstrated wastewater treatment technologies. The CWA requires EPA to periodically review and update ELGs and to biennially publish a plan that establishes a schedule for such revisions.

Plan 15 discusses several actions related to PFAS. First, Plan 15 indicates that EPA intends to initiate a new rulemaking to revise the effluent limitations guidelines for the Landfill Category (40 C.F.R. part 445) due to the presence of PFAS in landfill leachate. Plan 15 also announces EPA's intention to expand an existing study regarding the use and discharge of PFAS in the Textile Mills Category (40 C.F.R. part 410). Lastly, Plan 15 provides updates on ongoing rulemakings for the Organic Chemicals, Plastics and Synthetics Fibers Category (40 C.F.R. part 414), the Metal Finishing Category (40 C.F.R. part 433), and the Electroplating Category (40 C.F.R. part 413). EPA expects these rules to be finalized by Spring 2024.

Proposed TSCA Regulation

While CERCLA and the CWA address the release or discharge of hazardous substances from industrial facilities, the Toxic Substances Control Act (TSCA) protects public health by authorizing EPA to regulate and screen all chemicals produced or imported into the United States, primarily to ensure the safety of chemicals used in consumer products. On January 26, 2023, EPA published a proposed "significant new use rule" (SNUR) for PFAS that are currently on the TSCA Chemical Substance Inventory but have not been used in manufacturing or processing since 2006. The proposed SNUR would apply to PFAS listed as "Inactive" on the TSCA Inventory.

The proposed SNUR would require any person to notify EPA 90 days in advance before commencing any manufacture (including import) or processing of any of the designated PFAS for a significant new use. EPA must also make a determination that any significant new use does not pose an unreasonable risk of injury to health or the environment, or, if it cannot make that determination, take such regulatory action as necessary. Any person who began manufacturing (including import) or processing of the designated PFAS compounds as a significant new use identified as of January 26, 2023 would have to cease any such activity upon the effective date of the final rule. To resume their activities, these persons would have to first comply with all applicable SNUR notification requirements and wait until all TSCA prerequisites for the commencement of manufacturing (including importing) or processing have been satisfied.

Safe Drinking Water Act

After monitoring the presence of PFAS in public drinking water systems for the past decade, on March 14, 2023, EPA announced the proposed National Primary Drinking Water Regulation (NPDWR) for several PFAS. NPDWRs are legally enforceable primary standards and treatment techniques that apply to public water systems. The pre-publication version of the NPDWR would establish legally enforceable levels (known as maximum contaminant levels or MCLs) for six PFAS in drinking water. The MCLs for PFOA and PFOS – the two most common PFAS – would be set at four parts per trillion (ppt), near the lowest level current laboratory analytical methods can reliably detect the chemicals, with "maximum contaminant level goals" (MCLG) of zero for each. The NPDWR would also regulate four other PFAS chemicals – perfluorononanoic acid (PFNA), hexafluoropropylene oxide dimer acid (HFPO-DA, commonly known as GenX Chemicals), perfluorohexane sulfonic acid (PFHxS), and perfluorobutane sulfonic acid (PFBS) as a group based on their cumulative potential health impacts using a risk-based calculation known as a "Hazard Index" rather than using specific chemical concentrations.

A hazard index is a number calculated to represent the non-cancer health risk of a mixture. The MCL for this group of PFAS chemicals would be set at 1.0 – the level at which non-cancer adverse effects are not likely to occur. This approach is considered more conservative and protective of human health than regulating based on cancer end points and will require water systems to measure the individual chemicals' chemical concentrations and calculate the cumulative hazard index. The MCLG for these four PFAS would also be set at a Hazard Index of 1.0. The SWDA requires EPA to establish MCLs as close as feasible to the MCLG for a chemical, taking into account treatment costs, and to publish a health risk reduction and cost analysis for each contaminant to be regulated under the NPDWR. EPA must also make a determination whether or not the benefits of the regulation outweigh the compliance costs. EPA now has 18 months to promulgate a final rule, although EPA has stated that it intends to finalize its PFOA and PFOS NPDWR regulations by Fall 2023.

California Legislation

At the state level, Governor Newsom recently signed into law AB 1817 and AB 2771, which prohibit the manufacture, distribution, and sale of certain "textile articles" containing PFAS and cosmetic products containing intentionally added PFAS, respectively. Both bills take effect on January 1, 2025.

AB 1817 prohibits any person from manufacturing, distributing, selling, or offering for sale in the state a new textile article that contains regulated PFAS. AB 1817 defines regulated PFAS to mean PFAS that a manufacturer has intentionally added for a functional or technical effect or PFAS that exceeds a certain threshold. Commencing on January 1, 2025, the threshold is 100 parts per million ("ppm") and decreases to 50 ppm on January 1, 2027. AB 1817 also applies to a wide variety of products, as the bill defines "Textile Articles" as "Apparel," i.e., clothing intended for regular wear or formal occasions, outdoor apparel, handbags, and backpacks. AB 1817 also applies to household items such as shower curtains, bedding, towels, and tablecloths. AB 1817 would require manufacturers to provide to distributors and sellers a certificate of compliance that the textile article is free from regulated PFAS.

AB 2771 prohibits any person or entity from manufacturing, selling, delivering, holding, or offering for sale in commerce any cosmetic product that contains intentionally added PFAS. AB 2771 defines "intentionally added" to mean either (1) PFAS chemicals that a manufacturer has intentionally added to a product and that have a functional or technical effect on the product or (2) PFAS chemicals that are "intentional breakdown products" of an added chemical. AB 2771 also defines "cosmetic product" to mean an article for retail sale or professional use intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body for cleansing, beautifying, promoting attractiveness, or altering appearance. Manufacturers of textile articles and entities in the supply chain for cosmetics should take advantage of the available time before the January 1, 2025 effective date to implement compliance strategies for AB 1817 and AB 2771.

CONCLUSION

Taken together, these regulatory actions are further evidence that federal and state agencies are continuing to build a comprehensive regulatory scheme to address PFAS in the economy and in the environment. A broad and diverse group of stakeholders will be impacted and should remain abreast of developments that will affect their business or operations. For assistance in understanding any of the regulatory developments described above and how they may impact your business or industry, please feel free to contact Allen Matkins' Land Use, Environmental & Natural Resources Practice Group.

Contact: David Cooke, Kamran Javandel, & Dan Warren

EPA Approves New ASTM Standard for Phase 1 Environmental Site Assessments

Every eight years, standards for environmental Phase I reports are updated – and, typically, made more detailed and stringent. The standards were most recently updated in 2021, and the updated version was approved by the U.S. Environmental Protection Agency ("EPA") for use beginning in February 2023.

BACKGROUND

Prospective buyers of real property, particularly commercial and industrial properties, routinely commission environmental consultants to prepare Phase I Environmental Site Assessments ("Phase I ESA") in order to educate themselves about potential environmental conditions they might face as owners, and often to satisfy a condition for qualifying for landowner liability protections available under the Comprehensive Environmental Response, Compensation & Liability Act of 1980 ("CERCLA," commonly known as the "Superfund" statute). Of particular importance to prospective buyers – and, since 2018, prospective tenants – is the opportunity to qualify as "bona fide prospective purchasers" ("BFPPs"), who may be exempt, notwithstanding their pre-purchase or pre-lease knowledge of the contamination, from the strict, joint and several cleanup cost liability that usually attaches to all current "owners" and "operators" of real property contaminated with "hazardous substances." Prospective lenders and environmental insurers also rely on Phase I ESAs to guide lending and underwriting decisions that can frequently be critical to the successful closing of a purchase and sale of real property.

CERCLA provides that a prospective buyer's or tenant's pre-purchase or pre-lease environmental investigation must meet a standard called "all appropriate inquiries" ("AAI," for short) in order to qualify it for landowner liability protection. EPA adopted a regulation establishing the elements of AAI in 2005, and also specified that a pre-purchase environmental assessment that met the more detailed requirements of the then-current 2005 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process," developed and published by the American Society for Testing and Materials ("ASTM"), would satisfy the AAI requirement. Since then, the ASTM standard has twice been updated and approved by EPA, first in 2013, and, most recently, in 2021. EPA's approval of the 2021 version of the standard, designated ASTM Standard E1527-21, became effective on February 13, 2023. EPA also provided for a one-year phase-out period for the 2013 version, ASTM Standard E1527-13, which will expire on February 13, 2024. Thus, until that date, environmental consultants and their clients will be able to satisfy AAI by complying with either the 2013 or the 2021 version. Prospective purchasers and tenants – and their lenders and environmental insurers, among others – may nevertheless demand that their environmental consultants begin complying with the latest version long before E1527-13 expires.

KEY CHANGES IN E1527-21

The changes wrought by the 2021 version are not as extensive as the changes to the 2005 version that ASTM adopted in 2013, but some of them are significant.

Definition of "recognized environmental conditions." One change that has garnered attention goes to the core objective of an ASTM-compliant Phase I ESA – identifying "recognized environmental conditions," or "RECs" – which are now defined as follows:

1. The presence of hazardous substances or petroleum products in, on or at the subject property due to a release to the environment;
2. The likely presence of hazardous substances or petroleum products in, on or at the subject property due to a release or likely release to the environment; or
3. The presence of hazardous substances of petroleum products in, on or at the subject property under conditions that pose a material threat of a future release to the environment.

In practice, environmental professionals and those who rely on their Phase I ESAs may well treat this definition as a non-substantive clarification of the 2013 definition, and, according to EPA, the concepts and ramifications of the definition have not changed. Nevertheless, the language changes could be read to grant greater deference to the judgment of the environmental professional with respect to the second prong – a REC based on the "likely presence" of hazardous substances or petroleum at the subject property due to a "likely release." The concept of a "likely release" is new, and appears in place of the 2013 version's requirement that the "presence or likely presence" of hazardous substances be based on the arguably more objective criterion of "conditions indicative of a release to the environment." Any change to the definition of "REC" that vests environmental professionals with greater discretion than they previously had is likely to make REC findings more subjective, and hence less predictable. Because a prospective buyer's or tenant's knowledge or reason to know of contamination at the subject property is not a disqualifying factor for BFPP status, the change to the REC definition is unlikely to affect its ability to invoke that defense. Rather, the change is more likely to affect the terms and success of the prospective transaction itself. REC findings can, and often do, prompt buyers to insist on renegotiating the purchase price or other purchase contract provisions, cause lenders to withdraw loan commitments or impose unfavorable loan terms, and induce insurers to insert undesirable exclusions in their quotations of environmental coverage. When greater discretion is given to environmental consultants to characterize a condition – or decline to characterize it – as a REC, it is entirely possible that, in close cases, consultants could find themselves under increased pressure to exercise their judgment in a particular way depending on the needs of their clients.

Historical Research

ASTM Standard E1527-21 substantially overhauls the requirements for historical research into past uses of the subject property. The new standard identifies eight categories of "standard historical resources" and prioritizes four categories that the environmental professional must review if they are "reasonably ascertainable" and likely to be useful: aerial photographs, fire insurance maps (e.g., Sanborn maps), local street directories, and historical topographical maps. If any of these four categories of resources is not reviewed, the reasons why must be explained in the report. If other standard historical resources will aid in identifying specific past uses of the subject property – rather than broad categories of use, such as "industrial" or "retail" – then these resources must be reviewed if they are likely to be useful in this regard. If the four required standard historical sources also provide information regarding "obvious" past uses of adjoining properties, they must be reviewed for purposes of evaluating those uses in order to assess the possibility that use or migration of hazardous substances or petroleum products at the adjoining property has impacted the subject property. If they are not reviewed for this purpose, the report must explain why. Other standard historical sources (e.g., property tax files, zoning records and land use records) should also be reviewed for information regarding the risk of migration from adjoining properties if, in the judgment of the environmental professional, they are likely to be useful and reasonably reviewable in light of considerations of time and cost. Historical resources identified in prior assessments can be used so long as copies were included in the prior assessments and the environmental professional determines that they help to meet the objectives of the Phase I ESA. The historical resources relied upon in a Phase I ESA must be organized and cited in a manner that enables others to recreate the research in the future.

These provisions are substantially more detailed and comprehensive than the parallel provisions in the 2013 version of the standard, and compliance with them may increase both the time and the cost required to complete a compliant Phase I ESA. These factors should be taken into account when planning the timeline and budget for a transaction that requires a Phase I ESA.

Elements of the Phase I ESA report

The report of a Phase I ESA must specify the dates on which the environmental professional conducted interviews, the required review of government records, and the site reconnaissance, and provided the declaration of his or her qualifications, in order to ensure that, regardless of the date the report is issued, those tasks were performed within 180 days of the transaction that the Phase I ESA supports. The report must include a site plan showing the approximate location of features, activities, uses and conditions on the subject property, in addition to photos of features and conditions indicative of RECs. It must also contain detailed findings that identify the features or conditions that indicate the presence or likely presence of hazardous substances or petroleum products at the property, and opinions, with supporting rationale, of the environmental professional whether the features or conditions qualify as RECs, "conditional RECs" "CRECs", "historical RECs," or "de minimis conditions." Significant data gaps must be identified, and the report must discuss how the missing information affects the environmental professional's ability to identify conditions indicative of releases of

hazardous substances or petroleum products, and whether additional information would assist in determining whether a REC or CREC exists.

Non-Scope Considerations

The list of "non-scope considerations" – i.e., environmental issues that a Phase I ESA need not address but that the parties may wish to include in the report – has been expanded to include discussion of substances not yet defined as CERCLA "hazardous substances." Prominent among these are per- and polyfluoroakyl substances ("PFAS"), two of which (known as PFOS and PFOA) are expected to be considered for designation as "hazardous substances" later this year. Once these compounds are designated as "hazardous substances," Phase I ESAs must consider them, just as they consider any other hazardous substance of petroleum product, in order to comply with the 2021 standard. Even before this designation is finalized, prospective purchasers, lenders and insurers may well ask their environmental consultants to address PFAS compounds as part of their work on a Phase I ESA. Considering the regularity with which environmental insurers are automatically inserting PFAS exclusions in their policies, users of Phase I ESAs may have little to lose by assessing the likelihood of the presence of PFAS releases at the subject property, and something to gain – for example, the withdrawal of a coverage exclusion – if the conclusion of the report is that there is little or no risk of such a release.

CONCLUSIONS

The 2021 modifications to the ASTM standard were not radical, but, predictably, the modifications imposed a few more detailed requirements – and hence a few more ways to fail to comply – than the earlier version. The new version of the standard is likely to result in increased costs and longer lead times for completion of compliant Phase I ESAs. Particularly when the Phase I ESA is relied upon to set up a landowner liability protection under CERCLA (or to meet some other statutory requirement, such as qualification for an agreement with a state environmental agency under the California Land Re-use and Revitalization Act), a careful review of a Phase I ESA in draft form be conducted by experienced environmental professionals or attorneys, in order to ensure that the detailed requirements of the new standard are met.

Contact: David Cooke

ESG on the Rise

Companies are facing increased federal, state, and public scrutiny regarding environmental, social, and governance (ESG) issues. Amidst this momentum, it is important for companies operating in all sectors to address ESG compliance proactively and plan accordingly. We foresee an uptick in environmental litigation and enforcement actions, including CERCLA/RCRA and citizen suits, as lawmakers and agencies have focused their agenda on environmental justice and as community-based environmental advocacy is activated. The following article briefly lays out several of the key regulatory and legislative proposals coming down the pipeline to help companies begin to prepare.

CORPORATE DISCLOSURE RULES

New climate-related disclosure rules are looming at the federal level from the U.S. Securities and Exchange Commission (SEC), with a set of even more stringent requirements affecting both private and public entities, pending before the California Legislature.

SEC's Enhancement and Standardization of Climate-Related Disclosures for Investors

In March 2022, the SEC **proposed** rule changes that would require public companies to disclose climate-related risks, including data on greenhouse gas emissions, in their registration statements and periodic reports. The rules are expected to be finalized in April 2023. Under the proposed rules, companies would be required to disclose data pertaining to direct greenhouse gas emissions (Scope 1), indirect emissions (Scope 2), and, most controversially, emissions from upstream and downstream activities indirectly generated by a company along its value chain (Scope 3). As expected, the proposal has been the subject of heated debate during public comments among C-suite executives, politicians, and other interested parties, and they will likely be challenged in court once finalized.

California Corporate Disclosure Bills

In California, legislators have introduced a trio of bills the authors call the **Climate Accountability** package. The authors have described the legislation as a complement to the pending SEC rules.

Two of the proposed pieces of legislation focus on corporate disclosures, targeting large corporations doing business in California, both public and private: **SB 253** (Wiener), the California Climate Corporate Data Accountability Act and **SB 261** (Stern). SB 253, an updated version of a similar bill (Senate Bill 260) that

narrowly failed in 2022, would require the California Air Resources Board by January 1, 2025 to enact regulations mandating that companies with more than $1 billion in revenue doing business in California publicly disclose Scope 1, 2, and 3 emissions data by 2026 and annually thereafter. SB 261 would mandate that companies with more than $500 million in revenue prepare and submit climate-related financial risk reports by December 31, 2024, and annually thereafter.

The third bill, **SB 252** (Gonzalez), would prohibit the state's public pension funds from investing in fossil fuel companies and require them to liquidate current fossil fuel holdings by July 1, 2030.

Environmental Justice

Environmental justice has become an important policy consideration at the federal and state level, guiding regulations and proposed legislation. The U.S. Environmental Protection Agency (EPA) **defines** environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." As one of numerous actions the agency has taken to address the issue, EPA **proposed** on January 19, 2023, to add environmental justice as one of three new National Enforcement and Compliance Initiatives for FY 2024-2027, along with climate change and PFAS contamination.

Among the numerous environmental justice initiatives in California, state legislators and municipalities have targeted oil and gas operations, as well as industrial facilities, operating in overburdened communities through an environmental justice lens; as with the City and County of Los Angeles' recent votes to ban new oil and gas extraction and deem existing wells and drill sites as legally nonconforming uses to address longstanding injustices.

Allen Matkins will continue to monitor these trends so companies can minimize the risk of litigation and ensure compliance with new ESG regulations.

Contact: Shawn Cobb

Allen Matkins

Natural Resources

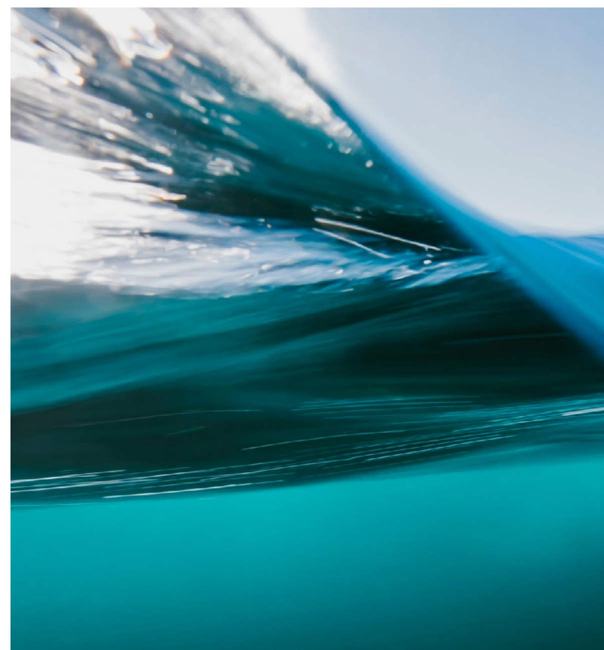
California Water Policy: How Will Water — Or Lack Thereof — Impact Our Economy in the 21st Century?

How does California's drought — or on the other end of the spectrum, an overabundance of water — impact our economy, infrastructure, and real estate development? David Osias and Barry Epstein, both partners at the law firm Allen Matkins and thought leaders on water rights, land use, natural resources, and energy law, joined Jerry Nickelsburg, adjunct professor of economics at the UCLA Anderson School of Management, and Andrew Ayres, a research fellow at the Public Policy Institute of California Water Policy Center, to discuss water rights, the challenges of water distribution in California, legal issues, and possible solutions, as well as obstacles to the solutions.

WATER PROBLEMS IN CALIFORNIA — NOT A NEW STORY

It's not news that California suffered from a decades-long drought, the worst in over 1,000 years, immediately followed by a once-in-a-century winter snowpack and rainfall. Episodic droughts and floods have long been a part of the region's history, which is why the state's modern landscape reflects the efforts to manage both. Although California's average snowpack and rainfall suggest abundant supplies, where that precipitation occurs, its distance from population and farming centers, and the wide variation in volume from year to year make the "average" an unreliable predictor of water availability. 75% of California's precipitation falls north of Sacramento, while 80% of the state's water use is south of the city. In truth, a lot of precipitation falls on the state, but the annual water supply comes from about nine storms a year, with half falling between December and February. In other words, precipitation doesn't fall evenly throughout the state or the year, so there is usually too much or too little water at any given time. And there is almost no such thing as a "normal" year.

California's state and federal water projects are in place to move water to where it is needed and when it is needed. However, these projects were all built in the early-mid 1900s and weren't designed for today's circumstances, including global warming, significant population growth leading to greater water requirements, and the strain on the environment from increases in



consumptive uses of water. Additionally, farming has changed, with a decrease in annual crops and an increase in more permanent crops like trees and vines, which make annual water supply fluctuations more difficult for farmers to adjust to.

WATER RIGHTS — A COMPLEX ISSUE

Water rights are incredibly complex, with different types of water rights having different priorities and other attributes that affect their allowed use, locations and transfers, all of which is beyond summarizing in a succinct fashion. However, in general, and without regard to a variety of exceptions to the rules affecting where water rights can be exercised and with what priority, the following fairly summarizes the status quo.

The water rights laws on the books in California make it extremely difficult to change the distribution of available supply, if desired, to meet competing needs. Priority of water rights is mainly determined by the historical date of acquisition of the right for stream systems and groundwater basins, but subject to the highest priority belonging to contiguous or overlying landowners. So contiguous/overlying rights and older (senior) rights have priority, and the higher priority rights are entitled to be satisfied in full before junior rights get any water. This hierarchy of water rights does not consider the modern societal or economic value of water, i.e., the importance of one use versus another.

Water rights are not only defined by who holds them, but also by where the water is taken from, where it can be used, and what it can be used for. So to repurpose water that is subject to a water right, changes may need to be made regarding where it's taken from, for what purpose, where it's used, or all of these. These changes may require state approval, and in general, they cannot cause injury to any other water rights holder. And, like most things involving water rights, what an injury is and whether one is caused is frequently a matter of dispute. Additionally, proposals of this sort often trigger an environmental review. And the delivery systems (canals, etc.) needed to move the water to a new destination may be owned by a third party. As a result, the transaction barriers to changing water rights and repurposing water use can be slow and expensive to overcome. Complicating the matter further, taking water from one area and using it in another can become a hot political issue.

In one instance, a large transaction to transfer conserved water supplies took five years to negotiate and document, and an additional nine years to resolve the lawsuits challenging the transfer. It eventually went through, but real estate developers are understandably hesitant when the issue of water rights could delay a project for years and add significantly to the overall cost.

THE REASONABLE AND BENEFICIAL USE DOCTRINE

Regarding water use, the Reasonable and Beneficial Use Doctrine included in the California Constitution is gaining more traction. Notwithstanding the priority system, state agencies are flexing their muscles a bit more when it comes to the "reasonable" part of this provision as a mechanism for requiring reductions in water use by senior water rights holders. There will likely be more regulations regarding reallocation and redistribution using this "reasonable" requirement. However, it's expected that this will be very controversial and highly litigated.

POSSIBLE SOLUTIONS

California's Pacific coast stretches for over 800 miles, and desalination of seawater has been proposed as a way to ameliorate the state's water shortage. But this method is expensive and difficult for at least four reasons:

1. Desalination plants have to be built on the coast, which is among the most costly real estate in the country.
2. The costs of building and operating a plant are high.
3. The process has to be done in an environmentally benign way (e.g., preventing the capture of living organisms, preventing dead zones from discharge of brine or thermal pollution, etc.).
4. The desalinated water is at sea level, and all the users are at a higher elevation, which presents additional energy costs for moving the water from the plant to the people.

Some proposed desalination plants were found lacking in sufficient protection of the environment. Plants that have been approved are dealing with disputes and disagreements over whether the approvals were correct.

Overall, desalination isn't the single silver bullet that will cure California's water shortage problem.

What about storage and more equitable distribution? Aside from the water rights issue mentioned above, more storage is needed to capture water when it is available. One problem is there isn't much land in flood plains that isn't already built on. While storage and distribution are feasible, the costs will be very high. Additionally, moving water from north to south means going through the Delta region, which is historically very litigious, and it could take years to sort through all the legal challenges that are likely to arise.

The experts all agree that California's water problem can be alleviated — through desalination, more storage and distribution, aggressive water conservation, and the use of recycled water. The technology is there. The main problem is money, as all these endeavors will cost a great deal.

Contact: Barry Epstein & David Osias

California's Offshore Wind Power Industry Sets Sail

BACKGROUND: OFFSHORE WIND IN CALIFORNIA

California is entering the new waters of offshore wind power. The unique challenges and potential of developing offshore wind power in California have spurred numerous federal and state cooperation efforts. While other U.S. offshore wind power generating projects, including the handful in operation and planned for the U.S. East Coast, are generally located in shallow waters and anchored to the seafloor, California's continental shelf geology, which drops off steeply close to shore, will largely require wind power installations on floating platforms. Only a few such floating projects currently exist around the world, located in Europe and Asia at a relatively small scale. According to the U.S. Department of Energy, two thirds of potential wind power resources in the U.S. are located in deep water where floating platforms would be required. To facilitate development of these resources, the **U.S. Department of Energy's Floating Offshore Wind Shot Program** has set a goal to deploy 15 gigawatts ("GW") of floating offshore wind and accelerate cost reductions for floating technologies by more than 70% by 2035.

In September 2021, Governor Gavin Newsom signed **AB 525** (Chiu), which required the California Energy Commission ("CEC") to facilitate the development of offshore wind power facilities. In August 2022, the CEC set offshore wind planning goals of 2-5 GW by 2030 and 25 GW by 2045, creating an opportunity for the wind power industry to expand into new territory. The permitting and construction of floating offshore wind power facilities will be a complex, lengthy process that requires the cooperation of several federal, state, and local agencies.

In December 2022, the federal Department of the Interior's Bureau of Ocean Energy Management ("BOEM") auctioned two leases for an area off of Humboldt County in northern California and three leases for areas off of the central coast of California. The winners of the northern California lease auctions were RWE Offshore Wind Holding, LLC and California North Floating, LLC. The winners of the central coast auctions were Equinor Wind US LLC, Central California Offshore Wind LLC, and Invenergy California Offshore LLC. When available, BOEM will post executed leases at the following website: **https://www.boem.gov/renewable-energy/lease-and-grant-information.**

To assist stakeholders in navigating the coming process, CEC has promulgated a draft Conceptual Permitting Roadmap ("Roadmap") for offshore wind that contains timeframes and milestones for permitting offshore wind power and associated electric and transmission infrastructure. The Roadmap is at present a draft, preliminary document that will be updated through at least June 2023 and possibly afterward. AB 525 also requires the CEC to develop a full Offshore Wind Strategic Plan by June 30, 2023.

CONCEPTUAL PERMITTING ROADMAP

Because the contemplated floating offshore wind generating facilities and related components will be located in federal waters and ultimately connected to onshore facilities through state waters on submerged state lands, the projects will be ultimately subject to federal, state, and local jurisdictions. The Roadmap is intended to facilitate timely, coordinated, and efficient permitting processes among the entities responsible for issuing entitlements and associated environmental review.

BOEM manages development of the nation's offshore energy and mineral resources under the authority of the federal Outer Continental Shelf Lands Act. BOEM has exclusive authority to grant leases and approve construction and operations plans for renewable energy development in the federal waters of the United States Outer Continental Shelf.

Renewable energy projects in the OCS follow the BOEM's four-stage permitting process, which can take over 10 years to complete. The four stages are:

1. Planning and Analysis (identification of offshore wind areas and initial environmental reviews)
2. Leasing (issuance of notices, negotiation of lease terms, issuances of leases)
3. Site Assessment
4. Construction and Operations. For the initial five California offshore lease areas identified by BOEM, the first two stages are essentially complete and therefore the Roadmap focuses on site assessment and construction and operations.

Stage 3 site assessment activities include developing site assessment plans and conducting environmental surveys. BOEM estimates that the site assessment process will take up to six years between lease issuance and construction, with the first year devoted to creation of a "Site Assessment Plan" ("SAP".) Once the lessees have completed the SAP, BOEM will conduct additional environmental reviews of the proposed projects. BOEM may also conduct additional analysis under the federal National Environmental Policy Act ("NEPA") if significant new information

becomes available after site assessment is complete. Such additional BOEM reviews and analysis could also potentially trigger additional review by the California Coastal Commission. Site assessment activities may also require permits from the California State Lands Commission, the California Department of Fish and Wildlife, and other federal, state, and local agencies. Within 120 days of lease issuance, lessees must develop a communication plan for and hold a meeting with all federal, state, and local agencies with authority related to the lease area. Lessees are also required to develop plans to communicate with local tribes and commercial fishing communities that may be affected. California's formal permitting and leasing processes, including applications for state tidelands leases and coastal development permits, which require compliance with the California Environmental Quality Act ("CEQA") via environmental review, have not yet been initiated with regards to offshore wind. The CEC anticipates that the initial surveys taken during the BOEM's Stage 3 will assist the state lead CEQA agency in describing the environmental baseline and setting against which potential impacts would be measured.

In Stage 4, lessees must submit a detailed Construction and Operations Plan ("COP") before beginning construction. BOEM has published a checklist that will assist lessees in preparing their COPs and will allow lessees to submit information under a phased approach. Once the COP is finished, BOEM will conduct NEPA review. The Roadmap anticipates that joint CEQA-NEPA review may be possible. Additionally, the California Coastal Commission must approve the COP.

STAKEHOLDER COMMENTS; REVISED ROADMAP FORTHCOMING

The vast potential for offshore wind's contribution to the California grid has attracted a large volume of stakeholders and associated comments on the Roadmap. Industry groups have requested participation in the Roadmap drafting process and have suggested several changes to the draft Roadmap. As described in a comment by American Clean Power California, industry's "deep technical expertise and experience permitting offshore wind and understanding of the requirements and constructability of offshore wind technologies and associated facilities" is essential to developing a successful, coordinated and efficient permitting process.

Not surprisingly, industry groups have requested further clarity on the specifics of the permitting and entitlement process. Multiple comments requested that a CEQA lead agency be designated for all offshore wind projects. The current draft of the Roadmap does not specify a particular lead agency, and appears to anticipate that the lead agency could change based upon the specifications of the project. Based on our decades of experience assisting clients navigating the CEQA process, we strongly endorse the concept that there be one uniform CEQA lead agency for all California offshore wind projects.

Other comments have urged the CEC to describe the specific roles and responsibilities of each agency involved in the permitting process and establish a detailed sequence and schedule of approvals that identifies where certain agency approvals are dependent on prior approvals.

Additional comments emphasize the importance of allowing for concurrent state and federal permitting reviews and that state and federal approvals processes be scheduled to terminate at the same time. Finally, comments have suggested establishing a forum to resolve disputes that emerge during the permitting process.

Other stakeholders have raised additional concerns with the process outlined in the draft Roadmap. Community groups such as the Offshore Wind Now Coalition have requested additional clarity on public comment and engagement processes, while fisheries groups have requested that a full CEQA review happen prior to the leasing stage.

In light of these stakeholder comments, the CEC is expected to promulgate a revised version of the Roadmap before or in June 2023. The revised Roadmap will further illuminate the legal challenges facing California offshore wind as it spins forward.

Contact: Molly Coyne & Dana Palmer

Allen Matkins

Land Use

New California Housing Laws

ASSEMBLY BILL 2011 AND SENATE BILL 6 – HOUSING IN COMMERCIAL ZONING DISTRICTS

AB 2011 (Wicks) provides for "by right" streamlined ministerial (i.e., no CEQA) approval of qualifying mixed-income and affordable housing projects along commercial corridors in commercial zoning districts. This new law is expected to be a game-changer for multi-family housing developers providing on-site affordable housing. The new law will become operative on July 1, 2023 and will be in effect until at least January 1, 2033.

The following is a summary of the requirements that must be met under AB 2011 for mixed-income housing projects, along with a summary of the key differences between AB 2011 and **SB 6** (Caballero), which also creates a pathway for the approval of qualifying housing projects in commercial zoning districts and will become operative on July 1, 2023. Please contact us for information about these bills, including applicable requirements for 100% affordable housing projects.

KEY INSIGHTS AND OPEN ISSUES

- Under AB 2011, the project must "meet or exceed" the greater of five enumerated residential density options, which is in turn the minimum residential density applicable to the qualifying property. AB 2011 provides that the "other" applicable objective zoning standards for the project shall be those for the closest zoning district that allows multifamily residential at that minimum density. AB 2011 is untested, and it is not clear from the statutory language whether the maximum density under those objective zoning standards also applies (prior to any density bonus). We expect the California Department of Housing and Community Development ("HCD") and/or reviewing courts to weigh in accordingly.
- AB 2011 explicitly allows for a density bonus under the State Density Bonus Law (Gov. Code § 65915) to maximize the residential density on a qualifying property. AB 2011 also sets forth minimum affordability requirements. For example, if the project would meet AB 2011 requirements by including 15% low income units (as defined), the project would also qualify for a 27.5% density bonus under the State Density Bonus Law. AB 2011 also provides that only objective standards under a local ordinance implementing the State Density Bonus Law shall apply. Many local density bonus ordinances purport to require a separate discretionary approval, which would otherwise trigger CEQA review. The utilization of the State Density Bonus Law for a qualified AB 2011 project is untested. However, based on the statutory language in AB 2011, local jurisdictions should be prohibited from requiring a separate discretionary approval and CEQA review in this context. We expect HCD and/or reviewing courts to weigh in accordingly.
- AB 2011 prohibits residential units from being located within 500 feet of a freeway. At least two local jurisdictions have preliminarily determined that includes freeway on-ramps and off-ramps, which appears to be contrary to the intent of AB 2011. We expect HCD and/or reviewing courts to weigh in accordingly.

AB 2011 REQUIREMENTS: MIXED-INCOME HOUSING PROJECTS

The following summary applies to housing projects that include a combination of affordable housing and market rate housing.

Threshold Requirements

- The project must be a multi-family housing project (five or more dwelling units).
- The project must consist of (i) residential units only, (ii) residential and nonresidential uses with at least two-thirds of the square footage designated for residential use, or (iii) transitional housing or supportive housing.
- Minimum density requirements must be met (see below).

Affordability Requirements

- For rental projects, either (i) 15% of the units must be lower income (as defined) or (ii) 8% of the units must be very low income and 5% of the units must be extremely low income (as defined), unless different local requirements apply.
- For ownership projects, either (i) 15% of the units must be lower income (as defined) or (ii) 30% of the units must be moderate-income (as defined), unless different local requirements apply.
- Where different local requirements apply, the project must include the higher percentage requirement and the lowest income target, unless local requirements require greater than 15% lower income units (only), in which case other specified requirements apply.
- For rental projects, the affordable units must be restricted for 55 years and for ownership projects, the affordable units must be restricted for 45 years.
- Affordable units in the project must have the same bedroom and bathroom count ratio as the market rate units, be equitably distributed within the project, and have the same type or quality of appliances, fixtures, and finishes.

Site Requirements

The project **must** be located on a site:

- 20 acres or less;
- within a zoning district where office, retail or parking are a principally permitted use;
- in an urbanized area or urban cluster (as defined and specified);
- that abuts a commercial corridor (as defined, with a right-of-way between 70 and 150 feet) and has at least 50 feet of frontage along that commercial corridor; and
- where at least 75% of the perimeter adjoins (as defined) parcels that are developed with urban uses (as defined).

The project **must not** be located on a site:

- where the proposed housing would be located within 500 feet of a freeway (as defined);
- where (or adjoins a site where) more than one-third of the square footage is dedicated to industrial use (as defined);
- that is prime farmland, a wetland, a very high fire hazard severity zone, a hazardous waste site, a delineated earthquake fault zone, a special flood hazard area, a regulatory floodway, conservation land, or habitat for protected species (as each is defined);
- currently occupied by existing restricted affordable units, restricted rent/price controlled units, or units occupied within the past 10 years (as each is defined) that would be demolished;
- previously used for occupied permanent housing that was demolished within the past 10 years;
- currently occupied by a historic structure listed on the national, state or local historic register that would be demolished;
- currently occupied by one to four existing dwelling units;
- that is vacant and (i) zoned for residential but not multi-family housing, (ii) contains tribal cultural resources and potential impacts cannot be mitigated (as specified), or (iii) is within a very high fire hazard severity zone (as defined);
- that is a designated mobile home, RV or special occupancy park (as specified);
- within a neighborhood plan area, unless that neighborhood plan permits multi-family housing and (i) was effective as of January 1, 2022 or (ii) was proposed (as specified) before that date and is adopted before January 1, 2024; or
- where the proposed housing would be located within 3,200 feet of a facility that actively extracts or refines oil or natural gas.

Labor Requirements

- All construction workers must be paid at least the general prevailing wage of per diem wages for the type of work in the geographic area (as specified), except that apprentices registered in approved programs (as specified) may be paid at least the applicable apprentice prevailing rate.
- The prevailing wage requirement must be included in all construction contracts, and all contractors and subcontractors must comply with specified requirements.
- If the project would include 50 or more dwelling units, additional requirements would apply (as specified), including but not limited to participation in an approved apprenticeship program and health care expenditures for any construction craft employees.

Housing Replacement and Relocation Assistance Requirements

- If the project would demolish one or more dwelling units, the project must replace those units.
- If any vacant or occupied protected dwelling units (as defined) would be demolished, specified requirements must be met, including but not limited to relocation assistance.
- Any applicable objective local regulations that are more protective of lower income households shall control, as specified.

Applicable Zoning, Subdivision and Design Review Standards

- Must be objective (i.e., standards that involve no personal or subjective judgment and are uniformly verifiable to an external and uniform benchmark or criterion).
- The standard of review shall be whether there is substantial evidence that would allow a reasonable person to conclude that the development is consistent with the objective standards.
- Applicable standards shall be those standards in effect at the time that the development application is submitted to the local agency pursuant to AB 2011.
- Applicable standards shall be those for the closest zoning district that allows multi-family residential at the residential density described below. If no such zoning district exists, the applicable standards shall be those for the zoning district that allows the greatest density in the applicable city, county or city and county.
- The local agency may require that up to one-half of the ground floor of the project be dedicated to retail use, in which case that requirement cannot be modified through the density bonus process.
- If the project is deemed to be in conflict with applicable objective standards, the local agency must notify the project sponsor within 60 to 90 days of submittal of the development proposal, depending on whether the project contains more than 150 dwelling units. If the local agency fails to provide the required documentation (as specified), the project shall be deemed to satisfy applicable objective standards.
- Design review may be conducted by the local agency but must be objective (as specified) and must be concluded within 90 to 180 days of submittal of the development proposal, depending on whether the project contains more than 150 dwelling units.

Density Requirements and Height Limits

- The following density requirements are minimums, and may be exceeded pursuant to a density bonus under the DBL.
- In metropolitan jurisdictions (as defined), the minimum density shall be the greater of (i) the residential density allowed by local regulations (as specified), (ii) 80 units/acre for sites within one-half mile of a major transit stop (defined below), (iii) 60 units/acre for sites at least one acre in size and on a commercial corridor (as defined) at least 100 feet wide, (iv) 40 units/acre for sites at least one acre in size and on a commercial corridor less than 100 feet wide, or (v) 30 units/acre for sites less than one acre in size.
- The foregoing minimum density requirements under (ii)-(v) are reduced by 10 units (respectively) in non-metropolitan jurisdictions (as defined).
- The applicable height limit shall be the greater of (i) the height allowed by local regulations; (ii) 65 feet for sites within one-half mile of a major transit stop (as defined), within a city with a population greater than 100,000, and not within a coastal zone (as defined); (iii) 45 feet for sites on a commercial corridor (as defined) at least 100 feet wide; or (iv) 35 feet on sites on a commercial corridor less than 100 feet wide.
- A "major transit stop" is defined as: (i) an existing rail or bus rapid transit station; (ii) a ferry terminal served by either a bus or rail transit service; or (iii) the intersection of two or more major bus routes with a frequency of service interval of 15 minutes or less during the morning and afternoon peak commute periods.

Other Requirements

- Required notice to existing commercial tenants and required relocation assistance for qualifying commercial tenants, as specified.
- Required Phase I ESA and if a recognized environmental condition is found, specified requirements must be met.
- Required setback and street frontage requirements, as specified.
- Required bicycle parking pursuant to local regulations.
- Required EV and accessible/handicap parking spaces pursuant to local regulations, but off-street parking cannot otherwise be required.

KEY DIFFERENCES BETWEEN AB 2011 AND SB 6

SB 6 will also become operative on July 1, 2023 and will likely serve as a fallback for housing developers where more extensive site and project requirements under AB 2011 would not be met, or where SB 35 could be utilized in conjunction with SB 6. Similar to AB 2011, SB 6 allows for the approval of qualifying housing projects in commercial zoning districts where office, retail or parking are a principally permitted use (i.e., without requiring a rezoning). However, it does not by its own terms provide for "by right" streamlined ministerial approval of those projects.

Rather, SB 6 amends SB 35 to allow project sponsors to invoke that law where a housing project would not otherwise qualify due to inconsistency with the underlying commercial zoning and objective zoning and design standards, provided that specified requirements

are met. As explained in our prior **legal alert**, SB 35 separately provides for a streamlined ministerial approval process for qualifying housing projects in local jurisdictions that have not made sufficient progress towards their state-mandated Regional Housing Needs Allocation (RHNA), as determined by the California Department of Housing and Community Development (HCD).

SB 6 also expressly allows project sponsors to invoke protections under the Housing Accountability Act (HAA) for qualifying housing projects notwithstanding inconsistency with an applicable plan, program, policy, ordinance, standard, requirement, or other similar local provision. As explained in our prior **legal alert**, the HAA can be used as a tool to prevent a local agency from (i) applying its design or development standards to qualifying housing projects in a way that is overly restrictive or in a manner that is not an objective application of what the standards explicitly say in writing and (ii) denying or reducing the dwelling unit density of a qualifying housing project.

Other key differences under SB 6 include but are not limited to:

- Extensive "skilled and trained workforce" requirements must be met in addition to prevailing wage requirements, subject to limited exceptions.
- No on-site affordable housing requirement (but any local requirements still apply), unless SB 35 is utilized in conjunction with SB 6.
- For mixed-use projects, 50% of the project square footage must be dedicated to residential use, the remainder of which must be allocated to retail commercial or office uses (hotel uses are prohibited). Note, however, that if SB 35 would be utilized, at least two-thirds of the square footage must be designated for residential use and other specified requirements must be met.
- Lower minimum density and less restrictive "urban area" requirements apply, as specified.
- The project must be consistent with any applicable sustainable community strategy or alternative plan, as described in Government Code section 65080.

ASSEMBLY BILL 2097 – ELIMINATION OF PARKING REQUIREMENTS

- **AB 2097** (Friedman), which took effect on January 1, 2023, is expected to benefit housing development (and other) projects. AB 2097 prohibits public agencies from imposing parking requirements on most development projects located within one-half mile of a major transit stop. A "major transit stop" is defined as: (1) an existing rail or bus rapid transit station; (2) a ferry terminal served by either a bus or rail transit service; or (3) the intersection of two or more major bus routes with a frequency of service interval of 15 minutes or less during the morning and afternoon peak commute periods.

AB 2097 establishes a "substantial hardship exception" that allows a public agency to impose parking requirements on an otherwise qualifying project if the public agency makes written findings, within 30 days of receipt of a completed application, that not enforcing parking requirements on the project would have a substantially negative impact, supported by a preponderance of the evidence in the record, on any of the following: (1) the public agency's ability to meet its share of the regional housing need for low and very low income households; (2) the public agency's ability to meet any special housing needs for the elderly or persons with disabilities identified in the applicable Housing Element; or (3) existing residential or commercial parking within one-half mile of the housing development project. Notably, the aforementioned "preponderance of the evidence" requirement sets a high bar for a public agency attempting to impose the exception.

Furthermore, a housing development project is not subject to the above exception if it satisfies any of the following: (1) it dedicates a minimum of 20% of the total units to very low, low, or moderate income households, students, the elderly, or persons with disabilities; (2) it contains fewer than 20 housing units; or (3) it is subject to parking reductions based on the provisions of any other applicable law (e.g., the State Density Bonus Law).

AB 2097 includes the following exceptions:

- AB 2097 does not eliminate local electric vehicle and accessible parking requirements for new multifamily residential and nonresidential development.
- Hotels, motels, bed and breakfast inns, and other transient lodging developments are not eligible for the benefits of AB 2097, except where a portion of a housing development project is designated as a residential hotel.
- An event center must provide parking, as required by local ordinance, for employees and other workers.
- Commercial projects subject to an existing development agreement with parking requirements are still subject to those requirements, provided that the required parking is shared with the public.

If a project provides parking voluntarily, a public agency may require: (i) spaces for care share vehicles; (ii) that spaces are shared with the public; and/or (iii) that parking owners charge for parking. A public agency cannot require that voluntarily-provided parking is provided to residents free of charge.

Contact: Caroline Chase & Ben Brown

AB 2234 – Mandatory Timeframes for Issuance of Post-Entitlement Permits

In September of 2022, Governor Newsom signed **AB 2234** (Rivas, R.), which establishes mandatory timeframes for local agencies to issue post-entitlement permits, and represents another step in the Legislature's continued efforts to facilitate housing production. The affected permits include all nondiscretionary permits and reviews filed after a project's entitlement and which are required by any county, city, or county and city (a "local agency") to begin construction of a project that is at least two-thirds residential, including building, demolition, grading, excavation, and off-site permits.

AB 2234 is notable because its mandatory timelines aim to curtail the "post-entitlement doldrums" developers sometimes encounter when applying for building permits to construct an approved project. AB 2234 is slated to go into effect for most jurisdictions on January 1, 2024.

CONSISTENT APPLICATION REQUIREMENTS

Under the new law, local agencies must prepare post-entitlement permit application lists specifying required application materials. Local agencies are also required to post an example of a complete set of post-entitlement permits for at least five types of housing development projects, such as accessory dwelling units, duplexes, multifamily, mixed-use, and townhomes. As described below, this application submittal list cabins local agencies' permit reviews and requests for additional information.

MANDATORY TIMEFRAMES FOR APPLICATIONS AND ISSUANCE OF PERMITS

15 days to determine if an application is complete, based on compliance with the publicly-available list of required application materials.

A local agency must determine whether an application for a post-entitlement permit application is complete within 15 days of receiving the application. In reviewing an application, the local agency cannot require an item that was not previously included in the list of required application materials. If the agency determines that an application is incomplete, the agency must specify the incomplete items and describe how the application can be made complete, and may only request incomplete items that are missing from the local agency's required application material list (above). Local agencies must also review subsequent reapplications providing the specified incomplete items within 15 days. If the agency fails to make a determination on the completeness of an application within the 15 day period, the application shall be deemed complete.

30-60 days to approve an application or request specified revisions.

For housing development projects with 25 or fewer units, the local agency shall complete review and either return a full set of comments with a comprehensive request for revisions or return the approved permit application within 30 business days of the local agency's determination that an application is complete. For housing development projects with 26 or more units, the local agency has 60 business days.

These time limits do not apply if the local agency makes written findings within the above time limits, based on substantial evidence, that the proposed permit might have a specific adverse impact on public health or safety requiring additional processing time. Notably, however, such adverse impacts are defined as "significant, quantifiable, direct, and unavoidable" impacts based on "objective, identified, and written public health or safety standards, policies, or conditions" that existed at the time the application was deemed complete. The time limits may also be tolled if an outside entity is required to review the application. The tolled period shall be for the duration of the outside entity's review, and the local agency shall complete its review with the time remaining in the applicable 30 or 60 day time limit.

As with the procedure for determining that an application is complete, if the local agency finds during its 30 or 60 day review period, as applicable, that an application is noncompliant, it shall list the items that are noncompliant and describe how they can be remedied. Review of any resubmitted application is also subject to the applicable 30 or 60 day time limit.

APPEALS RESOLVED IN 60-90 DAYS

An applicant may appeal the local agency's determination of noncompliance. Projects with 25 or fewer units must receive a final written determination on the appeal within 60 business days of receipt of the applicant's appeal. For projects with 26 or more units, the time limit is 90 business days. For all projects, the fact that an appeal may be heard at both the planning commission and governing body of a local agency does not alter the applicable 60 or 90 business day time limit.

LOCAL AGENCY'S FAILURE TO COMPLY

A local agency's failure to meet AB 2234's time limits is a violation of the Housing Accountability Act, which can lead to a lawsuit against a local agency and result in a court's imposition of attorneys' fees and fines.

LOOKING AHEAD: PROPOSED LEGISLATION EXTENDS AB 2234'S IMPACT

Three bills in the current legislative session focus on the granular mechanics of post-entitlement permitting. **AB 1114** (Haney) would modify the definition of "post-entitlement phase permits" to apply to all post-entitlement permits required to begin construction of developments that are at least two-thirds residential and clarify that issuance of post-entitlement phase permits is a local agency's ministerial duty. AB 281 (Grayson/Rivas) would broaden AB 2234's applicability to special districts, such as water and fire districts, by defining "local agency" to include special districts. Similarly, SB 83 (Wiener) would require utility companies to comment on post-entitlement permit applications and connect new construction to the electrical grid within specified time limits.

Contact: Nick DuBroff

California's Proposed Housing Laws for the 2023-24 Legislative Session

There are multiple proposed bills under consideration by the State Assembly and Senate that would affect new housing developments. The following is a summary of a few of the key bills, which is current as of the date of this publication. These bills are subject to the legislative process so future amendments are expected.

SENATE BILL 423 – AMENDMENTS TO SENATE BILL 35

SB 423 (Wiener) would remove the sunset provision for and make other substantive changes to SB 35 (codified at Government Code section 65913.4). As explained in our prior **legal alert**, SB 35 separately provides for a streamlined ministerial approval process for qualifying housing projects in local jurisdictions that have not made sufficient progress towards their state-mandated Regional Housing Needs Allocation (RHNA), as determined by the California Department of Housing and Community Development (HCD).

SB 423 would expand SB 35 to apply when a local jurisdiction fails to adopt a housing element in substantial compliance with state housing element law, as specified and as determined by HCD. Under that circumstance, the project sponsor would need to provide a minimum of 10% low income units or, in the San Francisco Bay Area, a minimum of 20% moderate income units, as specified and before calculating any density bonus. Therefore, this change could result in the increased production of mixed-income housing since as explained in our prior **legal alert**, multiple local jurisdictions are currently out of compliance (and could be out of compliance in future housing element cycles).

To summarize, SB 423 would also amend SB 35 as follows:

- Remove the coastal zone development restriction.
- Remove the wetland and protected species habitat development restriction where development has been authorized by federal or other state law.
- Require projects with 50 or more housing units and using construction craft employees, as specified, to meet apprenticeship program requirements and provide health care expenditures for each employee, as specified. This would replace existing skilled and trained workforce requirements and qualifying expenditures would be credited toward compliance with prevailing wage requirements, as specified.
- Require determinations regarding compliance with applicable objective planning standards to be made by the planning director (or any equivalent local government staff).
- Prohibit local governments from requiring compliance with any standards necessary to receive a post-entitlement permit or other information (including studies) that does not pertain directly to determining whether the housing development project is consistent with applicable objective planning standards.
- Exclude the California Building Code, local building codes, fire codes, noise ordinances, other codes requiring detailed technical specifications, and studies that are evaluated with subsequent permits from the definition of objective planning standards.

- Prohibit local governments from requiring specified consultant studies or other materials that are not necessary to ascertain consistency with objective planning standards.
- Remove the planning commission (or equivalent board/commission) public oversight hearing provision (but retain the design review provision).
- Provide that the "total number of units in a development" includes: (i) all housing development projects developed on the site, regardless of when those developments occur.
- Clarify that if a local affordable housing ordinance requires units that are restricted to households with incomes higher than the SB 35 income limits, then the units that meet SB 35 income limits shall be deemed to satisfy the local requirement.

ASSEMBLY BILL 1287 – AMENDMENTS TO THE STATE DENSITY BONUS LAW

AB 1287 (Alvarez) would amend the State Density Bonus Law (Government Code section 65915) by incentivizing the construction of housing units for both the "missing middle" and for very low income households by providing for an additional

density bonus and incentive/concession for projects providing moderate income units or very low income units.

First, the project must provide the requisite percentage of on-site affordable units to obtain the maximum density bonus (50%) under existing law: 15% very low income units, or 24% low income units, or 44% moderate (for sale) units. Second, to qualify for an additional density bonus (up to 100%) and an additional incentive/concession under AB 1287, the project must provide additional on-site affordable units, as specified. To illustrate, for a rental project, if the base project includes 24% low income units and 15% to 16% moderate income units, the project would qualify for a 100% density bonus and three to four incentives/concessions, respectively, under AB 1287. To illustrate, for an ownership project, if the base project includes 10% very low income units and 44% to 45% moderate income units, the project would qualify for an 88.75% density bonus and three to four incentives/concessions, respectively, under AB 1287. Under existing law, the same projects would only qualify for a 50% density bonus and three incentives/concessions.

As first introduced, AB 1287 would have amended existing law to specify that any density bonus, concessions, incentives, waivers or reductions of development standards, and parking ratios to which an applicant is entitled under the State Density Bonus Law "shall be permitted notwithstanding the California Coastal Act of 1976." This change would have limited the California Coastal Commission's authority over a density bonus project in the coastal zone. However, AB 1287 was amended in the State Assembly on April 26, 2023 to revert back to existing law, which provides that the State Density Bonus Law "does not supersede or in any way alter or lessen the effect or application of the California Coastal Act of 1976."

AB 440 (Wicks) would also amend provisions related to the calculation of maximum allowable residential density under the State Density Bonus Law.

ASSEMBLY BILL 1532 – "BY RIGHT" APPROVAL OF OFFICE TO RESIDENTIAL CONVERSIONS

AB 1532 (Haney) would address "the growing crisis of California's rapidly emptying downtowns and the huge need for housing statewide." It would provide for "by right" streamlined ministerial (i.e., no CEQA) approval of qualifying office to residential conversion projects. To qualify, the project must: (i) meet the definition of an office conversion project: the conversion of a building used for office purposes or a vacant office building into residential dwelling units; (ii) designate at least 10% of the on-site residential units as affordable to low or moderate income residents, as defined; and (iii) utilize a skilled and trained workforce, as specified.

AB 1532 would:

- Provide that qualifying projects shall be a use by right in all zones, regardless of the zoning of the site, and subject to ministerial review.
- Prohibit city councils, county boards of supervisors, planning commissions and other planning oversight boards from subjecting qualifying projects to "any review" and require the local planning director (or equivalent local government staff) to approve qualifying projects ministerially.
- Exempt qualifying projects from impact fees that are not directly related to the office-to-residential conversion, and allow applicants to pay any applicable impact fees over a 10-year period, with the first payment due upon the earlier of the date of final inspection or the date of issuance of the certificate of occupancy.
- Prohibit local agencies from imposing any new parking or open space requirements that were not imposed on the original office use. (See also AB 2097 regarding the elimination of parking requirements for qualifying projects.)
- Prohibit local agencies from imposing increased inclusionary housing requirements that would apply specifically because the project is approved under AB 1532.

New state funding would be available for qualifying office to residential conversion projects. AB 1532 would create the Office to Housing Conversion Fund in the State Treasury and upon appropriation, would require HCD to establish a grant program that would award funding to qualifying projects based on the project square footage.

AB 529 (Gabriel and Haney) is a related bill that would require the California Building Standards Commission to work with HCD to revise existing state adaptive reuse codes to better facilitate office to residential conversion projects. AB 529 would also allow HCD to award points to "pro-housing" jurisdictions during its housing element review process for policies that facilitate office to residential conversion projects.

ASSEMBLY BILL 1700 – CEQA: POPULATION GROWTH AND NOISE IMPACTS

AB 1700 (Hoover) would clarify that "population growth, in and of itself, resulting from a housing project and noise impacts of a housing project are not an effect on the environment" under CEQA. AB 1700 is a legislative response to the tentative ruling in a high-profile appellate CEQA ruling in which the court held that the lead agency should have analyzed those impacts in the Environmental Impact Report (EIR) for a proposed student housing project in the City of Berkeley. (Make UC a Good Neighbor v. Regents of Univ. of California, 88 Cal. App. 5th 656, (2023), as modified (Mar. 16, 2023).)

ASSEMBLY BILL 1633 – EXPANSION OF HOUSING ACCOUNTABILITY ACT PROTECTIONS: CEQA

AB 1633 (Ting) is a legislative response to a procedural loophole in the Housing Accountability Act ("HAA") (Government Code section 65589.5 et seq.), the declared intent of which is to "refine and clarify the standards" for when a local agency's failure to exercise discretion, or a local agency's abuse of discretion, under CEQA for a HAA-protected project constitutes a violation of the HAA, and to establish procedures that will allow local governments to rectify any such failure without risking HAA litigation.

There have been instances where HAA-protected projects have been stymied by a local agency's failure to approve or deny a project due to CEQA-related delays. For example, as explained in **this** letter from HCD to the City and County of San Francisco, the Board of Supervisors' actions to decertify and remand an EIR back to the Planning Department based on vague concerns "exemplify a pattern of lengthy processing and entitlements timeframes" that "act as a constraint on housing development."

To qualify under AB 1633, the project would need to meet the definition of a "housing development project" under the HAA and meet the following additional requirements:

- The project site is located in an urbanized area, as defined.
- The project meets or exceeds a dwelling unit density of 15 units per acre.
- The project site is not located in a coastal zone, on certain types of farmland, on wetlands, on a hazardous waste site, within a delineated earthquake fault zone, within a special flood hazard area, within a regulatory floodway, on lands identified for conservation, or on habitat for protected species, as specified.
- The project site is not located in a high or very high fire hazard zone, as specified.

Under AB 1633, the following circumstances would also constitute "disapproval" of the project, in which case the local agency could be subject to enforcement under the HAA:

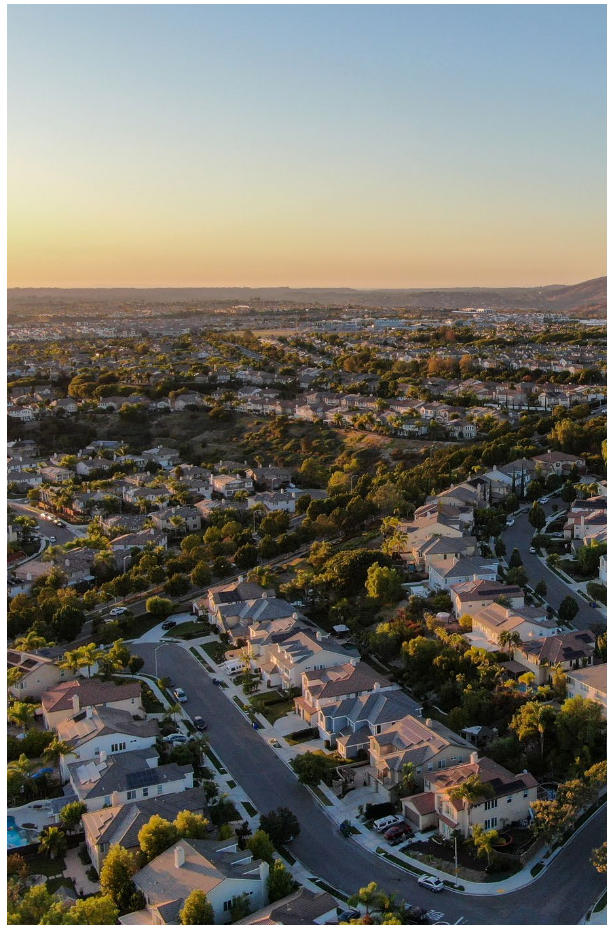
- **CEQA Exemptions.** If (i) the housing development project qualifies for a CEQA exemption and is not subject to an exception to that exemption under the CEQA Guidelines based on substantial evidence in the record; (ii) the local agency fails to make a determination of whether the housing development project is exempt under CEQA; and (iii) the local agency does not make a lawful determination, as defined, on the exemption within 90 days of timely written notice from the applicant, as specified. The local agency may extend that time period by up to an additional 90 days if the extension is necessary to determine if there is substantial evidence in the record that the housing development project is eligible for the exemption sought by the applicant.
- **Other CEQA Determinations.** If (i) the housing development project qualifies for a negative declaration, addendum, EIR, or comparable environmental review document under CEQA; (ii) the local agency commits an abuse of discretion, as defined, by failing to approve the applicable CEQA document in bad faith or without substantial evidence in the record to support the legal need for further environmental study; (iii) the local agency requires further environmental study; and (iv) the local agency does not make a lawful determination, as defined, on the applicable CEQA document within 90 days of timely written notice from the applicant, as specified.

AB 1633 includes a limited exception to enforcement where a court finds that the local agency acted in good faith and had reasonable cause to disapprove the project due to the existence of a controlling question of law about the application of CEQA or the CEQA Guidelines as to which there was a substantial ground for difference of opinion at the time of the disapproval.

See our prior **legal alert** for more information about the HAA and recent case law.

Contact: Kori Anderson, Sean Becker, Ben Brown, & Caroline Chase

City of San Diego Expands "Complete Communities" Program



The City of San Diego's popular infill development initiative, the Complete Communities – Housing Solutions program, has generated a flurry of transactions and project applications during its first few years of existence. Developers have rushed to take advantage of the program's benefits which include by-right development up to 8.0 or even unlimited FAR for certain sites. In response to the program's success, the City Council recently voted to expand its benefits to an additional 688 acres by redefining the criteria for qualifying sites.

The **Housing Solutions program**, which was approved by the City Council in December 2020, was a major goal of the prior Mayor. The program one-ups the State Density Bonus Law by providing a floor area ratio ("FAR") -based incentive program for projects that restrict specified percentages of units for rental at affordable rates. To qualify, a development must lie within one of four FAR tiers as shown on the City's **interactive map**. Qualifying projects are entitled to new FAR ratios of 4.0, 6.5, 8.0, or unlimited FAR, with some exceptions, as well as incentives and waivers to deviate from development standards in the same fashion as traditional Density Bonus projects. Vitally, compliance with the Housing Solutions program itself does not necessitate a discretionary approval for most projects, so developments can achieve massive infill density without triggering California Environmental Quality Act review.

Housing Solutions projects earn the heightened FAR by restricting 40% of base units for rental at affordable rates. Specifically, projects must reserve 15% for very low income households, 10% for low income households, and 15% for households earning up to 120% of the area median income. Projects must satisfy a number of other requirements, including mandatory design standards and certain fee payments. While the program's steep affordability requirements generated a lukewarm initial response, developers have subsequently found countless properties where the dramatic increase in FAR has presented attractive returns.

The City Council voted on February 14th to add an additional 688 acres of qualifying property to this popular program. While all FAR tiers were previously tied to Transit Priority Areas, which generally include the area within one half-mile of a major transit stop that is existing or planned, the Council revised the program to apply to "Sustainable Development Areas" which extend to a walking distance of one mile from transit stops in most instances.

Our firm has received numerous calls with requests to help developers navigate the Housing Solutions program. We expect those calls to increase despite the uncertain economic environment as understanding of the City's updated maps makes its way through the development community.

Contact: Bo Peterson

Repurposing San Francisco Office Buildings for New Housing

New **legislation** recently introduced by San Francisco Mayor Breed and Supervisor Peskin, is aimed at revitalizing commercially-zoned properties in the greater downtown area. The intent of the legislation is to "address twin problems of under-utilized office space and lack of affordable housing available in San Francisco."

COMMERCIAL RESIDENTIAL ADAPTIVE REUSE PROGRAM

The proposed Commercial Residential Adaptive Reuse program ("Program") would apply to qualifying residential conversion projects proposed on or before December 31, 2028. To qualify, the project must:

- Include a change of use of existing gross floor area from a non-residential use to a residential use;
- Be located in a Commercial ("C") zoning district east of (or fronting) Van Ness/South Van Ness Avenue and north of Townsend Street and outside of the Group Housing Special Use District;
- Limit any expansion of the existing building envelope to 20% of the existing gross floor area and one additional vertical story; and
- Not propose a density bonus under the State Density Bonus Law pursuant to Planning Code Sections 206.5 or 206.6. A density bonus could be proposed pursuant to the HOME-SF Program or 100 Percent Affordable Housing Program, subject to the limitations above.

As summarized in our prior **legal alert**, the Program would exempt qualifying conversion projects from otherwise applicable Planning Code requirements for residential projects, as specified.

Without these exemptions, qualifying residential conversion projects would otherwise require either Planning Commission or Zoning Administrator approval of waivers of or modifications to these requirements after a noticed public hearing based on specified findings.

The San Francisco Building Official and Fire Code Official would also be directed to prepare an alternative buildings standards manual for qualifying residential conversion projects, which would include, among other things, alternative standards if technical infeasibility is present. This is also critical because there are well-documented design challenges associated with the conversion of existing commercial buildings to residential use due to required compliance with the strict provisions of the San Francisco Building Code.

RELAXED PLANNING CODE REQUIREMENTS IN COMMERCIAL ZONING DISTRICTS

The proposed legislation includes numerous Planning Code amendments to "support existing and attract new businesses Downtown, and streamline approvals to draw consumers back Downtown." As summarized in our prior legal alert, these changes would include modified Planning Commission approval requirements, additional permitted uses, relaxed ground floor active and commercial use requirements, and other modifications.

DEVELOPMENT IMPACT FEE WAIVERS

New **legislation** recently introduced by Supervisors Dorsey and Safai would waive development impact fees for qualifying residential conversion projects, with the exception of any in-lieu fees proposed to satisfy inclusionary affordable housing requirements. Development impact fees associated with any non-residential uses proposed as part of the project would not be waived.

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