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Proposed CEQA Streamlining and other Reforms for Permitting Renewable Energy Projects

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On May 19, 2023, Governor Newsom proposed some welcome legislative reforms intended to speed up the permitting of renewable energy projects in California. Also on May 19, 2023, the Governor issued Executive Order N-8-23, creating a Strike Force to accelerate clean infrastructure projects across the state by implementing "all-of-government" strategy for planning and development. See https://www.gov.ca.gov/wp-content/uploads/2023/05/5.19.23-Infrastructure-EO.pdf.

This *Client Alert* focuses on the Governor's Draft Trailer Bill Language and how, if adopted, these legislative reforms would help accelerate the development of renewable energy in California. In particular, we summarize four of the Governor's specific legislative proposals to:

(1) accelerate preparation of the administrative record in CEQA litigation;

(2) accelerate judicial resolution of CEQA litigation;

(3) repeal the four existing statutes designating species as "fully protected" and

(4) create a fee mitigation payment regime for conservation of the western Joshua Tree.

The full text of these legislative proposals can be found at https://esd.dof.ca.gov/trailer-bill/trailerBill.html.

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A. CEQA Reform

Compliance with the California Environmental Quality Act (CEQA) has become a daunting gauntlet for all but the smallest and least controversial development projects in California, providing bountiful opportunities for project opponents to cause expense and delay. Governor Newsom's reform proposals would remove some of the obstacles to development, particularly where projects have been challenged in court.

1. Speeding Up Preparation of The Administrative Record

When approvals for development projects are challenged under CEQA, courts review the agency's record of proceedings for abuse of discretion. Preparing the administrative record in CEQA litigation frequently spawns disputes and sometimes produces gargantuan records that are not relevant to issues in the case.

The reform proposals would amend Public Resources Code 21167.6 to achieve greater speed and certainty in the preparation of administrative records. A welcome component of the reform would be to exclude staff notes and internal agency emails from the record unless those notes or emails were provided to the final decision-making body. Excluding such internal staff communications from the record would reduce the scope of the record and speed preparation. Other notable features of the proposal would:

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  - Require a plaintiff, if the plaintiff elects to prepare the record, to complete preparation within 60 days of receiving the relevant documents from the agency.
  - Allow a public agency to override a plaintiff's election, and, within 60 days of providing notice that it will prepare the record, prepare the record itself at its own expense. Costs of record preparation may be passed through the project applicant.
  - Require the court to hold a case management conference to discuss the scope, timing, and costs of preparing the record within 30 days of the filing of the complaint. At this conference, the parties may stipulate, subject to court concurrence, to a partial record of proceedings that does not contain all of the documents normally required under section 21167.6.
  - Requires judges to grant extensions to the 60-day requirement only for "for good cause," striking the existing language allowing such extensions to be granted "liberally."
  - Excludes from the record "staff notes" and "internal agency electronic communications, including emails, that were not presented to the final decision-making body" from the administrative record unless the lead agency chooses to include them.
  - Requires the record to be submitted to the court in electronic format and requires citations to the record to be hyperlinked to the cited document.

2. Speeding Up Judicial Resolution of CEQA Cases

The package also proposes to make court cases move faster by adding new section 21189.80 to the Public Resources Code. Section 21189.80 would extend some of the key benefits of Environmental Leadership Development Projects under SB 7 to more renewable energy projects without having to comply with SB 7's more onerous requirements. (SB 7 is the law that allows the Governor's Office to certify certain projects with environmental benefits, including GHG reducing characteristics, for expedited judicial review.) The two chief benefits would include (1) preparation of the administrative record concurrently with the administrative approval process and (2) resolution of any litigation, including appeals, within 270 days of the filing the litigation, if feasible.

Covered projects include "energy infrastructure projects" defined as solar PV projects, terrestrial wind powerplants and energy storage systems. Electric transmission projects are also included. To be covered, wind and solar projects of more than 20 MW and energy storage projects capable of storing more than 80 megawatt hours of energy would be required to demonstrate payment of prevailing wage and use of a skilled and trained workforce.

Further, to obtain expedited judicial review, an applicant would need to agree to:

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  - pay for the costs of preparing the administrative record
  - pay for the costs the trial court and the court of appeal in hearing the deciding the case

For renewable energy projects that are challenged in court under CEQA, these reforms could significantly reduce delays in resolution of the dispute. However, given that applicants are required to pay for the costs of the trial court and the court of appeal to (for most cases, such costs are borne publicly), the acceleration of the litigation under this proposed provision could test the proposition that "time is money."

B. Reform of Species Protection

1. Reclassification of "Fully Protected" Species

Under existing California law, 37 species are "fully protected," meaning that no authorization exists for these species to be taken, except for scientific research or in conjunction with the preparation of natural community conservation plan. If one of these fully protected species is present on a development site, it can create legal and practical uncertainty as no guidance exists whether development should be prohibited outright, or whether it can be allowed if complete avoidance can be demonstrated. Preparation of a natural community conservation plan is usually infeasible for a single project both in terms of cost and delay. Given this lack of guidance and onerous requirements to authorize take under existing law, the presence of a "fully protected" species on a renewable energy development site can paralyze the processing of project approvals for months and, at worst, ultimately kill a project.

The proposal would reclassify 15 of these species as threatened, 19 as endangered and three would have no listing status. Specifically, the proposal would:

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- Repeal the four existing fully protected species statutes: Fish and Game Code sections 3511, 4700, 5050, and 5515.
- Reclassify the 37 currently fully protected species as follows:
  - Add 7 species not previously listed pursuant to CESA to the list of threatened species under CESA. These species include (1) Golden eagle; (2) Trumpeter swan; (3) White-tailed kite; (4) Northern elephant seal; (5) Ring-tailed cat; (6) Pacific right whale; (7) and Southern sea otter.
  - For the 8 species currently listed as both threatened and fully protected, retains the threatened status under CESA. These species include (1) California black rail; (2) Greater sandhill crane; (3) Yuma clapper rail; (4) Guadalupe fur seal; (5) Wolverine; (6) Limestone salamander;(7) Black toad; and (8) Rough sculpin.
  - For the 19 species currently listed as both endangered and fully protected, the bill retains the endangered status under CESA. These species include (1) California clapper rail; (2) California condor; (3) California least tern; (4) Light-footed clapper rail; (5) Southern bald eagle; (6) Morro Bay kangaroo rat; (7) Bighorn sheep; except Nelson bighorn sheep; (8) Salt-marsh harvest mouse; (9) Blunt-nosed leopard lizard; (10) San Francisco garter snake; (11) Santa Cruz long-toed salamander; (12) Colorado River squawfish; (13) Mohave chub; (14) Lost River sucker; (15) Modoc sucker; (16) Shortnose sucker; (17) Humpback sucker; (18) Owens pupfish; and (19) Unarmored threespine stickleback.
  - For the 3 species that are currently fully protected and were previously listed pursuant to CESA but removed from those lists by the Commission, the bill provides for the protections afforded to species generally under the Fish and Game Code. These species include (1) American peregrine falcon; (2) Brown pelican; and (3) Thicktail chub.
- Confirm that the Commission has authority to change the CESA status (e.g., uplist, downlist, or delist) any of the 34 formerly fully protected species that will be CESA listed. The bill also exempts any future proceeding to change the CESA status of any of these 34 species from compliance with the California Environmental Quality Act.
- Confirm that prior project-specific statutes authorizing take of fully protected species remain valid and in effect.

2. Payment of Specified Mitigation Fee for the Take of Western Joshua Tree

This proposal to be codified in new sections 1927 through 1927.5 of the Fish and Game Code contains criteria under which the California Department of Fish and Wildlife may authorize the take of western Joshua Tree and would require mitigation for such take to conform to the terms of the new law, including the option of paying mitigation fees into a Western Joshua Tree Mitigation Fund. Fees range from $125 per tree for trees less than one meter in height to $1,000 per tree for trees more than five meters in height. The Mitigation Fund would be used to allow CDFW to develop a conservation plan for western Joshua Trees, which could include the acquisition and permanent protection of mitigation lands.

C. Summary and Conclusion

For projects embroiled in CEQA litigation and projects encountering the need for take authorization for "fully protected" species or western Joshua Tree, these reforms could be game-changing by reducing delay. However, numerous unnecessary obstacles to the development of renewable energy projects in California remain. If Governor Newsom and the California legislature are serious about addressing climate change and reducing greenhouse gasses,

they need to do more—much more—to streamline permitting for renewable energy projects, including exempting more projects from CEQA review and repealing unnecessary substantive requirements for the preparation of other CEQA documents.

For questions, please contact Annie Mudge, Co-Team Lead of the Land Use Team and Renewable Energy Industry Group at Cox, Castle & Nicholson LLP.