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BRIDGING PUBLIC & WATER LAW

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MEMORANDUM

To: BKS Public Agency Clients
Date: January 28, 2025
Re: Annual New Laws Update – 2025

This memorandum summarizes a number of important new laws, judicial opinions, Executive Orders, and Attorney General Opinions that were issued this year. Except as noted, the new laws took effect on January 1, 2025. If you have any questions about anything discussed in this memorandum, please contact your primary BKS attorney.

WATER

AB 460: Water Rights and Usage – Civil Penalties.

AB 460 introduces three major changes to existing law. First, currently the diversion or use of water other than as authorized by law is a trespass, subject to civil liability. Under AB 460, the State Water Resources Control Board (State Water Board) will now be required to adjust for inflation (1) the amounts of civil and administrative liabilities/penalties it imposes, or (2) the amounts in water right actions brought at its request by January 1, 2026.

Second, existing law authorizes the State Water Board to issue a cease-and-desist order for the violation or threat of violation of water diversion and use requirements. The failure to comply with one of these cease-and-desist orders permits the Attorney General (at the State Water Board's request) to petition the superior court for injunctive relief and/or civil penalties. AB 460 would increase civil penalties to $2,500 per day for failure to comply with a cease-and-desist order.

Third, existing law allows the State Water Board to hold a person or entity in violation of a permit, license, certificate, or registration civilly liable for a maximum of $500 for each day they are in violation. AB 460 increases the amount of civil liability to $1,000 for each day a person or entity is in violation. Additionally, if a person or entity violates a regulation or order adopted by the State Water Board, then that person or entity may be liable for up to $10,000 for each day they are in violation, and $2,500 for each acre-foot of water diverted in violation.

SB 1156: Groundwater Sustainability Agencies – Conflicts of Interest – Financial Interest Disclosures.

Current law, the Sustainable Groundwater Management Act (SGMA), requires all groundwater basins designated as high- or medium-priority to be managed under a groundwater sustainability plan (GSP) or coordinated GSP. Further, SGMA currently requires that these GSPs for high- or medium-priority basins be developed and implemented by a groundwater sustainability agency (GSA).

Another current law, the Political Reform Act of 1974, prohibits public officials from making, participating in making, or attempting to use their official position to influence a governmental decision in which they know or have reason to know that they have a financial interest. The law also requires disclosure of investments and other financial interests by officials.

SB 1156 requires members of the board of directors and executives of GSAs to file statements of economic interests according to the filing requirements of the Fair Political Practices Commission. These statements can be filed using the Commission's online system, available at https://www.fppc.ca.gov/Form700/Link_To_Efiling_Portal.html.

Executive Order N-3-24.

Executive Order (EO) N-3-24 terminates the drought State of Emergency in the Counties of Imperial, Inyo, Los Angeles, Marin, Mendocino, Mono, Monterey, Orange, Riverside, San Bernadino, San Diego, San Francisco, San Luis Obispo, San Mateo, Santa Barbara, Santa Clara, Santa Cruz, Sonoma, and Ventura. Given the persistence of significant impacts from the multi-year drought, the State of Emergency remains active in the 39 other counties, thereby allowing the Office of Emergency Services to continue providing disaster assistance funding if needed. EO N-3-24 narrows or rescinds specific provisions of prior orders that are no longer necessary in those counties.

EO N-3-24 calls for continued action by the State to address the ongoing effects of drought in the Sacramento and San Joaquin River basins, the Tulare Lake Basin, the Shasta, Scott, and Klamath River Watersheds, and the Clear Lake Watershed. Also, EO N-3-24 withdraws provisions of prior orders, most notably EO N-3-23, that imposed conditions on counties and other groundwater well permitting authorities. Counties and permitting authorities that had adopted interim procedures to obtain the verification and findings required by EO N-3-23 may seek to adjust their procedures with the removal of those requirements. Finally, as to the State of Emergency for counties impacted by the 2023 winter storms, EO N-3-24 rescinds unnecessary provisions to affect a more targeted emergency response.

Russian Riverkeeper v. County of Sonoma ("*Russian Riverkeeper*") (Aug. 21, 2024, SCV-273415) 2024 Cal. Super. ___.

In the *Russian Riverkeeper* case, the Sonoma County Superior Court held that the County of Sonoma (the County) failed to meet its obligations under the Public Trust Doctrine[1] and violated the California Environmental Quality Act (CEQA) in the adoption of a new amendment to modify its existing Well Ordinance (the Amendment). (*Id*. at p. 1.) Agreeing with the Petitioners,[2] the court found that the County's improper exercise of judgment and failure to support its decisions with facts made the Amendment unlawful. (*Id*. at pp. 14-39.)

Central to the court's decision was that the Amendment allowed construction and permitting of new emergency wells in sensitive areas. (*Russian Riverkeeper*, *supra*, at pp. 3-6.) Additionally, instead of case-by-case evaluation of each new emergency well permit application, the County subjected some applications to only ministerial review. (*Id.*) The court held that to comply with the law, the County should have analyzed the cumulative impacts of any new wells and evaluated and adopted offset measures for those impacts to lessen the known significant impacts from groundwater pumping. (*Id.*) Further, the court directed the County to complete appropriate CEQA environmental review. (*Id.*)

This case means that the County must fulfill its obligations under the Public Trust Doctrine and CEQA by conducting the necessary analysis and compiling the necessary evidence before it carries out the purpose of the Amendment by issuing new emergency well construction permits. Since this case was decided, the County has filed a motion for a new trial. In the meantime, the County issued an order on December 17, 2024 to, among other things, suspend all non-emergency water well permitting. (See Sonoma County, *Permit Sonoma: Well Ordinance Update* (Dec. 17, 2024) available at https://permitsonoma.org/wellordinanceupdate.) The County intends to comply with this order as long as the trial court's decision remains in effect.

Food & Water Watch, Inc. et al. v. U.S. EPA (N.D. Cal., Sept. 24, 2024) Case No. 17-cv-02162-EMC.

In a case about the U.S. Environmental Protection Agency's (EPA) current optimal level of the fluoridation of drinking water (which is 0.7 milligrams per liter (mg/L)), the District Court concluded that 0.7 mg/L of fluoride poses an unreasonable risk of reduced IQ in children. (*Id*. at p. 2.) The court directed the EPA to initiate a formal rulemaking to address fluoride levels, the outcome of which can range from requiring a warning label to banning the chemical. (*Id*.) Although the court acknowledged EPA's authority to potentially lower the fluoridation levels during the rulemaking, the court opined that the safe level of fluoride

[1] The Public Trust Doctrine is a policy that the state has a duty to consider and to protect public waterways, including groundwater. (*Russian Riverkeeper*, *supra*, at p. 12 [citing to *Environmental Law Foundation v. State Wat. Resources Control Bd.* (2018) 26 Cal.App.5th 844, 857].)

[2] Petitioners are the non-governmental organizations, Russian Riverkeeper and California Coastkeeper. (*Russian Riverkeeper*, *supra*, at p. 1.)

exposure would appear to be 0.4 mg/L (4 mg/L (hazard level) divided by 10) and the current "optimal" water fluoridation level in the United States of 0.7 mg/L is nearly double that safe level of 0.4 mg/L for pregnant women and their offspring. (*Id.* at p. 6.)

The EPA has not yet established a new recommended level of fluoridation in drinking water. The rulemaking process under the Toxic Substances Control Act (TSCA) requires that the EPA issue a proposed rule within 1 year and a final rule within 2 years. It is also possible that the EPA will file an appeal. An appeal in the federal courts could take an additional year or longer. Therefore, given the uncertainty as to what EPA will do and the timelines for possible EPA action, the prudent course of action at this time is to continue to watch and wait. We will provide updates if anything changes.

BROWN ACT

AB 2302: Open Meetings – Local Agencies – Teleconferences.

In 2021 and 2022, the Legislature codified standards for remote participation in meetings, building on the previous Covid-era executive orders. In addition to permitting remote participation by governing body members under the Brown Act's long-standing teleconferencing rules and the more recent rules that may be invoked in a declared state emergency, the legislation from these years allows members of Brown Act bodies to participate remotely in two situations:

- For "just cause," defined as the need to provide care to a child or close relation having contagious illness, needs related to a physical or mental disability, or being on official travel for the agency; or
- "Emergency circumstances," which include physical or family emergencies that prevent a member from attending.

Currently, members of Brown Act bodies may not appear remotely for a period of more than three consecutive months, or for 20% of the year's regular meetings. If a body meets fewer than ten times a year, a member may only appear remotely twice during the year. AB 2302 replaces these limitations with an easier-to-apply formulation. It limits the allowed number of remote appearances for members of Brown Act bodies to:

- Two times per year if the body regularly meets once per month or less;
- Five times per year if the body regularly meets twice per month; or
- Seven times per year if the body regularly meets three or more times per month.

These rules are currently slated to sunset on January 1, 2026. We will advise if the Legislature extends these rules for longer.

AB 2715: Ralph M. Brown Act – Closed Sessions.

AB 2715 provides express authorization to local agencies to meet about cyberattacks in closed session, by expanding on an existing ground for closed session. Under current law, agencies may meet in closed session to discuss threats to the security of public buildings, essential public services, or the public right of access to public facilities. The current focus of this exception is on physical threats to security. AB 2715 expands this to include non-physical threats to "critical infrastructure controls" and "critical infrastructure information" relating to cybersecurity.

Attorney General Opinion No. 23-1002 (July 24, 2024).

In Opinion No. 23-1002, the Attorney General addressed whether the federal Americans with Disabilities Act (ADA) requires a local agency's legislative body to allow remote participation for a member with a qualifying disability that precludes their in-person attendance at meetings.

The Attorney General determined that the ADA requires remote participation as a reasonable accommodation for a member with a qualifying disability. However, this duty to reasonably accommodate is subject to the Brown Act's requirement that the remote participation must be conducted in a manner that simulates in-person attendance at meetings held in person at a location open to the public. Therefore, members who attend meetings remotely due to a qualifying disability must (1) use two-way video and audio streaming in real time and (2) disclose the identity of any adults who are present with the member at the remote location.

LAND USE AND DEVELOPMENT

SB 450: Housing Development – Approvals.

Under current law, local land use agencies are required to allow and ministerially approve any lot in a single-family residential zone to be: (1) split, roughly into halves, with resulting lots as small as 1,200 square feet; and (2) developed with a second primary dwelling unit. Further, current law allows local land use agencies to impose objective zoning, subdivision, and design standards on applicable projects, subject to some limitations. SB 450 fundamentally alters this status quo by reducing the scope of local land use authority to regulate these projects. Under SB 450, local land use agencies:

- May no longer impose standards on second primary dwelling unit projects "that do not apply uniformly to development within the underlying zone" … that is, unless the standards "are more permissive."
- May only impose standards on urban lot splits that are "related to the design or to improvements of a parcel" (e.g., lot size, access, and grading).

- Must approve or deny a "completed application" for an urban lot split or second primary dwelling unit project within 60 days. (Failure to act results in the application being deemed approved.)
- Must provide detailed comments with any denial of an urban lot split or second primary dwelling unit application.
- May no longer deny an application for an urban lot split or second primary dwelling due to specific adverse impacts to the "physical environment." (Now only adverse impacts on "public health and safety" are a valid basis for denying an application).

SB 937: Development Projects – Fees and Charges.

SB 937's stated primary purpose is to minimize the impact of market fluctuations and high interest rates on housing production by delaying developers' obligation to pay local government development fees. This bill regulates fees for public improvement projects, designated residential development projects, and fees for specific purposes, including water and sewer connection fees, among others. Due to the broad scope and impacts of SB 937, we are preparing a separate primer that will be provided to your agency with a detailed discussion of the law's provisions and guidance for compliance.

CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

AB 2117: Development Permit Expirations – Actions or Proceedings.

Current law generally requires that an action or proceeding challenging a public agency's decision on a variance, conditional use permit, or any other permit (among other decisions), be commenced, and service made on the agency's legislative body, within 90 days after the legislative body's decision.

AB 2117 extends the expiration period for any developmental permit (e.g., variance, conditional use permit) that is subject to litigation. Although local governments typically extend permits in this circumstance, this law makes the extension automatic. The definition of "development permit" subject to automatic extension under AB 2117 does not include building permits, demolition permits, minor grading permits, or any other ministerial permit issued after the entitlement process has concluded, but prior to project construction.

LABOR AND EMPLOYMENT

AB 2561: Local Public Employees – Vacant Positions.

AB 2561 amends the Meyers-Milias-Brown Act, which authorizes collective bargaining for local public employees and employers, and creates a new obligation for public agencies to publicly address the status of their vacancies. Due to vacancies being a widespread and significant problem in the public sector, AB 2561 requires public agencies to present the status of their vacancies in a yearly public hearing before their governing body. The presentation must be made prior to the adoption of a final budget and the report must

also address the recruitment and retention efforts currently employed by an agency. During the presentation, the public agency also must identify any changes to policies, procedures, or recruitment activities that negatively impact efforts to reduce vacancies.

If an agency's number of vacancies exceeds 20% of the total number of authorized full-time positions in a particular bargaining unit, upon request of the recognized employee organization, the agency must include the following in its presentation:

(1) The total number of job vacancies within a bargaining unit;
(2) The total number of applicants for vacant positions within the bargaining unit;
(3) The average number of days to complete the hiring process from when a position is posted; and,
(4) Opportunities to improve compensation and other working conditions.

AB 2561 also requires that recognized employee organizations are entitled to also make a presentation before the governing body of an agency during the same public hearing as the public agency makes its presentation.

PUBLIC WORKS AND CONTRACTING

AB 2192: Public Agencies – Cost Accounting Standards.

AB 2192 amends the Uniform Public Construction Cost Accounting Act (the Act) to give public agencies more freedom to utilize the Act as an alternative method of procurement, and factors in rising costs due to inflation. AB 2192 accomplishes this by increasing the bidding thresholds in Public Contract Code Section 22032, expanding the statutory definition of "public projects," and broadening the oversight authority of the California Uniform Construction Cost Accounting Commission (Commission). AB 2192 increases the competitive bidding thresholds as follows:

- Public projects of $75,000 or less to be performed by public agency employees will be authorized by force account, negotiated contract, or purchase order;
- Public projects of $220,000 or less may be awarded by informal procedures; and
- Public contracts of more than $220,000 are to be contracted by formal procedures.

Furthermore, if all the bids received for the performance of a public contract exceed $220,000, the governing body of a public agency is authorized to award the contract at $235,000 or less to the lowest responsible bidder if the governing body determines by resolution that the agency's cost estimate was reasonable. AB 2192 also adds "installation[s]" to the definition of public contracts in Public Contract Code Section 22002.

Finally, AB 2192 expands the Commission's authority in administering the Act. The Commission can review the accounting procedures of participating agencies if an interested party presents evidence that work undertaken by the agency either (1) has been split or

separated into smaller work orders or projects or (2) has exceeded the bidding thresholds or other otherwise failed to meet the requirements of Public Contract Code Section 22032.

SB 1303: Public Works.

Currently the Labor Code requires public agencies that award contracts on public projects (awarding bodies) to ensure that the workers employed on those public works projects, except as specified, are paid the prevailing rate of per diem wages as determined by the Director of Industrial Relations. Also, awarding bodies may engage a third-party company to initiate and enforce a labor compliance program on certain public works projects. Existing law further requires an awarding body to withhold contract payments when payroll records are delinquent or inadequate; to provide notice of withholding of such contract payments to the contractor or subcontractor; and mandates that the notice is in writing, describes the nature of the violation, and describes the amounts withheld.

SB 1303 adds a number of additional requirements to existing law. First, SB 1303 requires a private labor compliance entity to confer with the negotiating parties to review relevant public works law prior to withholding funds from a public works contractor for an alleged violation, and prohibits such entities from withholding an amount that exceeds the alleged underpayments and penalty assessments. Second, SB 1303 requires private labor compliance entities to provide a venue for a public works contractor or subcontractor to review and respond to evidence of alleged allegations.

Third, SB 1303 provides that a violation of the conflict-of-interest provisions by a private labor compliance entity would void a contract between the parties and subject the entity to civil fees and fines. Further, these entities are required to submit a signed declaration under penalty of perjury verifying the absence of any conflicts of interest.

Finally, existing law allows a joint labor-management committee to bring an action against an employer who fails to pay the prevailing wage, or who fails to provide payroll records. SB 1303 authorizes a joint labor-management committee to initiate a private right of action against certain entities when the court is required to award reasonable attorney's fees and costs.

PROPOSITION 218 REFORM

AB 2257: Local Government – Property-Related Water and Sewer Fees and Assessments Remedies.

AB 2257 establishes new requirements for ratepayers challenging fees or assessments proposed by local governments to ensure that they provide a reasonable opportunity for an agency to respond to any alleged defects in the substance or procedure for adopting new fees and charges for property-related services. AB 2257 prohibits a ratepayer or entity from alleging noncompliance with Proposition 218 for any new, increased,

or extended fee or assessment unless that ratepayer or entity has timely submitted a written objection to the local agency. Due to the potentially significant impacts of AB 2257 and the process required, we are preparing a separate primer with a detailed discussion of the law's provisions and guidance for implementation that we will provide to your agency soon.

AB 1827: Low-Water User Protection Act.

AB 1827 affirms existing law that allows water suppliers to implement higher fees or charges for property-related water service based on high-demand factors. AB 1827 expressly provides that water suppliers are authorized to allocate incrementally increased costs resulting from (1) higher water usage demand of parcels; (2) maximum potential water use; (3) projected peak water usage; or (4) any combination of the previous three factors. A water supplier may make such allocations using any method that reasonably assesses its costs of service to high-water use parcels. AB 1827 also permits allocation of incremental costs caused by high water use among customer classes, within customer classes, or both, based on meter size or peaking factors, as those methods reasonably assess the water service provider's cost of serving parcels that increase water usage demand, maximum potential water use, or projected peak water usage.

SB 1072: Local Government – Proposition 218 Remedies.

Under current law, the California Constitution provides that a tax, assessment, or fee/charge incident to property ownership is prohibited from being imposed on any parcel if it exceeds the reasonable cost of the proportional special benefit conferred on or service provided to that parcel. Among other laws, Proposition 218 prescribes the procedures for compliance with these provisions of the California Constitution. One issue with Proposition 218 that has remained unresolved is where a public agency must provide cash refunds to customers if a final court judgment determines that a fee or charge for a property-related service exceeds the reasonable cost of service to each parcel served.

SB 1072 explicitly declares that it furthers the purposes and intent of Proposition 218. Under SB 1072, if a court determines that a fee or charge for a property-related service violates the California Constitution's requirements for the imposition of such fees and charges, no refund remedy is allowed, and instead a local agency must credit the amount of the fee or charge attributable to the violation against the amount of the revenues required to provide the property-related service in its next Proposition 218 proceeding to increase or impose the fee or charge unless a statute expressly requires a refund.

ETHICS AND CONFLICT OF INTEREST

SB 1243 and SB 1181: Campaign Contributions – Agency Officers.

SB 1243 and SB 1181 update the state's "pay to play" campaign contribution law, commonly known as the Levine Act. Currently, the Levine Act prohibits agency officers from

accepting, soliciting, or directing a contribution of more than $250 from a party or participant (or their agents) (1) while a proceeding involving a license, permit, or other entitlement for use, including most contracts, is pending before the agency and (2) for 12 months after a decision. The law also contains disclosure, recusal, and other requirements applicable to an officer who has received such contributions, and similar requirements applicable to parties, participants, and their agents.

SB 1243 and SB 1811 make the following changes to the Levine Act:

- Raise the threshold for covered contributions to officers from $250 to $500;
- Extend from 14 days to 30 days the period during which an officer can return and "cure" a contribution in excess of the threshold that the officer accepted, solicited, or received during the 12 months following a final decision on a license, permit, or entitlement;
- Establish that the term "participant" excludes individuals whose only financial interest results from a change in membership dues;
- Codify that the term "pending," as it relates to the officer, is when:
    - The item involving the license, permit, or other entitlement for use is placed on the agenda; or
    - The officer knows such license, permit, or other entitlement for use is within the jurisdiction of the officer's agency, and it is reasonably foreseeable that the decision will come before the officer for a decision; and
- Exclude the following contracts from the definition of "licenses, permits, or other entitlements for use" for the purposes of the Act:
    - Contracts under $50,000;
    - Contracts between two or more government agencies;
    - Contracts where no party receives financial compensation; and
    - Periodic review or renewal of development agreements or competitively bid contracts with non-material modifications.

Additionally, SB 1243 and SB 1181 exempt a city attorney or county counsel from the definition of "officer" covered by the Levine Act if the attorney's role in the decision is solely to provide legal advice and the attorney has no authority to make a final decision in the proceeding.