2024

Land Use, Environmental, & Natural Resources

Update

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Introduction

Since our last update in 2023, Allen Matkins has gained a foothold in the Big Apple, opening a New York office in Midtown, while continuing to expand the number of professionals focused on environmental, natural resources, water, energy, and land use across the firm. The topics in this year's Update address those most relevant to our evolving national client base.

As indicated in every year since the Update has been published, California housing remains one of the hottest issues in the public discourse. Last year's legislative session produced another crop of bills aimed at stimulating housing production and the ongoing session looks to be similarly productive. Many in the firm are working on housing-related issues and closely following every development.

At a national level, it is a presidential election year and the Biden Administration continues to promulgate rules tightening environmental standards across media. Just weeks ago, the federal EPA for the first time announced drinking water standards for two PFAS compounds.

Changes in both national and state standards ultimately affect the property market, and environmental due diligence supporting transactions has only become more complex. Meanwhile, the continuing greening of the grid and of transportation presents novel challenges in siting utility-scale and community-scale renewable generation and the charging of electric vehicles of all sizes.

Throughout the year, we look forward to offering updates on 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. Please do not hesitate to contact the authors of any of these articles should something pique your interest.

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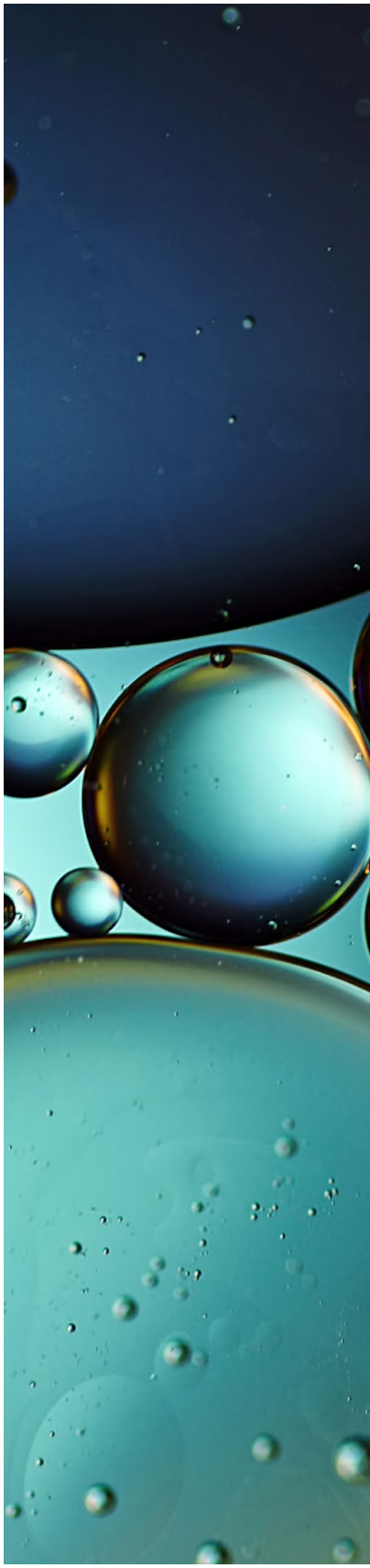
Single ASTM Standard For Phase I ESAs For Commercial and Industrial Properties

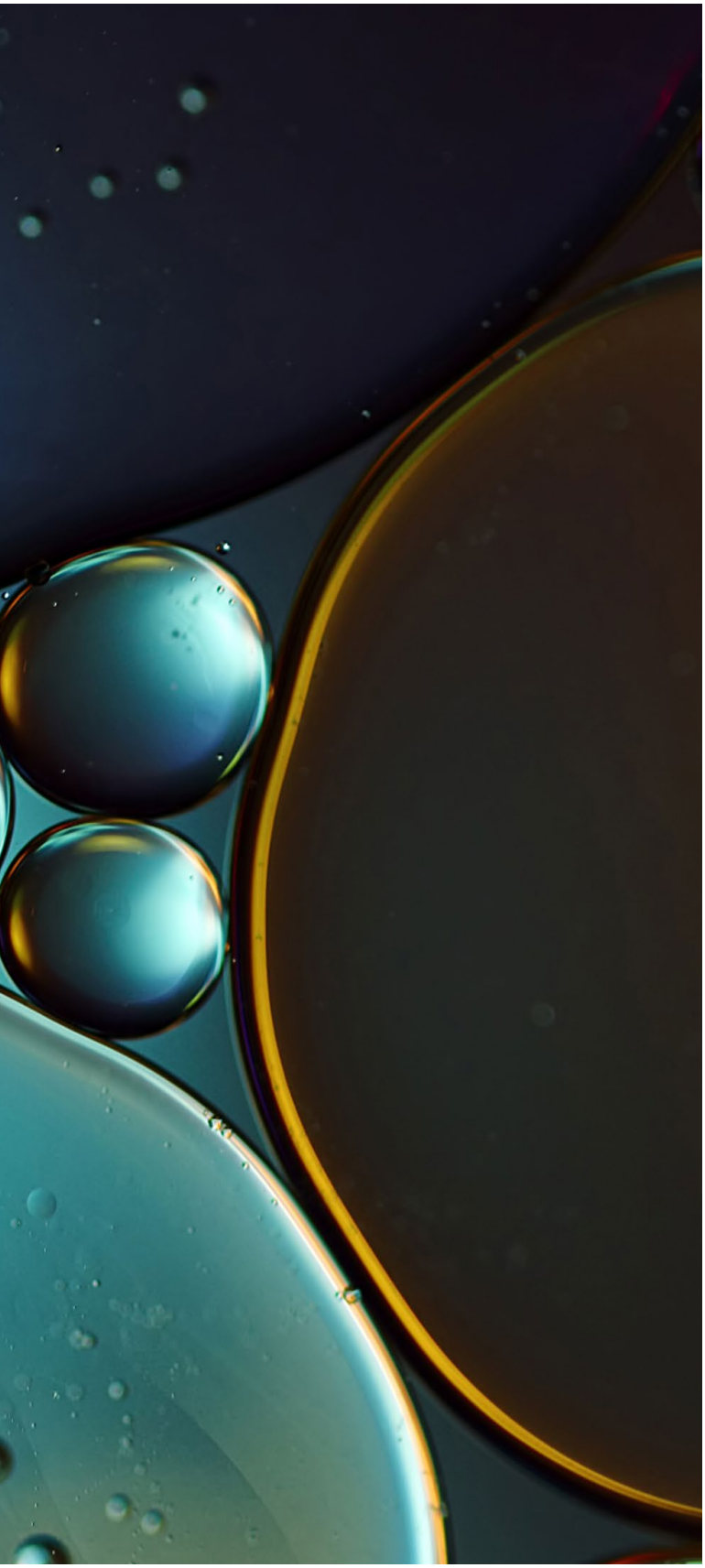
BY STUART BLOCK AND NICOLE MARTIN



Effective February 13, 2024, prospective purchasers and ground tenants of commercial and industrial property seeking liability protections under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) must ensure that their Phase I Environmental Site Assessment (Phase I ESA) complies with ASTM International's E1527-21, *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process* (ASTM E1527-21). Such purchasers and ground tenants can no longer rely on the older ASTM E1527-13 standard. ASTM International is one of the world's largest international standards-developing organizations, publishing almost 13,000 ASTM standards each year.

WHY IT'S IMPORTANT FOR PHASE I ESAS TO FOLLOW THE UPDATED ASTM STANDARD

Phase I ESAs serve two general purposes in environmental due diligence. They provide an overview of known and potential environmental issues at or affecting real property, and they fulfill one of the key statutory requirements necessary to qualify for environmental liability protections under CERCLA and analogous state laws.



Under CERCLA, current owners and operators of real property face strict, joint and several liability for response costs associated with existing contamination at a property, i.e., a new owner or operator can be held responsible for 100% of the property cleanup costs, even when they did not cause or contribute to the contamination. This potential liability can discourage property transfers and undermine the productive use of otherwise valuable property.

Certain protections, referred to as landowner liability protections (LLPs), are available under CERCLA to those who qualify as an innocent landowner, a bona fide prospective purchaser (which may include a ground tenant), or a contiguous property owner. To qualify for one of these LLPs, a prospective owner or tenant must perform "all appropriate inquiries" into the previous ownership and uses of the property in accordance with generally accepted good commercial and customary standards and practices, as defined under CERCLA (AAI). AAI must be completed within one year prior to the date of acquisition of the property, with certain components conducted or updated within six months prior to acquisition.

In 2005, the U.S. EPA (EPA) adopted the All Appropriate Inquiries Rule (AAI Rule) outlining the standards and practices for conducting AAI under CERCLA and specifying which existing industry standards comply with AAI requirements. On December 15, 2022, EPA amended the AAI Rule to allow use of ASTM E1527-21 and added a one-year sunset period to phase out use of the older ASTM E1527-13. As of February 13, 2024, ASTM E1527-13 no longer complies with EPA's AAI Rule. ASTM E2247-16 may also be used for properties that qualify as "forestland" or "rural property," designations

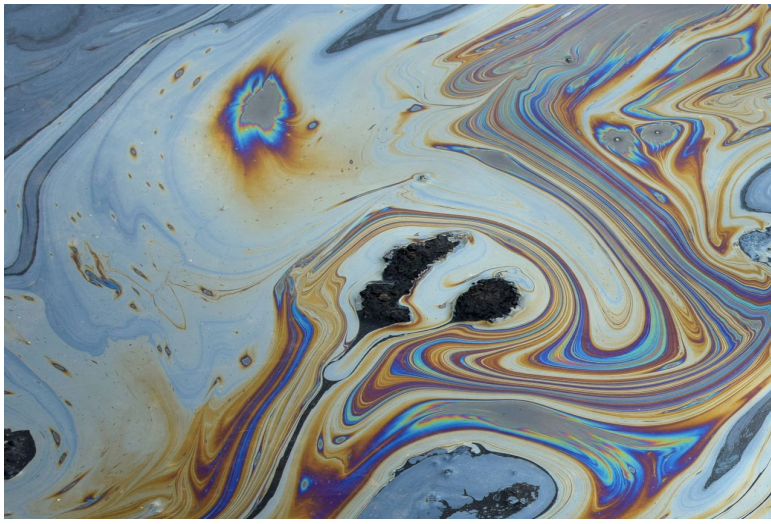
that may apply to certain properties acquired for solar and/or wind projects. On March 12, 2024, EPA issued a proposed rule to replace E2247-16 with an updated standard for forestlands and rural properties, E2247-23, although the exact timing for that change is uncertain until EPA issues its final rule. Although a party may attempt to qualify for LLPs by complying directly with the AAI requirements as listed in the federal regulations, the most common and commonly accepted practice for qualification is to obtain a Phase I ESA prepared in accordance with an EPA-approved ASTM standard.

KEY CHANGES IN THE NEW STANDARD FOR PHASE I ESAS

As reported in previous updates and summarized below, ASTM E1527-21 includes several key changes from its predecessor, ASTM E1527-13.

New Definitions for RECs, CRECs, HRECs, and Other Key Terms

ASTM E1527-21 modifies the definitions of key terms used in the Phase I ESA, including Recognized Environmental Conditions (RECs), Historical Recognized Environmental Conditions (HRECs), and Controlled Recognized Environmental Conditions (CRECs). The definitions are important because items identified as RECs can become key environmental considerations in a real estate transaction (including refinancing), potentially signaling open issues and associated uncertainty regarding the presence or potential presence of hazardous substances or petroleum products. In contrast, HRECs and CRECs generally denote something less onerous – past releases that have been adequately addressed but which, in the case of CRECs, may require implementation and/or



compliance with certain controls (e.g., a site cap and/or environmental deed restriction imposing restrictions on use of the property).

ASTM E1527-21 also includes new definitions and/or clarifications for other key terms, including "significant data gap," "property use limitation," and "land title records."

More Extensive Historical Research

ASTM E1527-21 imposes potentially more extensive requirements for research into the historical uses of the subject property and adjacent properties, which may increase the time and cost required to complete the Phase I ESA. At a minimum, environmental professionals must review certain "standard historical resources" if they are reasonably ascertainable, likely to be useful, and applicable to the subject property. Those resources must also be used to evaluate historical uses of adjacent properties if they are likely to be useful in identifying potential RECs for the subject property. Additional historical resources must be reviewed for both the subject property and adjoining properties if the environmental professional determines that additional

review is warranted in order to identify RECs for the subject property. Notably, ASTM E1527-21 adds retail as one of the land use types (along with industrial and manufacturing) that may require more in depth review of historical resources to identify specific uses of potential concern (e.g., a drycleaner).

Emerging Contaminants (Including PFAS) May be Addressed as Non-Scope Items

ASTM E1527-21 specifically addresses substances not yet defined as hazardous substances under CERCLA, including emerging contaminants such as per- and polyfluoroalkyl substances (PFAS), which may be evaluated as "non-scope" considerations in a Phase I ESA. Following publication of ASTM E1527-21, the EPA listed two PFAS - perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) - as CERCLA hazardous substances. Those substances must now be evaluated as part of a Phase I ESA. Therefore, depending on the overall objectives of the party relying on the Phase I ESA and any expected need to rely on the Phase I in the near term future, it may be wise to include evaluation of those substances as a non-scope consideration in the Phase I ESA.

Other Changes

ASTM E1527-21 includes additional requirements and/or clarifications for other issues as well, including: (1) the Phase I ESA user's responsibility to review land title records and judicial records for environmental liens and Activity and Use Limitations; (2) the "shelf-life" of a Phase I ESA; (3) site reconnaissance requirements; and (4) several updated or new appendices, including the new "Additional Examination of the Recognized Environmental Condition Definition and Logic."

ADDITIONAL REQUIREMENTS NECESSARY TO SECURE ENVIRONMENTAL LIABILITY PROTECTIONS

Fulfilling CERCLA's AAI requirements checks only one of the boxes necessary to qualify for the LLPs. Other obligations continue even after acquisition, including compliance with applicable land use restrictions, not impeding the effectiveness or integrity of institutional controls employed in connection with a response action, providing full cooperation, assistance, and access to those conducting response actions or natural resource restoration, and taking reasonable steps to stop any continuing release, prevent threatened future release, and prevent or limit any human, environmental, or natural resource exposure to previously released hazardous substances. In addition, the scope and requirements for securing analogous environmental liability protections available under state laws vary. Prospective owners and tenants should work with experienced consultants and qualified legal counsel to ensure compliance with the AAI Rule and satisfaction of other requirements necessary to qualify for LLPs and analogous environmental liability protections under state law.

EPA Takes Sweeping Actions to Regulate PFAS, California Makes Targeted Moves

BY KAMRAN JAVANDEL, DANIEL WARREN, BRIDGET CHO, AND JORDAN WRIGHT

As Americans are becoming increasingly aware, per- and polyfluoroalkyl substances (PFAS) are a class of thousands of manufactured chemicals that have been used in industry and consumer products since the 1940s. PFAS have unique physical and chemical properties and are colloquially termed "forever chemicals" for their ability to persist in the environment and bioaccumulate in humans and animals. In response to research indicating that PFAS can cause adverse human health and environmental effects, the U.S. Environmental Protection Agency (EPA) has undertaken a "whole-of-agency" approach to addressing PFAS contamination, which is focused on restricting dispersion, remediating contamination, and investing in research on PFAS risks and removal technologies.

In April 2024, EPA finalized two rules that represent a seismic shift in PFAS regulation, and that will potentially impose enormous costs on the regulated community, including public water systems. On April 10, EPA announced first-ever federal drinking water standards for PFAS under the Safe Drinking Water Act (SDWA). Just over a week later, on April 19, it announced the finalization of a rule listing two of the most widely used PFAS compounds – perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) – as "hazardous substances" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as the Superfund law. EPA has also proposed two PFAS-related rules under the Resource Conservation and Recovery Act (RCRA).

At the state level, California's Office of Environmental Health Hazard Assessment (OEHHA) adopted public health goals for PFAS and the state has enacted legislation concerning PFAS in food packaging, cookware, textiles, and cosmetics.

PFAS DRINKING WATER REGULATION

On April 10, 2024, EPA announced the final rule establishing a National Primary Drinking Water Regulation (NPDWR) for six PFAS under the SDWA. NPDWRs are legally enforceable primary standards and treatment techniques that apply nationwide to public water systems. This final rule is the most significant step EPA has taken to prevent PFAS exposure in drinking water in accordance with its "whole-of-agency" approach.

The final rule establishes enforceable Maximum Contaminant Levels (MCLs) – concentrations of a contaminant that may not be exceeded in water delivered to any user of a public water system – for six PFAS: PFOA, PFOS, PFNA, HFPO-DA, PFHxS, and PFBS. The final rule also identifies a non-enforceable maximum contaminant level goal (MCLG) for each chemical. The rule also addresses mixtures containing two or more of PFHxS, PFNA, HFPO-DA, and PFBS using a Hazard Index approach which requires a calculation to determine whether the cumulative effects of the combined PFAS compounds pose a potential risk. The finalized MCLs and MCLGs are as follows:

PFAS COMPOUND	FINAL MCLG	FINAL MCL (ENFORCEABLE LEVELS)
PFOA	Zero	4.0 parts per trillion (ppt)
PFOS	Zero	4.0 ppt
PFHxS	10 ppt	10 ppt
PFNA	10 ppt	10 ppt
HFPO-DA (commonly known as GenX Chemicals)	10 ppt	10 ppt
Mixtures containing two or more of PFHxS, PFNA, HFPO-DA, and PFBS	1.0 Hazard Index (unitless)	1.0 Hazard Index (unitless)

The MCLs of 4 ppt for PFOA and PFOS are set near the lowest level that current laboratory analytical methods can reliably detect the compounds. Further, the setting of the MCLGs for these compounds at zero reflects EPA's determination that there is no level of exposure to PFOA or PFOS at which known or anticipated adverse health effects would not occur.

By 2027, public water systems subject to the rule must complete initial monitoring at all entry points to their distribution systems either biannually or quarterly depending on the size of the systems. Those systems which detect PFAS in drinking water above MCLs have an additional two years to implement solutions to reduce PFAS levels below MCLs.

The final rule also requires public water systems to notify customers of the initial monitoring results and ongoing monitoring results in Annual Water Quality Reports from 2027 onward. Violations of the rule will also require public notice beginning in 2027. Notification of a water standard violation must be provided to customers within 30 days, and notification of a testing or monitoring procedure violation must be provided within one year.

Cost-Benefit Analysis

To support the required cost-benefit analysis of the rule, EPA contends that the final rule will result in savings of $1.5 billion annually as a result of reduced adverse health effects stemming from PFAS exposure. On the other hand, numerous trade and lobbying organizations representing water utilities and local governments submitted comments in response to EPA's March 2023 proposed NPDWR arguing that compliance costs would be significant because treating drinking water for PFAS would require utilities to install advanced technologies that carry an extraordinary cost. These astronomical expenses come at a time when water utilities and local governments are already facing increases in prices of essential supplies, equipment and electricity to maintain operations.

EPA estimates that between 4,100 to 6,700 public water systems serving a total population of 83 to 105 million people are currently exceeding one or more of the Maximum Contaminant Levels (MCLs) established by this rule. The American Water Works Association, an organization whose membership includes 4,300 water utilities that supply roughly 80% of the nation's drinking water, commissioned a PFAS National Cost Model Report which estimated that the cost to comply with the MCLs will exceed $3.8 billion annually.

Implementation and Cost of Compliance

Many water systems are currently ill-equipped to meet the required MCLs as traditional water treatment technologies do not address PFAS. The final rule identified several treatment technologies such as granular activated carbon, anion exchange resins, reverse osmosis, and nanofiltration that have been shown to be effective at removing PFAS.

Although these treatment technologies are available, they are expensive. EPA estimates compliance with the rule will cost approximately $1.5 billion annually, in the form of water system monitoring, communicating with customers, and installing water treatment technologies where necessary. As noted above, opponents of the rule have asserted that costs associated with compliance will

be much higher. An estimated 6% to 10% of the 66,000 public water systems will require significant investment in treatment systems to comply with the new MCLs.

To offset the cost, the federal government has dedicated $21 billion in the Bipartisan Infrastructure Law to drinking water related matters. Nine billion dollars are set aside specifically for communities dealing with PFAS contamination of drinking water, and the remaining $12 billion is allotted for general drinking water improvements including addressing PFAS chemicals.

Next Steps

The final rule will become effective 60 days from the publication date in the Federal Register. A pre-publication version of the final rule is available here. Public water systems subject to the rule will need to take steps now to identify whether PFAS compounds are present in their systems and, if so, begin the process of planning for and implementing capital improvements to treat for PFAS, which will likely take several years to complete.

PFOA AND PFOS LISTED AS CERCLA HAZARDOUS SUBSTANCES

On April 19, 2024, EPA announced that it is finalizing a rule to list PFOA and PFOS as "hazardous substances" under CERCLA. The move brings two of the most widely used PFAS compounds under EPA's broad CERCLA purview and will enable the agency to investigate, remove, and remediate releases of the compounds, and to impose liability for the associated costs on "potentially responsible parties," including current owners and operators of sites where the releases occurred, past owners and operators at the time of the releases, persons who arranged for the disposals of the hazardous substances, and persons who transported them to a site.

CERCLA imposes "strict liability" meaning that identified potentially responsible parties can be held liable regardless of any fault and regardless of whether they complied with all applicable laws. Further, liability to the government and non-liable private parties is "joint and several" so that each individual party can potentially be held responsible for all of the investigation, removal, and remediation costs regardless of the magnitude of their contribution to the problem (subject to potential divisibility and allocation arguments where applicable).

The listing of PFOA and PFOS as hazardous substances will likely lead EPA to designate new Superfund Sites and re-open closed sites. It may also expose potentially responsible parties to vast liability for the costs of investigating and remediating the widespread occurrence of PFAS in the environment. These consequences will be felt particularly strongly in California which has approximately 12,000 known PFAS-contaminated sites. Among other consequences, it is likely to add complexity to real estate sale and leasing transactions where buyers and lenders will have increased reason to investigate and seek to avoid potential exposure to liability associated with PFAS contamination.

EPA LOOKS TO EXPAND RCRA CORRECTIVE ACTIONS TO INCLUDE PFAS

On February 8, 2024, EPA proposed two rules to amend RCRA regulations to expand the definition of "hazardous waste" as it applies to "corrective action" (which entails environmental investigation and cleanup), and to designate nine types of PFAS and their salts and structural isomers as "hazardous constituents."

Hazardous Waste and Hazardous Constituents

In order to understand the proposed new rules, it is useful to review briefly the way EPA currently regulates "hazardous wastes" and "hazardous constituents."

Under Subtitle C of RCRA, EPA regulates hazardous waste from its generation to its ultimate disposal, commonly referred to as "cradle to grave" regulation. One way in which EPA regulates hazardous waste is by issuing permits to hazardous waste treatment, storage, and disposal facilities (TSDFs). These permits include corrective action provisions that require TSDFs to investigate and clean up releases of hazardous waste. In order for a material to be classified as a hazardous waste under Subtitle C, it must first be a solid waste, a term that is defined very broadly. Under these regulations, a solid waste is also classified as a hazardous waste if it exhibits one or more specific characteristics (ignitability, corrosivity, reactivity, or toxicity) or if EPA has specifically listed it as a hazardous waste. Thus, hazardous wastes are often referred to as either "characteristic" or "listed" wastes.

EPA also maintains a list of "hazardous constituents" in Appendix VIII, 40 C.F.R. Part 261. A hazardous constituent is a substance that has toxic, carcinogenic, mutagenic, or teratogenic effects on humans or other life forms. The listing of a hazardous constituent in Appendix VIII does not make the chemical a hazardous waste and thus subject to the broad requirements of Subtitle C. However, any permit issued by EPA to a TSDF must require corrective action for all releases of hazardous wastes or hazardous constituents.

EPA's Proposal to Clarify Corrective Action Authority

The first proposed rule would modify the RCRA regulations applicable to TSDFs with regard to EPA's corrective action authority. Specifically, the proposed rule would amend the definition of hazardous waste applicable to corrective actions to expressly apply RCRA's broader statutory definition of hazardous waste instead of the narrower regulatory definition, which is generally limited to characteristic and listed wastes. The RCRA statute defines hazardous waste broadly as a solid waste that may "(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." 42 U.S.C. § 6903(5)(A), (B). This amendment would allow EPA to use its corrective action authority to address emerging contaminants, such as PFAS, as well as other non-regulatory waste at RCRA permitted TSDFs.

This proposed change stems from efforts by the New Mexico Environment Department to address PFAS contamination at Canon Air Force Base in Curry County, New Mexico. The base was the site of PFAS releases to the environment caused by the use of aqueous film-forming foam for firefighting training. PFAS-contaminated groundwater migrated to nearby dairy farms and required dairy farmers to euthanize several thousand cows due to adulterated milk. The Department's response was to include provisions in the Base's renewed Corrective Action Permit that define "hazardous waste" according to RCRA's broad statutory definition, rather than the narrower definition found in EPA's regulations. The Trump Administration's Justice Department, acting on behalf of the United States Air Force, challenged the provisions in the renewed Corrective Action Permit in federal district court. The court dismissed the case on jurisdictional grounds. The United States appealed that decision to the Tenth Circuit Court of Appeals. The appeal is now pending. It is unclear if, or how, the United States will proceed with the appeal given that the rule the Biden Administration's EPA has now proposed is at odds with the position the Trump Administration's Department of Justice took in the trial court. After numerous extensions, the United States' opening brief on appeal is due June 28, 2024.

Proposal to list Nine PFAS as "Hazardous Constituents" under RCRA

EPA's second proposed rule would list nine PFAS, their salts, and their structural isomers as RCRA hazardous constituents in Appendix VIII, 40 C.F.R. Part 261. Those substances are:

- Perfluorooctanoic acid
- Perfluorooctane sulfonic acid
- Perfluorobutane sulfonic acid
- Hexafluoropropylene oxide-dimer acid
- Perfluorononanoic acid
- Perfluorohexane sulfonic acid
- Perfluorodecanoic acid
- Perfluorohexanoic acid
- Perfluorobutanoic acid

Similar to the first proposal, the principal impact of adding nine PFAS as hazardous constituents to Appendix VIII would be to expand the scope of EPA's Corrective Action Program. RCRA requires corrective action for all releases of hazardous waste or hazardous constituents from solid waste management units at a permitted facility. 42 U.S.C. § 6924(u). Thus, this proposal would require EPA and state agencies implementing an EPA-authorized hazardous waste program to consider the presence of these nine PFAS when implementing corrective action requirements at hazardous waste TSDFs.

Impact on the Regulated Community

Taken together, the revised Corrective Action rule and the PFAS Hazardous Constituent rule are likely to increase the number and scope of PFAS-related corrective actions at hazardous waste TSDFs. EPA indicates that nearly 50% of potentially affected facilities pertain to chemical manufacturing and waste management and remediation services. Other potentially impacted facilities include metal manufacturers and fabricators, coal manufacturers, and petroleum refineries. EPA also clarified that the PFAS Hazardous Constituent rule would apply only to facilities that are hazardous waste TSDFs. Facilities such as publicly owned treatment works, for example, would be excluded.

The proposal to list the nine PFAS as hazardous constituents potentially signals EPA's intent to eventually list certain PFAS as hazardous waste, which would subject facilities to the Subtitle C's cradle-to-grave regulatory scheme. Classifying PFAS as hazardous waste under RCRA would also subject facilities with PFAS contamination to cost recovery and contribution causes of action under CERCLA, assuming that the same PFAS constituents are eventually treated as CERCLA "hazardous substances" – the subject of the ongoing rulemaking that began in 2022.

Finally, if EPA were to finalize the PFAS Hazardous Constituent rule and the Corrective Action rule, citizen suits would likely follow. By adding PFAS as a hazardous constituent and clarifying that corrective actions now encompass hazardous constituents, TSDFs could be subject to citizen suits if they improperly handle PFAS waste or the release of PFAS waste presents an imminent and substantial endangerment to public health or welfare or to the environment.

CALIFORNIA ADOPTS PUBLIC HEALTH GOALS FOR PFOA AND PFOS IN DRINKING WATER

Days before EPA issued its nationwide drinking water standards for select PFAS, on April 5, 2024, California's OEHHA adopted Public Health Goals (PHGs) for PFOA and PFOS in drinking water at 0.007 ppt and 1.0 ppt, respectively.

A PHG is the level of a drinking water contaminant at which adverse health effects are not expected to occur from a lifetime of exposure. Like MCLGs at the federal level, PHGs are non-enforceable advisory levels. However, PHGs reflect the State's current assessment of the risk a particular contaminant poses to public health. PHGs also function as precursors to enforceable MCLs. Under California's Calderon-Sher Safe Drinking Water Act, essentially California's analogue to the federal Safe Drinking Water Act, OEHHA must adopt PHGs for each contaminant for which California's State Water Resources Control Board (SWRCB) proposes to adopt an MCL. California state law requires the SWRCB to establish an MCL as close to a PHG as is technologically and economically feasible, with a primary emphasis on protecting public health.

Importantly, California's MCLs cannot be less stringent than EPA's federal MCLs. Assuming the final rule becomes effective, EPA's MCLs of 4.0 ppt for PFOA and PFOS represent the regulatory floor for California. The SWRCB will have to propose MCLs at those levels or lower, which are already near analytical detection limits.

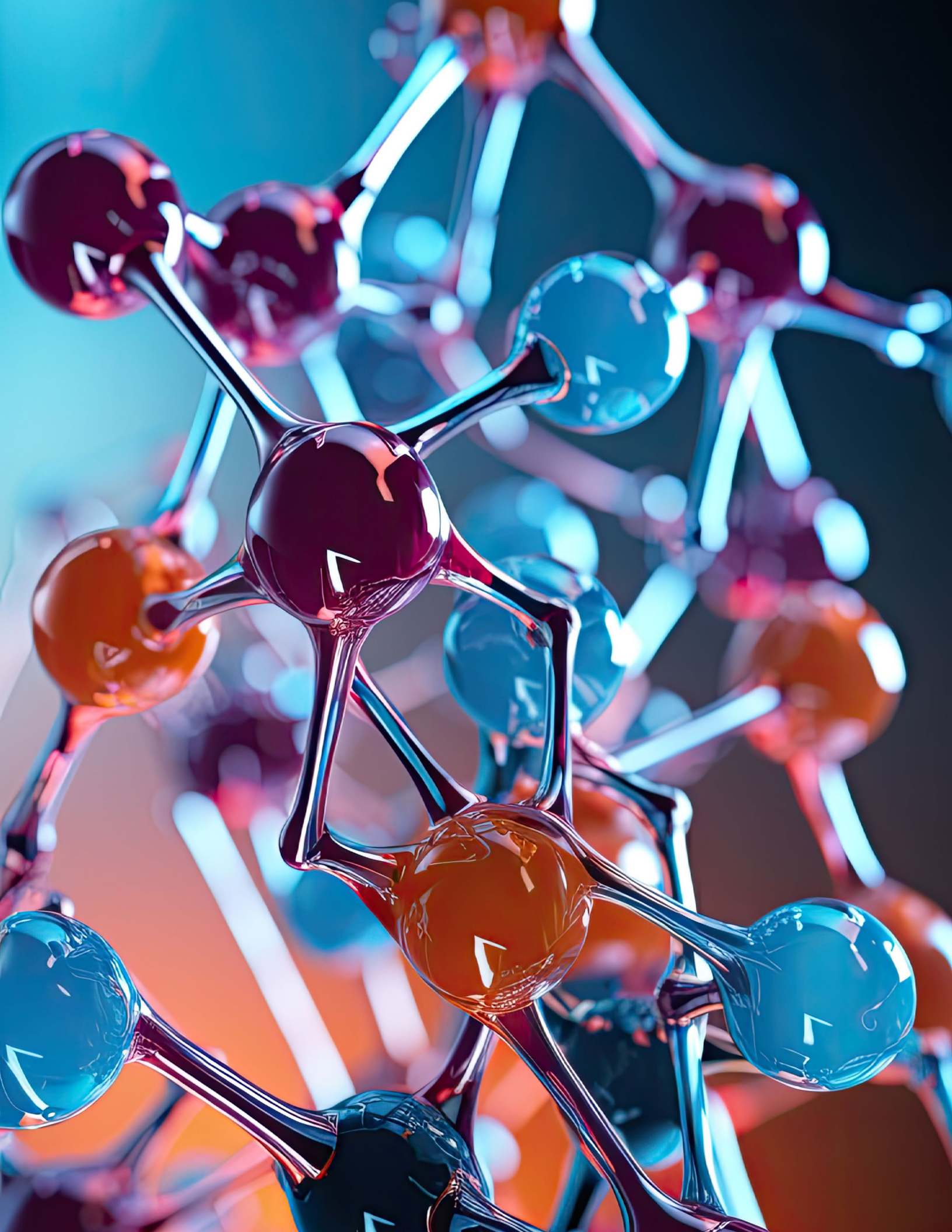
CALIFORNIA LEGISLATION ADDRESSING PFAS

In 2023, two California bills addressing the use of PFAS chemicals in various consumer products took effect. The first, Assembly Bill (AB) 1200, took effect on January 1, 2023, and prohibits the sale of food packaging containing PFAS and requires the manufacturer to use the least toxic alternative. The bill also requires that, as of January 1, 2024, all cookware which includes designated PFAS, among a list of other chemicals, must be labeled accordingly when sold. Additionally, AB 652, which took effect on January 1, 2023, bars the manufacture, distribution or sale of any new product for juveniles containing PFAS. The law uses a broad definition of PFAS and covers "intentionally added PFAS" or PFAS at concentrations above 100 parts per million (ppm) in the product.

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, will both take effect on January 1, 2025.

AB 1817 bans the manufacture, distribution, sale, or offer for sale of 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 ppm and decreases to 50 ppm on January 1, 2027. This bill 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 and household items such as shower curtains, bedding, towels, and tablecloths. Notably, AB 1817 will allow retailers and distributors to rely in good faith on certificates of compliance provided by manufacturers.

AB 2771 bans the manufacture, sale, delivery, holding, or offering for sale in commerce of 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.



A New Era for ESG Policy

BY SHAWN COBB

Over the past six months environmental, social, and governance (ESG) policy has shifted into a new era with the promulgation of new Greenhouse Gas (GHG) disclosure requirements at both the federal and state level in California. As expected, the majority of these requirements are now mired in litigation, but their arrival marks a significant shift in corporate accountability mandates.

SEC RULES

The U.S. Securities and Exchange Commission (SEC) finalized the agency's first climate disclosure regulations in March 2024. The rules, now on hold under an administrative stay in the face of pending litigation, apply to most public companies and companies that are going public. Among other mandates, the new rules will require companies to report "climate-related risks that have materially impacted, or are reasonably likely to have a material impact on, [their] business strategy, results of operations, or financial condition."

However in a significant step back from the draft rules released on March 21, 2022, the SEC will only require disclosure of material Scope 1 and Scope 2 GHG emissions from certain categories of filers, and will not require the disclosure of emissions indirectly produced along a company's upstream or downstream value chain (Scope 3 emissions) – a measure that generated significant industry pushback. While acknowledging that "many investors today are using Scope 3 information in their investment decision making," SEC Chair Gary Gensler stated that the agency omitted Scope 3 disclosure rules due to public comment.

The final rules now face multiple lawsuits from a variety of opponents. On one end, at least 10 states and various companies and industry representatives, including the U.S. Chamber of Commerce, have sued the SEC, calling the regulations an unconstitutional overreach of agency authority. At the other end of the spectrum, environmental advocacy groups have sued the SEC for weakening the rules by omitting the Scope 3 reporting requirements included in the draft version. The consolidated suits will be heard in the U.S. Court of Appeals for the Eighth Circuit based on a random lottery pick by the Judicial Panel on Multidistrict Litigation. In addition, a new petition for review was recently submitted in the Fifth Circuit by two new petitioners.

On April 4, the SEC voluntarily stayed implementation of the disclosure rules pending resolution of the consolidated litigation in the Eighth Circuit.

CALIFORNIA LEGISLATION

While the SEC backed down from the more stringent regulations initially proposed in 2022, California pressed ahead to pass the most ambitious disclosure requirements in the United States. The three pieces of legislation, which Governor Gavin Newsom signed into law on October 7, 2023, are expected to collectively

impact over 10,000 companies, including public and private entities and subsidiaries of non U.S.-based companies, according to a recent PwC analysis.

- Senate Bill 253 requires covered entities with more than $1 billion in annual revenue that do business California to report direct (Scope 1 and 2) and indirect (Scope 3) emissions;
- Senate Bill 261 mandates that businesses operating in California with over $500 million in annual revenue report certain climate-related financial risks beginning on January 1, 2026; and
- Assembly Bill 1305 requires certain disclosures for companies that market, sell, and purchase voluntary carbon offsets.

This suite of legislation now faces both legal and possible budgetary obstacles. On January 30, 2024, a coalition of business and agricultural groups, including the U.S. Chamber of Commerce, sued the state, seeking to block the implementation of SB 253 and 261. The plaintiffs allege in part that the disclosure requirements violate First Amendment protections by compelling speech, as anticipated in the Allen Matkins California Corporate & Securities Law Blog.

In another possible hurdle to implementation, Governor Newsom's proposed budget, released on January 10, 2024, paused the funding required to implement all new laws, including the new disclosure requirements, to address the state's deficit. Supporters, including the bills' sponsors, Senator Scott Wiener and Henry Stern, are urging Newsom to fully fund the measures when the budget is finalized in May.

Allen Matkins will continue to track these measures to help companies prepare for and respond to these new legal requirements.

California Water Board Adopts Direct Potable Reuse Regulations to Increase Water Supply

BY BARRY EPSTEIN, DAVID OSIAS, AND BRIDGET CHO

California Governor Gavin Newsom's recent executive order, calling on state agencies to create a comprehensive Water Resilience Portfolio, has set goals for recycling at least 800,000 acre-feet of water per year by 2030 and 1.8 million acre-feet by 2040 while reducing the amount of wastewater discharged to rivers and the ocean. Further advancing the state's water supply strategy to make California more resilient to drought and climate change, the State Water Resources Control Board (State Water Board) unanimously approved regulations on December 19, 2023 that will allow public water systems to develop treatment protocols to recycle wastewater into safe drinking water.

Known as direct potable reuse (DPR), the approved regulations provide the standards for treating and producing recycled water either directly into a public drinking water system or into a raw water supply immediately upstream of a drinking water treatment plant. DPR relies on an immediate, multi-barrier treatment that can recycle wastewater to drinking water standards within hours. In contrast, indirect potable reuse, the method currently being deployed in major water recycling projects throughout the state, relies on treatment through long-term underground storage or dilution, such as groundwater replenishment or surface water augmentation.

Currently, recycled water offsets nine percent of the state's water demand, about 728,000 acre-feet per year, and approximately 1.5 million acre-feet per year of treated wastewater is currently discharged to California's ocean waters. While not all of this wastewater can be recycled, as some water is needed to discharge brine and wastewater in some places provides critical streamflow for fish and wildlife, many communities can tap into recycled water resources to build water supply resilience.

While the State Water Board's objective is to recycle and replenish safe drinking water that California will lose due to a hotter, drier climate and to protect public health, there are hurdles to overcome before the state fully embraces its water reuse potential, including the public's perception of recycled wastewater coined as "toilet-to-tap," a term critics used in opposition to water recycling. In response to this concern, the proposed DPR regulations include robust maintenance and monitoring requirements to control pathogens during wastewater treatment. This criteria is consistent with the State Water Board's extensive research with members of the state's recycled water community concerning potable and non-potable application.

Relatedly, DPR may further serve to be an invaluable link between water supply availability and certain land-use decisions that require documentation of adequate water supplies for large development projects. For instance, pursuant to Senate Bill 610, local California jurisdictions acting as lead agencies for certain projects subject to the California Environmental Quality Act are responsible for ascertaining whether adequate water supplies exist to serve the project. Senate Bill 610 requires water service providers to prepare a water supply assessment (WSA) for such projects. Ultimately, the goal of the WSA is to evaluate whether the public water system's total projected water supplies available during normal, single-dry and multiple-dry water years during a 20-year projection are sufficient to meet the projected water demand associated with the proposed project. The State Water Board's approval of DPR will offer an additional source of water supply supporting this important area of land use planning.

The State Water Board's approval of the DPR regulations will still need to be approved by California's Office of Administrative Law to ensure that the State Water Board has complied with the rulemaking procedures set forth in California's Administrative Procedure Act. The OAL rulemaking process is expected to start by Spring 2024 with final approval of the DPR regulations anticipated in Fall 2024.

California Considers Endangered Species Protection for Burrowing Owls

BY JENNIFER JEFFERS AND RYAN CHEN

On March 5, 2024, six conservation groups filed a petition with the California Fish and Game Commission (the Commission) to request the implementation of legal protections for five populations of the western burrowing owl (*Athene cunicularia hypugaea*) under the California Endangered Species Act (CESA). Specifically, the petition requests endangered status for burrowing owl populations in southwestern California, central-western California, and the San Francisco Bay Area, and threatened status for burrowing owl populations in the Central Valley and southern desert range.

Burrowing owls are small birds that typically nest and roost below ground in grassland and desert habitats throughout the state of California. The petition asserts that burrowing owl numbers are declining due to loss of habitat from urban development, conversion of grasslands to agricultural uses, and large-scale renewable energy projects. Surveys estimate that the number of burrowing owls has decreased from more than 10,000 pairs in the 1990s to about 6,000 at the time of the petition's filing; it is estimated that fewer than 25 breeding pairs remain in the Bay Area.

State law currently allows for the passive relocation of burrowing owls from breeding sites during non-breeding season to accommodate development projects. However, CESA protections would significantly increase regulations and requirements for developers seeking to build in the species' habitat. Acceptance of the burrowing owl as a candidate species by the Commission under CESA (which could occur as early as mid-July) would no longer permit such relocation, nor the eradication of ground squirrels, a species on which the owls rely. Moreover, new protections could serve to significantly limit the development of large-scale solar and wind energy farms, certain agriculture uses, and new sizable residential projects.

Notably, burrowing owl habitat spans much of the State. If the species is afforded protection under CESA, even temporarily as a candidate species while the

Commission makes a final listing determination, the ramifications of this action have the potential to impact almost all development projects in the Central, Coachella, and Imperial Valleys. In addition, the presence of burrowing owls in the Bay Area, particularly in the Altamont Pass area and eastern Alameda and Contra Costa counties may affect renewable energy projects and will almost certainly prompt additional studies during project diligence and construction.

The listing process under CESA is a lengthy one, and the burrowing owl petition represents just the start of a time intensive process to come. The Commission publicly received the petition at its April 17-18 meeting and the California Department of Fish and Wildlife (CDFW) is conducting a formal 90-day petition evaluation. Unless an extension is requested, CDFW's evaluation and recommendation relating to the petition is expected to be received by the Commission at its June 19-20 meeting.

Time will tell as to whether the likelihood of a formal listing is forthcoming, particularly given that the Commission voted 4-0 against a previous 2003 petition requesting CESA legal protections for burrowing owls. We will be tracking the outcome of this petition and provide subsequent legal updates as things continue to develop over the next few months.

SGMA at 10 Years: Navigating California's Groundwater Future

BY TARA PAUL

This year marks the 10th anniversary of a major milestone in California water law history: the enactment of the Sustainable Groundwater Management Act (SGMA) in 2014. This landmark legislation signaled a critical step toward regulating groundwater resources across the state by requiring the formation of local Groundwater Sustainability Agencies (GSAs) to manage certain groundwater basins identified by the Department of Water Resources (DWR). GSAs were required to develop and implement Groundwater Sustainability Plans (GSPs) tailored to the needs of their respective basins in order to achieve sustainable groundwater conditions. In its 10th year of implementation, this article reviews the progress made, the next steps, and identifies implementation challenges.

PROGRESS AND NEXT STEPS

DWR identified 48 medium-priority basins and 46 high-priority basins, of which 21 were designated as critically overdrafted. SGMA required a GSA to be created by June 30, 2017 for all of these basins. In some instances, more than one GSA was formed to co-manage a basin. Next, the GSAs were required to develop and submit a GSP for DWR review that outlines the management policies that will mitigate overdraft and achieve basin sustainability within 20 years. GSAs managing critically overdrafted basins submitted their GSPs in 2020; GSAs managing other high- and medium-priority basins submitted their GSPs in 2022. Among other issues, the GSPs are targeted toward addressing groundwater depletion, land subsidence, seawater intrusion, and chronic lowering of groundwater levels.

The GSAs have a range of tools they can use to respond to those issues, subject to respect for water rights constraints, including imposing limits on groundwater pumping, charging fees for excessive groundwater use, and implementing basin recharge projects. SGMA requires GSAs for critically overdrafted basins to achieve sustainability goals by 2040, and the remaining GSAs must achieve these goals by 2042.

Some local agencies and stakeholders across the state managed to meet SGMA's deadlines. To date, DWR has approved 71 GSPs. There are nine GSPs that are still under review, 13 that have been designated as "incomplete," and 23 designated as "inadequate." GSAs with "incomplete" GSPs can revise and resubmit their plans for a final determination from DWR.

The 23 "inadequate" GSPs correspond to six basins areas, all of which are located in the Central Valley. There is also one unmanaged basin for which no GSA was ever formed and no GSP ever submitted: the Upper San Luis Rey Valley Subbasin. The State Water Resources Control Board (State Water Board) has intervened in this basin and now requires groundwater users to report on their annual pumping activities and pay fees related to water use.

The GSAs with "inadequate" GSPs will be required to consult with the State Water Board and their basins could be designated as "probationary" through a public process with a public hearing. If this occurs, those GSAs have one year to remedy the issues that led to the probationary designation and groundwater users in these regions could be subject to reporting requirements and fees similar to those imposed on the unmanaged basin. So far, none of the basins have been designated as "probationary." The GSAs with "inadequate" GSPs will continue to coordinate with DWR and the State Water Board in order to comply with all SGMA requirements.

OUTLOOK

Some GSAs have been implementing their GSPs in their respective basin areas for a few years now, and they did not have to wait for DWR approval before doing so. As a result, some groundwater users in certain basins have experienced restrictions in the amount of water they are allowed to pump. Other groundwater users have been exposed to new fees associated with pumping, and still others have not noticed much change at all. The impacts vary from one regulated basin to the next.

It is a central tenant in SGMA's provisions that it cannot be implemented in a manner that harms existing groundwater rights. Nevertheless, groundwater users have worried since the Act passed that it would result in such harm. Unsurprisingly, as GSAs finalized and submitted for review or began implementing their GSPs, litigation followed. Landowners in several counties in the Central Valley, Central Coast, and eastern desert regions are challenging the management tools the GSAs are utilizing on the grounds that the tools unlawfully interfere with their water rights to groundwater. Disputes have erupted over volume limitations, priority to sustainable yield, and fees imposed on acreage and water extraction volumes. In some instances, plaintiffs are asking the courts to conduct a comprehensive adjudication of all water rights in the basin area and to impose a physical solution to timely reach mandated sustainable yield goals in order to displace the tools or approach chosen by a GSA.

As these cases make their way through the courts, the decisions will help delineate the extent of a GSAs' authority to regulate groundwater use under SGMA. There are likely to be more challenges to GSP implementation, modifications to GSPs as groundwater conditions change, and possibly a new role for the State Water Board in regulating basins that fail to comply with SGMA mandates.

Recently Effective & Pending State Housing Laws

BY CAROLINE CHASE, MARTY AKERBLOM, JORDAN WRIGHT AND ZACHARY REGO

Various state housing bills are currently making their way through the State Legislature that are expected to benefit mixed-income multifamily housing developers. The following summaries reflect the status of the legislation as of May 15, 2024. The legislative process is ongoing and future amendments are expected. The recently effective state housing laws are also summarized below.

PART I: RECENTLY EFFECTIVE STATE HOUSING LAWS

Governor Newsom approved multiple state housing bills passed by the State Assembly and Senate during the last legislative session. The following is an abbreviated summary of a few of the key bills that are expected to benefit mixed-income multifamily housing developers, with a more detailed summary available in our prior legal alert.

SENATE BILL 423 — EXPANSION AND EXTENSION OF SENATE BILL 35

SB 423 (Wiener) extends the sunset provision for and makes other substantive changes to SB 35. As explained in our prior legal alert, SB 35 provides for a streamlined ministerial (i.e., no CEQA) approval process for qualifying housing development 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 made the following key amendments to SB 35:

- Extended SB 35 to January 1, 2036
- Expanded SB 35 to apply when a local jurisdiction fails to adopt a housing element in substantial compliance with state housing element law (regardless of RHNA progress), as specified and as determined by HCD
- Revised the coastal zone development prohibition to allow for projects in specified urban coastal locations (e.g., property not vulnerable to five feet of sea level rise or within close proximity to a wetland) where the property is zoned for multi-family housing and is subject to a certified local coastal program or a certified land use plan
- Removed skilled and trained workforce requirements for projects below 85 feet in height and imposes modified skilled and trained workforce requirements, as specified, for projects at least 85 feet in height. In exchange, projects with 50 or more dwelling units and using construction craft employees to meet apprenticeship program requirements and provide health care expenditures for each employee, as specified

Please see our prior legal alert for information about other SB 35 amendments made by SB 423, including San Francisco-specific amendments.

ASSEMBLY BILL 1287 — ADDITIONAL DENSITY BONUS UNDER STATE DENSITY BONUS LAW

AB 1287 (Alvarez) amended the State Density Bonus Law (Government Code § 65915) by incentivizing the construction of housing units for both the "missing middle" and 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.

The project must provide the requisite percentage of on-site affordable units to obtain the maximum density bonus (50%) under prior law: 15% very-low-income units, or 24% low-income units, or 44% moderate-

income (ownership only) units (the Base Bonus). 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 (the Added Bonus). The Added Bonus may be obtained by adding moderate-income units to *either* a rental or ownership project, but that is capped at a total maximum of 50% moderate-income units.

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

AB 1633 (Ting) closed a loophole in the Housing Accountability Act (HAA) (Government Code section 65589.5 et seq.) by establishing when a local agency's failure to exercise its discretion under CEQA, or abuse of its discretion under CEQA, constitutes a violation of the HAA.

To qualify under AB 1633, the project must be a "housing development project" under the HAA and meet other specified requirements, as summarized in our prior legal alert. Under AB 1633, the following circumstances constitute "disapproval" of the project, in which case the local agency could be subject to enforcement under the HAA:

- CEQA Exemptions. If (i) the project qualifies for a CEQA exemption based on substantial evidence in the record (and is not subject to an exception to that exemption) and (ii) the local agency does not make a lawful determination, as defined, on the exemption within 90 days (with a possible extension, as specified) of timely written notice from the applicant, as specified.
- Other CEQA Determinations. If (i) the 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.

ASSEMBLY BILL 1485 — STATE ENFORCEMENT OF HOUSING LAWS

AB 1485 (Haney) granted the California Attorney General the "unconditional right to intervene" in lawsuits enforcing state housing laws, whether intervening in an independent capacity or pursuant to a notice of referral from HCD. Under prior law, the Attorney General and HCD were required to petition the court to be granted intervenor status and join a lawsuit, which can be a "lengthy and onerous process."

PART II: PENDING STATE HOUSING LAWS

Various state housing bills are currently making their way through the State Legislature that are expected to benefit mixed-income multifamily housing developers. AB 2243 (Wicks) would amend AB 2011 (the Affordable Housing and High Road Jobs Act of 2022). AB 1893 (Wicks) and AB 1886 (Wicks and Alvarez) would amend Builder's Remedy provisions under the HAA. AB 2560 (Alvarez) and SB 951 (Wiener) would help facilitate housing development in the coastal zone. AB 3068 (Haney) would provide for the streamlined ministerial (i.e., no CEQA) approval of qualifying adaptive reuse projects involving the conversion of an existing building to residential or mixed-uses. SB 1227 (Wiener) would help facilitate middle-income housing and other projects in the San Francisco Downtown Revitalization Zone.

The following summaries reflect the status of the legislation as of May 15, 2024. The legislative process is ongoing and future amendments are expected.

ASSEMBLY BILL 2243 — AB 2011 AMENDMENTS

AB 2243 (Wicks) would amend AB 2011 (operative as of July 1, 2023). As explained in our prior legal alert, AB 2011 provides for "by right" streamlined ministerial (i.e., no CEQA, no discretion) approval of qualifying mixed-income and affordable housing development projects along commercial corridors in zoning districts where office, retail, and/or parking uses are principally permitted.

As currently proposed, AB 2243 would:

Project Review and Approval

- Require the local government to approve the AB 2011 project within a specified timeframe. Once the project is deemed to be consistent with applicable objective planning standards, the local government would be required to approve the project within 180 days (for projects with more than 150 housing units) or 90 days (for projects with 150 or fewer housing units).

- Require the local government to determine project consistency or inconsistency with applicable objective planning standards within 30 days when a project is resubmitted to address written feedback. The otherwise applicable timeframe is within 60 or 90 days, with the longer timeframe applying to projects with more than 150 housing units.
- Provide that a density bonus under the State Density Bonus Law, including related incentives, concessions and/or waivers, "shall not cause the project to be subject to a local discretionary government review process" even if the requested incentives, concessions and/or waivers are not specified in a local ordinance. This is important because some local governments purport to require discretionary approval for specified "off menu" incentives, concessions and waivers despite the fact that AB 2011 provides for a ministerial (i.e., no CEQA) project approval process and specifically contemplates utilization of the State Density Bonus Law in conjunction with AB 2011.
- Provide that the Phase I Environmental Assessment (ESA) requirement would be imposed as a condition of project approval versus prior to project approval. If any remedial action is required due to the presence of hazardous substances on the project site, that would need to occur prior to issuance of a certificate of occupancy (as specified).

Residential Density

- Provide that the AB 2011 (base) residential density, which varies depending on the location and size of the project site, is now the "allowable" density (prior to any density bonus) instead of a minimum ("meet or exceed") density requirement.
- Impose a new minimum residential density requirement, which would be 75% of the greater of the applicable "allowable" residential density.
- Specify that the imposition of applicable objective planning standards shall not preclude the "required" (minimum) AB 2011 residential density (prior to any density bonus) or require a reduction in unit sizes. It appears that this new provision is instead intended to apply to the "allowable" AB 2011 residential density pursuant to the cross-referenced subsections.

Commercial Corridor Frontage Requirements

- Revise the definition for "commercial corridor" based on the applicable height limit. Where local zoning sets a height limit for the project site of less than 65 feet, the right-of-way would need to be at least 70 feet, which is the current AB 2011 requirement. For all other project sites, the right-of-way would now only need to be at least 50 feet.
- Clarifies that the width of the right-of-way includes sidewalks for purposes of determining whether it is a "commercial corridor."
- Expand eligible sites to include conversions of "existing office buildings" that meet all other AB 2011 requirements, even if they are not on a commercial corridor.

Project Site Size Requirements

- Waive the current 20-acre project site size limitation for "regional malls" that are up to 100 acres. Regional malls is defined to include malls where (i) the permitted uses on the site include at least 250,000 square feet of retail, (ii) at least two-thirds of the permitted uses on the site are retail, and (iii) at least two of the permitted retail uses on the site are at least 10,000 square feet. Additional criteria for the redevelopment of regional mall sites is expected to be added to the bill.

Setback Requirements

- Provide that density bonus incentives, concessions, and waivers permitted under the State Density Bonus Law may be utilized to deviate from specified AB 2011 setback requirements related to existing adjacent residential uses. The HCD previously opined that under existing AB 2011, only the AB 2011 height and density maximums can be modified via the density bonus approval process.

Freeway, Industrial Use, & Oil/Natural Gas Facility Proximity

- Eliminate the freeway proximity and active oil/natural gas facility proximity prohibitions and replace those with specified air filtration media requirements.
- Revise the AB 2011 limitation on project sites dedicated to industrial uses. Currently, project sites are disqualified where more than one-third of the square footage is dedicated to industrial use or the project site adjoins a site exceeding that threshold. "Dedicated to industrial use" would no longer include sites (i) where the most recently permitted use was industrial, but that use has not existed on the site for over three years; or (ii) where the site is designated industrial by the general plan, but residential uses are a principally permitted use on the site or the site adjoins an existing residential use.
- Revise the definition of "freeway" to specify that freeway on-ramps and off-ramps are not included.

Coastal Zone Projects

- Newly prohibit AB 2011 projects in the coastal zone that do not meet SB 35 coastal zone siting requirements (as recently amended by SB 423) under Government Code section 65913.4(a)(6), exclusive of the requirement for the project site to be zoned for multifamily housing (since AB 2011 allows for multifamily housing on commercially zoned properties), including (but not limited to) where the applicable area of the coastal zone is not subject to a certified local coastal program or a certified land use plan.
- Provide that the public agency with coastal development permitting authority, as applicable, shall approve the permit if it determines that the project is consistent with all objective standards of the local government's certified local coastal program or certified land use plan, as applicable.
- Provide that any density bonus, concession, incentive, waiver, and/or (reduced) parking ratios granted pursuant to the State Density Bonus Law "shall not constitute a basis to find the project inconsistent with the local coastal program."

Residential Conversion Projects

- Eliminate the residential density limit for the conversion of existing buildings to residential use, except where the project would include net new square footage exceeding 20% of the "overall square footage of the project."
- Prohibit the local government from requiring common open space beyond "what is required for the existing project site" versus required pursuant to the objective standards that would otherwise apply pursuant to the closest zoning district that allows for the AB 2011 residential (base) density, where applicable.
- Exempt the conversion of "existing office buildings" from the commercial corridor frontage requirement.

Clarifications

- Clarify that the AB 2011 on-site affordable housing requirement only applies to new housing units created by the project.
- Clarify that the number of on-site affordable housing units required under AB 2011 is based on number of housing units in the project prior to any density bonus (i.e., the "base" project), which is consistent with the State Density Bonus Law.
- Clarify the process for calculating the on-site affordable housing requirement under AB 2011 where the local jurisdiction requires a higher percentage of affordable units and/or a deeper level of affordability.
- Clarify that the "allowable" density under AB 2011 is calculated prior to any density bonus under the State Density Bonus Law.
- Clarify that "urban uses" includes a public park that is surrounded by other urban uses.

Implications

AB 2243 would make important clarifications in advance of the to-be-provided HCD guidance document on the implementation of AB 2011. The bill would make important amendments to the prior freeway and oil/natural gas facility proximity prohibitions by instead requiring installation of air filtration media, consistent with Senate Bill 4 (Affordable Housing on Faith and Higher Education Lands Act of 2023). The bill would also help facilitate AB 2011 projects in specified coastal zone areas. Under existing law, a qualifying AB 2011 project would be subject to streamlined ministerial approval at the local level, but not by the Coastal Commission, which could separately trigger a discretionary (i.e., CEQA) review and approval process. AB 2243 partially addresses that, but only in qualifying coastal zone areas (pursuant to SB 423, as modified) that are subject to a certified local coastal program or certified land use plan, which excludes various coastal zone areas.

ASSEMBLY BILL 2560 & SENATE BILL 951 — COASTAL ZONE PROJECTS

Assembly Bill 2560

AB 2560 (Alvarez) would amend the State Density Bonus Law to partially address coastal zone projects. Currently, the State Density Bonus Law explicitly provides that it "does not supersede or in any way alter or lessen the effect or application of the California Coastal Act of 1976" (Public Resources Code § 30000 et seq.). As currently proposed, AB 2560 would revise that provision to instead provide that any density bonus, concessions, incentives, waivers, or reductions of development standards, and (reduced) parking ratios to which an applicant is entitled under the State Density Bonus Law "shall be permitted notwithstanding the California Coastal Act of 1976" but only if the development is **not** located on a site that is any of the following:

- An area of the coastal zone that is not subject to a certified local coastal program
- An area of the coastal zone subject to paragraph (1), (2), or (3) of subdivision (a) of Section 30603 of the Public Resources Code (i.e., within a specified distance of the sea, estuary, stream, coastal bluff, tidelands, submerged lands, public trust lands, or sensitive coastal resources area)
- An area of the coastal zone that is vulnerable to five feet of sea level rise, as determined by the National Oceanic and Atmospheric Administration, the Ocean Protection Council, the United States Geological Survey, the University of California, or a local government's coastal hazards vulnerability assessment
- A parcel within the coastal zone that is not zoned for multifamily housing
- A parcel in the coastal zone and located on either of the following: (i) on, or within a 100-foot radius of, a wetland, as defined in Section 30121 of the Public Resources Code or (ii) on prime agricultural land, as defined in Sections 30113 and 30241 of the Public Resources Code

Implications

AB 2560 should help facilitate density bonus projects in coastal zone areas, but the coastal zone area would need to be subject to a certified local coastal program (versus either that or a certified land use plan pursuant to SB 423). Again, that excludes various coastal zone areas.

Senate Bill 951

SB 951 (Wiener) would amend the State Housing Element Law (Government Code § 65580 et seq.). Existing law requires rezoning by a local government, including adoption of minimum density and development standards (as specified), when the local government's Housing Element site inventory does not identify adequate sites to accommodate the applicable state mandated RHNA. As currently proposed, SB 951 would require local governments in the coastal zone to make "any necessary local coastal program updates" to meet the applicable RHNA.

SB 951 would also amend the California Coastal Act to target the City and County of San Francisco. Existing law provides that approval of a coastal development permit by a "coastal county" with a certified local coastal program

may be appealed to the California Coastal Commission under specified circumstances, including where the approved use is not "the principal permitted use" under the local zoning ordinance or zoning map. As currently proposed, SB 351 would provide that for purposes of that provision, "coastal county" does not include a local government that is both a city and county.

Implications

SB 951 would effectively require consistency between local coastal programs and any upzoning or rezoning required under State Housing Element Law. The appealability of coastal zone permits approved by the City and County of San Francisco would also be limited by the bill, which could help facilitate new housing development projects.

ASSEMBLY BILL 1893 & ASSEMBLY BILL 1886 — BUILDER'S REMEDY AMENDMENTS

As explained in our prior legal alert, the Builder's Remedy applies when a local jurisdiction has not adopted an updated Housing Element in compliance with State Housing Element Law (Gov. Code § 65580, et seq.), in which case the local jurisdiction cannot deny a qualifying housing development project even if it is inconsistent with the local general plan and zoning ordinance (subject to limited exceptions).

To qualify for the Builder's Remedy, the project must currently (i) fall under the definition of a "housing development project" under the HAA (i.e., a project consisting of residential units only, mixed-use developments consisting of residential and non-residential uses with at least two-thirds of the square footage designated for residential use, or transitional or supportive housing) and (ii) dedicate at least 20% of the dwelling units in the project as lower income (or 100% of the units as moderate income), as defined in the HAA.

Assembly Bill 1893

As currently proposed, AB 1893 would (i) reduce the required percentage of affordable units for mixed-income Builder's Remedy projects from 20% lower income to 10% **very** low-income; (ii) impose new size and location guardrails on Builder's Remedy projects; and (iii) authorize local jurisdictions to require compliance with other specified objective development standards so long as they do not reduce the "allowed" residential density or result in an increase in "actual costs." AB 1893 would also eliminate the affordability requirement for Builder's Remedy projects consisting of 10 units or fewer, so long as the project site is smaller than one acre with a minimum density of 10 units per acre.

New Basis for Denial & New Project Requirements

AB 1893 would significantly amend the most controversial component of the Builder's Remedy, which is that a local jurisdiction without a substantially compliant Housing Element ("Non-Compliant Jurisdiction") cannot deny a qualifying Builder's Remedy project unless specified findings are made, which are intended to create a high threshold for denial by local jurisdictions.

As currently proposed, AB 1893 would newly authorize a Non-Compliant Jurisdiction to deny a qualifying Builder's Remedy project if the project fails to meet any of the following "objective" standards. In other words, Builder's Remedy projects would need to meet **all** the following new requirements (unless the project is "grandfathered" as explained below):

- The project site must be designated by the general plan or located in a zone where housing, retail, office, or parking are "permissible" uses. Alternatively, if the project site is designated or zoned for agricultural use, at least 75% of the perimeter of the project site must adjoin parcels that are developed with urban uses, as defined under AB 2011. Recall that AB 2243 would amend the AB 2011 definition of "urban use" to clarify that urban use includes a public park that is surrounded by other urban uses.
- The project site must not be on a site or adjoined to any site where more than one-third of the square footage on the site is "dedicated to industrial use," as defined under AB 2011. Recall that AB 2243 would amend the AB 2011 definition of "dedicated to industrial use" to no longer include sites (i) where the most recently permitted use was industrial, but that use has not existed on the site for over three years; or (ii) where the site is designated industrial by the general plan, but residential uses are a principally permitted use on the site or the site adjoins an existing residential use.
- The residential density for the project **must not exceed** the "greatest" of the following density calculations, as applicable, prior to any density bonus under the State Density Bonus Law (there is no codified limit under existing law):
    - For project sites within "high or highest resource census tracts" (as defined): (i) 50% greater than the "maximum" density deemed appropriate to accommodate (lower income) housing for the local jurisdiction as specified in Government Code section 65583.2(c)(3)(B) (e.g., for a local jurisdiction in a metropolitan county, "at least" 30 dwelling units per acre); or (ii) three times the density allowed by the general plan, zoning ordinance, or state law (prior to any density bonus under the State Density Bonus Law), whichever is greater.
    - For other project sites, (i) the "maximum" density appropriate to accommodate (lower income) housing for the local jurisdiction as specified in Government Code section 65583.2(c)(3)(B) (see above); or (ii) twice the density allowed by the general plan, zoning ordinance, or state law (prior to any density bonus under the State Density Bonus Law), whichever is greater.
    - For project sites located within one-half mile of a major transit stop, up to 35 dwelling units per acre more than the "amount allowable" specified above, as applicable.
- The project must comply with "other" objective development standards (as defined) imposed by the local jurisdiction that apply in closest zone in the local jurisdiction for multi-family residential use at the "allowed" residential density above. If no such zone exists, the applicable objective standards shall be those for the zone that allows the greatest density within the city, county, or city and county, as applicable.

AB 1893 would provide that in no case may the local agency apply any objective development standards that will (i) have the effect of physically precluding the construction of the project at the "allowed" residential density (see above) or (ii) result in an increase in "actual costs." The local agency would bear the burden of proof under these circumstances.

Project "Grandfathering"

As currently proposed, the foregoing new requirements would not apply to Builder's Remedy applications that are "deemed complete" on or before April 1, 2024. Under existing law, "deemed complete" is defined to mean that the applicant has submitted a SB 330 preliminary application or, if that has not been submitted, a complete development application (as defined) has been submitted. AB 1893 would add that the local agency shall bear the burden of proof in establishing that the applicable application is not complete.

Implications

AB 1893 is an attempt to "modernize" the Builder's Remedy by providing clarity to developers, local jurisdictions, and courts to avoid the "legal limbo" described by Attorney General Rob Bonta. As part of that compromise, significant new requirements would be imposed on Builder's Remedy projects, including a new "cap" on residential density where no codified limit currently exists. In return, the clarifications made by AB 1893 and the reduced affordability requirement for mixed-income projects could help facilitate Builder's Remedy projects in Non-Compliant Jurisdictions.

Assembly Bill 1886

A recent Builder's Remedy lawsuit exposed some ambiguity regarding when a Housing Element is deemed "substantially compliant" with State Housing Element Law. Opposing sides of the litigation disputed where (retroactive) self-certification by the local jurisdiction was sufficient. The court ruled that it was not. See our prior legal alert for our coverage of this ruling, which appears to be the impetus for the amendments proposed under AB 1886 (Alvarez and Wicks).

As currently proposed, AB 1886 would:

- Clarify the point at which a Housing Element is deemed substantially compliant with State Housing Element Law: (i) the Housing Element has been adopted by the local jurisdiction and (ii) the local jurisdiction has received an affirmative determination of substantial compliance from HCD or a court of competent jurisdiction.
- Clarify that the Housing Element shall continue to be considered in substantial compliance with State Housing Element Law until either: (i) HCD or a court of competent jurisdiction determines that the adopted Housing Element is no longer in substantial compliance (e.g., where any required rezoning is not approved in a timely manner) or (ii) the end of the applicable Housing Element cycle.
- Specify that Housing Element compliance status is determined at the time the SB 330 Preliminary Application is submitted for the qualifying Builder's Remedy project, which is consistent with HCD's prior determination

that the Builder's Remedy is vested on that filing date. If a SB 330 Preliminary Application is not submitted, then the compliance status would be determined when a complete development application (as defined) is filed for the Builder's Remedy project.

- Require a local jurisdiction that adopted its Housing Element despite HCD's non-compliance determination to submit the required findings, as specified, to HCD. In any legal proceeding initiated to enforce the HAA, HCD's determination on the required findings would create a rebuttable presumption of substantial compliance or lack thereof.

Implications

AB 1886 would make it clear that a local jurisdiction cannot "self-certify" its Housing Element. Rather, an affirmative determination must be granted by HCD or, if a local jurisdiction adopts its Housing Element notwithstanding HCD's determination to the contrary, a court of competent jurisdiction would need to agree with the local jurisdiction, notwithstanding the "rebuttable presumption" in favor of HCD's non-compliance determination, where applicable.

ASSEMBLY BILL 3068 — ADAPTIVE REUSE PROJECTS

AB 3068 (Haney, Quirk-Silva, and Wicks) would provide for the streamlined ministerial (i.e., no CEQA) approval of qualifying adaptive reuse projects involving the conversion of an existing building to residential or mixed-uses, as specified. Qualifying adaptive reuse projects would be deemed "a use by right" regardless of the applicable zoning district, with the exception of any proposed non-residential uses.

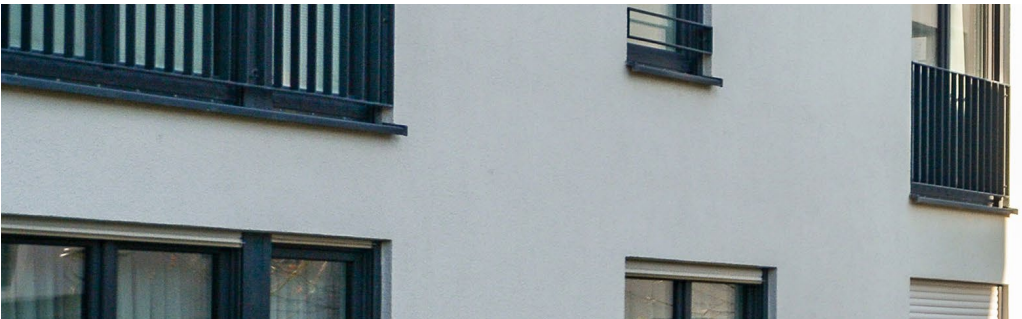
As currently proposed, the following requirements would need to be met:

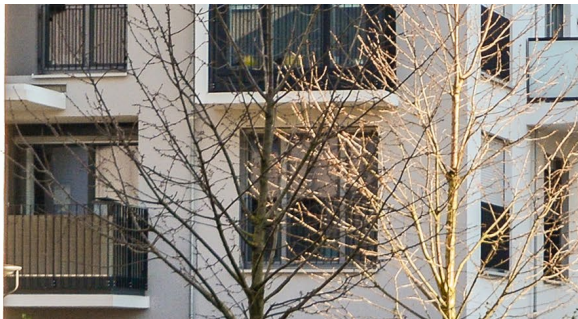
Threshold Requirements

- The project must retrofit and repurpose an existing building to create new residential or mixed-uses (Adaptive Reuse). The Adaptive Reuse of light industrial buildings is prohibited unless the local planning director (or equivalent) determines that the "specific light industrial use is no longer useful for industrial purposes."
- At least 50% of the Adaptive Reuse project must be designated for residential use, which is defined to include housing units, dormitories, boarding houses, and group housing. For purposes of calculating total project square footage, underground spaces, including basements or underground parking garages, are excluded.
- Any nonresidential uses must be "consistent with the land uses allowed by the zoning or a continuation of an existing zoning nonconforming use."
- If the existing building is a listed historic resource or is over 50 years old, specified requirements must be met.

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.





Project Site Requirements

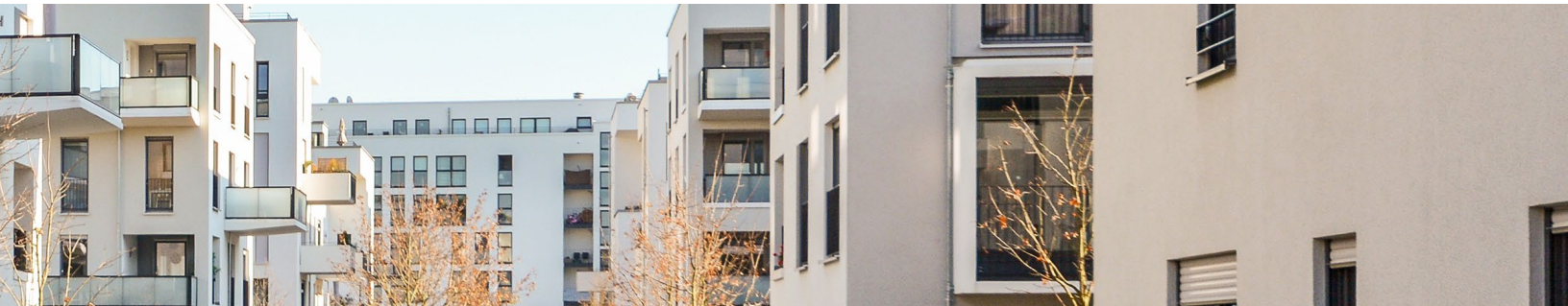
- The Adaptive Reuse project site must be in an urbanized area or urban cluster (as defined and specified) and at least 75% of the perimeter must adjoin (as defined) parcels that are developed with urban uses (not defined in AB 3068 but separately defined in AB 2011).
- Required Phase I ESA and if a recognized environmental condition is found, specified requirements must be met.

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 Adaptive Reuse 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.

Project Approval Process

- If the Adaptive Reuse project is determined by the local planning director (or equivalent) to be consistent with the foregoing requirements (referred to collectively as "objective planning standards"), the local agency must approve the project. That consistency determination must be based on whether there is "substantial evidence that would allow a reasonable person to conclude that the project is consistent with the objective planning standards."
- If the project is deemed to conflict with any applicable objective planning 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 planning 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.



Development Impact Fees

Adaptive Reuse projects would be exempt from all development impact fees "that are not directly related to the impacts resulting from the change of use of the site from nonresidential to residential or mixed-use" and any development impact fees charged must be "proportional to the difference in impacts caused by the change of use." The project sponsor may also request that payment of development impact fees be deferred to the date that the certificate of occupancy is issued, subject to a written agreement to pay the development impact fees at that time.

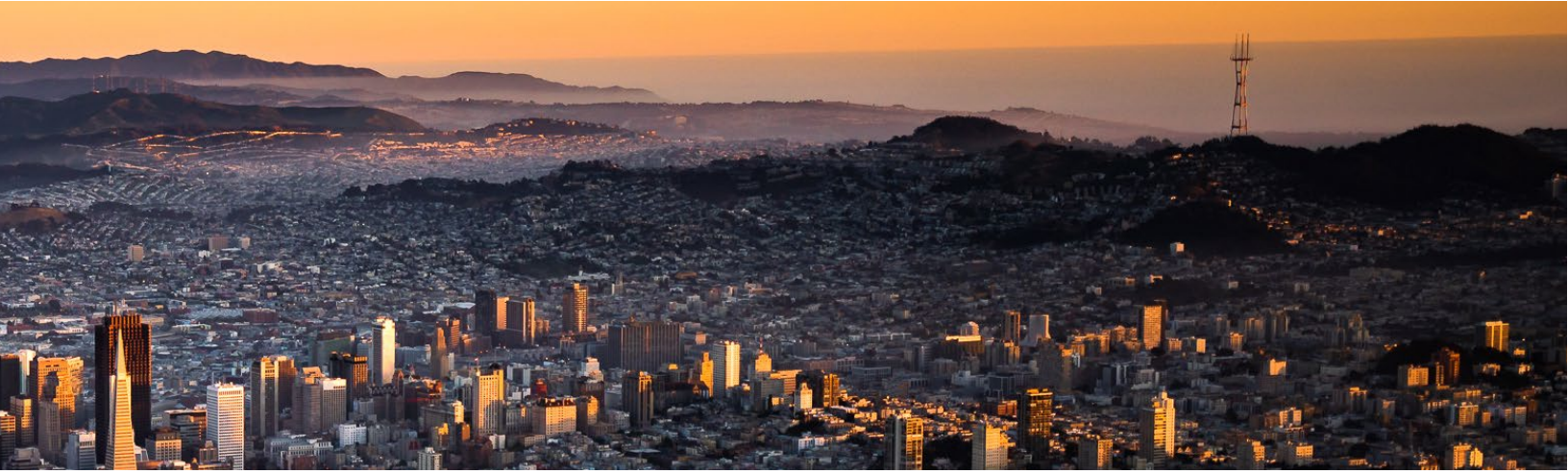
Adjacent Projects

A qualifying Adaptive Reuse project "may include the development of new residential or mixed-use structures on undeveloped areas and parking areas on the parcels adjacent to the proposed adaptive reuse project site" if specified requirements are met.

Implications

AB 3068 would be another tool in the growing toolbox available to real estate developers to encourage the adaptive reuse of underutilized commercial buildings, including office buildings. Financial feasibility is likely to remain an issue due to high interest rates and construction costs. There are well-documented design challenges associated with the conversion of existing buildings to residential use due to required compliance with the strict provisions of the California Building Code, the California Residential Code, and local amendments to those codes. Even if alternate buildings standards are available for adaptive reuse projects (see the directive under AB 529), it not clear yet whether alternative standards would be available for required seismic upgrades, which are often cost-prohibitive.

Financial feasibility would be partially addressed by AB 3068, which would authorize local agencies to establish an Adaptive Reuse Investment Program funded by *ad valorem* property tax revenues (as specified), which could be transferred to the owners of qualifying Adaptive Reuse projects for the purpose of subsidizing the on-site affordable housing units required by AB 3068. The bill would also "align program requirements to encourage the utilization of existing programs such as the Federal Historic Tax Credit, the newly adopted California Historic Tax Credit, the Mills Act, and the California Historical Building Code."



SB 1227 — SAN FRANCISCO DOWNTOWN REVITALIZATION ZONE PROJECTS

SB 1227 (Wiener) aims to speed the recovery of downtown San Francisco by creating a new CEQA exemption for qualifying student housing and mixed-use residential projects (along with commercial and institutional projects) in the Downtown Revitalization Zone, which includes the Financial District, Union Square, Eastern SOMA, Mid-Market, and Civic Center neighborhoods. Projects that do not meet all the requirements for the new CEQA exemption could qualify for the new CEQA streamlining process proposed under the bill. SB 1227 would also create a new property tax exemption for moderate-income housing in the Downtown Revitalization Zone.

Qualifying Downtown Revitalization Zone Projects

As currently proposed, the following threshold requirements would need to be met:

- The project site must be in the San Francisco Downtown Revitalization Zone.
- The general plan land use and zoning designations for the project site must allow for commercial, institutional, student housing, or mixed-uses (as specified below), as applicable to the project.
- The project must not include any hotel uses, and if residential uses are proposed, the residential square footage must be less than two-thirds the total project square footage (i.e., the project cannot be a "housing development project" already protected under the HAA). The foregoing square footage limitation (see specified calculation requirements) would not apply to student housing.
- To the extent that residential uses are proposed, the project must comply with applicable San Francisco inclusionary affordable housing requirements.
- The project must not require the demolition of restricted affordable units, rent-controlled units, or a hotel (as specified). See also the specific requirements that apply to other existing and prior tenant-occupied housing.
- The project must comply with 24 enumerated San Francisco ordinances related to development impact fees and environmental protection (including but not limited to the reduction of greenhouse gas emissions and water and energy consumption) and specified provisions of the California Green Building Standards Code.
- The project site must not be environmentally sensitive, e.g., a delineated earthquake fault zone, habitat for protected species, or a hazardous waste site (as defined and specified).
- The project must not result in net additional emissions of greenhouse gases from demolition or construction.

New CEQA Exemption

As currently proposed, the following additional requirements would need to be met to qualify for the new CEQA exemption:

- Prevailing wage, skilled and trained workforce, and/or health care expenditure and apprenticeship requirements must be met (as specified), depending on the size of the project.
- The project must not include any warehouse uses.
- The project must not require the demolition of a building that is over 75 years old (regardless of its historic status) or result in "substantial harm" to a building on a federal, state, or local historic registry.
- The project must be LEED Platinum certified (if over 1,000 square feet).
- The project must be in an area with a per capita vehicle miles traveled (VMT) level 15% lower than the city or regional VMT.

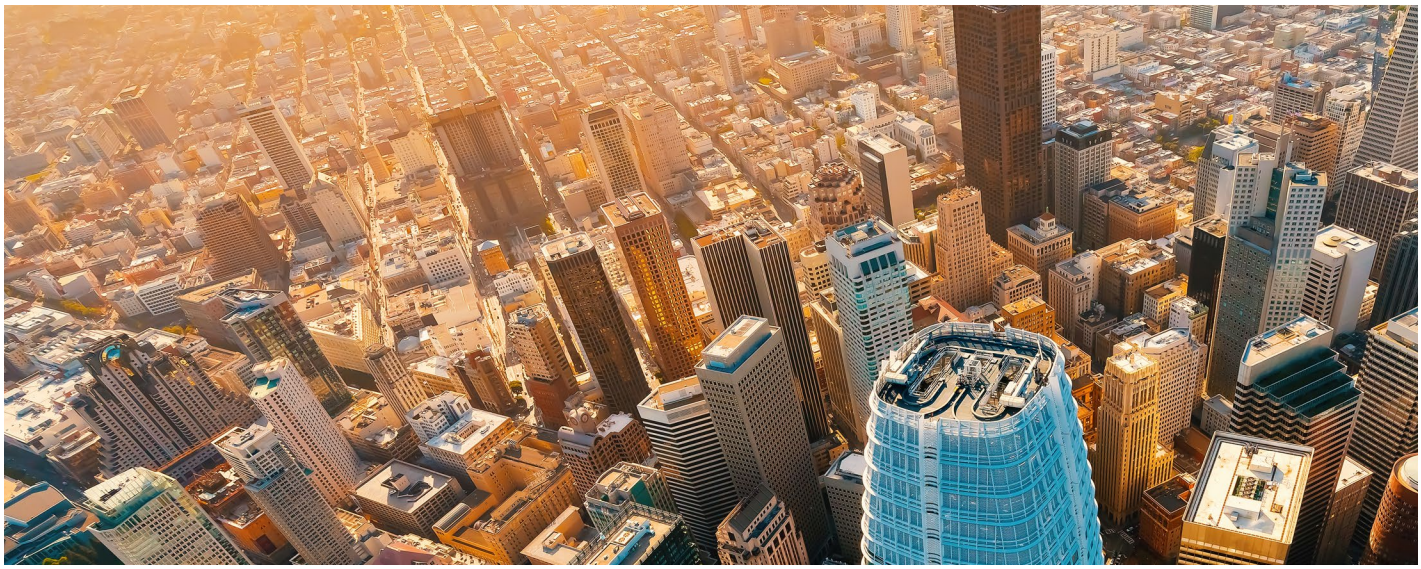
New CEQA Streamlining Pathway

As currently proposed, San Francisco Downtown Revitalization Zone projects that meet the threshold requirements above, but not all of the additional requirements for the new CEQA exemption, could instead pursue CEQA streamlining whereby the project could be certified by the Governor prior to certification of an EIR for the project pursuant to the Jobs and Economic Improvement Through Environmental Leadership Act of 2021 (Leadership Act), which authorizes the Governor to certify qualifying projects (before January 1, 2032) for CEQA streamlining. One of the benefits of CEQA streamlining under the Leadership Act is that any CEQA litigation must be resolved (to the extent feasible) within 270 days, as specified.

As currently proposed, the following additional requirements would need to be met to qualify for CEQA streamlining:

- Prevailing wage, skilled, and trained workforce requirements must be met (as specified).
- The project must be at least LEED Gold certified (versus Platinum) if the project contains residential, retail, commercial, sports, cultural, entertainment, or recreational uses.
- The project must not demolish a historic structure that is placed on a national, state, or local historic register (versus a building that is over 75 years old, regardless of its historic status).
- The project must avoid a substantial adverse change to the significance of a historical or cultural resource.
- The project must avoid or minimize significant environmental impacts in a disadvantaged community (as defined) and any required mitigation measures must be undertaken in, and directly benefit, the affected community.
- The project must not result in any significant and unavoidable impacts under CEQA that would require adoption of a statement of overriding considerations by the lead agency.
- The lead agency must approve a project certified by the Governor before January 1, 2031.

Please see the text of SB 1227 for more information about the proposed CEQA streamlining provisions for qualifying San Francisco Downtown Revitalization Zone projects.



New Property Tax Exemption for Moderate-Income Housing

This new (welfare) property tax exemption would allow for a partial exemption equal to the percentage of the value of the property that is equal to the percentage of the number of units serving moderate-income households. As currently proposed, the following requirements would need to be met to qualify:

- The project must be in the San Francisco Downtown Revitalization Zone.
- The project must include moderate-income rental units, as defined and specified.
- The project must be owned and operated by a charitable organization (as defined), which includes (but is not limited to) limited partnerships in which the managing partner is an eligible nonprofit corporation or eligible limited liability company meeting specified requirements.
- A building permit or site permit for the residential units on the property must be filed before January 1, 2035, and the property owner must claim the exemption within five years following the issuance of the first building permit. The new property tax exemption would also apply with respect to lien dates occurring on or after January 1, 2025.

Implications

SB 1227 should help facilitate the development of new housing for the "missing in the middle" in the San Francisco Downtown Revitalization Zone by providing for a new property tax exemption for projects that include moderate-income rental units. That could in turn help increase the financial feasibility of converting underutilized commercial buildings to mixed-uses, including residential uses.

SB 1227 would impose robust labor requirements for both the new CEQA exemption and CEQA streamlining pathway for qualifying projects in the San Francisco Downtown Revitalization Zone, which could inhibit the utilization of those benefits.

Court of Appeal Upholds Transit-Oriented Development Surrounding Los Angeles' Expo Line

BY KORI ANDERSON

California's Second District Court of Appeal upheld the City of Los Angeles's legislative actions related to the Metro Exposition Light Rail Transit Line (commonly known as the Expo Line) in a February 2024 ruling that supports the City's transit-oriented development efforts. (*See Fix the City, Inc. v. City of Los Angeles*, No. B318346, 2024 WL 1012368 (Cal. Ct. App. Feb. 8, 2024), *as modified on denial of reh'g* (Feb. 27, 2024), *as modified* (Mar. 7, 2024).)

In its opinion, the Court upheld the City's Exposition Corridor Transit Neighborhood Plan (the Expo Plan), and related zoning changes. Specifically, it (1) affirmed the City's demurrer on the Expo Plan challenge, which the lower court sustained as untimely under a *de novo* review, and (2) found the City did not abuse its discretion in finding that the zoning changes were consistent with the City's General Plan. In its March revisions, the Court determined that the initially unpublished opinion should be published exempting the analysis on General Plan consistency.

The Expo Plan "consider[s] how land use regulations can foster building design and a mix of uses around the transit stations that will encourage transit use and improve mobility for everyone," and focuses on the neighborhood surrounding the Expo Line, a 15.2-mile-long light rail line along Exposition Boulevard between downtown Los Angeles and the City of Santa Monica. In July 2018, the City Council adopted corresponding amendments to the Community Plan — a subset of the City's General Plan, which is split into 35 regional Community Plans — adopted the zoning changes, and certified the Final Environmental Impact Report, but deferred adoption of the Expo Plan until the City Attorney's Office completed its legal review. The Expo Plan was adopted more than a year later on November 5, 2019.

Between the two rounds of adoption, however, plaintiff and appellant Fix the City, Inc. (FTC) filed a petition on October 25, 2018 against the Expo Plan and the zoning changes as inconsistent

with the General Plan's mandatory policies. Its challenge focused on the City's infrastructure capacity and increases in population density stemming from the Expo Plan and zoning changes.

FTC never updated its petition following the passage of the Expo Plan. This proved to be a fatal error; the City filed a motion for judgment, arguing that FTC's challenge to the Expo Plan adoption was untimely because it was not filed within 90 days of adoption as required under Government Code Section 65009. Although FTC was twice given leave to amend, the lower court ultimately sustained the City's demurrer to FTC's second amended petition, finding the challenge to the Expo Plan to be untimely and denying additional leave to amend.

The Court of Appeal affirmed judgment. It held that courts "take a restrictive approach to applying section 65009's limitations period, in light of its express acknowledgment of California's housing crisis and its emphasis on reducing delays and restraints on completion of projects without the cloud of potential litigation." Additionally, it found uncompelling FTC's argument that under the relation back doctrine, its challenge to the November 2019 Expo Plan was timely, holding that the July 2018 and November 2019 actions were "two distinct legislative acts." Although not published, the Court also found that FTC failed to show the City abused its discretion in its determination of General Plan consistency because the policies FTC cited were not "fundamental, mandatory, and clear."

Ultimately, this case affirms the need to closely comply with appeal timelines in land use litigation, particularly as even similar legislative actions may be considered distinct when trying to extend a statute of limitations by relating one back to older events. More broadly, the case supports the City's ongoing efforts to promote transit-oriented development. The City's Transit Oriented Communities (TOC) program offers special development incentives for providing affordable housing near qualifying transit stops. This trend towards transit-oriented development also mirrors recent state initiatives such as AB 2097, which generally prohibits jurisdictions from enforcing parking requirements within half a mile of a major transit stop.

EV Charging Is Here to Stay

BY MARTY AKERBLOM AND BO PETERSON

Energy efficiency regulations may not be changing quite as fast as housing laws, but California has made notable changes over the last several years aimed at reaching its ever more ambitious carbon emissions reduction goals, including achieving carbon neutrality by 2045 and reducing statewide GHG emissions by 85 percent compared to 1990 levels. Transportation and building usage account for the majority of California's GHG emissions. Accordingly, California has set goals to put at least five million zero-emission vehicles on California roads by 2030 and have 100 percent zero-emission vehicles for new cars and trucks by 2035, and medium- and heavy-duty vehicles by 2045. California is also assessing how to reduce GHG emissions from building usage by at least 40 percent below 1990 levels by 2030.

In an effort to reach these goals, California is increasingly adopting new laws with the goal of improving energy efficiency in buildings and increasing the number of Electric Vehicle (EV) charging stations. Some of these laws are intended to remove barriers to EV projects by streamlining permitting and removing burdensome local parking replacement requirements, while others may impose costly additional requirements on development projects. This article touches on some of the key changes that we expect to come into play more as the state's GHG reduction deadlines loom.

ENTITLEMENT STREAMLINING FOR EV CHARGING STATIONS

AB 1236 (2015) provides streamlined permit approval for EV charging stations. The law requires administrative, by-right (i.e., no CEQA, no planning approvals) by the local agency, regardless the size of the station, so long as it complies with the California Electrical Code and meets all health and safety requirements. Local agencies may deny an application for an EV station only if they find in writing, based on substantial evidence, that the station would cause a specific, adverse impact upon the public health or safety that cannot be mitigated or avoided. AB 1236 is currently set to expire January 1, 2030. AB 970 (2021), a companion to AB 1236, sets very short, mandatory timelines for the local agency to determine whether the EV charging station application per AB 1236 is complete and to approve or deny the application.

No Parking Replacement Requirements for EV Projects

AB 1100 requires that local

agencies consider an EV parking space as at least one standard parking space for purpose of satisfying applicable minimum parking requirements. AB 970 similarly provides that local jurisdictions cannot require applicants to replace existing parking spaces which are reduced or eliminated to accommodate an EV charging station proposed per AB 1236.

2022 CALGREEN

The California Green Building Standards Code, Cal. Code Regs., Title 24, Part 11, (CALGreen), the statewide mandatory construction code, requires new residential and commercial buildings to comply with a variety of energy efficient design measures intended to facilitate building decarbonization. The most recent CALGreen update went into effect on January 1, 2023. Regarding EVs, CALGreen distinguishes between "EV Ready" (a space equipped with low power Level 2 EV charging receptacles), "EV Capable" (a space which can support future installation of Level 2 EV supply equipment (EVSE)), and "EV Charging Station" (EVCS) (a space fully equipped with EVSE). In general, CALGreen requires for multifamily projects, hotels, and motels that 25% of all parking spaces are EV Ready and 10% are EV Capable. Such projects with more than 20 dwelling units or hotel rooms also must equip 5% of all spaces with EVCS. Nonresidential projects must make a certain percentage of all spaces EV Capable and EVCS; the number of each increases as the number of total project parking spaces increases. The percentages work out on average to approximately 20% EV Capable and 5% EVCS.

Developers should take note that local jurisdictions can, by ordinance, adopt requirements different than those in the statewide CALGreen. It is therefore important to check your local building code.

For instance, the City of Los Angeles requires for multifamily, hotel, and motel projects that 25% of total spaces (but in no case less than one per unit) be EV Ready and an additional 5% be EV Capable. If the project has 20 or more units, an additional 10% of all spaces must be EVCS (Level 2). For nonresidential projects, 20% of all spaces, regardless of project size, must be EVCS (at least one Level 2 EVSE), and an additional 10% of all spaces must be EV Capable.

The City of Encinitas requires that at least 15% of all spaces provided for new multifamily projects, and 8% of all spaces for new hotels, motels, and nonresidential projects, including significant alteration/additions, be equipped with EVCS (Level 2).

To complicate things further, CALGreen also includes "Voluntary" residential and nonresidential standards known as Tier 1 and Tier 2. The standards in these appendices are stricter energy efficiency measures than the mandatory CALGreen provisions, including for EV. These additional standards become mandatory for a project if the local agency adopts them by ordinance. We are finding that more jurisdictions are now starting

to do this, and therefore again, it is important to check your local building code.

Santa Rosa and Larkspur, for instance, impose most Tier 1 requirements on all new residential and nonresidential development. This means that, in these jurisdictions, multifamily projects and hotels must provide 35% of all spaces as EV Ready. If the project has more than 20 units, an additional 10% of all spaces must be EVCS. The number of EV Capable and EVCS for nonresidential projects depends on the project's total parking spaces, but the average is generally about 30% EV Capable and 10% EVCS. Note that Tier 1 and Tier 2 contain much more than just expanded EV requirements.

Tier 2 requirements are even higher. While we have yet to encounter a jurisdiction that has adopted the Tier 2 requirements in whole-cloth, Palo Alto has adopted modified Tier 2 rules for new nonresidential construction (and most additions) and new low-rise residential construction.

The takeaway: existing and future energy efficiency and EV regulations are going to be increasingly relevant for development projects as the state approaches its impending and every more ambitious GHG emissions deadlines. It is therefore important to be tracking their changes and be aware of how local agencies are implementing them.

New State Laws to Facilitate Infrastructure Project Development

BY JACOB ARONSON AND RYAN CHEN

Two laws enacted in 2023 as part of Governor Gavin Newsom's infrastructure streamlining package are intended to facilitate development of certain energy, water resources, transportation, semiconductor manufacturing, and other infrastructure projects. SB 147 allows the California Department of Fish and Wildlife (CDFW) to issue permits authorizing the incidental take of "fully protected species" for qualifying projects, while SB 149 requires expedited resolution of California Environmental Quality Act (CEQA) lawsuits for qualifying projects.

SENATE BILL 147: INCIDENTAL TAKE PERMITS FOR FULLY PROTECTED SPECIES

Background

State law prohibits the take (defined as actual or attempted hunting, pursuing, catching, capturing, or killing) of roughly three dozen species that are designated as fully protected. While CDFW can issue permits authorizing incidental take of endangered, threatened, and candidate species under the California Endangered Species Act (CESA), CDFW does not have similar authority to permit the incidental take of fully protected species. With some limited exceptions, the incidental take of fully protected species cannot be permitted unless pursuant to a natural community conservation plan.

SB 147 authorizes CDFW to issue permits for the incidental take of fully protected species in connection with specified water resources, transportation, and renewable energy projects.

Eligible Infrastructure Projects

The following infrastructure projects are eligible for incidental take permits for fully protected species:

- Maintenance, repair, or improvement projects to the State Water Project, including existing infrastructure, undertaken by the Department of Water Resources
- Maintenance, repair, or improvement projects to critical regional or local water agency infrastructure
- Transportation projects, including associated habitat connectivity and wildlife crossing projects, that do not increase street or highway capacity for automobiles or trucks and are undertaken by a public agency

- Wind and solar photovoltaic energy projects, appurtenant infrastructure improvements, and associated electric transmission projects

Through-delta water conveyances in the Sacramento-San Joaquin Delta and ocean desalination projects are not eligible.

Permit Requirements

Incidental take permits for fully protected species must meet the same requirements as incidental take permits for endangered, threatened, or candidate species under the CESA:

- The take is incidental to otherwise lawful activity
- Impacts of the authorized take are minimized and fully mitigated, with measures roughly proportional in extent to the impact of the authorized taking on the species
- The applicant ensures adequate funding to implement minimization/mitigation measures and to monitor compliance with and effectiveness of those measures
- Issuance of the permit will not jeopardize the continued existence of the species

Further, SB 147 imposes the following additional requirements on incidental take permits for fully protected species:

- Incorporation of all further measures that are necessary to bring the species to the point at which the CESA's protections are not necessary and, if the species is not listed under the CESA, to maintain or enhance the condition of the species so that listing under the CESA will not become necessary
- Take of the species is avoided to the maximum extent possible
- Implementation of a monitoring program and adaptive management plan for monitoring the effectiveness of and amending, as necessary, the measures to minimize and fully mitigate the impacts of the authorized take

Expiration

CDFW's authority to issue incidental take permits for fully protected species for qualifying projects will expire on December 31, 2033. Any permits issued before that date will remain in effect.

Change in Status of Three Species

In addition to creating this new permitting regime, SB 147 removed the American peregrine falcon, brown pelican, and thicktail chub from the lists of fully protected species. With those status changes, there are now 34 fully protected species under state law.

SENATE BILL 149: STREAMLINING CEQA LAWSUITS

Background

SB 149 authorizes judicial streamlining of CEQA litigation for certain governor-certified infrastructure projects. Its aim is to encourage and streamline projects critical for combatting climate change while maintaining CEQA's environmental and public engagement benefits.

Eligible Infrastructure Projects

The following infrastructure projects are eligible for certification and judicial streamlining:

- Energy infrastructure projects as specified, including solar, wind, geothermal, and other specified renewable energy projects; certain energy storage systems; specified projects for manufacturing energy storage, solar photovoltaic, or wind energy

systems and components, and products that are integral to those systems; and electric transmission facilities (but not including any projects that use hydrogen as a fuel)
- Semiconductor or microelectronic projects, meaning projects that meet the requirements related to investment in new or expanded facilities and are awarded funds under the federal CHIPS Act
- Transportation-related projects that advance and do not conflict with specified goals in the state's Climate Action Plan for Transportation Infrastructure
- Water-related projects as specified, including projects that implement a groundwater sustainability plan; certain water storage projects; recycled water development projects; projects to remove contaminants and salt (but not including seawater desalination) and associated treatment, storage, conveyance, and distribution facilities; and projects exclusively for canal or other conveyance maintenance and repair (but not including through-Delta conveyance facilities of the Sacramento-San Joaquin Delta)

Requirements for Streamlining

To receive streamlining benefits, projects must meet specified labor requirements, which, depending on the type of project, include treatment of the project as a public work or payment of prevailing wages, using apprentices, and/or using a skilled and trained workforce. Additionally, the project must meet stringent greenhouse gas mitigation requirements (these requirements vary depending on the type of project) and avoid, minimize, and mitigate significant environmental impacts in any "disadvantaged community" (as defined in the law). Further, a private applicant must agree to pay the lead agency's administrative record preparation costs and all court costs if litigation is filed.

Project sponsors must apply to the governor for certification of a project. The governor's certification decision is not subject to judicial review, but the decision must be submitted to the Joint Legislative Budget Committee for concurrence or nonconcurrence. If the committee fails to act within 30 days, the project is deemed certified.

The lead agency must prepare the administrative record concurrently with the administrative process and meet specified public disclosure requirements, including making all administrative record documents publicly available on a website within specified short deadlines. The lead agency must certify the administrative record within five days of its approval of the project.

Judicial Streamlining

Any lawsuit challenging the environmental impact report or the granting of any approvals for a certified infrastructure project must be resolved, to the extent feasible, within 270 days of the filing of the administrative record (this includes trial, appellate, and Supreme Court proceedings).

Expiration

Lead agencies have until January 1, 2033, to approve certified infrastructure projects. SB 149 remains in effect until January 1, 2034.

Evaluating Changes In Industrial Regulation: 2024 And Beyond

BY EOIN MCCARRON

In recent years, the demand for industrial warehouse, distribution, and outdoor storage uses has surged. This robust demand, a response to the e-commerce boom and other market forces, has driven a critical need for logistics and fulfillment facilities near the Ports of Long Beach and Los Angeles and other regional transportation hubs. In response to this demand, municipalities have begun to overhaul their land use policies and to establish new regulatory programs intended to curb the impact of these uses and the truck traffic generated as a result on their communities.

These regulatory changes have created a high degree of uncertainty for industrial developers, who must now anticipate and evaluate regulatory change as they consider the investment, acquisition, and development throughout the Los Angeles area and Southern California more broadly. This article offers developers a framework for assessing the impact of proposed regulations and mitigating the risk of operating in a rapidly changing regulatory environment and provides an overview on key zoning code updates occurring in the Los Angeles area.

A FRAMEWORK FOR ASSESSING LOCAL CHANGE

To evaluate the impact of a proposed zoning code update industrial developers should consider certain key elements of a zoning ordinance. While the impact of some of the elements identified below are familiar, like downzoning, increasingly

municipalities have begun to impose new development, operational, and noticing requirements that may be hidden deeper within a proposed ordinance but nonetheless can have a significant impact on the use and development of a parcel. These are the requirements that must be carefully evaluated.

Downzoning

Downzoning is the process of changing the zoning classification of a property to a lower density or less intensive use, often limiting the property's development potential, and reducing its market value.

The latest trend in downzoning is the establishment of new "hybrid" or "flex" zoning, often employed in areas adjacent to areas with sensitive uses, to limit the range of industrial uses allowed. These new zones often prioritize higher employment and tax generating uses, such as the production, design, distribution, and repair of products, over warehousing, distribution, and industrial outdoor storage. In some cases, hybrid/flex zoning outlaws these uses entirely. Hybrid/flex zoning can be particularly challenging as a municipality's desire for a particular use does not always align with the market realities and existing tenant pool, resulting in existing uses in legacy industrial areas located close to existing rail and freeways being rendered legally nonconforming.

Changes to Permitted Uses

Multiple jurisdictions have imposed, or are considering, significant changes to uses allowed within a typical industrial zone. These changes include establishing permitting requirements for certain uses, such as warehouses, based on building size rather than the activity carried out within or the expected impacts and mandating that certain uses include significant square footage devoted to commercial, non-warehousing uses. Municipalities are also imposing new permitting requirements on uses previously allowed by right, requiring, for example, a conditional use permit (CUP) for a use, such as trailer and truck parking, previously been allowed by right. Such changes limit the usability of sites and greatly increase the cost, complexity, and uncertainty associated with obtaining the approvals needed for a particular use to be established on a property. Considering the impacts of these changes is an essential first step in any due diligence conducted before the acquisition of a property.

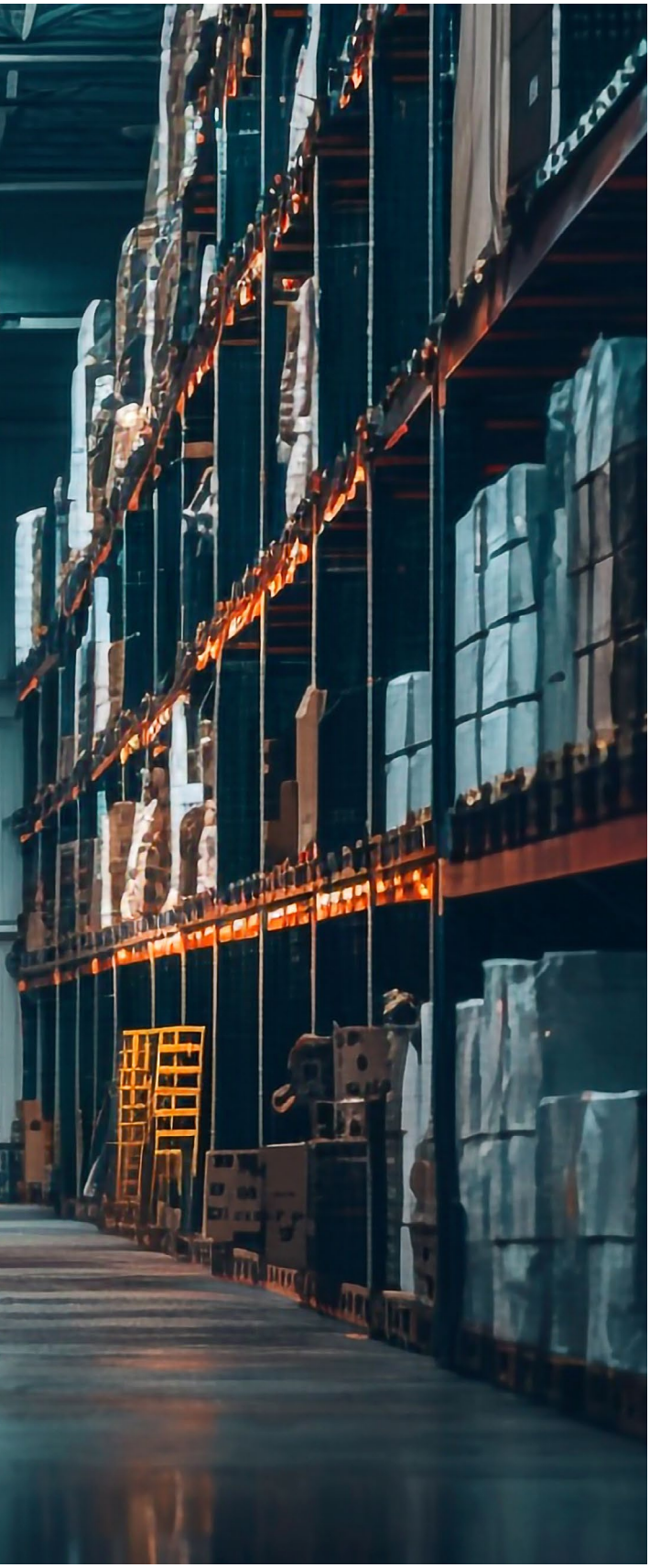
Development, Operational, and Noticing Standards

While changes to permitted uses and zoning often garner the greatest publicity, development, operational, and even noticing standards, often hidden deep within proposed ordinances, can have just as much, and sometimes more, impact on the ability to develop a site and find tenants. Development and operational standards range from the familiar, increased setbacks and screening, to the unusual, such as prohibitions on the use of local streets by employee's personal vehicles and requirements that industrial projects include outdoor amenity space encompassing significant percentages of lot area. Also present may be expanded noticing requirements — even up to a half mile — for industrial projects. A very close examination of a proposed ordinance, including sections governing process and procedure, is necessary to understand the full impact of a zoning update on a particular project's use and development.

RECENT AND PENDING ZONING CODE UPDATES IN THE LOS ANGELES AREA

Summarized below are several zoning code updates that have already impacted, or have the potential to impact, industrial development in the Los Angeles area. Although this list is not exhaustive, the updates highlighted below illustrate the types of regulatory changes that developer's should be aware of and consider when evaluating a locally-proposed regulatory change.

- County of Los Angeles. Effective since 2022, the County's Green Zone, which applies to certain areas of unincorporated Los Angeles County, mandates that existing and proposed industrial uses within a 500-foot radius of sensitive uses like residential neighborhoods, comply with new development, operating, and permitting requirements. These include height maximums, new setbacks, landscaping requirements, screening, requires related to the location of access points, and restrictions limiting hours of operation from 8:00 AM to 6:00 PM. Notably, discretionary approvals, including CUPs, requiring the approval of the County's Regional Planning Commission are required for many industrial uses that previously could be established with only-staff level approvals, such as the County's Ministerial Site Plan Review.
- The County is also in the final stages of adopting the Metro Area Plan and its implementing zoning ordinance (collectively, the MAP). Notably absent from the current version of the MAP, which is set for adoption by the County Board of Supervisors later in 2024, is the previously proposed M-0.5 (Artisan Production and Custom Manufacturing) zone, which would have broadly prohibited distribution uses and industrial outdoor storage in areas of the County. Although abandoned, this hybrid/flex zoning is expected to be proposed at a to be determined future date and any effort by County staff to do so should be carefully monitored due to its wide-reaching impact.
- City of Los Angeles. The City is in the midst of a long-running update to it's Community Plans, which comprise the Land Use Element of the City's General Plan, and its Zoning Code. Notable for industrial developers are the ongoing updates to the Harbor Gateway Community Plan and the Wilmington-Harbor City Community Plan. Due to the proximity of these areas to the Ports of Los Angeles and Long Beach and the significant amount of existing industrial development in

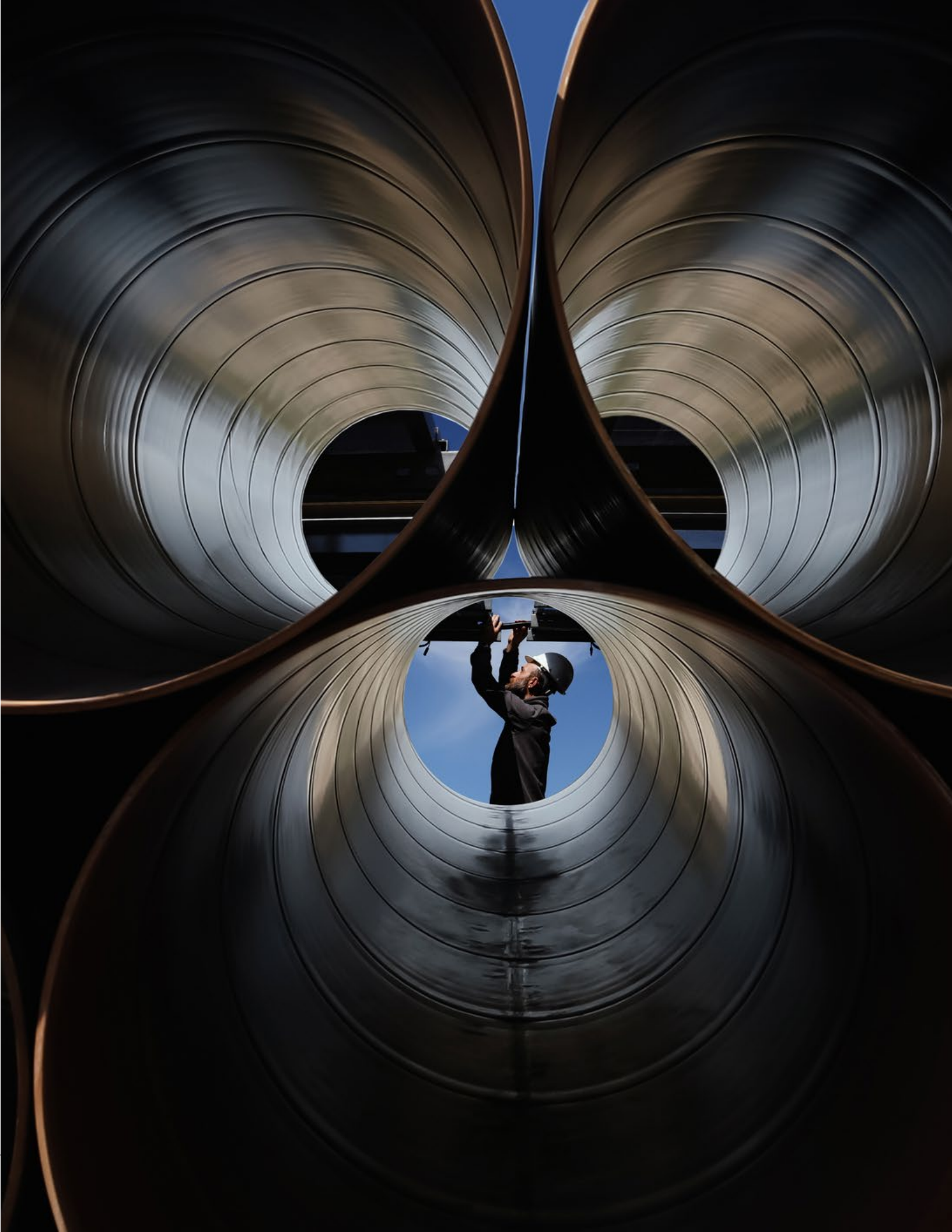


these areas, the ongoing update is likely to significantly impact the owners and operators of industrial properties in these areas. The latest draft plans include a multitude of regulatory changes and redesignate certain parcels as Industrial Transition Areas, a type of hybrid/flex zoning that would, over time, eliminate industrial land uses in areas near residential uses. Other areas will be rezoned in such a manner that outdoor storage, including the storage of cargo containers and commercial vehicles, will be outlawed and certain uses, such as warehouses, formerly were allowed by right will now require approval of a CUP. The plans and their implementing zoning would also establish several unusual development standards, including a requirement in certain zones that all warehouse uses devote a percentage of total floor area to "another use" (i.e. office, school, restaurant, retail, office, medical clinic, and market uses). The Harbor Gateway Community Plans update is expected to be completed in late 2025 and, given its potential impact, should be closely monitored as it proceeds.

- City of Carson. In 2023, the City of Carson adopted an updated General Plan. In connection with this update parcels in the City previously designated for industrial uses were redesignated Flex District (FLX). Within this hybrid/flex designation, the City is encouraging a transition from industrial to commercial/residential uses. And while light industrial uses with 30,000 of less square feet of floor area are still allowed, any projects over this size will require approval of a Development Agreement by the City Council, thus providing the City an opportunity to extract community benefits from developers unrelated to a project's impact. A new zoning code implementing the General Plan's policies related to industrial uses is expected to be released sometime later in 2024.

- City of Pomona. The City is amid a contentious multi-year update to its zoning code. The ongoing update, which as currently drafted would eliminate most warehousing, distribution, and outdoor storage uses and a now expired moratorium on all trucking related uses, that remained in place for two years, have caused significant concern amongst industrial stakeholders with interests in the City. It is expected that this effort will be wrapped up in 2024 and its impacts will be better understood as the draft continues to progress.
- County of San Bernardino. The County of San Bernardino is working on development of an overlay to implement environmental-justice focused policy goals identified in its recently adopted Policy Plan, the County's version of a General Plan. Current drafts of this ordinance, which would apply in unincorporated areas of the County within or near identified Environmental Justice Focus Areas, include an expanded noticing radius of as much as a half mile for certain types of industrial projects, require development of a community outreach plan for certain projects, and includes unique limitations, such as a requirement that certain industrial or commercial developments be prohibited from using local or residential streets for employee, client, or truck access or parking. It is not clear when this effort will be completed.
- City of Pico Rivera. The City is currently undergoing a comprehensive update to its zoning code. Although detailed drafts have not yet been released, given the City's attempt in March of 2024 to adopt a moratorium on warehouses, distribution centers, and related land uses in all industrial zones, it's safe to assume that the updated zoning code will include a multiple of new use, development, and operational restrictions associated with warehousing and distribution uses.

The efforts identified above represent a non-exhaustive survey of local regulatory that have, or will, significantly impact owners, operators, and developers of warehousing, distribution, and outdoor storage uses throughout Southern California. Given the high degree of uncertainty in the current regulatory environment and the impacts these updates, we recommend carefully evaluating any jurisdiction's plans to update its General Plan or zoning code before investing in a particular market or jurisdiction. To discuss specific rules, proposed regulations, or project/property specific impacts, please do not hesitate to reach out to our land use team.



State and Regional Efforts To Address Environmental Impacts Of Warehouses and Distribution Uses

BY BEN PATTERSON

Efforts to regulate warehouses and distribution uses are not isolated to the local development moratoria and zoning code updates. At the state and regional level, the State Attorney General's Office and regulatory agencies, such as the South Coast Air Quality Management District (SCAQMD) have taken a keen interest in the impacts of industrial uses.

STATEWIDE PROGRAMS

At the State level, the Attorney General's Office has issued policy documents and strong recommendations on characteristics and features that cities and counties should consider when permitting warehouses, logistics facilities, and distribution centers. Commonly referred to as "good neighbor policies," these policies address topics that frequently arise during the preparation of an initial study or an Environment Impact Report (EIR) pursuant to the California Environmental Quality Act (CEQA) and include siting and design considerations, air quality and greenhouse gas emissions analysis and mitigation, noise, and traffic among others.

The Attorney General has also taken a more active role at the local level, issuing comments, and engaging local municipalities in an effort to drive local regulation of these uses. This state-level guidance and support has been a driving force behind newly imposed land use restrictions and regulations on warehouses and distribution uses throughout Southern California.

Another State agency that is changing the industrial landscape is the California Air Resource Board (CARB), which over the last few years has adopted numerous regulations and policy documents to reduce or eliminate emissions from heavy trucks and other sources. Some of the more notable

CARB actions include the adoption of the Advanced Clean Truck Regulations, which aims to phase out the sale of new diesel or gas heavy trucks; and CARB's 2022 Scoping Plan, which sets forth CARB's plan for achieving Carbon Neutrality.

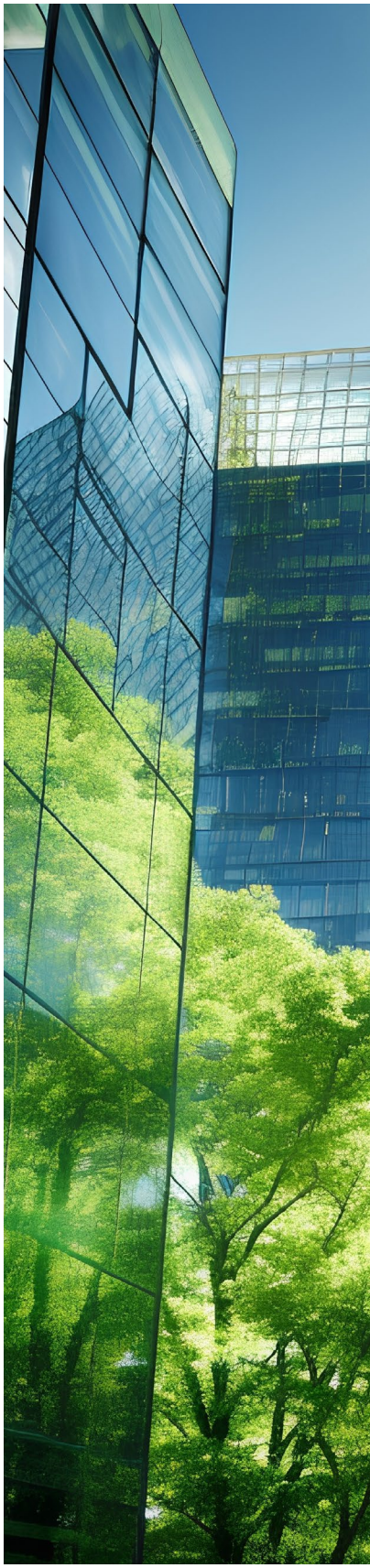
REGIONAL PROGRAMS

At the regional level, SCAQMD—the regulatory agency responsible for controlling air pollution in the South Coast Air Basin, which encompasses all of Orange County and the urban portions of Los Angeles, Riverside, and San Bernardino counties—has also taken several recent actions to limit and reduce emissions from vehicles associated with warehouses and distribution centers. Notably, in 2021 it adopted Proposed Rule 2305 known as the Warehouse Indirect Source Rule, which garnered significant national attention for its targeting of impacts resulting from trucks traveling to and from warehouses.

More recently, SCAQMD released its proposed concept for new guidelines on how local agencies should analyze cumulative impacts for Toxic Air Contaminants (TAC). While the proposed concept is still in its infancy, there is little doubt that this proposed approach will have significant implications for industrial projects within SCAQMD's jurisdiction. In its own analysis, SCAQMD found that 40% of the industrial projects that were approved over the last few years with a mitigated negative declaration would have required an EIR if these guidelines were in place. For developers, this means a lengthened entitlements process and additional costs.

Significant Changes to the National Environmental Policy Act

BY JACOB ARONSON



As part of the Fiscal Responsibility Act (also known as the debt ceiling bill) in June 2023, Congress made the most significant revisions to the National Environmental Policy Act (NEPA) since the statute was enacted in 1970. While some provisions codify existing regulations, principles in case law, and longstanding practices, there are also some noteworthy changes. These statutory changes—as well as the Council on Environmental Quality's (CEQ) recent revisions to its NEPA regulations, which were published in the Federal Register on May 1, 2024, and are beyond the scope of this article—have important implications for developers of projects that require federal agency permits/authorizations or receive federal funding.

The Fiscal Responsibility Act included the following notable changes to NEPA:

- Analytical Requirements. Agencies must "ensure the professional integrity, including scientific integrity" of the discussion and analysis in environmental impact statements (EIS), environmental assessments (EA), and Findings of No Significant Impact (FONSI), and must use "reliable data and resources" in carrying out NEPA. Further, the law codifies the longstanding principle that an EIS must consider only environmental effects that are "reasonably foreseeable."
- Alternatives Analysis. An EIS must consider a reasonable range of alternatives that are technically and economically feasible and meet the purpose and need of the proposal, as well as the no action alternative.

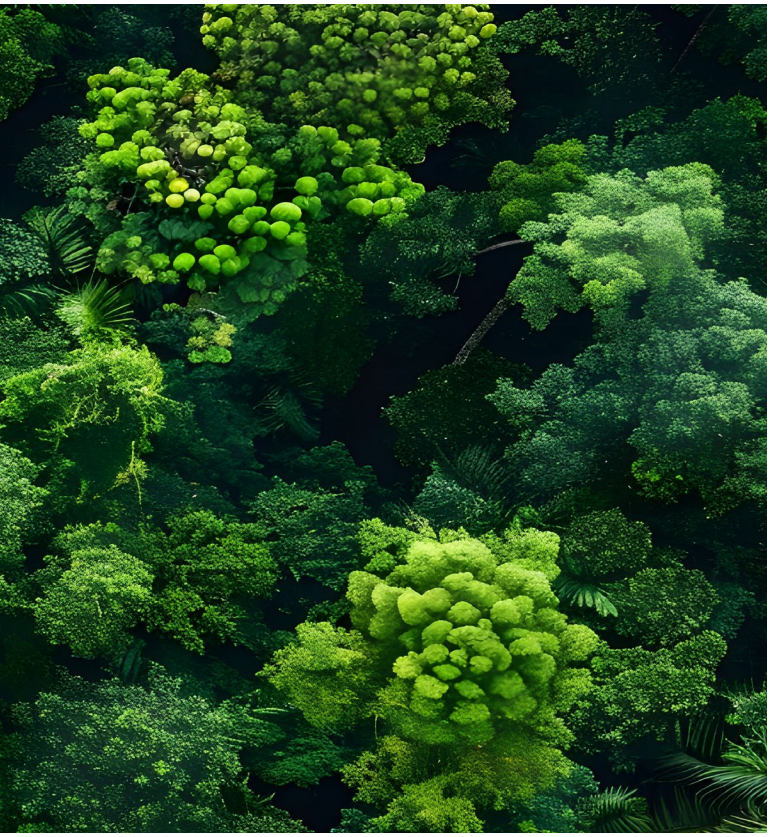
- NEPA Applicability. NEPA's existing requirement to prepare an EIS applies to "major federal actions significantly affecting the quality of the human environment." The law defines "major federal action" to mean "an action that the agency carrying out such action determines is subject to substantial federal control and responsibility." The law also lists a number of actions that are excluded from the definition of "major federal action," most notably including (among others):
  - a non-federal action with no or minimal federal funding
  - a non-federal action with no or minimal federal involvement where a federal agency cannot control the outcome of the project
  - loans, loan guarantees, or other forms of financial assistance where a federal agency does not exercise sufficient control and responsibility over the subsequent use of such financial assistance or the effect of the action
  - certain business loan guarantees provided by the Small Business Administration
  - non-discretionary activities or decisions
- Threshold Determinations. The law codifies longstanding practice and regulations for circumstances under which federal agencies must prepare an EIS (when a proposed action has a reasonably foreseeable significant environmental effect) or an EA (when a proposed action does not have a reasonably foreseeable significant environmental effect, or if the significance of environmental effects is unknown). In making this threshold determination, an agency may use any reliable data source and is not required to undertake new scientific or technical research unless the new research is essential to a reasoned

choice among alternatives and the overall costs and time of obtaining it are not unreasonable. The law lists the following circumstances when an EIS or EA is not required:

  - the proposed agency action is not a final agency action within the meaning of the Administrative Procedure Act
  - the proposed agency action is excluded pursuant to a categorical exclusion or another provision of law
  - the preparation of an EIS or EA would clearly and fundamentally conflict with another provision of law
  - the proposed agency action is a nondiscretionary action with respect to which the agency does not have authority to consider environmental factors in determining whether to take the action

- Lead Agency Designation. The law establishes standards for determining which agency will be the lead agency for a project when multiple federal agencies are involved. It also establishes procedures for requesting designation of a lead agency, including a process for designation of a lead agency by CEQ if participating federal agencies are not able to timely agree on the designation of a lead agency.
- Schedule. The lead agency must develop a schedule—in consultation with cooperating agencies, the project applicant, and such other entities as the lead agency determines appropriate—for completing any environmental review, permit, or authorization required for the project. If the lead agency determines that a deadline in the schedule will not be met, it must notify the responsible agency and request that the agency take such measures as it determines appropriate to comply with the schedule.

- Time Limits. An EIS must be completed within 2 years and an EA within 1 year. The clock begins to run on the date on which the lead agency (1) determines that NEPA requires the preparation of an EIS or EA, (2) notifies the project applicant that the application to establish a right-of-way for the project is complete, or (3) issues a notice of intent to prepare an EIS or EA, whichever is earlier. If the lead agency is not able to meet this deadline, it may extend the deadline, in consultation with the project applicant, to provide only so much additional time as is necessary to complete the EIS or EA. If the lead agency does not meet required deadlines, a project applicant can seek a court order compelling the lead agency to act.



- Page Limits. An EIS must not exceed 150 pages, or 300 pages for projects of "extraordinary complexity," and an EA must not exceed 75 pages (not including citations and appendices).
- One Environmental Document. If a project will require action by multiple federal agencies, the lead and cooperating agencies must evaluate the project in a single environmental document, to the extent practicable.
- Sponsor-Prepared Environmental Documents. Federal agencies must prescribe procedures to allow a project sponsor to prepare an EIS or EA under the lead agency's supervision. The lead agency may provide guidance and assist in the preparation of the document, and the lead agency must independently evaluate the document and take responsibility for its contents.
- Categorical Exclusions. The law establishes a process by which agencies may adopt other agencies' categorical exclusions.
- Tiering. An agency may rely upon the analysis in an earlier programmatic environmental document to comply with NEPA for a later project. Within 5 years of the programmatic environmental document, no additional review of the programmatic analysis is required unless there are substantial new circumstances or information about the significance of adverse effects that bear on the analysis. After 5 years, the agency may rely upon the programmatic analysis so long as the agency reevaluates the analysis and any underlying assumptions to ensure reliance on the analysis remains valid.
- Cooperating Agency Roles. A lead agency may designate as cooperating agencies any federal, state, tribal, or local agency that has jurisdiction by law or special expertise with respect to any environmental impact. The lead agency must request the participation of each cooperating agency at the earliest practicable time; must consider any analysis or proposal created by a cooperating agency; and must meet with a cooperating agency upon request. A cooperating agency may submit comments to the lead agency by the deadline set in the schedule.
- Joint Lead Agencies. Participating federal agencies may appoint state, tribal, and local agencies to serve as joint lead agencies, which must jointly carry out the lead agency's statutory responsibilities for the project.

Recent Amendments to the Surplus Land Act

BY CAROLINE CHASE AND JORDAN WRIGHT

The following is a summary of (i) the general procedural requirements for the disposal of surplus land by a local agency under the Surplus Land Act (SLA) (Gov. Code § 54220 et. seq.) and (ii) recent key amendments to the SLA. The California Department of Housing and Community Development (HCD) has issued draft updated SLA Guidelines to address these and other recent amendments.

BACKGROUND

Originally enacted in 1968, the SLA requires local agencies to prioritize affordable housing, as well as parks and open space, when disposing of surplus land, which is defined as "land owned in fee simple by any local agency for which the local agency's governing body takes formal action in a regular public meeting declaring that the land is surplus and is not necessary for the agency's use." (Gov. Code § 54221(b)(1).)

The SLA was significantly amended in 2020 by Assembly Bill No. 1486 (among other amendments) to specifically exclude property disposed for the generation of revenue: "Property disposed of for the sole purpose of investment or generation of revenue shall not be considered necessary for the agency's use" (2020 SLA Amendment). (Gov. Code § 54221(c)(2)(A).) This makes it more likely that the property will be deemed surplus land under the SLA.

Surplus land owned by a local agency must be designated as "surplus land" or "exempt surplus land" before the property is disposed (i.e., the sale or lease of land for more than 15 years).

Non-Exempt Surplus Land

If property is declared (non-exempt) surplus land, the local agency is required to follow the notice and open bidding procedures in the SLA. To summarize:

- The local agency must give written notice of the availability (NOA) of the surplus land to any local public entity with jurisdiction over the area where the surplus land is located, public agencies administering infill opportunity zones, and certified "housing sponsors" that have notified HCD of their interest in surplus land. (Gov. Code § 54222.)
- Any qualified entity that wishes to purchase or lease the surplus land would have 60 days from the date of the NOA to notify the local agency in writing of its interest in the property. (Gov. Code § 54222(e).) After the local agency receives a notice of interest, it may begin negotiations to determine the sale price or lease terms. (Gov. Code § 54223(a).)

- If the local agency receives notice from more than one entity interested in purchasing or leasing the surplus land, it must give priority to any entity that agrees to use the surplus land for affordable housing (unless the property is designated for park and recreational uses). (Gov. Code § 54227(a), (b).) If more than one entity agrees to use the surplus land for affordable housing, the local agency must give priority to the entity that would provide the greatest number of affordable units. (Gov. Code § 54227(a).) If the same number of affordable units are proposed, priority must be given to the entity that proposes the deepest average level of affordability for the affordable units. (Ibid.)
- If no agreement on terms or price is reached after a good faith negotiation period of (at least) 90 days (commencing on the first day after the end of the 60 day notice of availability period), the surplus land can generally be disposed of without further regard to the SLA's procedures. (Gov. Code § 54223(a).) However, under such circumstances (or where no entity responds), an affordability covenant must still be recorded against the property requiring that at least 15% of the total number of residential units must be sold or rented as affordable housing if 10 or more residential units are constructed on the property. (Gov. Code § 54233.)

Exempt Surplus Land

"Exempt surplus land" is surplus land that is formally declared exempt from the procedural public notice and bidding requirements under the SLA because it meets one or more criteria under Government Code Section 54221(f)(1) to qualify for an exemption, which are limited in scope but have been expanded by the recent legislative amendments discussed below.

RECENT AMENDMENTS

The California legislature passed, and Governor Newsom approved, several bills (Senate Bill 747, Assembly Bill 480 and Assembly Bill 1734) amending the SLA during the 2023-2024 legislative session ("Recent Amendments"). The Recent Amendments clarify important definitions, include additional exemptions, amend procedural requirements, and strengthen oversight and enforcement by HCD. The key amendments to the SLA are summarized below.

Modified Exemptions

The Recent Amendments modify the following SLA exemptions:

- There is a pre-existing exemption for "land subject to valid legal restrictions" not imposed by the local agency (e.g., not a non-residential land use restriction) that makes housing prohibited, unless there is a feasible method to satisfactorily mitigate or avoid the prohibition on the site. The Recent Amendments specify that valid legal restrictions include, but are not limited to: (i) existing contracts, including leases, agreed to prior to September 30, 2019; (ii) easements; (iii) source of funding restrictions (as specified); (iv) federal or state statutes or regulations; and (v) local voter-approved initiatives. A valid legal restriction must be supported by documentary evidence. (Gov. Code § 54221(f)(1)(J).)
- There is a pre-existing exemption for "small parcels" which has been modified by the Recent Amendments to apply to land that is less than one-half acre and is not contiguous to public land used for open-space or low- or

moderate-income housing purposes. Pursuant to the draft updated HCD SLA Guidelines, contiguous parcels that are disposed of simultaneously to the same receiving entity (or any entity working in concert with another receiving entity) will be treated as a single unit of land. (Gov. Code § 54221(f)(1)(B).)

- There is a pre-existing exemption for the "exchange of surplus land" where the property is necessary for the local agency's use. That exemption has been extended by the Recent Amendments to also apply to easements. (Gov. Code § 54221(f)(1)(C).)
- There is a pre-existing exemption for "local agency to agency surplus land transfer" where the property is necessary for the transferee agency's use. That exemption has been extended by the Recent Amendments to also apply to (i) federally recognized California Indian tribes and (ii) where the surplus land is transferred to a third party if that third party agrees to use the property for an agency use, as specified, and that third party is required (pursuant to a legally binding document) to transfer the property to the local agency by a specified date that is (per HCD) "within a reasonable time period." (Gov. Code § 54221(f)(1)(D).)
- There is a pre-existing exemption for "land for affordable housing." The Recent Amendments remove the requirement that the land be put out to an open, competitive bid for qualifying 100% affordable housing projects (only), as specified. (Gov. Code § 54221(f)(1)(F).)
- The pre-existing exemption for "land for affordable housing" also includes an exemption for qualifying mixed-income projects where at least 300 residential units are proposed and at least 25% of the units are reserved for lower-income households, among other specified requirements. The Recent Amendments modify the project requirements depending on the size of the property, and clarify that for larger properties (over 10 acres and consisting of either one or multiple parcels combined for disposition), the number of residential units must equal the greater of (i) 300 units or (ii) 10 times the number of acres of the surplus land or 10,000 residential units, whichever is less. (Gov. Code § 54221(f)(1)(G), (H).)

New Exemptions

The Recent Amendments create new categories of "exempt" surplus land, including:

- Land for mixed-use development in a non-urbanized area (as defined) where at least 50% of the square footage of new construction is dedicated to residential use and at least 25% of the units are reserved for lower-income households, among other specified requirements. The land must nonetheless be put out for an open, competitive bid. (Gov. Code § 54221(f)(1)(I).)
- Land owned by a local agency whose primary mission or purpose is to supply the public with a transportation system that is used to develop a mixed-use project, including for commercial or industrial uses, including nongovernmental retail, entertainment or office development or for the sole purpose of investment or generation of revenue. The agency must meet specified criteria, including the requirement that a specified number of residential units are also proposed at a specified level of affordability. (Gov. Code § 54221(f)(1)(S).)
- Land that is transferred to a community trust that is to be developed or rehabilitated as specified types of housing and meets specified conditions. (Gov. Code § 54221(f)(1)(R).)

- Land that is owned by a California public-use airport on which residential uses are prohibited pursuant to Federal Aviation Administration standards. (Gov. Code § 54221(f)(1)(Q).)
- Land being disposed by a city with a population exceeding 2,500,000 for specified housing uses if the jurisdiction has a compliant housing element and has been designated "pro-housing" by HCD. (Gov. Code § 54222.3.1.) The City of Los Angeles is the only local agency that currently meets these requirements. The following types of housing projects qualify for this new exemption, subject to the payment of prevailing wages for the construction of the project:
    - Affordable housing projects where 100% of the units in the project, exclusive of a manager's unit(s), are sold or rented to lower-income households (as defined), except that up to 20% of the units may be sold or rented to moderate-income housings (as defined)
    - Supportive housing, as defined
    - Transitional housing, as defined, for youth and young adults between 12 and 24 years of age
    - Low barrier navigation centers, as defined

Modified Definitions

- The SLA requires a local agency disposing of (non-exempt) surplus land to send a written NOA, as summarized above, before disposing of the property or "participating in negotiations." The Recent Amendments provide that the following actions do not constitute "participating in negotiations": (i) issuing a request for proposals or request for qualifications to the entities eligible to receive the notice of availability in order to comply with the terms of specified exemptions; (ii) negotiating a lease, exclusive negotiating agreement, or option agreement with entities eligible to receive the notice of availability in order to comply with the terms of specified exemptions; and (iii) negotiating with a developer to determine if the local agency can satisfy the disposal exemption requirements. (Gov. Code § 54222(f).)
- The Recent Amendments clarify the definition of "dispose" to mean either the sale of surplus land or the lease (after January 1, 2024) of surplus land for a term longer than 15 years (previously five years), including any extension or renewal options. (Gov. Code § 54221(d)(1).) The Recent Amendments also provide that "dispose"

does not include entering into a lease for surplus land on which no development or demolition will occur, regardless of the term of the lease. (Gov. Code § 54221(d)(2).)

- The Recent Amendments revise the definition of "agency's use" (meaning that the property is not surplus land) to include property owned by a port that is used to support logistics uses, sites for broadband equipment or wireless facilities, and waste disposal sites. (Gov. Code § 54221(c)(1).)

Extended Deadline for "Grandfathered" Agreements

The 2020 SLA Amendment provides that an exclusive negotiating agreement (ENA) or legally binding agreement to dispose of property entered into on or before September 30, 2019 is not subject to the 2020 version of the SLA, provided the disposition of property was completed by December 31, 2022. In other words, under that circumstance, surplus land disposed of for the sole purpose of investment or generation of revenue would still be considered necessary for the "agency's use" and therefore, the property could be deemed non-surplus land. The Recent Amendments (Gov. Code § 54234(a), (d)):

- Extend the foregoing 2022 disposition deadline to December 31, 2027
- Extend the deadline for specified mixed-income or affordable housing projects where a competitive request for proposals (RFP) was issued by the local agency by September 30, 2019 and the local agency enters into a disposition and development agreement (DDA) by December 31, 2027
- Allow for the "revival" of a prior ENA, DDA or legally binding agreement, as applicable, if the disposition was not completed by the prior 2022 deadline, so long as (per HCD), the agreement has "substantially similar terms"

Declaration of Exempt Surplus Land by Notice

The Recent Amendments provide that a local agency may declare certain exemptions without a public hearing, if it instead publishes a notice and makes it available for public comment at least 30 days before the exemption takes effect. (Gov. Code § 54221(b)(4).)

Affordability Period

Under the SLA, an entity proposing to use surplus land for affordable housing must record a covenant on the property agreeing to make available at least 25% of the total number of units available at an affordable cost to lower income households for a specified period. The Recent Amendments vary the affordability period based on the type of housing. The affordable housing units must be made available at an affordable housing cost for a period of 55 years for rental housing, 45 years for ownership housing, and 50 years for rental or ownership housing on tribal trust lands. (Gov. Code § 54222.5.)

Please note that in addition to the new exemptions summarized above, there are pre-existing surplus land exemptions for 100% affordable housing projects with other specified affordability requirements.

SLA Violations

The Recent Amendments impose an additional requirement on a local agency that has received a notification of violation (NOV) from HCD regarding the disposal of surplus land. A local agency must hold an open public meeting to evaluate the NOV and is prohibited from approving the proposed disposal of surplus land until the meeting has occurred. (Gov. Code § 54230.7.) In Orange County jurisdictions specifically, a local agency having received a NOV cannot dispose of the surplus land until HCD affirmatively determines compliance with the SLA. (Gov. Code § 54230.8.)

The Recent Amendments revise the penalty fee for SLA violations to 30% of the applicable "disposition value" (versus final sale price) for a first-time violation and 50% for subsequent violations. In the case of a sale, the applicable disposition value is defined as the greater of the final sale price of the land or the fair market value of the surplus land at the time of sale. In the case of a lease, the applicable disposition value is the discounted net present value of the fair market value of the lease as of the date the lease was entered into. The Recent Amendments also prohibit penalty fees for non-substantive violations (e.g., clerical errors) that do not impact the availability or construction of housing affordable to lower income households or the ultimate disposition of the land, as specified. (Gov. Code § 54230.5(a).)

HCD SLA GUIDELINES

The following are a few key changes in the draft updated HCD SLA Guidelines:

Hybrid Projects

Only land used in "its entirety" by a local agency for an "agency's use" will qualify as non-surplus land, even if revenue generated on the portion of land not being used according to that definition would support the development on the qualifying portion of land. Under that scenario, it will be important to factor in the type of local agency.

Recall that for most local agencies, pursuant to the 2020 SLA Amendment, property disposed of for the purpose of investment or generation of revenue shall not be considered necessary for the "agency's use." However, there is a carve-out for a local agency that is a non-transportation district, in which case "agency's use" may include commercial or industrial uses or activities, including nongovernmental retail, entertainment, or office development, or may be used for the sole purpose of investment or generation of revenue, so long as specified requirements are met.

As discussed above, the Recent Amendments add the same carve-out for transportation agencies. However, that is technically an "exemption" versus a basis for finding that the land is not surplus land in the first instance.

Reporting Requirements

A local agency that plans to dispose of land for "agency's use" must provide documentation that the land meets that definition to HCD at least 30 days prior to disposition. This requirement would provide for additional oversight by HCD where a local agency has determined that the land is not surplus land in the first instance.

Good Faith Negotiations

HCD has clarified what constitutes "good faith negotiations" during the required 90-day good faith negotiation period for (non-exempt) surplus land, as applicable. The local agency must: (i) make serious efforts to meet at reasonable times to attempt to reach an agreement, (ii) respond to letters of interest, (iii) respond to and consider reasonable offers to purchase or lease, (iv) not require that development proposals significantly deviate from the NOA, and (v) not arbitrarily end active negotiations after the 90-day good faith negotiation period.

Environmentally Sensitive Land

If the surplus land is located in one of the following four locations, the NOA must be for open space purposes and the local agency is permitted, but not required, to send the NOA to affordable housing providers: (i) the coastal zone; (ii) adjacent to a historical unit of the State Parks System; (iii) listed on, or determined to be eligible for listing on, the National Register of Historic Places; and (iv) within the Lake Tahoe region. The NOA must be sent to the following agencies: (i) any park or recreation department of any city or county, as applicable, within which the surplus land is located, (ii) any regional park authority having jurisdiction within the area, and (iii) the State Resources Agency. (Gov. Code § 54222(b).)

HCD Enforcement

The SLA provides: "The failure by a local agency to comply with this article shall not invalidate the transfer or conveyance of real property to a purchaser or encumbrancer for value." (Gov. Code § 54230.6.) However, HCD has clarified that it may seek to enforce the SLA and pursue all applicable legal and equitable remedies, including, but not limited to, injunctive or declaratory relief, if a local agency disposes of land, or attempts to dispose of land, in violation of the SLA.

Changes to the California Environmental Quality Act Enacted in 2023

BY JACOB ARONSON

This article summarizes some of the most significant amendments to the California Environmental Quality Act (CEQA) that were enacted in 2023. Some housing laws that relate to CEQA are discussed in the article on page 30.

ASSEMBLY BILL 1307: NOISE EFFECTS OF RESIDENTIAL PROJECTS; RESIDENTIAL AND MIXED-USE PROJECTS OF PUBLIC HIGHER EDUCATION INSTITUTIONS

AB 1307 was passed as urgency legislation in response to the ongoing litigation over the University of California, Berkeley's proposed housing development at People's Park (a California Supreme Court decision in this case is expected in spring/summer 2024).

AB 1307 added Public Resources Code § 21085, which provides that "for residential projects, the effects of noise generated by project occupants and their guests on human beings is not a significant effect on the environment." AB 1307 also added Public Resources Code § 21085.2, which provides that for projects with at least two-thirds of the square footage designated for residential use, a public higher education institution is not required to consider alternative locations for the project in the Environmental Impact Report (EIR) if (1) the project site is no more than 5 acres, (2) at least 75% of the adjoining parcels are developed with "qualified urban uses" (defined as any residential, commercial, public institutional, transit or transportation passenger facility, or retail use, or any combination of those uses), and (3) the project has already been evaluated in the EIR for the most recent long-range development plan for the campus.

SENATE BILL 69: NOTICE FILING AND POSTING

Public Resources Code § 21152 requires a local agency, after approving a project, to file a notice of determination or notice of exemption with the county clerk of each county in which a project is located. These notices must be filed electronically with the county clerk if possible. Previously, this section required county clerks to post these notices for 30

days either in the clerk's office or on the clerk's website. SB 69 adds the following additional requirements: These notices must be filed electronically with the State Clearinghouse (in addition to county clerks), county clerks must post these notices for 30 days both in the clerk's office and on the clerk's website (clerks no longer have a choice between the two), and the Office of Planning and Research (OPR) must post these notices on the State Clearinghouse website.

SENATE BILL 149: ADMINISTRATIVE RECORDS; ENVIRONMENTAL LEADERSHIP DEVELOPMENT PROJECTS; INFRASTRUCTURE PROJECTS

SB 149 made a few modest changes to the procedure and requirements for the administrative record in CEQA lawsuits (amending Public Resources Code § 21167.6).

First, SB 149 requires the agency to produce the administrative record in electronic format, codifying an existing common practice. Second, it requires the court to schedule a case management conference within 30 days of initiation of a lawsuit to review the scope, timing, and cost of the administrative record. Third, the law allows the parties, with the court's approval, to stipulate to a partial record that does not contain all the specified documents otherwise required to be included in the administrative record. Fourth, the law clarifies that the lead agency must certify the record within 60 days even when a petitioner elects to prepare the record. Fifth, the law allows the agency to deny a petitioner's request to prepare the record, in which case the agency or real party in interest must bear the costs of preparing the record and cannot recover those costs from the petitioner. Sixth, the law specifies that the administrative record does not include "communications that are of a logistical nature, such as meeting invitations and scheduling communications," materials that are privileged, and materials that are exempt from disclosure under the California Public Records Act.

Separately, SB 149 extended the Jobs and Economic Improvement Through Environmental Leadership Act of 2021 (Public Resources Code §§ 21178–21189.3), which provides expedited judicial review for "environmental leadership development projects." To qualify for judicial streamlining, projects must be certified by the governor and meet various specified requirements (including, depending on the type of project, minimum investment amounts, transportation impacts, greenhouse gas emissions mitigation, and labor requirements). These provisions were to have expired on January 1, 2026, with a deadline of January 1, 2024, for projects to be certified by the governor. SB 149 extended these provisions until January 1, 2034, and extended the deadline for projects to be certified by the governor to January 1, 2032. SB 149 also specified that the project applicant cannot recover the costs of preparing the administrative record from a petitioner.

In addition, SB 149 added provisions for expedited judicial review of certain infrastructure projects, as described in the article on page 57.

ASSEMBLY BILL 1449: AFFORDABLE HOUSING

AB 1449 (codified at Public Resources Code § 21080.40) adds a new statutory exemption from CEQA for specified actions related to qualifying affordable housing projects that will be subject to a recorded California Tax Credit Allocation Committee regulatory agreement. At least two-thirds of the square footage of the project must be designated for residential use, and all residential units (except managers' units) must be designated for lower income households. In addition, projects must meet numerous specified requirements related to labor standards, location, and environmental site conditions. The exemption applies to the issuance of entitlements for a qualifying project; actions to lease, convey, or encumber land owned by a public agency for a qualifying project; actions to facilitate the

lease, conveyance, or encumbrance of land owned or to be purchased by a public agency for a qualifying project; and rezoning, specific plan amendments, or general plan amendments required specifically and exclusively to allow a qualifying project. These provisions will expire January 1, 2033.

ASSEMBLY BILL 356: AESTHETIC EFFECTS OF DILAPIDATED BUILDING REFURBISHMENT

Public Resources Code § 21081.3 provides that a lead agency is not required to evaluate the aesthetic effects of a project that involves the refurbishment, conversion, repurposing, or replacement of abandoned, dilapidated, and vacant buildings; includes the construction of housing; and meets other specified requirements. AB 356 extends the expiration of this section to January 1, 2029. Further, AB 356 adds a new requirement that the lead agency must file a notice with the county clerk and OPR after it relies on this section when approving a project.

SENATE BILL 91: INTERIM MOTEL PROJECTS; ENVIRONMENTAL LEADERSHIP TRANSIT PROJECTS

Public Resources Code § 21080.50 provides a statutory exemption from CEQA for projects that convert a motel, hotel, residential hotel, or hostel to supportive or transitional housing ("interim motel projects") and meet specified requirements. Previously, this section was to expire on January 1, 2025. SB 91 removed the sunset provision, making this statutory exemption permanent.

In addition, SB 91 extended for one year the streamlining provisions for "environmental leadership transit projects," which are transit projects located in Los Angeles County that meet specified requirements and are certified by the governor (Public Resources Code § 21168.6.9). As amended by SB 91, an environmental leadership transit project must be approved by January 1, 2025, and the provisions expire January 1, 2026.

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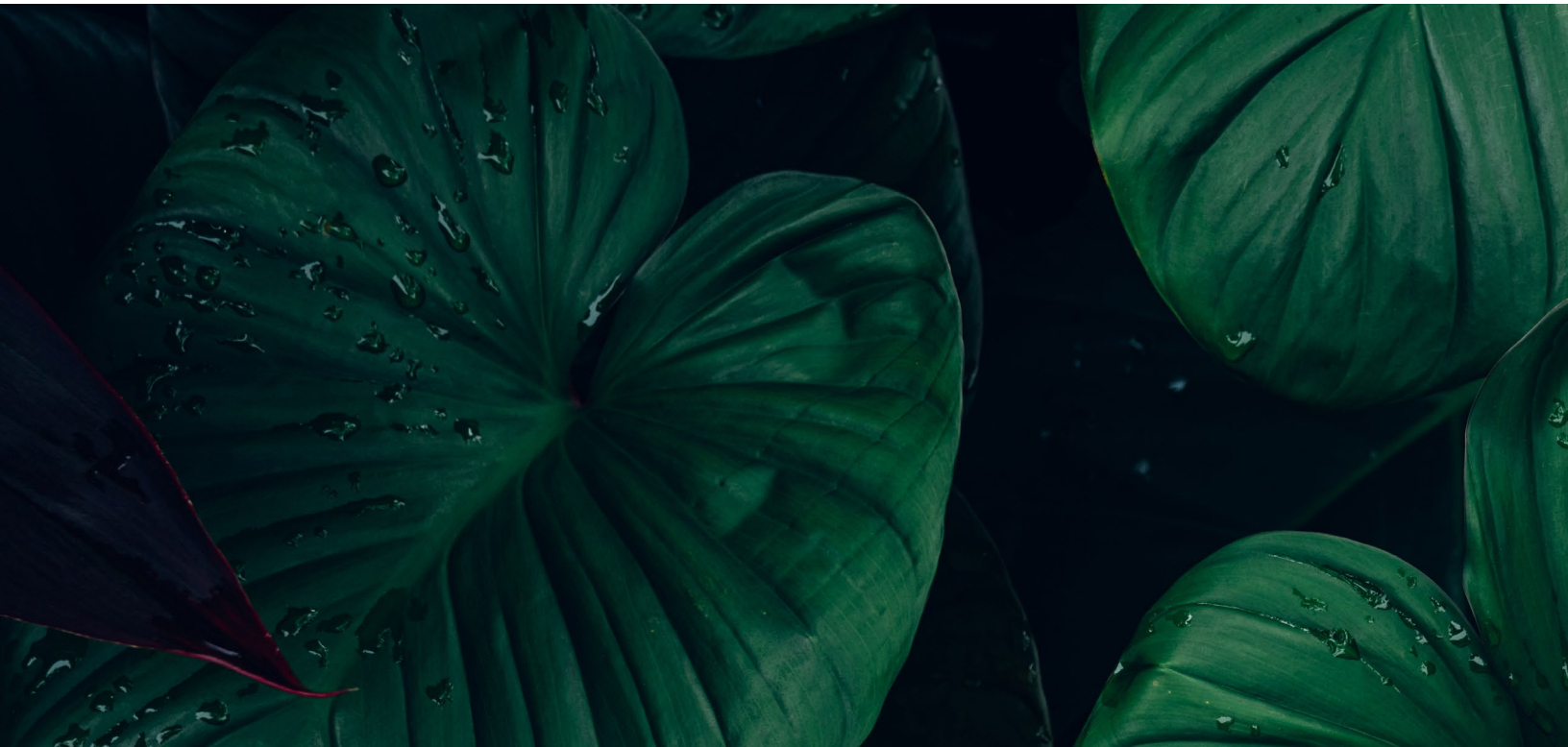

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