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USA – California: Law and Practice

Kim Bick, Alan Bick, Corrie Plant and Tyler Alexander
Bick Law LLP

USA – CALIFORNIA

Law and Practice

Contributed by:
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Contributed by: Kim Bick, Alan Bick, Corrie Plant and Tyler Alexander, **Bick Law LLP**

Bick Law LLP was founded in 2015 and is a full-service environmental law firm in Southern California. Bick Law provides world-class environmental litigation, compliance, and transactional services to businesses across a wide variety of industries. The firm's team of skilled counsellors and problem solvers work together with clients to minimise risk and advance both short and long-term objectives. With a practice focused exclusively on environmental issues, Bick Law's boutique structure offers "Big Law" representation, but with a flexible fee structure tailored to the complex needs of each client. Attorneys at Bick Law are at the forefront of environmental law issues in California and across the nation, leveraging that expertise to achieve outstanding results for the firm's clients.

Authors

Kim Bick is the founding partner of Bick Law LLP. Kim has represented clients across several industries in environmental litigation, compliance, enforcement, and transactional work. With an environmental engineering background and a work history that includes hands-on remediation engineering experience, clients seek out Kim for her substantive expertise as well as her legal acumen. A leader in the environmental bar, Kim has served as the Chair of the California Lawyers Association's Environmental Law Section, in leadership roles with the LA County Bar Association, and is the current President of the Environmental Law Network, a worldwide association of environmental law firms.

Alan Bick is the co-managing partner of Bick Law LLP. A former partner and co-chair of Gibson, Dunn & Crutcher LLP's Environmental Practice Group, Alan has over 35 years of experience representing clients in cost recovery actions under CERLCA, RCRA, and state equivalents; federal and state enforcement actions; mass and toxic tort cases; natural resource damages matters; and environmental review litigation under CEQA, NEPA, and the Endangered Species Act. Beyond his extensive experience as a litigator, Alan advises clients on environmental compliance and helps mitigate risk in real estate and corporate transactions.

Corrie Plant is a partner at Bick Law LLP with nearly 20 years of experience in environmental litigation and compliance counselling. Corrie has extensive experience counselling clients on both federal and California environmental law, including CERCLA, RCRA, the Clean Water Act, OSHA, and California's Proposition 65. Clients turn to Corrie for compliance with environmental laws related to the sale of consumer products, as well as when faced with administrative, civil, and criminal environmental enforcement actions. Corrie is also skilled in resolving complex multiparty cases, including through trial and pretrial motions practice, reaching negotiated resolutions, or appearing before third-party neutrals.

Tyler Alexander is a senior associate at Bick Law LLP. Before joining the firm in June 2025, Tyler served for eight years as a Trial Attorney at the US Department of Justice's Environment and Natural Resources Division in Washington, DC. Tyler is an expert in federal public lands and natural resources law and an experienced federal civil litigator, having represented the United States and federal agencies in district courts across the country. Prior to his time at the Department of Justice, Tyler clerked for the Hon. Patrick E. Higginbotham of the US Court of Appeals for the Fifth Circuit.

Bick Law LLP

520 Newport Center Drive
Suite 750
Newport Beach
CA 92660
California
USA

Tel: +1 949 432 3500
Fax: +1 949 432 3494
Email: abick@bicklawllp.com
Web: www.bicklawllp.com

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1. Regulatory Framework and Law

1.1 Environmental Protection Policies, Principles and Laws

Home to the fourth-largest economy in the world and with rich natural resources spread across diverse landscapes – including beaches, mountains, deserts, and forests – California implements both federal and state environmental safeguards to protect the health and beauty of the Golden State and its people. Key sources of environmental law in California include the following.

- The California Constitution, which includes a right to fish on public lands and waters (Article I, Section 25), provides that water in California belongs to the people of the state and must be protected from unreasonable use (Article X, Section 2), preserves the right of public access to beaches (Article X, Section 4), and regulates public utilities (Article XII).
- Federal environmental laws, including the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., the Clean Air Act, 42 U.S.C. § 7401 et seq., the Clean Water Act, 42 U.S.C. § 1251 et seq., the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), 42 U.S.C. § 9601 et seq., the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq., and the Endangered Species Act, 16 U.S.C. § 1531 et seq.
- State environmental laws, including the California Environmental Quality Act, Cal. Pub. Res. Code § 21000 et seq., the California Coastal Act, Cal. Pub. Res. Code § 30000 et seq., the California Hazardous Waste Control Law, Cal Health & Safety Code § 25000 et seq., the California Hazardous Substances Account Act, Cal. Health & Safety Code § 78000 et seq., and the Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop 65), Cal Health & Safety code §§ 25249.5-25249.14.
- Regulations promulgated by federal agencies in the Code of Federal Regulations and by state agencies in the California Code of Regulations.
- Local municipal laws, regulations, and permitting requirements.

In addition, California courts recognise common law claims like negligence, nuisance, and trespass that help protect the environment and abate environmental harm.

2. Enforcement Authorities and Mechanisms

2.1 Regulatory Authorities

California regulatory and enforcement agencies are responsible for protecting California's environment and natural resources. The California Environmental Protection Agency (CalEPA) has primary jurisdiction over issues of environmental quality and pollution cleanup. CalEPA oversees the following subcomponents.

- California Air Resources Board (CARB) – regulates GHG emissions and air pollution.

- Department of Pesticide Regulation – reviews and approves pesticide products and regulates pesticide use.
- Department of Resources, Recycling, and Recovery (CalRecycle) – implements recycling and waste management programmes and regulates waste disposal.
- Department of Toxic Substances Control (DTSC) – regulates storage, treatment, or disposal of hazardous waste, oversees cleanups on contaminated properties, and brings enforcement actions against polluters.
- Office of Environmental Health Hazard Assessment – evaluates and lists substances that cause cancer or reproductive harm under Prop 65 and determines safe exposure levels for contaminants.
- State Water Resources Control Board – permits and regulates diversionary and appropriative water uses and protects water quality.

The California Natural Resources Agency has primary jurisdiction over public lands, natural resources, and wildlife, overseeing the following departments.

- Department of Forestry and Fire Protection (CalFire) – manages state forests and provides disaster response.
- Department of Conservation – regulates oil, gas, and geothermal energy production, as well as mining and reclamation.
- Department of Parks and Recreation – administers state parks.
- Department of Fish and Wildlife – protects animal and plant resources and administers state hunting and fishing programmes.
- Department of Water Resources – manages the State Water Project and regulates dams.

Other important California regulatory and enforcement agencies include the Coastal Commission – the body that regulates land and water use in the coastal zone – and local regional water quality boards and air quality management districts.

2.2 Co-Operation

Regulated entities can co-operate with state regulators through various processes. For example, the California Administrative Procedure Act, Cal. Govt. Code § 11340 et seq., provides opportunities for participation and comment during the rulemaking process.

Before initiating enforcement proceedings, California agencies will often seek to cure non-compliance through informal mechanisms like Notices of Violation and Notices to Verify Compliance. By co-operating at this early stage, companies may avoid unnecessary enforcement and litigation expenses.

For contaminated land or water resources, regulated entities may pursue voluntary cleanup agreements with either DTSC or a regional water board. These agreements usually involve agency review and approval of investigation and remediation plans, as well as reimbursing the costs of continued agency oversight. The upside is that the regulated entity can usually obtain more flexible cleanup milestones and avoid civil penalties for failing to meet deadlines. In some cases, the regulated entity may even receive a "closure" or "no further action" determination from the agency, which makes a formerly contaminated property viable to sell.

3. Environmental Protections

3.1 Protection of Environmental Assets

The United States' system of dual sovereigns results in overlapping responsibility for environmental protection. Under the doctrine of co-operative federalism, federal and state authorities work together to protect California's natural resources and environmental quality. For example, under the Clean Air Act, 42 U.S.C. § 7401 et seq., the federal Environmental Protection Agency establishes nationwide standards for air quality. California, in turn, creates State Implementation Plans (approved by EPA) to reach those goals. Likewise, the Clean Water Act, 33 U.S.C. § 1251 et seq., provides the EPA and US Army Corps of Engineers with jurisdiction over discharges and filling of waters of the United States while authorising California to adopt water quality standards. Through the federal Coastal Zone Management Act, 16 U.S.C. § 1451 et seq., the federal government allows California to regulate development in the coastal zone under the California Coastal Act, Cal. Pub. Res. Code § 30000

et seq., including over federal projects through the consistency determination process.

Wildlife protections are also cross-jurisdictional. For example, through the Endangered Species Act, 16 U.S.C. § 1531 et seq., the Migratory Bird Treaty Act, 16 U.S.C. § 703 et seq., and the Magnuson-Stevens Act, 16 U.S.C. § 1801 et seq., the federal government protects specific species and prevents commercial overfishing. On the state side, hunting and sport fishing – including on federal public lands within California and where not otherwise prohibited – are regulated by the California Department of Fish and Wildlife under the California Fish and Game Code.

3.2 Breaching Protections

Violations of environmental law may result in severe consequences, including both civil and criminal sanctions by both federal and state authorities. At the federal level, EPA Region 9 has enforcement authority for violations of the Clean Air Act, Clean Water Act, and for cleanup costs under CERCLA and RCRA. The US Fish and Wildlife Service's Office of Law Enforcement prosecutes violations of federal wildlife protections. In California, CalEPA and local law enforcement agencies bring actions for civil or criminal violations of California environmental law. In addition, certain statutes like the Clean Water Act, 33 U.S.C. § 1365, or Prop 65, Cal. Health & Safety Code § 25249.7 (d), provide for citizen suits, potentially resulting in an award of attorney's fees and costs to the prosecuting party in addition to civil penalties.

4. Environmental Incidents and Permits

4.1 Investigative and Access Powers

CalEPA and its departments have broad statutory authority to investigate and prosecute violations of California environmental law. California Public Resources Code Section 21000 instructs public regulatory agencies to give "major consideration to preventing environmental damage". Water Code Section 13304 vests both the regional and state water boards with the power to order cleanup or abatement of unlawful discharges into California waterways. Health & Safety Code Section 40716 charges regional air quality management districts with both regulating and mitigating emissions.

4.2 Environmental Permits/Approvals

Permits – and attendant environmental reviews – are broadly required in California. For example, the 35 regional air districts across California have regulatory authority over stationary sources of air pollution and may permit equipment that emits oxides of nitrogen, volatile organic compounds, sulphur dioxide, or particulate matter. Denials of permits may be appealed to a hearing board so long as the applicant petitions for a hearing within 30 days of the denial (Cal. Health & Safety Code § 42302.1). If the denial is upheld, the applicant may seek judicial review through the writ of mandate process, Cal. Code of Civ. P. § 1094.5.

Water use is another example of California's extensive permitting regime. Under California law, water rights are usufructuary and limited by (i) the California constitution's reasonableness requirement and (ii) the public trust doctrine. Appropriative water rights and related permits can only be issued by the State Water Resources Control Board. Denial of or restrictions on such permits can be challenged in superior courts through the writ of mandate process, Cal. Code of Civ. P. § 1094.5.

The local regional water boards issue a variety of permits, such as waste discharge requirements (WDRs). If a regional water board denies a permit application, the applicant may appeal to the State Water Resources Control Board within 30 days (Cal. Water Code § 13320). If the State Water Resources Control Board upholds the denial, the applicant may seek a writ of mandate in the Superior Court.

Obtaining a permit in California often requires extensive environmental reviews. The California Environmental Quality Act (CEQA), Cal. Pub. Res. Code § 21000 et seq., requires environmental reviews for projects undertaken by, funded by, or requiring a permit from a public agency and requires adopting reasonable mitigation measures to protect the environment. The National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., requires federal agencies to take a "hard look" at the environmental impacts of major federal actions with the potential for significant

environmental effects. Like CEQA review for state projects, NEPA review is broadly required for actions on federal public lands – like mining, timber harvesting, or special permitted events – or that require federal funding or approval.

4.3 Regulators' Approach to Policy and Enforcement

California environmental law and regulation is broadly protective of the health and safety of the people of California. Though on an upward trajectory, California cities have poor air quality compared to the rest of the United States. California has been experiencing longer periods of drought due to climate change. In response, the California legislature has passed ambitious legislation aimed at improving the environmental quality in California, including:

- AB 32 – a landmark 2006 law that required California to reduce climate pollutants to 1990 levels by 2020 – a goal which was met early;
- SB 32 – requires California to reduce climate pollutants to 40% below 1990 levels by 2030; and
- Cal. Health & Safety Code § 40001 – provides state standards for air quality and authorises state and local agencies to regulate to achieve those standards.

Enforcement priorities can vary by region or by year-to-year, but there has been a general trend towards increased enforcement regarding GHG emissions (including against improper generation, storage, transport, or use of products containing solvents that create GHGs) and improper waste disposal. If California agencies or District Attorneys initiate formal enforcement proceedings, they tend to seek significant penalties to incentivise compliance.

4.4 Transferring Permits/Approvals

Whether an environmental permit may be transferred depends on the issuing body, the permit's terms, and statutory limits on transfer. Under California Water Code § 1702, a permission for a transfer may only be granted if the petitioner shows that the change will not harm other water users or public trust resources. In contrast, under the South Coast Air Quality Management District's rules, permits to operate equipment may not be transferred as part of a sale and the new owner must apply for a change of ownership.

Even where regulation or law allows for transfer, individual permit terms apply and may limit or prohibit assignment or transfer.

4.5 Consequences of Breaching Permits/Approvals

California agencies typically seek to address permit non-compliance through the administrative process. For example, if an inspection by the local Air Quality Management District finds that a business is not operating in accordance with its permit terms or applicable clean air rules and regulations, it may issue a Notice to Comply either requesting additional information or instructing the entity to correct a minor violation. For more serious non-compliance, the Air District may issue a Notice of Violation, subjecting the entity to daily penalties. If a business is unable to move into compliance immediately, the business may petition for a variance from a hearing board in the interim. Civil and criminal enforcement proceedings are also possible based on the severity of the violation. A similar process governs the compliance with stormwater permits under the Clean Water Act, which is implemented by the State Water Resources Control Board and the local regional water boards.

For permits that are subject to discretionary or mandatory renewals, compliance with the existing permit's terms and conditions is a common condition for renewal. Thus, failing to comply with a permit's terms and conditions may result in the denial of future permits.

5. Environmental Liability

5.1 Key Types of Liability

California entities that breach environmental laws may face administrative, civil, or criminal proceedings. Liability is often strict and limited to enumerated defences. Statutory penalties may be severe, such as daily penalties of USD15,000 per day under Cal. Water Code § 13350, up to USD70,000 per violation under Cal. Health & Safety Code § 25189, and with enhanced penalties for intentional bad acts. Criminal

violations warrant harsher sanctions, such as imprisonment and fines of up to USD250,000 per day under Cal. Health & Safety Code § 25189.5. In addition, California may order the violator to clean up or abate the violation, or else tax the cost of cleanup to the violator.

For statutes with citizen suit provisions, violators may be further subject to attorney's fees and costs of suit. Fee awards apply the lodestar calculation, where the prevailing plaintiff's attorneys receive a reasonable hourly rate for the hours reasonably spent in the litigation. Given California's high fee rates and the complexity of environmental litigation, fees and costs are often considerable.

Finally, tort law claims by aggrieved parties may result in compensatory damages and, for certain classes of conduct, punitive damages.

5.2 Liability for Historical Environmental Incidents or Damage

Present operators or owners of real property are liable for historical pollution on their premises. CERCLA Section 107 (a), RCRA, and California's Hazardous Substance Account Act define "potentially responsible party" to include current property owners and operators. Liability is strict, joint, and several, allowing the federal government, California agencies, or private parties to pursue the full cleanup costs against present owners and operators. In addition, potentially responsible parties may pursue contribution from each other.

Finally, CERCLA liability is retroactive, with current owners and operators liable for contamination that predates CERCLA's enactment, regardless of any nexus between the current owners and operators and the contamination. Owners who conducted "all appropriate inquiry" before purchasing the property may qualify as an "innocent purchaser" or "bona fide purchaser" under California or federal law, which provides certain protections against liability.

5.3 Key Defences

Liability for environmental law violations is often strict and limited to enumerated defences. CERCLA, 42 U.S.C. § 9607 (b), and California's Hazardous Substances Account Act limit defences to the following:

- acts of God;
- acts of war; and
- that an act or omission by a third party was the sole cause of the contamination.

In addition, both CERCLA and California law recognise an "innocent landowner defence", which applies to acquirers of real property who (i) did not know about the contamination and (ii) who engaged in all appropriate inquiries before the acquisition. A Phase I Environmental Site Assessment by a licensed environmental professional may qualify a purchaser for the innocent landowner defence, with some limitations, including that the assessment is no more than six months old at the time of purchase and the purchaser has no nexus to any potentially responsible party.

Other defences – such as statute of limitations or equitable considerations – may be available depending on the facts of the case.

6. Corporate Liability

6.1 Liability for Environmental Damage or Breaches of Environmental Law

California law holds corporations liable for (i) the actions or omissions of the corporation and (ii) tortious acts of employees or agents within the scope of employment under the doctrine of respondeat superior. Officers and directors may also be personally liable under the Responsible Corporate Officer doctrine if they had the power to prevent or remedy an environmental violation but failed to do so.

6.2 Environmental Taxes

The California Department of Tax and Fee Administration imposes an annual environmental fee on businesses that use, generate, or store hazardous materials. The fee applies to business entities operating in California that employ more than 100 employees, with the fee amount calculated based on the number of employees who worked more than 500 hours in California the prior year. Revenues from the environmental fee are used by the California Department of Toxic Substances Control for site remediation and administration of state cleanup programmes.

California also imposes environmental taxes across specific industries, including:

- hazardous waste generation and handling fees;
- electronic waste recycling fees;
- environmental mitigation surcharges on producers of plastic-covered materials;
- integrated waste management fees;
- lithium extraction excise taxes;
- marine invasive species fees; and
- natural gas surcharges.

6.3 Incentives, Exemptions and Penalties

California offers various incentives for environmentally responsible business entities, including:

- sales and use tax exclusions for manufacturers of clean and alternative energy vehicles;
- research and development tax credits;
- tax incentives for transitioning to zero emissions vehicles; and
- tax deductions for donating conservation easements.

Most California environmental regulations adjust penalties up for recalcitrant or repeat offences and adjust penalties down for co-operation with the regulators and voluntary reporting of environmental incidents.

6.4 Shareholder or Parent Company Liability

California law treats a corporation as a distinct and separate legal entity from its stockholders, officers, or directors. Piercing the corporate veil and imposing liability on shareholders or a parent company is thus a departure from the normal rule. Before doing so, a reviewing court must find both (i) a unity of interest and ownership between the corporation and its shareholders and (ii) that respecting the corporate form on the facts before the court would work an inequity. Among the factors courts consider in weighing piercing are:

- whether the corporation and its shareholders commingled funds and assets;
- whether the corporation disregarded corporate formalities, like board meetings or proper record keeping;
- whether the corporation and its owner have identical offices, employees, directors, or officers;
- whether the corporation is inadequately capitalised; and
- whether corporate assets have been diverted for personal use.

6.5 ESG Requirements

Signed into law by Governor Newsome in 2023, SB 253, SB 261, and AB 1305 impose ESG reporting requirements on businesses in California. SB 253 applies to companies (i) formed in the United States; (ii) doing business in California; and (iii) with annual revenues exceeding USD1 billion. Covered entities must annually disclose (i) their direct GHG emissions (Scope 1); (ii) indirect GHG emissions from their consumption of electrical energy (Scope 2); and (iii) upstream and downstream GHG emissions within the entities' value chain, such as emissions related to purchased goods and services, business travel, and employee commutes.

SB 261 applies to companies (i) formed in the United States; (ii) doing business in California; and (iii) with annual revenues exceeding USD500 million. Covered entities must publish a climate-related financial risk report and publish the report on the entities' website.

AB 1305 applies to businesses selling voluntary carbon offsets in California and requires covered entities to disclose on their company website specific details about their participation in carbon offset projects and accountability measures if those projects are not completed or do not achieve their stated emissions reduction or removal benefits. In addition, companies that purchase voluntary carbon offsets in California or who make marketing claims regarding their achievement of net zero emissions or carbon neutrality must disclose on their company websites details about how they determined they have achieved those claims and, if they purchased carbon offsets, details about the sellers and projects.

SB 253 and SB 261 direct the California Air Resources Board to promulgate regulations to implement these disclosure requirements, which are forthcoming. All three statutes face legal challenges from industry groups. Thus, the applicability and scope of these laws is still unclear. However, because California is a leader in combatting climate change, the trend

towards ESG requirements for companies doing business in California will likely continue.

6.6 Environmental Audits

The California Code of Regulations Section 5280 (m) defines "Environmental Audit" as "an investigation that may be required by a lender or a corporation into the applicant's operations and compliance with federal, state and local environmental laws, regulations and rulings, which would indicate whether the facility is, or is likely to become, contaminated". However, California does not impose a general environmental audit requirement. Still, California requires thorough environmental reviews in permitting through CEQA and has begun imposing disclosure requirements regarding environmental impacts through statutes like SB 253 and SB 261. California will likely continue to expand environmental impact reporting requirements on companies within the state.

7. Personal Liability

7.1 Directors and Other Officers

In imposing liability on directors and officers, California follows the Responsible Corporate Officer doctrine. Under the doctrine, officers and directors are liable for violations of strict liability statutes that protect the public welfare when the officers and directors (i) were in a position of responsibility that allowed them to influence the corporation's activities or policies; (ii) had the ability to influence the corporation's actions that caused the violation; and (iii) either caused the violation or failed to stop the violation. For example, in *People v Roscoe*, 169 Cal. App. 4th 829, 839 (2008), the Third District of the California Court of Appeal applied this doctrine in holding two officers, directors, and shareholders liable for leakage from an underground gasoline storage tank.

Officers and directors may also be liable under the Responsible Corporate Officer doctrine for violations of the Clean Air Act and Clean Water Act. See *United States v Iverson*, 162 F.3d 1015, 1022-25 (9th Cir. 1998) (applying Responsible Corporate Officer Doctrine in Clean Water Act case based on 33 U.S.C. § 1319 (c)(6)'s definition of "person" as including "any responsible corporate officer").

In addition, officers and directors may be personally liable for tortious acts that they commit, authorise, negligently fail to prevent, or ratify, regardless of whether the corporation is also liable.

8. Insurance

8.1 Environmental Insurance

Environmental and pollution liability insurance is available in California to help mitigate the risk of site contamination and associated liability from business operations. Commercial and general liability insurance policies may also provide coverage for some environmental liability, although environmental risks tend to be excluded. Like other insurers, environmental insurance providers are regulated by the California Department of Insurance and required to meet financial strength requirements. California companies are not subject to a blanket requirement to purchase environmental insurance, although specific programmes do require a qualified policy. For example, California's cleanup loan programme requires the borrower to obtain a qualified environmental insurance policy before disbursing funds (Cal. Health & Safety Code § 80520).

Environmental insurance can also play an important role in real estate transactions, acting like title insurance to protect the purchaser from the risk of unknown contamination. These policies are generally expensive, subject to exclusions, and limited in duration. Still, they are sometimes a necessary tool in getting a deal across the finish line.

9. Lender Liability

9.1 Financial Institutions/Lenders

Under both CERCLA and California's Hazardous Substance Account Act, lenders who hold mortgage or other security interests in contaminated properties are not liable for cleanup costs unless the lenders actively participated in or managed the activities that caused the contamination. Similarly, lenders do not become potentially responsible parties solely by virtue of acquiring title to a contaminated property through foreclosure. Those protections may be lost, however,

if post-foreclosure the lender continues to operate, direct, or maintains the operation of the property in a manner that contributes to further contamination. However, lenders are allowed to manage and maintain the property post-foreclosure to protect the security interest.

9.2 Lender Protection

Lenders may protect themselves from potential CERCLA or California Hazardous Substance Account Act liability by:

- avoiding participation in management or control of the property or facility, except as necessary and appropriate to protect their security interest;
- obtaining and maintaining indicia of ownership as defined by EPA's regulations at 40 CFR § 280.200 (d); and
- in the event of foreclosure, winding up operations and liquidating the facility as soon as commercially reasonable.

10. Civil Liability

10.1 Civil Claims

Companies in California may face civil liability to regulators under both federal and California environmental statutes. Some environmental statutes, like the Clean Water Act and California's Prop 65, provide for citizen suit enforcement. Companies may also face liability under common law theories like negligence, nuisance, and trespass for environmental effects that harm neighbouring landowners. Companies may also be liable at contract or for fraud in real property transactions.

10.2 Exemplary or Punitive Damages

In general, the proper measure of damages in California civil actions is compensatory damages (Cal. Civil Code § 3333). Punitive damages are disfavoured under California law and limited to the enumerated circumstances in Civil Code Section 3294: oppression, fraud, or malice. A party seeking punitive damages must plead specific facts satisfying the Civil Code Section 3294 standards in the complaint and prove those facts by clear and convincing evidence at trial. Where punitive damages are available, they are limited to what is necessary to punish and deter bad conduct and by the due process concerns explained by the US Supreme Court in *BMW v Gore* and *State Farm v Campbell*.

10.3 Class or Group Actions

Class action procedures are available for environmental cases in California where the proposed class satisfies the standards in California Code of Civil Procedure § 382 for state court or Federal Rule of Civil Procedure Rule 23 (b)(3) for federal district court. The party seeking class certification bears the burden to prove:

- numerosity – that the proposed class is too large to practically join all members to the action;
- commonality – that common questions of law or fact predominate over individual issues;
- typicality – that the proposed class members' claims or defences are typical to those of the class; and
- adequacy – that the proposed class members will adequately represent the interests of the class.

10.4 Landmark Cases

Landmark California environmental cases include the following.

- *Friends of Mammoth v Bd. of Supervisors*, 8 Cal. 3d 247 (1972) – held that CEQA's definition of "project" includes private activities that require government permission.
- *National Audubon Soc'y v Sup. Ct.* (Mono Lake), 33 Cal. 3d 419 (1983) – held that the California State Water Resources Control Board has an ongoing responsibility to determine whether water diversions are in the best interest of public trust resources.
- *Center for Biological Diversity v Dept. of Fish & Wildlife*, 62 Ca. 4th 204 (2015) – upheld California's use of AB 32's statewide GHG reduction goals as a reasonable standard for "significance" under CEQA but found agency failed to rationally explain how the reduction in the specific land use development at issue was adequate to support the statewide goal.
- *Association of Irritated Residents v EPA*, 10 F.4th 937 (9th Cir. 2021) – upheld EPA's approval of Cali-

fornia's Enhanced Enforcement Activities Program under the Clean Air Act.
- *City & County of San Francisco v EPA*, 604 US (2025) – held the Clean Water Act does not authorise EPA to impose "end-result" or "receiving water" limitations in NPDES permits.

11. Contractual Agreements

11.1 Transferring or Apportioning Liability

Indemnity clauses are generally enforceable in California. However environmental cleanup statutes like CERCLA, RCRA, and the California Hazardous Substance Account Act follow the "polluter pays" principle, which favours holding responsible parties financially accountable for the costs associated with pollution remediation and avoiding passing those costs on to the taxpayer. Under these statutes, indemnity clauses in contracts are generally enforceable among potentially responsible parties to allocate costs associated with cleanup among themselves. But all potentially responsible parties remain jointly and severely liable to the government in a cost recovery action. Indemnity clauses may also factor into a court's analysis during the equitable allocation phase of a cost recovery proceeding.

12. Contaminated Land

12.1 Key Laws Governing Contaminated Land

Several statutes govern the cleanup of contaminated sites in California, including:

- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), 42 U.S.C. § 9601 et seq. – federal law providing for cleanup of polluted sites and passing the costs of cleanup to potentially responsible parties;
- Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq. – federal law regulating hazardous materials, solid and municipal waste, and underground storage tanks;
- California Hazardous Waste Control Law (HWCL), Cal Health & Safety Code § 25000 et seq. – California law regulating generation, transportation, use, and disposal of ignitable, corrosive, reactive, or toxic wastes; and
- California Hazardous Substances Account Act (HSAA), Cal Health & Safety Code § 78000 et seq. – California law authorising the California Department of Toxic Substances and Control to respond to hazardous substances releases and to hold responsible parties liable.

Regulatory authorities usually become involved when a property owner reports a release or threat of release of hazardous substances on their property, often following due diligence at time of sale. At that time, the authorities usually require delineation of the contamination in the subsurface, a conceptual plan for remediation of the contamination and mitigation of threat of exposure, and an agreement to conduct the remediation to protect human health and the environment. California considers all groundwater to be potential drinking water; therefore, any groundwater with contaminants exceeding regulatory standards must be remediated to meet those standards, regardless of the use of the groundwater. California agencies require an agreement to pay for the government's oversight, in addition to the costs for investigation and remediation.

12.2 Clearing Contaminated Land

Both federal and California law follow the "polluter pays" principle in assigning the costs of site cleanup. Under both federal and California law, "potentially responsible parties" may be sued for cost recovery by public or private entities who remediate contaminated land. Potentially responsible parties are:

- the current owners and operators of a contaminated site (even if they were not the actual polluters);
- the prior owners and operators of the contaminated site at the time of the contamination;
- entities which arranged for the contaminating substances to be disposed of at the site; and
- transporters which brought the contaminating substances to the site.

12.3 Determining Liability

Liability under CERCLA, RCRA, and California law is strict, joint, and several. The government or private party that performed the cleanup may seek cost recovery against any or all potentially responsible parties.

The potentially responsible parties may, in turn, seek contribution from each other for the cleanup costs. Courts have broad discretion in equitably allocating costs among multiple potentially responsible parties.

12.4 Proceedings Against Polluters

Both federal and state law provide causes of action for government agencies and aggrieved parties to pursue claims against polluters. To initiate and maintain proceedings in federal court, a plaintiff must have "standing" throughout the case, a doctrine that flows from Article III of the US Constitution's "cases or controversies" limit on federal court jurisdiction. Standing comprises three elements:

- injury-in-fact – the plaintiff must have suffered (or face an imminent) legally-recognised harm;
- traceability – the plaintiff's injury must have resulted from the alleged actions of the defendant; and
- redressability – the court must have the power to remedy the plaintiff's injury.

In addition, the case must not become moot before a final resolution and, for statutory claims, the plaintiff's harms must fall within the zone of interests Congress sought to protect through passing the law.

California law imposes similar requirements. State courts are not subject to Article III's jurisdictional limits and the California Constitution lacks a parallel case-or-controversy requirement. California generally requires that the plaintiff has suffered some injury and so is motivated to adequately develop and represent the issues to the tribunal. Unlike in federal court, however, the California legislature may – by statute – permit individuals to sue and seek statutory remedies even if they have not suffered any concrete harm.

In practice, standing requirements are not usually difficult to meet in environmental cases; a neighbouring landowner whose property is contaminated by a release of a hazardous substance or a member of the public whose use and enjoyment of public lands is diminished by an improperly issued permit will have standing to sue.

12.5 Investigating Environmental Accidents

The California Department of Toxic Substances Control (DTSC) carries out site inspections and responds to hazardous substances releases, including on an emergency basis. If DTSC cleans up a contaminated site, the agency will seek to tax those costs back to potentially responsible parties through a cost recovery action. Companies may also pursue voluntary cleanup agreements with DTSC and potentially avoid costly civil penalties. In some counties, DTSC delegates its inspection authority to Certified Unified Program Agencies (CUPAs), which report to DTSC.

13. Climate Change and Emissions Trading

13.1 Key Policies, Principles and Laws

California is a leader in combating climate change and curbing the GHG emissions. Starting with AB 32 in 2006 – which required California agencies to reduce climate pollutants to 1990 levels by 2020 – California has consistently worked towards reducing climate pollutants. The California Air Resources Control Board has jurisdiction to regulate sources of GHG emissions in California and works to achieve state emissions reduction goals.

California has taken a multi-pronged approach to combatting climate change. In addition to the corporate disclosure requirements discussed above, California's cap and invest programme seeks to reduce GHG emissions by private actors through steady increases in the price of climate pollution. The programme implements a statewide cap on GHG emissions, forcing emitters to either pay more for emissions allowances or reduce their emissions. Covered entities are subject to reporting and verification requirements. And revenues from cap and invest are deposited in the California Climate Investments programme, which funds projects aimed at reducing climate change.

13.2 Targets to Reduce Greenhouse Gas Emissions

California has ambitious goals to cut GHG emissions in coming years. Following the success of AB 32, SB 32 aims to reduce GHG emissions to 40% below 1990 levels by 2030 and AB 1279 seeks to achieve carbon

neutrality and total GHG emissions at 85% below 1990 levels by 2045. SB 100 and SB 1020 establish clean electricity targets. SB 1383 sets goals for short-lived climate pollutant reductions. In short, California remains at the forefront of combating climate change, and future climate legislation is likely.

14. Asbestos and Polychlorinated Biphenyls (PCBs)

14.1 Key Policies, Principles and Laws Relating to Asbestos and PCBs

Asbestos is a heat and corrosive-resistant building material that was widely used in commercial and residential construction until the late 20th century, when asbestos exposure was linked to cancers, and specifically mesothelioma. Asbestos is not completely banned in California, but its use – as well as abatement and removal by contractors – is heavily regulated by the California Department of Industrial Relations Division of Occupational Safety and Health (Cal/OSHA).

Polychlorinated Biphenyls (PCBs) are a class of highly toxic chemicals that were used in industrial processes until the manufacture of PCBs was banned in 1979 by the federal EPA under the Toxic Substances Control Act. EPA has not delegated authority under the Toxic Substances Control Act to California, so the EPA is the lead regulatory agency for PCB cleanups.

15. Waste

15.1 Key Laws and Regulatory Controls

At the federal level, hazardous and non-hazardous solid waste is controlled by RCRA. Under RCRA, EPA authorises California to implement its own waste management programmes, which it does under the Hazardous Waste Control Law, California Health and Safety Code Sections 225100 et seq.

Solid and municipal waste in California is regulated by the California Department of Resources Recycling and Recovery (CalRecycle), which implements California's integrated waste management programme, Cal. Pub. Res. Code § 40000 et seq., and regulates generators and transporters of solid waste as well as landfills. Under the California Integrated Waste Management Act (AB 939), local jurisdictions are required to create and implement solid waste management plans and divert 50% of their waste from landfills through recycling or other means. Recently, California adopted it's Short-Lived Climate Pollutant Reduction Strategy, SB 1383, which requires a further diversion of green and organic materials from landfills to curb methane emissions.

In addition to hazardous waste and non-hazardous solid waste, California regulates medical waste under the Medical Waste Management Act of 2017, California Health and Safety Code, Sections 117600-118360.

15.2 Retention of Environmental Liability

Under CERCLA, RCRA, the California Hazardous Substances Account Act, and the California Hazardous Waste Control Law, generators – entities whose act or process produces waste – remain liable even after transfer or disposal if their actions contributed to improper handling, transportation, or disposal of waste.

15.3 Circular Economy Requirements

California is developing it's Zero Waste Plan, which aims to reduce waste generation and promote a circular economy. Authorised by the 2023 Budget Act, SB 101, CalRecycle published a baseline report in July 2024 that detailed the cost of pollution from waste on California's air, water, food, and land quality. The comment period on CalRecycle's draft Zero Waste Plan ran in October 2025 and the final plan is due for publication in 2026.

15.4 Rights and Obligations Applicable to Waste Operators

Rights and obligations regarding waste management are defined by a comprehensive framework of federal, state, and local laws that divide the waste into various categories, diverting non-hazardous waste to specialised disposal facilities to manage the hazardous characteristics of the waste, while managing the non-hazardous solid waste accumulation in municipal landfills that have different requirements.

Waste operators are legally obligated to ensure the type of waste accepted is managed appropriately. It

is generally the legal obligation of the waste generator to segregate and send the waste to the correct facility. The waste operator has the right to rely on the generator to correctly identify and segregate the waste; however, if a waste operator is notified that it was sent the wrong waste, it is legally obligated to report to the agency and attempt to mitigate any impacts.

Operators may seek compensation from generators for mitigation costs. If a waste operator does not comply with the regulations governing the waste facility, the governing agency may issue a notice of violation, require mitigation, and seek penalties. Egregious or repeat offenses may result in increased penalties and risk revocation of a permit to operate.

16. Environmental Disclosure and Information

16.1 Disclosure and Reporting Requirements

In addition to the emissions reporting requirements discussed above, businesses must submit information on hazardous materials or other environmental compliance matters to CalEPA through the California Environmental Reporting System (CERS) or to a local Certified Unified Program Agency (CUPA). Under the California Hazardous Substances Account Act, regulated entities must also report significant or emergency releases of hazardous substances to the California Governor's Office of Emergency Services or face civil penalties of up to USD25,000 per day and potentially increased liability for cleanup costs.

16.2 Public Environmental Information

Public information regarding ongoing property investigations and remediations is available at the DTSC's website and the State Water Resources Control Board's website. Settlements of enforcement actions can also be found at the California Air Resources Board (CARB) website. Self-reporting of stormwater sampling and compliance with the Industrial General Permit and the Construction General Permit is available at Stormwater Multiple Application and Report Tracking System (SMARTS) website.

In addition, members of the public may obtain information from public authorities through requesting public records under the California Public Records Act. Under the Act, any natural person, corporation, partnership, limited liability company, firm, association, or state or local agency may request public records. Requests may be in person, via mail, phone, or by email. Under the Act, the agency must respond within ten days as to whether it has the requested record and can produce it, extendable by a further 14 days in some circumstances.

16.3 Corporate Disclosure Requirement

See **6.5 ESG Requirements**, discussing ESG reporting requirements.

16.4 Green Finance

The California Alternative Energy and Advanced Transportation Financing Authority offers green finance programs aimed at incentivising energy efficient and sustainable construction and other projects. California's GoGreen Home Financing Program provides lower cost financing for residential energy upgrades to support California's transition toward carbon neutrality. Likewise, California's GoGreen Business Energy Financing Program incentivises lenders to help small businesses and non-profits build clean energy generation and storage upgrades, charging units for electric vehicles, and energy efficient retrofits in existing construction.

17. Transactions

17.1 Environmental Due Diligence

In the M&A setting, due diligence typically evaluates all properties owned and leased, and all operations, for compliance risk, potential contamination risk, and hazardous waste generator risk (including an assessment of the disposal facilities used by the company being acquired) to determine if any of these risks are material. Responsible due diligence for transactions involving potentially contaminated land follows the standards published by the American Society for Testing and Materials.

That begins with a Phase I Environmental Site Assessment (ESA) conducted by a qualified environmental professional. A Phase I ESA assesses the historical uses of a property to determine the potential risk of

past contamination. A Phase I ESA may satisfy CERCLA's "all appropriate inquiries" standard and allow a purchaser to assert the innocent landowner defence.

If a Phase I identifies any Recognized Environmental Conditions (RECs), it may be prudent for a buyer to conduct further investigation, including subsurface sampling, which would be memorialised in a Phase II ESA. A Phase II is not required to qualify as an innocent landowner; however, it may help a buyer assess future risk of environmental cleanup costs. A Phase I, and if appropriate, a Phase II is also helpful when leasing property for operations, especially if such operations may involve the use of hazardous substances.

New tenants should consider baseline sampling to assist in defence of future allegations of contamination.

17.2 Disclosure of Environmental Information

California law requires sellers and lessors of real property to disclose potential environmental contamination. California Health and Safety Code Section 78700 requires that owners who know or have a "reasonable cause to believe" of the release of a hazardous substance provide the buyer or lessee with a written disclosure. Failing to provide notice may result in a civil penalty of USD5,000, as well as potential civil liability to the purchaser or tenant. Federal regulations may also apply, including the federal EPA's lead-based paint disclosure rule.

17.3 Key Issues in Environmental Due Diligence

Transactions involving real property require diligence concerning the prior use and ownership of the property to identify any potential releases of hazardous substances that may require remediation. Legal issues include:

- liability for remediation and potential damages for claims related to the contamination;
- real estate disclosure requirements;
- lender liability concerns;
- environmental insurance options;
- institutional control; and
- future closure of remedial action or permitted facilities at the property.

If the property in the transaction holds ongoing or future operations that may result in releases of hazardous substances, additional legal issues include:

- baseline of contamination;
- burden of proof of additional or exacerbation of contamination triggering liability for new or former operators and owners; and
- compliance with operation requirements and regulations.

For mergers and acquisitions or investments in industrial or consumer products, companies require diligence concerning compliance of prior operations with environmental, health and safety regulations and requirements, resulting in material risk, depending on the severity, including:

- proposition 65 warnings (both environmental and on products placed into the market in California by the target company);
- permits and licences (air, water, stormwater, hazardous waste); and
- waste management.

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