

Environmental Developments to Watch in California in 2023



January 12, 2023

AUTHORS

Kaitlyn Shannon, Gary Smith, Susan Smith, Jeff Clare, Jake Duginski, Liz Glusman, Claire McLeod

California is an epicenter of environmental policymaking and often a harbinger of laws and regulations adopted throughout the country, and there's no reason to think this will change in 2023. Beveridge & Diamond closely tracks developments, upcoming deadlines, and business implications for companies with operations in California.

Below we summarize the following key areas of activity we expect in 2023 and what companies should consider in preparation.

Cal/OSHA and COVID-19

CA Supreme Court Case

In April 2022, the Ninth Circuit Court of Appeals asked the California Supreme Court to decide whether employers can be responsible for non-employees' injuries caused by COVID-19. *Kuciemba v. Victory Woodworks, Inc.*, 31 F.4th 1268 (9th Cir. 2022). At issue is whether employers can have "take-home" liability when an employee allegedly contracts COVID-19 at work and then infects others, typically family members, who are non-employees. California courts have applied "take-home" liability in asbestos cases. Illness caused by asbestos, however, is more easily traceable to an employer that utilizes asbestos-containing products. COVID-19, in contrast, to asbestos-based illnesses, is highly contagious and individuals could be exposed to the virus from various sources.

Briefing at the California Court of Appeals concluded in late 2022. *Kuciemba v. Victory Woodworks, Inc.*, Case No. S274191. The California Supreme Court is not required to answer questions certified to it. If the Supreme Court does respond, an opinion is likely in the spring of 2023 and could clarify the scope of employer liability for COVID-19.

COVID-19 Prevention

By far Cal/OSHA's hottest topic in 2022 was COVID-19 Prevention Standards for California workplaces. In 2022 alone, Cal/OSHA's [COVID-19 Prevention Emergency Temporary Standards \(ETS\)](#) underwent three rounds of changes through emergency rulemaking processes. The current ETS, which entered into effect on May 6, 2022, expired December 31, 2022.

The [Non-Emergency COVID-19 Prevention Regulation](#) will take the place of the ETS and govern workplace requirements for the next two years. The Cal/OSHA Standards Board [approved](#) the Non-Emergency Regulation at its board meeting on December 15, 2022. The California Office of Administrative Law (OAL)

received the Non-Emergency Regulations for review on December 20, 2022 and has up to 30 working days to review and approve the final rulemaking. Once the OAL sends the final regulatory package to the Secretary of State, the Non-Emergency Regulation will enter into effect.

Employers should be aware of the following key features of the Non-Emergency Regulation that relax employers reporting obligations and alter how “close contacts” are defined:

- ◆ **Timeline:** The Non-Emergency Regulation will be in effect for two years from its effective date.
- ◆ **Exclusion pay / paid sick leave:** While the Non-Emergency Regulation still requires employers to exclude COVID-19 cases and other exposed employees from workplaces, employers are no longer required to provide exclusion pay to excluded employees.
- ◆ **Close contacts:** Employers are still required to notify “close contacts” of employees who had COVID-19 and entered the workplace environment. The Non-Emergency Regulation also changes how close contacts are determined in small vs. large indoor spaces. Now, employers have to base close contact determinations in different ways depending upon whether their workplaces are larger or smaller than 400,000 cubic feet per floor.
- ◆ **Returned cases:** Under the ETS, an employee that had COVID-19 and later returned to work was exempted from some requirements for 90 days (such as mandatory testing if they were identified as a close contact of a new COVID-19 case). The Non-Emergency Regulation reduces the period from 90 days to 30 days.
- ◆ **General COVID-19 exposure notifications:** The new regulations align with the [new Labor Code section 6409.6](#), which gives employers more flexibility in how they notify employees of potential COVID-19 workplace exposures. Employers may post notices “where notices to employees concerning workplace rules or regulations are customarily posted” such as an online dashboard in lieu of written notices.
- ◆ **Regular outbreaks:**
 - ◆ Maintains the same threshold for regular outbreaks as the ETS (three cases within 14 days), but allows the California Department of Public Health (CDPH) to establish different thresholds which would then control.
 - ◆ Aligns with new Labor Code provisions by eliminating the requirement that employers report cases during regular outbreaks to local health departments.
 - ◆ Allows a workplace to exit outbreak status when there are one or fewer cases for 14 days, rather than zero cases.
 - ◆ Still requires masking and testing for exposed groups in regular outbreak.
- ◆ **Major outbreaks:**
 - ◆ Keeps the threshold for major outbreak as the ETS (20 or more cases within a 30-day period).
 - ◆ Adds a new requirement that employers must report major outbreaks to Cal/OSHA (rather than local health departments, as was required under the ETS).
 - ◆ Still mandates that employers implement physical distancing requirements for employees that were in an exposed group during a major outbreak.

- ◆ **Ventilation:** Employers are required to take one or more actions to improve ventilation and lower COVID-19 transmission, by either maximizing the supply of outside air to a workplace, applying the highest level of filtration possible given existing ventilation systems, or deploying High Efficiency Particulate Air (HEPA) filtration units.

Renewed Vigor in Other Enforcement Programs?

The COVID-19 pandemic stymied most in-person activities for the past few years, including Cal/OSHA's enforcement programs. As Californians return to work in person more and more, we expect to see Cal/OSHA resume pre-pandemic programs such as those involving in-person inspections.

One area garnering public attention is the workplace hazard presented by cut stone and stone product manufacturing, which exposes workers to "respirable crystalline silica." When crystalline silica enters lungs, it can cause an incurable fatal illness known as silicosis, as lung tissue impacted by the silica continues to scar and deprives the body of oxygen. Cal/OSHA revised [applicable standards](#) in 2019 and conducted inspections at facilities engaged in manufacturing, cutting, polishing, shaping, and finishing engineered stone through early 2020 under its [Special Emphasis Program](#). However, according to [news reports](#), no new inspections were conducted through the middle of November 2022. As in-person activities ramp up again, it seems likely that Cal/OSHA will jumpstart enforcement efforts for high-visibility issues like respirable crystalline silica. In fact, the CDHP updated its [Silica Safety Resources for Stone Fabricators](#) on December 5, 2022—another sign of an expected ramp-up in enforcement.

Chemicals and Emerging Contaminants

PFAS

1. Drinking Water Standards

Nationally, the U.S. Environmental Protection Agency (EPA) is moving ahead aggressively to regulate two PFAS (perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS)) in drinking water under the Safe Drinking Water Act (SDWA). Throughout 2022, [EPA carried out actions](#) in line with its March 2021 decision to establish National Primary Drinking Water Standards for PFOA and PFOS under the SDWA. Under the SWDA, primacy agencies (typically a state, tribal, or territorial agency) implement EPA's drinking water regulations at public water systems in their jurisdictions. EPA [aimed](#) to propose a National Drinking Water Regulation for PFOA and PFOS by the end of 2022. Although a proposed rule has been pending at the Office of Management and Budget since October, EPA has yet to publish a final proposal. EPA plans to hold [virtual community engagements throughout 2023](#) for each of EPA's ten Regions, as well as engage directly with tribal communities, in order for communities to give feedback to EPA on the agency's PFAS Roadmap.

California agencies are not waiting for a new EPA regulation, and are expanding state-level PFAS work in 2023. The California Environmental Protection Agency (CalEPA) Office of Environmental Health and Hazards Assessment (OEHHA) is expected to release first-of-its-kind public health goals (PHGs) concerning PFOA and PFOS in drinking water for public comments in the first quarter of 2023. PHGs represent the amount of a chemical in drinking water at which, even with a lifetime of exposure, no adverse health effects are expected. While PHGs are not per-se enforceable regulatory standards, they guide State Water Resource Control Board's decisions in setting drinking water standards. The Control Board is required by law to set [Primary Maximum Contaminant Levels](#) (MCLs)—the enforceable level of a contaminant that public water systems must not exceed—as close as possible to OEHHA-established PHGs (while also considering costs and

technological feasibility). Public water systems must regularly sample drinking water sources to ensure they comply with MCLs. If it exceeds the MCL, the water can still be delivered to customers but must then be tested on a monthly basis for six months and reported to the state. If the average of the tests exceeds the MCL, a water system is deemed out of compliance and receives a formal citation that prevents continued use of that water source for drinking water. The Water Resources Control Board is also evaluating the prevalence of PFAS in California's public water systems and plans to sample approximately 400 public water systems for certain PFAS (PFOA, PFOS, PFHxS, and PFBS) on a quarterly basis as of 2023 per a [PFAS General Order](#) (signed Oct. 31, 2022). The monitoring aims to improve community-level PFAS detection, response, and treatment. Lastly, the Control Board's Division of Drinking Water and Division of Water Quality will continue efforts focused on testing and monitoring PFAS levels in disadvantaged communities throughout 2023.

2. Proposition 65

Although lead and lead compounds still comprised the largest number of Proposition 65 (Prop 65) Notices of Violation filed with the California Attorney General, PFAS are likely to comprise a growing number of Prop 65 actions in 2023. The increase of PFAS Prop 65 actions is in part due to OEHHA's recent decisions to add certain PFAS to the list of chemicals "known to the state" to cause cancer or reproductive harm. [PFOA](#) and [PFOS](#) were first added to the Prop 65 list for developmental toxicity in 2017. In 2021 OEHHA listed PFOS and its salts and transformation and degradation precursors to the list for cancer, and in 2022, PFOA was also added to the list for cancer. [Perfluorononanoic acid \(PFNA\)](#) and its salts, were listed in 2021 for reproductive toxicity. OEHHA is currently considering (but has yet to list) [perfluorodecanoic acid \(PFDA\)](#) and its salts for reproductive toxicity. We may see more PFAS considered and added to the Prop 65 list in 2023 and beyond.

3. California Cookware

Assembly Bill 1200 ("AB 1200"), addressing "Food Packaging Containing PFAS" and "Chemical Disclosures for Cookware" will be sure to shake up the kitchen goods and food packaging industry. (AB 1200 is codified at California Health and Safety Code [§§ 109000 – 109014](#).)

- a. The first part of AB 1200, on Food Packaging Containing PFAS, strictly curbs PFAS in food packaging made from paper or plant fibers (including beverage containers, take-out containers, product boxes, and eating utensils). As of January 1, 2023, AB 1200 prohibits the sale and distribution of any food packaging that has any intentionally added PFAS, PFAS that result from the breakdown of other chemicals in the packaging, or PFAS at or above 100 ppm (measured in total organic fluorine).
- b. AB 1200 imposes new labeling and disclosure obligations for cookware that has an array of "candidate chemicals" identified by California's Department of Toxic Substances Control (DTSC), including PFAS. The obligations fall on manufacturers of cookware, i.e. pots, pans, skillets, grills, baking sheets, baking molds, trays, bowls, and cooking utensils. As of January 1, 2023, manufacturers of cookware containing one or more intentionally added chemicals from DTSC's list in the cookware's handle or food-contact surface must disclose on product websites the chemicals in the cookware on the designated list and provide customers with links to DTSC resources. Then, starting January 1, 2024, manufacturers selling cookware that has one or more intentionally added chemicals from DTSC's "Designated list" in the cookware's handle or any food-contact surface, must list those

chemicals on the product's label. AB 1200 also limits manufacturers ability to claim that cookware is "PFAS free" or free of any specific chemical depending upon the other chemicals intentionally added to the cookware.

4. Cosmetics & Textiles

On September 29, 2022, Governor Newsom signed into law two bills that ban PFAS in textiles and cosmetics, respectively: [Assembly Bill 1817](#) ("AB 1817") and [Assembly Bill 2771](#) ("AB 2771"). Although the bills do not impose requirements until 2025 and 2026, manufacturers and retailers should plan for the mandatory changes as soon as possible as they will impact their national, and potentially international, product strategies for an array of consumer products.

AB 1817 (codified at Cal. Health & Safety Code §§ 108970-71) prohibits the manufacture, distribution, or sale of any new "textile articles that contain regulated perfluoroalkyl and polyfluoroalkyl substances or PFAS" in California starting January 1, 2025 (except for certain outdoor apparel for severe wet conditions). The law applies to "any item made in whole or part from a natural, manmade, or synthetic fiber, yarn, or fabric," including things like apparel, accessories, handbags, shower curtains, furnishings, towels, napkins, and tablecloths. While outdoor apparel may continue to use PFAS, if it does, it must be clearly labeled as "Made with PFAS chemicals" on both the product and online listings. AB 1817 also imposes additional certification and PFAS alternative requirements.

AB 2771 (codified at Cal. Health & Safety Code §§ 108981-82) prohibits the manufacture, distribution, or sale of any cosmetic product that contains "intentionally added PFAS" in California starting January 1, 2025. This is a wide expansion of California's 2020 ban of 13 specified PFAS substances in the "[Toxic-Free Cosmetics Act](#)"—now all PFAS will be banned from cosmetics.

6PPD

On May 20, 2022, DTSC initiated rulemaking to list motor vehicle tires containing 6PPD as a Priority Product under the Safer Consumer Products (SCP) regulations. This triggered obligations on manufacturers of motor vehicle tires to conduct an alternatives analysis to identify, among other things, whether 6PPD is necessary in the product and if there is a safer alternative. The analysis is underway and its outcome will determine the next steps the agency takes.

Prop 65

Important appellate decisions in 2022, both good and bad from the standpoint of Prop 65 defendants, will reshape the landscape for Prop 65 enforcement actions in 2023 and beyond.

First the bad: *Lee v. Amazon.com, Inc.*, 76 Cal.App.5th 200, a decision of the California Court of Appeal, appears to hold that the mere presence of a listed chemical in a product is sufficient to sustain liability. Further, a retailer can be found to have "knowingly" caused an exposure to a listed chemical if evidence establishes that the retailer should have known that the listed chemical was present in the product.

On the other hand, the long-running acrylamide litigation, beginning with a lawsuit against Starbucks and other coffee retailers filed in 2011, has produced two positive significant developments. First, OEHHA issued a regulatory determination that consumption of acrylamide in coffee posed no significant risk of cancer, leading the trial court to dismiss the Starbucks action. The Court of Appeal upheld the validity of the regulation and affirmed the dismissal. *Council for Education and Research on Toxics v. Starbucks Corp.*, 84 Cal.App.5th 879 (Cal.Ct.App. 2022). Second, the California Chamber of Commerce has used the

uncertainty about the carcinogenicity of acrylamide to obtain a federal court injunction against actions seeking to enforce Prop 65 regarding exposures to acrylamide in food, which the Ninth Circuit recently upheld. *California Chamber of Commerce v. Council for Education and Research on Toxics*, 29 F.4th 468 (9th Cir. 2022). The Chamber persuaded the courts that a government requirement that a party provide a warning including the false statement that acrylamide is “known” to cause cancer violates the First Amendment.

Finally, in a case involving the sale of bongos, the Court of Appeal recently ruled that a party selling a product that could be used in a way that led to an exposure to a listed chemical (in this case, cannabis) did not directly cause an exposure and was not subject to the Prop 65 warning requirement. *Environmental Health Advocates, Inc. v. Scream, Inc.*, 83 Cal.App.5th 721 (Cal.Ct.App. 2022). Over the years, private enforcers have brought many Prop 65 claims for products that did not themselves contain listed chemicals, such as charcoal grills whose users could be exposed to listed chemicals in smoke and stone cutting tools that could lead to exposure to crystalline silica in rock. 2023 may tell us whether *Scream* puts an end to that genre of Prop 65 claims.

Climate Regulation and Mobile Source Emissions

California Air Resources Board

The California Air Resources Board (CARB) closed 2022 with a [self-described](#) “unprecedented climate action plan to shift the world’s 4th largest economy from fossil fuels to clean and renewable energy” when it approved the final [2022 Scoping Plan for Achieving Carbon Neutrality](#) (“2022 Scoping Plan”) on December 15, 2022. The 2022 Scoping Plan outlines a sector-by-sector roadmap of how the state will cut greenhouse gas emissions by 85% below 1990 levels and achieves carbon neutrality in 2045. It radically accelerates and increases the pace and scale of climate programs already in place in the state to compliment and implement recent legislation and directions from Governor Gavin Newsom. The 2022 Scoping Plan will purportedly (among many other things): reduce fossil fuel consumption (liquid petroleum) to less than 1/10th of today’s use – a 94% reduction in demand; reduce smog-forming air pollution by 71%; create four million new jobs given massive shifts in the energy, transportation, and infrastructure sectors; and save Californians \$200 billion in health costs due to pollution by 2045.

CARB’s finalization of the 2022 Scoping Plan came a month after the Board approved a \$2.6 billion [Fiscal Year 2022-23 Funding Plan for Clean Transportation Incentives](#) on November 17, 2022. The plan constituted the largest investment as of that date by the state for clean cars, trucks, mobility options, and [according to the agency](#) represented the “largest-ever investment in equity, expanding clean transportation in communities hardest hit by pollution.”

California Energy Commission

It didn’t take long for the California Energy Commission (CEC) to one-up CARB on setting the record for investment in a clean transit future. On December 13, 2022, the [CEC approved](#) a \$2.9 billion investment for Zero-Emission Vehicle (ZEV) transportation via the [2022-2023 Investment Plan Update](#). Compared to the CEC’s 2019 Clean Transportation Program, this represents a 30 fold increase in funding with an additional \$2.4 billion from the state budget that will be spent over the next four years (of which at least 50% is targeted to benefit priority populations). Benefits are anticipated in the form of 90,000 new electric vehicle (EV) chargers across the state, which will more than double the 80,000 chargers currently installed. The Investment Plan Update aims to achieve the state’s goal to deploy 250,000 chargers by 2025. The \$2.9 billion are allocated across: light-, medium-, and heavy-duty ZEV infrastructure; hydrogen

refueling infrastructure; zero- and near-zero-carbon fuel production and supply; low-carbon fuels; ZEV manufacturing; workforce development; and emerging opportunities such as aviation, locomotive, marine vessels, and vehicle-grid integration. Funding for the CEC's 14-year old Clean Transportation Program is scheduled to phase out at the close of December 2023.

The CEC is also moving quickly to build out its new flexible demand appliance standards program. The CEC already has one of the most expansive and heavily-enforced appliance efficiency programs in the world. Now California will be one of the first jurisdictions with mandatory flexible demand standards. Senate Bill 49 (Skinner, Chapter 697, Statutes of 2019) requires the CEC to set feasible and cost effective standards, with the aim of reducing greenhouse gas emissions by scheduling, shifting, or curtailing appliance operations with consumer consent. The CEC is currently developing standards for four product categories: electric clothes dryers, dishwashers, pool pump controls, and thermostats. The draft standards are available [here](#). Once these rulemakings are completed, the CEC will likely develop standards for additional types of appliances.

In another action aimed at improving load flexibility in California's electric grid, on February 8, 2023, the CEC will adopt updates to its Load Management Standards (LMS) regulations to require the five largest electric utilities in California and the community choice aggregators within their service territories to:

- ◆ Develop retail electricity rates that change at least hourly to reflect locational marginal costs and submit those rates to the utility's governing body for approval.
- ◆ Update the time-dependent rates in CEC's Market Informed Demand Automation Server (MIDAS) database whenever a rate is approved or modified.
- ◆ Implement a single statewide standard method for providing automation service providers with access to their customers' rate information.
- ◆ Develop a list of cost-effective automated price response programs for each sector and integrate information about time-dependent rates and automation technologies into existing customer education and outreach programs.

Climate Disclosure, Climate Reporting Bill

Momentum around climate disclosures was prevalent through efforts by the state's legislature, Insurance Commissioner, and Attorney General. California's State Assembly ultimately rejected [S.B 260](#) last year, the landmark Climate Corporate Accountability Bill that would have mandated both public and private companies to report on greenhouse gas emissions associated with their entire supply chain. The bill faced strong opposition from industry and was similar to the U.S. Securities and Exchange Commission (SEC)'s [climate disclosure rule](#) which was proposed in March of 2022 – both factors which contributed to the bill's rejection. The bill's sponsor, Senator Scott Wiener, is likely to reintroduce the bill in 2023.

Insurance companies, however, were subject to Insurance Commissioner Ricardo Lara's effort to safeguard consumers against climate change through his [report and webpage](#) disclosing insurance companies' fossil fuel investments. The California Attorney General supported both an SEC proposal to require [companies' disclosure of financial risk posed by climate change](#) and another SEC proposal requiring [increased disclosure on companies' use of ESG criteria](#) in investment products. This support mirrors the California Attorney General's and other state attorneys general's increased attention to greenwashing and ESG marketing claims against corporations. Along with this trend has come an increase in civil litigation from private plaintiffs around these claims. Despite S.B. 260's failure, climate and ESG related reporting and litigation is certainly on the rise in California, making these issues of particular importance to monitor in the year ahead.

Zero Emission Vehicles

Various programmatic and regulatory developments from CARB in 2022 will impact manufacturers, businesses, and consumers in 2023 and beyond.

First, CARB's 2022 Scoping Plan will have a significant impact on the transportation industry. The Plan will propel the state's massive shift to ZEVs, increase the supply to zero-carbon alternative fuels (like electricity and hydrogen), and reduce the vehicle miles traveled by individuals on a daily basis (which relies on state, regional, and local transit, land use, and housing agencies' decisions and funding strategies).

Second, CARB finalized its [Advanced Clean Cars II Regulations](#) in August (which entered into effect November 30, 2022). Under the regulations, all new passenger cars, trucks and SUVs sold in California will be ZEVs by 2035. Car manufacturers must gear up to deliver an increasing number of zero-emission light-duty vehicles to the state every year starting in model year 2026. Sales of new ZEVs and plug-in hybrid electric vehicle (PHEV) must be 35% in 2026, and reach 68% by 2030, and hit 100% by 2035. The regulation builds on the [momentum already impacting California's ZEV market](#): last year ZEV sales comprised close to 18% of all new car sales in California (as of October 2022, over 250,000 ZEVs had been sold in the state). CARB's Advanced Clean Cars II Regulations has far reaching impacts as well. [According to CARB](#) "17 states have adopted all or part of California's low-emission and zero-emission vehicle regulations, as allowed under Section 177 of the Clean Air Act" meaning that "more than 35% of national new light-duty vehicle sales meet California automotive emissions standards."

Third, continued development on CARB's [Advanced Clean Fleets Regulations](#) in 2022 and into 2023 will largely shape the composition of the commercial auto industry. The Advanced Clean Fleets Regulations will impact medium- and heavy-duty vehicles, off-road yard trucks, and light-duty mail and package delivery vehicles with the goal of ensuring every Californian truck and bus fleet feasible is zero-emission by 2045. Owners of qualifying vehicle fleets will have to ensure their fleets are increasingly comprised of ZEVs beginning in 2024. In 2022, the Board held workgroups to inform its final proposal, focusing on issues like exemptions and how to address potential delays in infrastructure development or commercial availability of ZEVs / near-zero emission vehicles (NZEVs). These workgroup meetings will continue in 2023 and offer stakeholders and the public the opportunity to weigh in on this key component of California's climate regulations.

Zero Emission Locomotives

The rail industry will also need to keep an eye on California regulators as the state finalizes regulations hitting all areas of the industry in 2023. Specifically, CARB is developing measures to reduce emissions from railyards and locomotives operating in California in its [In-Use Locomotive Regulation](#). CARB staff aim to return with a final proposed regulation by the spring of 2023. The proposed regulation focuses on reducing diesel contaminants given that the rail industry is responsible for 11% of PM 2.5 and 15% of NOx coming from freight operations in California. At a [November 18 hearing](#), CARB staff outlined the proposed In-Use Locomotive Regulation which will impact line-haul, switcher, passenger, and historic locomotives. Some of the main features of the regulation are:

- ◆ A spending account through which locomotive operators set aside funds annually based on their emissions from the prior year (intended to reflect the estimated health costs of rail emissions to Californians). Spending account funds will only be used for purchasing, leasing, or renting the cleanest available locomotives (Tier 4, or ZE locomotives); remanufacturing such locomotives; or purchasing zero-emission infrastructure or rail equipment.
- ◆ A 23-year cap on the age of in-use locomotives beginning in 2030. However, older in-use locomotives would be permitted in the state if they operate in zero-emission configuration when inside of California.
- ◆ A requirement that any switch, industrial, or passenger locomotive built in 2030 or later operate in a zero-emission configuration at all times when inside of California.
- ◆ A requirement that any freight line haul locomotives built in 2035 or later operate in a zero-emission configuration at all times when inside of California.

CARB's November hearing had a healthy attendance of environmentalists, industry players, public transit agencies, environmental justice groups, public health advocates and professionals, and individuals. The attendees and their comments highlighted the number of competing concerns CARB must balance.

Importantly, EPA has also voiced its support for California's push toward zero-emission locomotives. On [November 9, EPA responded](#) to a 2016 and a 2017 petition from California to address harmful nitrogen oxide (NOx) and particulate matter (PM) emissions from locomotives. The federal agency "plans to propose revisions to existing locomotive preemption regulations to ensure they don't inappropriately limit California's and other states' authorities under the Clean Air Act to address their air quality issues."

Ports

California's port operations are largely impacted by California's climate advancements through drayage truck regulations. Existing regulations include [CARB's 2008 Truck and Bus Regulation](#), which requires drayage trucks to have been compliant in meeting a 2010 or newer model year engine standard by January 1, 2023. By the end of 2023, all combustion powered trucks must be registered on the CARB Online System to comply with this requirement. [CARB's development of the Advanced Clean Fleet Regulation](#) discussed above will further require drayage trucks to transition to zero-emission technology starting in 2024, with complete implementation by 2035. California ports are ramping up efforts to expand battery-electric and hydrogen fuel cell trucks, as well as charging infrastructure in anticipation of compliance with impending statewide ZEV and CARB Clean Fleet mandates. Stakeholders in related industries should monitor such progressions in the coming year.

Air Districts

AB 617, a landmark environmental justice statute passed by the California legislature in 2017, required air districts with nonattainment status to adopt timelines to ensure implementation of Best Available Retrofit Control Technology (BARCT) as soon as feasible, but no later than December 31, 2023. Since that time, affected air districts have been crafting and adopting such rules (the South Coast Air Quality Management District (SCAQMD), for example, has already adopted 14 such rules according to CARB). We expect a rush from affected air districts to finalize rules currently in development to meet the December 31, 2023 deadline.

In addition to BARCT implementation, AB 617 also provided a framework for identifying and funding communities (through community air monitoring or emission reduction programs, both of which are largely undertaken by air districts) that carry an outsized pollution burden. So far, 17 such communities have been targeted for support under the program. By February 2023, CARB intends to approve new communities for inclusion. Also in 2023, CARB will update its 2018 Community Air Protection Blueprint, which embodies the process for implementing AB 617. While details are currently sparse on the update, CARB's latest workshop on the effort reflects an intent to "reimagine" the program. At the very least, recently passed AB 1749 will require that the update include strategies to reduce criteria air pollutants and toxic air contaminants.

Air district rulemaking efforts will continue in 2023. SCAQMD has in its current rulemaking forecast new indirect source rules (for new and existing intermodal railyards and ports), refinery flare rules, and a suite of rules aimed at transitioning from RECLAIM to command-and-control regulations. The Bay Area Air Quality Management District's calendar includes rules and updates affecting solid waste facilities, refineries, and marine vessels, along with updates to indirect source review, new source review, and startup, shutdown, and malfunction emissions. And the San Joaquin Valley Air Pollution Control District is slated to adopt updates to meet federal equivalency requirements for offsets during new source review, as well as rules targeted at reducing volatile organic compounds from oil and natural gas production.

Environmental Justice

Environmental justice (EJ) has taken an increasingly important role in California's legislative and regulatory strategy. Several bills introduced last year involving amendments to the state's public utilities code (SB 1261), solid waste management (AB 1857), water code (AB 2108), and other departments contained EJ considerations. The successful passage of some of these bills and the EJ considerations of those that were unsuccessful reflect California's continued effort to expand EJ across all departments of the state.

In line with this legislative priority, California's Office of the Attorney General has bolstered EJ enforcement efforts as well. In line with its [2021 announcement](#) to expand the Bureau of Environmental Justice, [five of the six California Environmental Quality Act \(CEQA\) comment letters](#) submitted by the Office in 2022 incorporated EJ concerns. These legislative and enforcement related trends should be expected to continue in 2023 and warrant monitoring by all sectors.

CARB also highlighted EJ in its [2022 Scoping Plan](#) and emphasized its commitment to "centering equity." As mandated by AB 32, CARB worked directly with the EJ Advisory Committee via public meetings to discuss their recommendations for the scoping plan throughout 2022. The EJ Advisory Committee, which appointed its first tribal representative early last year, is comprised of community representatives from areas facing the most prominent exposures to air pollution.

The oil and gas industry is facing large opposition through EJ action. At the state level, [Senate Bill 11347](#) (passed in September, 2022) bans any new oil or gas wells, or major retrofitting of existing wells, within a new "health protection zone" of 3,200 feet between the wells and homes, schools, nursing homes, and hospitals starting January 1, 2023. At the local level, California's largest metropolitan area closed out 2022 with a landmark EJ oil and gas ordinance complimenting SB 11347. The Los Angeles City County held a historic vote on December 2, 2022 to phase out all oil drilling in L.A. and ban new wells. L.A. currently has 26 oil and gas fields with more than 5,000 individual wells (both active and idle). Under the [Ordinance](#), all existing operations must be phased out over a 20 year period, and in the interim, imposes obligations on operators including: requirements for posting signage to clearly identify a well to

the public, maintaining a comment and complaint log, requirements for site maintenance, bonds for existing wells, and standards for well plugging, abandonment, and restoration.

Green Marketing and Greenwashing

Although [Senate Bill 343](#) (SB 343), which amended California's environmental marketing laws in order to address recycling and recyclability claims, will be in play in 2023 as CalRecycle studies materials in the state's recycling system and develops implementing regulations. SB 343 tackles environmental marketing by prohibiting the import, sale, or distribution of any product or packaging in the state that has a deceptive or misleading recyclability claim. With some exceptions, a product or packaging that includes recycling symbols, such as the unmistakable chasing arrows symbol, statements, or directions to recycle a product, must 1) actually be collected by recycling programs covering 60% of the state's population, and 2) actually be processed by recycling facilities that serve at least 60% of statewide recycling programs. Otherwise, including such symbols or statements will constitute a "deceptive or misleading claim." SB 343 imposes additional restrictions on labeling products or packaging as recyclable that have additives that hinder their recyclability, or that contain PFAS and other chemicals identified by CalRecycle regulations.

CalRecycle has yet to begin formal rulemaking but will build off of [informal workshops and stakeholder engagement activities from 2022](#) in order to finalize regulations by January 1, 2024. Product and packaging manufacturers will need to closely evaluate product lines and supply chains as well as follow CalRecycle's activities to avoid being caught off guard by civil or criminal penalties or consumer litigation.

Waste

CalRecycle

Since CalRecycle adopted regulations implementing SB 1383, local jurisdictions have struggled to meet the law's mandates (namely, a 50% reduction in organic waste to landfills in 2020, and a 75% reduction by 2025). Questions about the ability for the state to achieve SB 1383's ambitious diversion targets have resulted in legislators appointing the Little Hoover Commission to conduct a study on the implementation of SB 1383 and whether any tweaks are needed. Expect this issue to get continued attention as the 2025 target date nears, including potential legislative actions to revise SB 1383.

Extended Producer Responsibility (EPR) Requirements

California continues to be a frontrunner in establishing strong EPR requirements for various products. In 2022 California passed the [Plastic Pollution Prevention and Packaging Producer Responsibility Act](#) (SB 54), the nation's broadest EPR program for plastics and packaging. California also [expanded its battery EPR program](#) in 2022 via two new bills overhauling the state's existing battery scheme. We expect that the California legislature will continue the trend of expanding EPR programs' reach and establishing programs for an ever-growing list of products.

While SB 983, providing consumers with a right-to-repair for electronic goods, died in committee last year, we expect that a similar bill will be introduced again in 2023. If introduced, we expect it may make it further through the legislative process with a likelihood of passing, particularly given the passage of a similar law in New York and expected right-to-repair legislation coming from the EU, two jurisdictions that California frequently legislates in-step with.

Plastics

As mentioned above, California put intense focus on single-use plastics and plastic packaging in the last year. This trend has occurred on both the state and local level, with increasing numbers of cities

considering laws banning single-use plastics within their borders. Berkeley, for example, passed laws banning the use of plastic bags, while San Diego passed a ban on all single-use plastics. CalRecycle will likely continue to issue more regulations implementing the recently passed plastics laws, and the California legislature will likely introduce more legislation aiming to curb plastics use and plastic waste within the state.

E-waste

California's passage of [SB 1215](#) last year, adding all battery-embedded products into the state's e-waste recycling program, shows that the legislature is still actively focused on e-waste issues in the state. With the state increasingly focused on environmental issues and impacts, we can expect the legislature to continue introducing bills expanding requirements on electronics manufactures and consumers. Additionally, with the increased push for the transition to electric vehicles, we may see the legislature introduce legislation implementing some of the [recommendations](#) issued by CalEPA's [Lithium-Ion Car Battery Recycling Advisory Group](#).

Beveridge & Diamond advises clients throughout California on environmental issues affecting their facilities, operations, and products. With an office in San Francisco, our experience includes representing clients in litigation before state and federal courts in California. Businesses benefit from our deep understanding of the interplay between California's complex statutes and regulatory programs and federal environmental regulations and enforcement. For more information on the topics covered in this article, please contact the authors.

AUTHORS



Kaitlyn Shannon
Principal, San Francisco
kshannon@bdlaw.com
+1.415.262.4020



Susan Smith
Principal, San Francisco
ssmith@bdlaw.com
+1.415.262.4023



Jake Duginski
Associate, San Francisco
jduginski@bdlaw.com
+1.415.262.4018



Claire McLeod
Associate, San Francisco
cmcleod@bdlaw.com
+1.415.262.4011



Gary Smith
Principal, San Francisco
gsmith@bdlaw.com
+1.415.262.4045



Jeff Clare
Associate, San Francisco
jclare@bdlaw.com
+1.415.262.4003



Liz Glusman
Associate, San Francisco
eglusman@bdlaw.com
+1.415.262.4013

ABOUT B&D

Beveridge & Diamond's more than 125 lawyers across the U.S. focus on environmental and natural resources law, litigation, and alternative dispute resolution. We help clients around the world resolve critical environmental and sustainability issues relating to their products, facilities, and operations.

Learn more at bdlaw.com

The content of this alert is not intended as, nor is it a substitute for, legal advice. You should consult with legal counsel for advice specific to your circumstances. This communication may be considered advertising under applicable laws regarding electronic communications.