



# THE ENVIRONMENTAL LIABILITY IMPLICATIONS OF ABx1 26 LEAGUE OF CITIES CONFERENCE CALL BRIEFING

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## **I. The Main Statutory Provisions Relevant To Environmental Issues**

### **A. Asset Transfers**

1. Section 34175(b): RDA assets pass to the successor entity on Feb. 1, 2012.
2. Section 34175(a): RDA “housing assets and functions” may be retained by the city.<sup>1</sup>
3. Section 34167.5: may lead to 2011 asset transfer agreements between RDAs and their cities being unwound, although the statute notes that this directive may face state or federal law challenges.

### **B. Transfer of Powers and Authority**

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<sup>1</sup> Throughout this outline, “city” is used as a shorthand reference to those portions of AB1x 26 that read “city, county, or city and county.”

1. Section 34173(b): except for those parts of the Community Redevelopment Law (“CRL”) that are “repealed, restricted, or revised,” the powers and authorities of the RDA pass to the successor entity. Query the extent to which this permits use of those powers for anything other than the wind down process? For example, could a City now undertake Polanco Act “enforcement activities” within existing redevelopment plan areas but unrelated to winding down the RDA? Section 34189 provides that portions of the CRL “that depend on the allocation of tax increment to redevelopment activities . . . shall be inoperative.” However, use of the Polanco Act was not infrequently funded with other resources, e.g., EPA loans and grants, so there was no necessary and inescapable connection back to tax increment.

2. Section 34176 (b): if the “housing functions” are retained by the city, all “rights, powers, duties, and obligations” excluding the Low/Mod fund pass to the city. Note that this transfer of rights and powers is not limited by the “except for those things repealed, restricted or revised” caveat. Standard rules of statutory construction would generally say that this differential treatment must be taken as purposeful and meaningful. Query whether this consequently becomes a broad grant of authority to the city so long as it is performing a “housing function” previously performed by the RDA.

### C. The Fate Of Transferred Assets

1. Section 34167(a) provides that the intent is to preserve to the “maximum extent possible” the revenues and assets of the RDAs. Section 34169(d) calls for RDAs to minimize their liabilities, presumably that intent is also applicable to the successor entity.

2. Section 34177(e) calls for disposal of RDA assets “to be done expeditiously **and** in a manner aimed at maximizing value” pursuant to Oversight Board supervision.

3. Experience teaches that those commands, in the context of a brownfield site, are frequently in conflict. Oversight Board members may have little to no real understanding of the complex challenge of maximizing value at brownfield sites. Fire sales and/or far-reaching indemnities to buyers may be entirely contrary to the statutory command to maximize value. Query what it means, in this context, for the Oversight Board to have “fiduciary responsibilities” to the benefitted taxing entities? See § 34179(i).

4. Note: “housing assets” are treated differently. Sections 34177(j), 34180, and 34181(c) touch on various aspects of what the Oversight Boards do, but none of them suggests ongoing oversight of “housing functions” that pass from an RDA to a city.

### D. Liability Limitation

1. Section 34173(e): limits the liability of a successor entity to the tax revenue received and the value of the assets transferred to the successor.

2. Relevance Under Federal Law: highly doubtful - 42 U.S.C. § 9607 provides for very limited statutory defenses, and by virtue of the Supremacy Clause the federal limitation would presumably trump Section 34173(e).

## II. Implementation Issues

### A. Inventory RDA Assets

1. What are they and what is known about their current environmental condition – in terms of contamination, status of any investigation/cleanup, oversight agreements with regulatory agencies, institutional control obligations, etc.

2. Where Are They Going: to the “Successor/Liquidator” or “Housing Successor.”

3. What, if any, Enforceable Obligations are associated with them?

4. Section 34167(d)(3): includes in the definition of enforceable obligations “obligations imposed by state law other than passthrough payments.” In that context, consider Fish and Game Code Section 5650, which makes it “unlawful to . . . permit to pass into . . . the waters of this state . . . (1) Any petroleum . . . (2) Any refuse . . . from a [business] . . . [and] (6) Any substance or material deleterious to fish, plant life, or bird life.” A site leaching additional chemical mass into groundwater arguably violates that requirement and the owner thus has an obligation imposed by state law to stop the leaching.

5. Settlement Agreements: are Enforceable Obligations – e.g., §§ 34167(d)(1)(4); 34171 (d)(1)(D), but the successor entity and the Oversight Board have “authority and standing” to appeal any judgment or to set aside any settlement or arbitration decision.” This provision seems constitutionally dubious, and deadlines to appeal are statutory. Oversight Board actions to set aside judgments, settlements, and/or arbitration decisions thus seem unlikely.

6. Continuing Obligations on Assets Previously Disposed. Many brownfield sites have been transacted pursuant to cleanup programs that envisions either long-term monitoring, long-term O&M programs, notification requirements, or other so-called institutional controls. The RDA may thus have “environmental” obligations on properties it no longer owns.

### B. Assess The CERCLA Exposure On Transferred Assets

1. CERCLA Background: 42 U.S.C. § 9601, *et seq.* provides for strict, retroactive, and potentially joint and several liability among three classes of people relevant for present purposes. The categories are (1) current owner/operators, (2) past owner/operators who owned or operated at the time of “disposal” and (3) those who arranged for transportation and disposal. Liability attaches at sites with “hazardous substances,” which is most chemicals other than “petroleum” unless the petroleum is intermixed with one or more “hazardous substances.

2. Involuntary Governmental Transferees: generally are not owner/operators by virtue of 42 U.S.C. § 9601(20)(D). However, AB1x 26 successor entities likely are not “involuntary” transferees due to the opt in/opt out mechanism provided in § 34173(d)(1). In other words, a city, by virtue of not exercising its option to avoid successor entity status is a voluntary current owner as of February 1<sup>st</sup>. As such, it has made itself potentially jointly and severally liable for the cleanup of contaminated sites passing from the RDA into the city’s hands.

3. Bona Fide Prospective Purchaser/Acquiror – 42 U.S.C. § 9607(r) and 42 U.S.C. § 9601(40) may provide an affirmative defense. Despite the name, it does not depend on a “purchase” transaction. However, it does require compliance with “All Appropriate Inquiries,” which includes, among other things, pre-acquisition due diligence and post acquisition “due care”. It is doubtful whether many, if any, cities conducted the required pre-transfer due diligence. The defense is fact driven and nuanced, so consult counsel with expertise in CERCLA litigation if there appear to be significant risks.

4. See above re § 34173(e) and its doubtful ability to limit liability based on federal law. Unfortunately, the ready, shoot, aim nature of AB1x 26 may have shifted considerable liability on to California cities.

### C. Assess Your Insurance, If You Have It

1. Many brownfield sites have been acquired with a Pollution Legal Liability or “PLL” policy. It may provide coverage under the right circumstances, and successors are commonly but not always covered.

2. These policies were almost always highly negotiated, so specialized environmental coverage counsel should be consulted for advice.

### D. Rethink, As Needed, The EOPS/ROPS

1. EOPS/ROPS may need to include various line items based on review of the assets and evaluation of the issues discussed above.

2. Note: generally speaking you cannot buy cost cap insurance today, so plan for costs to exceed the engineers’ estimates.

3. Consider whether to file Government Code claim notices with the RDA before it goes out of existence to support EOPS/ROPS submissions.

### E. Disposition

1. Evaluate the maximize value/minimize expense/expeditious sale commands discussed above relative to current and foreseeable market conditions.

Anticipate the need to educate Oversight Board members. Nothing in the identification of the board members suggests they will have any understanding of either environmental law or real estate, much less the complex interaction of the two. Anticipate that board members will have little inclination to learn the important nuances, because they serve “without compensation or reimbursement for expenses.” § 34179(c). Note also that while § 33179(d) provides for personal immunity for Oversight Board members, the federal statute has its own provisions concerning the liability of fiduciaries, and it permits personal liability if the fiduciary is negligent. 42 U.S.C. § 9607(n).

2. Evaluate § 34177 – the command to “enforce all former RDA rights for the benefit of the taxing authorities.”

3. Section 34177(i) permits finishing out existing contracts, and § 34177(h) envisions dialogue with the Oversight Board regarding the wind down process.

4. Section 34180(f) allows the city to retain RDA assets for future redevelopment, provided it reaches a compensation agreement with the other taxing entities. Query what sorts of passthrough agreements would be dictated by Section 34180(f)(1) and (2) on brownfield sites with current net negative value given market conditions and environmental complications.

5. Don’t ignore any existing permits, both in terms of compliance and transfer issues.

### **III. Looking Forward: Dealing With Brownfields Post AB 26**

#### **A. The Polanco Act – CRA Brownfield Committee White Paper**

1. Redevelopment Agency Assets Held By Successor Entity
2. Housing “Assets and Functions”
3. Pending Legislation
4. Polanco Includes: information gathering, cleanup plan solicitation, cleanup via injunction to implement an approved plan, and cost recovery

#### **B. Other California Law**

1. Nuisance Law & Code Enforcement
  - a. Civil Code Section 3479 – broad definition of a nuisance



b. Civil Code Section 3480 – definition of a public nuisance

c. Fish & Game Code Section 5650 – Pollution of Waters of the State

2. H&SC Chapter 6.10 – CLERA (Not CLRRRA – Chapter 6.82)

3. The Lodi Mini-Superfund Statute Approach

C. Federal Statutes

- not likely.
1. CERCLA as a sword – cleanup costs and declaratory relief; attorneys fees
  2. RCRA: injunctive relief and attorneys’ fees.

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