The Biden Administration
Environmental Compliance & Sustainability

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- Certified Professional Environmental Auditor
- Author
- California Lawyer's Assoc. Environmental Law
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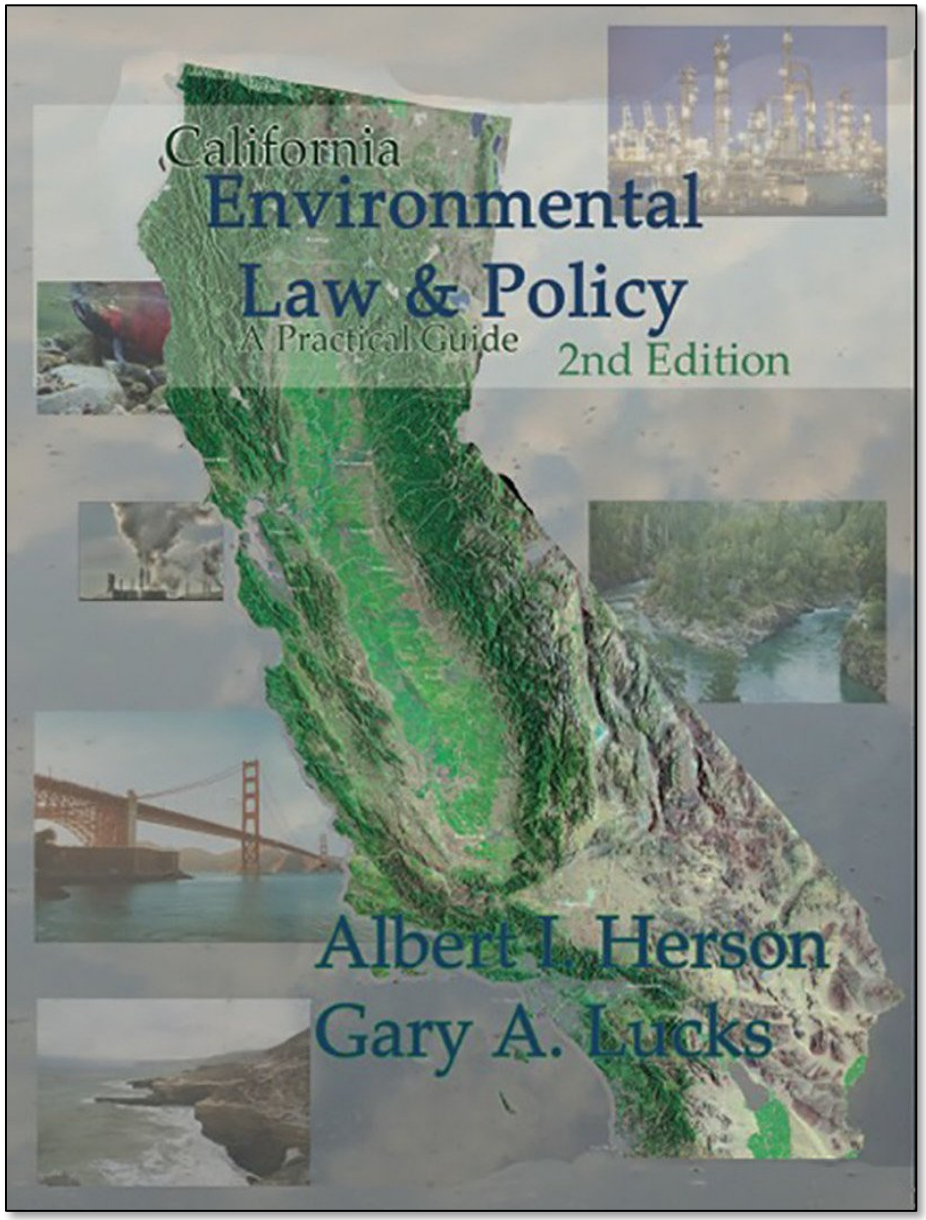

CALIFORNIA

Environmental Law Reporter

FEBRUARY 2020
VOLUME 2020 • ISSUE NO. 2

THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

Substantial evidence supported a city's finding that the construction of seven dwelling units was consistent with its general plan, community plan, and steep hillside regulations, while the project's steep hillside topography made construction of 16 to 23 dwelling units on the site impractical and inconsistent with the regulations (p.77).

LAND USE AND ENVIRONMENTAL PLANNING

Denial of plaintiff's fee motion under 42 U.S.C. 1988 was an abuse of discretion, because plaintiff was a prevailing plaintiff where he succeeded on a significant issue, his section 1983 claim was substantial, and he prevailed on a state law claim based on the same facts as the section 1983 claim (p.86).

CONTROLS ON NOISE

A court of appeals held that the city ordinance that required individuals to obtain permits before using sound amplifying devices within the city was a prior restrain that chilled First Amendment free speech rights (p.105).

LexisNexis™
Matthew Bender®

The 2020 Environmental Legislative Update: Change of the Guard

By

*Gary A. Lucks**

* Mr. Gary Lucks JD, CPEA is a principal environmental attorney and scientist with Beyond Compliance Law. He is a Certified Professional Environmental Auditor (CPEA) with 35 years of experience in environmental, health, and safety law, legislative affairs, and sustainability strategy. He advises clients on maintaining business continuity, risk management, and license to operate while managing compliance risks.

Mr. Lucks wrote environmental policy briefing papers for Governor Newsom, Senator Feinstein, Senator Steinberg, and State Insurance Commissioner Dave Jones. He has published extensively on environmental law, legislation, and policy. He co-wrote a book entitled *California Environmental Law and Policy: A Practical Guide* and wrote the Environmental Auditing chapter in the treatise *California Environmental Law and Land Use* (Matthew Bender). He has been contributing to the *California Environmental Law Reporter* for the past 25 years.

He serves on the California Lawyers Association, Environmental Law Section's Executive Committee and the Environmental Legislation Committee for over two decades. He also served as an Advisor to the Bay Area Air Quality Management District, co-founded the Sustainable Earth Initiative, and has chaired the West Coast Institute of Internal Auditors.

Introduction

Notably absent from Governor Newsom's first State of the State address was a focus on environmental priorities, especially considering President Trump's unrelenting efforts to roll back environmental protections. Of particular note was Governor Newsom's veto of SB 1 (Atkins, Portantino, Stern), which would have enacted the California Environmental, Public Health, and Workers Defense Act of 2019. This bill was intended to push back against the Trump Administration's efforts to weaken environmental and labor protections. Authored by the Senate President Pro Tempore Toni Atkins, this bill was designed to codify the versions of the federal Clean Air Act, Clean Water Act, Endangered Species Act, and Fair Labor Standards Act, and their accompanying regulations prior to the inauguration of President Trump in January 2017.

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Gearing up and Getting Going

- **Gear up with Environmental Compliance**
- **Get going on Sustainable Leadership**
  - Optimize your investment:
  - Branding opportunities
  - Investment opportunities
  - Leadership opportunities
  - Avoid Green washing

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The Writing is on the Wall

The Biden Administration's Environmental Compliance challenges & Sustainability opportunities

1. **Not your mission?** You still have opportunities
2. **You lead and innovate in the sustainability space as part of your corporate mission?** Leverage opportunities and put a stake in the ground as a visionary, innovative early adopter.

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The Biden Train has left the station.

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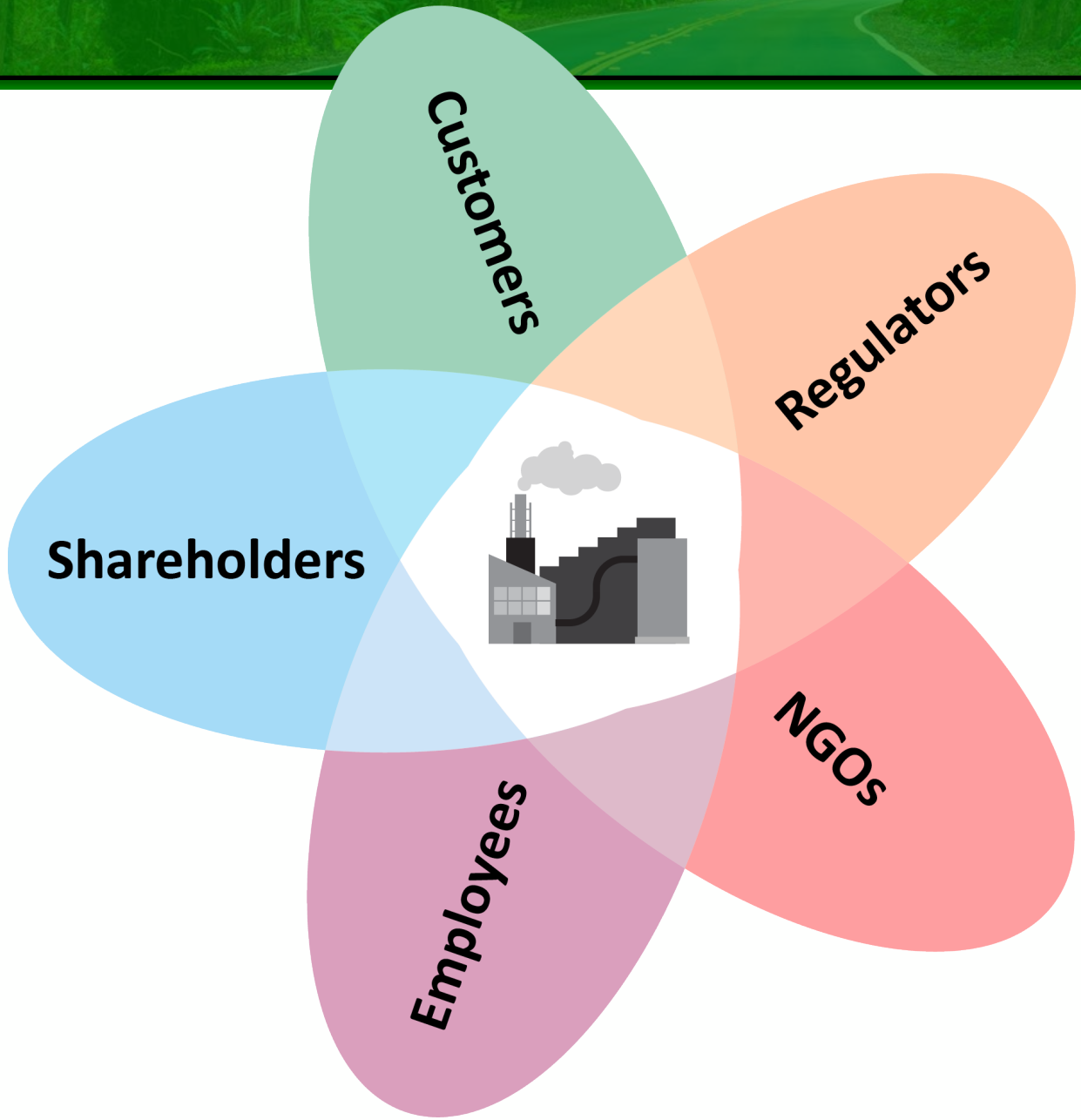
Stake holders & the New Paradigm

- Regulators
- Customers
- Shareholders
- Employees
- NGOs



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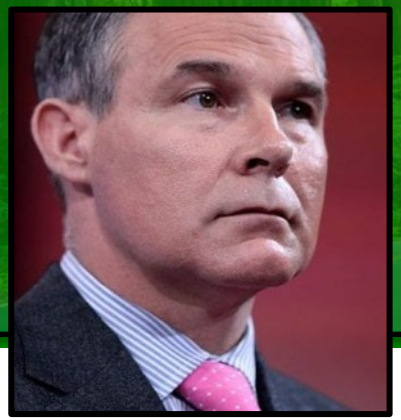
The Trump Administration's Legacy

Where we are Now



1. **A nuanced, partial retreat pivoting to a wholesale a Reversal**
2. **Federal Regulatory Drivers**: Remained largely intact
3. **EPA Staff and funding**: Still largely intact
4. **EPA Morale**: Suffering at the federal level
5. **Enforcement**:
    1. **Federal**: Relaxed but Yates Memo and still relatively heavy enforcement in targeted OECA areas
    2. **State**: Blue and Green Sates: Robust enforcement
    3. **NGOs**: Winning 95% of their cases
6. **Courts**: Largely served as a backstop

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Trump EPA Staff Priorities

Narrow Focus:

Superfund:

- High priority
- Identified list of sites with significant redevelopment potential

TSCA: Shifting staff to implement TSCA updating and streamlined risk reviews for "new" chemicals

- Approximately 40,000 chemicals in commerce
- Targeting backlog of 600 chemicals:
- Reduced to 300 new cases for review
- Challenge to meet strict regulatory deadlines

Safe Drinking Water Act

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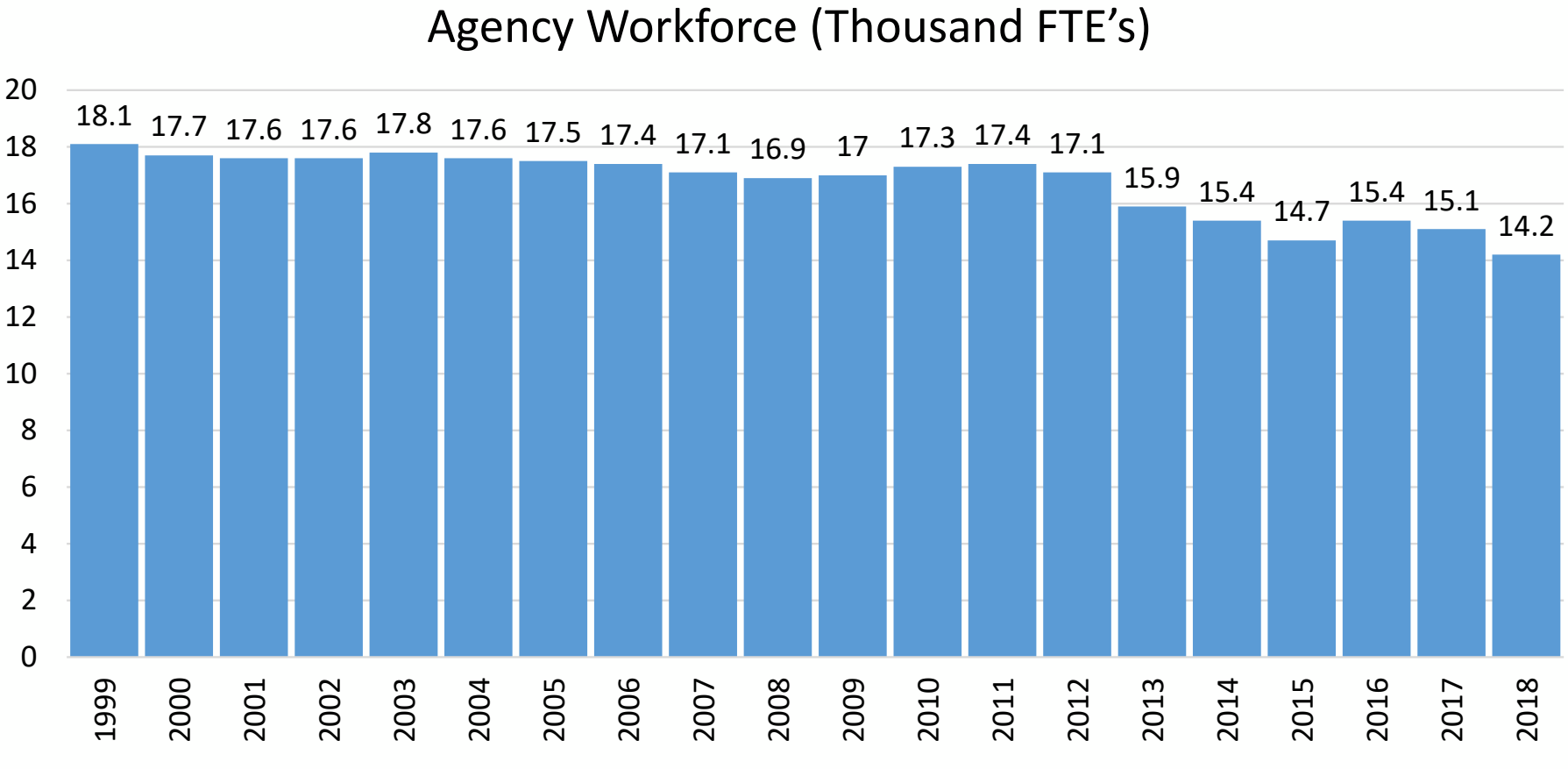
Proposed Budget and Staffing cuts did not Materialize



Source: U.S. EPA

Former EPA Administrators & Alumni

- Rebuilding Workforce & Budget
- Expand work force planning efforts
  - Reinvigorate demoralized EPA staff
  - Attempt to increase program and enforcement funding
- EPA budget (in real dollars) declined 45% from 2004
- Environmental Protection Network (EPA alumni): plan to rebuild budget to 40-year average in “real dollars” or ~ to $11.4 B (2019 dollars)
- Strengthen recruitment to overcome “hollowing out”
- Add 500 – 1,000 new FTEs

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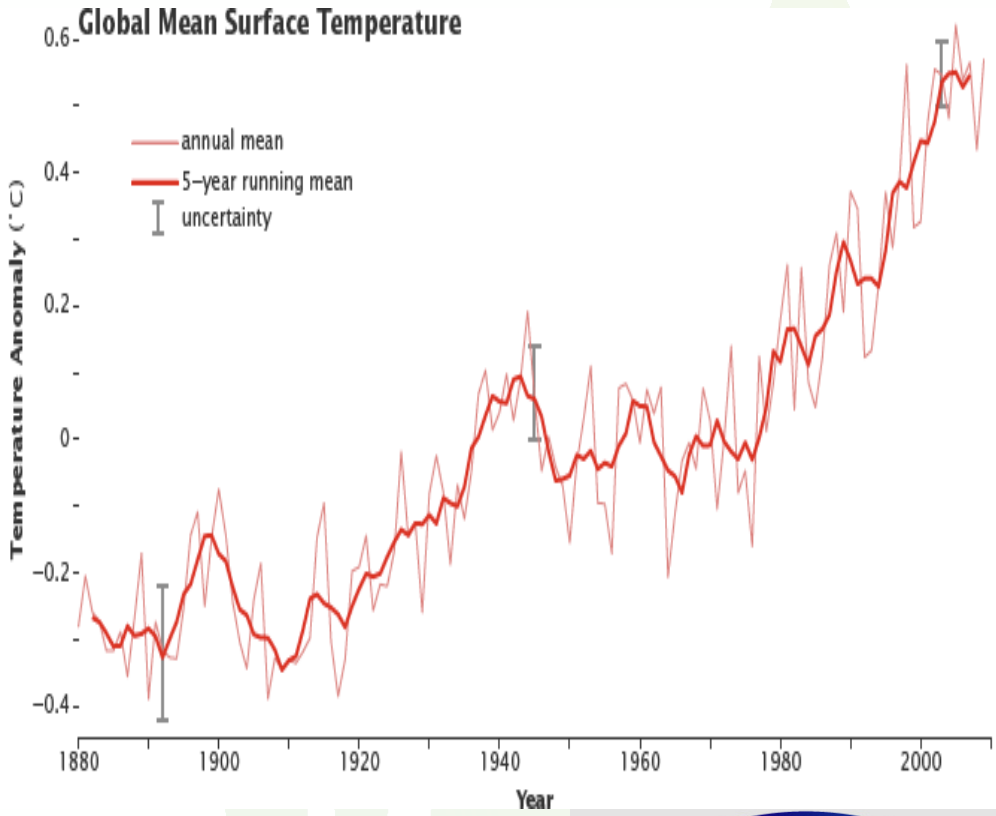
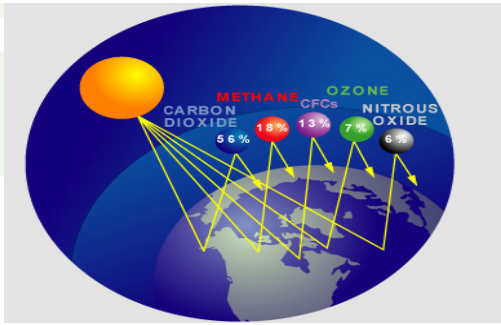
Public Sentiment

2020: Warmest Year on Record

Tied with 2016

- 20 of 21 warmest years have occurred since 2000
- 10 hottest years occurred in past 20
- 2018: Warmest for Oceans
- 2015 – 2018: Four warmest years since records began in 1850
- **Source**: NASA





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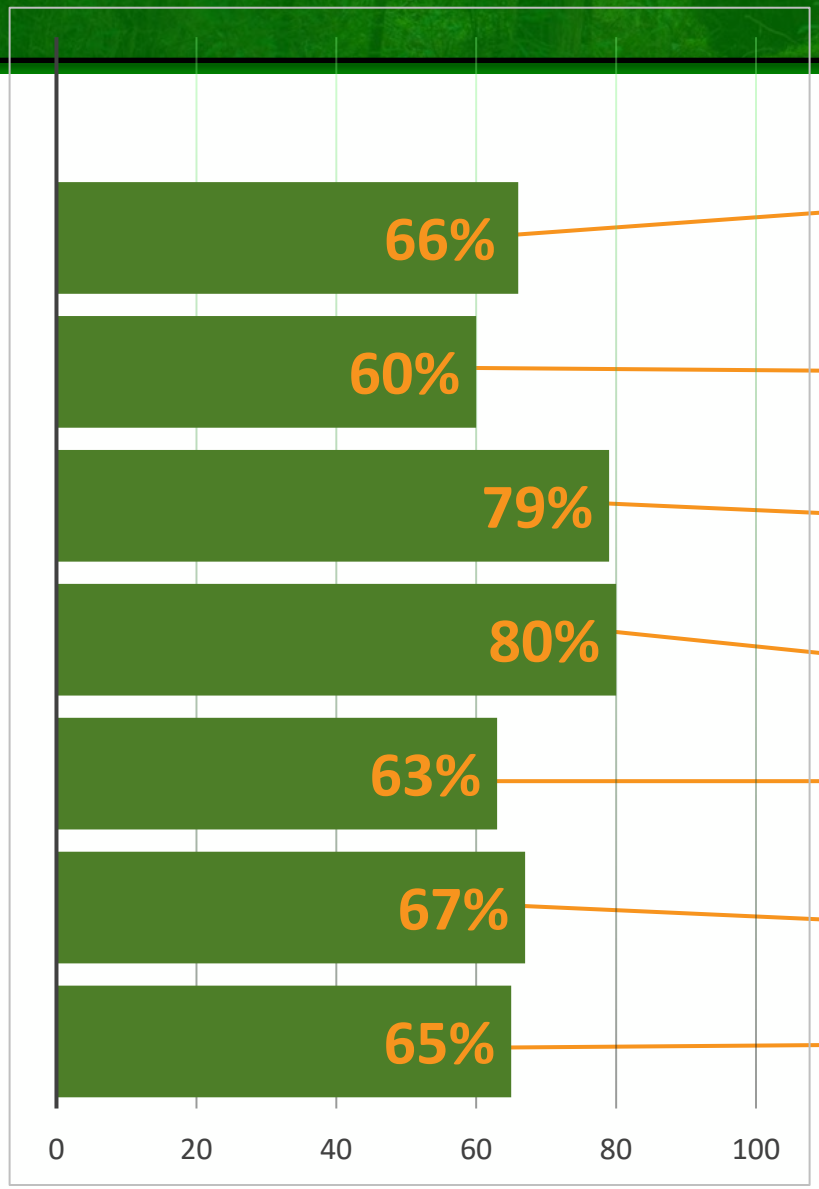
Environmental & Climate Polls



- Federal government should act more aggressively to combat climate change (Pew Research Center June 2020)
- Climate change is a major threat
  (Pew Research Center June 2020)
- Country should prioritize alternative forms of energy
  (Pew Research Center June 2020)
- Human activity is fueling climate change
  Source: 2019 Washington Post & Kaiser Family Foundation
- The Green New Deal is a good idea to address climate change (NPR/PBS 2019)
- The US needs to do more to address climate change
  (Quinnipiac 2019)
- Protecting the environment is a priority even at the risk of curbing economic growth (Gallup 2019)

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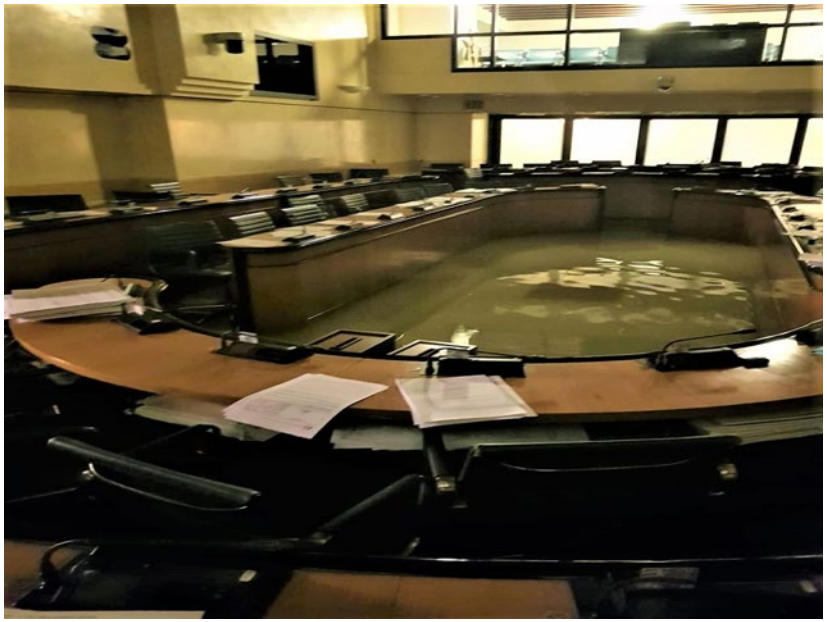
Climate Poll

- **Almost 2/3 of Americans** say it is already affecting their community
- **Carbon capture/storage** Overwhelming support for tax credit
- **Significant majorities support**:
  - Taxing corporations based on their emissions
  - Requiring more fuel-efficient cars
  - Planting huge numbers of trees
  - Restricting power plant emissions



Source: Pew Research Center June 2020

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The Green New Deal & Biden

The Green New Deal
Non-binding Resolution

- **Renewable Energy**: Transition to 100% green, renewable energy & zero-emissions power by 2030 (no nuclear or natural gas) & building/upgrading to "smart" power grids
- **Green Transportation:** EV infrastructure, public transport (including high-speed rail)
- **Energy-efficient Buildings**: Upgrade all existing buildings to be energy-efficient
- **GHG Reduction**: Cuts carbon emissions to meet Paris Agreement's most ambitious climate goal
- **Eliminate fossil fuels**: Reduce air quality pollution & GHG emissions "as much as technologically feasible"
- **Green Jobs**: Guarantee full employment generating up to 20 million new, living-wage jobs
- **Climate Resiliency**

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Biden's Environmental Agenda

- Pivot from Trump deregulatory Agenda
- Regulatory reversals (time-consuming)
- Green Executive Orders
  - Formal Initiatives
  - Non-regulatory tools
- Boosting staffing and morale at the compliance office
- Withdrawing guidance aimed at limiting inspections or enforcement
- Focus on EJ considerations

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Biden Climate & Energy Priorities

- **Environmental Justice:**
  - New Environmental Justice Advisory Council
  - EJ and “equitable opportunity” in a clean energy future
- **Climate:** Urging congressional enactment of GHG reduction “enforcement mechanism” with initial target no later than 2025 with commitments in 7 topic areas:
  - Energy efficient buildings
  - Achieve net-zero GHG emissions by 2050
  - Eliminate fossil fuel emissions from power sector by 2035
  - Green Infrastructure
- **Vehicular Emissions:** Positioning auto sector to “win the 21st century”
- **Power**: Achieving “carbon pollution free” power sector by 2035

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Biden and Climate

- Return to the Paris Climate Treaty
- New round of GHG commitments extending to 2030 by 11/21 (Glasgow, Scotland)
- Due to inaction, other counties may expect US to make up for lost time.
- Convene a climate summit of world leaders
- Executive orders with “unprecedented reach” working toward net zero emissions no later than 2050

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U.S Climate Alliance

- In the wake of U.S. withdrawal from the UN Paris Agreement:
- Alliance members: CA, NY, WA, CT, DE, HI, MA, MN, OR, RI, Vt, VA, & Puerto Rico
- >100 cities
- 19 Attorney Generals
- >1,000 investors and businesses
- To “convene U.S. states committed to upholding the Paris accord and taking aggressive action on climate change.”
- Committed to cutting emissions by 26 – 28% from 2005 levels or exceeding the Clean Power Plan

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The Biden Green New Deal Elements

- **$2 trillion Clean Energy proposal**
- **Goal:** to achieve carbon neutrality by 2035
- Paid for by mix of tax increases on corporations and the wealth & deficit spending to stimulate the economy
- Emphasizes green infrastructure
- Energy efficiency in buildings & houses
- Promoting production of EVs
- EJ
- Clean energy
- Conservation in agriculture & industry

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Biden's Agency Leaders

- **White House Office of Climate Policy**: To be led by Gina McCarty to coordinate domestic policy
- **International Climate Envoy**: John Kerry
- **Dept. of Energy**: Jennifer Granholm
- **DOT**: Pete Buttigieg focusing on green infrastructure
- **EPA**: Michael Regan
- **CEQ**: Brenda Mallory: Experienced former environmental lawyer who spent 15 years at EPA
- **Dept. of Interior**: Deb Haaland Expected to curtail oil and gas leasing on federal lands

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Michael Regan's Mission

- Restore morale
- Emphasis science and integrity
- Remove barriers to enacting new rules

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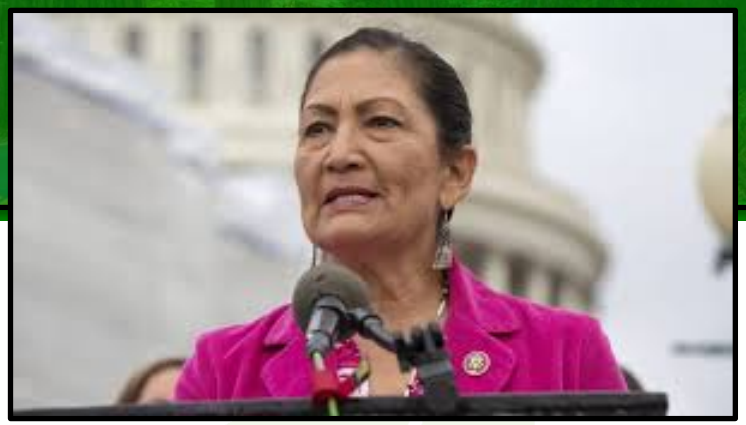
Department of Interior



- Deb Haaland
- Expected to curtail oil and gas leasing on federal lands

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Council on Environmental Quality

Brenda Mallory

- Experienced former environmental lawyer who spent 15 years at EPA

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Climate 21 Project

- NGO offers EPA cross-cutting agencies policies focused on:
- Emissions reductions
- Climate Diplomacy
- Adaptation/resilience
- **EPA's Office of Enforcement & Compliance Assurance**: to conduct "enforcement of power-sector regulations with climate co-benefits."
- Move NEPA office back to OECA from Office of Policy:
- To collaborate with the rest of the agency on NEPA climate issues
- OECA to collaborate with DOE & DOI to speed renewable energy siting on public lands

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Natural Sequestration -- Planting a Trillion Trees

- Planting trees over the size of the US would:
- Sequester carbon released by humans in the past 25 years
- Younger trees remove more carbon
- Promotes biodiversity
- **Most room for planting**: Russia, US, Canada, Australia, Brazil, &China

Source: Swiss Federal Institute of Technology

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California's Carbon Neutrality by 2045

EO B-55-18:

- Commits CA to total economy-wide carbon neutrality by 2045
- Maintain net negative emissions thereafter
- Implementation via future Scoping plans

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Decarbonizing California
A Nation State

- Reduce GHG emissions:
  - 40% below 1990 levels by 2030
  - 80% below 1990 levels by 2050
- Carbon neutral by 2045
- 60% Renewable energy by 2030
- 100% Renewable energy by 2045
- 1.5 million ZEVs by 2025
- 5 million ZEVs by 2030
- Half petroleum use by 2030

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California Accelerating Climate Change Ambitions

CalEPA & Natural Resources Agency to specifically adapt strategies:

- More EVs
- Electrify transportation
- More dynamic & deliberative Land Use efforts
- Revisit soil, industrial, and agricultural policies

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Specific Targets

- **ZEVs**: 100% ZEVs by 2030/2035
- **Appliances**: 100% electric appliances by 2030/2035

Source: Achieving Carbon Neutrality in CA PATHWAYS Scenarios Developed for the CA ARB

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California's EV Focus

ARB's Advanced Clean Truck Rule:

- Beginning 2024, Automakers must sell a minimum number of zero-emission big rigs, delivery vans, and large pickups weighing more than 8,500 lbs.)
- By 2035, most new trucks in California will be zero emission

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Electric Vehicles & Infrastructure Legislation

SB 957: Opens carpool lanes to low-income drivers using electric vehicles

AB 193: Rebate on purchases of batteries for used zero-emission cars

AB 2885: Instructs the ARB to promote clean vehicle rebates in low income communities

SB 1403: Instructs the ARB to review incentive programs for zero-emission vehicles

AB 2006: Makes permanent agricultural vanpool program using electric vehicles

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Biden's Vehicular Standard Agenda

- **Tailpipe Emissions:**
  - Biden expected to grant CA's CAA waiver of preemption allowing it to regulate GHG and ZEVs
  - 5 automakers agreed to meet CA GHG & fuel economy standards through model year 26
- **GHG Emissions:**
  - Biden expected to tighten GHG vehicle rules through model year 2026
  - CA could delay stand—alone vehicle GHG rules
- **GM Going all electric by 2035**
  - Abandoned Trump's rule preempting CA's vehicle GHG standard
  - Commits to "an all-electric, zero emission future."

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Oil Companies Poised for Cleaner Energy

- Europe's big oil companies set carbon reduction targets
- Most have "net zero" goal for 2050 (embraced by EU and Great Britain)
- **Strategy:** Selling more renewable energy & offsetting emissions with nature-based solutions (e.g., planting trees)

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Global Momentum

- World's largest GHG emitter targeting net zero emissions by 2060
- Emissions to peak by 2030
- Japan joins EU's pledge for carbon neutrality
- Japan's carbon neutral goal by 2050
- Denmark Ending Oil & Gas Extraction:
  - Ending North Sea activities by 2050
  - Canceled latest licensing round

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Biden Agenda vs. Green New Deal

GND	Biden	
Net-zero GHG Emissions by 2030	2035	Conservation focus on agriculture industry • Emphasizes green infrastructure • Energy efficiency in buildings & houses • Promoting production of EVs • EJ • Clean energy • Conservation in agriculture & industry
Abolish fracking?	Not abolishing fracking	Market forces: oil/gas companies are transitioning to renewables adding pressure to replace jobs with green jobs
Carbon Free Electricity	Yes $2 trillion pledge	40% earmarked for legacy pollution & investments in disadvantaged communities
Building energy efficiency	Yes	
Green Transportation	Promoting EVs	Could see climate friendly policies in infrastructure & stimulus bills
Meet Paris Agreements limit to below 2C	Rejoined Paris Climate Agreement	

Greener Policy Direction
Reversing the Dismantling Deregulatory Policies

- **GHG Policy: Advance stricter vehicle-emissions standards**
- **WOTUS:**
  - Either make targeted revisions OR
  - Withdraw & replace
    (which would be competing with staff time on Climate policies)
  - NOTE: The Obama WOTUS rule
    (presumption all water covered by CWA vs Trump's bright line balance between federal & state/local to determine land uses)
- **Reverse Trump roll back of Obama's methane rules:**
  - Possibly going further: Near zero GHG methane emissions from hydraulic fracturing on private lands

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PFAS Policies

- Drinking water limits (using emergency powers to establish)
- Drinking water of ~110 M Americans may be contaminated by PFAS (per & polyfluoroalkyl substances)
- Setting PFAS Superfund hazardous substances designation
- Prioritizing substitutes through procurement
- Accelerating toxicity studies
- List as a CWA toxic

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Vapor Intrusion

- Adopting California's assertive rules managing risks of vapor contaminant inhalation.
- **Supplemental Guidance**: Screening & Evaluating Vapor Intrusion by DTSC & SWRCB:
- More specific than federal guidance for sampling & "focuses on prioritizing & screening buildings more quickly."
- Framework for deciding when cleanup &/or mitigation is necessary
- Guidance on EPA's 2015 attenuation factors
- Establishing 4 step evaluation process to assess vapor intrusion
- Increased focus on collection & evaluation of indoor air & sub-slab soil gas samples

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Invigorated Enforcement

Scaling up Enforcement

- Returning to Ruckelhaus “fishbowl memo” that EPA serves as a “gorilla in the closet” to compel civil & criminal compliance through stringent oversight of state programs
- Rescinded DOJ EO banning SEPs in enforcement settlements
- Shift from National Compliance Initiatives to Enforcement focus
- Increased focus on states considered to be lax on enforcement
- Increased focus on heavy industry
- Reversing centralized enforcement, returning delegated authority to regions

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Biden's Enforcement Reset

- Repeal memos prohibiting settlement payments to third parties (e.g., land trusts)
- Moving away from wide Covid discretionary enforcement policy easing enforcement; only allowing relief where truly needed
- Restoring EPA regional enforcement no longer requiring HQ permission & choosing cleanup remedies over $50 M
- Rescind 2018 memo prohibiting agency use of guidance documents as evidence in affirmative enforcement cases (even when relied on by regulators and regulated for years

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Covid 19 Environmental Actions/Enforcement

- Enforcement Discretion on civil violations
- No penalties involving routine monitoring & reporting
- Facilities must document decisions made to prevent or mitigate non-compliance & demonstrate how the noncompliance was caused by the pandemic
- EPA Interim Guidance for “response actions”:
- Superfund,
- RCRA corrective action,
- TSCA PCB cleanup
- Oil Pollution Act
- UST program

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Covid 19 Environmental Actions/Enforcement

- Interim Guidance on Site Field Work Decisions, Region-by-Region
- Continuous Emission Monitoring: If an affected unit is unable to complete monitoring or test by the applicable deadline due to current travel, plant access, and other safety restrictions implemented as a result of the COVID-19 national emergency, and actual CEMS monitoring data is otherwise valid, the reporting facility can continue to utilize actual monitoring data instead of submitting

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Individual Liability for Corporate Wrongdoing

Focus on prosecuting Corporate fraud & other misconduct as deterrence

Yates Memo Guidance:

- Corporate Cooperation Credit: corporations must provide all relevant facts to DOJ regarding individual responsible for misconduct
- Investigations: focus on individual from inception of investigation
- Attorneys handling investigations should routinely communicate4. DOJ will not release culpable individuals for liability when resolving corporate matter
- DOJ attorneys should not resolve corporate matter without clear plan to resolve related individual cases
- Civil attorneys should consistently focus on individuals AND the company regardless of individual's ability to pay

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Environmental Civil Penalties Rise Significantly

Federal Civil Penalties Inflation Adjustment Improvement Act of 2015

EPA Civil Penalties rose with inflation in 2020

Per day / Per violation Penalties:

- RCRA: $102,638
- Clean Air Act: $102,638
- Clean Water Act: $56,460
- EPCRA: $59,017
- CERCLA: $59,017
- SDWA: $50.-18
- FIFRA: $20,528

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Few Significant Environmental Regulatory Roll backs

Promised Regulatory Rollbacks

Climate, Air Quality & Energy:

- Clean Power Plan/Affordable Clean Energy Rule
- Café Standards/Clean Air Act Waiver
- Methane standard for oil and gas
- Energy Efficiency
- POTW Air Toxics (NESHAP) Rule

Water:

- Clean Water Act jurisdiction
- Offshore Drilling

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Promised Regulatory Rollbacks

Hazardous Materials/Waste:

- Risk Management Plans
- Coal Ash rules
- Formaldehyde Emissions (Wood products)

“NextGen” Enforcement

Endangered Species Act

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Reality: The Trump Administration Is Reversing 100 Environmental Rules. Here's the Full List
NYT

	Completed	In progress	Total
Air pollution and emissions	19	8	27
Drilling and extraction	12	8	20
Infrastructure and planning	11	1	12
Animals	9	2	11
Toxic substances and safety	6	2	8
Water pollution	4	7	11
Other	5	6	11
All	66	34	100

https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks.html?smid=fb-nytimes&smtyp=cur

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Democratic Sweep & the Congressional Review Act

- Absent the CRA, withdrawing or repealing Trump orders & rules will take time (Requires APA notice and comment as a prelude)
- Late Trump rules issued in "Lookback" period could be retroactively repealed
    - Last 60 days when Congress is in session
- EPA cannot re-issue "substantially the same form" unless Congressionally authorized
- **New Legislative prospects**: Expect internecine fighting between the progressive and moderate wings

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NEPA Streamlining Rule

- Codifies important case law while superseding longstanding court precedent
- Establishes separate tests to determine if a federal action is “major” & whether it has a significant environmental impact
- “Environmental effect” definition drops explicit requirements to consider “indirect” and “cumulative” effects
- Could avoid robust climate reviews.

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NEPA Streamlining Rule

- Sets hard deadlines for completion of:
  - EIS: 2 year
  - EA:1 year
- Establishes categories of projects not requiring EAs
- NGOS & 54 law professors allege rule will:
  - "Narrow the range of impacts & alternatives agencies consider"
  - Make it harder to challenge flawed NEPA analyses in court."
  - Unintended benefit of reaching net-zero carbon economy by 2050 by speeding renewable energy & low carbon projects & other green infrastructure

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Trump Retains Fine Particulate NAAQS

- Trump EPA retained fine particulate matter (PM 2.5) rule (12 micrograms/M3)
- Despite EPA's public health experts who say it contributes to 10s of thousands of premature deaths annually. EPA staff is split on this final rule
- NGOs, seeking a more health protective standard, will sue alleging the rule allows tens of thousands of preventable premature deaths annually

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Stimulus & HFC Cuts

Phases out HFCs:

- EPA authorized to cut product & use of HFCs by 85% over 15 years
- Expected to save as much as half degree Celsius of warming by end of 2100
- 35 billion for renewable energy including tax credit extensions for solar, wind, and energy storage ($4B), energy efficiency products, electric grid upgrades, sustainable transportation ($2.6B), carbon capture research ($6B), $1.7 B for low-income families to install renewable energy, nuclear ($11B)
- Reauthorizes EPA program to cut diesel engine emissions
- DOE: Must prioritize funding research with 100% “clean, renewable, or zero-emission energy sources”

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EU struck deal to cap super-warming F-gases

- EU finalized tentative deal on limiting the use in fridges and air conditioners of fluorinated gases that have a global warming potential thousands of times greater than carbon dioxide
- Introduce a cap to achieve a 79% reduction by 2030 on hydrofluorocarbons (HFCs)
- Includes bans on the use of HFCs in new equipment in some business sectors by 2022 and prevent their use for servicing and maintenance of old equipment

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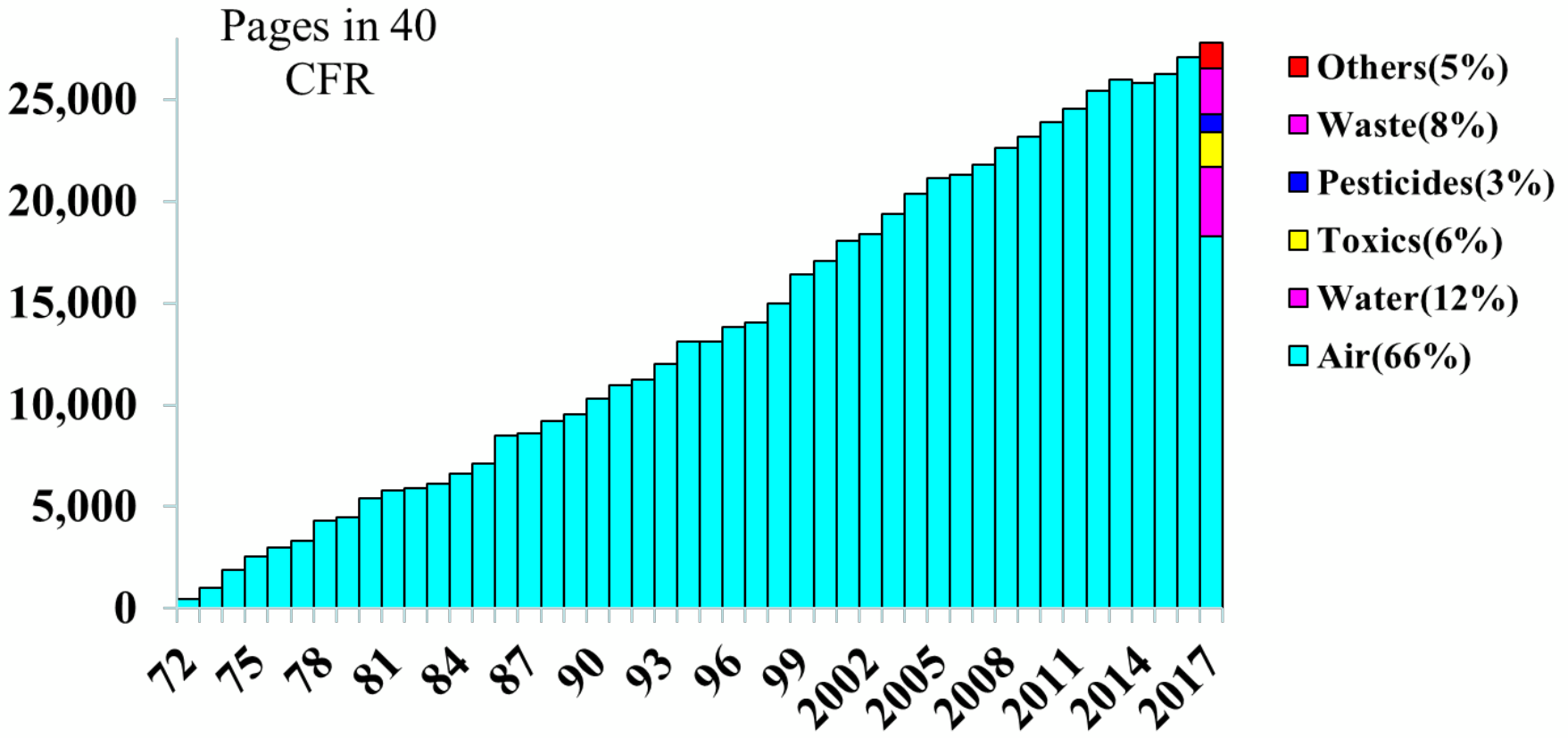
EPA Regulations continue to grow

Over 27,000 pages in 2017; Increase of almost 700 pages



Source: U.S. Code of Federal Regulations
Courtesy: Larry Cahill

California Environmental Regulatory Developments

Environmental Legislative Topics

- Climate Change
- Air Quality
- Hazardous Waste
- Hazardous Materials
- Green Chemistry
- Water Quality
- Sustainability
- Health & Safety
- Enforcement
- Forecast

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Governor Newsom's Vision

- "Yes/and" not "either/or"
- No more binary farmers vs. environment
- **Housing for All**: 3.5 M housing units by 2025
- Local govt. $ to update Land use planning
- Wildfire funding & policies
- Limited Highspeed Rail (Merced to Bakersfield
- Central Valley Focus
- "Water Fix"--Just One Tunnel, not Two
- "Saving Sacramento-San Joaquin Bay Delta"
- Fiscal Prudence: "We will prepare for uncertain

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Democratic Dominance

- Historic ultra-supermajority in both houses with a Democratic governor
- Both houses led by members who have a deep interest in environmental issues
- What would the Legislature do with this opportunity?

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Newsom Agency Challenges

- CDFW—budget, program
- DTSC—budget, program
- Cal Recycle—solid waste and recycling crisis
  - National Sword
  - Bottle bill
- Air Resources Board
  - Board Membership
  - Meeting Climate Targets
  - Localized Pollution

- Source: Kip Lipper

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California Accelerating Climate Change Ambitions

- **Sparked by wildfires**: Fast tracking on top of leading the nation in decarbonizing the economy fast tracking goals
- Roughly $2 billion in new funding for CalFire, OES, other state agencies for landscape/forestry management (2020)
- **CalEPA & Natural Resources Agency to specifically adapt strategies**:
    - More EVs
    - Electrify transportation
    - More dynamic & deliberative Land Use efforts
    - Revisit soil, industrial, and agricultural policies

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Senate Appointments/Confirmations

- Agency Secretaries (CAL-EPA, NR)
- CPUC (new President)
- CEC (new Chair)
- SWRCB (New Chair)

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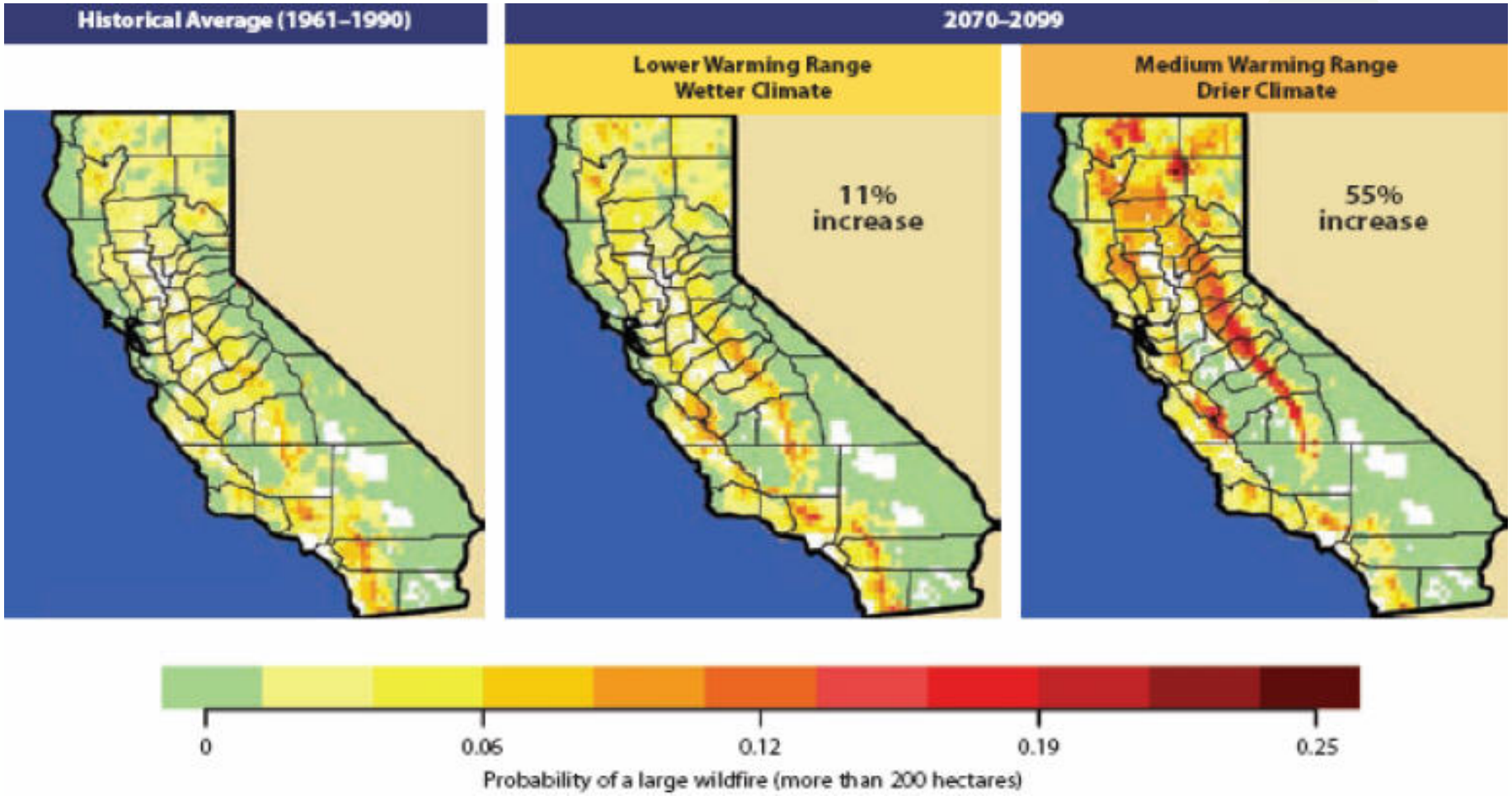
Global Warming and Wild Fire Risk



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Wildfire Legislative Package

- Focus on prevention, response, & recovery
- Fuel Reduction
- Mitigation Plans
- Fire-hardening homes
- Evacuation
- Cost recovery from utilities

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Wildfire Legislation (2018)

SB 901: Aimed at reducing fuel loading emphasizing removal of small/mid-sized trees

AB 2126: Leverages CCC forestry expertise

SB 465: Funding for ember-resistant roofs, duel-paned windows, ignition resistant decks, walls, and patio covers

AB 2911: Fire safety planning and defensible space and building standards

AB 1956: Local assistance grant program for fire prevention

AB 1492, AB 1954, AB 2889: Timber Harvest Plans

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More Wildfire Legislation (2018)

- **AB2518**: Innovative forest products and manufacturing
- **AB 2551**: Prescribed burning
- **SB 1260**: CAL FIRE & local planning collaboration
- **SB 833, SB 821 & AB 2380**: Emergency Notification
- **SB 30**: Natural infrastructure to reduce risk
- **AB 1800**: Consumer protections for insurance

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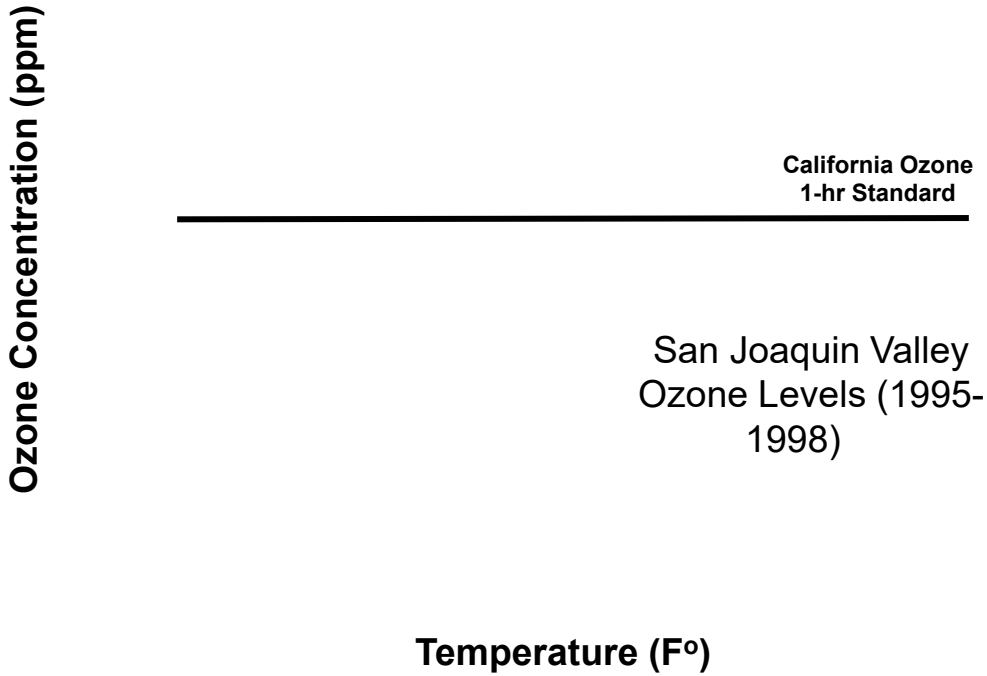
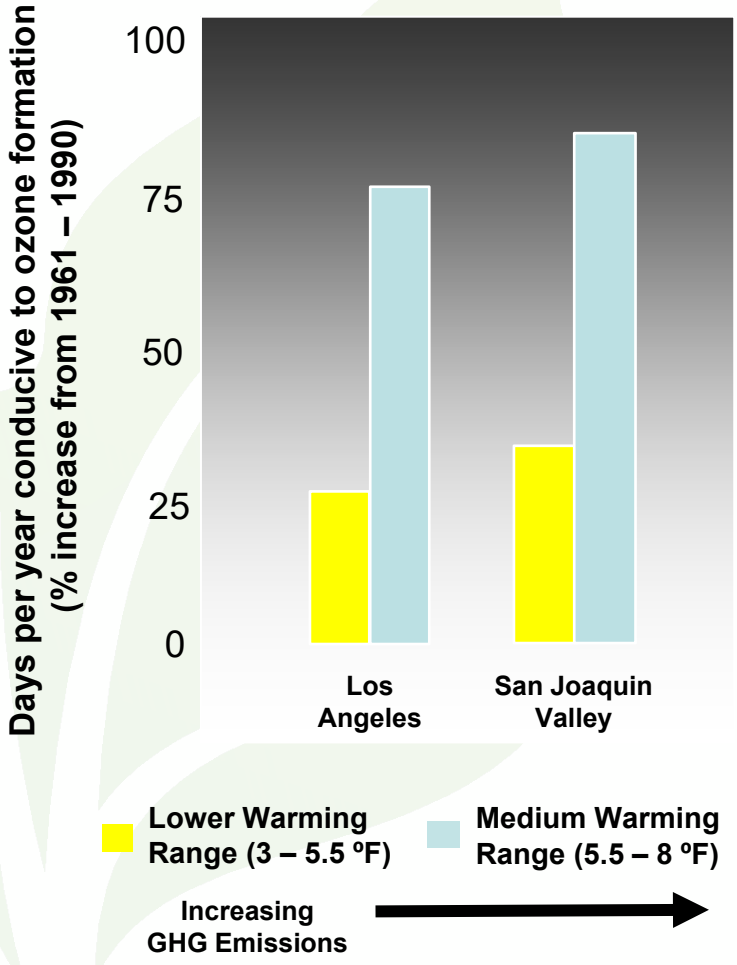
Increased Risk of Poor Air Quality





Our Changing Climate: Assessing the Risks to California (2006), *www.climatechange.ca.gov*

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Buy Clean California Act

AB 262:

- Dept. of General Services must publish maximum acceptable global warming potential (GWP) for category for eligible materials

- Beginning 7/1/19: bidders must submit Environmental Product Declaration not exceeding GWP

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Hazardous Waste Developments

Consolidated Manifesting

Retail Hazardous Waste

- **AB 2920** Retail hazardous waste eligible for consolidated manifesting for California-only HW (i.e., unsold consumer products in its original retail sales packaging that is determined by the retailer to be a hazardous waste).
- **Original list:** household bleach/cleaning products, light bulbs, pool chemicals, laundry detergent, cat litter, potting soil, and fertilizers, used oil, brake fluid, antifreeze, "paint-related" wastes, and dry cleaning solvents.
- Waste streams no longer have to individually listed on the manifest and in its own container, saving extra vehicle
- **Under consolidated manifesting procedures, the generator is exempt from filling out a hazardous waste manifest, and instead the transporter completes both the generator and transporter section of the manifest.

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DTSC Oversight Board

Vetoed

AB 995 would have created Board of Environmental Safety within CalEPA

- Providing DTSC policy direction & oversight, & established new,
- Increased fees to raise an estimated $22 million to “begin fiscal stability in the department
- Heard & decided appeals of hazardous waste facility permit decisions & certain financial assurance decisions;
- Held public hearings on individual permitted or remediation sites;
- Set priorities for each program for each year;
- Reviewed how the department is coordinating with other regulatory agencies
- Required the board, by Jan. 1, 2022, to establish guidelines for site prioritization under the site mitigation program, including orphan sites.

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"Ignitability" Waste Rule

- "Modernizing Ignitable Liquids Determination" updates and codifies test methods for determining ignitability.
- Offers industry flexibility & cost-saving opportunities using modernized test procedures
- Eliminates uses of mercury thermometers in analytical methods
- Defines "aqueous" as "50% water by weight" which partially excludes alcohols from the definition of "ignitability

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Hazardous Waste Generator Improvements Rule

- Major overhaul of RCRA
- Took effect May 2017
- Major Changes:
- Reorganization of 40 CFR 262
- Expanded Emergency Preparedness Requirements
- Bolstered rules for Biennial Reporting
- Relief for Episodic generation events impacting generator status
- New Marking/labeling requirements for HW tanks & containers
- California must adopt rule by 7/1/19

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Hazardous Materials Developments

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California Safe Cosmetics Act

- SB 312 closes that allows chemicals in personal care and cosmetics products to be categorized as “fragrance”
- Fragrance chemicals can be found in more than 95% of shampoos, conditioners, hair styling products, antiperspirants and shaving products as well as fine fragrances, body spray and lotions, and 1/3 of the fragrance chemicals currently in use have been linked to negative health impacts ranging from allergic reactions to reproductive harm and increased risk of breast cancer.
- Cosmetic manufacturers, by January 1, 2022, must disclose product information to DPH re cosmetic products containing a fragrance ingredient or flavor ingredient
- Agencies must post on database associated health hazards.

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Cosmetics Product Safety

- **Prior Law**: FDA and CA DPH did not require premarket safety testing, review, or approval of cosmetic products.
- **AB 2762** bans a list of specified ingredients from cosmetics products consistent with the European Union's (EU) Annex II of regulation No 1223/2009 including carcinogens, reproductive toxicants, and endocrine disruptors
- Prohibits, beginning January 1, 2025, the manufacture, sale, delivery, holding, or offering for sale in commerce of any cosmetic product containing specified intentionally added ingredients.

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Menstrual Products Right to Know Act of 2020

AB 1989:

- Requires disclosure of all ingredients in menstrual products including tampons, pads, cups, disks, sponges, and menstrual underwear which contain: Phthalates, Bisphenols, Parabens, and [per- and polyfluoroalkyl substances].

- Packaging containing menstrual products must be conspicuously labeled with a list of all ingredients in the product

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EPCRA TRI Reporting

Now Includes PFAS

- Per- and polyfluoroalkyl substances (PFAS) added to Toxic Release Inventory under the Emergency Planning & Community Right to Know Act
- Includes 172 PFAS chemicals
- Facilities that manufacture, process or use100 lbs. ore more of PFAs chemicals must report by 7/1/21 for all of 2020 activity

40 CFR 372.29

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Ban on Fire Fighting Foams with PFAS

SB 1044 bans firefighting foam from containing per- and polyfluoroalkyl substances (PFAS) beginning

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Pipeline & Hazardous Materials Safety Rules

- Changes to proper shipping names, hazard classes, packing groups, special provisions, packaging authorizations, air transport quantity limitations, and vessel stowage requirements
- Amends Hazardous Materials Table (Section 172.1010)
- Classification system for articles containing hazardous materials without a proper shipping name.
- Regulates hazardous materials residues present in articles
- Lithium battery shipping requirements Corrosive mixture packing requirements

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Water Quality/Supply Developments

Increases penalties for oil spills

- **AB 3214** responds to the largest oil spill California in over 25 years Doubles maximum and minimum criminal penalties for companies that knowingly spill oil into state waters.
- Plains All American Pipeline was convicted of one felony and eight misdemeanors for failing to maintain the pipeline along with mishandling the response to the spill.
- Paid a ~$3 million

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BCDC Enforcement

AB 2809 mandates actions by the San Francisco Bay Conservation and Development Commission (BCDC) re enforcement, penalties, & implementation of the Suisun Marsh Preservation Act.

BCDC must create & implement a procedure to:

- Provide managerial review of staff decisions in enforcement cases
- Timelines for resolving enforcement cases,
- Penalty matrix for assessing fines and civil penalties,
- Method for assessing civil penalties in cases involving multiple violations.

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Point Source Discharges Through Groundwater Ruling

- **Issue:** does "pollution that reaches navigable waters only through groundwater [is] pollution that is 'from' a point source" requiring an NPDES permit?
- **No bright line in 6-3 SCOTUS Ruling**: An NPDES permit is required "when there is a direct discharge from a point source into a navigable water or when there is the functional equivalent of a direct discharge" from a point source. County of Maui v Hawaii Wildlife Fund 2020
- **"Functional Equivalent" factors**:
    - Pollutant travel time
    - Between discharge point & navigable water
    - Distance traveled
    - Material through which discharge travels
    - Dilution or chemical change during travel

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CWA 401

Cooperative Federalism

- Limits scope of state reviews of federally permitted projects' water quality impacts
- Overturns Supreme Court ruling: Section 401 should be read to authorize additional conditions & limitations on permitted activity as a whole, not merely discharges. (PUD No. 1 of Jefferson Co of Tacoma v. Washington DEP (1994)
- Using Clarence Thomas dissenting opinion: "Text & structure of Section 401 allow states to only impose those conditions related to discharges."
- Implications: Will prevent states from raising climate change and other non-water quality issues.

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ESA General Permit Ruling

- SCOTUS confirms General Permit OK for most pipeline construction

- Lifted national injunction on use of nationwide permit 12 for new oil & gas pipelines

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Lowered Bromide levels for Drinking Water

- AWWA seeking zero liquid discharge requirement for wastewater from power plants (flue gas desulfurization)

- Bromide controls mercury releases from coal power plants & increases carcinogenic brominated disinfection byproducts (e.g., trihalomethanes)

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Banning Offshore Drilling

SB 834 and AB 1775

- Response to Trumps move to drill offshore
- 15 coastal governors oppose offshore drilling (1/3 are Republican governors)
- Brown: "We will not let the federal government pillage public lands and destroy our treasured coast."
- Bans construction of the infrastructure to support rigs pipelines and docks

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"Waters of the United States"

- EPA and U.S. Army Corps of Engineers issued definitional clarity in an effort to clarify the scope of protected waters "clearer, simpler, & faster
- Three Categories of Waters:
- Jurisdictional in all instances
- Subject to case-by-case analysis to determine whether jurisdictional
- Excluded in all instances
- Seeks to clarify the Rapanos decision, which left confusion as to which waters fell under the governments jurisdiction

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"Waters of the United States" (Cont.)

- Jurisdictional in all instances: Traditional navigable waters, interstate waters, territorial seas, impoundments, tributaries & waters "adjacent" to jurisdictional waters
- Subject to case-by-case analysis to determine whether jurisdictional include geographical clusters:
- Water sheds with a "significant nexus"
- Waters within 100 year floodplain & within 4,000 feet of high tide line
- Excluded: converted croplands, waste treatment systems, "ditches", storm water control treatment /storage structures, cooling ponds on dry land.
- Sixth Circuit: Issued temporary stay

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"Waters of the United States" (Cont.)

- **Jurisdictional in all instances**: Traditional navigable waters, interstate waters, territorial seas, impoundments, tributaries & waters "adjacent" to jurisdictional waters
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California Hazardous Substances/Cleanup Developments

Superfund Preemption

- Superfund does not preempt state court oversight of damages pursuant to state tort law
- SCOTUS (8-1) preserved EPA's ultimate cleanup authority: Finding landowners seeking a more extensive cleanup remedy through tort claims must first obtain EPA approval

Atlantic Richfield Company v. Gregory Christian

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Expansive Statute of Limitation Rulings Superfund

- Cost recovery actions under Section 107 not time barred by 6-year statute of limitations
- Must seek cost recovery claim within 6 years from initiation of remedial action
- Reset allowed for distinct remediation projects addressing problems different than those in initial cleanup plan
- Ct. of Appeals: MPM Silicones v Union Carbide 2020 & Arconic, Inc. v APC Investment Co.

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Superfund Listing based on Vapor Intrusion

Obama-rule:

- **Note:** Approximately 1,073 site possibly qualify for NPL due to subsurface intrusion
- **Hazard Ranking System rule**: allows regulators to list contaminated sites on NPL solely upon presence of vapor or water intrusion
- Rule "requires consideration of permanent vapor mitigation systems in scoring sites for consideration on the NPL."

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California Solid Waste Developments

Plastic Bottle Minimum Recycled Content

- AB 793 sets a minimum recycled content standard for plastic bottles in California.
- Requires producers of plastic beverage containers to incorporate postconsumer recycled content
- Requires the total number of plastic beverage containers to contain, on average, no less than 50% postconsumer recycled plastic content per year on and after January 1, 2030

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Litigation Reset

Pivot from Defense

Blue State AGs and NGO shifting from Defense

Red States likely to go on Offense

NRDC NATURAL RESOURCES DEFENSE COUNCIL

EARTHJUSTICE BECAUSE THE EARTH NEEDS A GOOD LAWYER

EDF ENVIRONMENTAL DEFENSE FUND

OFFICE OF THE ATTORNEY GENERAL ★ CALIFORNIA DEPARTMENT OF JUSTICE ★ liberty and justice under law

Letitia James NY Attorney General

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Biden Litigation Step back

- Likely to drop legal defenses
- No more friend-of-the-court briefs on behalf of industry
  - ACE
  - Navigable Waters Protection Rule (replaced Obama's WOTUS)
  - NEPA overhaul
  - Clean Air Act waiver & vehicle GHG rules
- Reset in pending litigation over DJT rollbacks:
  - Oil & gas GHG rules
  - Vehicle GHG standards

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SCOTUS Outlook

- 6-3 conservative majority
- May try narrowing legal standing for petitioners challenging environmental rules & policies
- *Juliana v. US* could be a test case
- One-third of appellate judges appointed by Trump
- Narrowing the Chevron Doctrine: which grants agencies discretion interpreting ambiguous statutes

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Looking forward…

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2021 Prognostications

Key Issues

- Climate Policy
- Water Policy
- Toxics Reform
- DTSC Reform

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Looking Ahead

Storm water: New Industrial General Permit (IGP)

- Effective July 2020
- Those exceeding NEL "numeric effluent limitation" deemed in violation of the IGP and subject to citizen suit enforcement
- **Start Planning**:
  - ID water bodies & pollutants relevant to your facilities
  - Select which compliance option alternatives

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So What?

Your Strategy

Beyond Compliance Strategy Assumptions

- Environmental Risk is heightened with the Biden Administration
- **Stake holders overwhelmingly care about your environmental performance & corporate values**
  - Public image and compliance are tied together
  - Greenwashing Law
- **Your reputation and license to operate are on the line**

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Beyond Compliance
Risk Management Strategy

Objective: Maintain values-based, proactive, long term approach to manage risk and optimize performance

- **Continue investing in environmental assurance programs**
- **Invest in your human your human capital**
- **Strive toward Operational Excellence**
- **Sustain Culture & Accountability**

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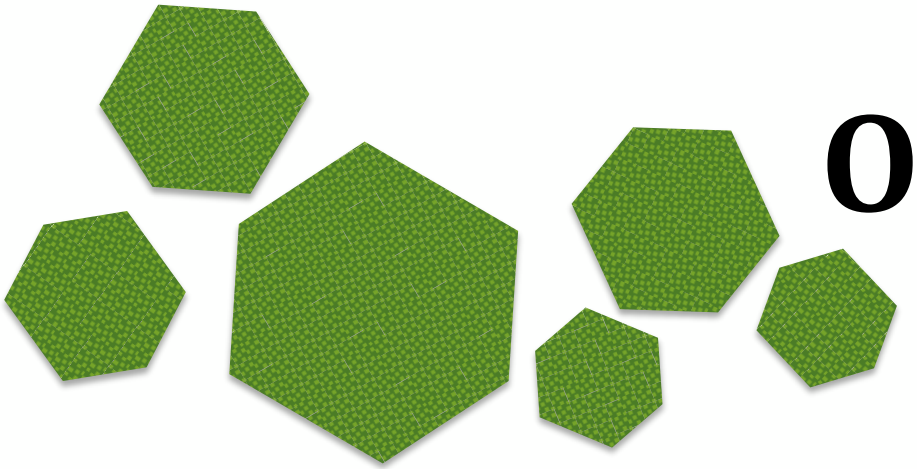
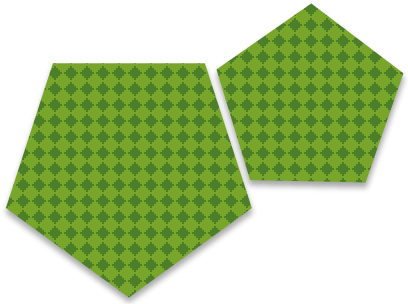
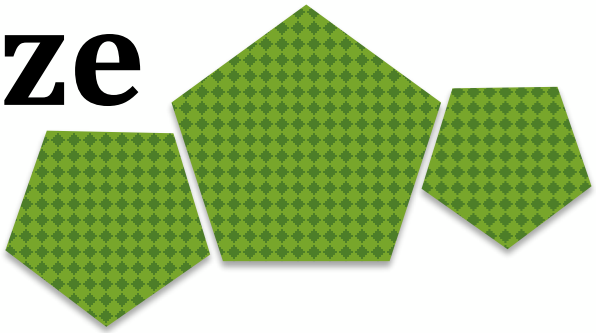
Following Our Compliance Assurance Strategy Promotes a Resilient Environmental Assurance Strategy that Manages Risks and Protects Your Investment & Your Brand



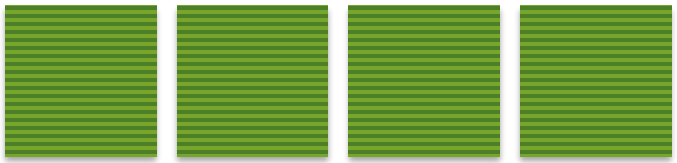
Operationalize



Proceduralize



Institutionalize



Beyond Compliance Assurance Strategies: Operationalize

Legal Registry:

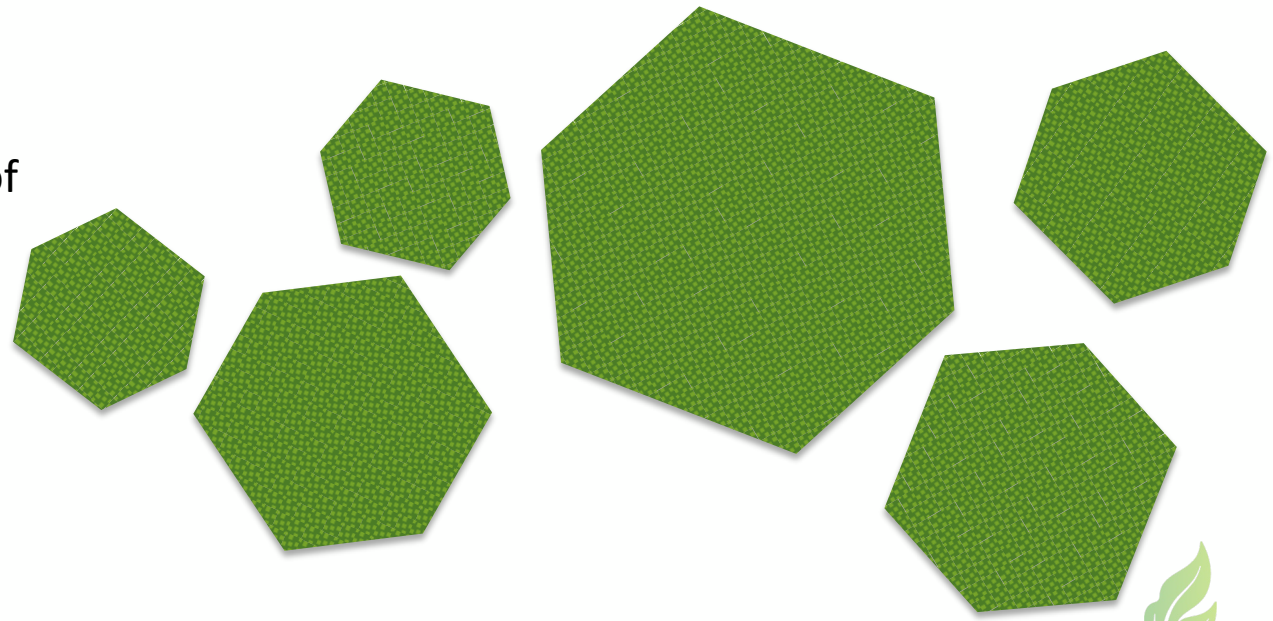
- Identify all potentially applicable EHS requirements
- Confirm exempt operations
- Prove the Negative

Compliance calendar:

- Identify specific compliance tasks (e.g., permit renewals, monitoring frequencies, report submittals, training deadlines, etc.) and action items.
- **Roles and responsibilities** for implementing the compliance calendar

SOPs/Compliance Calendar:

- "who, what, when, and how" of obligations
- Spill Management/Release Reporting



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Beyond Compliance Assurance Strategies: Operationalize

Training programs (Required & Advisory)

- Training Matrix (Who & When)
- Including Contractors

Updates:

- Identify & cascade developments into tools

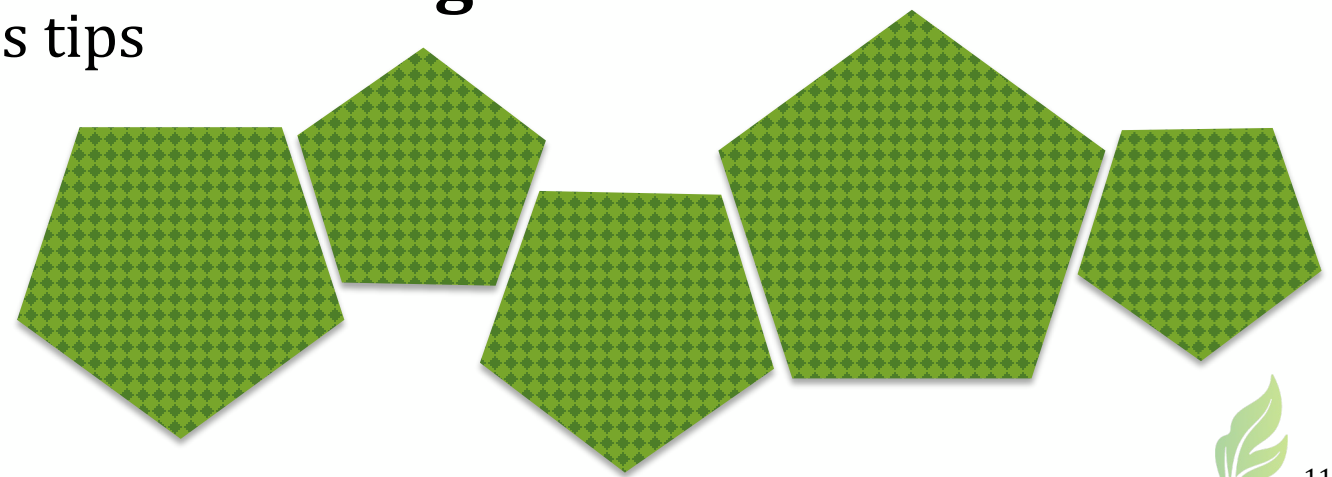
Hotline: Anonymous tips

Management of Change:

- Transitioning staff & contractors & organizations to re-direct resources, business process, budgets

Enterprise Information Management System

Strategy for Dealing with Regulators



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Beyond Compliance Assurance Strategies: Operationalize

Self Inspections:

- Internal ground truthing

Third Party Auditing:

- EHS assessment by third party

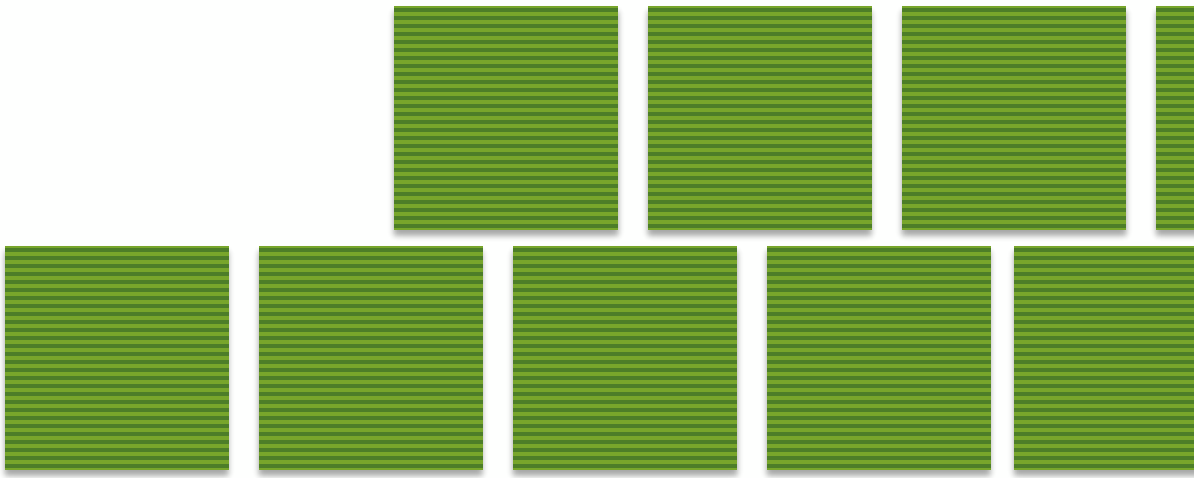
Operational Excellence

- Facilitation
- Anonymous Deep Dive Assessment

CAPA/Root Cause:

- Corrective Action Preventive Action support & implementation

Culture & Accountability



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Green Washing & the Law

No misrepresentation, directly or by implication, that a **product/package/service** offers a general environmental benefit, or that such product is:

- **Compostable**: Support claims with competent & reliable evidence that all materials break down into compostable materials in a timely way.
- **Carbon Offsets**: Support claims with competent & reliable evidence using appropriate accounting methods to ensure not selling ERCs more than once.
- **Non-Toxic**: Support claims with competent & reliable evidence the produce is safe for people AND the environment
- **Degradable**: Must prove "entire produce or package breaks down completely & returns to nature in reasonably short time"
- **Recyclable:** Must be available to 60% of consumers or communities
- **Made from Recycled Content**: Must qualify claims for products or packages made partly from recycled material e.g., "Made from 30% recycled material."

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beyond compliance law

compliance assurance counseling

Earnest Company LLC EHS Compliance Assurance Guide

Hazardous Waste & Hazardous Materials Management Federal and California Guide

June 2020
by Beyond Compliance Law

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Sample Environmental Legal Registry

Regulation Topic	Regulatory Citation (Federal/State/ Local/City)	Regulatory Requirement	Threshold Requirement (i.e., threshold limits/ quantities/volumes)
EPA Identification Number	Cal H&SC 25205.16	Facility should verify that information provided DTSC and EPA w/ regard to hazardous waste generating activity is accurate and current. Provide waste codes associated with the four largest hazardous waste streams. This fee will be due 30 days after the applicable DTSC notice is received.	>1000 kg/mo. of hazardous waste, or >1 kg/mo. of acutely hazardous waste
Hazardous Waste Tanks	22 CCR 66265.191-194	For each existing hazardous waste tank system, the facility will meet tank integrity standards, tank and system component design and construction standards, containment and release detection requirements, and operating, overfill and spill prevention requirements.	Applies to all hazardous waste tanks
SPCC Plan	40VFR Part 112	Spill Prevention Control & Countermeasure Plan: Facilities with greater than 1,320 gallons of combined oil capacity are required to complete an SPCC Plan. Oil includes diesel fuel, gasoline, motor oil, transformer oil, hydraulic elevator oil, vegetable oil, used oil, and cooking grease.	> 1,320 gallons of oil capacity

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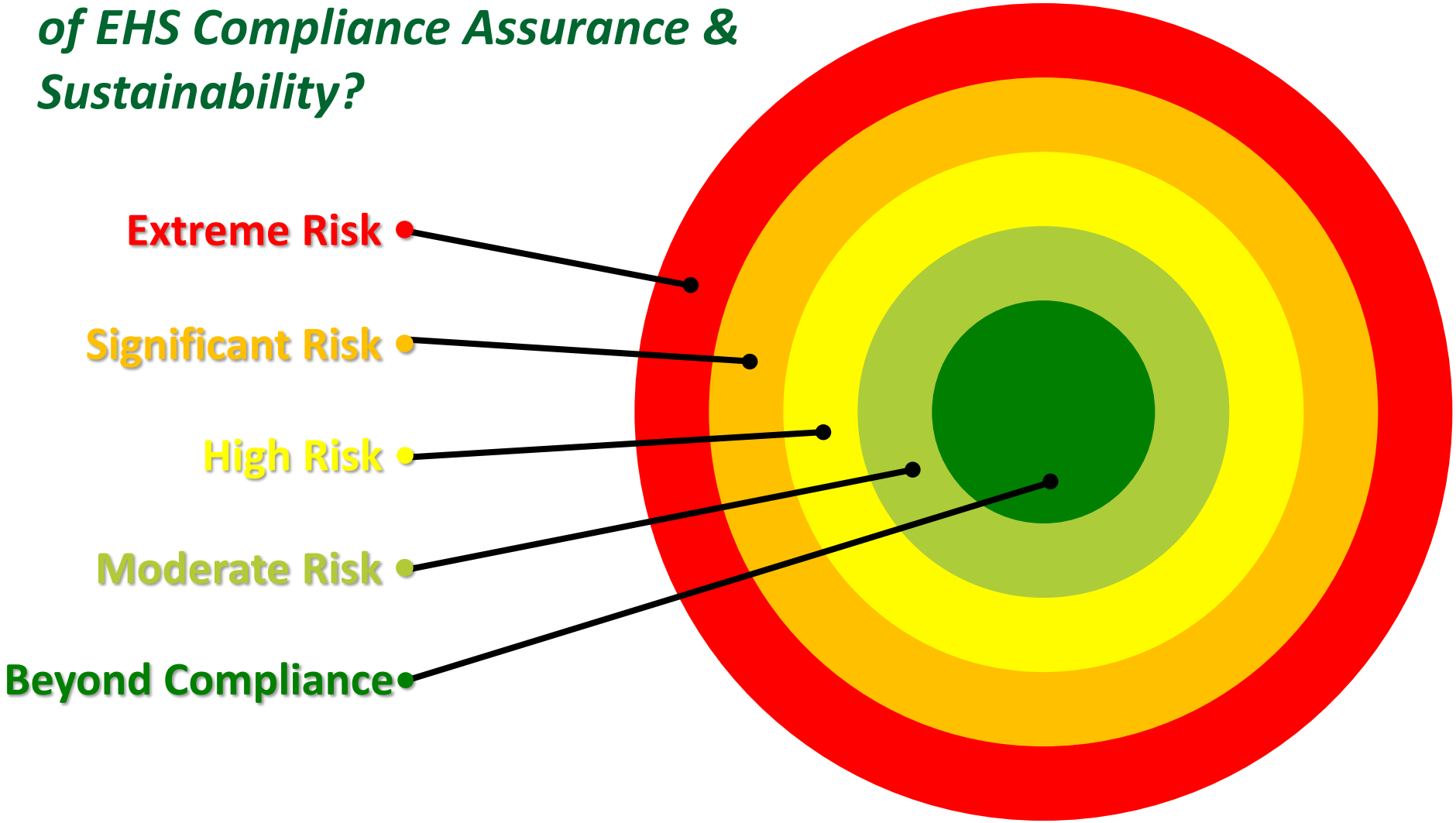
This is what I do with my clients
to ensure that they manage compliance
risk and sustainability performance

From Risk to Opportunity

Where are you on the Continuum of EHS Compliance Assurance & Sustainability?



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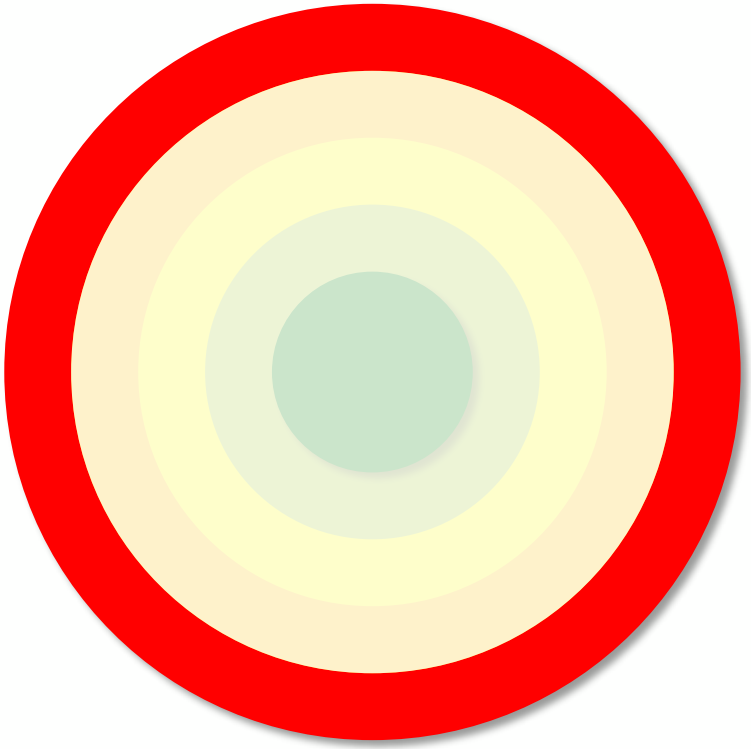
We are All Speeding

Compliance Category – EXTREME RISK

- No meaningful effort to comply
- No environmental programs or systems in place
- No accountability for employee actions



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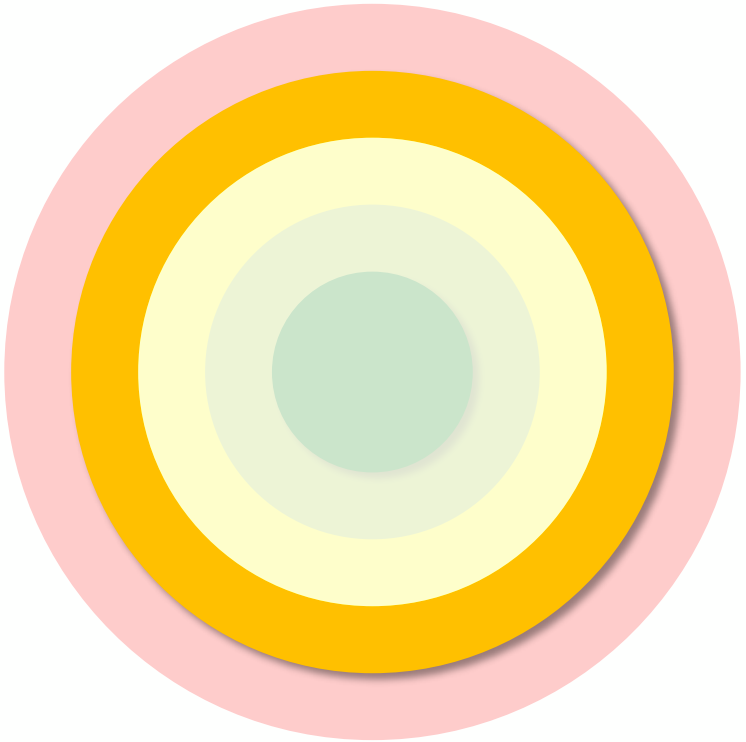
Compliance Category – SIGNIFICANT RISK

- Just barely getting by
- New company or one with an incomplete compliance system
- Reactive management responding to fines and penalties from regulators



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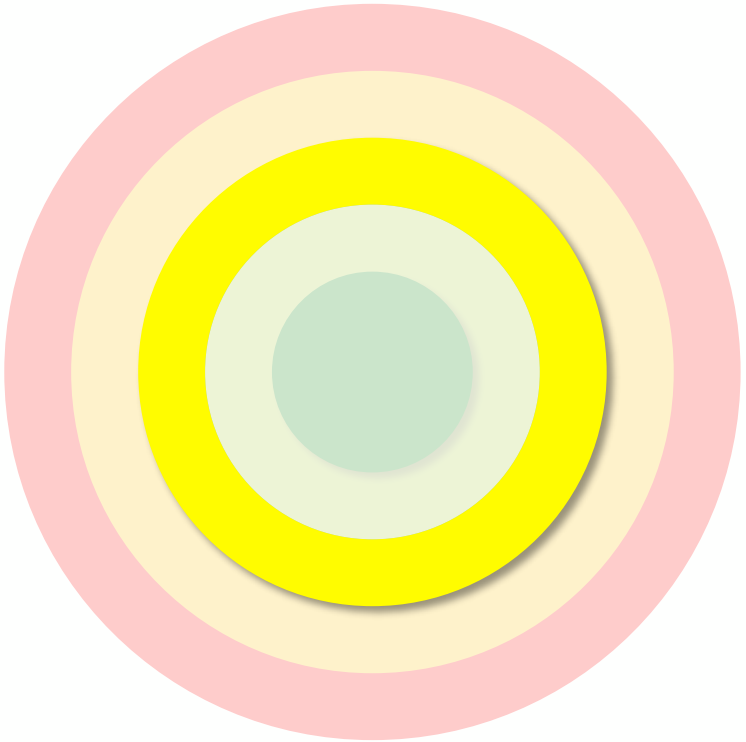
Compliance Category – HIGH RISK

- Managing, still reactive and exposed
- Basic, piecemeal approach and understanding of applicable EHS regulations
- Basic programs in place
  - Training
  - Some self inspections
  - Other important programs missing
- Rudimentary recordkeeping



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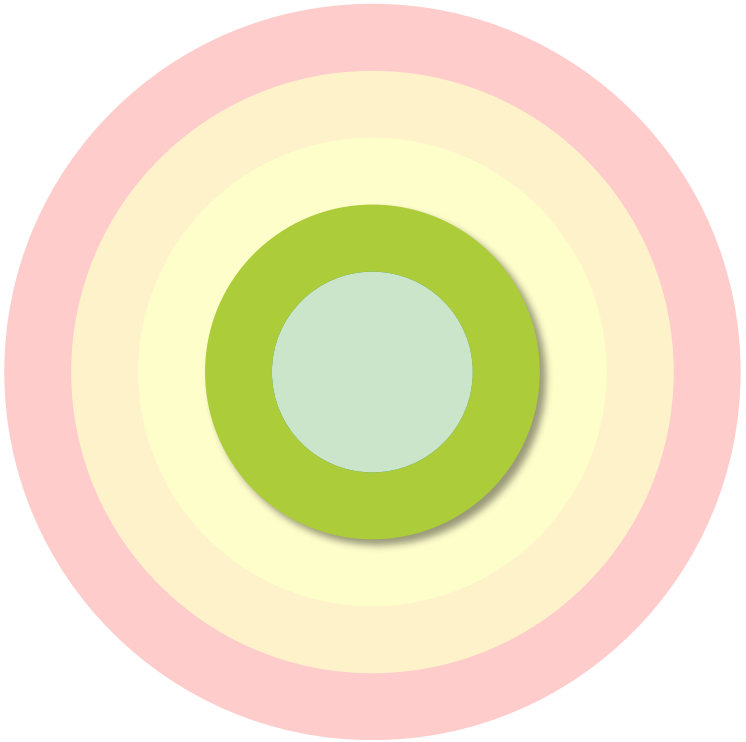
Compliance Category – MODERATE RISK

Proactive Compliance

- EHS Compliance Management System (CMP)
- Regulatory applicability Analysis in place
- Permit and other requirements translated into standard operating procedures (SOPs)
- Staff accountability
- Proactive training programs (with regulatory updates)
- Clearly identified roles/responsibilities
- Tickler system scheduling schedules to comply
- Robust self-inspection program
- Management of Change
- Third party environmental auditing system in place
- Strong corporate environmental policy
- Knowledge of which laws apply and the resources to follow through
- Capable staff and adequate resources
- Healthy Corporate Culture & Accountability



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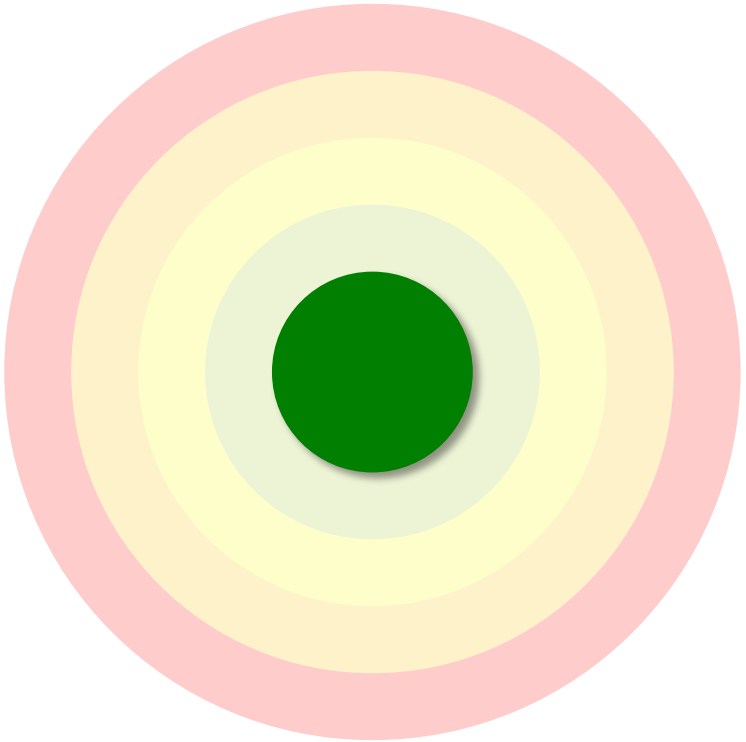
Compliance Category – Beyond Compliance

- Beyond Compliance Leadership/Proactive environmental compliance
- Sustainability framework and Performance goals and commitment
- Lean production and profit optimization
- Management Systems
- Possible ISO 14001 Certification
- Possible OSHAS 18001 Certification
- Voluntary Protection Program (VPP)
- Able to anticipate regulatory changes
- Strong regulatory systems & well-resourced compliance personnel
- *Doing well by doing good*



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Your Next Step

What's your Company's Compliance Risk?

Take the Beyond Compliance EHS Assessment

You will get:

1. Critical insight into your exposure

2. Understanding of strategy gaps

3. Road map to your next steps for assuring compliance

Go to: beyondcompliancelaw.com/assessment

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