


Regulatory Update with Baw Law Group LLP

**COFFEE &
COMPLIANCE**

July 26th, 2022



A photograph of the Golden Gate Bridge in San Francisco, California, viewed from the water. The bridge's iconic red-orange towers and suspension cables are prominent against a clear blue sky. The water is a deep blue, and the surrounding hills are visible in the background.

Environmental Policy Updates, Trends, Legal Risks Impacting Industry

For MAPISTRY Coffee & Compliance

July 26, 2022

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LAW
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MEET THE TEAM



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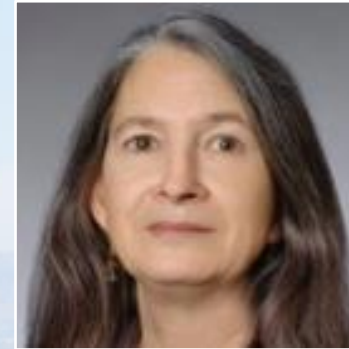
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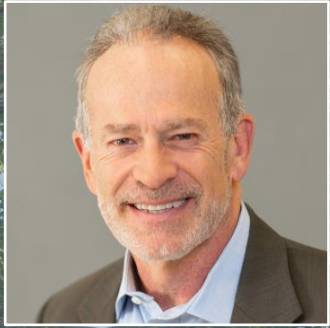
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GARY LUCKS PARTNER

Gary Lucks JD, CPEA is the principal environmental attorney with deep expertise in environmental, health, and safety (EHS) law, legislative affairs, and sustainability strategy. He has over 35 years of experience advising Fortune 500 clients in most industry sectors. He is a licensed attorney, a scientist, and a Certified Professional Environmental Auditor (CPEA) who has completed or overseen close to 500 major EHS compliance audits across the country and overseas. He also specializes environmental compliance counseling, environmental auditing, environmental management systems (EMS), permitting, and training. He wrote environmental policy briefing papers for Governor Newsom, Senator Feinstein, Senator Steinberg, State Insurance Commissioner Dave Jones, and Marin County Supervisor Charles McGlashan. He serves on the California Lawyer's Association Environmental Law Section's Executive Committee leading environmental legislation, sustainability, and education committees. He also served as an Advisor to the Bay Area Air Quality Management District and co-founded the Sustainable Earth Initiative-- a non-profit dedicated to helping public agencies improve environmental performance and advance sustainability initiatives. Mr. Lucks has published extensively on environmental law, legislation, and policy. He co-wrote a book on environmental law ([California Environmental Law and Policy: A Practical Guide](#) which is used in law schools, colleges, by practitioners, and which has been cited in legal opinions). He also wrote the Environmental Auditing Chapter in the [California Environmental Law and Land Use Practice](#). He has been a regular contributor to the California Environmental Law Reporter for over twenty-five years.

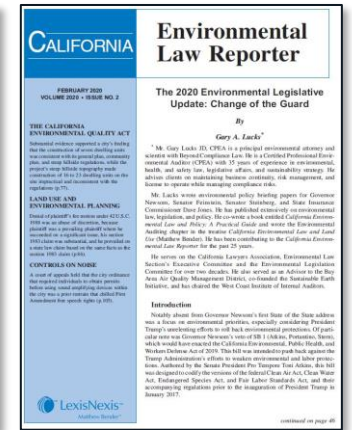
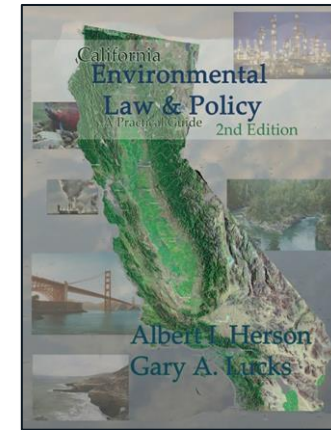


REGISTRATIONS & CERTIFICATIONS

- Certified Professional Environmental Auditor (CPEA), 2005
- California State Bar J.D., 1985
- California Environmental Assessor (REA I), 1993

EDUCATION

- University of the Pacific, McGeorge School of Law
- Tulane University (Cum Laude) B.S., Biology and Environmental Sciences



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ANDREA SUMITS PARTNER

Andrea Sumits' practice includes environmental, health and safety (EH&S) regulatory compliance, product regulatory compliance, strategic EH&S counseling, and EH&S aspects of real estate and business transactions. She advises domestic and international clients in the real estate, consumer products, automotive, electronics, medical device, biotechnology, pharmaceutical, energy, and manufacturing industries.

Andrea's areas of expertise include Proposition 65 for both consumer products and buildings (commercial office buildings, residential rental properties, hotels & resorts, retail centers, restaurants), hazardous materials and waste, occupational health and safety requirements, environmental and EH&S aspects of due diligence and business transactions, and permit transfer issues. She has represented numerous clients in resolving notices of violation or notices to comply, including successful penalty mitigation and even withdrawal of enforcement action.

Andrea's Proposition 65 experience includes drafting and negotiating settlements, advising clients regarding Prop 65 testing protocols, warning language, supplier management, and compliance assurance programs. In the context of buildings and real estate, Andrea counsels clients on Prop 65 warnings and testing, as well as drafting Prop 65 and related hazardous materials provisions, disclosures, and notifications in tenant leases and contractor agreements.

PRACTICES

- Proposition 65
- Asbestos
- Environmental Regulatory Compliance
- Occupational Health & Safety Compliance
- Product Regulatory Compliance
- Permitting and Enforcement
- Hazardous Materials
- Compliance Auditing
- Voluntary Self-Disclosures
- EH&S Compliance Policies and Programs
- Management Systems
- Transactions/Due Diligence

EDUCATION

- University of Texas at Austin (with honors)
- Santa Clara University School of Law (with honors)



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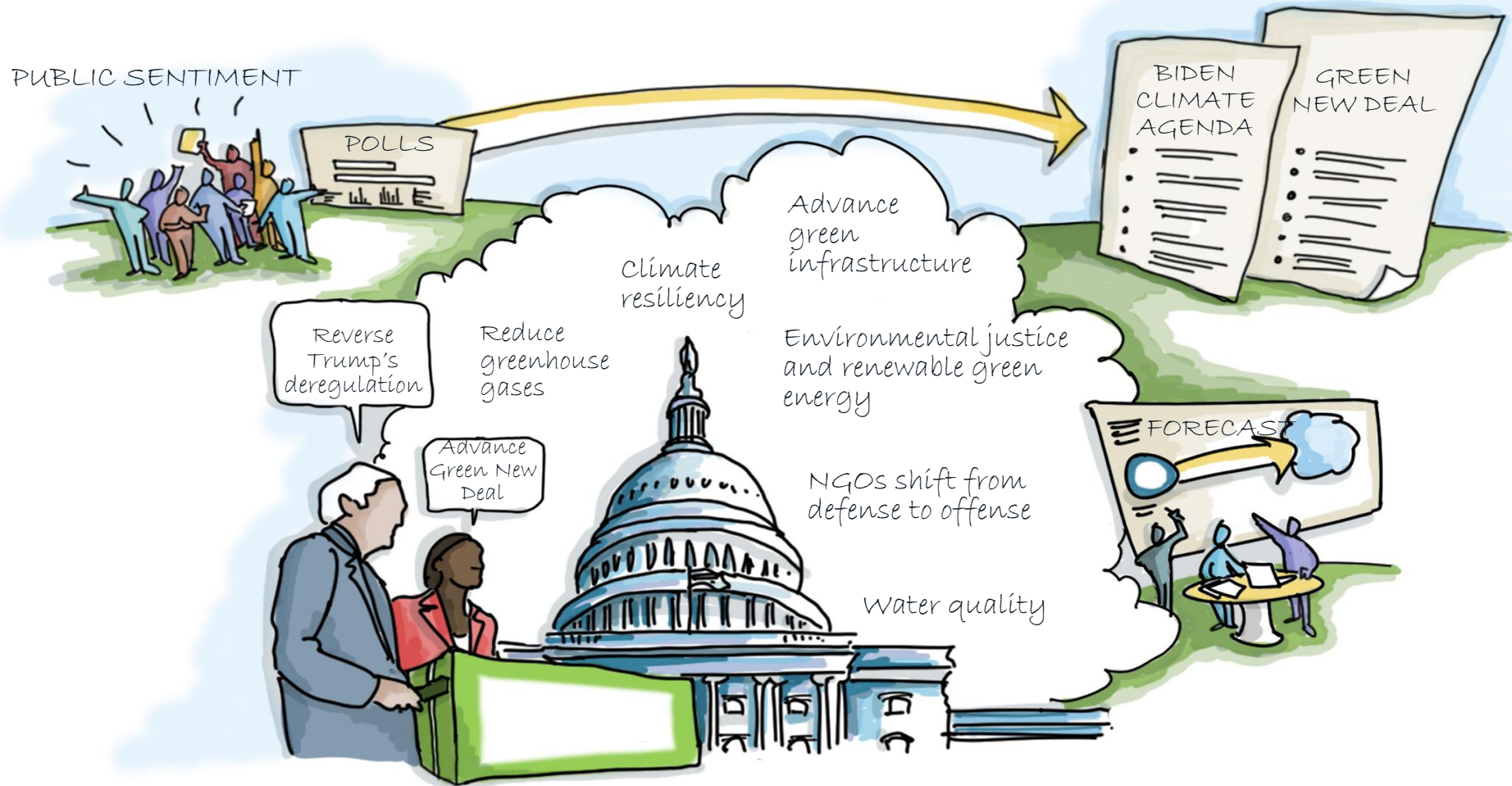
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Where Are We Now?



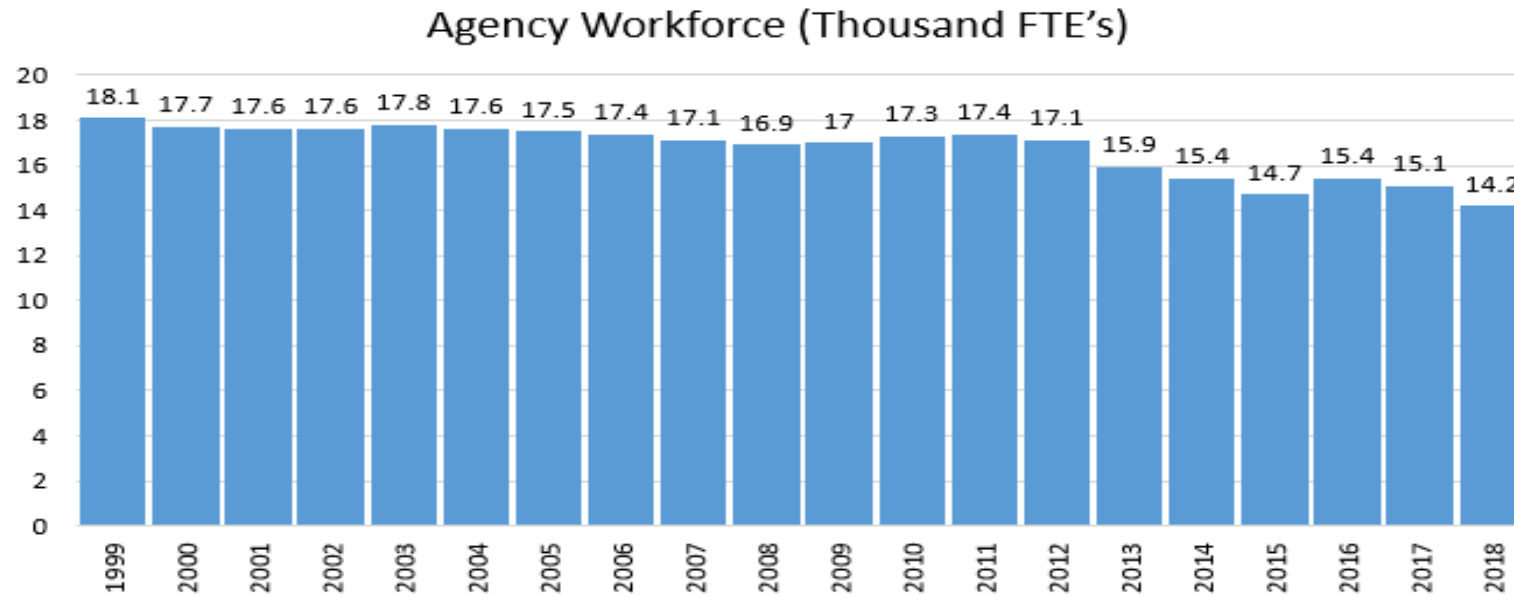
1. **A nuanced, partial retreat pivoting to a wholesale reversal**
2. **Federal Regulatory Drivers:** Remained largely intact
3. **EPA Staff and funding:** Still largely intact
4. **EPA Morale:** Suffering at the federal level
5. **Enforcement:**
 1. **Federal:** Relaxed but Yates Memo and still relatively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

Context – From Trump to Biden



Proposed Budget & Staffing Cuts Did Not Occur

Proposed Budget and Staffing cuts did not Materialize



Source: U.S. EPA

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



Hazardous Materials/Waste:

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



"NextGen" Enforcement

Endangered Species Act

Reality: The Trump Administration Is Reversing 100 Environmental Rules. 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>

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
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Biden Agenda vs. Green New Deal



GND	Biden	
Net-zero GHG Emissions by 2030	2035	Conservation focus on agriculture industry <ul style="list-style-type: none"> ▪ 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	

Biden Environmental Agenda



- **Boosting Agency Morale**
- **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 to:
 - 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”

Personnel is Policy

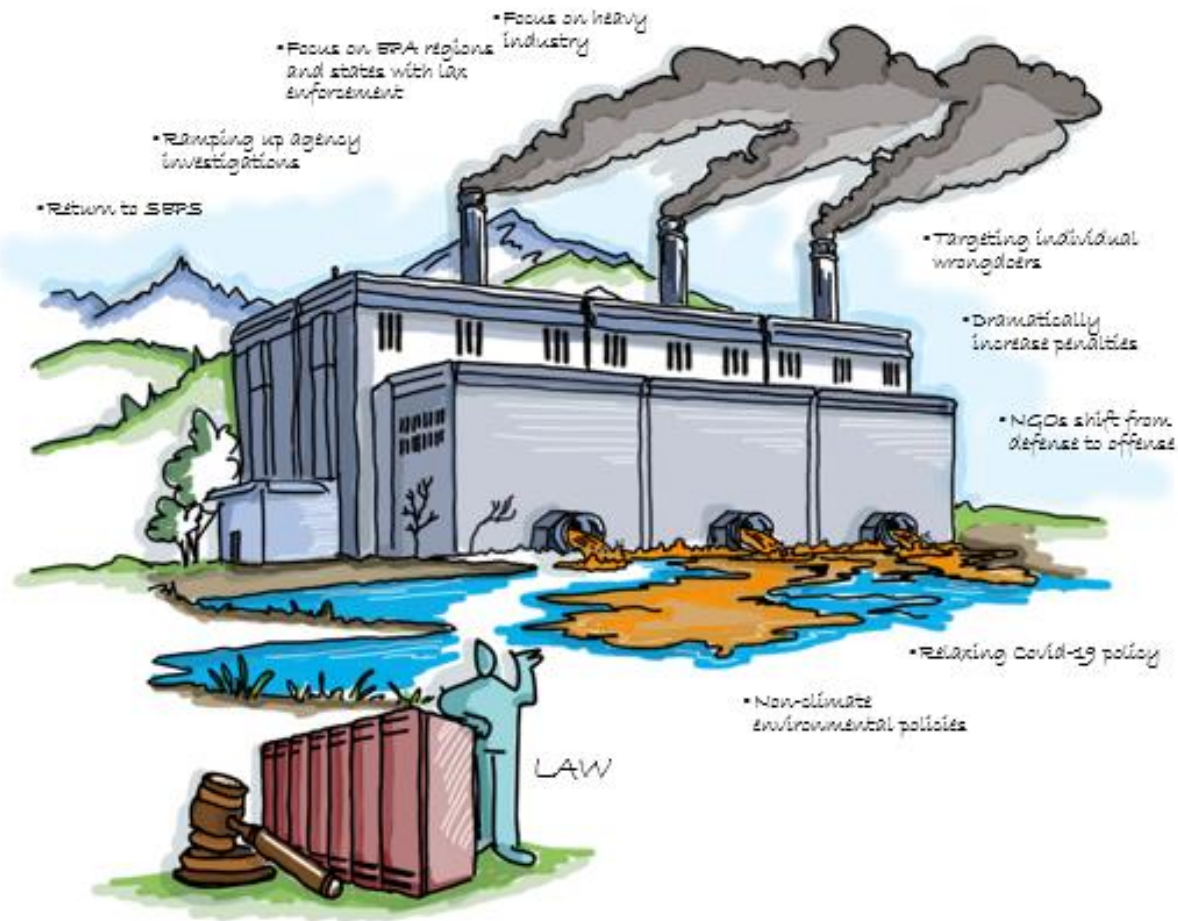


- **EPA:** Michael Regan
- **White House Office of Climate Policy:** To be led by Gina McCarthy to coordinate domestic policy
- **International Climate Envoy:** John Kerry
- **Dept. of Energy:** Jennifer Granholm
- **DOT:** Pete Buttigieg focusing on green infrastructure
- **CEQ:** Brenda Mallory: Experienced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

Biden Administration - Enforcement



BIDEN ENFORCEMENT



DOJ Prosecution Focus

❖ **DOJ Environment Natural Resources Division prioritizing:**

❖ **Corporate Environmental Crimes including:**

❖ Violations of environmental laws and fraud, conspiracy and obstruction of justice

❖ “Due care” throughout the supply chain.“ If supplies originate from a criminally tainted source, [DOJ] ‘ will consider the criminal responsibility of all parts of that supply chain.’

❖ **“Sector-wide” civil enforcement:** If all or most of an entire sector is out-of-compliance, DOJ will focus on individual facilities in that sector

❖ **Critical Enforcement nexus:** Focusing on climate and violations of GHG rules and cases protecting carbon sinks (e.g., illegal logging) and protecting renewable energy programs from fraud

❖ **EJ:** Increased inspections, early relief for communities near non-compliant facilities, & increased engagement with EJ communities.

Significant Increase in Civil Penalties



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: \$50,018
- FIFRA: \$20,528

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
- ❖ 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

Federal Developments



- Climate Change & Air Quality
- Water
- PFAS
- Methane Rule
- HFCs
- Facility Response Plans – Worst Case Discharge
- OSHA

Climate Change & Air Quality

- Climate Change is Goal #1 of 7 in EPA's 4-yr strategic plan
 - Promulgate final rules to reduce GHGs from vehicles, electric utility generating units, and oil & gas industry
 - Partnership programs to reduce annual GHGs by 545 MMT CO₂e
 - Climate Adaptation Action Plans
 - Reduce HFCs
 - Methane reductions
 - ESG
 - Supreme Court decision re: Clean Power Plan (*W.Virginia vs. EPA*)
- Air Quality (Goal #4 of 7)
 - Reduce ozone season emissions of NO_x from electric power generation sources
 - Improve AQ in counties not meeting NAAQS
 - EJ – low SES live in areas where AQ meets PM NAAQS
 - Reduce HFCs
 - Reduce lung cancer deaths from radon exposure
 - Methane rule also has aggressive targets for smog-forming VOC emissions reductions
 - End of CAA exemptions for violations resulting from SSM (startup, shutdown, malfunctions)





- **WOTUS**

- EPA has previously stated they would reveal proposal re WOTUS definition by end of 2022
- Supreme Court to hear *Sackett v. EPA* on Oct 3, decision by summer 2023
- EPA plans to release proposed rule by November 2023
- No specified date for final rule

- **Bipartisan Infrastructure Law (November 15, 2021)**

- \$50 billion to EPA for water systems – grants to be appropriate to state revolving funds
- Lead service line replacement
- Emerging Contaminants / PFAS
- Making water systems more resilient to all threats – natural disasters, climate change, bioterrorism, cyber-attacks
- Increase investment in disadvantaged communities

PFAS



- CERCLA: Proposal to designate PFOA and PFOS as hazardous substances under CERCLA. May 18 EPA added 5 PFAS to the list of RSLs and RMLs
- EPCRA: Added PFAS to TRI reporting
- CWA: priority pollutant; fish toxicity criteria; NPDES permitting; (monitoring, BMPs, notifications)
- SDWA: National Primary Drinking Water Regulation for PFOA/PFOS expected late 2022 and finalized by end of 2023, including MCL and MCLG
- TSCA: SNURs; information; testing strategy
- California Prop 65: PFOA/PFOS listed; more coming
- States actively legislating and regulating

Methane Rule



- Revived in 2021
- EPA proposal to strengthen the rules and extend them to existing sources (oil & gas industry)
- **Applies to oil & gas industry:** production & processing (onshore wells, storage tank batteries, compressor stations, natural gas processing plants, distribution mains/services, city gate, regulators and meters for customers)
- Focus on work practices and measures that can be implemented at individual sources
- Awaiting supplemental proposal prior to final rulemaking. Anticipated elements:
 - Leak monitoring and repair
 - Advanced methane detection technologies - surveys every 2 months
 - Zero emitting pneumatic controllers
 - Eliminate venting
 - Reduce methane and VOCs by 95%
 - Fugitives, pumps, compressors
 - Call for information and comments to inform rule
 - Eliminate some exemptions

HFCs



- AIM Act directs EPA to phase down production and consumption of HFCs to reduce to 15% of baseline levels by 2036.
- Global HFC phasedown avoids up to 0.5 degrees Celsius of global warming by 2100
- Establishes baseline levels and methodology for allocating and trading HFC allowances for 2022 and 2023
 - Production allowances
 - Consumption allowances
 - Application-specific allowances (semiconductor, defense sprays, mission-critical military, metered dose inhalers, structural composite foam)
 - Set-aside pool of allowances for applicants in three groups of unique circumstances
- Allowances issued in October for following calendar year

CWA Hazardous Substance Worst Case Discharge Planning



- Rule proposed March 2022, comments due July 26 (87 FR 17890)
- Applicability: facilities w/ maximum onsite capacity of a CWA hazardous substance exceeding threshold quantities (10,000 x the RQ at any one time) and within 0.5 miles radius of navigable water or conveyance to navigable water, and meets one or more substantial harm criteria
- Worst case discharge = Largest foreseeable discharge in adverse weather conditions including those from climate change
- Requires Facility Response Plans for worst case discharge of CWA hazardous substances (and for substantial threat of such discharge)
- Also considers EJ angles

OSHA

- Moving away from ETS for Covid-19 (still working on permanent rule); shifting to inspections and citations based on general duty clause
- Pre-rule stage for a permanent standard for heat illness prevention (indoor and outdoor work). Targeting end of 2022 for proposed rule.
 - Increased inspections (warehouses, distribution centers, etc.)
 - Breaktimes, monitoring employee acclimatization, temperature/humidity
- Noise – increasing enforcement activity for noise hazard standard
- Working to revive effort to file electronic injury & illness. Pushback due to risks associated with public accessibility of the records.
- Other work in progress:
 - PSM – employee involvement
 - Emergency response and preparedness standard – update to current technologies/practices
 - Mechanical power presses
 - Prevention of workplace violence – healthcare & social assistance work settings
 - Revise blood lead level for medical removal – adjust upward



California Developments

- ❖ PFAS
- ❖ Climate
- ❖ Air Quality
- ❖ Storm water
- ❖ Water Supply
- ❖ Greenwashing/Solid Waste
- ❖ Electric Vehicles



PFAS Prohibitions



AB 652

- ❖ Prohibits the sale or distribution any juvenile products containing PFAS, on or after July 1, 2023
- ❖ Manufacturers must use the least toxic alternative when replacing PFAS chemicals in a juvenile product

AB 1200

- ❖ Prohibits selling food packaging containing PFAS beginning 1/1/23
- ❖ Cookware manufacturers must label product if it contains an intentionally added chemical on specified lists (1/1/24)
- ❖ Manufacturers must use the least toxic alternative when replacing PFAS chemicals for cookware

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

GHG Reduction from Cement



California's 8 cement plants:

- Second largest cement producing state, accounting for 10-15% of the cement production
- Accounting for 1.8% of the CA's GHG emissions.
- Largest consumer of coal in the state.

SB 596:

- ❖ Requires ARB to establish a strategy to reduce achieve carbon neutrality (net zero) no later than 2045
- ❖ Develop strategy to reduce GHG emissions from the concrete and cement used in California by 40% (from 2019 levels) by 2030

Warehouse Indirect Source Rule



SCAQMD Indirect Source Rule (ISR)—Rule 2305: Requires warehouse operators to annually earn specified # of points from menu of items by acquiring or using:

- Near Zero Emissions &/or Zero Emissions on-road trucks
- Zero emission cargo handling equipment
- Zero Emission charging/fueling infrastructure, solar panels or particulate filters for nearby sensitive land uses
- Estimated to reduce NOx emissions by up to 15%



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



Electric Vehicles & Infrastructure Legislation

- **AB 970:** Sets permit approval time frames & reduces the number of required parking spaces to accommodate the EV charging stations
- **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



Electrification of Off-road Engines



AB 1346: Requires zero emissions for small off-road engines (SORE):

- Small off-road engines Lawn & other outdoor equipment (2024)
- New portable generators & specified commercial pressure washers (by 2028)
- Remote emissions monitoring devices to be used to ID high-emitting vehicles subject to follow-up compliance testing

Storm Water



- ❖ **SB 273** authorizes municipal wastewater agencies to enter into voluntary agreements with entities responsible for stormwater management to acquire, construct, expand, operate, maintain, & provide facilities to manage stormwater and dry weather runoff
- ❖ **Prior law:** Obtained through piecemeal legislation, only a handful of municipal wastewater agencies are granted the explicit authority to capture and treat stormwater under existing law

SB 1383: Trash, Recycling, and Organic Wastes



- Part of CA effort to address short-lived climate pollutants (e.g., methane from solid waste)
- New requirements effective Jan 2022 for commercial businesses to provide containers for organic wastes and non-organic recyclables wherever trash containers are provided
 - Exceptions: restrooms, areas where no organic wastes would be generated
 - Consider break/lunch rooms, dining tables
- Must periodically inspect organic waste containers for contamination and inform employees if contamination is found
- Must prohibit employees from disposing of organic waste in a container not designated to receive organic wastes (e.g., training or communications)
- Containers must be color-coded per jurisdiction/hauler's color-coding, or labeled with text of what can AND what cannot be disposed of in each container
- Shall annually provide information to employees, contractors, customers, tenants re proper sorting of organic wastes
- Shall provide information to new tenants before or within 14 days of occupation (re organic waste recovery requirements and sorting)



Looking Ahead



Pending CA Climate Legislation



- **Climate Corporate Accountability Act (SB 260):** would require corporations with over \$1B annual revenue and supply chain to report all scopes 1 2 3 emissions
- **Property Buy Out (SB 1078):** would address voluntary buy out of vulnerable properties from climate change
- **Sequestration/Capture (SB 905 SB 1101):** would address carbon sequestration/carbon capture in deep wells

- **Extreme Heat**
 - AB 2238 & AB 2076 AB 2243 : would address extreme heat to coordinate programmatically
 - AB 2076 OPR would be a hub for grants and coordinated response to manage extreme heat and mitigation
 - AB 2645 would require emergency plans for counties for extreme, heat and cold

Pending CA Climate Legislation



- **Resilience** (SB 833, SB1217 & AB 2632 AB 1640): regional scale cc adaptation and resilience
- **Fossil Fuel Divestment**: SB 1173 requires CalPERS & Cal Stirs liquidate fossil fuel investments
- **Oil Refinery Cost Disclosure Act** (SB 1322)
- **Just Transition** (AB 1634): would create office of just transition to ensure workers not left behind
- **CA Justice 40** (AB 2419): 40 percent of climate money to disadvantaged communities
- **Building Materials Carbon Intensity** (AB 2446): would reduce carbon intensity of embedded carbon in construction materials
- **HFC Ban** (SB 1206): would ban the sale of HFC (low and high Global warming potential) by specified dates

Pending CA Water Quality Legislation 2022



- **SB 1157 water conservation:** Builds on 55 gallons per capital down to 50 gallons per capita. Will lower the standard in 2025 to 47 gallons per capital daily and 2032 down to 42 gallons
- Southern California Regional Board Water Conservation/Consumption restrictions

Beyond Compliance Assurance Strategies: Operationalize



Legal Registry:

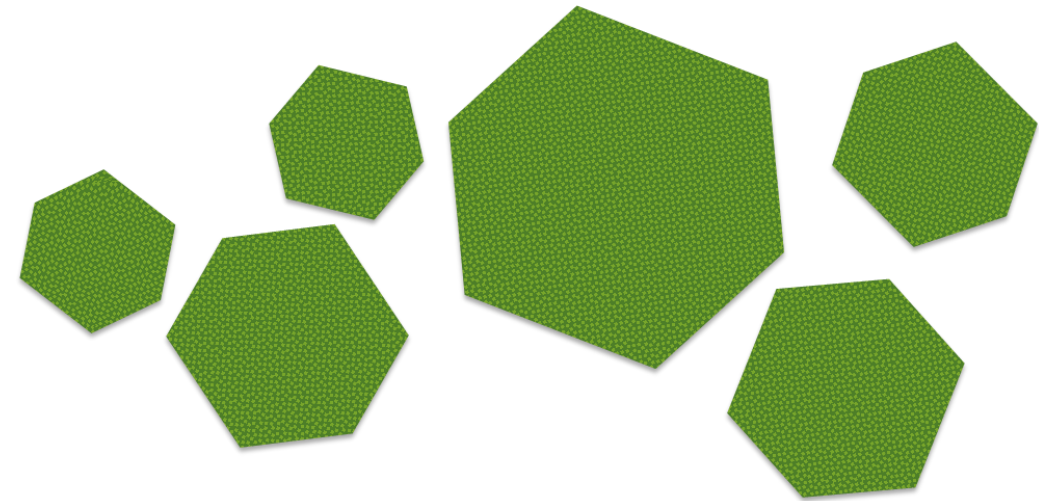
- Identify all potentially applicable EHS requirements
- Confirm exempt operations
- Prove the Negative

SOPs:

- “Who, what, when, and how” of obligations
- Spill Management/Release Reporting

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



Beyond Compliance Assurance Strategies: Operationalize



Training programs (Required & Advisory)

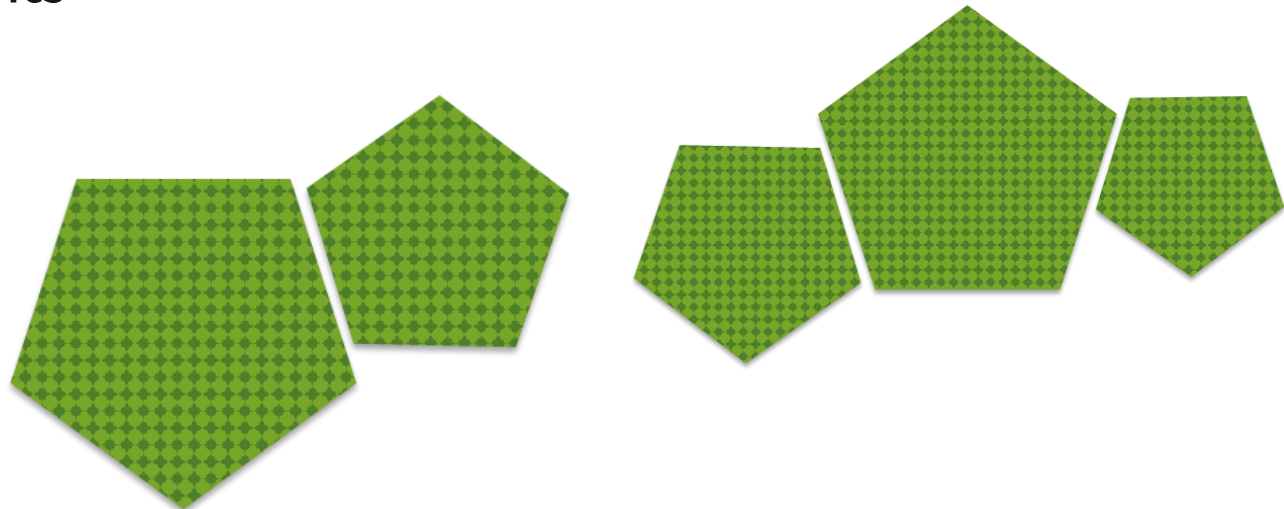
- Training Matrix (Who & When)
- Including Contractors

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**



Beyond Compliance Assurance Strategies: Operationalize

Self-inspections:

- Internal ground truthing

Third Party Auditing:

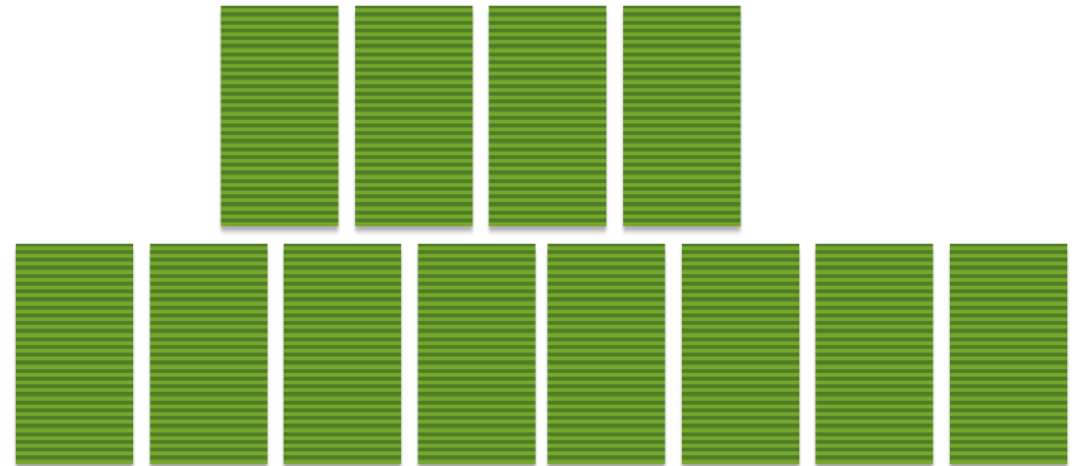
- EHS assessment by third party

Operational Excellence

- Facilitation
- Anonymous Deep Dive Assessment

CAPA/Root Cause:

- Corrective Action Preventive Action support & implementation
- **Culture & Accountability**



Questions?

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