

# THE INDUSTRIAL STORMWATER LITIGATION SURGE: HOW TO DEAL WITH NEW EXPOSURES & RISKS

Presented by  mapistry



## Ryan Janoch, PE

Founder of Mapistry

State of VA BMP Committee (appointed)  
Led NJDEP BMP testing reg. development  
National Committee for Stormwater BMPs w/ EPA



# ABOUT MAPISTRY

- **Intuitive cloud-based platform and mobile app** makes compliance painless
- **Provides 24/7 visibility into compliance health** from inspections to sampling, and discharge reporting
- **Effortlessly record, manage, and analyze inspection data** in real-time
- **Quickly and easily create site maps** of all your facility locations

Trusted by:



Simplifying  
stormwater  
compliance

# **MAPISTRY SOLUTION**

**STORMWATER  
EDUCATION**

**ENVIRONMENTAL  
COMPLIANCE  
PLATFORM**

**SUBJECT MATTER  
EXPERTS**



# MAPISTRY STORMWATER LITIGATION INTELLIGENCE GROUP

- ✓ Formed January 2018
- ✓ **Data scientists, legal analysts, and subject matter experts**
- ✓ **FOIA requests, public documents, consent decrees, etc**

# **CITIZEN LAWSUITS**

## QUICK REFRESHER

**CLEAN WATER  
ACT PROVISION**

60-DAY **NOTICE**

**ALLEGED  
VIOLATIONS**

# LITIGATION TRENDS

## MAPISTRY'S LITIGATION INTELLIGENCE GROUP

- ✓ **California** 60-Day Notices
- ✓ From **2015** through **2017**
- ✓ **Industrial General Permit (IGP)** allegations

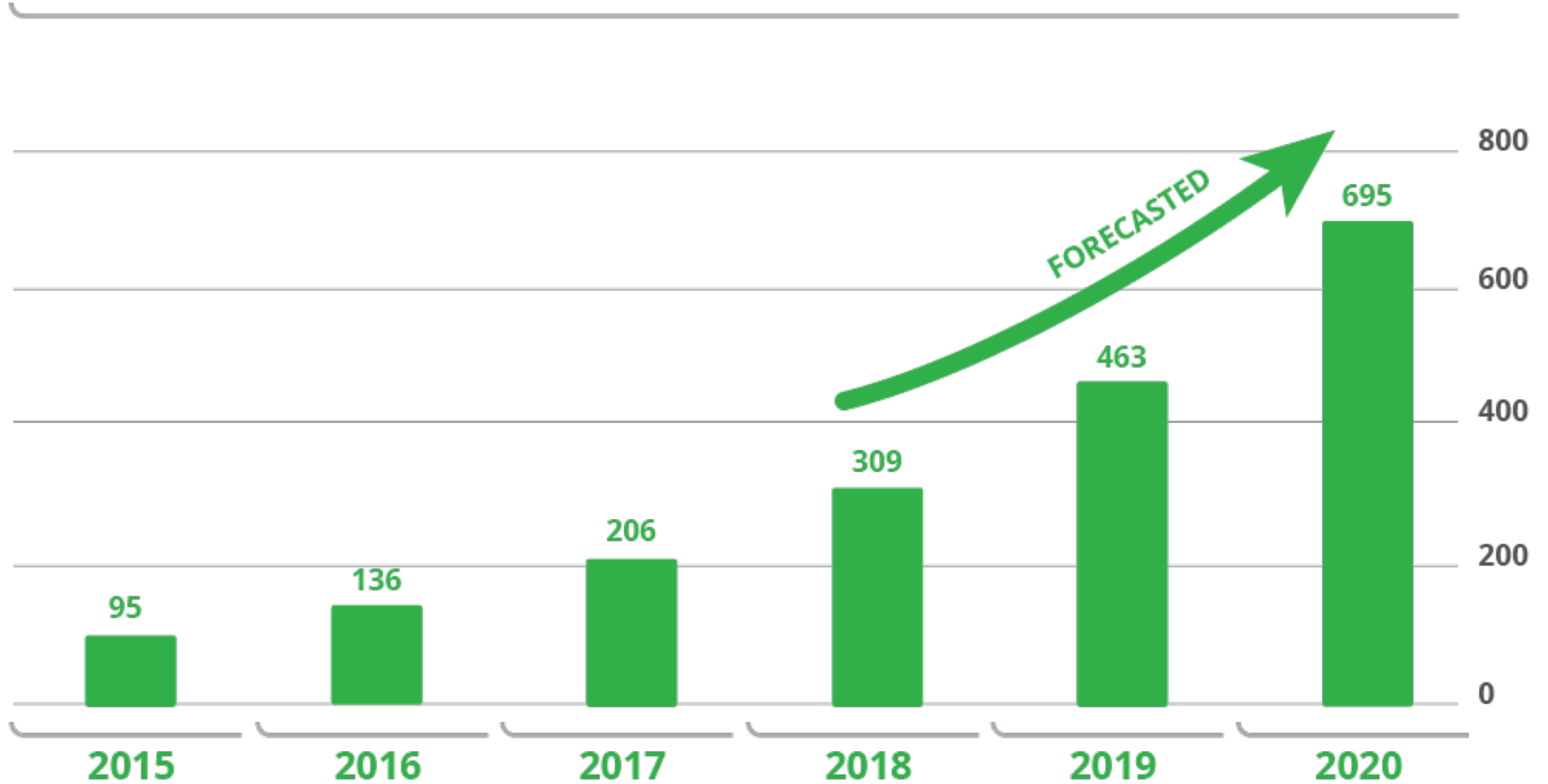


# #1 TREND

LITIGATION IS GOING UP. A LOT.

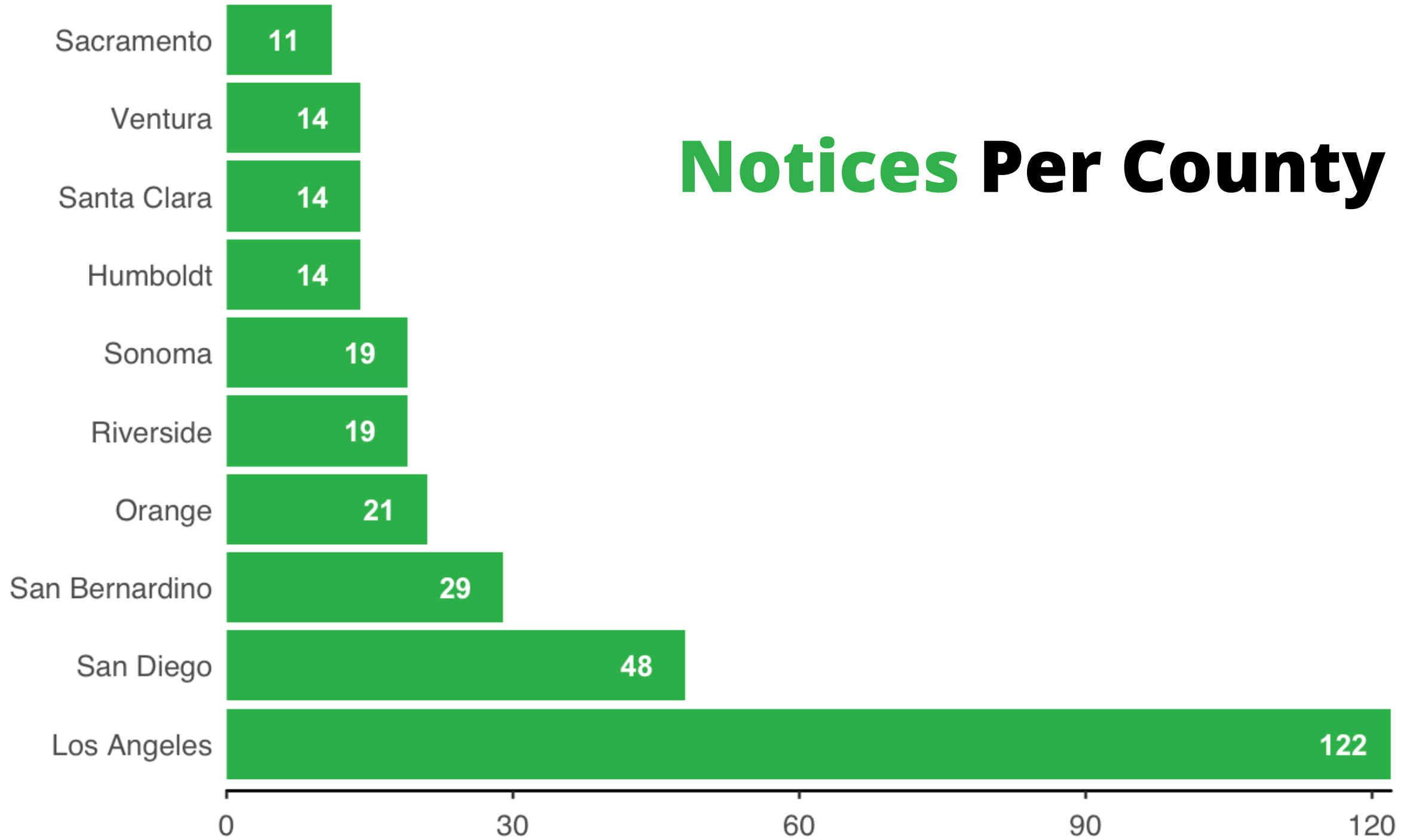
# CALIFORNIA

## Number of Lawsuits Filed



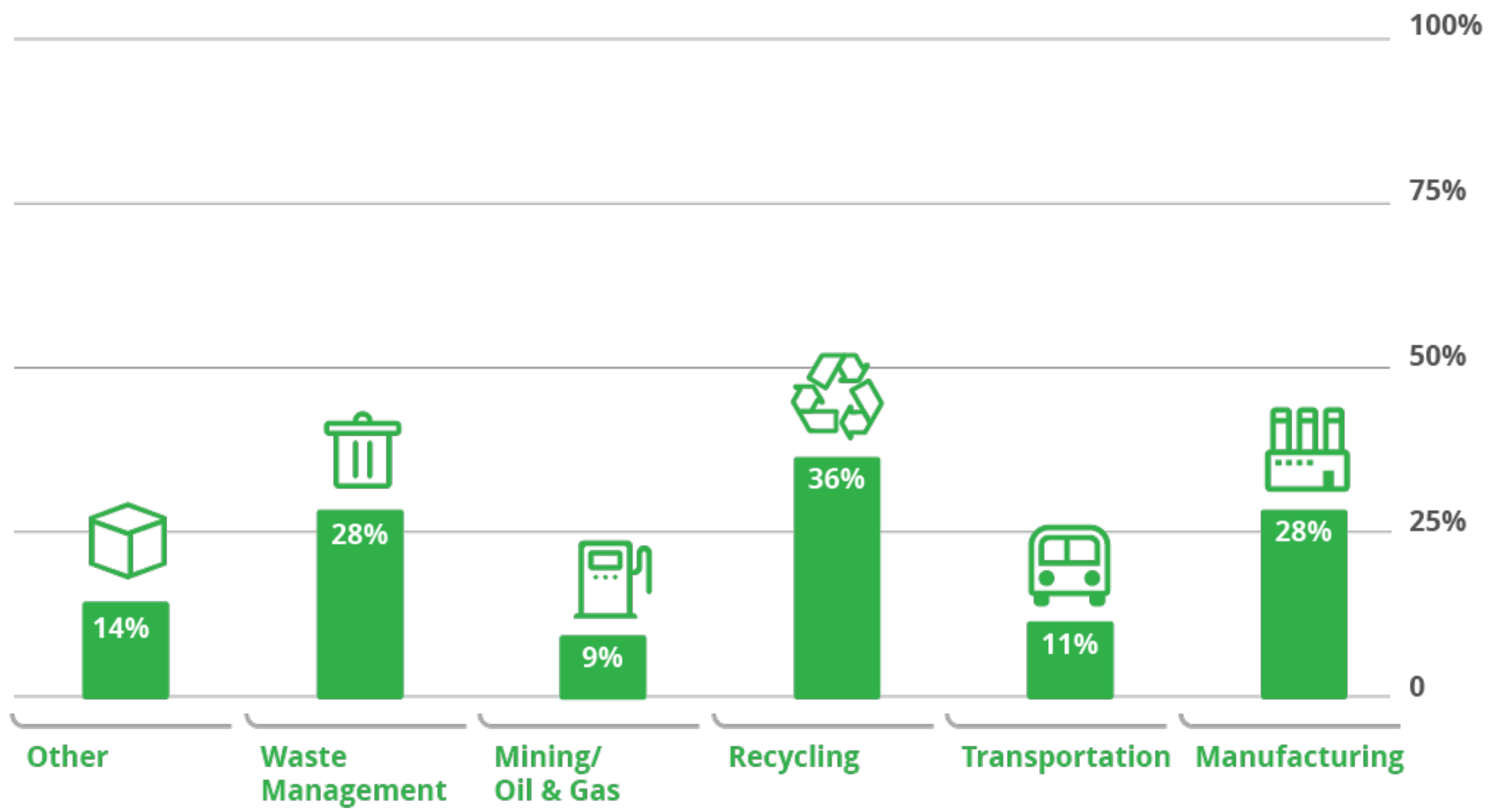


# Notices Per County



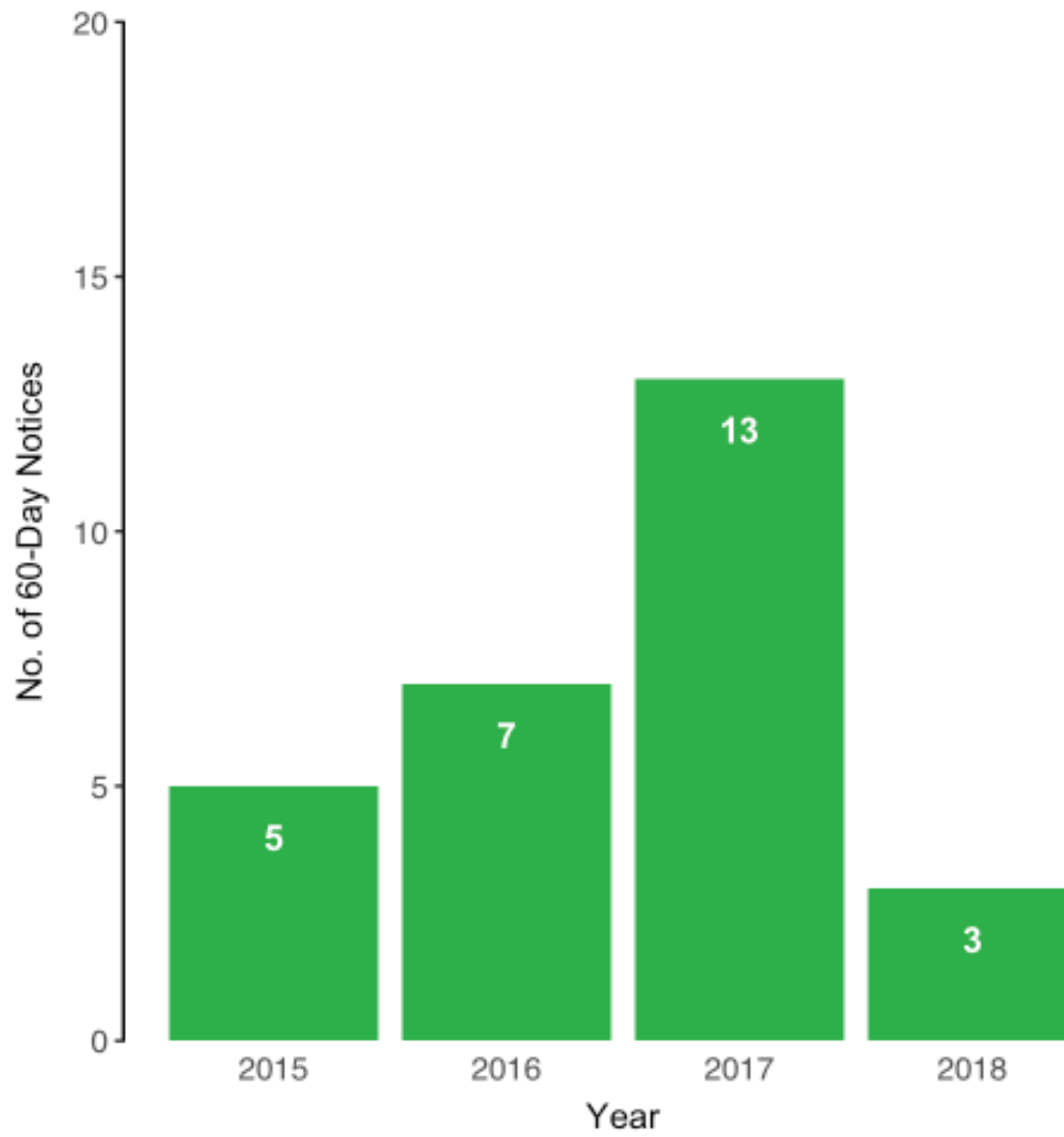
No. of 60-Day Notices 2015 - 2017

# Lawsuits by Industry



# WASHINGTON





# #2 TREND

ONLINE REPORTING MAKES IT EASY

HOW DO **THEY** FIND YOU?





“ There is a growing toolkit of inexpensive monitoring technologies that make it easier for private groups and individuals to detect environmental violations and collect evidence. ”  
- Crowell Moring LLP

**ONLINE REPORTING**  
MANDATORY BY 2020

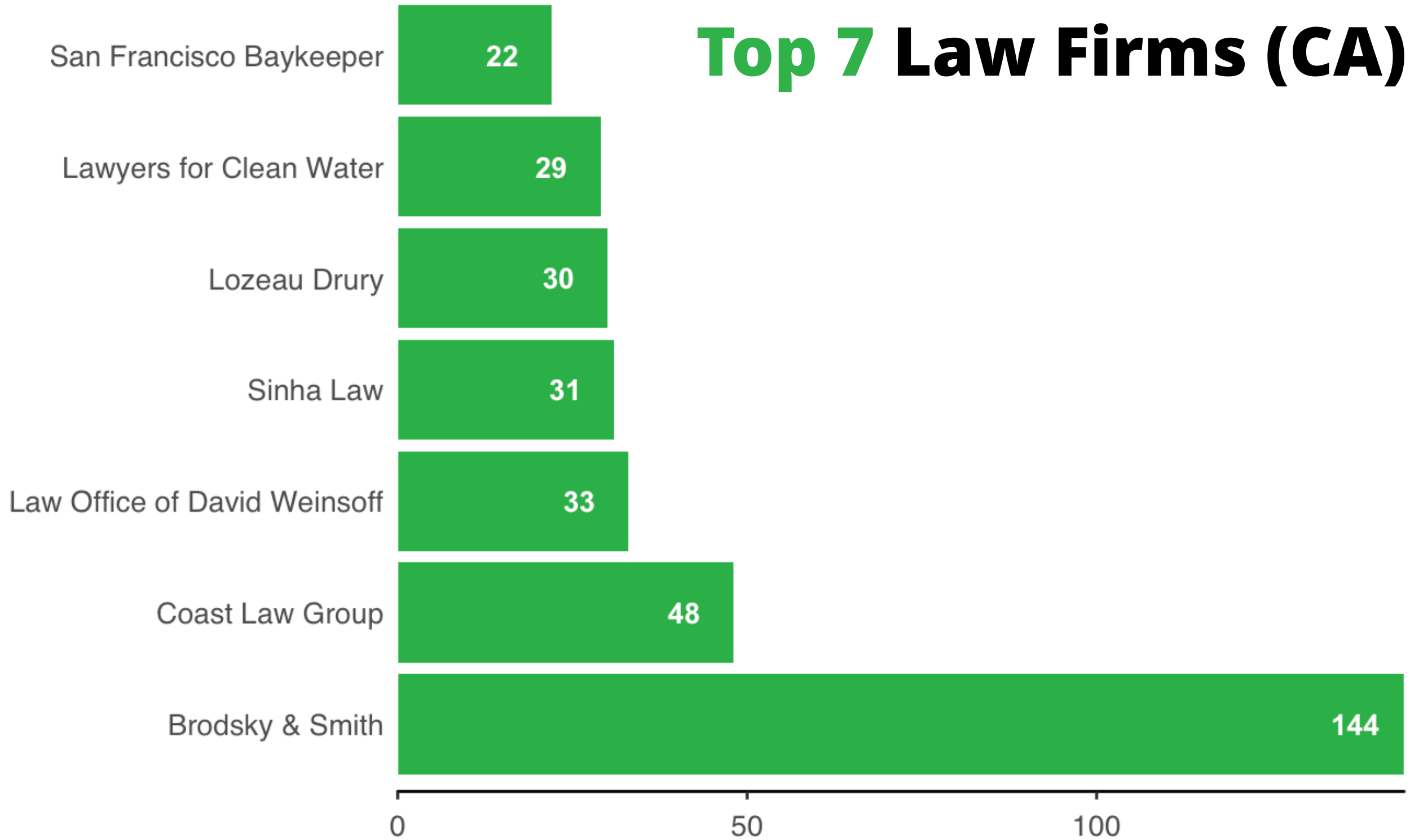
**OPEN DATA** MOVEMENT

**CITIZEN SCIENTISTS** RECRUITMENT

# #3 TREND

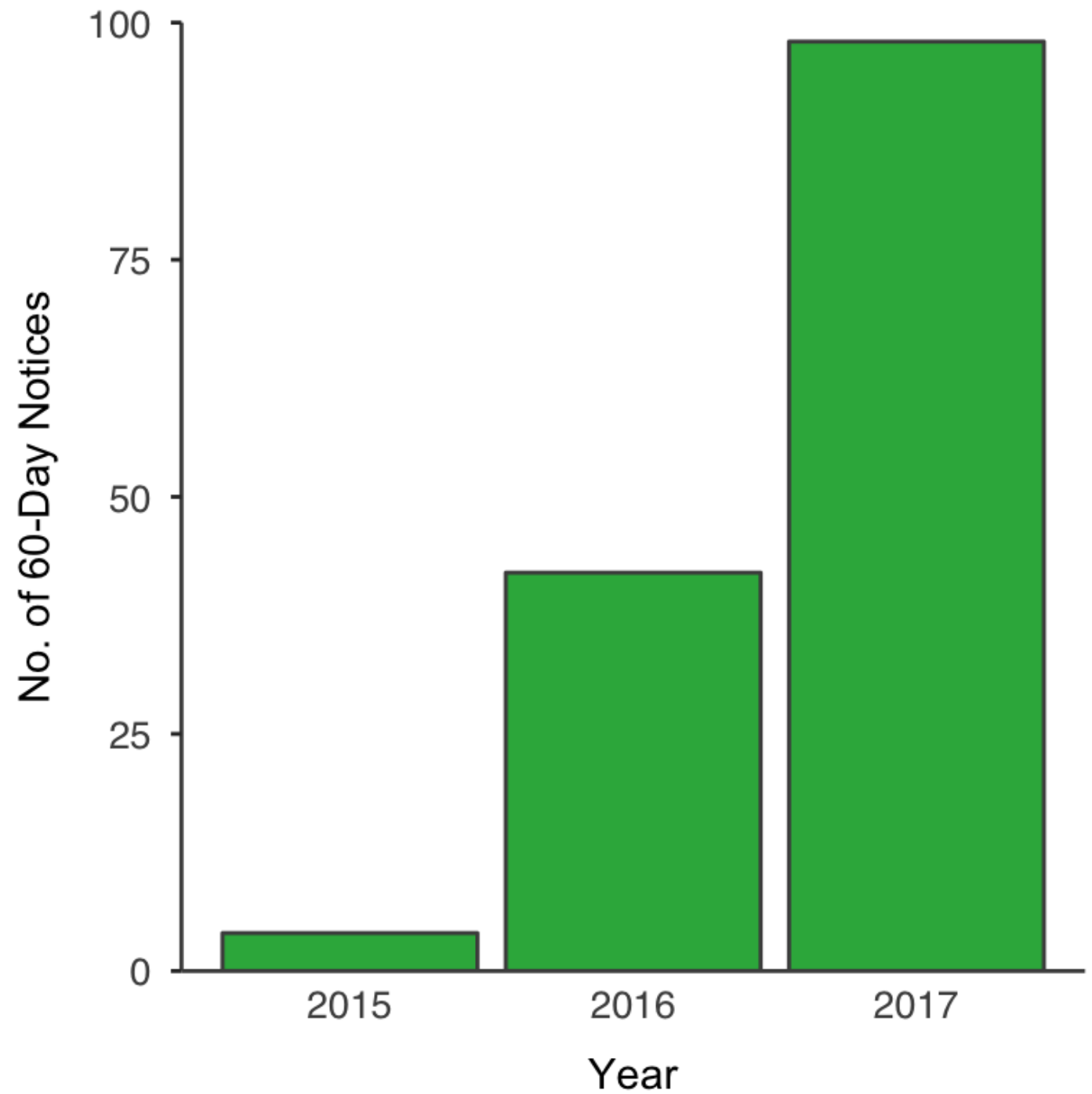
NEW HIGH-VOLUME GROUPS

# Top 7 Law Firms (CA)



Number 60-Day Notices Sent Jan '15 - Dec '17

**EXAMPLE:**  
**Brodsky & Smith**

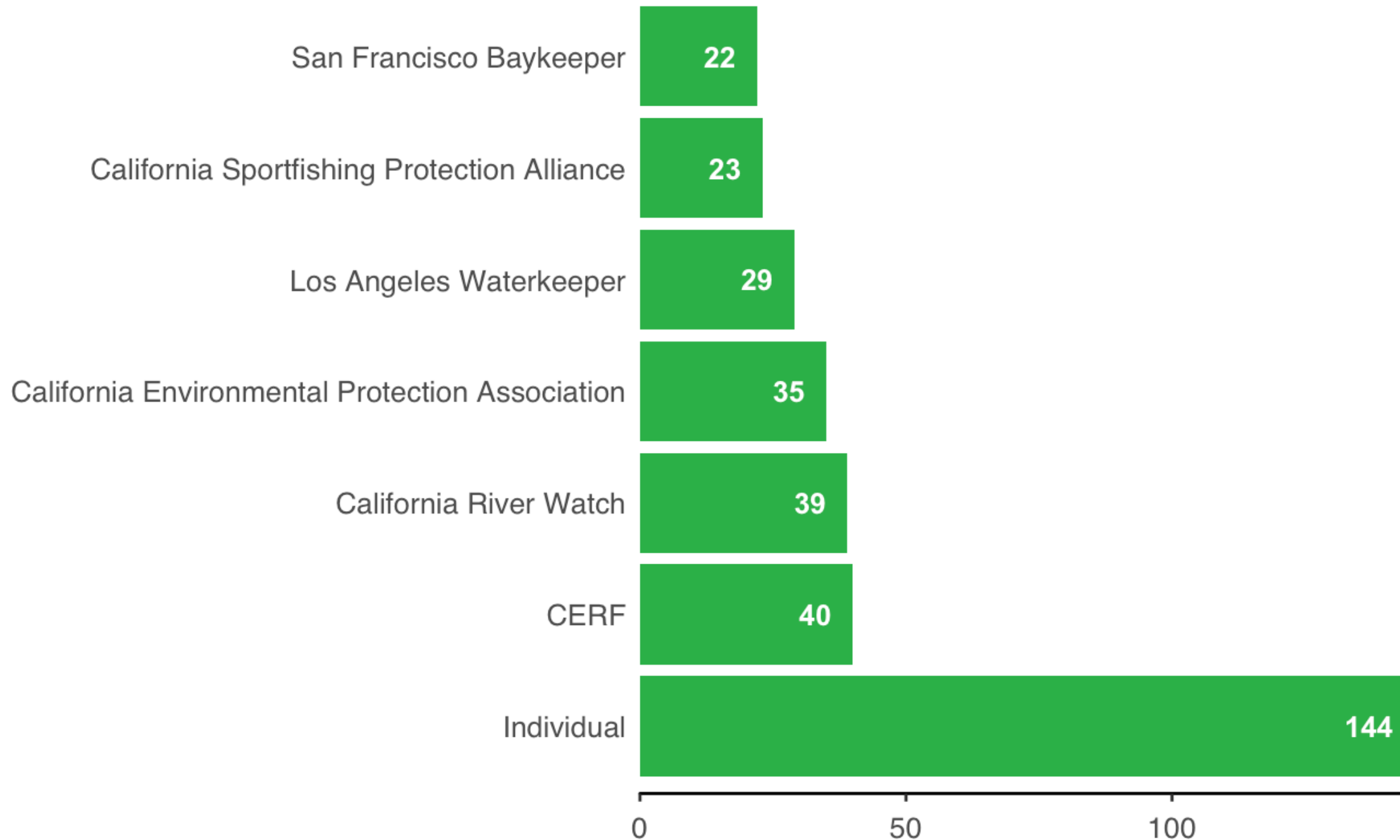


# Simple, scalable **strategy**

1. Pick a location
2. Team up with a **private citizen**
3. Identify facilities not in compliance
4. Download rain data from NOAA to document '**unpermitted discharge**' violations
5. Detail alleged violations in 60-Day Notice
6. Send 60-Day Notice
7. Wait 60 days to determine if the facility will settle



# Top 7 Environmental Groups (CA)

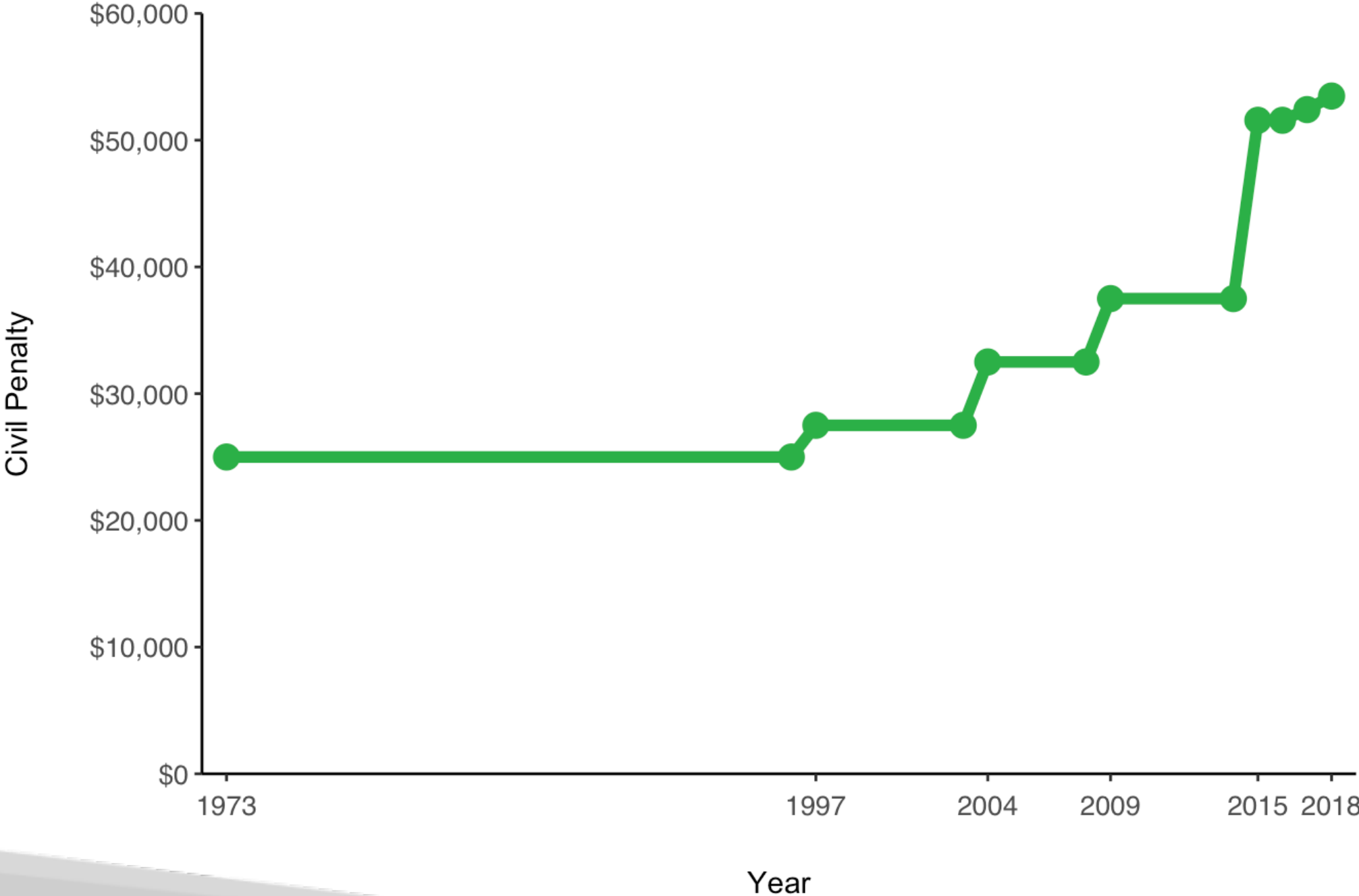


Number 60-Day Notices Sent Jan '15 - Dec '17

# #4 TREND

IT COSTS A LOT!

# Civil Penalties



# Settlement trends

Time - **3 years**

Donation - **\$22K**

Attorney Fees - **\$47K**

Future Attorney Fees - **\$10K**

Settlements - **\$80K per facility**

# What will this cost **my company?**

Allegations total **\$3M to \$4M**

Settlements = **\$80K per facility**

+ consultants and lawyers \$\$

+ improvements to the program \$\$\$\$

+ staff time \$\$

**Total = \$250K to \$5M+**

# **What makes a company a target?**

# Ignorance is Bliss?

**14%** of  
60-Day Notices are  
**Non-Fileers**



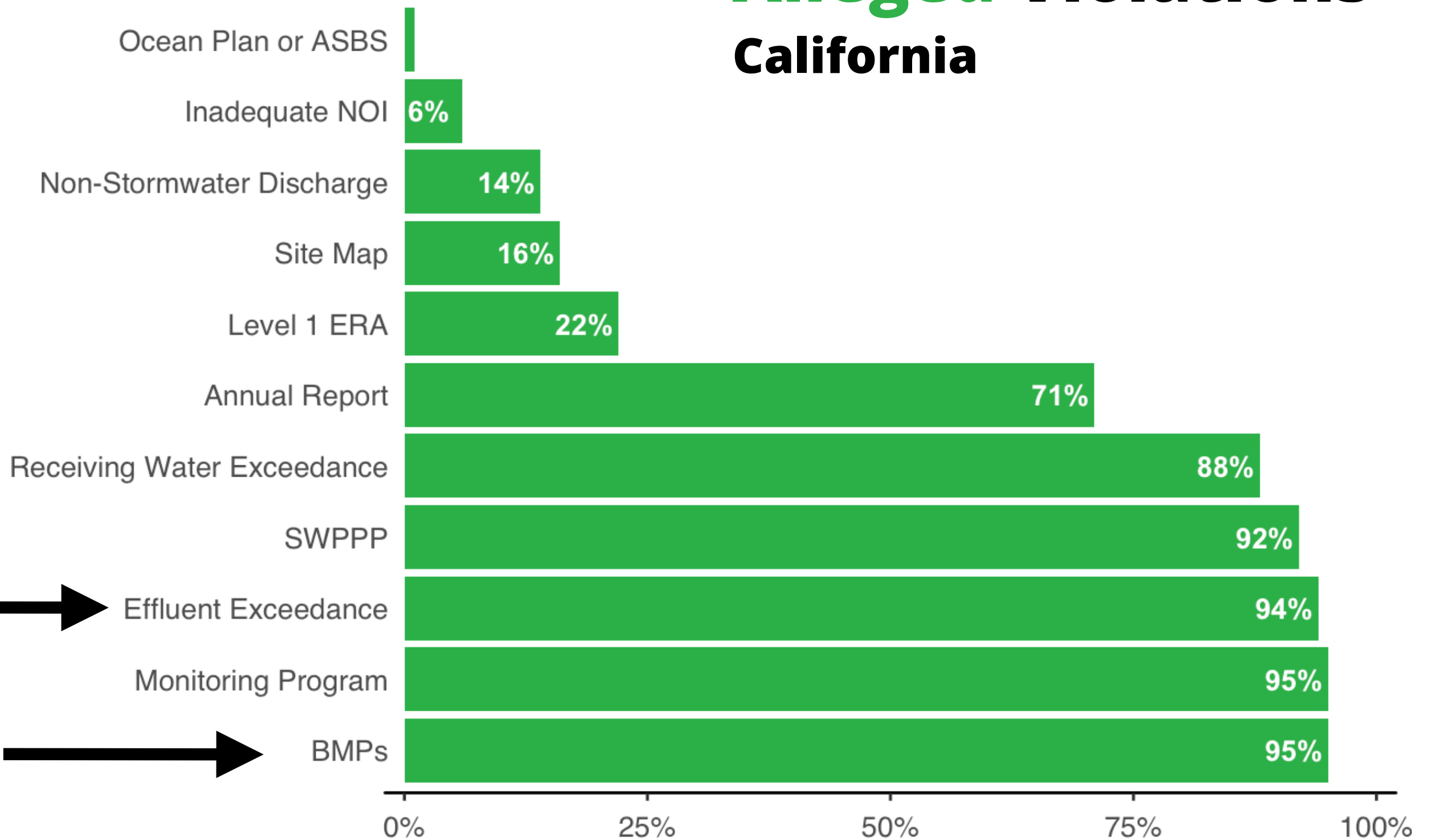
# #1 Issue

**Not having  
an organized  
stormwater  
program**

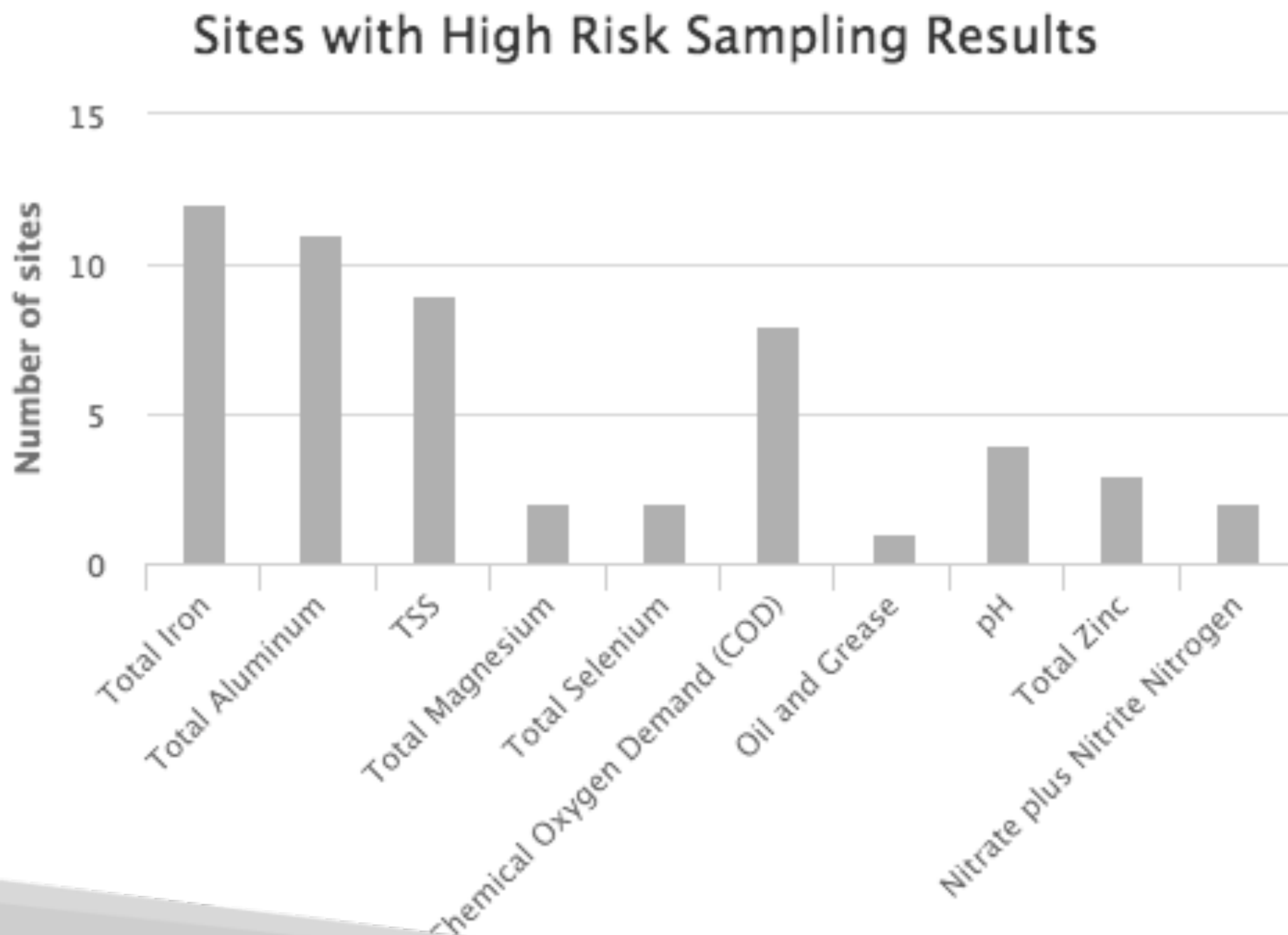


# #1 REACTIVE APPROACH

# Alleged Violations California



# MAPISTRY SOFTWARE ANALYSIS



# #2 RECORD KEEPING

# When was your last SWPPP update?

## Stormwater Pollution Prevention Plan (SWPPP)

for  
Mapistry Inc

**Located at:**  
2120 University Ave  
Berkeley, CA 94704

**Waste Discharge Identification (WDID):**  
WDID 2 440136721

**Standard Industrial Classification (SIC) Code:**  
1442

**Primary Contact:**  
Ryan Janoch  
Manager  
Mapistry Inc  
ryan@mapistry.com  
(510) 984-3332

**SWPPP Date:**  
03/05/2017

SWPPP Preparer Name: Ryan  
SWPPP Preparer Company: Mapistry  
SWPPP Prepared using Mapistry





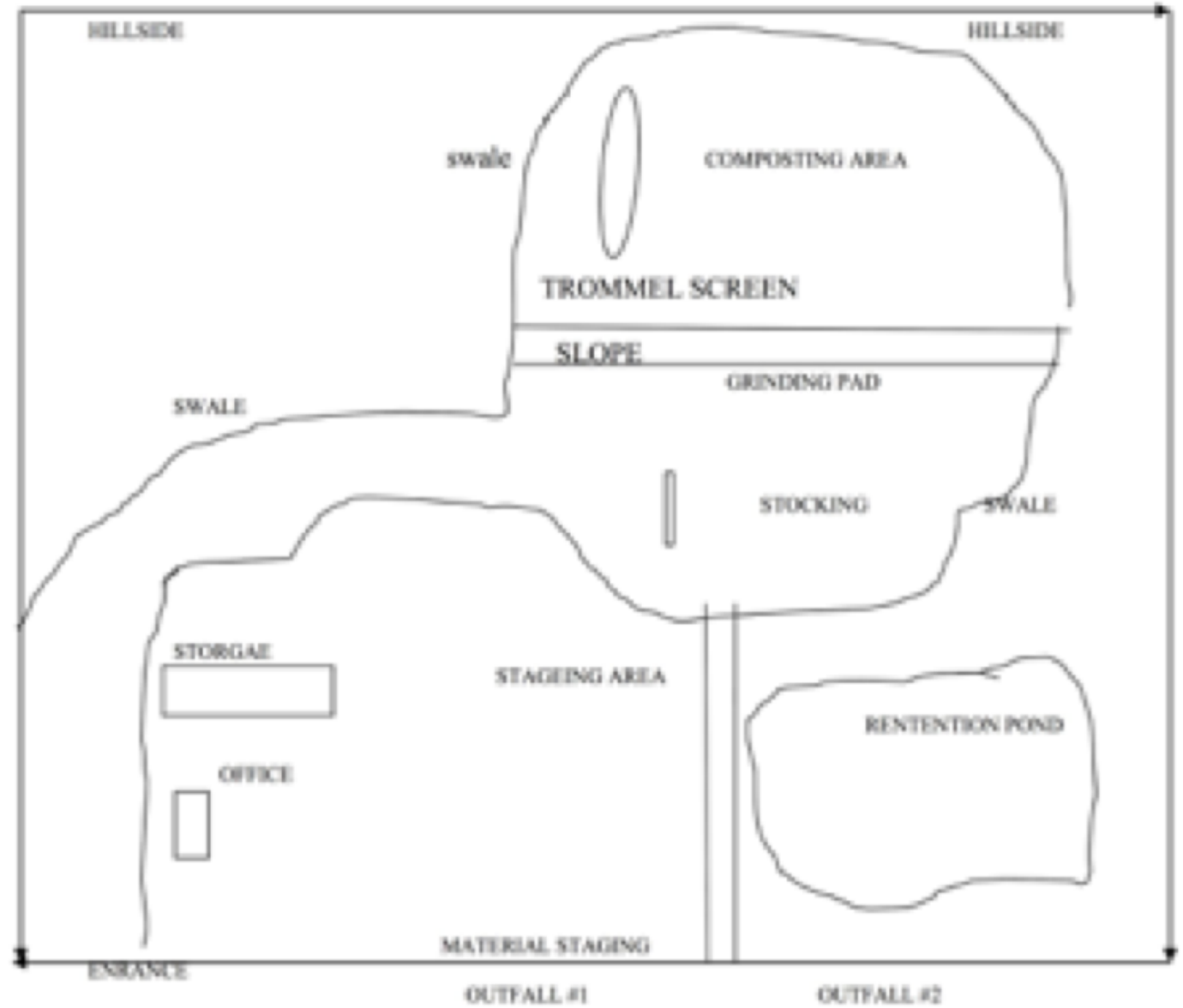
Are 5 years  
of records  
here?





# SITE MAP?

## SITE MAP

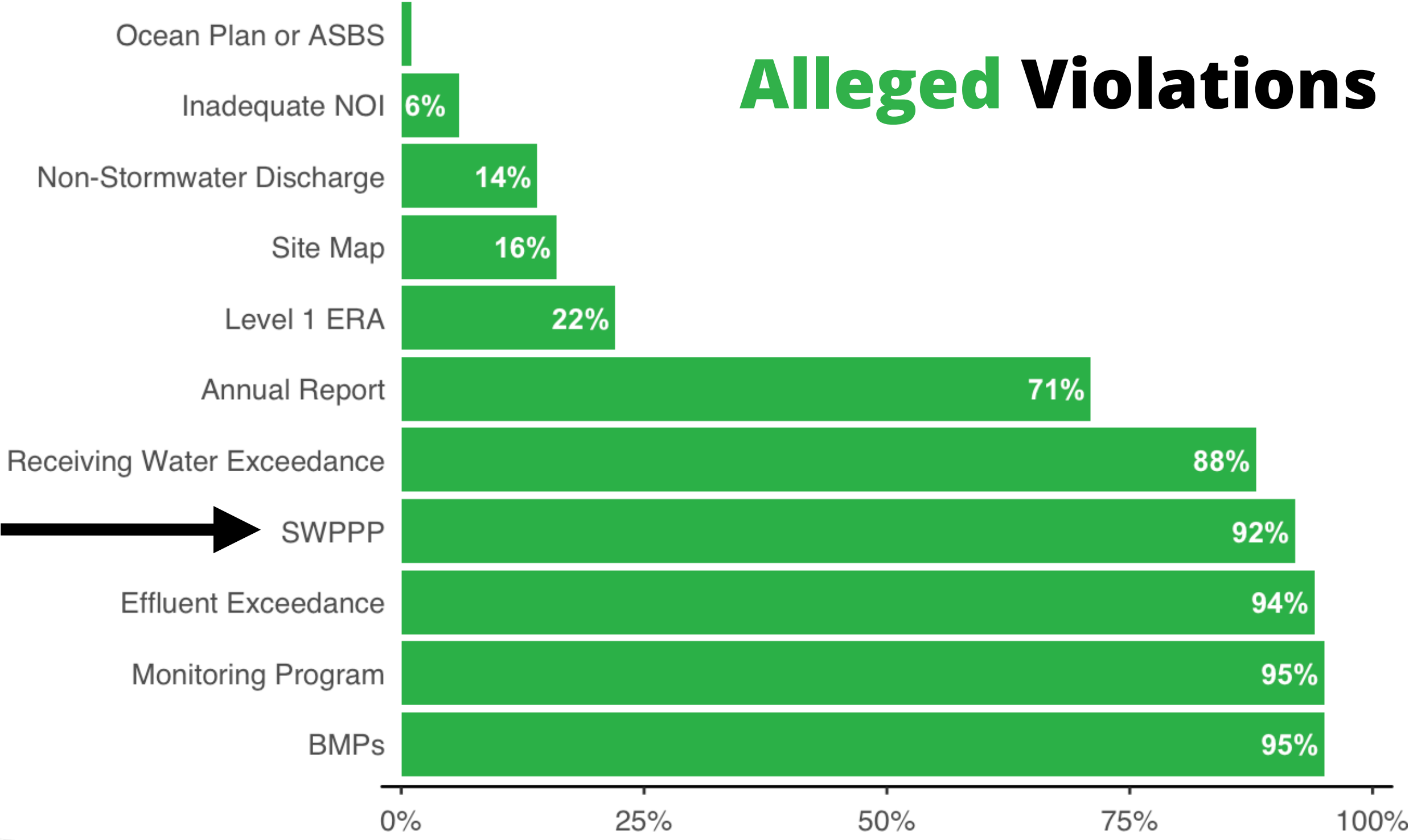


# SITE MAP?





# Alleged Violations



# #3 TRAINING

SAMPLING, INSPECTIONS, BMPS



# When was your last team training?





# #4 INSPECTOR FINDINGS







EMPTY  
BARRELS

NO  
FLAMMABLE  
LIQUIDS

NO  
CORROSIVE  
LIQUIDS

VALVE  
HANDLE  
MUST BE  
IN PLACE  
ON ALL CONTAINERS  
BEFORE EMPTYING

NOTICE

**WMA RECYCLE** 510-613-8700

 Glass	 Metal	 Paper & Cardboard	 Plastics
--	--	--	---

**NO HAZARDOUS  
WASTES ACCEPTED**

**CAUTION CAUTION**

CONTAINERS  
MUST BE PLACED  
ON FLAT LEVEL  
SURFACE AND LOADED



# LITIGATION PREVENTION

WHAT EVERY COMPANY SHOULD BE DOING

- ✓ **Be proactive** with issues/exceedances
- ✓ Build a **world-class stormwater program**
- ✓ **Leverage technology** to fight back

# THE LEGAL PERSPECTIVE

# WHERE **MAPISTRY** CAN HELP

## STORMWATER **EDUCATION**

- ✓ On-site staff training
- ✓ **E-learning platform**
- ✓ Manager workshop(s)

## ENVIRONMENTAL **COMPLIANCE PLATFORM**

- ✓ **SWPPP builder**
- ✓ Site map updates
- ✓ Mobile inspections
- ✓ **Rain logging & alerts**

## SUBJECT MATTER **EXPERTS**

- ✓ **BMP/Program review**
- ✓ **Litigation support**
- ✓ Exceedance reports

# QUESTIONS?

**(978) 821-4302 CELL**

**RYAN@MAPISTRY.COM**

# Join our live showcase!

*Tuesday 7/17 at 10am PST*

## The Next-Gen Environmental Compliance Platform

See how environmental professionals are using Mapistry to ensure compliance while running smarter, data-driven programs

Register here:

[www.mapistry.com/live-showcase](http://www.mapistry.com/live-showcase)



# **Industrial Stormwater Litigation**

**June 27, 2018**



— CASTELLÓN & FUNDERBURK LLP —

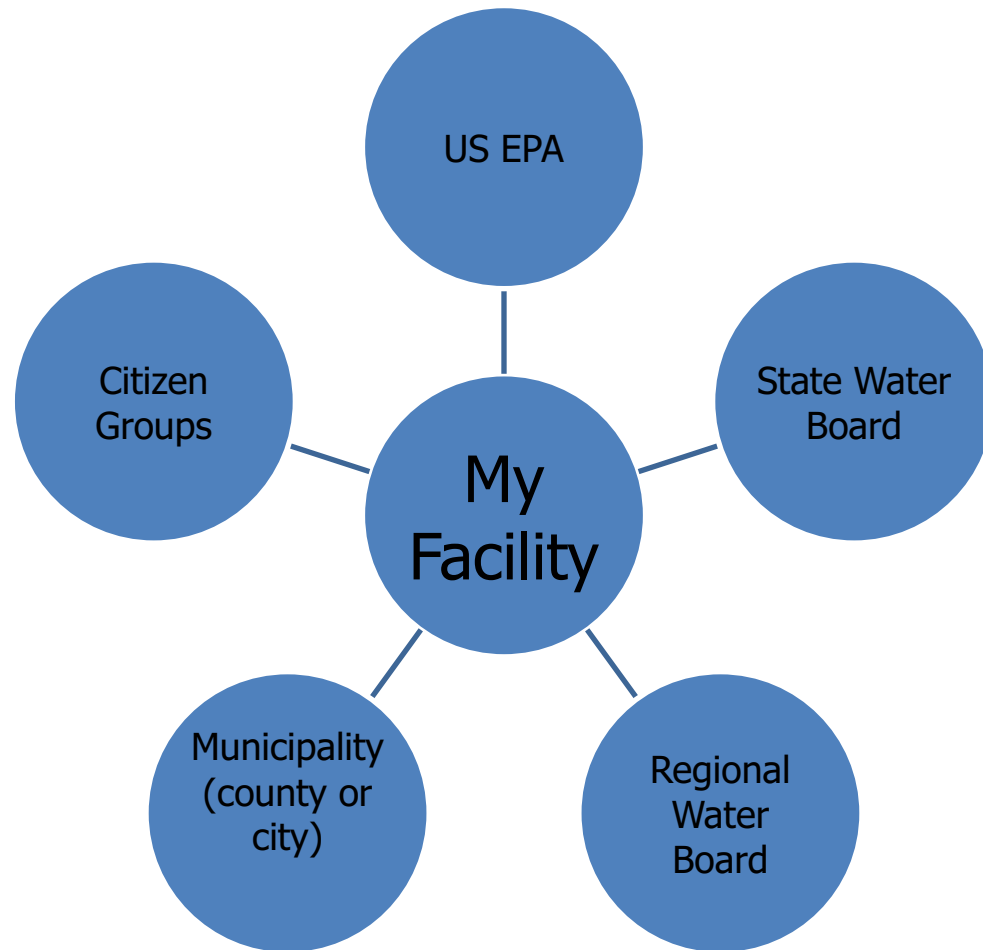
# Agenda

---

- Introduction & Background
- Enforcement Prevention & Response
  - Offensive Playbook
  - Defensive Playbook
- Department of Justice Clean Water Act Citizen Suits Investigation Update



# Enforcement Prevention & Response Enforcement Wheel – Who is My Boss?



## Enforcement Prevention & Response

- Regional Water Quality Control Board
- Notice to Comply
- Notice of Violation
- Administrative Civil Liability
- Cleanup and Abatement Order
- Citizen's Suits commenced with Notice of Intent to Sue

# **Castellon & Funderburk LLP's Offensive Playbook**

# Enforcement Prevention & Response

## Citizen Suits

### Proactive Compliance Strategies

- Be Proactive
- Review your public access SMARTS file
  - Previous NOVs from Water Board, is the SWPPP and the site map up to date
- Sample last year
  - Due to structural BMPs, lack of rain, other circumstances
- Rain Event Log on site
  - Rain gauge? Tracking log
- ERA Level 1 or Level 2?
  - Implemented additional BMPs
  - Updated SWPPP based on Level 1 or Level 2 Report

**Enforcement Prevention & Response**  
**Citizen Suits**  
**Proactive Compliance Strategies**

- **SWPPP**
  - Consistent implementation throughout SWPPP?
  - Does the site map match the SWPPP?
- **Site Map**
  - Without looking at the SWPPP, does the site map provide the reader enough information? (e.g., structural overhead coverage is marked, treatment system is clearly identified, note on map if facility rarely discharges due to infiltration)

# **Castellon & Funderburk LLP's Defensive Playbook**

# Enforcement Prevention & Response

## Citizen Suits

### Defensive Strategies

- Challenge sufficiency/adequacy of notice of intent to sue (citizen suit)
- Audit, evaluate and achieve compliance in the 60-day notice period (have topo map, if possible, to prove drainage routes)
- Retain expert who will testify that BAT/BCT is met at the end of the 60-day notice period
- *Gwaltney v. Chesapeake Bay Found.*, 484 U.S. 49 (1987)
- Pre-empt lawsuit by having Regional Water Board or EPA oust jurisdiction from citizen group (very difficult and has several risks; may be better to obtain opinion on compliance)



# Enforcement Prevention & Response

## Citizen Suits

## Consent Decrees

- Attorney's fees (your own: \$25k - \$250k pre trial)
- Attorney's fees (theirs: \$40k-\$400k the sky's the limit)
- Remediation component (implementation of BMPs over strict 2-5 year schedule: \$100k - \$1 million' also includes \$\$ for compliance monitoring)
- Supplemental Environmental Project (also called a SEP involves donation to environmental mitigation project/group approved by Justice Dept.: \$25k to \$500k)
- California groups include Keeper organizations, Sportfishing and Surfriders, individuals
- Available on Request

**Department of Justice  
Clean Water Act Citizen Suits  
Investigation Update**

# Case Update

*Luke Delgadillo Garcia v. Miller Castings, Inc.* – Case No. 2:17-cv-07408-AB-AGR

*Gary Lunsford v. Arrowhead Brass Plumbing, et al.* – Case No. 2:16-cv-08373-PA-KS

*Alfonso Lares v. Reliable Wholesale Lumber Inc.* – Case No. 8:18-cv-00157-JLS-AGR

Entire file available from Castellon & Funderburk LLP upon request

# Feedback & Questions?

William W. Funderburk, Jr.  
Los Angeles Office of Castellón & Funderburk LLP  
811 Wilshire Blvd., Suite 1025  
Los Angeles, California 90017  
wfunderburk@candffirm.com



— CASTELLÓN & FUNDERBURK LLP —