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Sustainability for Government Contractors



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Today's Presenters



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Agenda

- What is sustainability?
- Sustainability in public procurement
- Current regulatory environment
- Proposed rulemaking
- Where do we go from here

Sustainability & Climate Change Trends

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What is Sustainability?



The ability to maintain a process over time

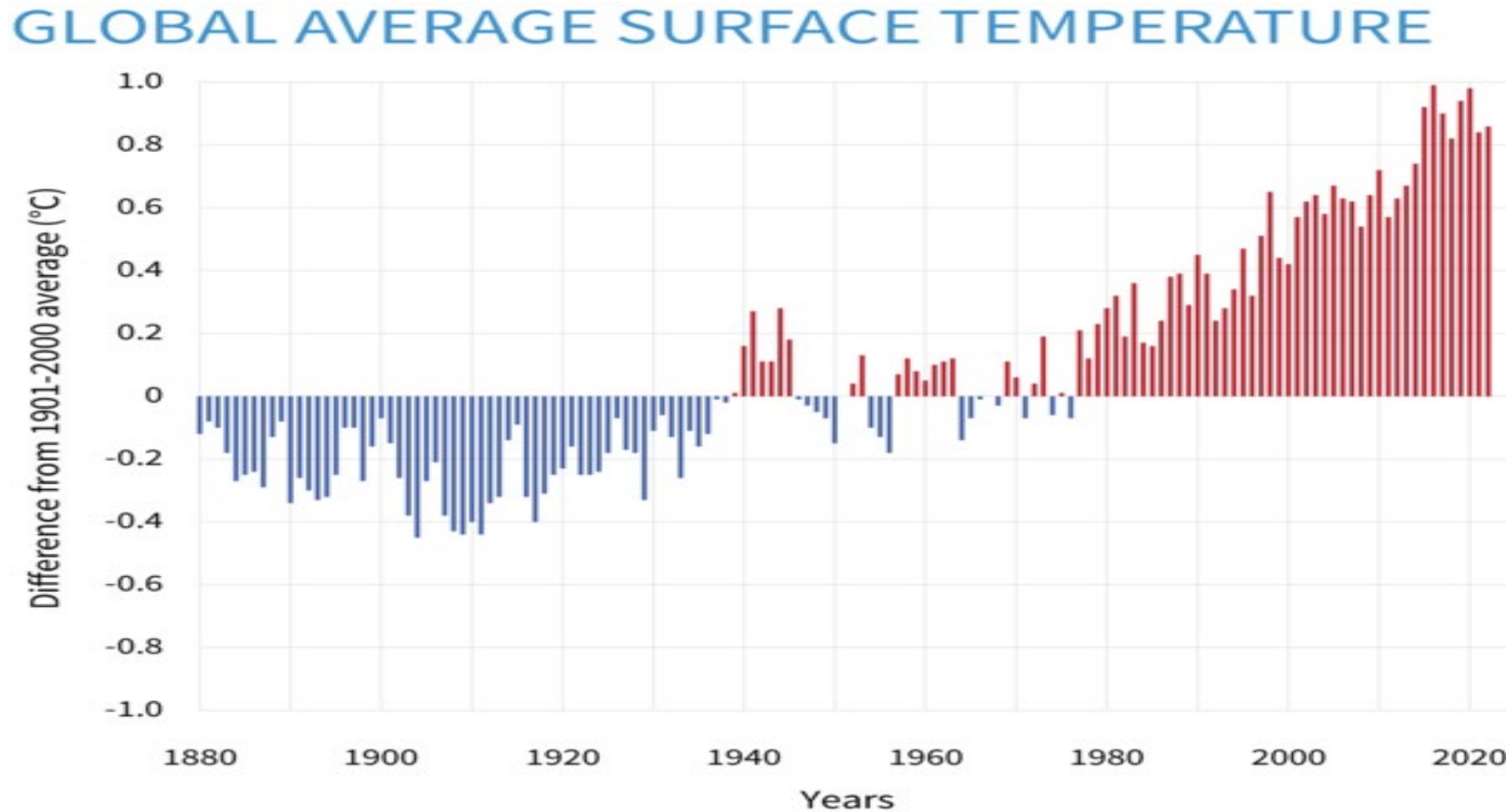
Balancing “people, planet, profit”

Meeting the needs of the present *without* compromising the ability of future generations to meet their own needs

A global climate snapshot

- **Where we are today:**
 - Climate data shows Earth has warmed $\sim 2^{\circ}\text{F}$ ($\sim 1.1^{\circ}\text{C}$) since @ 1880
 - Trend has accelerated over last 40 years
 - The 10 warmest years in the historical record have all occurred since 2010
- **Where we are heading:**
 - Current warming trend likely to reach $\sim 1.5^{\circ}\text{C}$ over next 30 years
 - Net zero by 2050 to limit warming to $\sim 1.5^{\circ}\text{C}$
 - Net zero by 2070 to limit warming to $\sim 2.0^{\circ}\text{C}$

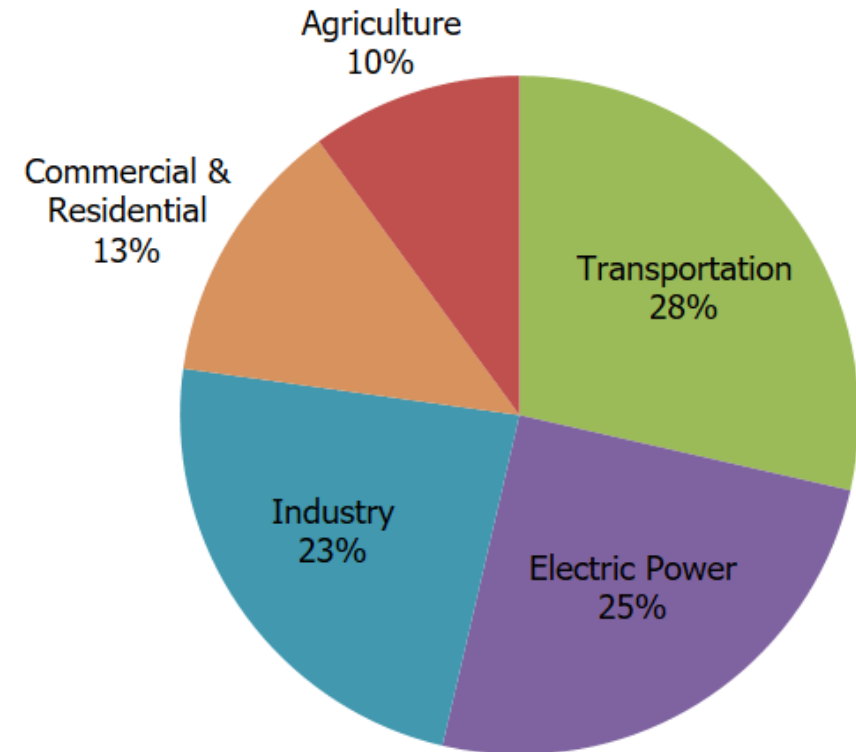
Trends in global surface temperatures since the IR



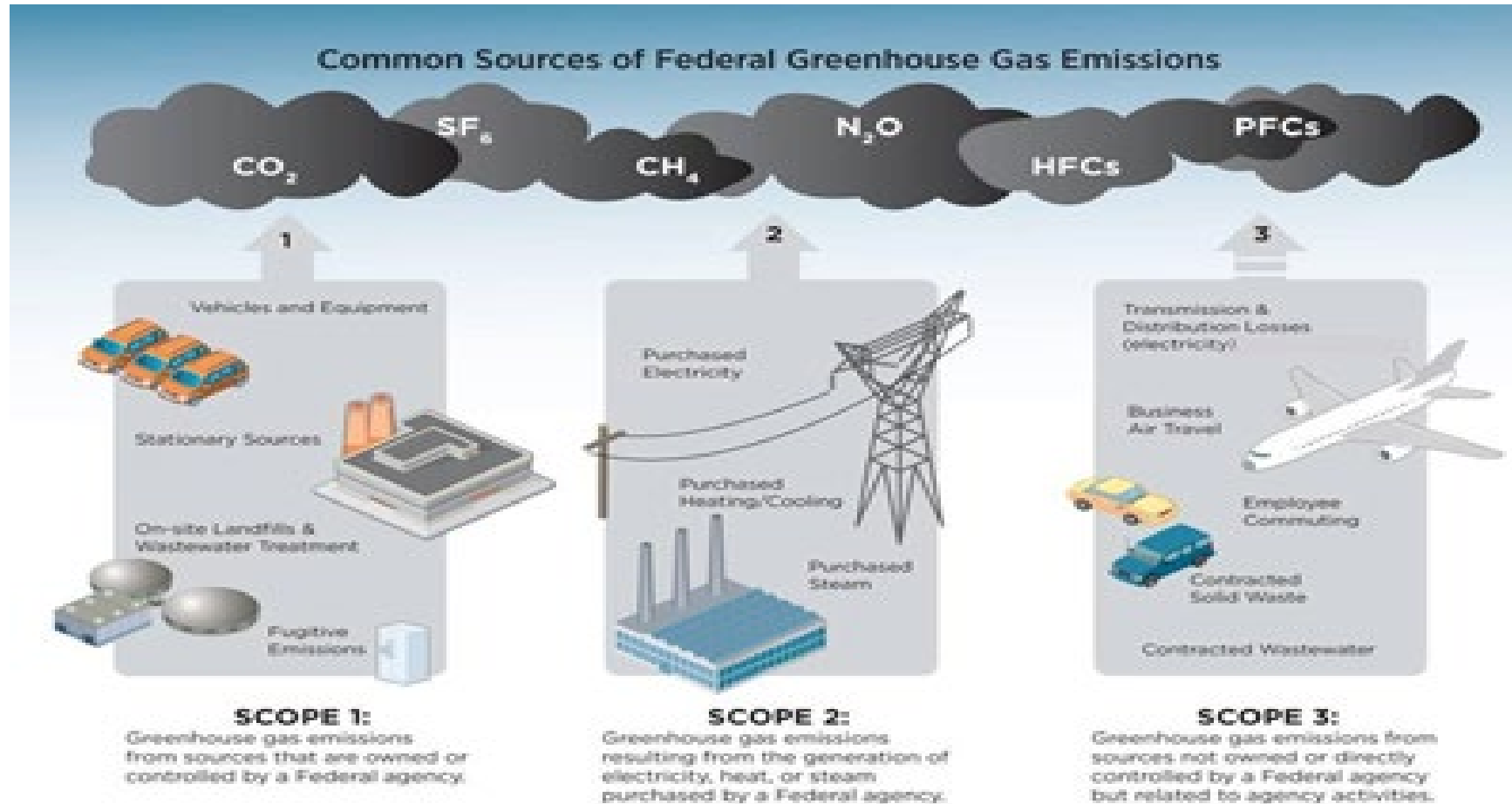
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Greenhouse gases sources the United States

- **Greenhouse gases (GHGs)**
 - **Carbon dioxide** (fossil fuel burning, cement production, deforestation)
 - **Methane** (cattle farming, landfills, and oil/gas production)
 - **Nitrous oxide** (fossil fuel and biomass combustion, large scale fertilizer use)
 - **Fluorinated gases** (industrial applications)
- **Major sources:**
 - Gasoline, diesel, natural gas, and coal



Emissions Sources: Scope Types

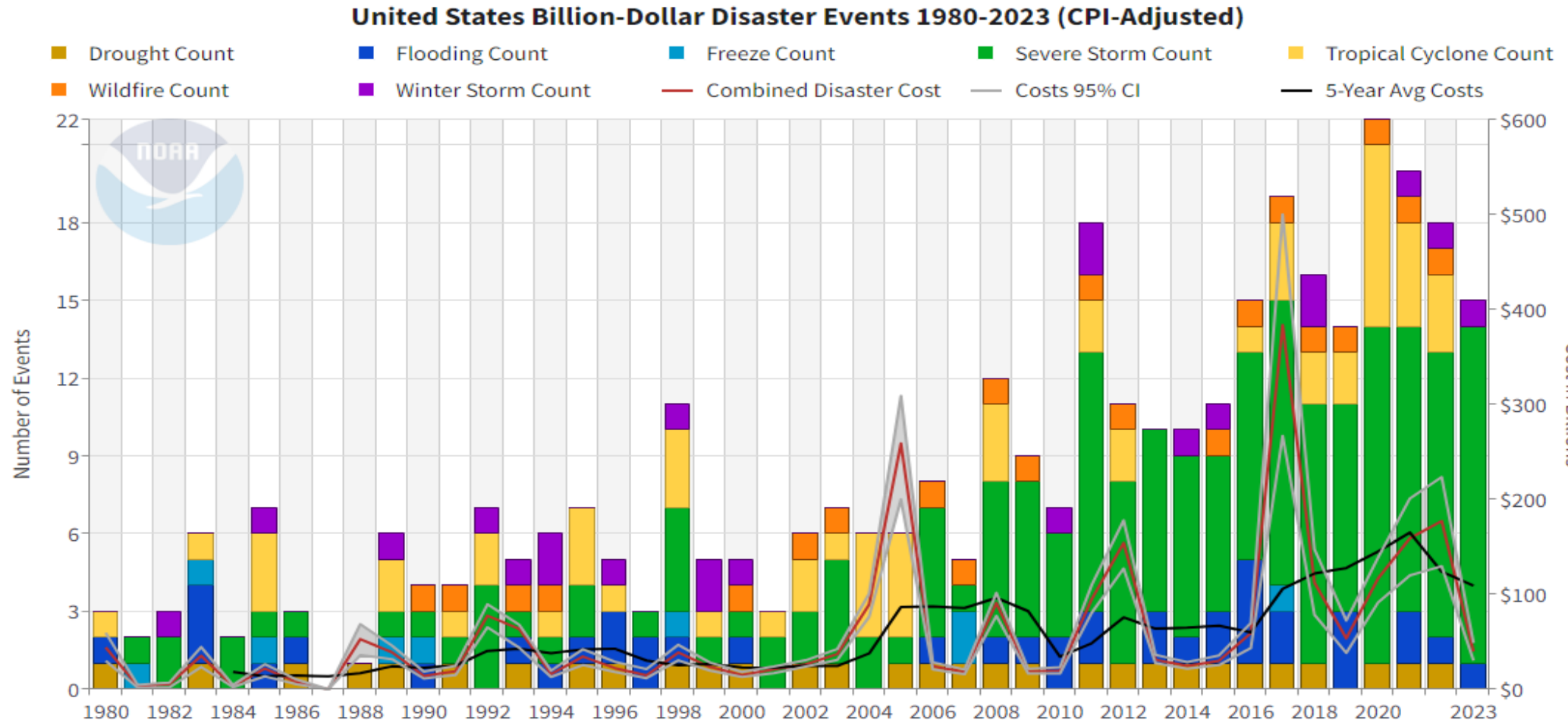


The role of public procurement



- Global procurement market: \$11 trillion
- Public procurement = 15% of GHG emissions
- Six industries drive 70%:
 - Defense, transportation, waste management, construction, industrial, utilities
- Challenges:
 - Higher costs (3-6% higher in near term)
 - Measurement and data gaps
 - Competing priorities
 - Political dynamics and decentralization

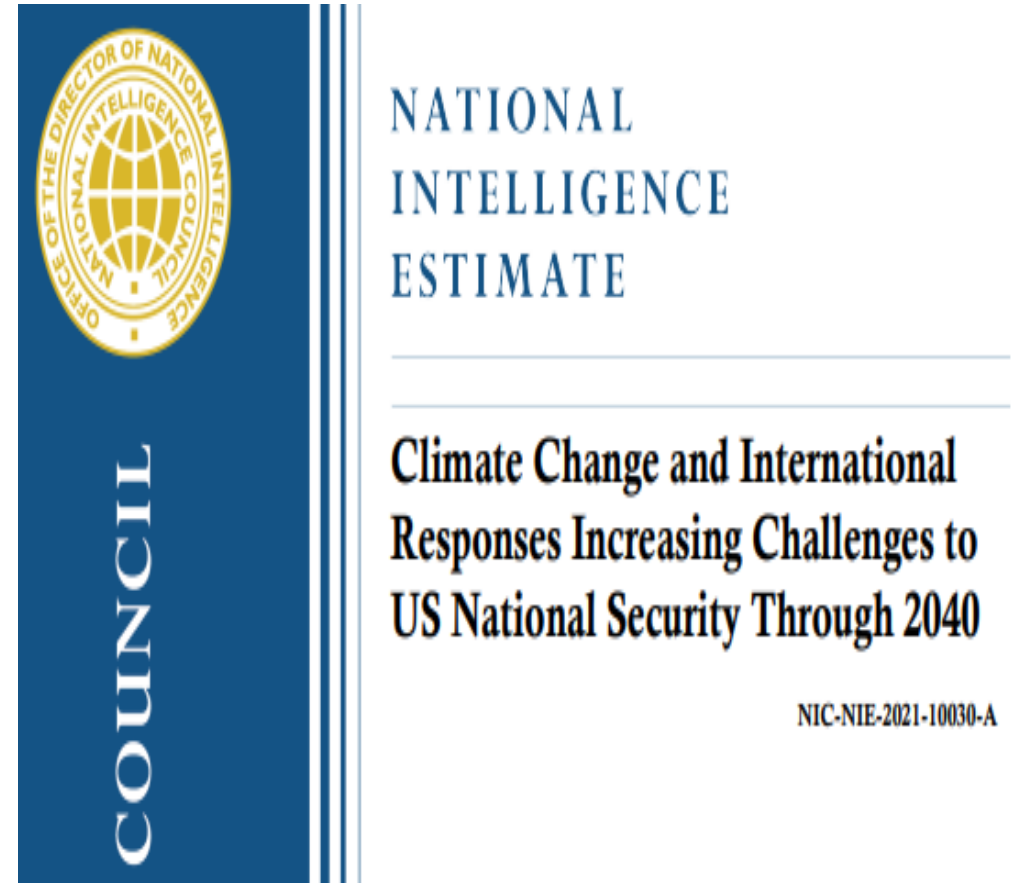
The impact: rise in US billion-dollar disasters



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The impact: more geopolitical risk

1. Growing geopolitical tensions over pace of transition (and resources needed to get there)
2. The physical effects of climate change will exacerbate cross-border flashpoints
3. Expect higher demands on US diplomatic, economic, humanitarian, and military resources



The Current (Regulatory) Climate

Limited current FAR provisions

- USG required to buy energy efficient and environmentally friendly products (see [FAR Pt. 23](#))
- USG *may* also require service providers to use compliant products in service delivery
- Many, many exceptions:
 - Weapon systems
 - Ex-US contracts
 - National security

Current GHG Disclosure Regs

- [FAR 52.223-22](#) & [52.212-3\(t\)](#): Public Disclosure of Greenhouse Gas Emissions and Reduction Goals- Representation
 - Applies if company received \$7.5 million + in awards in prior FY
 - Company must state whether it currently publicly discloses GHG emissions
 - Company must state whether it currently publicly discloses a GHG emissions reduction goal
 - If so, company must identify a website where the information is disclosed
- But does *not* impose independent obligation to inventory or report

Agency-specific requirements

- **General Services Administration**

- Alliant 2 GWAC (IT solutions) requires awardees to submit a “Sustainable Practices and Impact Disclosure,” including an annual GHG inventory and GHG reductions targets set after 24 months. Compliance reported in CPARs.
- OASIS+ MAC (professional services) offers evaluation credits to other than small companies that calculate Scope 1 and 2 emissions in accordance with the GHG Protocol Corporate Accounting and Reporting Standard and publicly disclose emissions
- Since 2015, GSA has asked CDP to survey hundreds of major federal contractors to assess exposure to supply chain risks and climate action commitments. See GSA’s contractor climate action scorecard [here](#).

Agency-specific requirements

- **Environmental Protection Agency**

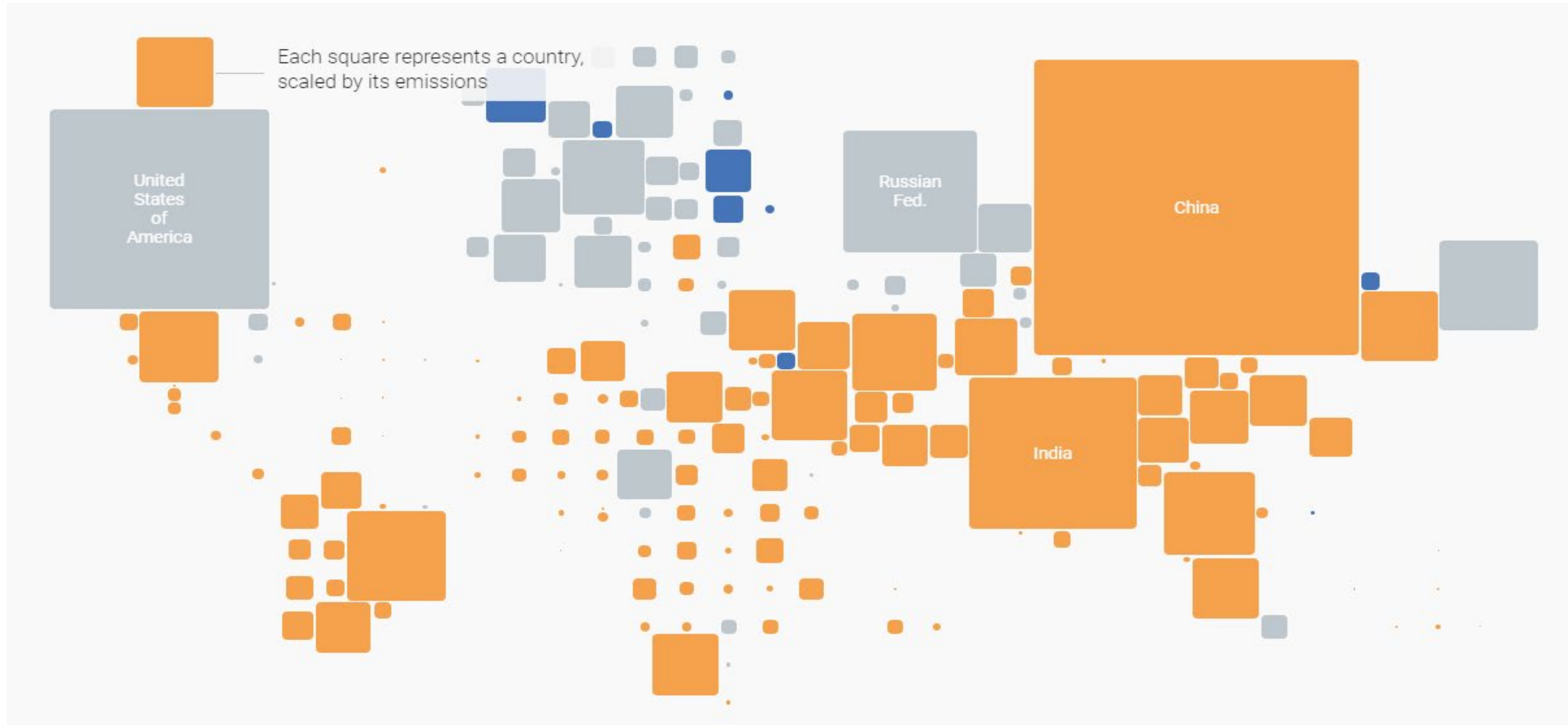
- Since 2010, 7,600 large emitters must calculate and report emissions annually, accounting for 50% of total U.S. GHG emissions

- **Securities Exchange Commission**

- [2010 Guidance](#) explained that climate issues might trigger disclosure obligations (such as physical impacts from climate change affecting operations and results or indirect consequences of technological or scientific developments that create new opportunities or risks)
- [2021 sample comment letter](#): “information related to climate-change risks and opportunities may be required in disclosures related to a company’s description of business, legal proceedings, risk factors, and management’s discussion and analysis of financial conditions and results of operations.”

**“We’ll always have Paris”
(or will we?)**

Global GHG Emitters



The Paris Agreement

- **United States rejoined the [Paris Agreement](#) Jan. 2021**
- Reached at UN Climate Change Conference (COP21) in 2015
- International treaty entered into force Nov. 4, 2016
- **Key elements:**
 - Limit temperature rise to 1.5-2.0° C (2.7-3.6° F) in this century
 - Drive shift to net-zero carbon emissions world (~2050)
 - Provide climate financing to developing countries
 - **Update national climate action plan every 5 years**

Three Executive Orders to align with Paris goals

EO 14008

- Climate change key to U.S. national security
- Government-wide approach to tackle climate change
- Including use of USG buying power

JANUARY 27, 2021

Executive Order on Tackling the Climate Crisis at Home and Abroad



› BRIEFING ROOM › PRESIDENTIAL ACTIONS

Three Executive Orders to align with Paris goals

MAY 20, 2021

Executive Order on Climate-Related Financial Risk



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EO 14030

Directed FAR Council to consider:

- (1) requiring USG suppliers to disclose GHG emissions and climate-related financial risk + set science based-reduction targets and
- (2) ensure Agencies consider social costs of GHG emissions in procurement and, where feasible, give preference to suppliers with a lower social cost of GHG emissions

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Three Executive Orders to align with Paris goals

EO 14057

- Create carbon pollution-free electricity sector by 2035
- Net-zero emissions economy-wide no later than 2050
- 100% zero-emission vehicle acquisitions by 2035
- Net-zero emissions government buildings by 2045
- 65% reduction in scope 1 and 2 GHG emissions from Federal operations by 2030 (from 2008 levels)
- Net-zero emissions from Federal procurement, including a Buy Clean policy for construction materials with lower embodied emissions
- Promote climate resilient infrastructure and operations
- Promote climate and sustainability-focused Federal workforce

DECEMBER 08, 2021

Executive Order on Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability



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Current FAR and SEC Rulemaking

Proposed rule on GHG emissions disclosures

- **Requirements for “Significant” (\$7.5M) and “Major” (\$50M) contractors**
 - Complete an inventory of annual Scope 1 and Scope 2 GHG emissions using the GHG Protocol Corporate Accounting and Reporting Standard
 - Report results of inventory in SAM
- **+ More Requirements for “Major” contractors**
 - Include Scope 3 emissions in GHG inventory and report in SAM
 - Complete annual CDP Climate Change Questionnaire
 - Set a science-based GHG reduction target validated by SBTi
 - Make above available on public website

Compliance + enforcement

- Compliance to be a “responsibility” factor
- COs must presume that non-complying suppliers are non-responsible *unless* supplier shows it:
 - is non-compliant due to circumstances beyond its control;
 - has provided sufficient documentation that demonstrates substantial efforts to comply; and
 - has made a public commitment to comply as soon as possible.
- Suppliers can rely on higher-level owner reps

Exceptions + waivers

- **Exceptions**

- ANCs, CDCs, Native Hawaiian Organizations, Tribally-owned concerns
- Higher ed and non-profits
- Entities that derive 80% revenues from Federal M&O contracts that already have site sustainability reporting requirements
- Major contractors that are considered small under primary NAICS code (exempt from disclosure and reduction targets)

- **Waivers**

- For national security, emergency, or mission essential reasons
- For one year, to enable a contractor to come into compliance

Comments - and what's next?

- 38,000(!) comments
- Comments run the gamut:
 - Acknowledgement that climate change is a problem
 - Disclosures will help address contractor and government risk
 - FAR Council has/does not have legal authority
 - Too tough to measure Scope 3 GHGs and set reductions targets
 - NGOs should not be involved in setting standards
 - Too costly for contractors and the government
- Final rule: December 2023?

Proposed “sustainable procurement” rule

- [Rule](#) applies to all procurements “to maximum extent practicable”
- Reorganizes FAR Part 23 for clarity
 - Dedicates Part 23 to environmental matters
 - Consolidates sustainable purchasing preferences
- Adds “Sustainable Products and Services” FAR clause
- Exceptions: national security, combat or spacecraft systems, weapons, OCONUS contracts
- Additional exemptions: responses to cyber, nuclear, or chemical attack and other emergencies

FAR 52.223-XX: Sustainable Products and Services

- To require contractors to:
 - Deliver sustainable products and services for USG use
 - Use sustainable products + services in public buildings & works
- “Sustainable products”
 - Contain certain EPA-approved, recommended, labeled, or certified standards
 - Meet ENERGYSTAR or FEMP standards
 - Biobased products meeting USDA’s BioPreferred Program standards
- Includes an order of preference
- No flow-down

ANPR - Minimizing the risk of climate change

- [Advanced Notice](#) of proposed rulemaking (Oct. 2021)
- Sought input on:
 - How social costs of GHG emissions can best be considered in procurement
 - How to give preference to bids and proposals from suppliers to achieve reductions in GHG emissions (or reduce social cost of GHG emissions)
 - How to align goals without impacting opportunities for small businesses
- Proposed rule coming?: November 2023

SEC proposal on climate-related disclosures for investors

- Rule needed to make informed investment decisions
 - Disclose Scope 1 & 2 GHG emissions
 - Disclose Scope 3 emissions if material or have reduction goal that includes Scope 3. Safe harbor applies (no reasonable basis/bad faith)
 - Prepare attestation report (by independent attestation provider) covering Scope 1 & 2 emissions.
 - Disclose climate-related risks like to have material impact on financial statements or business, specifically physical and transition risks
 - Disclose oversight on climate risks by management and board
 - Disclose disaggregated climate-related impacts of 1% or greater on existing financial statement lines subject to independent audit

SEC vs. FAR

- Similar goal: support of “whole-of-government” approach to GHG
- Both require disclosure of GHG emissions and climate-related risks
 - FAR disclosures for “major” contractors must be made using the CDP climate change questionnaire
 - SEC Scope 3 if material or included in reduction goal
- Big difference: FAR requires “major” contractors to set science-based GHG emissions reduction target

Going Forward

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Climate-related procurement policy goals here to stay?

- Recognition of USG buying power
- Acknowledge federal contracts are a large sources of GHG emissions
- Gain visibility into major sources of GHG emissions
- Understand and manage supply chain vulnerabilities
- Increase standardization in tracking GHG emissions
- Create transparency into costs and impacts of climate risks
- Prompt suppliers to take action to realize efficiencies and manage risk

Practical dilemmas

- **Legal Uncertainty:** Is there authority to regulate?
 - OFPPA: “promote economy, efficiency, and effectiveness” in procurement, including acquisition of “best value products” that “achieve appropriate public policy objectives.”
 - [*Louisiana v. Biden*](#), 55 F.4th 1017 (5th Cir. 2022): No authority to issue federal contractor vaccine mandate, an “enormous and transformative expansion” in power
 - [*West Virginia v. EPA*](#), 142 S. Ct. 2587 (2022): Under “major questions doctrine,” an agency must have clear congressional authorization to regulate an issue of “vast economic and political significance”

Practical dilemmas

- **Costs of compliance:** Employee hours, outside consultants, data management tools
- **Small business burden:** May need to allocate larger share of tech, financial and staff resources and build program from scratch
- **Flow-downs:** Do you have to amend contracts with subcontractors and other suppliers to require sharing of climate related data to calculate Scope 3 emissions?
- **Vagueness:** Rule does not set a reduction target; acknowledges that not all CDP questions are relevant

Predictions:

- Climate change disclosures coming in most major economies
- Growing number of U.S. companies (and cities and states) to track GHG emissions and set reduction targets to take advantage of economic and reputational benefits
- Increased public exposure to climate change across all sectors of the economy likely to drive actions
- Standardization will make monitoring and setting targets easier

What you should do now

- Get familiar with frameworks like [GHG Protocol](#), [CDP Questionnaire](#), [SBTi](#), [Task Force on Climate-Related Financial Disclosures](#)
- Assess what resources you'll need to comply with proposed rules
- Identify personnel with expertise in climate-related risks
- Start assessing Scope 1 & 2 emissions
- Consider impact on costs and pricing considerations
- Keep an eye on rulemaking (and elections)!

For more information...



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