

U.S. EPA Region 5 Enforcement Developments

Midwest Regional Meeting of the
Auditing Roundtable

Bertram C. Frey
Acting Regional Counsel
Region 5

U.S. Environmental Protection Agency
November 18, 2005

Overview of Presentation

I. Environmental Enforcement

- National and Regional Priorities
- FY 2005 Regional Results
- FY 2004 National Compliance Incentive and Audit Policy Results
- Regional cases that Demonstrate Results

II. State Environmental Audit and Self-Disclosure Laws, Rules & Policies

Environmental Enforcement and Compliance

Both nationally and regionally, environmental enforcement has been, and continues to be, essential to the realization and furtherance of EPA's mission to protect and safeguard human health and the environment.

Environmental Enforcement and Compliance (cont'd)

OECA bases its national enforcement priorities on:

- Significant environmental benefit
- Patterns of non-compliance
- Whether the environmental and human health risks associated with a particular regulated sector or pollutant are sufficient in scope and scale such that EPA is best suited to take action

FY 2005-07 National Enforcement Priorities

OECA developed a performance-based strategy to achieve specific outcomes for **7 NATIONAL** enforcement priority areas:

1. Wet Weather
2. Air Toxics
3. Clean Air Act—NSR
4. Tribal
5. Mineral Processing
6. Financial Assurance
7. Petroleum Refineries

FY 2005-07 National Enforcement Priorities: **WET WEATHER ISSUES**

- Combined Sewer Overflows
- Sanitary Sewer Overflows
- Concentrated Animal Feeding
Operations
- Storm Water Runoff

FY 2005-07 National Wet Weather Priority: Combined Sewer Overflows

- **Problem:** Raw sewage, bacteria, pathogens, nutrients, industrial pollutants in lakes, wetlands and streams
- **Goal:** Reduce overflow volume by 90%
- **Focus:** Develop and Implement Long Term Control Plans (LTCPs)

FY 2005-07 National Wet Weather Priority: Sanitary Sewer Overflows

- **Problem:** Same as CSOs
- **Goal:** Reduce overflows by ensuring adequate collection system capacity
- **Focus:** Priority watersheds & impacted community

FY 2005-07 National Wet Weather Priority: Concentrated Animal Feeding Operations

- **Problem:** Nitrogen, phosphorous, ammonia & fecal coliform in lakes, wetlands & streams
- **Goal:** To minimize the discharge to surface water of pollutants from CAFOs
- **Focus:** Maintenance of waste lagoons & silage stock piles; excessive & improper application of manure to crops

FY 2005-07 National Wet Weather

Priority: Storm Water Runoff

- **Problem:** Sediment, oil & grease, suspended solids, nutrients, heavy metals, pathogens, and toxins in lakes, wetlands and streams
- **Goal:** Minimize the discharge of polluted storm water to surface waters
- **Focus:** Priority watersheds and impacted water bodies

FY 2005-07 National Enforcement Priorities: **AIR TOXICS**

Problem: Hazardous air pollutants pose significant risk to human health and the environment

Goal: Achieve an annual reduction of ~ 12,000 pounds of hazardous air pollutant emissions

Focus: 1) Facilities that are posing significant risk to communities; 2) industrial sectors that appear to show industry-wide non-compliance

FY 2005-07 National Enforcement Priorities: **AIR TOXICS** (cont'd)

Another goal of this priority is to ensure reduction of public exposure to toxic air emissions through enforcement of Maximum Achievable Control Technology (MACT) standards.

FY 2005-07 National Enforcement Priorities: **AIR TOXICS** (cont'd)

In addition to the six criteria air pollutants (PM, CO, O₃, NO_x, SO₂, Pb), the Clean Air Act identifies **188 toxic air** pollutants.

To date, EPA has issued rules regulating **90** source categories of the identified toxic air pollutants.

EPA estimates that once these rules are fully implemented, more than **1 million tons** of toxic air emissions will be prevented each year.

FY 2005-07 National Enforcement Priorities: **AIR TOXICS** (cont'd)

Based on the potential for excess emissions,
REGION 5 has selected enforcement of the
following MACTs:

- 1) Secondary Aluminum Operations
- 2) Pharmaceutical Facilities
- 3) Hazardous Organic NESHAPs
- 4) Polymers & Resins (4 MACTs)

FY 2005-07 National Enforcement Priorities: **AIR TOXICS** (cont'd)

Secondary aluminum operations –
Region 5 has recently evaluated 82
facilities and found 33% in non-
compliance. It is expected that the
resolution of these cases will reduce
more than 230,000 lbs. of hazardous
air pollutants (HAPs) a year.

FY 2005-07 National Enforcement Priorities: **AIR TOXICS** (cont'd)

Pharmaceutical facilities –

Region 5 has recently conducted 20 investigations and found 25% in violation. The resolution of these cases would reduce HAP emissions by 50,000 lbs. per year.

FY 2005-07 National Enforcement Priorities: **AIR TOXICS** (cont'd)

Leak detection provisions of MACT regulations for Hazardous Organic NESHAPs –

Region 5 has investigated 6 facilities and found three in violation of the leak detection provisions. We estimate that these violations release an excess of over 25,000 lbs. of emissions per year.

FY 2005-07 National Enforcement Priorities: **AIR TOXICS** (cont'd)

In FY 2006, in addition to the above mentioned MACTs, Region 5 will focus on enforcement of the Polymers & Resins MACTs.

FY 2005-07 National Priority: **CAA—NEW SOURCE REVIEW**

Problem: Inadequate control of emissions
— NO_x , VOC, SO_2 , & PM_{10}

Goal: Reductions in NO_x , VOC, SO_2 , & PM_{10}

Focus: Expansions without a permit

*****For FY 2006 and 2007, NSR violations at coal-fired power plants are no longer a priority, but for other sources the priority continues.**

FY 2005-07 National Priority: CAA NEW SOURCE REVIEW (cont'd)

Twofold Strategy:

- 1) to secure compliance with NSR at 75% of the nation's coal-fired electric generating plants; and
- 2) to identify other industrial sectors to target for NSR compliance.

FY 2005-07 National Priority: **CAA NEW SOURCE REVIEW** (cont'd)

In FY 2005, Region 5 settled two large NSR cases involving coal-fired power plants: Ohio Edison and Dynegy-Illinois Power.

FY 2005-07 National Priority: **TRIBAL PROGRAMS**

- **Problem:** Address significant human health and environmental problems associated with drinking water and waste management
- **Goal:** Improve compliance at facilities that are in or affect Indian country through integrated use of compliance assistance, compliance monitoring and enforcement, including addressing facilities in significant noncompliance
- **Focus:** Drinking water, environmental risks in schools, wet weather, and USTs

FY 2005-07 National Priority: **TRIBAL PROGRAMS**

There are 35 federally recognized Tribal governments in Region 5, all of which are located in Minnesota, Wisconsin, and Michigan. In this priority, we measure our success by how well we equip the tribes to directly implement their own environmental programs.

FY 2005-07 National Enforcement Priority: **RCRA MINERAL PROCESSING**

- **Problem:** Fish kills, contaminated residential drinking water wells
- **Goal:** ensure that high-risk facilities in the mineral processing and mining sectors are in compliance or on a path to compliance, or are otherwise working to reduce risk to human health and the environment through best management practices and other measures
- **Focus:** Phosphoric acid sector and other mineral processing facilities that pose the most significant risk to human health and the environment

FY 2005-07 National Enforcement

Priority: **FINANCIAL ASSURANCE**

One of the focuses of this priority is preventing the creation of new Superfund sites by keeping PRPs from defaulting on their financial obligations regarding cleanup or closure of a treatment, storage, or disposal facility.

FY 2005-07 National Enforcement Priority: **PETROLEUM REFINING**

Problem: Industry-wide non-compliance

Goal: 1) 80% of domestic refining capacity addressed through settlement of filed actions;
2) 20% reduction in emissions of SO₂ and NO_x

Focus:

NSP — Flaring

Leak Detection and Repair (LDAR)

Benzene NESHAP

PSD/NSR Compliance

FY 2005-07 National Enforcement Priority:

PETROLEUM REFINING (cont'd)

In Region 5, we estimate that our enforcement efforts will result in the reduction of more than 100,000 tons of SO₂ emissions and more than 50,000 tons of NO_x emissions.

We plan to complete our petroleum refinery enforcement priority effort within the next two years.

Additional Regional Priority:

EPA has joined with the Council of the States to develop a State Review Framework for the Enforcement program.

The review will pinpoint where each state environmental agency is performing well, and it will also identify areas for improvement. The pilot phase in Michigan was completed in January 2005.

Environmental Impact of Enforcement Cases

The environmental value of enforcement cases in terms of pollution reduction and prevention as well as the total dollar value of penalties and other forms of relief resulting from enforcement case resolution is impressive both nationally and regionally.

Region 5 FY 2005

Environmental Benefits

The enforcement actions that Region 5 concluded in FY 2005 require:

- reduction of a projected **584,417,618 lbs.** of pollution
 - approx. 2 times the national target measure and more than ½ of the FY 2004 national amount
- clean up an estimated **3,399,349 cubic yards** of contaminated soil
- reduction of an additional estimated **1,840,118 lbs.** of pollution through audit policy cases and other agreements

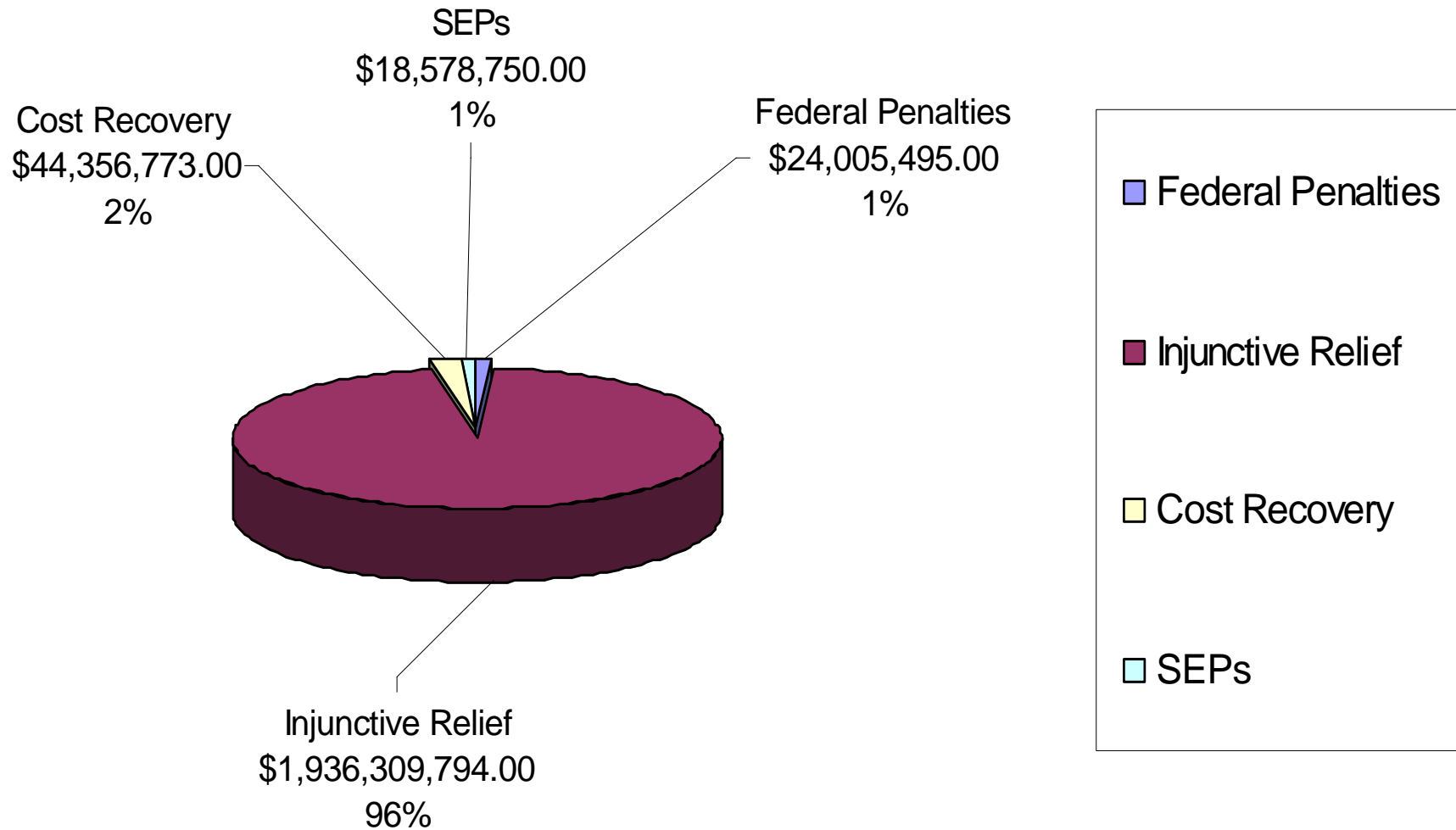
Region 5 FY 2005: Ten Pollutants with the Largest Projected Required Reductions

<u>Pollutant</u>	<u>Lbs.</u>
Sulfur Dioxide (SO ₂)	454,961,472
Nitrogen Oxides (NO _x)	115,402,000
Total Suspended Solids (TSS)	3,991,252
Biological Oxygen Demand	3,393,673
Particulate Matter (excluding PM10)	2,282,340
Carbon Monoxide (CO)	1,874,993
Sediment	440,484
Chemical Oxygen Demand	331,158
Volatile Organic Compounds (VOCs)	317,860
Hydrogen Chloride	244,183

Region 5 FY 2005 Case Counts

- **121** Administrative Orders Issued
- **215** Administrative Penalty Order Complaints
- **215** Administrative Settlements
- **55** Referrals to the Department of Justice
- **50** Administrative Penalty Order Complaints w/expedited settlements
- **34** Civil Judicial Settlements
- **33** Voluntary Disclosure Enforcement Settlements
- **4** of the National top 5 Pollutant Reductions:
 - Ohio Edison for SO₂ and NO_x, City of Cambridge for sanitary sewage, Illinois Power for SO₂.

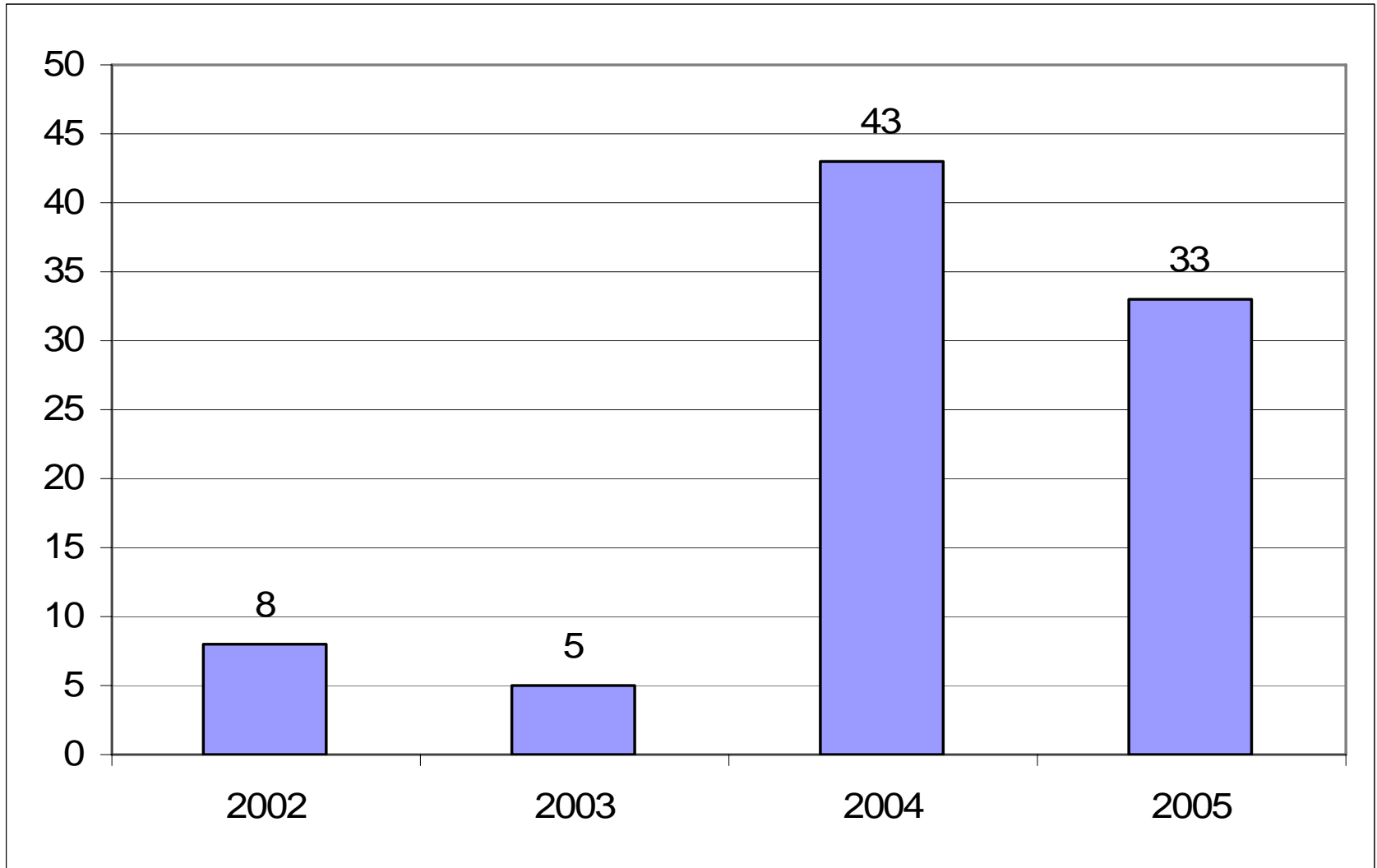
Region 5 FY 2005 Injunctive Relief, Penalties, Cost Recovery, and Supplemental Environmental Projects (SEPs) Values for all Civil Cases



REGION 5 FY 2005 Penalty, Injunctive Relief, Cost Recovery and SEP Values for all Civil Cases

Statute	Federal Penalty	Injunctive Relief	Cost Recovery	SEP Value
CAA	\$20,925,670	\$1,689,105,493	\$0	\$16,881,206
CERCLA	\$246,808	\$213,339,691	\$44,356,773	\$302,145
CWA	\$831,593	\$20,648,000	\$0	\$727,514
EPCRA	\$409,782	\$103,000	\$0	\$32,714
FIFRA	\$350,797	\$31,350	\$0	\$24,056
RCRA	\$892,555	\$11,298,016	\$0	\$319,313
SDWA	\$39,400	\$1,665,847	\$0	\$0
TSCA	\$308,890	\$118,397	\$0	\$291,802
	\$24,005,495	\$1,936,309,794	\$44,356,773	\$18,578,750

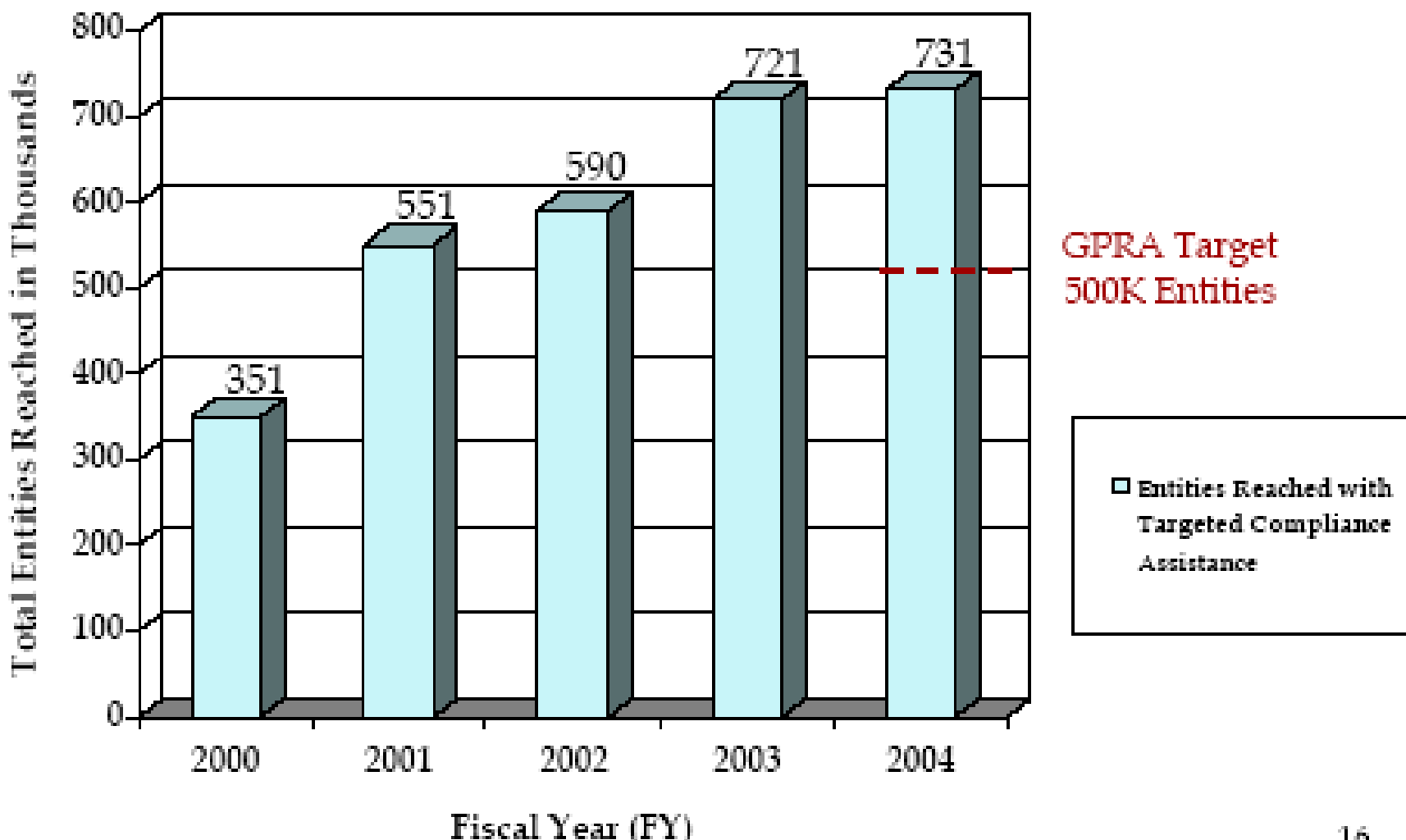
Region 5: Comparative Chart of Number of Voluntary Disclosure Enforcement Case Settlements for FY 2002 – 2005





EPA Compliance Assistance Program

Total Targeted Entities Reached with Compliance Assistance
in FY 2004



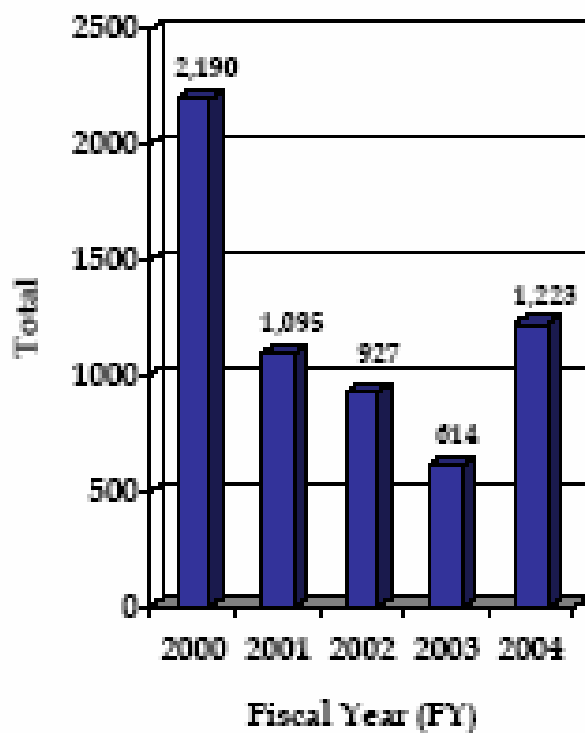


EPA Compliance Incentives Program

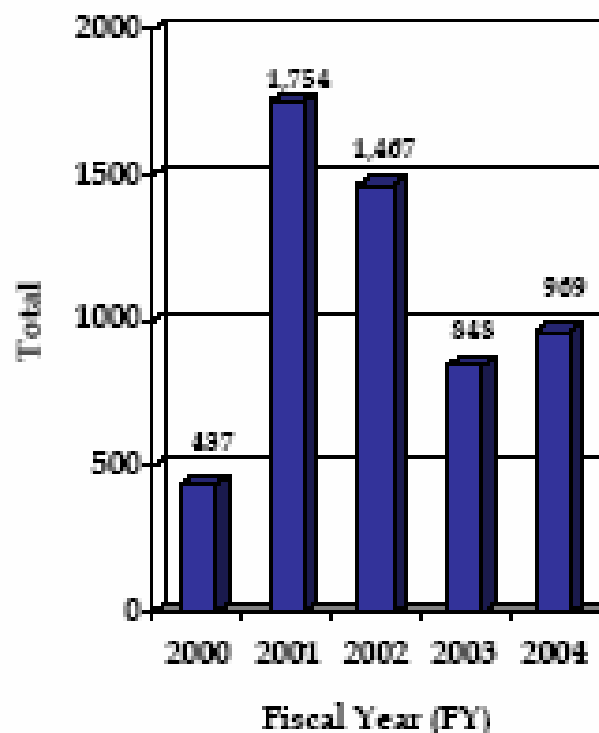
Facilities Disclosing & Correcting Violations

FY 2000 - FY 2004

Audit Policy Disclosures



Audit Policy Resolutions Correcting Violations



FY 04 GPR A Target = 500 Facilities Resolved

FY 2005 Environmental Enforcement Settlements that Demonstrate Results:

3 regional examples:

- 1) Ohio Edison Company — CAA, NSR
- 2) Illinois Power Company and Dynegy Midwest Generation — CAA, NSR
- 3) Kerr-McGee Chemical LLC — Superfund

Region 5 Cases that Demonstrate Results: Ohio Edison

- Consent Decree entered in U.S. District Court for Southern District of Ohio, July 11, 2005
- 2nd largest power plant settlement to date
- Requires a total emissions reduction by ~ 171,500 tons/year of SO₂ and 31,050 tons/year of NO_x by 2012 from 4 large power plants
- Requires the surrender of excess SO₂ allowances and restriction of NO_x allowances
- Estimated \$1.1 billion in injunctive relief

Region 5 Cases that Demonstrate Results: Ohio Edison (cont'd)

- \$25 million worth of mitigation projects, including
 - \$14.4 million in alternative power projects (wind power or, with plaintiffs' consent, landfill gas projects)
 - \$215,000 for environmentally beneficial projects for the National Park Service related to air pollution
 - \$400,000 for solar power projects in Allegheny County municipal buildings
 - \$10 million to the states of New York, New Jersey and Connecticut for other environmentally beneficial projects related to air pollution
- \$8.5 million civil penalty

Region 5 Cases that Demonstrate Results: Illinois Power—Dynergy Midwest Generation

- Consent Decree entered in U.S. District Court for Southern District of Illinois, May 27, 2005
- Requires Illinois Power-Dynergy to reduce emissions by ~ 39,500 tons/year of SO₂ by 2013 and ~14,800 tons per/year of NO_x by 2007
- Requires to Illinois Power-Dynergy retire 30,000 excess SO₂ emission allowances/year from its acid rain allocations and restrict trade of its NO_x allowances
- Estimated \$500 million in injunctive relief

Region 5 Cases that Demonstrate Results: Illinois Power—Dynergy Midwest Generation (cont'd)

- \$15 million to finance environmental mitigation projects, including:
 - a mercury reduction project (\$7.5 million credit Project Dollars for the \$26 million project)
 - DMG land donation to the Illinois Department of Natural Resources (\$2.25 million)
 - DMG land acquisition and donation to the Illinois Department of Natural Resources (\$2.75 million)
 - advanced truck stop electrification (\$1.5 million)
 - energy conservation at schools and municipal buildings (\$1.0 million)
- \$9 million civil penalty

Region 5 Settlement that Demonstrate Results: Kerr McGee

- Consent Decree entered in U.S. District Court for Northern District of Illinois, August 10, 2005
- Requires cleanup of radionuclides at 4 NPL sites in West Chicago—approximately 15,000 people live within 3 miles of the sites
- U.S. EPA initiated cleanup at these sites in 1994 and most of the cleanup is completed
- The total cost of the cleanups is an estimated \$172 million

Region 5 Cases that Demonstrate Results: Kerr McGee (cont'd)

Under the CD, Kerr McGee must:

- Complete the Remedial Design/Remedial Action the 2 riparian sites.
 - cleanup involves nearly 8 miles of river banks and flood plains and will cost approximately \$73 million
- Implement groundwater monitoring at the Reed-Kepler Park site
 - \$33 million removal of thorium already completed
- Complete clean-up of ~ 700 residential properties at a cost of \$66 million
 - at the time of the CD, 99% of the residential cleanup was completed
- Pay U.S. EPA
 - \$6 million of approximately \$20 million in past costs
 - \$2 million in future costs

State Environmental Audit and Self-Disclosure Laws, Rules & Policies

- 17 states have environmental audit laws (in effect) that provide some sort of both audit privilege and audit penalty immunity.
- 3 states have environmental audit privilege laws, but no environmental audit immunity laws.
- 3 states have environmental audit immunity laws, but no environmental audit privilege laws.
- 19 states have self-disclosure policies, which provide penalty “mitigation” rather than “immunity.”
- Illinois has a civil penalty mitigation law.
- Oklahoma has a self-disclosure rule.

State Audit and Self-Disclosure Laws, Rules & Policies: Audit Privilege Laws

Audit Privilege Laws provide an environmental audit privilege for voluntary disclosure of environmental violations.

19 states currently have audit privilege laws

Illinois' audit privilege law was repealed in August 2005.

List of States with Environmental Audit Privilege Laws in effect as of 11/2005

Alaska

Nevada

Arkansas

Ohio

Colorado

Oregon

Indiana

South Carolina

Iowa

South Dakota

Kansas

Texas

Kentucky

Utah

Michigan

Virginia

Mississippi

Wyoming

Nebraska

State Audit and Self-Disclosure Laws, Rules & Policies: Audit Immunity Laws

Audit Immunity Laws, in general, grant immunity from civil prosecution (in both civil judicial and administrative forums) for the imposition of penalties and fines for violations of environmental laws that were discovered during a voluntary environmental assessment or audit.

In general, there is no immunity from prosecution to correct environmental violations.

State Audit and Self-Disclosure Laws, Rules & Policies: Audit Immunity Laws (cont'd)

Wyoming and Minnesota each provide some exceptions to the “no-immunity-from-prosecution-for-correction-of-an-environmental-violation” general rule, but only for certain periods of time (grace periods) and not for imminent threat cases.

Colorado, Kansas, Michigan, Minnesota, Nevada, Rhode Island and South Dakota grant some form of immunity or penalty mitigation in situations involving criminal conduct.

List of States with Environmental Audit Immunity Laws in effect as of 11/2005

Alaska

New Jersey

Colorado

Ohio

Iowa

Rhode Island

Kansas

South Carolina

Kentucky

South Dakota

Michigan

Texas

Minnesota

Utah

Mississippi

Virginia

Nebraska

Wyoming

Nevada

State Audit and Self-Disclosure Laws, Rules & Policies: Audit Immunity Laws (cont'd)

General requirements for immunity

- the violation must be discovered as a result of an environmental audit and voluntarily disclosed (except in New Jersey, Rhode Island and South Carolina)
- remedial action be taken before immunity applies

State Audit and Self-Disclosure Laws, Rules & Policies: Audit Immunity Laws (cont'd)

In general, the U.S. EPA does not support the granting of immunity in situations involving:

- individual criminal conduct;
- violations needing injunctive relief to correct them;
- repeat or pattern violations;
- violations of existing court or administrative orders;
- violations which cause serious harm to human health or the environment;
- violations which create an imminent and substantial endangerment to human health or the environment; or
- violations where the regulated entity receives a significant economic benefit from noncompliance with the environmental laws.

State Audit and Self-Disclosure Laws, Rules & Policies: Audit Immunity Laws (cont'd)

The attorneys general of 15 states have issued clarifying opinions concerning their state environmental audit immunity laws.

Primarily, these opinions have been issued in response to concerns expressed by U.S. EPA that many of the state laws do not meet the minimum requirements for federally delegated, authorized, or approved, state environmental programs (specifically, the minimum level of enforcement authority required under federal law).

On the whole, the opinions serve to meet the expressed concerns of U.S. EPA, but the effect and weight of the opinions can vary by state.

State Audit and Self-Disclosure Laws, Rules & Policies: Illinois' Audit, Civil Penalty Mitigation Law

Illinois' Audit, Civil Penalty Mitigation Law

permits mitigation of a civil penalty when a person or entity, under a number of specified conditions set forth in the statute, self-discloses its noncompliance.

In essence, this law creates a hybrid program, combining features of penalty mitigation policies and immunity laws.

415 Ill. Comp. Stat. 5/42 (2004)

State Audit and Self-Disclosure Laws, Rules & Policies: Illinois' Audit, Civil Penalty Mitigation Law (cont'd)

In determining the appropriate civil penalty to be imposed: the Illinois Pollution Control Board is authorized to consider factors:

- (1) the duration and gravity of the violation;
- (2) due diligence on the part of the regulated person in attempting to comply with, or secure relief under, the Act;
- (3) any economic benefit accrued as a result of non-compliance;
- (4) the amount of monetary penalty required to deter further violations;

State Audit and Self-Disclosure Laws, Rules & Policies: Illinois' Audit, Civil Penalty Mitigation Law (cont'd)

In determining the appropriate civil penalty to be imposed (cont'd)

(5) the number, proximity in time, and gravity of previously adjudicated violations of the act by the regulated person;

(6) voluntary self-disclosure of the non-compliance;
and

(7) whether the regulated person agreed to undertake a "supplemental environmental project" in settlement of an enforcement action, which the regulated person is not otherwise legally required to perform.

State Audit and Self-Disclosure Laws, Rules & Policies: Illinois' Audit, Civil Penalty Mitigation Law (cont'd)

Conditions:

- Any imposed civil penalty must be at least as great as the economic benefits accrued as a result of the violation
- The regulated person must:
 - correct noncompliance
 - remediate any environmental harm in a “timely fashion”
 - act with due diligence in complying with requirements
 - cooperate with IEPA
 - Agree to prevent recurrence of the noncompliance

State Audit and Self-Disclosure Laws, Rules & Policies: Illinois' Audit, Civil Penalty Mitigation Law (cont'd)

Mitigation is NOT provided from

- Injunctive Relief

Mitigation is NOT provided for a violation of

- Administrative orders or consent decrees
- Civil Judicial orders or consent decrees

State Audit and Self-Disclosure Laws, Rules & Policies: Illinois' Audit, Civil Penalty Mitigation Law (cont'd)

Mitigation is also not provided for:

- Violations that result in “serious actual harm” or imminent and substantial endangerment to “human health or the environment”
- Current “noncompliance event[s]” that are “related” to previously (within 3 years) committed environmental violations
- Criminal violations, including criminal penalties
- Violations that constitute a pattern (5-year time frame)

State Audit and Self-Disclosure Laws, Rules & Policies: Self-Disclosure Policies

Self-disclosure policies: Because states must satisfy minimum requirements to enable them to administer federally authorized, approved or delegated environmental programs, almost all of the state self-disclosure policies are consistent with either the EPA Self-Policing Policy or the EPA Small Business Compliance Policy, or both.

State Audit and Self-Disclosure Laws, Rules & Policies: Self-Disclosure Policies

Self-disclosure policies provide for some measure of penalty mitigation, including elimination, for a voluntary disclosure of violations discovered during an environmental audit.

Self-disclosure policies are administered by state environmental agencies.

They do not carry the legal force of statutes or rules, and can be adapted and modified in response to changing requirements more easily than can enacted legislation.

List of States with Environmental Audit Self-Disclosure Policies in effect as of 11/2005

Arizona

New Mexico

California

New York

Connecticut

North Carolina

Delaware

Oregon

Florida

Pennsylvania

Hawaii

Tennessee

Indiana

Vermont

Maine

Washington

Maryland

*Minnesota's policy, as a practical matter, has been superseded by the state's audit immunity law.

Massachusetts

State Audit and Self-Disclosure Laws, Rules & Policies: Self-Disclosure Policies

General requirements include:

- (1) must be voluntarily disclosed;
- (2) must at least take measures to remediate disclosed violation;
- (3) mitigation does not apply to the economic benefit resulting from the disclosed violation;
- (4) penalty mitigation does not apply if the violation was required to be reported or the violation was under investigation;
- (5) the violation can not be part of a pattern of violations or a similar violation can not previously have resulted in a compliance action; and
- (6) penalty mitigation does not apply if the violation is serious or poses imminent or substantial endangerment to human health or the environment.

State Audit and Self-Disclosure Laws, Rules & Policies: Self-Disclosure Policies

Penalty mitigation for criminal violation

12 of the 19 state policies allow some sort of penalty mitigation for criminal violations.

State Audit and Self-Disclosure Laws, Rules & Policies: Oklahoma's Environmental Audit Immunity and Mitigation Rule

Oklahoma's rule has aspects of both the audit immunity laws and the self-disclosure policies.

It provides for immunity from prosecution for civil or administrative penalties under certain circumstances and for mitigation of civil or administrative penalties under other circumstances.

State Environmental Audit and Self-Disclosure Laws, Rules & Policies

It is clear that the states are moving toward a more uniform set of requirements for regulated entities to obtain either penalty immunity or mitigation for voluntary disclosures of environmental violations.

The more uniform requirements address EPA's concerns that many of the states' immunity laws did not meet the minimum requirements for federally delegated, authorized, or approved, state environmental programs.