



FOLEY & LARDNER LLP

# **The New Regulatory Climate... Clean Water Agencies Prepare to Act**

## **New Administration, Same Wet Weather Challenges**

### **Enforcement Update**

Linda E. Benfield  
777 E. Wisconsin Ave.  
Milwaukee, WI 53202

©2009 Foley & Lardner LLP • Attorney Advertising • Prior results do not guarantee a similar outcome • Models used are not clients but may be representative of clients • 321 N. Clark Street, Suite 2800, Chicago, IL 60654 • 312.832.4500



# **2008-2010 U.S. EPA National Enforcement and Compliance Assurance Priority**

- Combined Sewer Overflows
- Sanitary Sewer Overflows
- CSO/SSOs have been a priority since 1998
- Water programs have the majority of enforcement priorities



# FY2008 Enforcement & Compliance Annual Results

## National Priority Pollution Problems

	Estimated Pollutants to be Reduced <i>millions of pounds</i>		Estimated Investments in Pollution Control <i>millions of dollars</i> <i>(Inflation Adjusted to FY 08 Dollars)</i>	
	<u>FY 2007</u>	<u>FY 2008</u>	<u>FY 2007</u>	<u>FY 2008</u>
<b>CSO/SSO</b> Overflows from inadequate combined sewers and sanitary sewers discharge pollutants such as untreated sewage and industrial wastewater into rivers, lakes and oceans.	45 M	173 M	\$3,678 M	\$2,909 M
<b>CAFO</b> Runoff containing nutrients, bacteria, pesticides and antibiotics from concentrated animal feedlots are transported to local waterways.	15 M	32 M	\$31 M	\$10 M
<b>Stormwater</b> Stormwater runoff from large urban areas transports contaminants directly over land and into waterways.	118 M	1,329 M	\$9 M	\$68 M
<b>TOTAL</b>	178 M	1,534 M	\$3,717 M	\$2,986 M

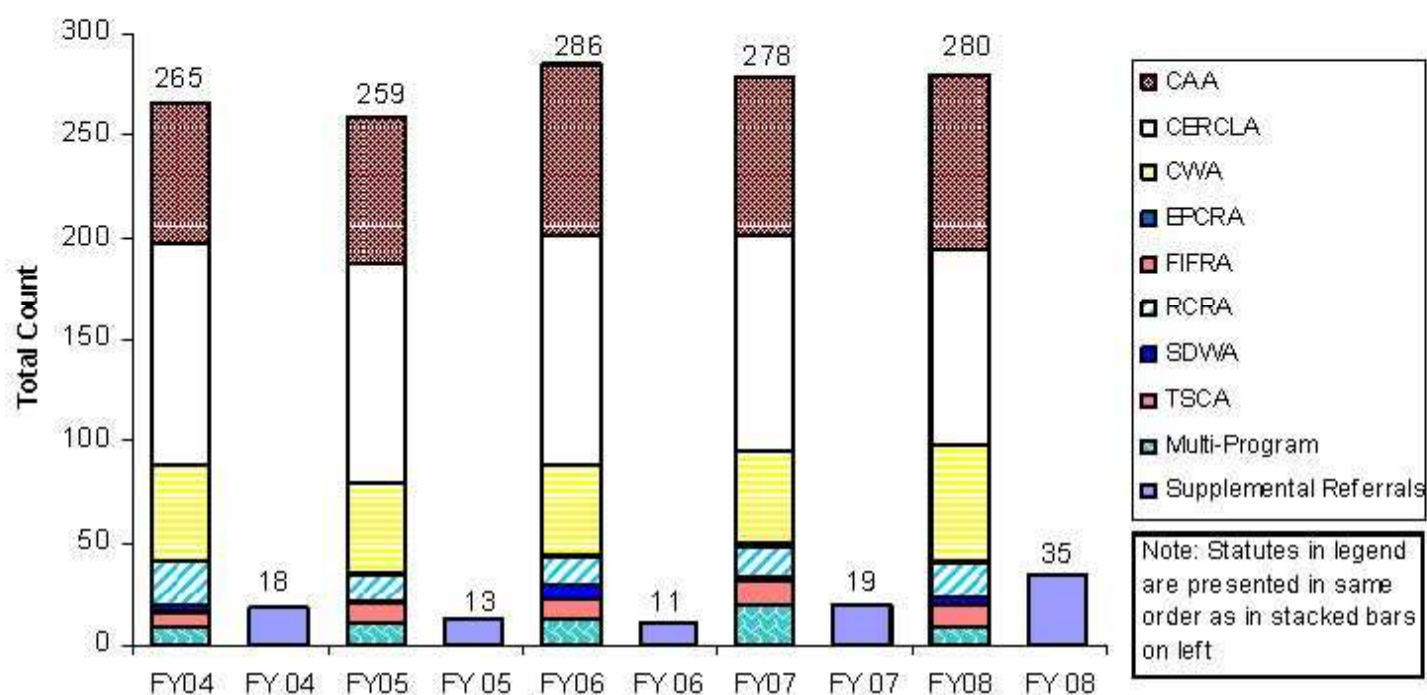
Note: All prior FY dollar figures in this report are adjusted to reflect the current value in FY 2008 dollars based on the monthly rate of inflation as determined by the U.S. Department of Labor Consumer Price Index for All Urban Consumers.

Note: Most of the numbers displayed in this document are rounded. As a result, adding the figures presented here may not produce exactly the same totals as those displayed in other EPA documents.



# FY 2008 Enforcement & Compliance Annual Results

## Referrals of Civil Judicial Enforcement Cases to Department of Justice Total and by Statute



Note: When EPA expands a case that has previously referred to DOJ to add parties, violations or facilities, or to amend or enforce a settlement, this activity is tracked as a "supplemental referral" and is counted separately from "Referrals".

FY2008 Data Source: Integrated Compliance Information System (ICIS), October 11, 2008; data source for previous fiscal years: ICIS

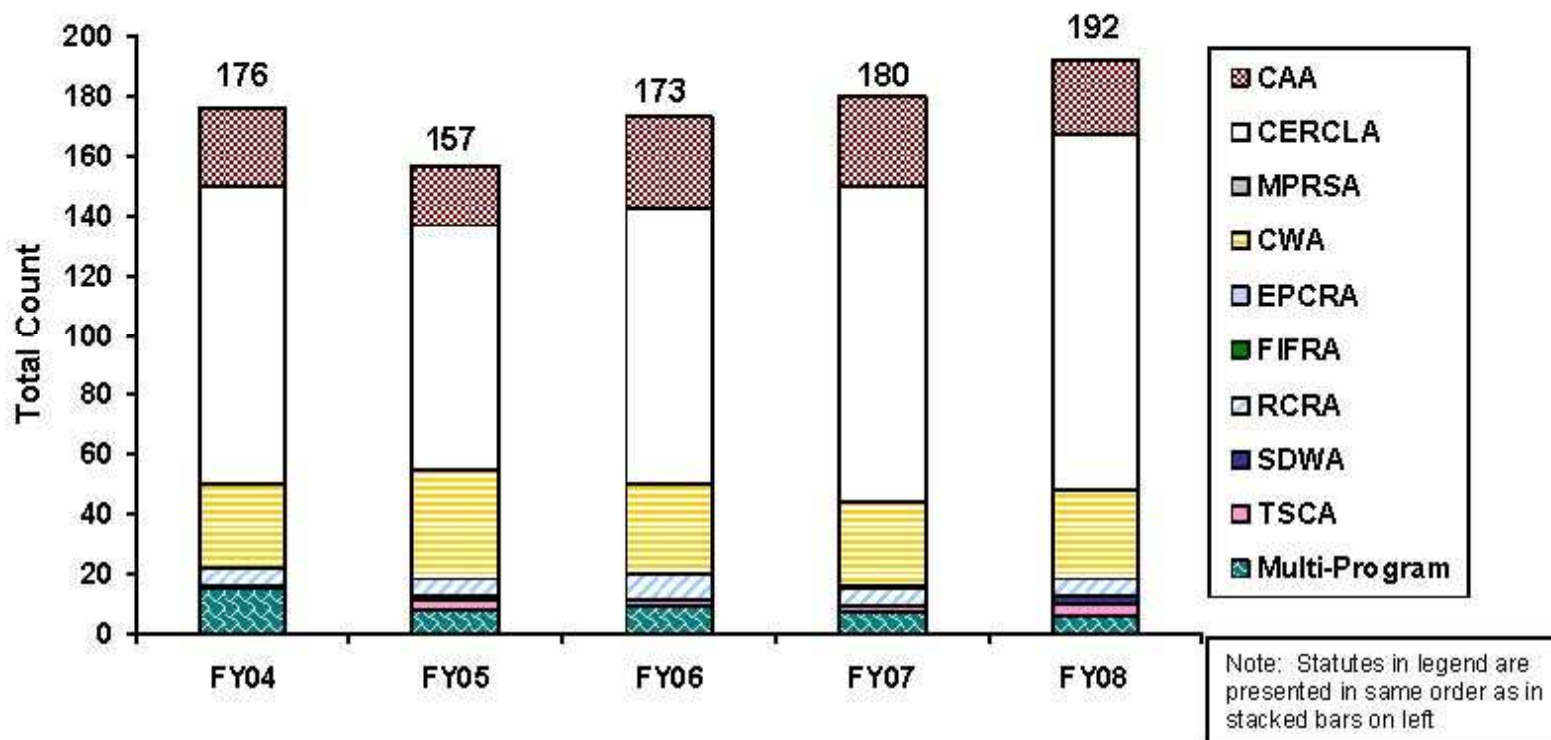


# FY2008 Enforcement & Compliance Annual Results

## Concluded EPA Enforcement Actions

EPA Civil Judicial Enforcement Case Conclusions

Total and by Statute



FY2008 Data Source: Integrated Compliance Information System (ICIS), October 11, 2008; data source for previous fiscal years: ICIS



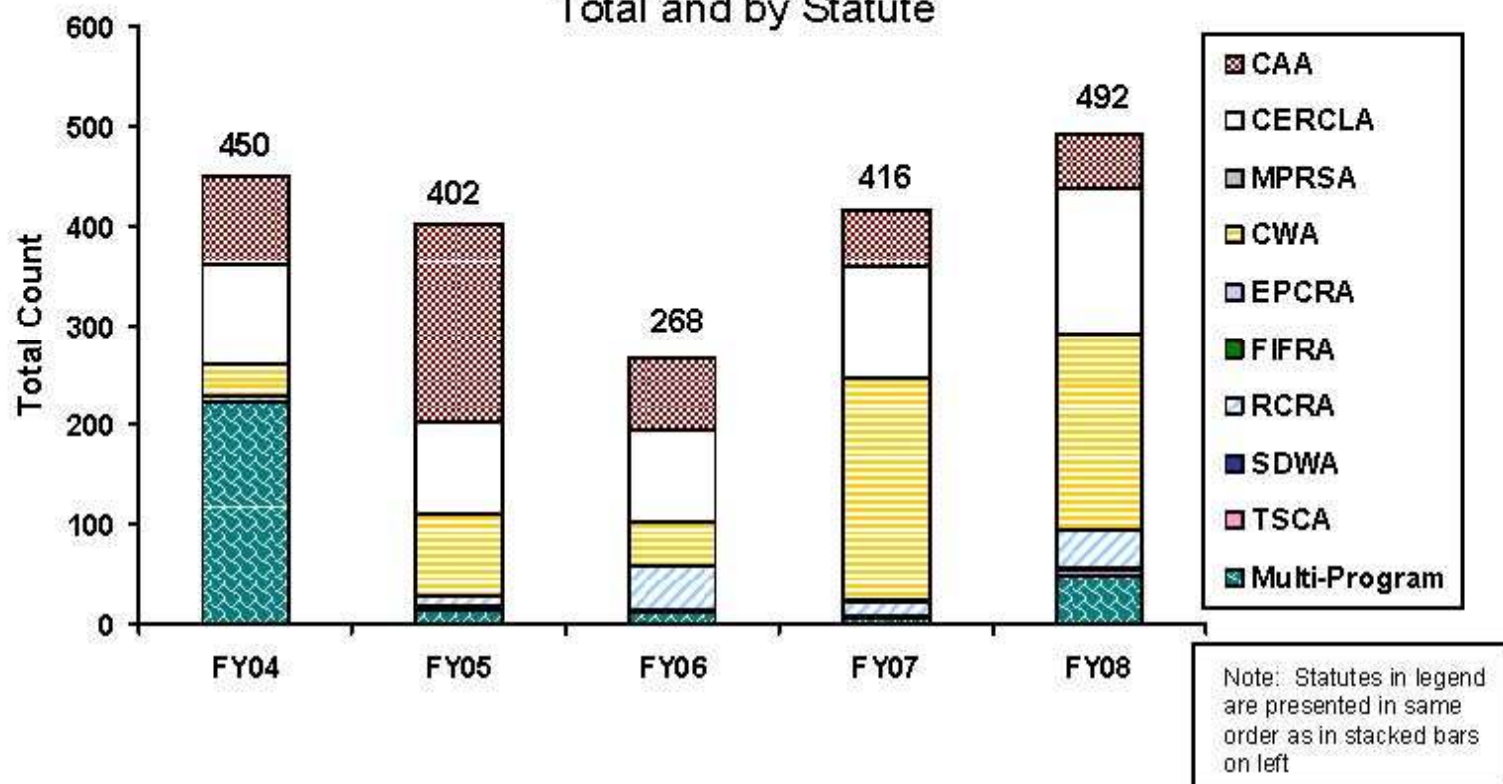


## FY2008 Enforcement & Compliance Annual Results Concluded EPA Enforcement Actions

EPA Civil Judicial Enforcement Case Conclusions

Number of Facilities Addressed

Total and by Statute

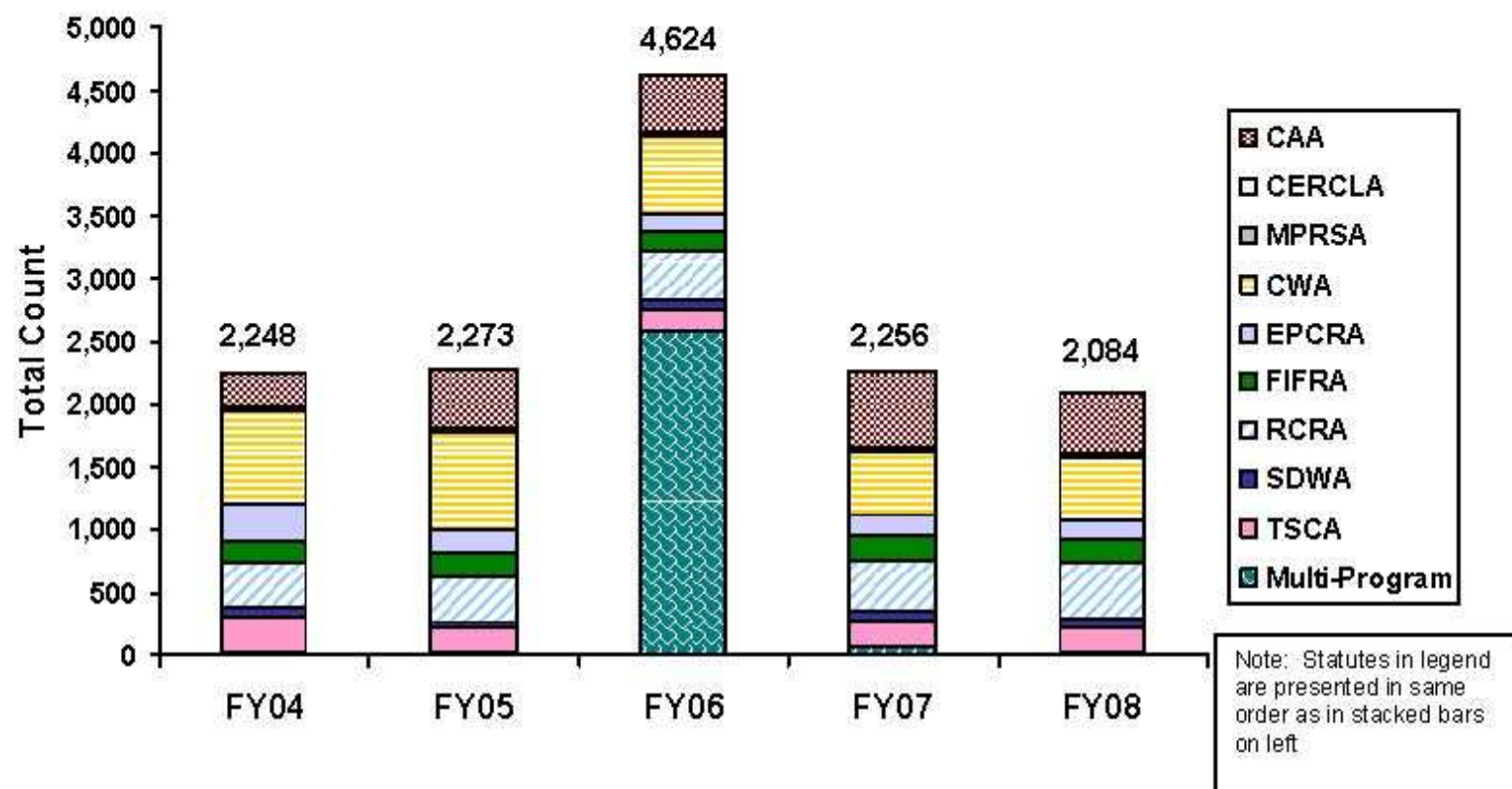


FY2008 Data Source: Integrated Compliance Information System (ICIS), October 11, 2008; data source for previous fiscal years: ICIS



## FY2008 Enforcement & Compliance Annual Results Concluded EPA Enforcement Actions

EPA Final Administrative Penalty Orders Issued  
Total and by Statute



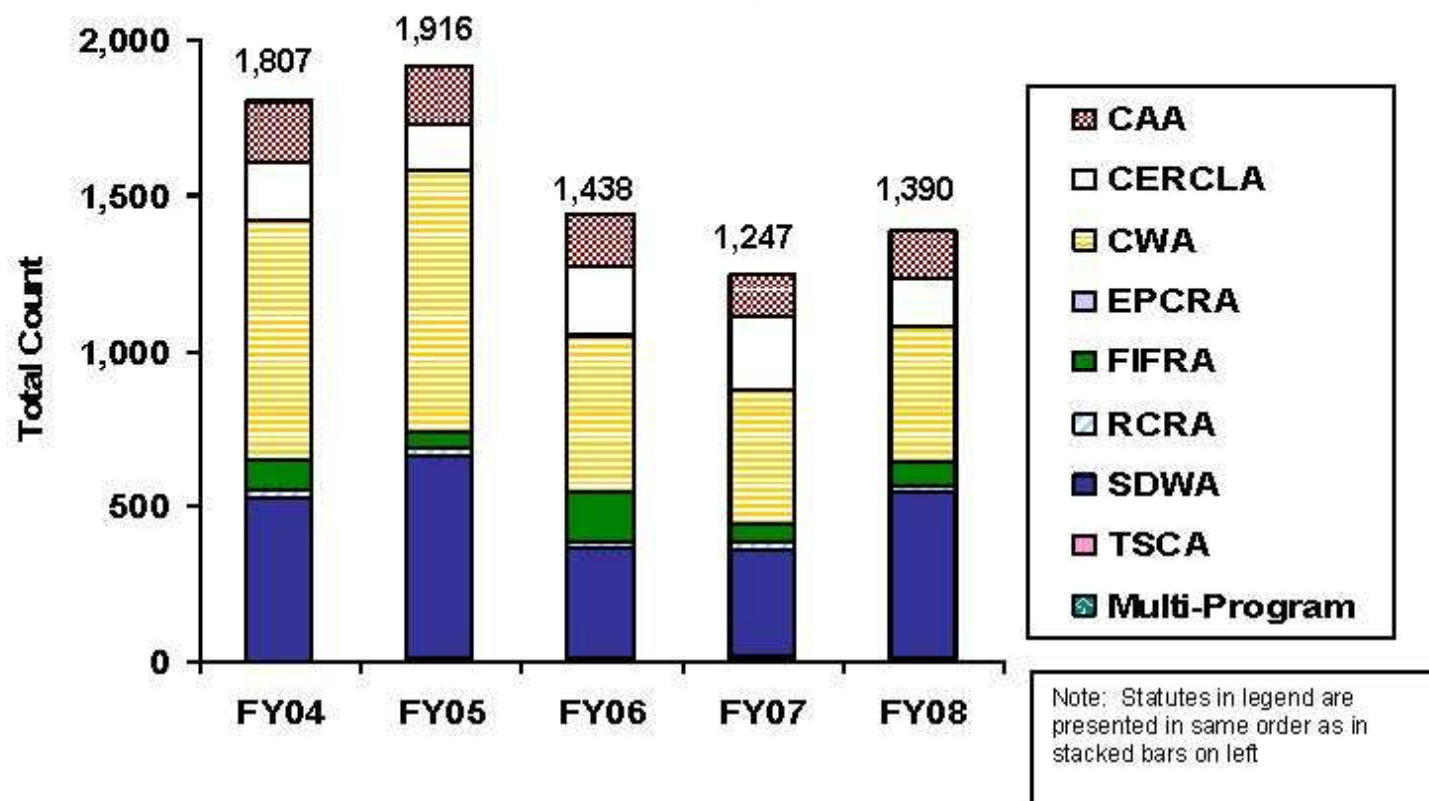
FY2008 Data Source: Integrated Compliance Information System (ICIS), October 11, 2008; data source for previous fiscal years: ICIS



## FY2008 Enforcement & Compliance Annual Results

### Concluded EPA Enforcement Actions

EPA Administrative Compliance Orders Issued  
Total and by Statute



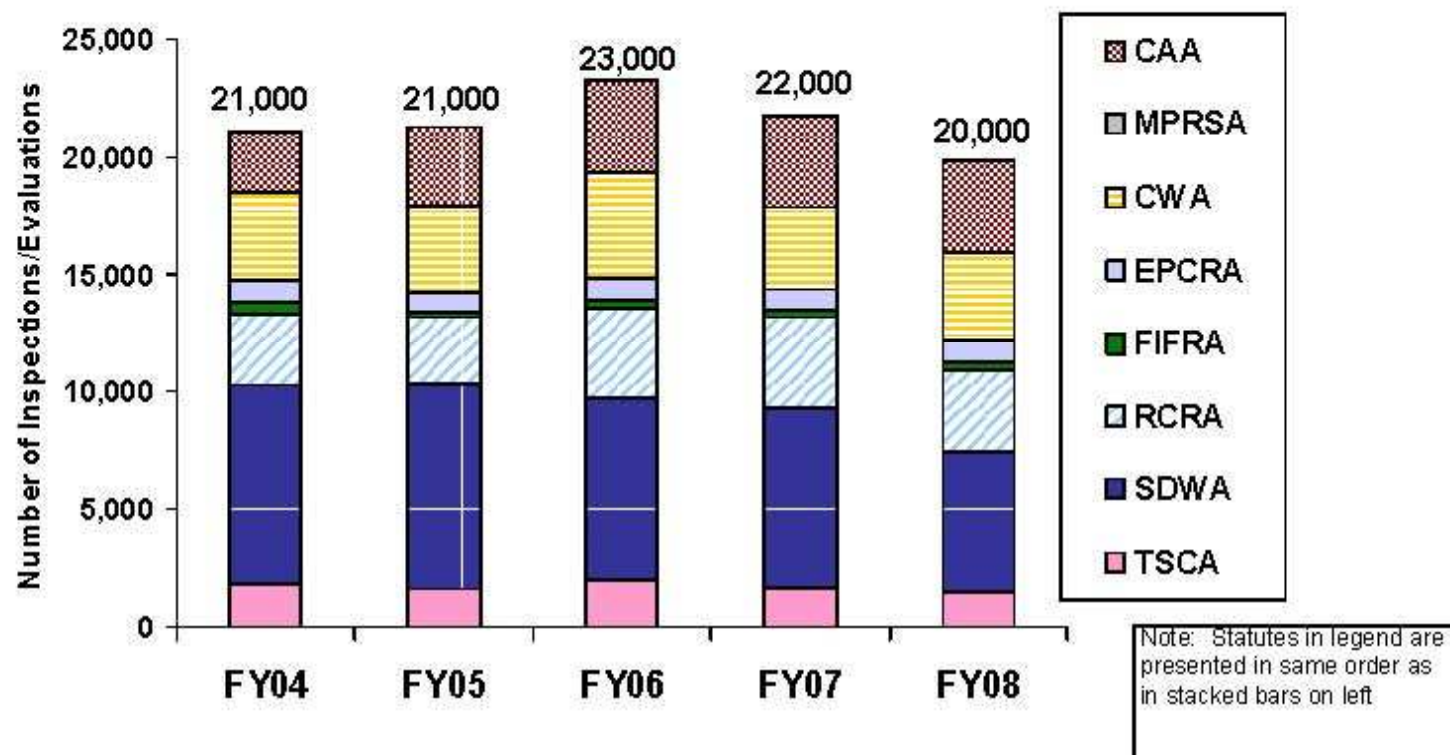
FY2008 Data Source: Integrated Compliance Information System (ICIS), October 11, 2008; data source for previous fiscal years: ICIS





## FY2008 Enforcement & Compliance Annual Results Compliance Monitoring

Number of Inspections - Evaluations Conducted by EPA



Note: In FY 2008, 334 Inspections were conducted by tribal inspectors using federal credentials, an important addition to the inspections conducted by EPA. Inspections conducted by tribes using federal credentials are done "on behalf" of the Agency, but are not an EPA activity.

Note: The numbers of EPA Civil Investigations for the last five FYs are: 455 (FY 04), 397 (FY 05), 354 (FY 06), 346 (FY 07) and 222 (FY 08).

FY2008 Data Source: Integrated Compliance Information System (ICIS), legacy databases, and manual reporting, October 11, 2008.

Data source for previous fiscal years: ICIS, legacy databases, and manual reporting

# Selected Recent CSO/SSO Settlements

<u>City</u>	<u>State</u>	<u>Improvements</u>	<u>Total Penalty</u>	<u>SEPs</u>	<u>Settlement Date</u>
Alcoscan (Pittsburgh)	PA	\$1B	\$1.2M	\$3M	2008
Cincinnati/Hamilton	OH	\$1.5B	\$1.2M	\$5.3M	2003
Duluth	MN	\$130M	\$400,000		PROPOSED
Fort Madison	IA	\$4.5-\$18M			2009
Ft. Wayne	IN	\$250M	\$538,380	\$400,000	2008
Greater Lawrence Sanitary District	MA	\$18M	\$254,000		2007
Honolulu	HI	\$1.2B			2007
Independence	MO	\$35M	\$255,000	\$450,000	2009
Indianapolis	IN	\$1.86B	\$1.1M	\$2M	2006
Lebanon	NH	\$30.2M			2009
Los Angeles	CA	\$2B	\$1.6M	\$8.5M	2004
Louisville	KY	\$500M	\$1M	\$2.25M	2006
Milwaukee	WI	\$1B (2004)		\$245,000 (2008)	2004/2008
Nashville	TN	\$300M	\$564,038	\$2.8M	2009
Okmulgee	OK	\$18.5M	\$1M		2006
San Diego	CA	\$1B			2007
Sanitation District of Northern Kentucky	KY	\$880M	\$476,400	\$636,000	2005
Toledo	OH	\$433M	\$500,000	\$1M	2002
Washington	DC	\$1.4B	\$250,000	\$2M	2005
Washington Suburban Sanitary Commission	MD	Accelerates \$350M	\$1.1M	\$4.4M	2005

# Selected Recent Criminal Enforcement Cases

- United States v. Holden (Tennessee 2007)
  - Father + son operators of municipal sewage treatment plant
  - Data falsification
  - 24 months / 32 months
- United States v. Comprehensive Environmental Solutions, Inc. (Michigan 2008)
  - Operator of industrial waste TSD
  - Dumping 13 million gallons raw sewage into Detroit sewer system
  - \$600,000 fines
  - \$150,000 (company paid SEP)

# **Selected Recent Criminal Enforcement Cases** (cont.)

- **United States v. Surgeon (Missouri 2008)**
  - Former public works director – failing to report
  - City-discharge of untreated sewage
  - \$50,000 fine
- **United States v. Cooper (Virginia 2007)**
  - Operator-sewage lagoon overflow
- **United States v. Fujicolor Processing (Texas 2007)**
  - Cherry picking data from silver-tainted waste
  - Company paid \$200,000

# **Selected Recent Criminal Enforcement Cases** (cont.)

- **United States v. Austin (Alaska 2006)**
  - Lab technician
  - Wastewater data falsification
  - 3 years probation, \$1,100 fine
- **United States v. Chief Ethanol Fuels, Inc. (Nebraska 2006)**
  - False temperature reporting
  - Company paid \$100,000 fine, \$100,000 SEP
- **United States v. Storms (New York 2006)**
  - Data falsification in drinking water monitoring records
  - 2 years probation, precluded from future employment involving public wealth, safety or welfare



# Enforcement Basics

- Federal enforcement- U.S. EPA and U.S. DOJ
- State enforcement- state agencies and departments of justice
- Citizen suits

# Enforcement Basics (cont.)

- Injunction to Perform Work
- Penalties
- Supplemental Environmental Projects (“SEPs”)

# Enforcement Basics (cont.)

- Citizen Suits
  - 60 Day Notice Letter
  - Gwaltney- no jurisdiction for “wholly past” violations

# U.S. EPA 2008-2010 National Enforcement Goals

- CSOs
  - “Address” 100 percent of CSOs in communities with populations greater than 50,000 (and satellites)

# **U.S. EPA 2008-2010 National Enforcement Goals** (cont.)

- **SSOs**
  - “Address” 100 percent of SSOs by the 63 large municipal authorities (total treatment capacity 100 mgd or larger), and satellites
  - “Address” 50 percent of the 516 medium municipalities (total treatment capacity greater than 10 mgd but less than 100 mgd)



# When “Addressed”

- Final administrative order or entered civil judicial consent decree with enforceable schedule and milestones
- Named in filed federal civil judicial Complaint
- Enforceable state administrative or judicial order that meets federal requirements
- Federal investigation documents a *de minimis* spill

# Issues to Address

- Affordability
- Schedule/Phasing
  - Cincinnati MSD 2004 settlement allows extension beyond 2022 if costs exceed \$1.5B. 2009 Wet Weather Management Plan was approved by agencies in June, 2009 and submitted for court approval to modify decree- allows for Phase I completion by 2018, and schedule for Phase II due by 2017

# Issues to Address (cont.)

- Satellite communities
- “Diligent Prosecution”
- Stimulus Law Impact

# Issues to Address (cont.)

- Supplemental Environmental Projects
  - WWTP Enforcement
  - Other media enforcement in service area
  - Requirements
    - Not otherwise required
    - Some nexus to violation
    - Percent credit

# Supplemental Environmental Projects- Greenhouse Gas

## ■ Interesting Facts

- 20 percent of all electricity used in the U.S. is used to pump and treat water
- Chicago estimates that 100,000 tons of coal/year are used to pump water that does not need to be treated



Linda E. Benfield  
Foley & Lardner LLP  
777 E. Wisconsin Ave.  
Milwaukee, WI 53202  
Phone: 414.297.5825  
Facsimile: 414.297.4900  
[ibenfield@foley.com](mailto:ibenfield@foley.com)

Dorothy E. Watson  
Foley & Lardner LLP  
111 N. Orange Ave.  
Orlando, FL 32801  
Phone: 407.244.3236  
Facsimile: 407.648.1743  
[dwatson@foley.com](mailto:dwatson@foley.com)