



FOLEY & LARDNER LLP

# **NACWA – Developments in Clean Water Law: A Seminar for Public Agency Attorneys & Managers**

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# PANEL DISCUSSION

## Enforcement: There Is A New Sheriff In Town

# Overview

- Enforcement Statistics/Update
- Citizen Suit Enforcement
  - Basics of Citizen Suit Involvement
  - Evolving Case Law regarding Citizen Suits
- Other Evolving Potential Exposures

## **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> (Inflation Adjusted to FY 08 Dollars)	
	<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

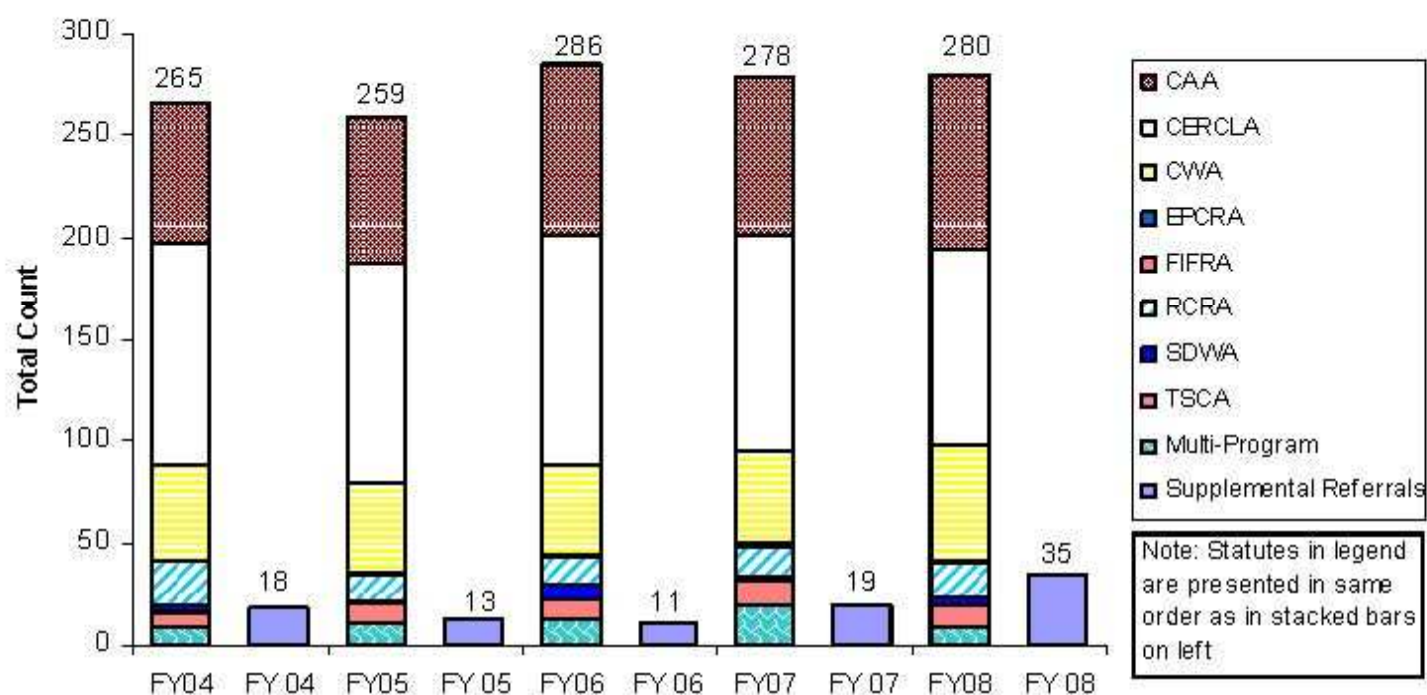
Note: All prior FY dollar figures in this report are adjusted to reflect the current value in FY 2008 dollars based on the monthly rate of inflation as determined by the U.S. Department of Labor Consumer Price Index for All Urban Consumers.

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

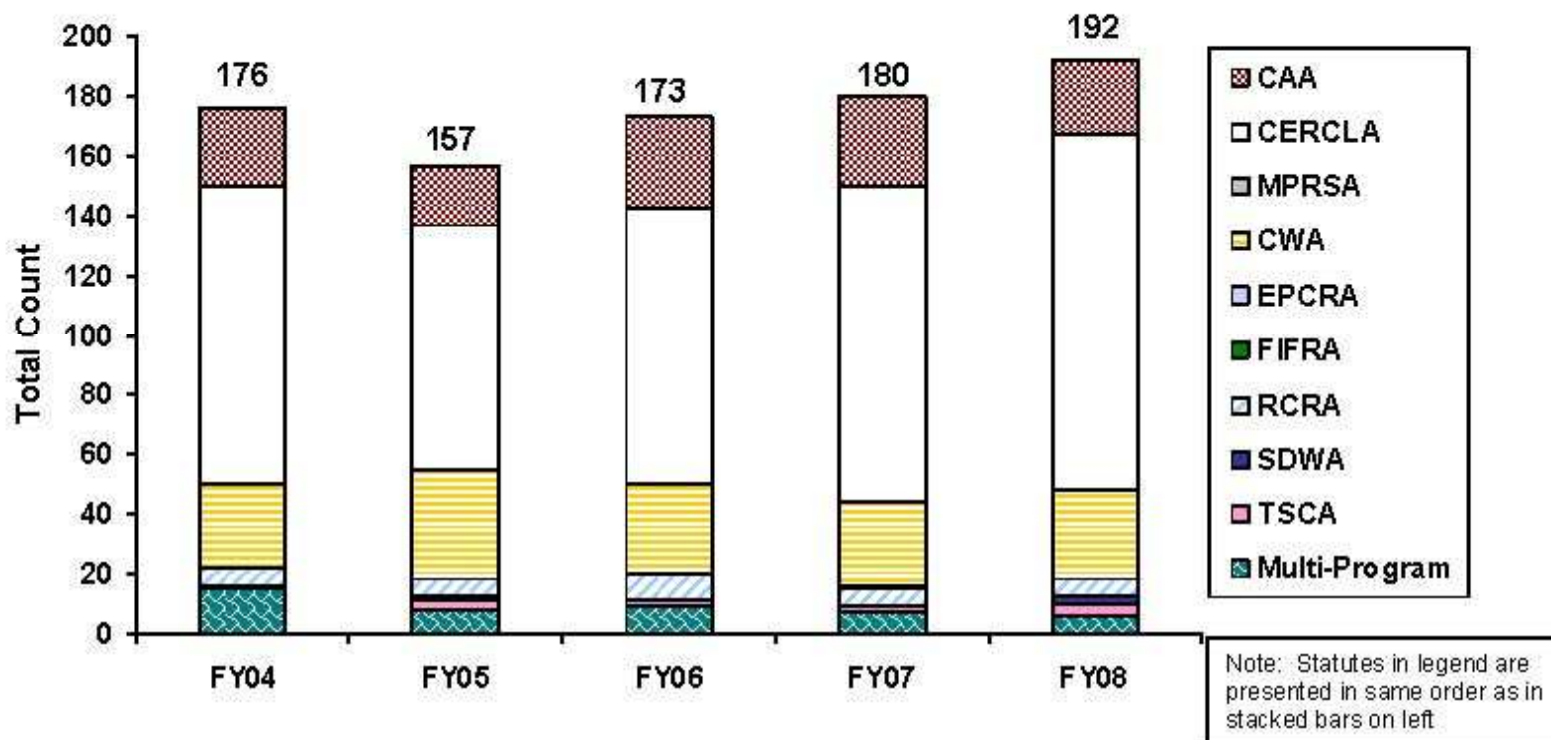


# FY2008 Enforcement & Compliance Annual Results

## 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





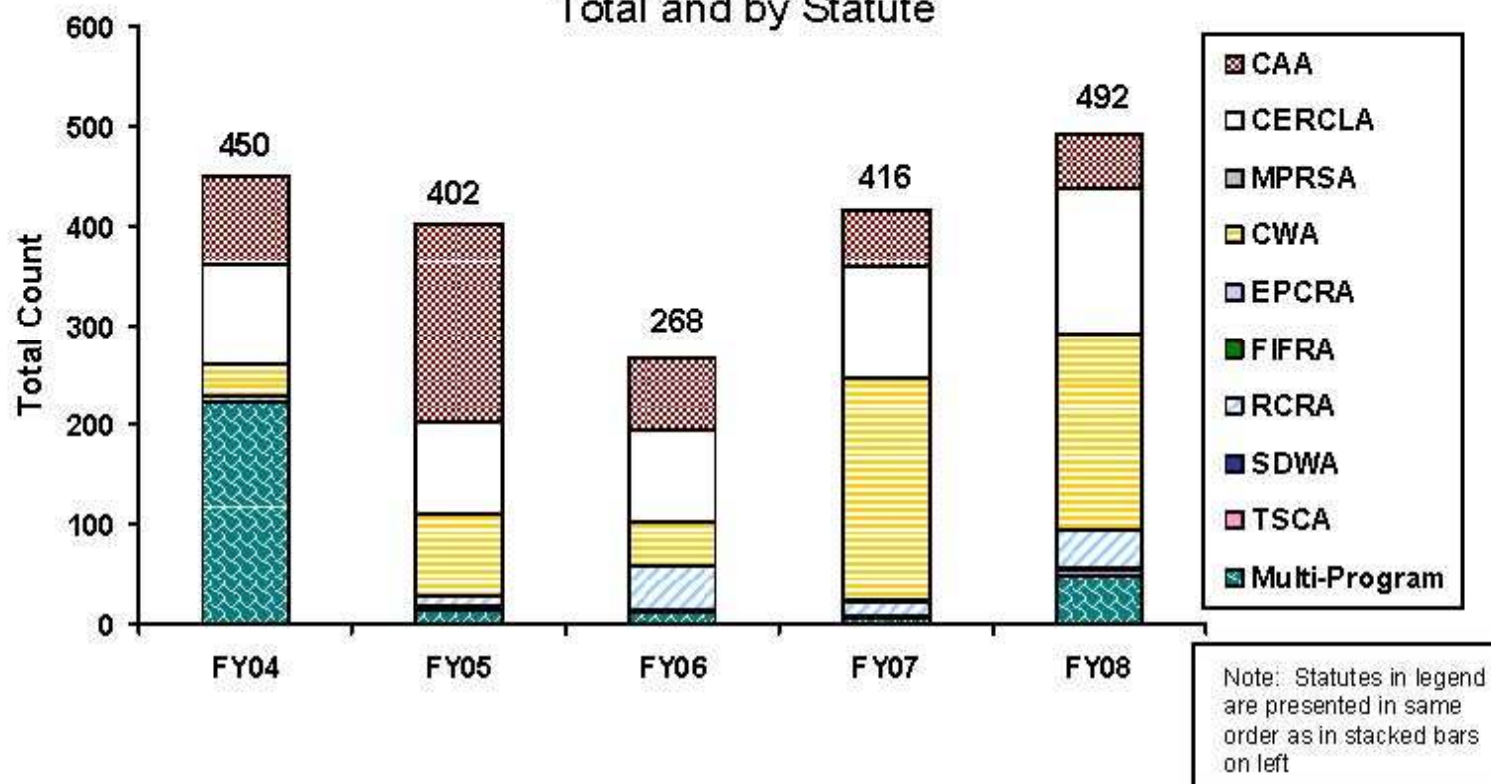
# FY2008 Enforcement & Compliance Annual Results

## 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

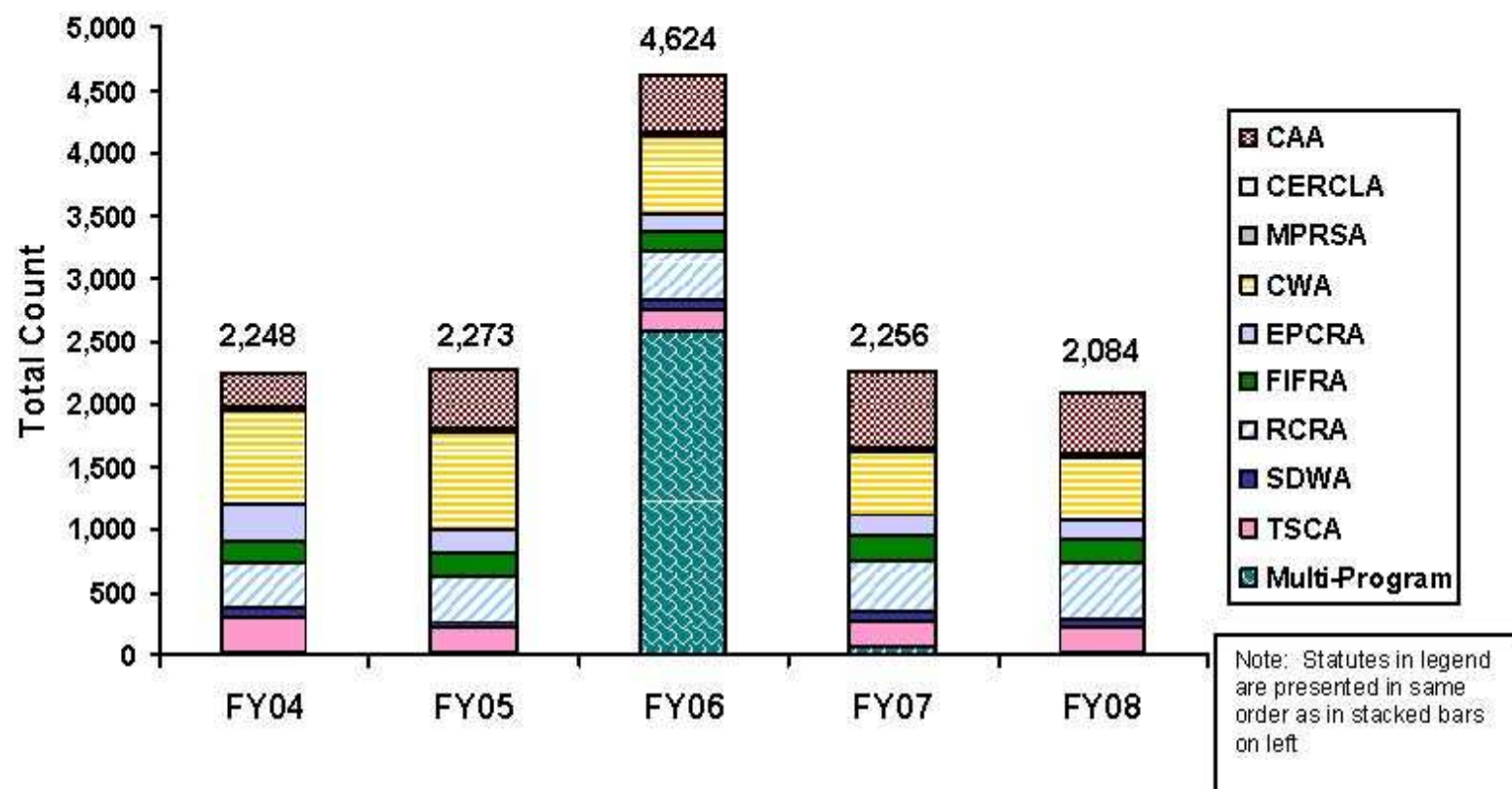




## FY2008 Enforcement & Compliance Annual Results

### Concluded EPA Enforcement Actions

EPA Final Administrative Penalty Orders Issued  
Total and by Statute



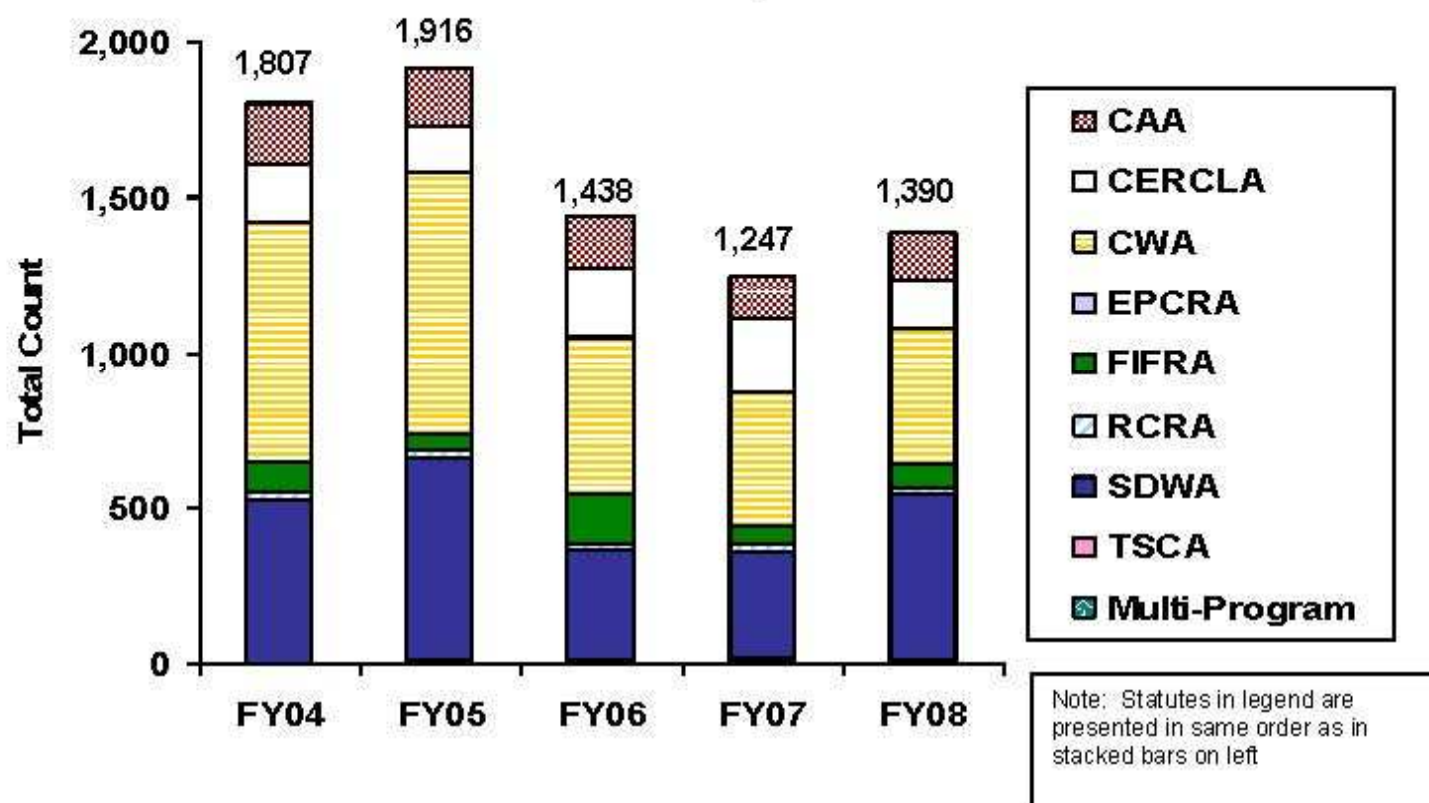
FY2008 Data Source: Integrated Compliance Information System (ICIS), October 11, 2008; data source for previous fiscal years: ICIS



## FY2008 Enforcement & Compliance Annual Results

### Concluded EPA Enforcement Actions

EPA Administrative Compliance Orders Issued  
Total and by Statute

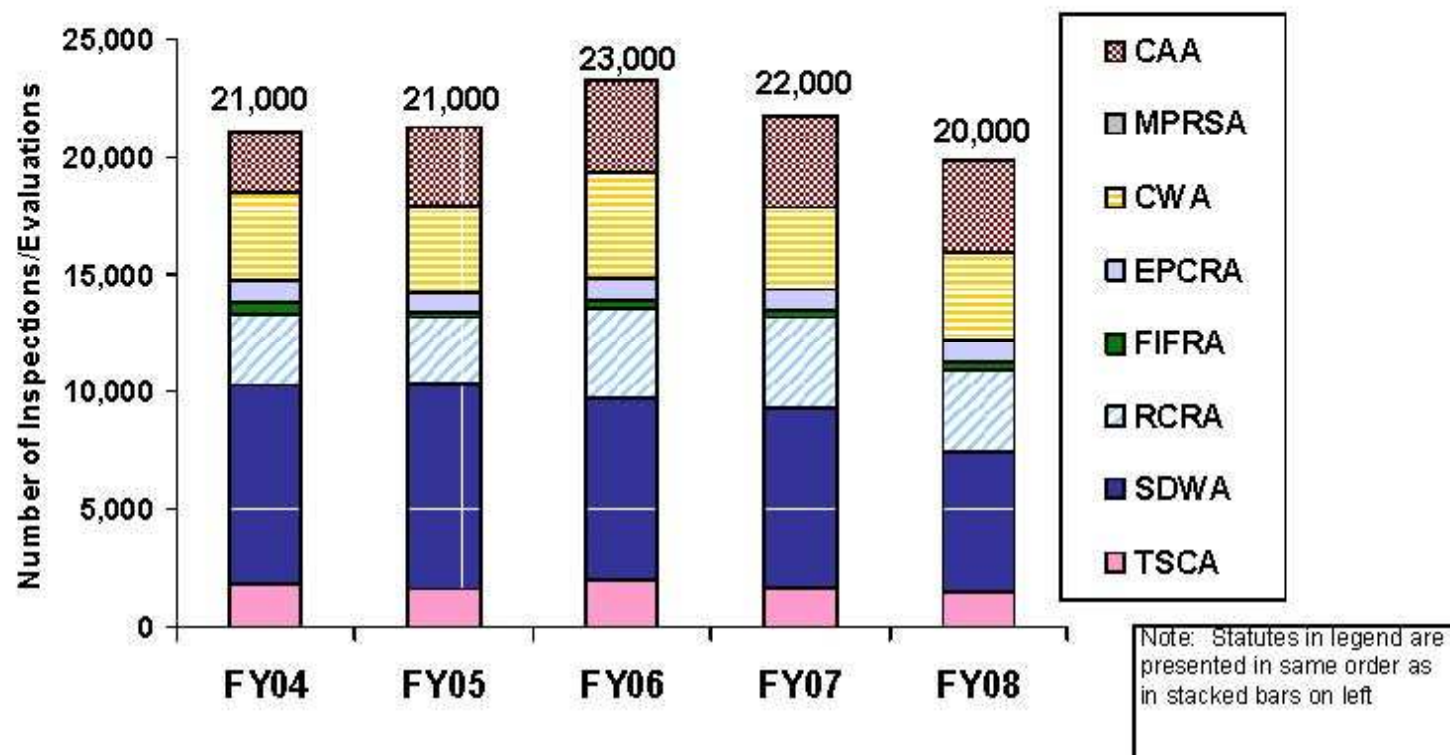


FY2008 Data Source: Integrated Compliance Information System (ICIS), October 11, 2008; data source for previous fiscal years: ICIS



## 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		2009
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
Jefferson	IN	\$100-\$150M	\$57,750	\$248,000	2009
King County	WA	Must develop & implement plan to observe & document combined sewer overflows			2009
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

# Selected Recent CSO/SSO Settlements (cont.)

<u>City</u>	<u>State</u>	<u>Improvements</u>	<u>Total Penalty</u>	<u>SEPs</u>	<u>Settlement Date</u>
Okmulgee	OK	\$18.5M	\$1M		2006
Portsmouth	NH	Construction of improved wastewater treatment plant to control combined sewer overflows	None if deadlines are met		2009
San Diego	CA	\$1B			2007
Sanitation District of Northern Kentucky	KY	\$880M	\$476,400	\$636,000	2005
Seattle	WA	Develop & implement overflow emergency response plan, system cleaning plan & storage creation plan			2009
Spencer	IA	\$32M			2009
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

# 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

# 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

# Citizen Suit Enforcement

- 60 Day Notice Letter
- No Jurisdiction If
  - “Wholly Past” Violations. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987)
  - Federal final order requiring compliance and penalty paid
  - State final order under state law “comparable” to federal CWA, and penalty paid
  - Federal action filed and diligently prosecuted
  - State action under “comparable” state law, filed and diligently prosecuted

# Citizen Suits

- Civil penalties
  - Court judgment penalties are paid to the U.S. Treasury
- Equitable relief
- Reasonable attorneys' fees

# Citizen Suits – Potential Defenses

- Jurisdiction
  - 60 day Notice Letter
  - “Wholly Past”
- Res Judicata
- Mootness

# Citizen Suits - Statistics

- 1995-2002
  - 4438 Notices of Intent filed
  - 4 statutes, primarily Clean Water Act, RCRA

Bruce Benson, "How Earthjustice and Other Green Groups Abuse the Legal System," (August 9, 2006), <http://www.perc.org/articles/article818.php>



# Evolving Case Law

- 120 Day Exception
- *Black Warrior Riverkeeper, Inc. v. Cherokee Mining, LLC*, 548 F.3d 986 (11th Cir. 2008)
  - 120 day exception – suit can proceed if notice of intent is given prior to commencement of administrative enforcement action and suit is filed within 120 days. 33 U.S.C. §1319 (g)(6)(B)(ii).
  - Suit was filed 7 days after the state initiated enforcement action, and within 120 days of notice.

# Evolving Case Law

- On Remand...
- Mootness
- *Black Warrior Riverkeeper, Inc. v. Cherokee Mining, LLC*, 637 F.Supp.2d 983 (N.D. Ala. 2009)
  - Motion to dismiss granted, claim for injunctive relief and civil penalties moot in light of administrative consent order with Alabama Department of Environmental Management
  - Plaintiffs alleged additional violations subsequent to the issuance of the consent order
  - “[i]f there is a lesson to be learned from this case, it is that a citizen who admittedly has a right to file a citizen suit seeking to remedy a perceived water violation, although knowing, as a matter of law, that ADEM has concurrent jurisdiction over the issue, is taking the risk that he will be headed off at the pass by subsequent appropriate ADEM enforcement action...”

# Evolving Case Law

- Res Judicata

- *Friends of Milwaukee's Rivers and Alliance for the Great Lakes v. Milwaukee Metropolitan Sewerage District*, 556 F.3d 603 (7th Cir. 2009)
- Affirming dismissal of case on res judicata grounds. Citizens filed suit hours before state enforcement action was filed. In earlier decision, 7th Circuit required hearing in district court on "diligence" of prosecution to support res judicata finding.

# Evolving Case Law

- Sufficiency of 60 Day Notice Letters
- *Center for Biological Diversity v. Marina Point Development*, 535 F.3d 1026 (9<sup>th</sup> Cir. 2008), amended 560 F.3d 903 (9<sup>th</sup> Cir. 2009), amended 566 F.2d 704 (9<sup>th</sup> Cir. 2009)
  - Judgment on the merits vacated, district court ordered to dismiss, where four 60-day notice letters sent to violator and Army Corps of Engineers were insufficient for lack of specificity or untimely because either violator or Army Corps had already responded to alleged violations

# Evolving Case Law

- Mootness
- *Environmental Conservation Organization v. City of Dallas*, 529 F.3d 519 (5<sup>th</sup> Cir. 2008)
  - Citizen suit filed prior to Consent Decree with EPA dismissed as moot where plaintiff could not establish a “realistic prospect” that the violations alleged in the complaint would continue despite the consent decree

# Evolving Case Law

- Diligent Prosecution/Mootness
- *Patterson v. Barden*, (W.D.N.Y. 2007)
  - Summary judgment based on mootness denied where plaintiffs “offered evidence to suggest that the DEC’s enforcement proceedings were less than diligent, perhaps ineffectual or even perfunctory

# Evolving Case Law

- Comparability
- *Sierra Club, et al. v. Powellton Coal Co., LLC, No. 2:08-cv-01363, (S.D. W.Va.) (August 18, 2009)*
  - At time complaint was filed, Powellton Coal was in negotiations with West Virginia Department of Environmental Protection to resolve alleged discharge violations
  - State administrative enforcement action resulting in penalty assessment did not bar claims by Sierra Club for some alleged violations where state administrative enforcement program is not “comparable” to CWA because W.Va. does not have the power to unilaterally assess administrative penalties.



# Evolving Case Law

- *Fowler v. EPA*, (D.D.C., filed January 5, 2009)
  - Lawsuit to force EPA to address Chesapeake Bay and comply with prior agreements
  - Stayed September 2009 in light of Executive Order requiring EPA to develop programs

# Other Evolving Potential Exposures

- Sediment Cleanups Have Been a New Focus
  - Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 40 U.S.C. §§9601, et seq.
    - Owners
    - Operators
    - Transporters
    - Persons who “arranged for disposal”
  - Liability May Be Joint and Several

# Other Evolving Potential Exposures

- In 2005, EPA designated 60 Superfund sites as "Tier 1 Sediment Sites"
- As of September 2005, remedies were selected at over 150 sediment sites
- Eleven of those sites are "mega sites" where the cost of the sediment portion of the remedy exceeds \$50 million
- Fifty additional sites may become "mega sites"
- EPA estimates that 20% of (1270) NPL sites have contaminated sediment

# Other Evolving Potential Exposures

- U.S. v. Montrose Chemical Corp. of California, 104 F.3d 1507 (9th Cir. 1997)
  - Orange County Municipalities and Sanitation District in Orange County
  - Ventura County Municipalities and Sanitation Districts in Ventura County
  - San Bernardino County Municipalities, Water & Sanitation Districts
  - Los Angeles County Sanitation District

# Other Evolving Potential Exposures

- Fox River - \$1.5 billion remedy
  - Green Bay Metropolitan Sewerage District
  - Heart of the Valley Metropolitan Sewerage District
  - Neenah-Menasha Sewerage Commission

# Other Evolving Potential Exposures

- Adobe Lumber, Inc. v. Hellman, No. Civ. 05-1510 WBS EFB (E.D. Cal.) (September 8, 2009)
  - Partial summary judgment denied in CERCLA contribution action against City which owned sewer pipe that received PCE from a dry-cleaner
  - Subsurface contamination allegedly due to leakage from sewer – “especially likely to leak due to ... its age, the large number of joints, grout (mortared) joints, and defects in the sewer system,” and City’s “management and maintenance of the sewer system was re-active, minimal[,] and inadequate.”



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