


National, Regional, and State Environmental Enforcement Trends

First Annual Environmental Conference
SRC Holdings, Inc. and EWI


September 26, 2013

Andrew C. Broughton

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WA4509903


Overview





- National Enforcement Initiatives
 - Stormwater and Water Protection
 - Multi-media - Warehouse and Consumer Products
- EPA Region 7
 - CAFOs
 - RCRA - Hazardous Waste
 - RMP
- Missouri DNR
- Focus on Transparency, Online Tools, and Electronic Reporting

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Obama Administration Enforcement Themes



- Tougher
- Get to Penalties Quicker
- Transparency/Publicity
- Penalties are higher
- Criminal Charges
- Environmental Justice

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EPA National Enforcement Initiatives, FY 2014 - 16



- Keeping raw sewage and contaminated stormwater out of our waters
- Cutting animal waste to protect surface and ground waters
- Reducing widespread air pollution from the largest sources, especially the coal-fired utility, cement, glass, and acid sectors



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EPA National Enforcement Initiatives, FY 2014 – 16, cont'd



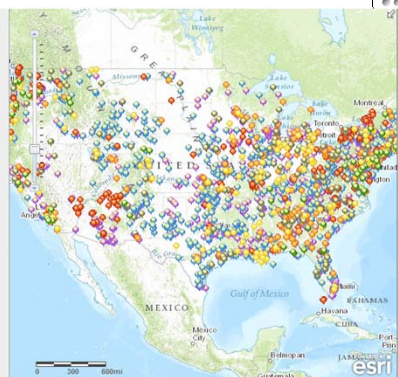
- Cutting toxic air pollution that affects communities' health
- Assuring energy extraction sector compliance with environmental laws
- Reducing pollution from mineral processing operations



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- Annual_Report
- Federal Facility
- Criminal
- Cleanup
- Air
- Waste
- Water
- Chemical



www.epa.gov Civil enforcement actions at facilities and criminal enforcement actions concluded in FY 2012.

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Wet Weather Event Civil Enforcement Trends

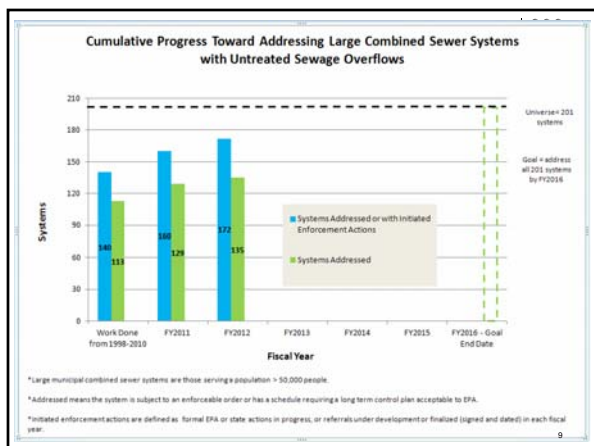


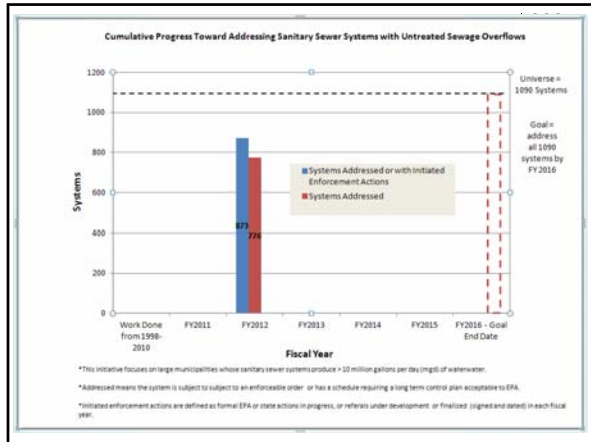
- Municipal wastewater and stormwater discharges from combined sewer systems and sanitary sewer systems have been and remain one of EPA's enforcement priorities.
- EPA and the states also are looking at NPDES dischargers who also operate public water systems and often do not like what they find.

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CSO Enforcement

- According to EPA, approximately 772 communities have combined sewer systems, but only 201 have wet weather overflows, primarily east of the Mississippi and the Pacific NW.
- EPA lists nine municipal CSO consent decrees since 7/19/11 on its wet weather enforcement website (<http://www.epa.gov/compliance/data/planning/initiatives/2011sewagestormwater.html>), not including St. Louis (4/12) and Scranton PA (12/12).

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CSO Enforcement -- Sample

- St. Louis MSD Consent Decree entered 4/27/2012.
 - 4th largest sewer system in the US (525 sq. miles & 9,600 pipe miles) with components dating to the 1860's.
 - Requires \$4.7B in infrastructure improvements over 23 years. Initial 4 years' costs funded by \$945M bond issue approved June, 2012. Residential sewer bills will increase 52% by 2015 instead of 123% immediately (to \$65/month) without bonds. MSD also pays \$1.2M in penalties.
 - Resolves CWA litigation filed in 2007 by EPA, the State of Missouri and the Missouri Coalition for the Environment alleging 500M gallons of raw sewage discharged yearly into rivers and streams from 2000 to 2006. State declined to sign, but did not oppose entry of, settlement.

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NPDES/SDWA Enforcement



- Mobile home parks, campgrounds, and recreational or resort developments seem to draw frequent enforcement attention.
- EPA's GSP Management settlement (10/12) covers 73 mobile home parks in PA, DE and VA with audits, EMS and monitoring valued at \$7-10M, plus \$1.3M in penalties.
- Missouri's AG website lists 20+ CWA recent settlements, and almost half meet these criteria. <http://ago.mo.gov/Agriculture-Environment.htm>

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Criminal Prosecution



- The line between civil enforcement and criminal prosecution is blurry and getting blurrier.
 - CWA Section 309 (c)(1) (33 U.S.C. §1319 (c)(1)) makes it a misdemeanor to "negligently violate" a laundry list of statutory sections but does not use "gross" or "willful" to color that negligence as is true elsewhere in the Act. Thus a plain language statutory construction argument controls -- Congress uses or leaves out words intentionally.
 - See *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), cert denied *Hanousek v. United States*, 585 U.S. 860 (2000); *United States v. Ortiz*, 427 F.3d 1278, 1283 (10th Cir. 2005); *United States v. Pruett*, 681 F.3d 232 (5th Cir. 2012) (per curiam).

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Criminal Prosecution



- In *United States v. Maury*, No. 09-2305, 2012 WL 4343775 (3d Cir. Sept. 17, 2012), the court held that *simple negligence* would support a misdemeanor conviction under the CWA at a New Jersey pipe foundry. This plus other felony convictions sends 4 managers to jail, costs the company \$8M in fines and puts it on 4 years' probation.
- Why criminal and not civil enforcement? Multiple, multi-media violations (CWA, CAA, OSHA); fatal and non-fatal worker injuries; late-night and weekend illegal discharges; and repeatedly falsifying records and lying to inspectors.
- DON'T MISLEAD THE REGULATORS!

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Criminal Prosecution



- Other recent criminal CWA cases:
 - *Deepwater Horizon* Gulf Oil Spill – guilty plea, \$4B in fines and penalties but not just for CWA violations.
 - Freedman Farms and William B. Freedman -- NC hog CAFO discharged into wetlands, \$1.5M fines and restitution, 60 months' probation, 12 months in prison.
 - Patrick Dooley -- Seattle businessman (Bargains, Inc.) told teenager to dump bleach and acid products into toilet creating chlorine gas, will spend 33 months in prison.
 - 2007 *MV Cosco Busan* collision with the San Francisco/Oakland Bay Bridge – guilty pleas by pilot and operator produce 10 month prison sentence, \$10M in fines and restitution, plus later civil settlement for \$44.4M.

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Stormwater Regulation



- Three categories of regulated stormwater discharges
 - Municipal
 - Industrial
 - Construction
- CWA Permit Required
 - Discharge
 - Point Source
 - Pollutant
 - Navigable Waters



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Stormwater Enforcement – Home Construction



- Some recent civil stormwater construction cases
 - Toll Brothers (6/12) – 23 states, 40 sites, \$741k penalty.
 - Ryland Group (10/11) – 14 states, 22 sites, \$625k penalty.
 - Each settlement includes the same types of company-wide sediment and stormwater control requirements.
 - The Links of Columbia (8/11) – construction company and limited partner associate pay \$430k penalty post-construction for stormwater violations at 9 hole golf course and 64 unit apartment development.

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Stormwater Enforcement – Road Construction



- Kansas DOT – July 2013 – 3 Construction Sites - \$477,500 Penalty
 - Compliance Requirements including:
 - Statewide Stormwater Compliance Manager;
 - Identifying an Area Engineer for every project;
 - Selecting an Environmental Inspector for every site; and
 - Performing third-party oversight inspections at environmentally sensitive areas in Kansas, which require a consultant or KDOT inspector not affiliated with the project to conduct additional inspections.
- Private Contractor for Oregon DOT - \$735,000 Penalty

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Stormwater “Flow” – A Pollutant?



- *Virginia DOT et al. v. EPA*, E.D.Va.(1.3.13)
- Facts: EPA established TMDL designed to control flow as a proxy for controlling sediment
- Court: EPA cannot regulate stormwater “flow” as a surrogate for sediment control
 - Although sediment is a pollutant, flow is not
 - “EPA’s authority does not extend to establishing TMDLs for nonpollutants as surrogates for pollutants.”

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“Navigable Waters” and “Waters of the United States”



- Draft guidance in April 2011
- EPA and ACOE finalized guidance in Feb. 2012, pending interagency review at OMB
- Final expected in 2013 – may cover intermittent and ephemeral streams and wetlands not currently covered



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Stormwater – Numeric Effluent Limitations at Construction Sites?



- *Wisc. Builders Assn. v. EPA*, 7th Cir.
- Facts: In 2009, EPA issued first-time numeric “turbidity” limits in Construction General Permit to control sediment
- Settlement – 12.21.2012
 - EPA to withdraw numeric turbidity limit
- EPA to issue revised proposed rule by 4.15.13 and final rule by 2.28.14

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Additional Stormwater Resources



- “Stormwater Runs Through It” – Stormwater as the New Epicenter of Clean Water Act Regulatory Disputes
 - http://www.spencerfane.com/environmental_law_solutions/blog.aspx?entry=240
- EPA Cannot Regulate Stormwater Flow Rate as a “Surrogate” for Sediment Runoff, According to Federal Court
 - http://www.spencerfane.com/environmental_law_solutions/blog.aspx?entry=257
- Road Construction Contractor to Pay \$735,000 Fine for Stormwater Discharges
 - http://www.spencerfane.com/environmental_law_solutions/blog.aspx?entry=267

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Why the Focus on Warehousing and Distribution?




- Nature of Activities
- Non-traditional manufacturing setting
- Use of contractors and sub-contractors and responsibility for regulatory issues
- Proactive enforcement



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Warehouse Dynamics



- Storage of large volume of chemicals and products
- Difficulties in keeping on top of products and chemicals that are changing constantly
- Obsolete and slow-moving products

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Warehouse Dynamics



- Historically lower risk operations than industrial sites or manufacturing
- Less staff than traditional manufacturing
- Knowledge base
- Operated by third-party vendors
- Segregated locations from company EHS professional

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Warehouse Dynamics



- Ripe for confusion – different and complex regulatory regimes, lists, thresholds
- EPA
 - RCRA – “hazardous wastes”
 - CERCLA – “hazardous substances”
 - EPCRA – “extremely hazardous substances” “toxic chemicals” and “hazardous chemicals”
- DOT – “hazardous materials” / “dangerous goods”
- OSHA – “hazardous chemicals”

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Contractors and Third-Party Vendors



- Responsibility
- Contract provisions
- Staffing considerations
- Subcontractors and use of temporary staff
- Oversight

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Is it Product or is it Waste?



- Returned products
- Damaged products
- Obsolete products
- Off-spec products
- Past shelf-life / efficacy
- Spills / releases (forklift damage, overturned pallets)

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RCRA Ignitable Wastes (D001)



- Characteristic – Flash point
- Aerosol cans
- Household goods and consumer products
- Bathroom and kitchen cleaners
- Furniture polish
- Carpet cleaners



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RCRA Corrosive Wastes (D002)



- Characteristic – Corrosive
- Bleach
- Chlorine cleaners and disinfectants
- Oven cleaners
- Degreasing agents



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RCRA Listed Wastes



- Discarded commercial chemical products, off-spec, container residues, and spill residues
- P-Listed: pharmaceutical residues in pill bottles, vials, blister packs, and wrappers
- U-Listed: pharmaceutical waste
- F-Listed: Spent solvents and solvent contaminated rags

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Warehouse Management and Handling of Hazardous Wastes



- Generator Status
 - Infrequent / Periodic Generation
- Container Storage Areas
- Containers
- Labeling
- Manifesting, Transportation, and Disposal

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And Don't Forget...



- Used Fluorescent Lamps
- Forklift batteries (and other batteries)
- Used oil
- Used hydraulic fluids
- Rags and towels with solvent (cleaning / housekeeping)
- Cleaning agents and degreasing solvents



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Pharmaceutical Waste as Hazardous Waste



- EPA I.G. Report 2012 “widespread noncompliance in the healthcare industry”
- P-Listed: coumadin® (warfarin), nicotine patches
- U-Listed: lindane (lice/scabies treatment)
- Characteristic: (D009 toxic) mercury in vaccines



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Chemical Storage and Management



- Emergency Planning Notification
- Release Reporting Notification
- Hazardous Chemical Storage
- Toxic Release Inventory (TRI)

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Warehouse and Chemical Management Clean Air Act Issues



- Refrigerant leak detection and repair for ozone depleting substances
 - Sept. 2013 - Safeway, Inc. - \$4.7 Million
- Anhydrous ammonia (refrigerant)
- Asbestos – Demolition and renovation activities



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OSHA - Health and Safety



- Fall protection
- Occupational exposures
- Adequate personal protective equipment
- Material handling and storage
- Lockout/Tagout



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OSHA - Health and Safety



- OSHA's Multi-Employer Citation Policy
- OSHA Warehouse Enforcement

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OSHA Inspections 2011


(FY – 10/1/2010 to 9/30/2011)

Top 10 Most Frequently Cited	Top 10 Highest Penalties
1. Scaffolding (construction)	1. Fall protection (construction)
2. Fall protection (construction)	2. Scaffolding (construction)
3. HazCom Standard	3. Lockout/Tagout
4. Respiratory Protection	4. Machine Guarding
5. Lockout/Tagout	5. Ladders (construction)
6. Electrical, wiring methods	6. Excavations, requirements
7. Powered industrial trucks	7. Powered industrial trucks
8. Ladders (construction)	8. General Duty Clause
9. Electrical systems design	9. Electrical wiring methods
10. Machine Guarding	10. Electrical systems design

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DOT HazMat and FAA Transportation

- HazMat
 - “Dangerous Goods”
 - Consumer Commodity ORM-D
 - Lithium Batteries
- FAA Enforcement
 - K-Mart (2010)
 - Nail polish and aerosol sun block
 - \$140,000 penalty sought by FAA



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National Retail and Consumer Product Enforcement

- Wal-Mart – 2013
 - \$82 Million criminal and civil penalties
 - Separate enforcement by California (2010) and Missouri (2012)
- Target (2011)
- CVS (2012)
- Costco (2012)

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EPA Region 7 Enforcement – Warehouses



- Cargo Largo (Independence, MO)
- UPS (Lenexa, KS)
- ChemCentral (KC, Missouri)



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Criminal Enforcement EPA Region 7



- Greenleaf LLC (Missouri)
 - Redistribution of pesticides and herbicides: FIFRA
- HPI (Missouri)
 - Chemical and pesticide manufacturer: RCRA, CWA, FIFRA
 - Individual criminal plea and Corporate criminal plea



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Warehouse Management and Handling of Hazardous Wastes



- Considerations and Best Practices
 - Contracting
 - Operating Procedures and Protocols
 - Training
 - Auditing and Compliance Evaluations

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RCRA Hazardous Waste: Top 10 Violations



10. Failure to update notifications of haz waste activity
9. Failure to report haz waste activity and pay fees
8. Universal waste: Batteries, lamps, etc.
7. Used oil
6. Satellite accumulation
5. Inadequate LQG contingency plans
4. Marking and labeling
3. Open containers
2. Training, records of training
- 1.



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RCRA Hazardous Waste: Top 10 Violations



No. 1: Failure to determine whether a material is a hazardous waste

Bonus: Improper disposal of waste materials



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EPA Region 7 Enforcement



- Concentrated Animal Feeding Operations (CAFOs)
- Risk Management Plans (RMPs)
- Pesticides and FIFRA
- RCRA – Schools and Laboratories

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CAFOs in EPA Region 7

Region 7 CAFO Distribution

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CAFOs – Dust in the Wind?

- *Lois Alt v. EPA*, D.WV. 2012
- Facts: EPA compliance order requiring poultry farmer to obtain NPDES permit to control air releases of feathers and dust into water
- Poultry operator cites agricultural stormwater exemption
- EPA announced it is withdrawing suit
- Environmental groups seeking to intervene in settlement negotiations

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CAFOs – Chicken What?

- *Assateague Coastkeeper, et al. v. Hudson Farm et al.*, D.Md. 12.20.2012
- Perdue Farms not liable for chicken manure from a contractor's farm polluting local waterway in violation of its NPDES permit
- "Integrator" liability – based on control or management of pollution and disposal related activities
- Evidentiary hurdle – Farmer also had 90 head of cattle, not part of Perdue operation

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AFOs?



- *Fowler v. EPA*, Case No. 09-cv-5 D.D.C.
- More facilities will be captured by the regulations
 - Smaller sized animal feeding operations to be targeted?
 - Response to *National Pork Producers v. EPA*, 635 F.3d 738 (5th Cir. 2011) – EPA cannot regulate CAFOs that only have potential to discharge – ACTUAL discharge of pollutants required
- More stringent permitting requirements for manure land application

UFOs?



- EPA Region 7 CAFO Inspections – Aerial Surveillance
- Congressional allegations of “military-style” use of “drones”



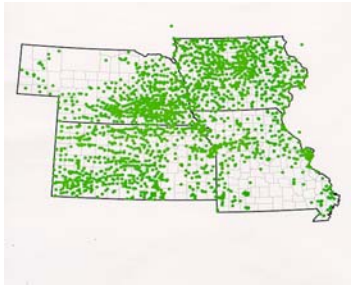
Worth a Thousand Words?



EPA's photo evidence of lagoon release to creek

EPA Region 7 RMP Facilities


- 2,487 RMPs
- Approx 20% of the U.S. total
- 88% RMP filers in Region 7 associated with three chemicals



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EPA Enforcement Trends 112(r)


- More onsite inspections
- Higher penalties
- Compliance orders (inspections and mechanical integrity – good engineering practices)
- General Duty Clause 112(r)(1) enforcement



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EPA Enforcement Trends 112(r) – What’s Causing the Shift

- Enforcement in past - did the company file?
 - Now, shift away from June 21, 1999 filing deadline to on-site inspection
- EPA/OIG Report Recommendations
 - Implement additional management controls to identify facilities that have not yet filed RMPs;
 - Target higher-priority facilities for inspections.
- More news attention to chemical accidents and industrial releases and explosions – West Fertilizer, Deepwater Horizon



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RMP Enforcement



- Tyson Foods – EPA Region 7
 - April 2013
 - \$4.2 Million Settlement – Anhydrous Ammonia used as a refrigerant
- Criminal
 - MFA, Inc. (E.D. Mo.)
 - Employee injured while loading anhydrous ammonia from bulk tank to nurse tank;
 - Negligent failure to inspect, detect wear, replace valve
 - Guilty plea to negligent release provisions of CAA, resulting in \$100,000 fine and \$600,000 in required safety upgrades

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Missouri CWA Enforcement



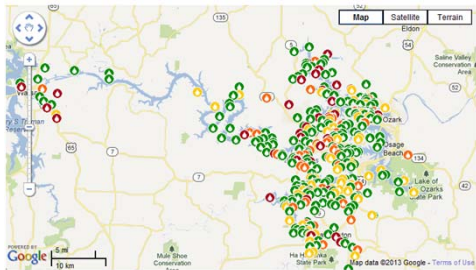
- Because sanitary sewer and WWTP systems are generally regulated by the states, enforcement is also often state-driven and can vary widely depending on resources, politics and publicity.
- For example, in 2009 the Kansas City Star began reporting on the delayed release of information showing high E. coli levels at the Lake of the Ozarks in mid-Missouri. Gov. Jay Nixon fired the No. 2 official at the Department of Natural Resources, suspended the MDNR Director without pay for 2 weeks, and ordered a "Fall Sweep" inspection of all WWTPs that could impact "The Lake," with a zero-tolerance approach to violations.
- Missouri also directed inspection and enforcement resources to audit community and non-community drinking water system operators at The Lake.

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Lake of the Ozarks 2009 Fall Inspection Sweep 419 Inspections, 155 Noncompliant Facilities



- Inspection was in compliance
- A Letter of Warning was issued
- A Notice of Violation was issued
- Facility was referred to the Water Protection Program for enforcement



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Focus on Transparency



- On February 7, EPA released a new *State Enforcement Performance Information and Comparative Map* tool as part of ECHO called the "State Dashboard."

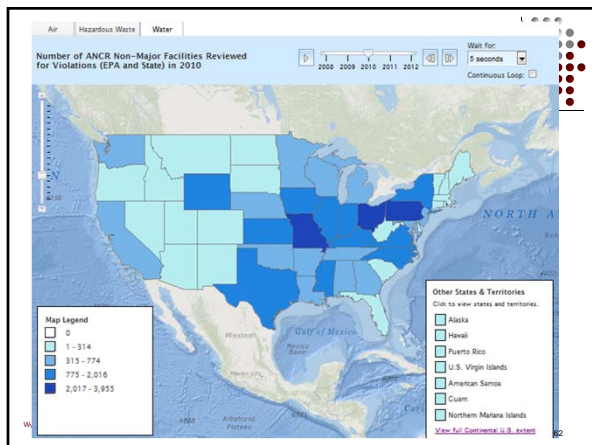
http://www.epa-echo.gov/echo/stateperformance/comparative_maps.htm

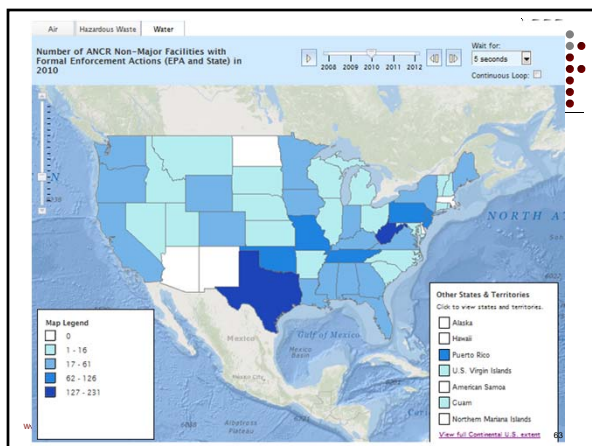
- This interactive map can be set to show air, water or hazardous waste compliance and enforcement at federal and/or state-specific levels.

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Electronic Reporting and Tools

- Electronic DMRs in Missouri – NEW!
- Electronic TRI Reporting – NEW!
- EPA Enforcement “Watch List”

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Additional Enforcement Resources

- EPA’s Transparency Initiatives Aimed to Expose Violators – The Best of Disinfectants or a Scarlet Letter?
 - http://www.spencerfane.com/environmental_law_solutions/blog.aspx?entry=280
- Electronic DMRs for Missouri NPDES Permits
 - http://www.spencerfane.com/environmental_law_solutions/blog.aspx?entry=360
- Has EPA Stopped Using Its Voluntary Self-Disclosure Policy?
 - http://www.spencerfane.com/environmental_law_solutions/blog.aspx?entry=260

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