Workshop A

(Do Not) Go Directly to Jail … Strategies for Avoiding State and Federal Environmental Enforcement

Tuesday, March 21, 2017
9:45 a.m. to 11 a.m.
Biographical Information

Jennifer J. Cave, Member, Stites & Harbison PLLC
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Jennifer J. Cave works closely with businesses to ensure compliance with environmental laws and regulations. She regularly assists clients with air, water, and waste permitting and compliance issues. She also has extensive experience defending clients in enforcement actions and citizen suit litigation. Jennifer counsels domestic and international manufacturers on the importation and sale of mobile sources, including non-road engines and equipment under the Clean Air Act. Jennifer guides clients through transactions involving the purchase and sale of Brownfields and frequently works with clients on facility or programmatic audits.

Additionally, Jennifer provides compliance advice on new regulatory proposals and drafts public comments on these rules on behalf of electric utilities, manufacturers, and industry trade groups. In addition, she has extensive experience evaluating and litigating coverage for complex and long-tail environmental contamination claims under general liability and pollution liability policies. She is a frequent speaker on a variety of environmental law topics, including permitting, reporting, enforcement, auditing, and regulation development.

During law school, Jennifer interned with the Office of Regional Counsel for the United States Environmental Protection Agency in Seattle. Prior to attending law school, she was an environmental consultant specializing in environmental contamination assessment and remediation and hazardous waste compliance across the United States.

Sherry L. Hesselbein, Senior Attorney
Marathon Petroleum Company LP, 539 S. Main St., Findlay, OH 45840
419-421-4616shesselbein@marathonpetroleum.com

Sherry is a Senior Attorney in the Environmental, Safety and Security group in the Marathon Petroleum Company (MPC) Legal Department. She focuses her practice on fuels and product quality compliance and supporting MPC’s advocacy activities. Sherry joined MPC in 2010 as the environmental attorney focusing on remediation, waste, RCRA and CERCLA matters. She has also provided legal support to MPC’s refineries in Clean Air Act compliance. Before joining MPC, Sherry was an environmental attorney with Ulmer & Berne, a regional law firm with offices in Ohio and Illinois. Prior to that, Sherry was with the Ohio Attorney General’s Office Environmental Enforcement Section representing the Ohio Environmental Protection Agency.

Sherry graduated from the Massachusetts Institute of Technology in 1998 with a Bachelors of Science degree in Earth, Atmospheric and Planetary Science. She then graduated with honors from the Ohio State University Moritz College of Law in 2001. She is a member of the Association of Corporate Counsel and the Ohio State Bar Association. She is also a past Secretary and member of Women for Economic and Leadership Development (WELD).
Jeff Cummins has worked in the environmental field for over 35 years. He began his career with the Louisville Water Company as a water quality technician and inspector. He later worked for the Kentucky Utilities Company as an air quality engineering technician and Neundorfer, Incorporated of Willoughby, Ohio, where he specialized in the engineering evaluation and upgrade of electrostatic precipitators throughout the United States and Canada.

Jeff joined the KDEP in 1991, and has served as an environmental technologist and regional office supervisor for the Division of Water and as the Solid Waste Section Supervisor for the Division of Waste Management’s Enforcement Branch. Jeff also served on the Environmental Response Team from 1991 to 2007.

Jeff transitioned into the Division of Enforcement when the division was established in 2004. He was named Manager of the Civil Enforcement Branch in February, 2007 and Acting Director of the Division in July, 2007, a position he held until he was named Director in June, 2012. As Director of the Division of Enforcement, Jeff manages a staff of 24 and oversees the resolution of environmental enforcement cases in air quality, waste management and water program areas across Kentucky.

Valerie Tachtiris has been an environmental attorney for the State of Indiana for over a decade. She currently serves as Deputy General Counsel for the Indiana Department of Environmental Management, as well as program counsel for the agency’s Office of Air Quality. Prior to her employment with IDEM, she served for eight years as a Deputy Attorney General in the Environmental Litigation section of the Indiana Attorney General’s Office. Valerie graduated from the Indiana University Maurer School of Law in 2003.
Since Valoria has been licensed in 1992, she clerked for the Ohio Ninth District Court of Appeals and the Ohio Supreme Court and was as a law firm partner at two mid-size firms and as the owner of her own law practice. She also acted as special counsel for the Ohio Attorney General as of 2003 and practiced and advised in various corporate and business actions. Presently, as Chief, Valoria supervises and manages the daily operations of the Ohio Attorney General DeWine's Environmental Enforcement Section and enforces compliance with state and federal environmental laws and regulations.

Professional Leadership Positions:
- Ohio Women's Bar Association, Former President
- Ohio Women's Bar Foundation, Founder of the Ohio Women's Bar Foundation Leadership Institute and Former President
- Columbus State Community College, Board Trustee appointed by Ohio Governor John Kasich

Education:
- B.A., Miami University, Magna Cum Laude
- J.D., University of Dayton School of Law, Magna Cum Laude
(DO NOT) Go Directly to Jail… Strategies for Avoiding Federal Enforcement

26th Annual Sustainability and Environmental, Health & Safety Symposium
Cincinnati, Ohio, March 21, 2017
Federal Enforcement Update

Normally, I talk about NEIs and EPA enforcement data trends, but….
Federal Enforcement Update

So instead…Let’s talk about Environmental Interest Groups & Citizens Suits

– **Earthjustice**
  - 160% increase in fundraising from election day through January
  - 300% increase in online donations
  - Adding lawyers to fight environmental agenda “tooth and nail”

– **Sierra Club**
  - 700% increase in fundraising
  - 30,000 new monthly donors

– **League of Conservation Voters**
  - 100% increase in fundraising
Federal Enforcement Update
So instead…Let’s talk about Environmental Interest Groups & Citizens Suits

Citizen Suit -- Lawsuit by Private Citizen to Enforce a Statute

1. Private citizen sues citizen/corporation/government for engaging in conduct prohibited by a statute
   • *E.g.*, citizen sues a corporation under the Clean Water Act for illegally polluting a waterway

2. Private citizen sues government for failing to perform a non-discretionary duty
   • *E.g.*, citizen sues EPA for failing to promulgate regulations required by the Clean Water Act

3. Private citizen sues for an injunction to abate a potential imminent and substantial endangerment involving generation, disposal or handling of waste, regardless of whether or not the defendant's conduct violates a statutory prohibition
   • *Analogous to the common law tort of public nuisance*
Federal Enforcement Update

So instead…Let’s talk about Environmental Interest Groups & Citizens Suits

**Environmental laws that allow citizen suits include:**
- Clean Water Act
- Safe Drinking Water Act (SDWA)
- Clean Air Act
- Resource Conservation and Recovery Act (RCRA)
- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
- Surface Mining Control and Reclamation Act (SMCRA)
- Endangered Species Act (ESA)
- Emergency Planning and Community Right To Know Act (EPCRA)

Successful citizen suit plaintiffs can recover reasonable attorney fees/litigation costs!!!!!!
Federal Enforcement Update

Ok—Let’s talk about Trump

• Inauguration Day
  – Trump Orders Freeze on all EPA Grants and Contracts Within Hours of Being Sworn In
Federal Enforcement Update

Ok—Let’s talk about Trump

• **Stream Protection Rule Killed**
  
  – In early February, the House and Senate voted to repeal Obama’s Stream Protection Rule using Congressional Review Act
  
  – Trump signed the bill, which means the Stream Protection Rule is now dead
Federal Enforcement Update

Ok—Let’s talk about Trump

• On the Chopping Block???
  – Clean Power Plan?
  – U.S. Participation in Paris Agreement on Climate Change?
  – Endangered Species Act?
Federal Enforcement Update

Ok—Let’s talk about Trump

Regulatory Reform & Executive Orders

• Dakota Access & Keystone XL Oil Pipeline PMs – 1/24
• PM on Streamlining Permitting & Reducing Regulatory Burdens for Domestic Manufacturing – 1/24
• EO on Reducing Regulation & Controlling Regulatory Costs – 1/30
  – Mandates the “elimination” of two regulations for every new one proposed and a requirement that new rules entail zero costs
• EO on Enforcing the Regulatory Reform Agenda – 2/24
  – Force agencies to create a task force and a designated officer to handle regulatory issues
  – Give agencies the authority to define deregulation objectives and to execute goals
• WOTUS EO – 2/28
  – Directs EPA and Corps to review WOTUS rule, interpret any necessary revisions in light of Justice Scalia’s opinion in *Raponos*, and notify the AG (who will notify the courts) about the pending review of the WOTUS Rule.
Federal Enforcement

Ok—Let’s Talk About Pruitt’s EPA

• Future of OECA?
  – Nominee to lead Office of Enforcement and Compliance Assurance????
  – Reorganization OECA?
  – Dismantling of OECA?
    • Disperse enforcement to respective EPA programs, i.e., air, water, etc.
    • As OK AG, Pruitt dismantled AG’s own environmental enforcement unit

• Push for Greater State Autonomy?
  – Defer to states in management of environmental issues

• EPA Budget
  – Trump expected to cut 24%, but needs congressional approval
  – Will return budget to George H.W. Bush-era levels
  – Will reduce EPA workforce by 1/5th
Federal Enforcement

Ok—Let’s Talk About Pruitt’s EPA

• **Civil Enforcement**
  – National Enforcement Initiatives
    • Announced in 2016 for FY17-19
    • New administration can change/eliminate
    • EPA efforts on illegal conduct in energy extraction sector and water pollution from CAFOs could be curtailed

• **Criminal Enforcement**
  – Most prosecutions arise out of U.S. Attorney’s Office
    • New Appointees
  – New appointee to head DOJ’s Environment and Natural Resources Division (ENRD)?
  – Environmental crime must compete with health care fraud, gun crimes, tax fraud, etc.
Agenda

- Criminal Environmental Enforcement
  - Enforcement triggers
  - Basis for criminal violations
  - Criminal enforcement cases

- Compliance Best Practices
  - HES&S Management System
  - Responsible officer certifications
  - Employee tips
Marathon Petroleum Corporation – Who We Are
Fully integrated downstream system

Refining and Marketing
- Seven-plant refining system with ~1.8 MMBPCD capacity
- One biodiesel facility and interest in three ethanol facilities
- One of the largest wholesale suppliers in our market area
- One of the largest producers of asphalt in the U.S.
- ~5,400 Marathon brand retail outlets across 19 states
- Owns/operates 61 light product terminals and 18 asphalt terminals, while utilizing third-party terminals at 120 light product and two asphalt locations
- 2,210 owned/leased railcars, 173 owned transport trucks

Speedway
- ~2,770 locations in 22 states
- Second largest U.S. owned/operated c-store chain

Midstream
- Owns, leases or has interest in ~8,400 miles of crude and refined product pipelines
- 18 owned inland waterway towboats with ~205 owned barges and 14 leased barges
- Owns/operates over 5,500 miles of gas gathering and NGL pipelines
- Owns/operates 54 gas processing plants, 13 NGL fractionation facilities and two condensate stabilization facilities

As of Sept. 30, 2016
The vision and mission for Health, Environment, Safety and Security (HES&S) at Marathon Petroleum Corporation (MPC) is built around the Responsible Care® philosophy of no accidents, no injuries, no harm to the environment, and a commitment to excellence and continual improvement in the areas of health, environment, safety and security. Simply, it means we believe our employees, contractors and others involved with our operations should work in a safe and healthy setting, free of injury. It means we conduct our operations in ways to protect the environment and strive to be a good corporate citizen wherever we operate.
Environmental Enforcement

Enforcement triggers

Routine agency inspections
Enforcement initiatives
Audits & self-reporting
Periodic reports & compliance tests
Response to accidents, spills, leaks, emissions events, or other incidents

Complaints and tips:
- Former/current employees
- Neighbors
- Non-governmental organizations

Deadlines
Permitting actions
Environmental Crimes
Drawing the line between civil and criminal offenses

Significant harm to environment or public health

Brazen and intentional conduct/operating outside the regulatory system

Repetitive violations

Fraud, deceit, lies, cover-ups
Clean Water Act

Any person who—

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation ..., or any requirement imposed in a pretreatment program ..., or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage ... shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both.

33 U.S.C. §1319(c)(1)

Clean Air Act

Any person who knowingly violates any requirement or prohibition of an applicable implementation plan ..., any order under subsection (a) of this section, requirement or prohibition of section 7411(e) of this title (relating to new source performance standards), section 7412 of this title..., including a requirement of any rule, order, waiver, or permit promulgated or approved under such sections or subchapters, ... shall, upon conviction, be punished by a fine pursuant to Title 18 or by imprisonment for not to exceed 5 years, or both.

42 U.S.C. §7413(c)(1)
Environmental Crimes
Title 18 – general criminal provisions

Conspiracy

Fraud

False Statements

Concealment

Obstruction of justice

Perjury
Environmental Crimes
Parties subject to criminal liability

Individuals

Corporations

Individuals Acting within Scope of Employment

Responsible Corporate Officer
Criminal Enforcement Case Example
CWA / Negligent Discharge

● Facts
  – Two leaks occurred from oil transit lines as a result of company’s “failure to heed many red flags and warning signs of imminent internal corrosion that a reasonable operator should have recognized.”
  – 201,000 gallons of crude oil released into Alaskan tundra and into Q-Pad Lake.

● Outcome
  – Company pled guilty to negligently discharging oil into the waters of the United States in violation of the CWA.
  – Three years probation, $12 million in criminal fines, $4 million to National Fish and Wildlife Foundation, and $4 million in criminal restitution to Alaska

Criminal Enforcement Case Example
CWA / Certification of Data

● Facts
  – Oil reclamation company operated a centralized waste treatment facility.
  – Company discharged excess wastewater during a rain event directly to the city sewer system, bypassing treatment and causing oily water to flow out of manholes.
  – Ensuing investigation revealed that company was not adequately treating waste it received because critical equipment was not maintained and necessary storage was not available.
  – Vice President of Operations knew that company was hiding noncompliance by, among other things, reporting only the sample results that met pretreatment limits.

● Outcome
  – Vice President pled guilty to two counts of CWA violations and one violation of federal false statements statute.
  – Three years probation, $1500 fine, community services, and prohibited from applying for a job in environmental field without disclosing the conviction.

“Leaders become great, not because of their power, but because of their ability to empower others.”
   - John Maxwell

“If you think compliance is expensive – try non-compliance.”
   - Former U.S. Deputy Attorney General Paul McNutty
Management System continually improves HES&S performance through sustainable processes.

Follow the Plan-Do-Check-Adjust process.
- Plan: identify and prioritize risks
- Do: establish sustainable processes to control risks
- Check: measure and assess performance
- Adjust: revise plans to drive continual improvement

HES&S standards complement this process by further defining requirements and expectations for each element of the HES&S Management System.

Standard Examples:
- Spill and accidental release reporting
- Waste management vendor approval program
- Personal protective equipment
- OSHA hazard communication
**Certification (40 C.F.R. 122.22(d))**

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

**Responsible Corporate Officer is obligated to inquire regarding the accuracy and completeness of the information submitted.**
Clean Air Act

Certification by Responsible Official under Title V

- Certification (40 C.F.R. 70.5(d) & 40 C.F.R. 71.5(d))
  Any application form, report, or compliance certification submitted pursuant to these regulations shall contain certification by a responsible official of truth, accuracy, and completeness. This certification and any other certification required under this part shall state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.

- Reasonable inquiry (56 Fed Reg 21712 (May 10, 1991))
  The provision makes clear that the signer must make a reasonable (under the circumstances) inquiry before attesting to the truth, accuracy, and completeness of the information and statements.

Responsible Official is obligated to make a reasonable inquiry regarding the truth and accuracy of the information submitted.
Environmental Enforcement
Top ten “best practices” for environmental professionals

1. Be truthful
2. No cover-ups
3. Seek help & ask questions
4. Verify certified information
5. Think critically
6. Investigate thoroughly
7. Be courteous to agency personnel
8. Visit the field
9. Remember the *New York Times* test
10. Be truthful
(Do Not) Go Directly to Jail…Strategies for Avoiding State and Federal Environmental Enforcement

Presentation to:
26th Annual Sustainability & EHS Symposium
March 21, 2017

Jeffrey Cummins, Director
Division of Enforcement
Kentucky’s Enforcement Authority

• Established under KRS Chapter 151 and KRS Chapter 224
• KRS 224 establishes civil and criminal enforcement authority
• Maximum civil penalties can range from $1,000 to $25,000 per day
The Enforcement Process

- Identification of Noncompliance
- Issuance of Notice(s) of Violation
- Referral
- Development of resolution strategy
- Negotiation of settlement with violator
- Agreement in principle or referral to EPLD
- Execution of Demand Letter, Agreed Order, or Secretary’s Order
- Monitoring
Notice of Violation

• Cites specific statutes or regulations
• Lists specific remedial actions with timeframes
• Issued by Field Operations or Division of Enforcement staff
• May or may not lead to an enforcement action
• Letters of Warning may be issued in certain circumstances
Kentucky Department for Environmental Protection

Compliance Notifications Issued by Division SFY 2016

- Division of Water, 1703, 36%
- Division of Waste Management, 1436, 31%
- Division of Enforcement, 1080, 23%
- Division for Air Quality, 488, 10%
Division of Enforcement
Case Referrals by Division
SFY 2016

Division of Water, 134, 20%
Division for Air Quality, 20, 3%
Division of Waste Management, 210, 31%
Division of Enforcement, 314, 46%
Trends in Enforcement Caseload

Division of Enforcement
New Cases
SFY 2010 - SFY 2016

<table>
<thead>
<tr>
<th>State Fiscal Year</th>
<th>Total Number of New Cases</th>
</tr>
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<tbody>
<tr>
<td>SFY 2010</td>
<td>477</td>
</tr>
<tr>
<td>SFY 2011</td>
<td>447</td>
</tr>
<tr>
<td>SFY 2012</td>
<td>443</td>
</tr>
<tr>
<td>SFY 2013</td>
<td>438</td>
</tr>
<tr>
<td>SFY 2014</td>
<td>347</td>
</tr>
<tr>
<td>SFY 2015</td>
<td>450</td>
</tr>
<tr>
<td>SFY 2016</td>
<td>678</td>
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</tbody>
</table>
Division of Enforcement

Notices of Violation Issued by Review Type

SFY 2016

- Coal, 773, 72%
- Major/Minor, 287, 26%
- Permit Program, 20, 2%
Division of Enforcement
Compliance and Operations Branch
Case Referrals by Review Type
SFY 2016

- Coal, 290, 87%
- Major/Minor, 42, 12%
- Permit Program, 3, 1%

Figure 16
Coal Water Quality Enforcement
Coal Water Quality Enforcement

• DENF initiated compliance reviews of all Kentucky mining operations in 2010.

• Coal companies operating in Kentucky were directed in March 2015 to self-report compliance issues to DENF.

• DENF has collected over $4,000,000 in approximately 160 separate actions under the initiative.

• In SFY 2016, the COB issued 773 NOVs and referred 290 SMCRA permits involving 69 coal companies.
The Wet Weather Initiative:

- Objective is the management of Combined Sewer Overflows and elimination of Sanitary Sewer Overflows.
- Joint Federal/State Consent decrees were lodged against MSD and SD1 in 2005 and 2007.
- State-lead Enforcement actions were initiated against 15 mid-sized and small communities in 2007.
- EPA overfiled in December 2007 in 6 state-lead cases.
- Funding for completion of CSO projects is at issue in some communities.
- Three state-lead cases have been resolved.
Wet Weather Enforcement

Combined Sewer Overflow Diagram

Dry weather: weir wall directs flow to treatment plant

Notice

COMBINED SEWER OVERFLOW

THIS WATER CAN BECOME POLLUTED DURING WET WEATHER.

IN THE EVENT OF FLOW FROM THIS PIPE DURING DRY WEATHER PLEASE CALL THE MAYOR'S ACTION CENTER AT 327-4672 PLEASE MENTION CSO NO. 213

Kentucky UNBRIDLED SPIRIT
Wet Weather Enforcement
Landfills
• Big Run Landfill entered into a Agreed Order in January 2014 to address odor and tracking violations

• DENF assessed stipulated penalties under the Order

• Citizens filed suit in Boyd Circuit Court against Big Run Landfill

• An Agreed Order was executed in December 2015 limiting the operation of the Big Run Landfill

• Two Notices of Violation have been issued for odors since entry into the 2015 Agreed Order
Landfills

• Central Kentucky Landfill entered into an Agreed Order to resolve violations at its CDD landfill
• Blueridge Landfill entered into an Agreed Order related to disposal of TENORM
• An additional case is pending resolution involving disposal of TENORM at a landfill
Privately-owned Treatment Works
Privately-owned Treatment Works
Privately-owned Treatment Works
Privately-owned Treatment Works

- DOW has currently permitted:
  - 207 non-public WWTPs
  - 126 package plants
  - 938 home aeration units
- 13 package plants have been abandoned
- The Cabinet supports regionalization of wastewater treatment works
  - The number of non-public WWTPs and package plants has decreased by 2/3 over the past 20+ years
(Do Not) Go Directly to Jail…

• Ten Reasons for Being Referred…
1. Lack of familiarity with the requirements
2. Failure to meet a regulatory standard, condition or limit
3. Economic benefit
4. High financial burden associated with compliance
5. Lack of motivation to comply
6. Policy/initiative
7. Third-party action/lawsuit
8. Circumstances beyond your control
9.  
10. Lack of resources
How to Prevent Enforcement Actions

1. Learn and follow the requirements
2. Get to know your regulators
3. Ask questions
4. Report
5. If in doubt, follow rule #4
Navigating the Enforcement Maze

• Be prepared to tell your story—enforcement conferences are interactive
• Present your story factually
• Negotiate in good faith
• Be open to alternatives
The Future of Enforcement?

• DMR automation was initiated in FY 2016
• DMR automation will be fully functional within 2 years
• Enforcement caseloads could be significantly impacted
Case Resolution

Average Number of Days to Executed Settlement
For Cases Referred SFY 2008 - SFY 2016

- Case Assigned to AO Executed (DEP)
- Case Assigned to DL Mailed
- Case Assigned to AO Executed (OGC)
- Case Assigned to Secretary's Order Executed

SFY 2008 - SFY 2016

Executed Settlement Documents

Kentucky UNBRIDLED SPIRIT

58
Civil Penalties Collected

Penalties Collected by State Fiscal Year
SFY 2009 - SFY 2016

<table>
<thead>
<tr>
<th>State Fiscal Year</th>
<th>UST</th>
<th>WATER</th>
<th>WASTE</th>
<th>AIR</th>
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<tbody>
<tr>
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<td>$203,512</td>
<td>$435,101</td>
<td>$109,226</td>
<td>$341,403</td>
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<td>SFY2010</td>
<td>$134,821</td>
<td>$445,532</td>
<td>$244,540</td>
<td>$693,639</td>
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<td>SFY2011</td>
<td>$244,089</td>
<td>$708,298</td>
<td>$204,574</td>
<td>$1,014,0</td>
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<td>SFY2012</td>
<td>$200,765</td>
<td>$1,005,3</td>
<td>$337,416</td>
<td>$887,039</td>
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<td>SFY2013</td>
<td>$134,846</td>
<td>$1,328,6</td>
<td>$332,823</td>
<td>$645,423</td>
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<td>SFY2014</td>
<td>$131,712</td>
<td>$973,872</td>
<td>$171,224</td>
<td>$601,016</td>
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<td>SFY2015</td>
<td>$88,484.</td>
<td>$1,981,8</td>
<td>$224,458</td>
<td>$586,093</td>
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<td>SFY2016</td>
<td>$154,816</td>
<td>$1,385,8</td>
<td>$178,148</td>
<td>$569,882</td>
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Allocation of Civil Penalties

• Authorized under KRS 224.99 and KRS 151.990
• Allocated under KRS 224.10-250:
  • $150,000 to the Kentucky Environmental Education Council
  • Remainder to the Kentucky Heritage Land Conservation Fund
Allocation of Civil Penalties

• Kentucky Heritage Land Conservation Fund
• Allocation of penalties under KRS 146.570:
  • 10% to the Department of Parks
  • 10% to Kentucky Fish & Wildlife
  • 10% to Division of Forestry
  • 10% for wild rivers corridors
  • 10% to the Nature Preserves Commission
  • Remander to state agencies, local governments and state colleges and universities
Civil Penalty Determination

• Based on NREPC v. Wendall Maggard, 1994
  • Seriousness of the violation
  • Economic benefit
  • Economic impact of penalty on the violator
  • Good faith actions to remedy violation
  • Culpability of the violator
  • History of other violations on the site by the violator
  • Other matters as disposition of a just penalty would require
  • Number of days of violation
26th Annual Sustainability & EHS Symposium

Valerie Tachtiris
Deputy Assistant Commissioner,
Office of Legal Counsel
Indiana Department of Environmental Management
Presentation Overview

• Administration and IDEM Personnel Changes
• Governor Holcomb’s Priorities
• How the Administration’s Priorities will shape IDEM’s Work
• Enforcement Overview
• Avoiding Enforcement
• Making your way through the enforcement process
New Administration

New Governor
• Eric Holcomb
  – Served as Lt. Governor to Mike Pence
  – Previously served in Governor Daniels’ administration

New Commissioner
• Bruno Pigott
  – With IDEM since 2000
  – Prior positions include Assistant Commissioner for Office of Water Quality, Deputy Chief of Staff, and Chief of Staff
IDEM Senior Staff

• Brian Rockensuess, Chief of Staff
• Nancy King, General Counsel/Assistant Commissioner, Office of Legal Counsel
  – Valerie Tachtiris, Deputy Assistant Commissioner
• Samantha Dewester, Assistant Commissioner, Office of Program Support
  – Niles Parker, Deputy Assistant Commissioner
• Ryan Clem, Director of Communications
IDEM Senior Staff

- Keith Baugues, Assistant Commissioner, Office of Air Quality
- Peggy Dorsey, Assistant Commissioner, Office of Land Quality
  - Amy Smith, Deputy Assistant Commissioner
- Martha Clark Mettler, Assistant Commissioner, Office of Water Quality
  - Paul Higginbotham, Deputy Assistant Commissioner
The Holcomb Administration’s Priorities
The Holcomb Administration: Direction

• Five Areas of Key Focus:
  – A relentless focus on the economy.
  – Developing a long-term, data driven state infrastructure program with transformational projects.
  – Educate, recruit, train, and retrain the workforce.
  – Kill the drug epidemic.
  – Deliver good state government at a great taxpayer value.
The Holcomb Administration: Direction

• Expect the following:
  – A re-evaluation of current agency metrics.
  – A focus on outcomes, not activities.
  – IDEM will be expected to identify 3-5 key objectives to focus on that will support the Governor’s five key areas.
The Holcomb Administration: Expectations for IDEM

• The Governor expects IDEM to provide good quality service to the citizens of Indiana.
• The Governor will measure, track, and evaluate IDEM performance with that expectation in mind.
• IDEM will be expected to revise our metrics to ensure that we measure outcomes.
How do these priorities impact enforcement?

- The Governor and Commissioner are interested in metrics that “drive our work.”
- Previous enforcement metrics were not very meaningful.
- Looking to reduce the time between inspections being conducted and regulated entity receiving the results of that inspection.
Enforcement Overview
IDEM Enforcement Leaders

Office of Air Quality
- Phil Perry, Branch Chief, Compliance and Enforcement
  - David McIver, Section Chief, Enforcement

Office of Land Quality
- Bruce Kizer, Branch Chief, Compliance and Response
  - Nancy Johnston, Section Chief, Enforcement

Office of Water Quality
- Brian Wolff, Branch Chief, Surface Water, Operations, and Enforcement
  - Dave Tennis, Section Chief, Enforcement
Office of Criminal Investigations

- Investigates matters to determine if a criminal referral is appropriate.
- Supports law enforcement activities.
- Section Chief: Sierra Alberts
- Investigators:
  - Larry Dockery, Indianapolis
  - Howard Lamaster, Indianapolis
  - Joe Rebesco, Valparaiso
  - Tom Sak, Valparaiso
Enforcement

Levels

• Minor Violations
• Informal Enforcement
  – Violation Letter
• Formal Enforcement
  – Notice of Violation and Proposed Agreed Order
  – Commissioner’s Order

Goals

• Protect human health and the environment.
• Compel compliance with all state and federal environmental laws.
• Deter future violations.
• Impose civil penalties.
Minor Violations

• Violations the agency is able to resolve with the regulated entity without referral to formal enforcement proceedings

<table>
<thead>
<tr>
<th>Program</th>
<th>2015</th>
<th>2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>Office of Air Quality</td>
<td>919</td>
<td>1126</td>
</tr>
<tr>
<td>Office of Land Quality</td>
<td>570</td>
<td>469</td>
</tr>
<tr>
<td>Office of Water Quality</td>
<td>1771</td>
<td>*</td>
</tr>
<tr>
<td>TOTAL</td>
<td>2745</td>
<td>*</td>
</tr>
</tbody>
</table>
# Notices of Violation

<table>
<thead>
<tr>
<th>Program</th>
<th>2015</th>
<th>2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>Office of Air Quality</td>
<td>112</td>
<td>143</td>
</tr>
<tr>
<td>Office of Land Quality</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hazardous Waste</td>
<td>23</td>
<td>11</td>
</tr>
<tr>
<td>Solid Waste</td>
<td>22</td>
<td>18</td>
</tr>
<tr>
<td>UST/LUST</td>
<td>15</td>
<td>7</td>
</tr>
<tr>
<td>CFO</td>
<td>22</td>
<td>11</td>
</tr>
<tr>
<td>Office of Water Quality</td>
<td>47</td>
<td>74</td>
</tr>
<tr>
<td>TOTAL</td>
<td>241</td>
<td>264</td>
</tr>
</tbody>
</table>
Understanding IDEM’s Roles

• IDEM’s roles:
  – Educate the public and regulated community.
  – Protect human health and the environment.
  – Inspect and monitor facilities to ensure compliance.
  – Enforce the law.
  – Promote compliance.
  – Deter and avoid noncompliance.

• Not IDEM’s role:
  – Act as attorney or consultant for regulated companies
Avoiding Enforcement
Compliance Technical Assistance Program (CTAP)

- Information provided is confidential and may not be used by other IDEM offices.
- Provides a quality assurance guarantee for assistance provided and relied upon.
- Can assist with self-disclosures.
- Contact information, forms, and program details can be found at [www.idem.in.gov/ctap](http://www.idem.in.gov/ctap).
Self Disclosure and Environmental Audit Policy

• Policy No. MP-004-R2-NPD*
• Encourages regulated entities to voluntarily discover, disclose, correct, and prevent environmental violations.
• Can result in reduction or elimination of gravity-based civil penalties if certain conditions are met.
• Even if conditions are not met, IDEM has authority to reduce penalties by up to 50% for good faith.
• Good faith means prompt reporting (when not otherwise required) and prompt correction of noncompliance.

*Available at: http://www.in.gov/idem/files/npd_mp_004_r2.pdf
Why Self-Disclose?

- Why should a person or company self-disclose?
  - Reduction or elimination of gravity-based civil penalties.
    - Self-disclosure may result in an Agreed Order (AO) without penalties.
  - IDEM agreement not to recommend prosecution.
  - It is the right thing to do.
Making your way through the Enforcement Process
Compliance and Enforcement Response Policy

• Policy No. MP-005-R1-NPD*

• Sets forth IDEM’s enforcement processes.

• Establishes three classes of violations based upon the degree of risk to human health or the environment.

• Each class has different standards and processes for enforcement.

*Available at: [www.idem.in.gov/files/MP-005-R1-NPD.pdf](http://www.idem.in.gov/files/MP-005-R1-NPD.pdf)
Civil Penalty Policy

• Policy No. ENF-99-0002-NPD*
• Penalties are only a deterrent – not our goal.
• Gravity-Based component:
  – Largely based on potential for harm and extent of deviation from the rule.
  – Multipliers for days of noncompliance.

*Available at: http://www.in.gov/idem/files/nrpdpd-enf_0002.pdf
Civil Penalty Policy

• Aggravating and Mitigating Factors:
  – Actions before and after the violation.
  – History of noncompliance.
  – Ability to pay.
  – IDEM enforcement costs.
  – Other unique factors.
Making Enforcement Easier

• Work with the case manager, who is your point of contact with the agency.
• Communicate extensively.
• Do not ignore a Violation Letter in hopes it will go away.
• Provide early and complete cooperation.
• Help clarify the facts.
Making Enforcement Easier

• Provide all requested documents and information as soon as possible.
• Retain a knowledgeable, experienced environmental consultant and/or attorney.
• Be well-prepared for settlement conferences, and make a good faith effort to resolve the matter.
• Discount for expedited Agreed Order and compliance.
Thank you

Valerie Tachtiris
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Indiana Department of Environmental Management
vtachtir@idem.in.gov
317-234-8884
26th Annual Sustainability & EHS Symposium, March 21-22, 2017

Valoria C. Hoover, Chief
Environmental Enforcement Section

MIKE DeWINE
OHIO ATTORNEY GENERAL
Today’s Discussion about Ohio will include…

• An exploration of courts’ outcomes and significant environmental cases;
• An assessment of the civil penalties and other costs courts have awarded;
• An evaluation of the amounts collected for civil and criminal cases; and
• An examination of current topics.
Court Outcomes
2016
Water

- EES litigated eighteen water cases.

Results

- Consent Orders (13)
- Judgment Entries (2)
- Court Orders (2)
- Appellate Court Opinions (1)
- Common Pleas Court Opinions & Judgment Entries (1)

- Ohio’s New Drinking Water Rules:
  http://epa.ohio.gov/ddagw/rules.aspx#112025079-chapter-3745-81-primary-drinking-water-standards
Air

• EES litigated eleven air cases.
Solid Waste

- EES litigated eight solid waste cases.
- One case involved the United States Bankruptcy Court in the District of New Jersey, resulting in stipulation and a consent order.

Results:
- Consent Orders (3)
- Court Orders (3)
- Appellate Court Opinions (2)
Hazardous Waste

• EES resolved seven hazardous waste cases.

Results
- Consent Orders (4)
- Court Orders for Civil Penalties and Injunctive Relief (1)
- Magistrate Decisions on Civil Penalties (1)
- Magistrate Decisions/Judgment Entries for Default Judgment (2)
DERR

- EES settled three cases that addressed DERR.
- Each case has a consent decree.
- These cases allowed for compensation for earlier assessment expenses and costs paid to the Ohio EPA.
Ohio Department of Natural Resources

- EES litigated seven ODNR cases.
Agriculture

- EES settled three agricultural cases resulting in three consent orders.

Consent Orders: What is Included

- Injunctive Relief (3)
- Civil and Stipulated Penalties (2)

Key:
3=All three cases
2=Two cases
• EES resolved five BUSTR cases.
Multi-Media Cases

• In 2016, EES resolved four cases that involved multi-media such as water, BUSTR, air, solid waste, and hazardous waste.

• These four cases resulted in two partial and two full consent orders.
Civil Contempt in 2016

• EES litigated four cases concerning civil contempt.
• These cases addressed air and water violations.
Felony and Misdemeanor Convictions in 2016
Criminal Cases

- EES litigated nine criminal cases in 2016.
- These matters resulted in community control for a specified period of time, non-reporting probation, restitution to the State of Ohio and Ohio EPA, fines, and investigative costs.

Results

- Misdemeanors (6)
- Felonies (4)

Rats.mov
Civil Penalties, Fines, and Other Costs Awarded in 2016

<table>
<thead>
<tr>
<th>Unit</th>
<th>Awarded</th>
</tr>
</thead>
<tbody>
<tr>
<td>All</td>
<td>$7,173,614.67</td>
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Civil Penalties Awarded

<table>
<thead>
<tr>
<th>Unit</th>
<th>Penalties</th>
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</thead>
<tbody>
<tr>
<td>Agriculture</td>
<td>$340,800.00</td>
</tr>
<tr>
<td>Air</td>
<td>$608,500.00</td>
</tr>
<tr>
<td>BUSTR</td>
<td>$663,670.00</td>
</tr>
<tr>
<td>Materials &amp; Waste Management</td>
<td>$2,441,421.00</td>
</tr>
<tr>
<td>ODNR</td>
<td>$141,817.96</td>
</tr>
<tr>
<td>Water</td>
<td>$1,300,357.00</td>
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<tr>
<td>Total</td>
<td>$5,496,565.96</td>
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</table>
## Civil Costs Awarded

### SEP & Other Costs

<table>
<thead>
<tr>
<th>Unit</th>
<th>Awarded Value</th>
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<tbody>
<tr>
<td>Air</td>
<td>$55,000.00</td>
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<tr>
<td>BUSTR</td>
<td>$5,000.00</td>
</tr>
<tr>
<td>Materials &amp; Waste Management</td>
<td>$68,000.00</td>
</tr>
<tr>
<td>Water</td>
<td>$695,800.00</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$823,800.00</strong></td>
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</table>

### Attorney Fees

<table>
<thead>
<tr>
<th>Unit</th>
<th>Awarded Fees</th>
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<tbody>
<tr>
<td>Air</td>
<td>$3,500.00</td>
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<tr>
<td>Materials &amp; Waste Management</td>
<td>$100,000.00</td>
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<td><strong>Total</strong></td>
<td><strong>$103,500.00</strong></td>
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### Response Costs

<table>
<thead>
<tr>
<th>Unit</th>
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<tbody>
<tr>
<td>DERR</td>
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<tr>
<td>Materials &amp; Waste Management</td>
<td>$69,000.00</td>
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<tr>
<td><strong>Total</strong></td>
<td><strong>$594,680.00</strong></td>
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</table>
Criminal Costs: Restitution & Court-Ordered Costs

Awarded Costs

$155,068.71
Amounts Collected in 2016

<table>
<thead>
<tr>
<th>Unit</th>
<th>Payments</th>
</tr>
</thead>
<tbody>
<tr>
<td>All</td>
<td>$2,410,735.49</td>
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# Civil Penalties Collected

<table>
<thead>
<tr>
<th>Unit</th>
<th>Payments</th>
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</thead>
<tbody>
<tr>
<td>Agriculture</td>
<td>$320,800.00</td>
</tr>
<tr>
<td>Air</td>
<td>$153,108.83</td>
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<tr>
<td>BUSTR</td>
<td>$13,800.00</td>
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<tr>
<td>Materials and Waste Management</td>
<td>$247,336.64</td>
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<td>ODNR</td>
<td>$30,125.75</td>
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<td>Water</td>
<td>$361,404.96</td>
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<td><strong>Total</strong></td>
<td><strong>$1,126,576.18</strong></td>
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### SEP & Other Costs Collected

<table>
<thead>
<tr>
<th>Unit</th>
<th>Payments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Air</td>
<td>$45,200.00</td>
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<tr>
<td>Materials and Waste Management</td>
<td>$30,343.00</td>
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<td>Water</td>
<td>$695,600.00</td>
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<tr>
<td>Total</td>
<td>$771,143.00</td>
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### Response Costs Collected

<table>
<thead>
<tr>
<th>Unit</th>
<th>Payments</th>
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</thead>
<tbody>
<tr>
<td>DERR</td>
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<tr>
<td>Total</td>
<td>$78,095.44</td>
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</table>
### Attorney Fees/AG Collection Costs Acquired

<table>
<thead>
<tr>
<th>Unit</th>
<th>Payments</th>
</tr>
</thead>
<tbody>
<tr>
<td>BUSTR</td>
<td>$5,000.00</td>
</tr>
<tr>
<td>Materials and Waste Management</td>
<td>$4,000.00</td>
</tr>
<tr>
<td>Water</td>
<td>$7,939.18</td>
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<tr>
<td>Total</td>
<td>$16,939.18</td>
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</table>

<table>
<thead>
<tr>
<th>Unit</th>
<th>Payments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Air</td>
<td>$152,189.32</td>
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<tr>
<td>Water</td>
<td>$252,037.37</td>
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<tr>
<td>Total</td>
<td>$404,226.69</td>
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</table>

### Environmental Education Payments Collected
Environmental Law – Trending Topics in Ohio
Clean Water Rule:
Definition of the Waters of the United States

- The rule has been codified in 40 C.F.R. Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401.
- The complaint filed in U.S. District Court for the Southern District of Ohio, Eastern Division:
- The U.S. Sixth Circuit Court of Appeals’ order for the Clean Water Rule’s stay in October 2015:
- The U.S. Sixth Circuit Court of Appeals’ opinion on jurisdiction: ([click the PDF to open](http://www.opn.ca6.uscourts.gov/opinions.pdf/15a0246p-06.pdf))
The Stream Protection Rule

• The rule has been codified in 30 C.F.R. Parts 700, 701, 773, 774, 777, and 827.
• The complete rule is found at
  • https://www.regulations.gov/document?D=OSM-2010-0018-10631
• The rule’s effective date was January 19, 2017.
• The Complaint filed in the United States District Court for the District of Columbia:
  • http://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/Appeals/2017-01-17-Complaint.aspx
• Under CRA, the President disapproved the rule on Feb. 16, 2017.
The Ozone Transport Region

- The Complaint filed in the U.S. District Court in the Southern District of New York: [https://www.epa.gov/sites/production/files/2016-10/documents/courtlink_docket_us_dis_nysd_1.16cv7827_10.06.2016.pdf](https://www.epa.gov/sites/production/files/2016-10/documents/courtlink_docket_us_dis_nysd_1.16cv7827_10.06.2016.pdf)

- This Complaint also includes the December 2013 petition as Exhibit 1 that exemplifies all the states’ signatures to petition the EPA.

- On January 19, 2017, the EPA proposed to deny the northeastern states’ petition.
Any Questions?

If you would like a copy of the PowerPoint, please contact Valoria C. Hoover
Valoria.Hoover@ohioattorneygeneral.gov.
How to contact us

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43215-3400
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