

Kentucky Division of Enforcement

2012 Annual Report



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INTRODUCTION

On July 9, 2004, the Governor issued Executive Order 2004-731 making significant revisions in the organizational structure of the Cabinet. Several of the changes involved the Kentucky Department for Environmental Protection (KDEP), one of which was the creation of a new Division of Enforcement. The Division of Enforcement combined the staff and most of the activities previously included in the enforcement branches of the Division for Air Quality, the Division of Waste Management and the Division of Water. The primary purpose of the organization of the Division of Enforcement was to promote a fair, firm and consistent approach to gaining compliance through the resolution of enforcement cases.

ORGANIZATION

The Division of Enforcement (DENF) consists of 3 units: the Director’s Office, the Civil Enforcement Branch (CEB), and the Compliance and Operations Branch (COB). Each of these units performs a distinct function within the Division. The Director’s Office is responsible for the overall management of the Division. This includes setting Division priorities for accomplishing Department goals, coordinating with all of KDEP’s divisions, and coordinating with management for KDEP and the Cabinet. The Director’s Office consists of a Director, currently vacant, and an Assistant Director, who serves as the acting Director.

The Civil Enforcement Branch (CEB) negotiates civil settlements to resolve environmental violations. There are two sections within the Civil Enforcement Branch: the Air & Water Case Resolution Section and the Waste Case Resolution Section. The Civil Enforcement Branch consists of a branch manager (currently vacant) two section supervisors, and nine Environmental Enforcement Specialists (with two vacant positions). The Civil Enforcement Branch (CEB) negotiates civil settlements for violations cited by the Department for Environmental Protection. These cases include all media: air, waste, and water. The CEB continues to emphasize multi-media negotiations in order to efficiently and effectively address environmental violations.

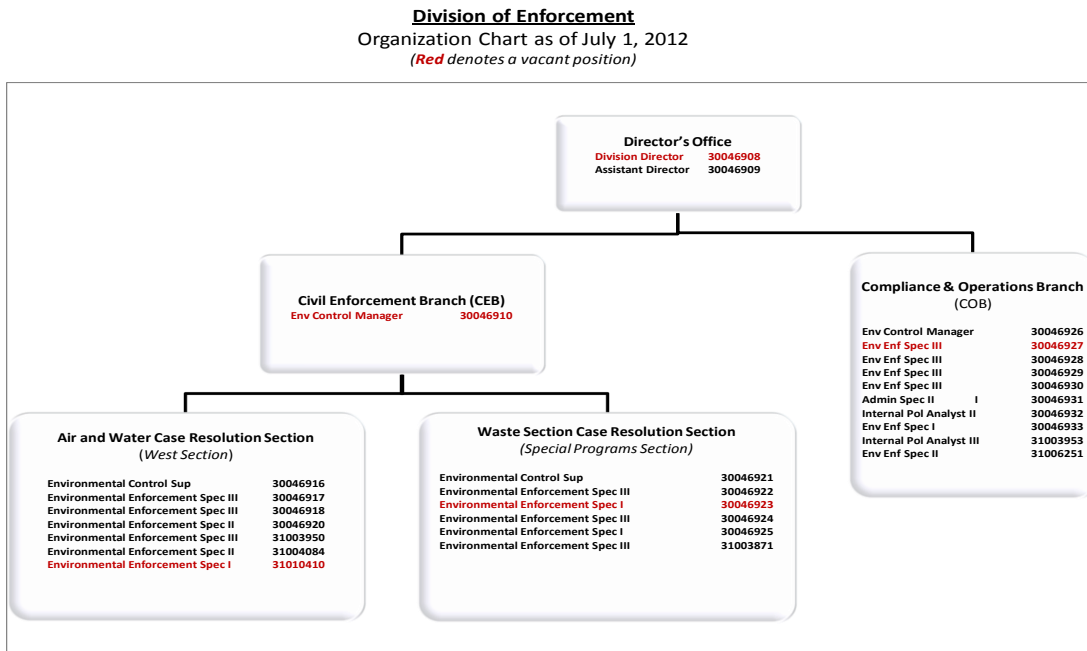


Figure 1 – July 1, 2012 DENF current organization chart

The Compliance and Operations Branch (COB) has two distinct functions: regulatory compliance and administrative support. Regulatory compliance involves citing environmental violations identified by either the COB or KDEP’s central office programs and then attempting to return regulated entities to compliance through the implementation of remedial measures. COB may also refer cases to the Civil Enforcement Branch (CEB) for formal enforcement action.

Administrative support includes functions necessary for the day-to-day operation of the Division: budget, accounts payable, supplies, inventory, training, travel, personnel actions, etc. As of July 2012, the Compliance and Operations Branch consists of a branch manager, six Environmental Enforcement Specialists (1 vacancy), an Administrative Specialist, two Internal Policy Analysts, three temporary compliance employees and one temporary administrative employee.

Staffing

The Division of Enforcement’s staffing was stable in FY2012. The CEB Manager position remained vacant for the remainder of the fiscal year. Two Environmental Enforcement Specialist positions were filled in the COB and one Environmental Enforcement Specialist position was filled in the CEB.

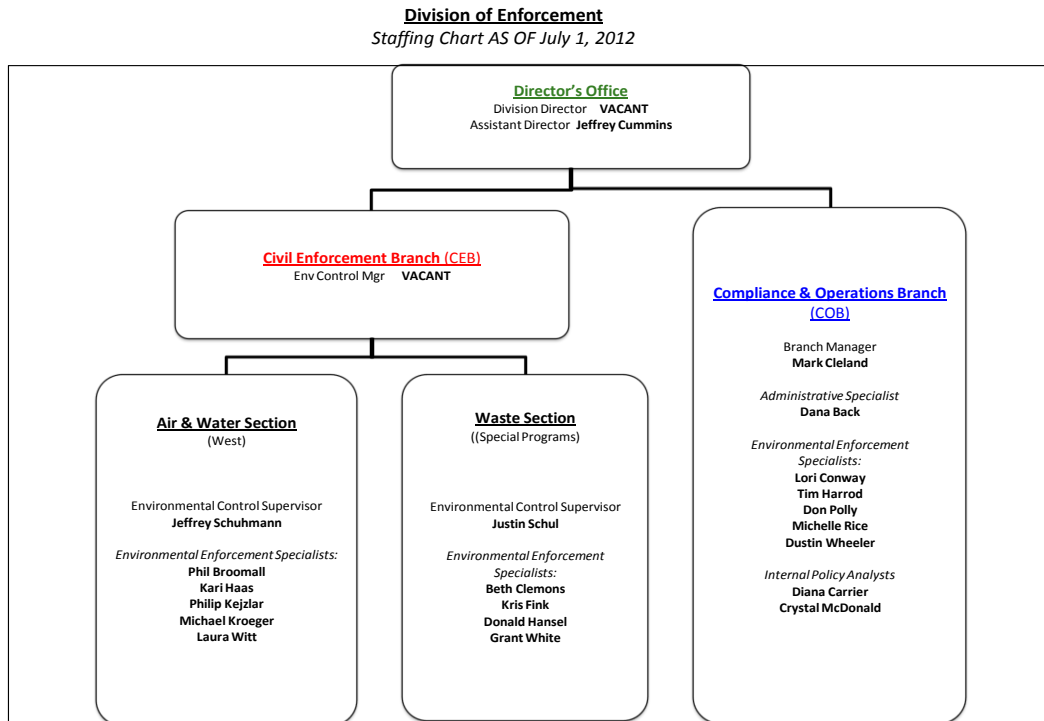


Figure 2 – July 2012 DENF current staffing chart

Enforcement Process

The Civil Enforcement Branch (CEB) receives case referrals from the three program divisions: Division for Air Quality (DAQ), Division of Waste Management (DWM), and Division of Water (DOW) and from the Division of Enforcement's COB. An enforcement specialist is assigned a case and proceeds to research the history and nature of the violations, as well as relevant information about the responsible party. The enforcement specialist then develops a resolution strategy including corrective actions that are required to return the responsible party to compliance and a proposed civil penalty for the violations. Upon approval of the resolution strategy, the enforcement specialist schedules an administrative conference with the responsible party. This administrative conference is typically held in person at the DENF offices, but may be held telephonically based upon the circumstances of the case.

The administrative conference allows the KDEP representatives and the responsible party to discuss the facts of the case. The enforcement specialist determines whether any information revealed during the administrative conference changes the basis of the case resolution proposal and if so, discusses those changes with Division management. The enforcement specialist then makes an initial settlement proposal to the responsible party, if appropriate. Negotiations continue until an agreement-in-principle is reached between the Department and the responsible party or until the determination is made that the parties cannot reach a negotiated settlement. The negotiation process can be lengthy, in some cases requiring multiple sessions.

Upon reaching an agreement-in-principle, the enforcement specialist drafts a written document to formalize an agreement. Demand letters, which are unilateral orders, are often used when required corrective actions can be completed in relatively short time frames or when no specific actions are required. Demand letters are formalized by the signature of the Director of DENF. Demand letters are not final orders of the Cabinet, and as such are not enforceable in Franklin Circuit Court. Agreed Orders, which are bi-lateral agreements, are used for more complicated or time-dependent agreements. Agreed Orders are formalized by the signature of the Cabinet Secretary and filed with the Cabinet's Office of Administrative Hearings. Agreed Orders are one form of a final order of the Cabinet, and as such are enforceable in Franklin Circuit Court.

The responsible party and the Department may not reach an agreement-in-principle in some cases. These cases are referred to the Cabinet's office of General Counsel, a Cabinet attorney is assigned to the case, and a complaint is filed with the Office of Administrative Hearings (OAH). These cases may be resolved through further negotiation, or may proceed to a formal hearing. Upon referral of a case to General Counsel, the enforcement specialist assumes the role of client contact and assists the attorney as necessary in the development of the case. When a case goes to formal administrative hearing, a hearing officer considers the facts of the case and makes a recommendation for the resolution of the case to the Cabinet Secretary. The Cabinet Secretary can either accept or modify the hearing officer's recommendation. The final resolution is documented in a Secretary's Order, which is filed with OAH. The Secretary's Order is a final order of the Cabinet and is enforceable in Franklin Circuit Court.

The assigned enforcement specialist is responsible for monitoring compliance with any agreement that resolves a case, whether it is a demand letter, agreed order, or Secretary's Order. Compliance with the agreement leads to the closure of the case. Failing to comply with the agreement can result in the resumption of settlement negotiations, initiation of a separate enforcement action, or with the Cabinet filing a complaint in Franklin Circuit Court seeking enforcement of the order.

U.S. EPA can become involved in cases involving delegated authority for the state enforcement of federal programs. Examples of delegated programs include the Clean Air Act, the Clean Water Act, elements of the Safe Drinking Water Act, and the Resource Conservation and Recovery Act. The Cabinet will under certain circumstances refer a case to EPA for a federal enforcement action. In some cases, the Cabinet may negotiate an enforcement settlement jointly with U.S. EPA. Alternately, U.S. EPA may overfile on an enforcement settlement previously reached between the Cabinet and the responsible party and proceed with a federal enforcement action.

ENFORCEMENT CASE REFERRAL SOURCES

The Division of Enforcement receives case referrals from all three of the media divisions (Air Quality, Waste Management, Water), as well as internal referrals from the Compliance and Operations Branch. Figure 3 shows the breakdown of the new cases referred in **FY2011** by division. Of the 452 new cases referred to the Division, the highest referral came from the Division of Water.

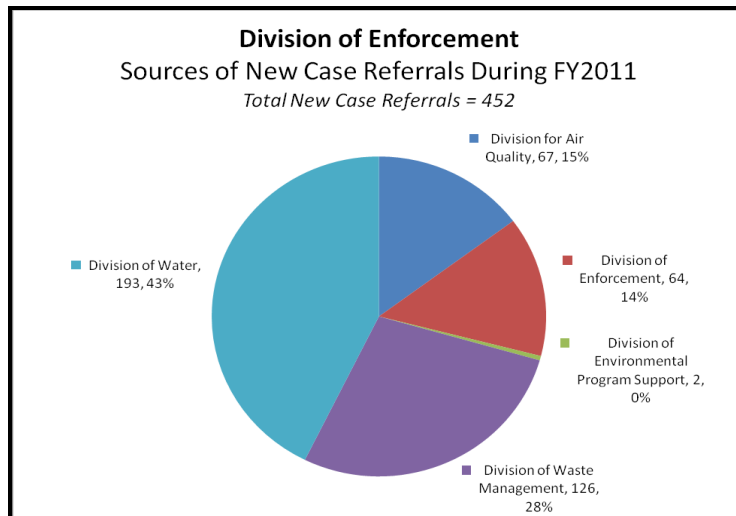


Figure 3 – Source of new enforcement cases by division in FY2011.

In **FY2012**, a total of 442 cases were referred: the Division of Air Quality referred 48 cases (11%), the Division of Water referred 86 cases (19%), and the Division of Waste Management referred 97 cases (22%). The highest referral of cases came from within the Division of Enforcement with an increase of 211 referrals (48%).

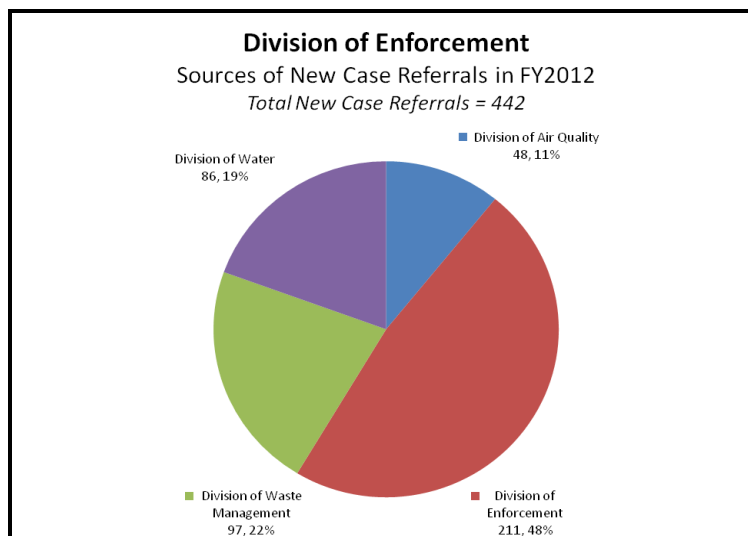


Figure 4 – Source of new enforcement cases by division FY2012.

The Division of Enforcement received new case referrals in FY2012 for 8 of the 12 program areas. Of the 442 new case referrals, the Division received 268 (61%) wastewater cases and the underground storage tank (UST) program accounted for 65 cases (15%). The Division also received 48 (11%) air cases and 30 (7%) solid waste cases. The remaining 31 cases were from the hazardous waste, drinking water, water resources, and water quality programs. The Division did not receive any referrals under the groundwater, asbestos (AHERA), or the recycling and local assistance (RLA) programs.

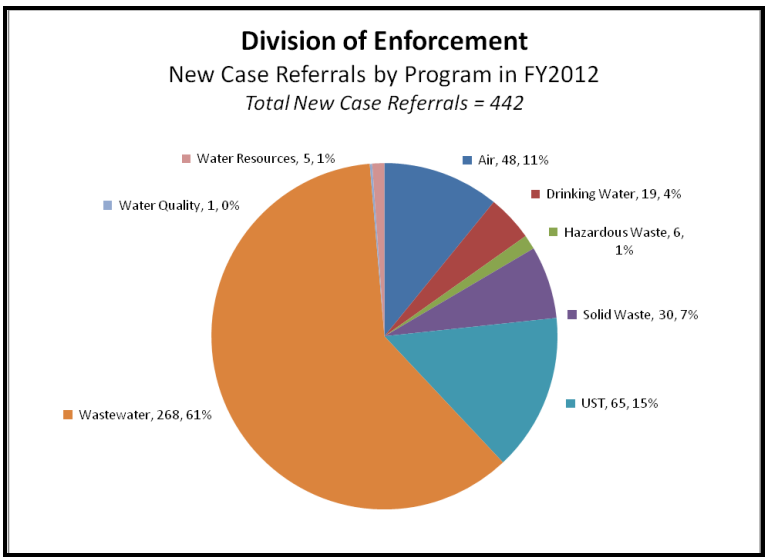


Figure 5 – Source of new enforcement cases by program in FY2012.

The Division of Enforcement receives its cases from the twelve regional offices, the Department’s central office programs, and the Division’s COB. Eight of the regional offices include inspectors from all three of the media divisions. Three of the regional offices include inspectors only from DWM and DOW (Columbia R.O., Louisville R.O., and Morehead R.O.). Two of the regional office includes only DAQ inspectors (Ashland R.O. and Owensboro R.O.). The counties covered by each regional office do not coincide among DAQ, DWM, and DOW.

Air Cases

According to the chart below, the Division for Air Quality referred 48 new enforcement cases to the Division of Enforcement in FY2012. The Frankfort R.O. referred 15 cases (31%) in FY2012 and was the largest source for air enforcement cases. The Ashland R.O. referred 10 enforcement cases (21%) in FY2012, the Paducah R.O. referred 8 enforcement cases (17%); both the Owensboro (10%) and Bowling Green R.O. (11%) each referred 5 enforcement cases. The London and Florence R.O. referred 2 cases (4%), and Hazard R.O. referred 1 enforcement case (2%). All eight of DAQ’s regional offices referred new cases to the Division in FY2012 (see Figure 6). DAQ’s central office programs refer issues they discover to the regional offices for investigation and compliance determinations and do not refer cases directly to the Division.

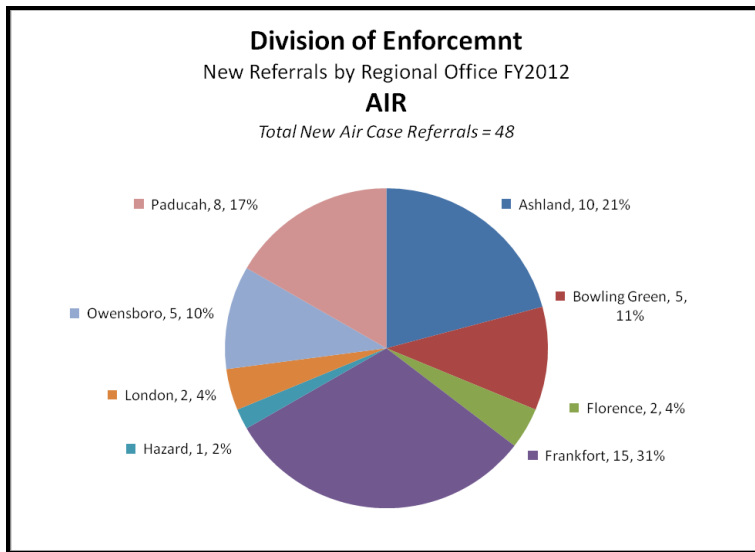


Figure 6 – FY2012 new case referrals from the Division for Air Quality by regional office

Waste Cases

All ten of the Division of Waste Management Regional Office's referred 101 new cases to the Division of Enforcement in FY2012. Morehead R.O. referred the most cases in FY2012 with 23 (22%), followed by London R.O. with 13 new referrals (13%). Madisonville R.O. had 12 new referrals (12%), Columbia R. O. had 11 new referrals (11%) and Frankfort and Louisville Regional Offices each had 10 cases referred (10% each). The remaining Regional Offices: Hazard (8 cases, 8%), Bowling Green (7 cases, 7%), Florence (4 cases, 4%), and Paducah (3 cases, 3%), make up the remaining 94 cases.

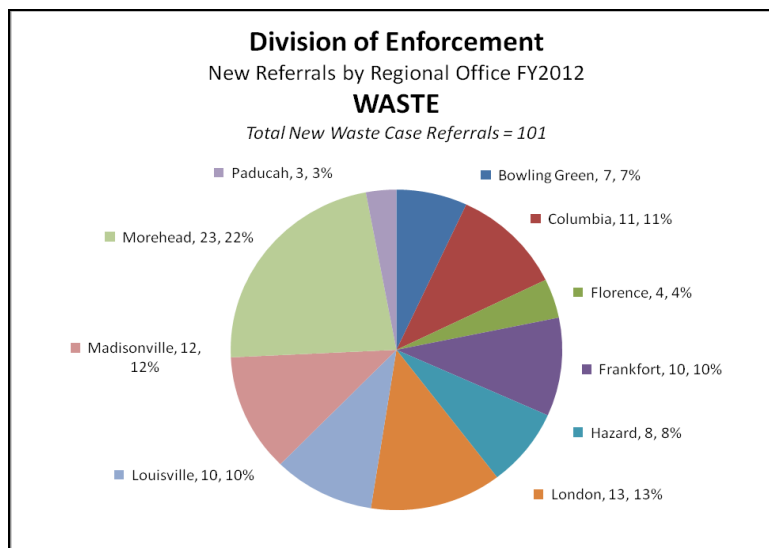


Figure 7 – FY2012 new case referrals from the Division for Waste Management by regional office.

Water Cases

All 10 of the Division of Water's regional office referred 293 new cases to the Division of Enforcement in FY2012. Of the 293 water cases referred by DOW, Hazard R.O. was the largest source with 144 (49%) case referrals from DOW. The London R.O. follows closely with 87 case referrals (30%). The Morehead and Bowling Green R.O. each referred 11 cases (4%) and the Paducah R.O. referred 10 cases (3%). The Frankfort R.O. referred 9 new cases (3%), the Madisonville R.O. referred 7 (2%) new cases, and the Columbia and Florence R.O. each referred 6 (2%) new cases. The remaining enforcement referrals were made by Louisville (2 cases, 1%).

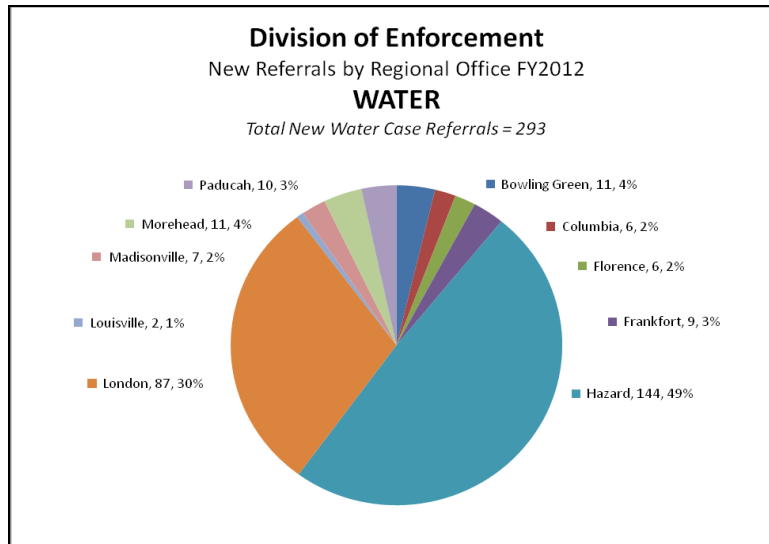


Figure 8 - FY2012 new case referrals from the Division of water by regional office

ENFORCEMENT CASE ACTIVITY

The Division of Enforcement's active cases at the end of FY2012 consisted of the largest number of cases from the wastewater program, followed by the underground storage tank program, the solid waste program, and the air program. The average number of active enforcement cases in FY2012 equaled 847 active cases with a current total of 271 cases being monitored through executed settlement documents.

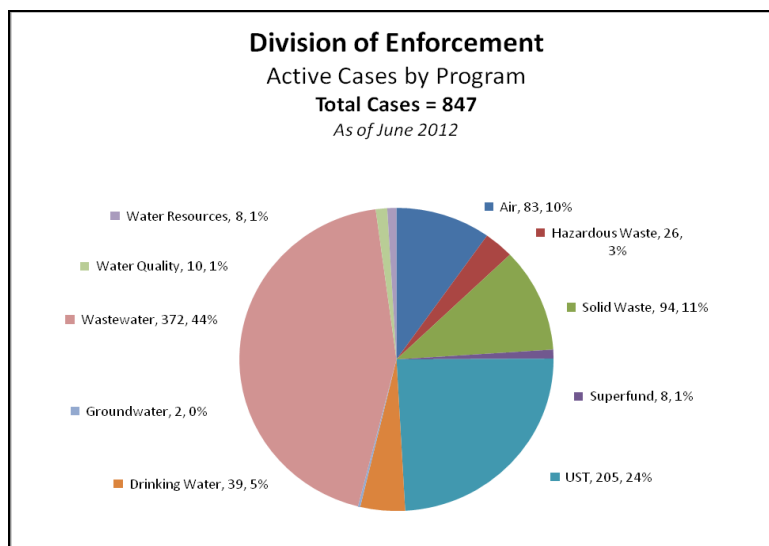


Figure 9 – Active cases by program at the end of FY2012

Figure 10 shows the trend for the number of open cases in the Division of Enforcement. The number of open cases remained relatively stable during FY2012, and has consistently declined from the peak number of cases in 2008. This can be attributed to an increase in staffing in late 2007 that allowed the Division to address a case backlog as well as process changes made in late 2007 to improve elapsed times between case assignment and case resolution.

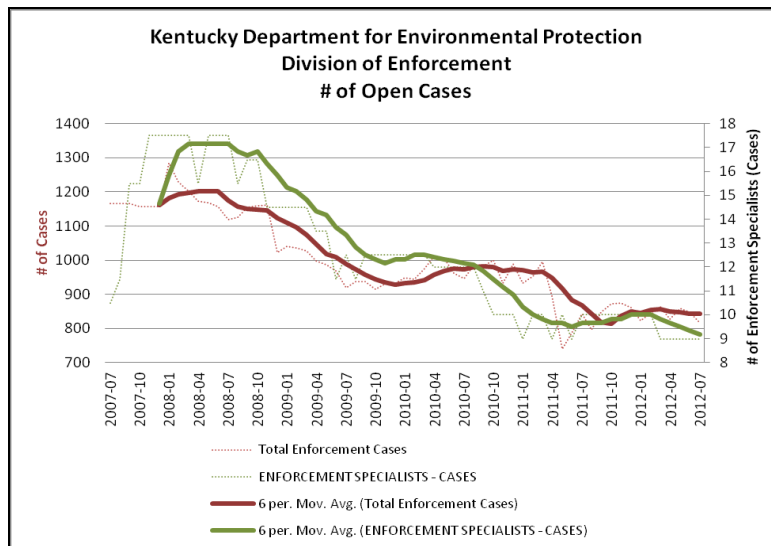


Figure 10 – Data and trends for # of open cases

The number of new cases to the number of cases closed (see Figure 11) show that the two statistics were relatively equal in FY2012. As a result, the number of active cases has remained between 800 and 1000.

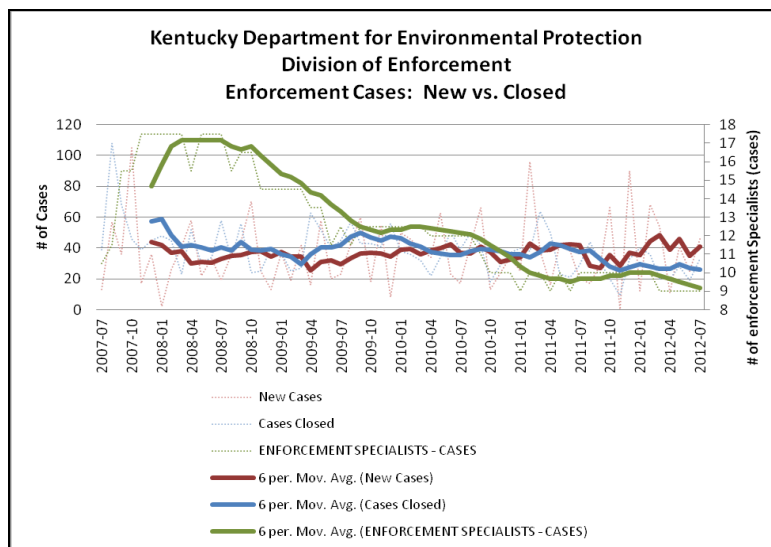


Figure 11 – Comparison of new cases and cases closed from FY2008 through FY2012

In February 2008, the Division of Enforcement reinstated the use of demand letters as the settlement document for penalty-only cases and cases with relatively simple remedial measures. The use of demand letters resulted in an increase in the number of case settlement executed. The data for FY2012 shows that the number of executed case settlements has been relatively stable. The use of agreed orders and demand letters has been relatively equal.

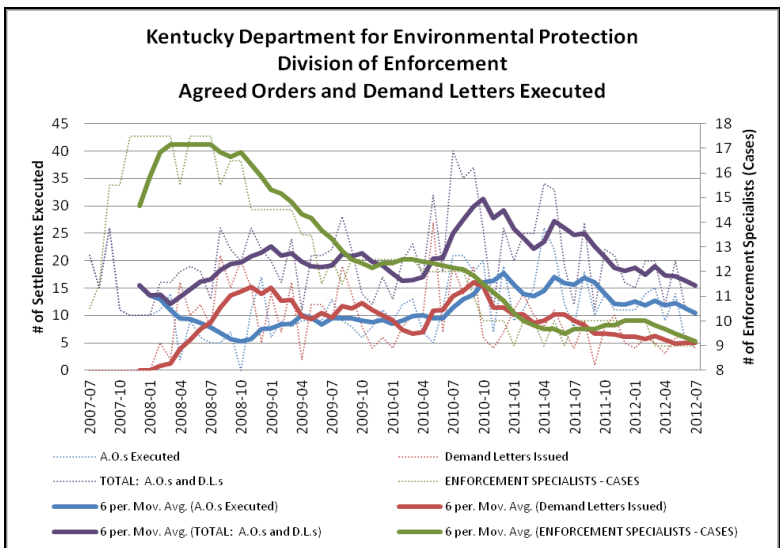


Figure 12 – Enforcement actions executed, broken out by total, agreed orders, and demand letters

Figure 13 shows the trends for agreements-in-principle. The chart shows a decrease in the number of agreements-in-principle reached from previous years.

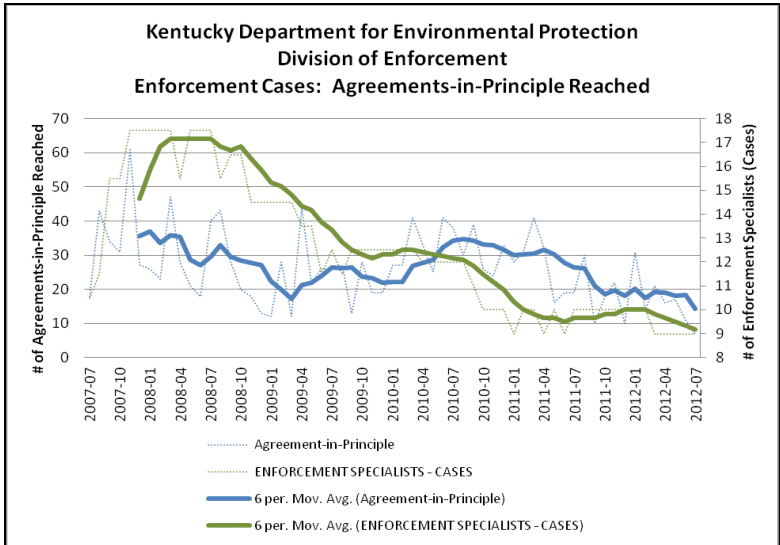


Figure 13 – Data trends for agreements-in-principle and agreed orders signed by the responsible party

CIVIL PENALTIES

- In FY2012, the Division of Enforcement collected **\$2,430,538.98** in civil penalties, a **5% increase from FY2011**. In FY2011, the Division of Enforcement collected **\$2,170,971.11** in civil penalties a **7.9% above the average civil penalties collected of \$2,011,741.76 (FY2000 through FY2011)** and a **43.0% increase over the \$1,518,533.11 of civil penalties collected in FY 2010**.
- In FY2012, the Division of Enforcement collected **\$887,039.60** for the air programs, a **6% decrease from FY2011**. In FY2011, the Division collected **\$1,014,009.04** in civil penalties for the air programs, a **58.6% above the average civil penalties collected of \$639, 411.64 annually for the air program (FY2010 through FY2011)**. This is **46.2% over the \$693,639.11 collected in FY 2010**.
- In FY2012, the Division of Enforcement collected **\$1,005,317.12** for the water programs, a **15% increase from FY2011**. The Division collected **\$708,298.00** in civil penalties for the water programs in FY2011. This is **21.3% below the average civil penalties of \$900,007.35 collected for the water program (FY2000 to FY2011)**. This is a **59.0% increase from the \$445,532.33 collected as civil penalties in FY2010**.
- In FY2012, the Division of Enforcement collected **\$337,416.63** for the waste programs, a **20% increase from FY2011**. The Division collected **\$204,574.37** in civil penalties in FY2011. This is a **43.8% decrease from the average civil penalties of \$364,217.43 (FY2000 through FY2011)**. This is a decrease of **16.3% in civil penalties from the \$244,540.39 collected in FY2010**.
- In FY2012, the Division of Enforcement collected **\$200,765.63** for the UST programs, a **9% decrease from FY2011**. The Division collected **\$244, 089.70** in civil penalties in FY2011 for the UST program. This is a **125.8% increase from the average civil penalties of \$108,105.34 for the UST program (FY2000 through FY2011)**. This is an **81.0% increase from the \$134,821.28 in civil penalties collected for the UST program in FY2010**.

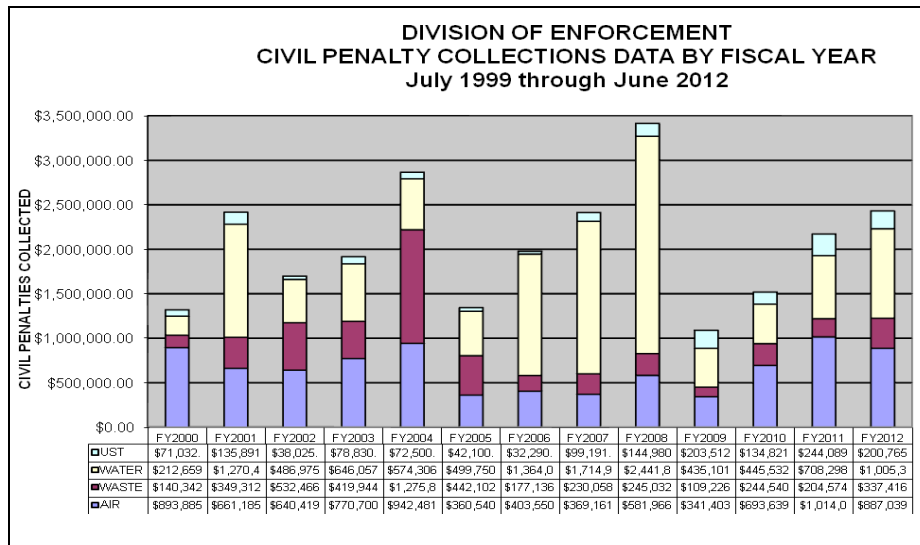


Figure 14 – Civil penalty collections for FY1999 through FY2012

SELECTED ENFORCEMENT CASES

- **Calgon Carbon Corp.** (Boyd County) is a Large Quantity Generator, Transporter, Importer, and Treatment/Storage/Disposal (TSD) facility. Calgon was referred due to a release of approximately 540,000 gallons of hazardous waste into the Big Sandy River. The case was resolved with a Demand Letter assessing a \$45,000.00 civil penalty and \$10,842.96 in cost recovery.
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- **Kentucky Wood Preserving/CSX Transportation Inc.** (Clark County) is a small quantity generator of hazardous waste cited for drip pad violations and soil contamination. The case was referred to legal services and the Superfund Branch (SFB) for cleanup and an environmental covenant was placed on the property. A total of \$35,000 was paid for cost recovery.
 - **Madisonville Westside Wastewater Treatment Plant** (Hopkins County) was referred by Enforcement's Compliance and Operations Branch after a DMR review revealed their FCB (*Fecal Coliform Bacteria*) in April 2011 was 200% over the permitted limit. An Agreed Order was executed and all remedial measures were met including a \$3,000.00 civil penalty.
 - **Rio Tinto Alcan – Sebree Works** (Henderson County) is a facility for the primary production of aluminum and secondary aluminum smelting. Under Air Permit V-05-088 R2, the source met the emission limit of 0.20 gr/scf; however, the control efficiency did not meet 97%. An agreement was negotiated and a Demand Letter was issued on June 6, 2012. The facility paid an \$83,750.00 civil penalty, and performance testing of the emission unit has shown to be in compliance with permit requirements.
 - **Campos BP** (Whitely County) is a service station with underground storage tanks (USTs). The facility was cited for failure to properly maintain the USTs and was required to permanently remove the tank system and pay a civil penalty in the amount of \$1,000.00. On June 8, 2012, the Underground Storage Tank Branch issued an NFA (*No Further Action*) Letter to the site after successful removal of the tanks. The civil penalty has also been paid.
 - **Frasure Creek Mining, LLC** (897-0550) (Perry County). On November 7, 2011 and March 14, 2012, Frasure Creek Mining was issued Notices of Violation for inadequate BMP's (*Best Management Practices*) which resulted in the degradation of the Waters of the Commonwealth. Frasure Creek entered into an agreement with the Division of Enforcement and a Demand Letter was issued. Frasure Creek has completed all remedials and paid a \$15,000.00 civil penalty.
 - **Kimberly-Clark Corp (KCC)** (Daviness County). KCC is a paper manufacturer who was issued Notices of Violation for exceeding their permit limits for Fecal Coliform Bacteria (FCB). KCC participated in an administrative conference with DENF in July 2012 and agreed to maintain compliance with their permit and pay \$1,500.00 in civil penalties. The case was resolved and closed on July 30, 2012.
 - **Corner Quick Stop No. 2** (8745-055) (Jackson County). Corner Quick Stop was referred to DENF for failure to perform Tank Tightness Tests (TTT) on their UST systems located in Tyner, Kentucky. An Agreed Order was executed on January 12, 2012 that included remedial measures and a \$5,000.00 civil penalty. On August 9, 2012, the case was closed with all remedial measures completed and the civil penalty paid.
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COMPLIANCE ACTIVITY

The Division of Enforcement's Compliance and Operations Branch issues Notices of Violation and Letters of Warning for violations discovered through review of Discharge Monitoring Reports submitted by facilities with KPDES permits and for violations discovered by KDEP Central Office program staff. In FY2012, the Division of Enforcement issued 725 notifications, which represents 21% of the total notifications issued by the Department for Environmental Protection. The Division of Enforcement accomplishes this with 0.3% of total KDEP staffing.

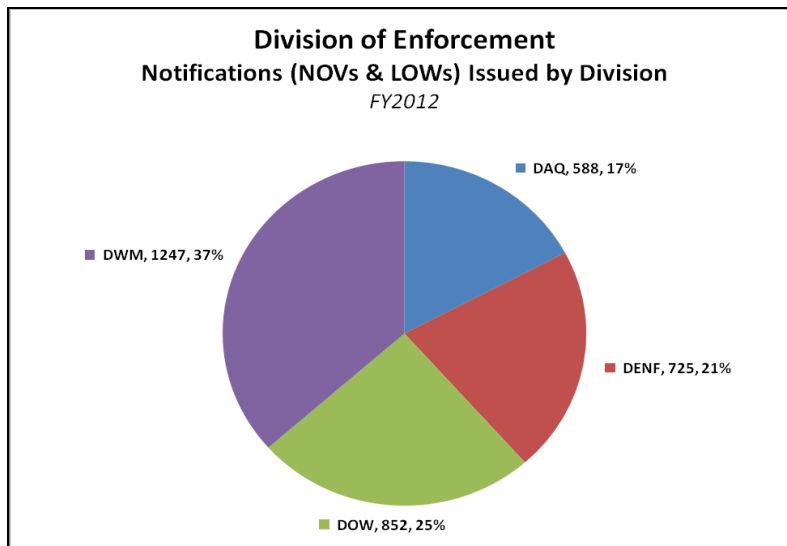


Figure 15 – FY2011 notifications issued (NOVs and LOWs) by Division

In **FY2011**, the largest number of notifications issued by KDEP was in the wastewater program with 1233 notifications (34%), with only 1177 notifications in the UST program (32%). In **FY2012**, the largest number of notifications were issued in the wastewater program with 1468 (43%). The UST and Air programs follow with 875 (26%) and 585 (17%) respectively, for notifications issued in FY2012.

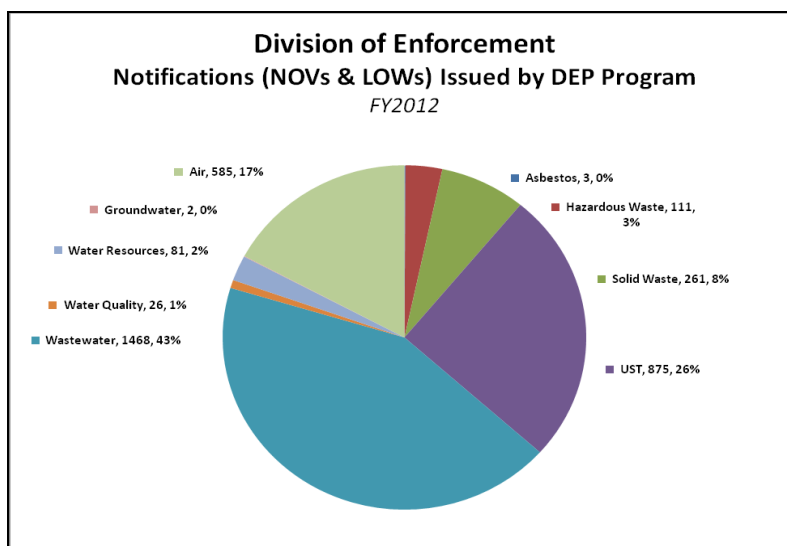


Figure 16 – FY2011 notifications issued by KDEP by program (excluding drinking water compliance)

The majority (77%) of the notices of violations (NOVs) were issued by KDEP’s field inspectors with a count of 2386. The Division of Enforcement issued NOVs (20%) in FY2012 through review of Discharge Monitoring Reports submitted by KPDES permitted facilities. The remaining enforcement program NOV’s count for the remaining 3% issued in FY2012.

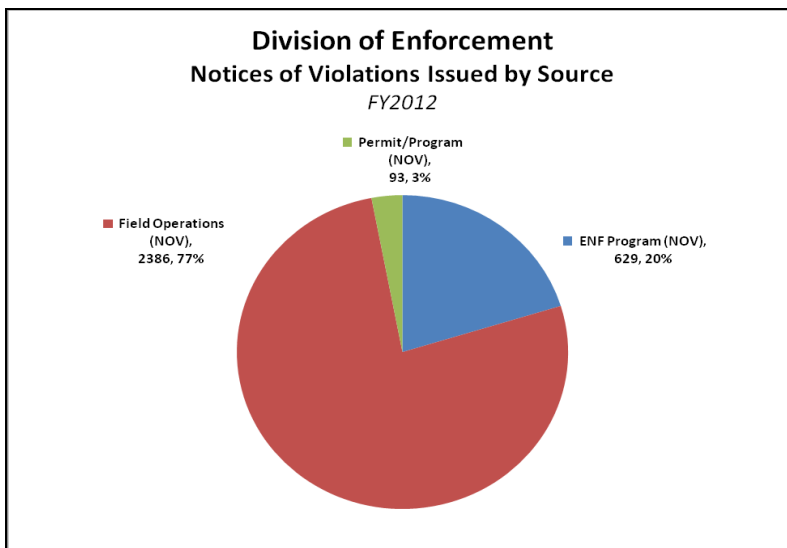


Figure 17 – FY2012 notices of violations issued by source

In FY2012, the Division of Enforcement issued 87% of its notifications based on the delegated activity of conducting compliance reviews of Discharge Monitoring Reports. The remaining 13% of notifications resulted from KDEP Central Office program referrals, the majority of which relate to Whole Effluent Toxicity violations and failing to renew KPDES permits.

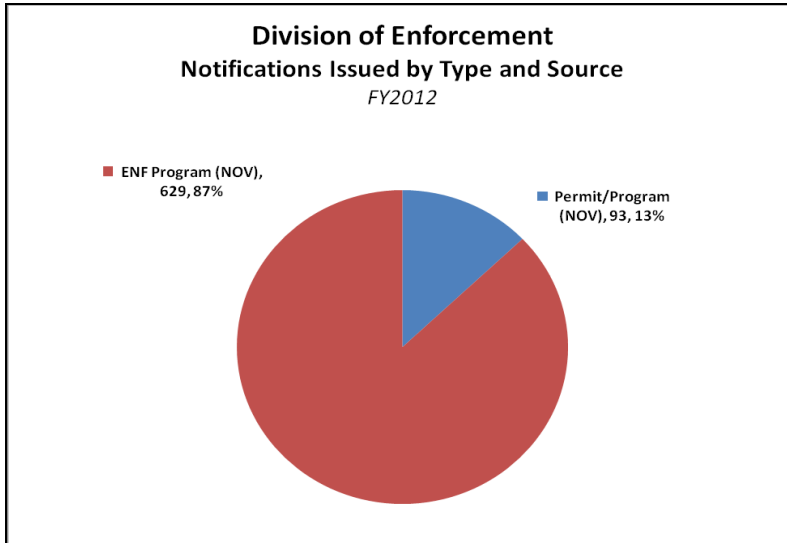


Figure 18 – FY2012 Division of Enforcement notifications issued by type and source

OTHER DIVISION ACTIVITY

Throughout FY2012, the Division of Enforcement has been very involved in compliance and enforcement issues related to the coal industry. The Division's work with this industry has included performing compliance determinations for KPDES self-monitoring data submitted on Discharge Monitoring Reports (DMRs), negotiation of civil enforcement settlements for cited violations, litigation support for the Cabinet's Office of General Counsel for several lawsuits involving the coal industry, and the development of new compliance and enforcement processes as regulatory roles between the Kentucky Department for Environmental Protection and the Kentucky Department for Natural Resources are adjusted.

The Division has taken on the primary responsibility for conducting compliance reviews of self-monitoring data that the coal industry reports on DMRs. In FY2012, the Division reviewed over 43,000 DMRs at 530 coal permits. This has resulted in the issuance of 436 Notices of Violation that cite nearly 1400 violations.

In FY2012, the Division received 51 civil enforcement case referrals. The Division generated 31 of these referrals for 18 coal companies based on DMR reviews. The Division received an additional 22 civil enforcement case referrals from the Division of Water's Compliance and Technical Assistance Branch for violations related to wastewater laboratory audit inspections and environmental releases.