

Fiscal Year
2011
Annual Report

Energy and Environment Cabinet
Department for Environmental Protection
Division of Enforcement
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Kentucky Division of Enforcement





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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 Department for Environmental Protection (DEP), 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, and the Compliance and Operations Branch. 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 DEP and the Cabinet. The Director's Office consists of a Director, currently vacant, an Assistant Director, who serves as the acting Director, and an Administrative Specialist, currently vacant.

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 ten Environmental Enforcement Specialists.

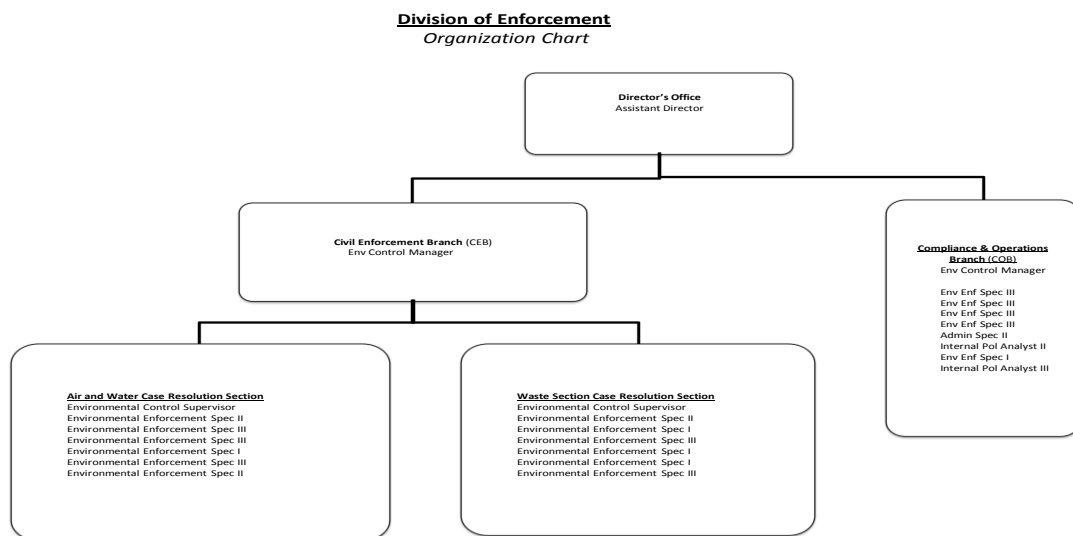


Figure 1 – Division of Enforcement organization chart

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. The Compliance and Operations Branch may refer cases to the Civil Enforcement Branch for formal enforcement action. Administrative support includes those functions necessary for the day-to-day operation of the Division: budget, accounts payable, supplies, inventory, vehicle maintenance, training, travel, personnel actions, etc. As of July 2012, the Compliance and Operations Branch consists of a branch manager, four Environmental Enforcement Specialists, 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 FY2011. The CEB Manager position remained vacant for the remainder of the fiscal year. One Environmental Enforcement Specialist position was filled in the COB and two Environmental Enforcement Specialist positions were filled in the CEB.

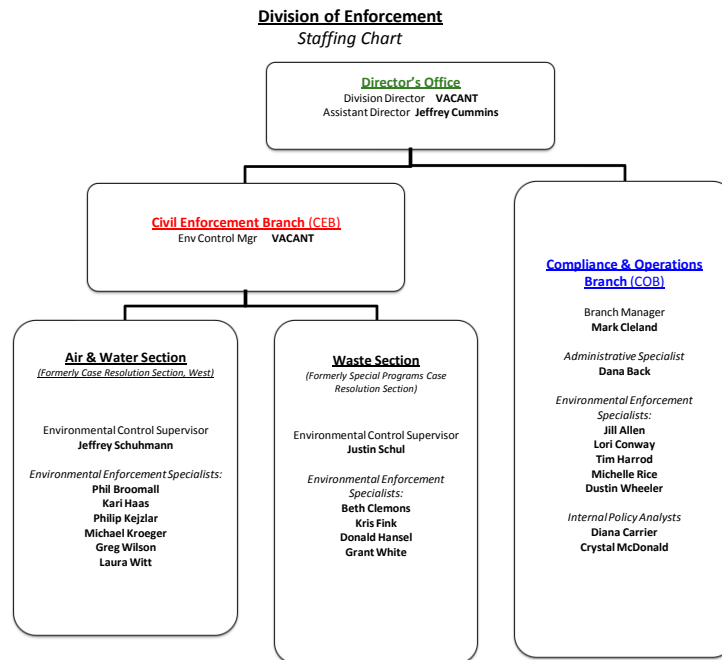


Figure 2 – Division of Enforcement of current staffing chart

CIVIL ENFORCEMENT BRANCH

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.

Enforcement Process

The Civil Enforcement Branch 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 Compliance and Operations Branch. An enforcement specialist is assigned to the 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 DEP 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 452 new cases referred to the Division in FY2011, 126 (28%) were referred from the Division for Waste Management, 193 (43%) were referred from the Division of Water, 67 (15%) were referred from the Division for Air Quality, and 64 (14%) were referred from within the Division of Enforcement.

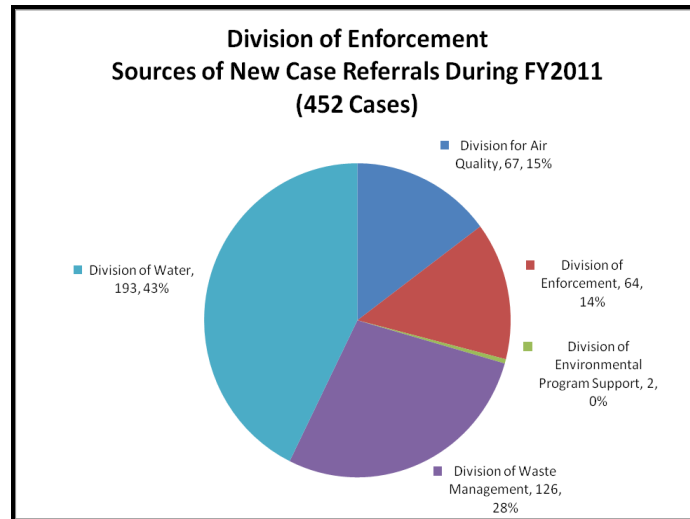


Figure 3 – Source of new enforcement cases by division in FY2011.

The Division of Enforcement received new case referrals in FY2011 for 9 of the 12 program areas. Of the 452 new case referrals, the Division received 225 (50%) wastewater cases and the underground storage tank (UST) program accounted for 83 cases (18%). The Division also received 69 (15%) air cases and 35 (8%) solid waste cases. The remaining 40 cases were from the hazardous waste, drinking water, water resources, environmental protection (Environmental Response Team), and water quality programs. The Division did not receive any referrals under the groundwater, asbestos (ASHERA), or the recycling and local assistance (RLA) programs.

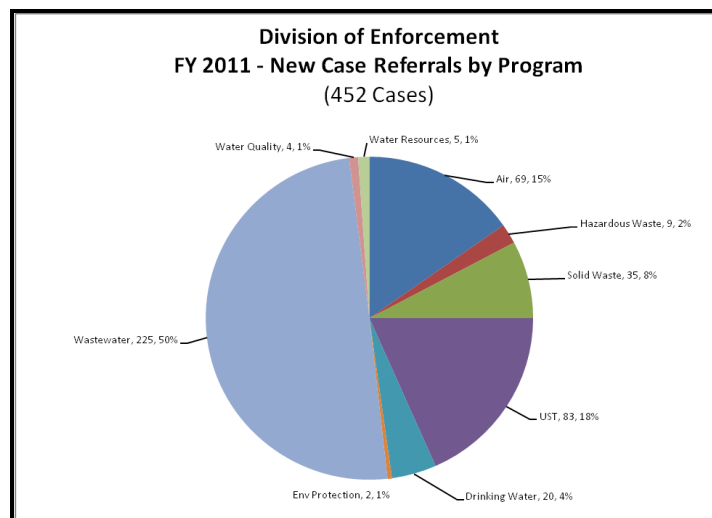


Figure 4 – Source of new enforcement cases by program in FY2011.

The Division of Enforcement receives its cases from the twelve regional offices, the Department’s central office programs, and the Division’s Compliance and Operations Branch. 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.

The Division for Air Quality referred 67 new enforcement cases to the Division of Enforcement in FY2011. The Paducah R.O. referred 21 cases (31%) in FY2011 and was the largest source for air enforcement cases. The Frankfort R.O. referred 11 enforcement cases (16%) in FY2011. The Bowling Green R.O. referred 9 enforcement cases (13%), and the Florence R.O. (11%) and London R.O. (10%) both referred 7 enforcement cases. The Owensboro R.O. and Ashland R.O. referred 5 and 6 cases, respectively, and Hazard R.O. referred 1 enforcement case (2%). All eight of DAQ’s regional office referred new cases to the Division in FY2011 (see Figure 4). 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.

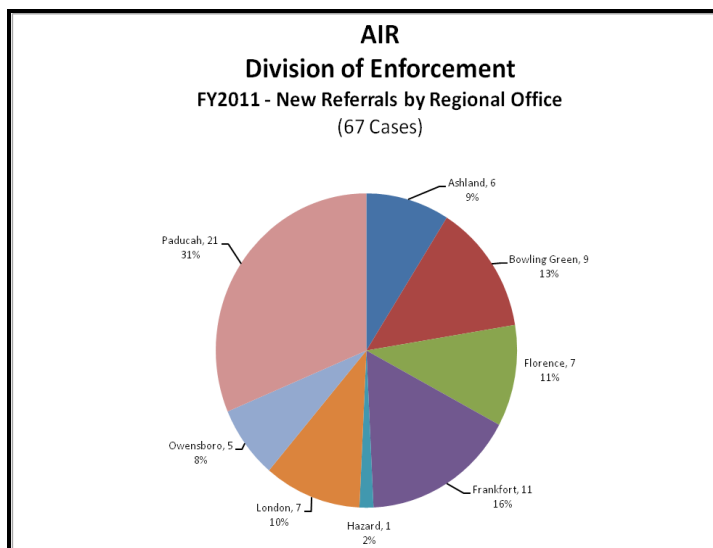


Figure 5 – FY2011 new case referrals from the Division for Air Quality by regional office

All ten of the Division for Waste Management’s regional offices referred enforcement cases to the Division in FY2011. The 126 cases referred by DWM show the Hazard R.O. and Louisville R.O. referred the most cases in FY2011 with 26 referrals each (28%), followed by Morehead R.O. with 19 new referrals (15%) and Columbia R.O. with 14 new referrals (7%). The Madisonville, Frankfort, London, Florence, Paducah, Bowling Green and Ashland Regional Offices make up the remaining 41 cases referred (31%).

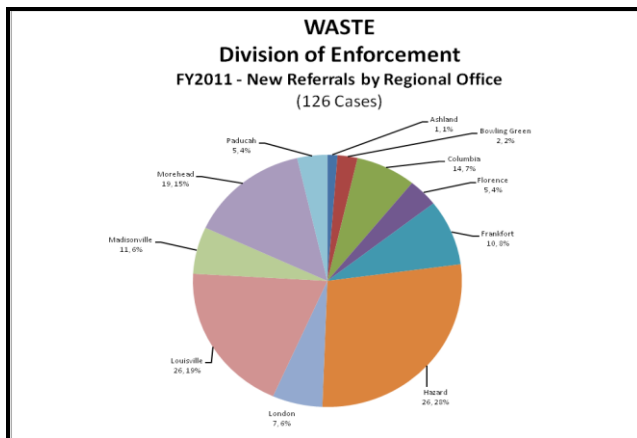


Figure 6 – FY2011 new case referrals from the Division for Waste Management by regional office.

All 10 of the Division of Water’s regional office referred cases to the Division of Enforcement in FY2011. Of the 179 water cases referred by DOW, with the Hazard R.O. being the largest source of 109 case referrals (61%) from DOW. The London R.O. referred 17 new cases (9%), the Columbia R.O. referred 15 new cases (8%) and Frankfort R.O. referred 14 new cases (8%). The remaining enforcement referrals were made by Louisville, Morehead, Florence, Paducah, Madisonville, and Bowling Green Regional Offices for a total of 24 (14%).

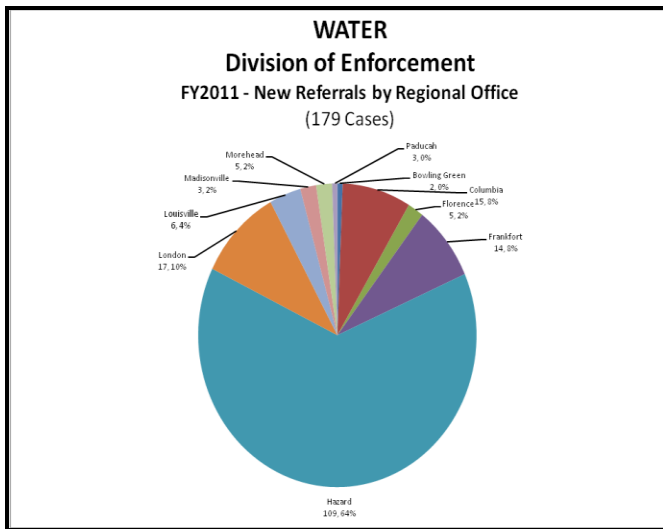


Figure 7 - FY2011 new case referrals from the Division of water by regional office.

ENFORCEMENT CASE ACTIVITY

The Division of Enforcement’s active cases in FY2011 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 FY2011 equaled 953 active cases with an average of 271 cases open for monitoring of executed settlement documents.

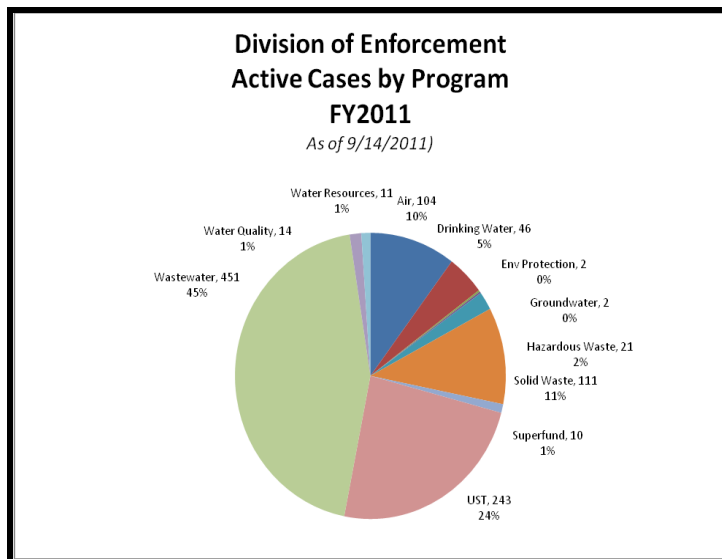


Figure 8 – Active cases by program at the end of FY2011

The Division averaged 14 unassigned cases throughout FY2011, caused by staff attrition in FY2011. The data trend of unassigned cases in any month have ranged from 2 to 14 as reflected in Figure 9.

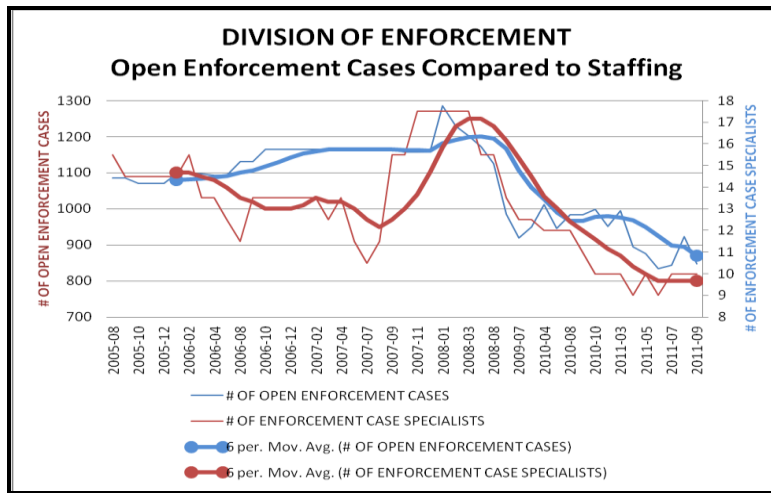


Figure 9 – Data and trends for # of open cases

The number of new cases to the number of cases closed (see Figure 10) show that the two statistics were relatively equal in FY2011. As a result, the number of active cases has remained between 800 and 1000. Although DENF encountered a reduction in staff, the number of open cases has declined due to an improved resolution process.

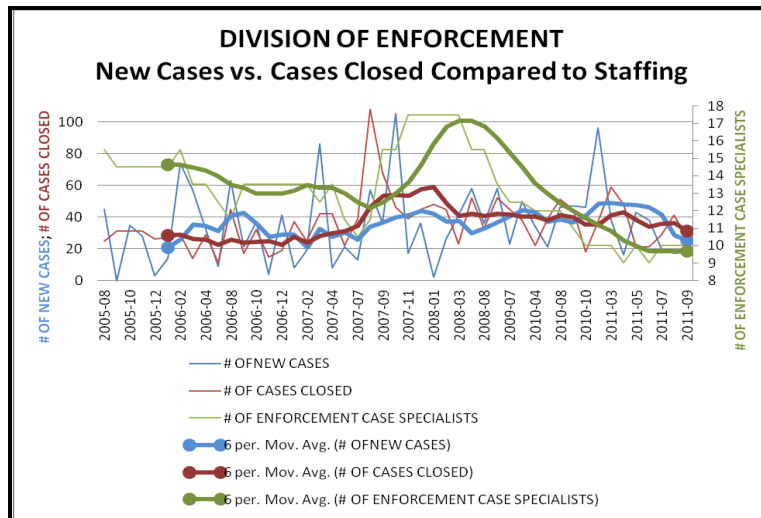


Figure 10 – Comparison of new cases and cases closed from FY2008 through FY2011

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 FY2011 shows that the number of executed case settlements has been relatively stable. The use of agreed orders and demand letters has been relatively equal.

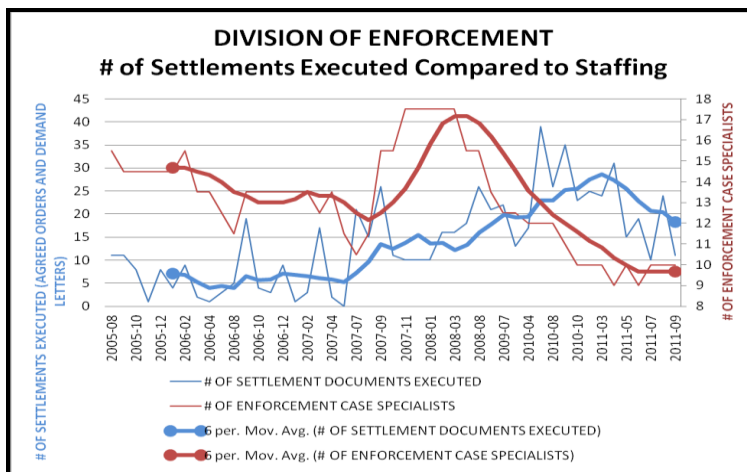


Figure 11 – Enforcement actions executed, broken out by total, agreed orders, and demand letters.

Data shows that the number of agreements-in-principle that have been reached. The number of agreed orders signed by the responsible party and routed for execution has remained stable in spite of declining staffing. In FY2011, DENF executed approximately 300 Agreed Orders and Demand Letters.

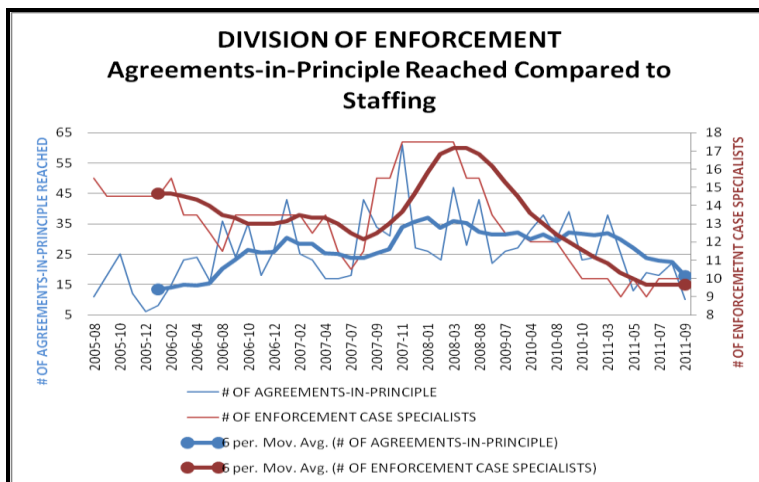


Figure 12 – Data trends for agreements-in-principle and agreed orders signed by the responsible party.

CIVIL PENALTIES

- In FY 2011, the Division of Enforcement collected \$2,170,971.11 in civil penalties. This is 7.9% above the average civil penalties collected of \$2,011,741.76 (FY 2000 through FY 2011) and a 43.0% increase over the \$1,518,533.11 of civil penalties collected in FY 2010.
- For the air programs, the Division collected \$1,014,009.04 in civil penalties in FY 2011. This is 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.
- 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.
- For the waste programs, 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.
- The Division collected \$244, 0890.70 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.

**DIVISION OF ENFORCEMENT
CIVIL PENALTY COLLECTIONS DATA BY FISCAL YEAR
July 1999 through October 2011**

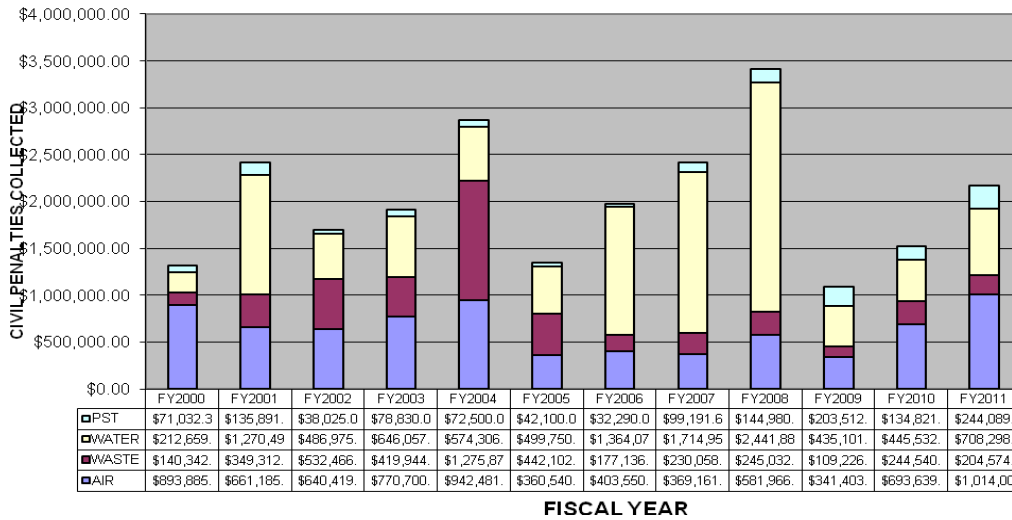


Figure 13 – Civil penalty collections for FY1999 through FY2011

SELECTED ENFORCEMENT CASES

- **Greater Paducah Economic Development Council (burn billboard).** Greater Paducah Economic Development Council (GPEDC) was cited for failing to conduct an asbestos survey, open burning of solid waste and CDD material, and for failing to submit a ten-day notification. A Demand Letter was issued to GPEDC for a \$6,000 civil penalty and GPEDC agreed to lease an "Open Burning Billboard" for 12 weeks. 
- **Phoenix Coal (includes Charolais Coal, Oxford Coal, and Crittenden Coal).** Phoenix Coal was cited for effluent and monitoring & reporting violations. A Demand Letter was issued requiring a \$200,000 civil penalty.
- **Whitley East Elementary School.** The Whitley East Elementary School was cited for failure to comply with its KPDES permit. The violation resulted from the unique characteristic of the influent and the flow rate. This issue was resolved with a Demand Letter in which Whitley East installed a lateral line system and ceased its discharge.
- **Alvaton Elementary School.** Alvaton Elementary School agreed to decommission its failing treatment unit and construct a sewer line extension to the nearest available trunk line.
- **Bullitt County Sewer District (BCSD).** BCSD owns and operates a wastewater treatment plant that provides sewage service to residents of Hillview in Bullitt County, Kentucky. After an unauthorized discharge, BCSD received notices of violation and subsequently signed an agreed order with DENF with the following remedials: 1.) Develop and implement a Corrective Actions Plan (CAP) to eliminate any sources of Inflow/Infiltration; 2.) Repair and/or replace defective lateral lines, illegal downspout connections, clean out traps, and illegal sump pumps; 3.) Notify the DOW Louisville Regional Office prior to initiating any remediation of a private source of Inflow/Infiltration; and 4.) Submit a quarterly report for each site. A \$46,000 civil penalty was incurred with \$44,000 to be allocated toward the implementation of a Supplemental Environmental Project (SEP).
- **Kelley Smith Scrapyard.** Kelley Smith Scrapyard was cited for petroleum releases and improper storage and accumulation of waste tires. Mr. Smith agreed to pay a \$3,000 penalty and install a screening fence around the scrapyard at a cost of \$12,000. Mr. Smith paid the penalty and provided a receipt and pictures to verify installation of the fence. 
- **Bluegrass Biodiesel.** Bluegrass Biodiesel produces biodiesel from used cooking oil. A release of approximately 700 gallons of used cooking oil occurred around December 15, 2009. The release impacted about 1.5 miles of an unnamed tributary to the Licking River. The facility was also cited for hazardous waste violations. Bluegrass Biodiesel worked with DWM Superfund branch to remediate the used cooking oil from the site. A demand letter was issued on March 11, 2011. The facility paid a \$23,000 civil penalty on March 31, 2011, along with cost recovery of \$7,888.97. 
- **Curry Oil.** Curry Oil was cited for failing to maintain monthly release detection records, failing to conduct line leak detector test, and failing to install automatic shutoff devices. Curry Oil entered into an Agreed Order for a \$10,000 civil penalty. The AO also included a performance penalty for any new violations that occur within the next two years.
- **Manslick Food Mart.** Manslick Food Mart was cited for failing to maintain release detection records, conduct annual line tightness test and failure to properly register the underground storage tanks (USTs). The owner entered into an Agreed Order assessing a \$5,000 civil penalty. 

- **Warren Oil – Maria Warren.** This case involved three facilities owned by Warren Oil. Warren Grocery was cited for failing to maintain monthly release detection records, install overfill protection, submit closure documentation for piping that was removed, and corrosion protection test. Warren Oil No. 4 was cited for failing to submit verification of the contents of the UST's and verification of overfill prevention. Jellico Creek Store was cited for failure to place tanks into proper temporary closure. The company entered into an Agreed Order assessing \$10,000 in civil penalties.
- **Hilltop Shell/Value Mart.** This facility was cited for failing to conduct internal lining test, failing to implement an approved method of release detection, failing to conduct a line tightness test, and failing to properly register the tank systems. The facility entered into an AO assessing \$10,726.40 in civil penalties.
- **Mac's Convenience Stores LLC.** Owned by Mac's Convenience Stores, this case encompasses six (6) facilities consisting of Dairy Marts and Circle K facilities. The facilities were cited for failure to report a suspected release and failing submit required documentation. The sites were brought back into compliance and the \$26,000 in civil penalties was assessed through a Demand Letter.
- **Kentucky Oil and Refining Co.** This case involves the three (3) Cardinal Country Stores. Kentucky Oil and Refining Co. was cited for failing to have corrosion protection for all tank systems including all associated product piping, failing to perform release detection for tanks and piping, failing to have overfill protection installed, and failing to place a single tank into proper temporary closure. The sites were brought back into compliance. Kentucky Oil and Refining Co. was assessed \$15,000 in civil penalties through a Demand Letter.
- **Hopkins County Regional Landfill.** Hopkins County Regional Landfill was cited for failing to operate according to their permit, failure to have a certified operator/manager on-site while receiving waste, failure to maintain daily cover reports, failure to have compactor and water truck operational while receiving waste, failure to spread waste within two (2) hours of receipt, failure to properly post correct operating information on all entrance signs, failure to conform to the posted hours of operation, failure to take appropriate steps to reduce disease vectors, litter, odor, and dust, failure to supervise the unloading of waste, failure to maintain daily cover, and failure to apply sufficient daily cover. Hopkins County Regional Landfill was immediately brought back into compliance and assessed an \$8,000 civil penalty through a Demand Letter.
- **Superway Inc.** This case encapsulates six (6) separate facilities consisting of Superway facilities for failure to submit corrosion protection results, integrity test results, tank tightness tests, monthly SIR reports, and submittal of outstanding tank fees for each site. The matter was set before the Franklin County Circuit Court who authorized the Cabinet to lock all of the gas dispersers located at all facilities until all said facilities are brought back into compliance. The Cabinet has also placed liens on the above listed properties to ensure it receives the \$89,581 in penalties and fines assessed.

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 DEP Central Office program staff. In FY2011, the Division of Enforcement issued 383 notifications, which represents 10% of the total notifications issued by the Department for Environmental Protection. The Division of Enforcement accomplishes this with 0.3% of total DEP staffing.

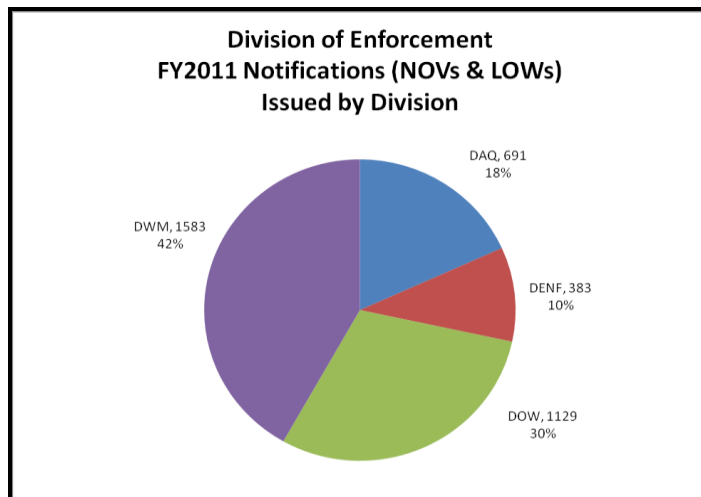


Figure 14 – FY2011 notifications issued (NOVs and LOWs) by Division

In **FY2010**, the largest number of notifications issued by DEP are in the underground storage tank program, where 1609 notifications (40%) were issued in FY2010. DEP issued 927 notifications (23%) or the wastewater program, 765 notifications (19%) for the air quality program, and 376 notifications (10%) for the solid waste program. However, in **FY2011**, the largest number of notifications issued by DEP was in the wastewater program with 1233 notifications (34%), with only 1177 notifications in the UST program (32%).

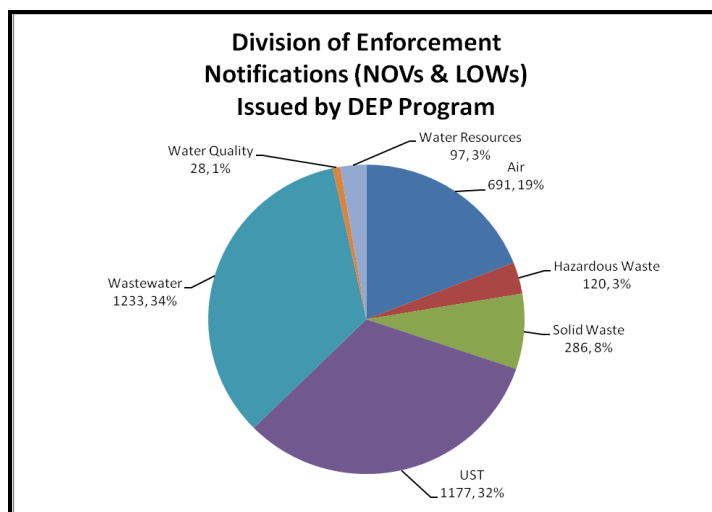


Figure 15 – FY2011 notifications issued by DEP by program (excluding drinking water compliance).

The majority (89%) of the notices of violations (NOVs) were issued by DEP’s field inspectors. The Division of Enforcement issued 129 NOVs (4%) in FY2011 through review of Discharge Monitoring Reports submitted by KPDES permitted facilities.

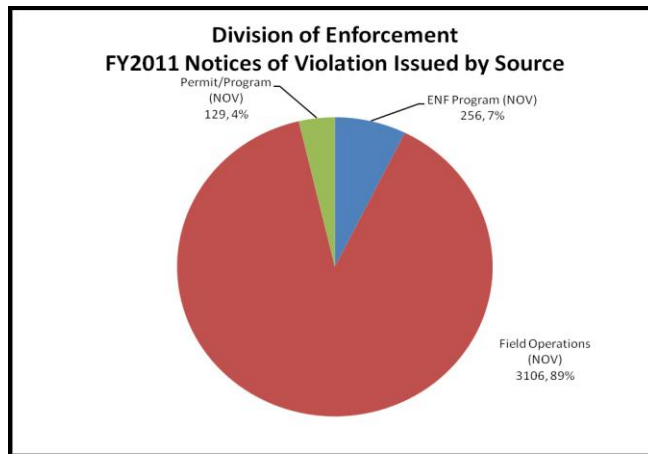


Figure 16 – FY2010 notices of violations issued by source.

In FY2011, the Division of Enforcement issued 34% of its notifications based on the delegated activity of conducting compliance reviews of Discharge Monitoring Reports. The remaining 66% of notifications resulted from DEP Central Office program referrals, the majority of which relate to Whole Effluent Toxicity violations and failing to renew KPDES permits.

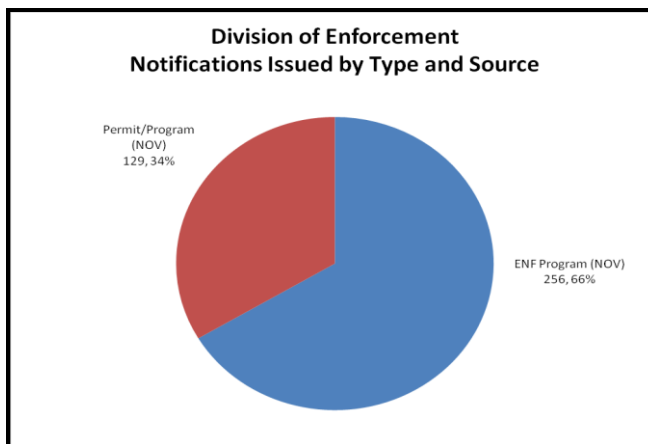


Figure 17 – FY2011 Division of Enforcement notifications issued by type and source.

OTHER DIVISION ACTIVITY

In FY2011, the Division of Enforcement (DENF) became increasingly involved in wastewater compliance and enforcement activities for coal mining.

In October 2010, a coalition of environmental groups served a Notice of Intent to Sue (NOI) in Federal Court for two coal companies based on a review of DMRs conducted by the environmental groups. To assess the verity of the allegations in the NOIs, the Division of Enforcement conducted reviews of the discharge monitoring reports submitted by the companies and the Division of Water (DOW) conducted performance audit inspections of the companies and their laboratories. DENF's and DOW's investigations discovered a number of problems both beyond and consistent with the allegations raised by the NOIs. In addition, DENF and DOW also discovered significant concerns with quality assurance practices of the coal mining operations and their contract laboratories in sampling, analyzing, and reporting effluent discharges to demonstrate compliance with their KPDES permits.

Because of the findings of the DENF and DOW investigations, KyDEP determined that investigation of these issues needed to be broadened. The Division of Enforcement and the Division of Water were directed to expand DMR compliance reviews and performance audit inspections throughout the coal mining industry. As a result of this enhanced oversight, KyDEP has either taken or is pursuing enforcement action against several coal mining operations for violations of KPDES permits.