Enforcement Overview

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Office of Compliance and Enforcement
Texas Commission on Environmental Quality
Environmental Trade Fair 2017





OCE Mission Statement

"The Office of Compliance and Enforcement is dedicated to ***protecting human health* and the *environment*** by ***ensuring compliance with state and federal regulations***. The office seeks to promote voluntary compliance through a comprehensive program of regional inspections, technical assistance, environmental monitoring, training and outreach. When enforcement is necessary, however, the office will take ***swift action that is fair, sensible and responsive to the needs of the citizens of Texas***."

What does that mean?

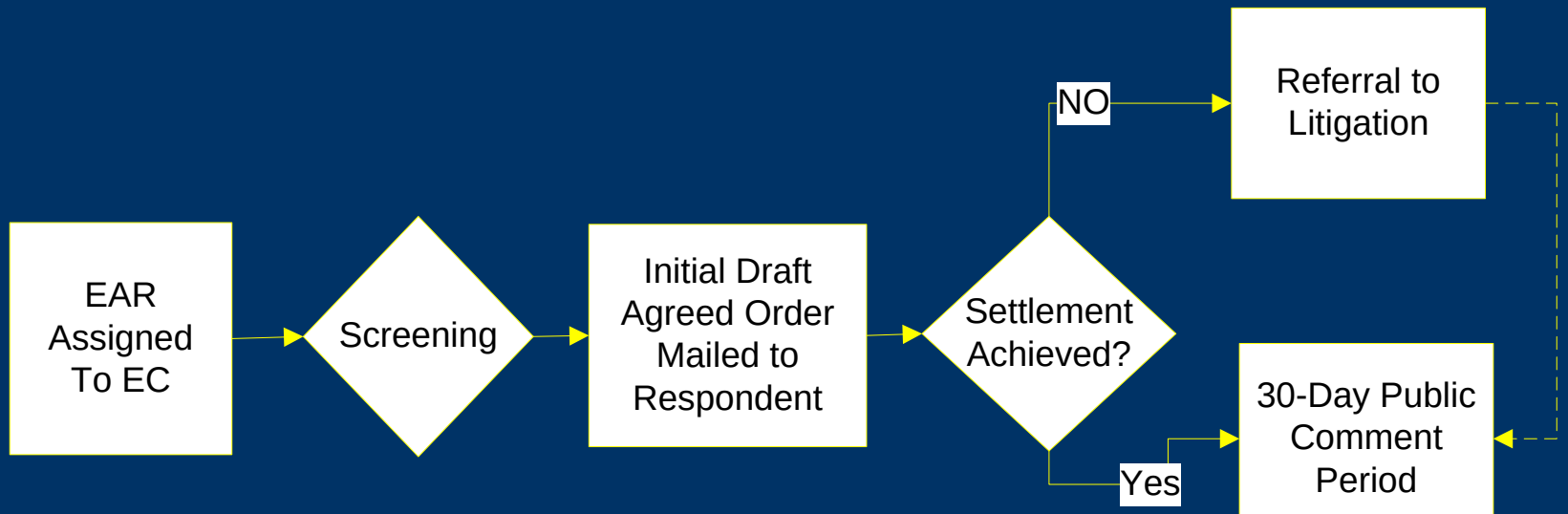
Swift Action

- Case assignment to mail out – 60 days
- Achieve settlement or refer to the Litigation Division – 60 days

Fair, Sensible, and Responsive

- Use of the Commission-approved Penalty Policies
- Use the facts of the case and the applicable rules
- Discuss the case with the Respondent

Enforcement Process



Definitions/Notes:

EC = Enforcement Coordinator
EAR = Enforcement Action Referral
ED = Executive Director

Expedited Enforcement Process Overview

- Within 14 days of assignment, Enforcement Action Referrals (EARs) are screened
- Enforcement documents are drafted and mailed within 60 days of assignment
- There are 60 days from after the proposed order is mailed to the Respondent reach a settlement agreement
- If settlement is reached, the case is scheduled for Commission or Executive Director Agenda
- If settlement is not reached, the case is referred to the Litigation Division (LD)

Screening

The Enforcement Coordinator (EC) will:

- Verify the correct Respondent name and Customer Reference Number/Regulated Entity Reference Number associations
- Contact the Respondent for information regarding the Notice of Enforcement
- Validate the violations contained in the referral
- Discuss specific corrective actions (what has and what needs to be completed)

The Respondent will receive…

Enforcement Documents:

- Cover letter with contact information and Financial Inability to Pay and Supplemental Environmental Project information (if applicable)
- Agreed Order (1660 or Findings)
- Penalty Calculation Worksheet (PCW)
- Compliance History report

EC will discuss the enforcement documents with the Respondent

Initial Proposed Agreed Order

Most enforcement actions will follow the expedited enforcement process and result in an Agreed Order

Agreed Orders

1. With a denial of liability
   - Referred to as a 1660 - The 74th Texas Legislature passed SB 1660 regarding Agreed Orders in 1995.
   - Includes a 20% deferral of the penalty
2. Without a denial of liability (Findings)
   - As defined by 30 Tex. Admin. Code §70.11
   - Does not include a 20% deferral

Penalty Calculation Worksheet

Penalties are assessed in accordance with the Commission's Penalty Policy

- Revision 2 Effective on September 1, 2002
- Revision 4 Effective on April 1, 2014

http://www.tceq.texas.gov/publications/rg/rg-253.html



Penalty Calculation Worksheet

Factors that affect the penalty:

- Major or minor source
- Nature, gravity, and duration of violation
- Compliance history
- Culpability
- Compliance status
- Economic benefit

Penalty Calculation Worksheet (PCW) – reflection of the Commission's Penalty Policy

Compliance History Report

The report will include:

- The Compliance History Person Classification
- Repeat Violator status
- Number of written notices of violation
- Number of final orders, court judgements, and consent decrees

https://www.tceq.texas.gov/enforcement/history/about.html

60 Day Settlement Period

Discussions between the TCEQ and the Respondent include:

- Additional information that can impact the proposed order
- Penalty calculation
- Need for a settlement conference
- Ability or willingness to pay the penalty
- Interest in Supplemental Environmental Projects (SEPs)
- Ability to comply with the technical requirements/ corrective actions and the applicable deadlines as written in the order
- Desire to settle the case and avoid litigation

60 Day Settlement Period

- Respondents are strongly encouraged to read and re-read the entire order.
- If the Respondent signs the order and pays the assessed penalty, then the Respondent is agreeing with the terms of the order.
- The Respondent is required to completely and timely fulfill the terms of the order.
- Additional enforcement actions including increased penalties may result if compliance is not achieved.

If We Have Achieved Settlement…

Notice of the Agreed Order is published in the *Texas Register* for a 30 day public comment period

Cases are scheduled for final approval

- Commission agenda
  - Final Assessed Penalties greater than $7,500
  - Agreed Orders without a denial of liability
  - Special circumstances
- Executive Director (ED) agenda
  - All other cases are delegated to the ED for adoption

Commission Agenda

- The Respondent will be contacted before the scheduled Commission agenda:
  - 19 days prior via letter
  - By the EC to determine status of the technical requirements
- At Commission agenda, the orders will be presented in a group to the Commissioners.
- If the Respondent wishes to speak at Commission agenda, please arrive early at TCEQ and sign-in.

What happens after the order is approved?

- The effective date of an Order is the date it is signed by the Commission.
- Order Compliance Team will track open technical requirements (TRs)
- Financial Administration Division will monitor remaining payments
- If the penalty has been paid and TRs have been completed, then the Respondent will receive a compliance letter
- The order is effective for five years

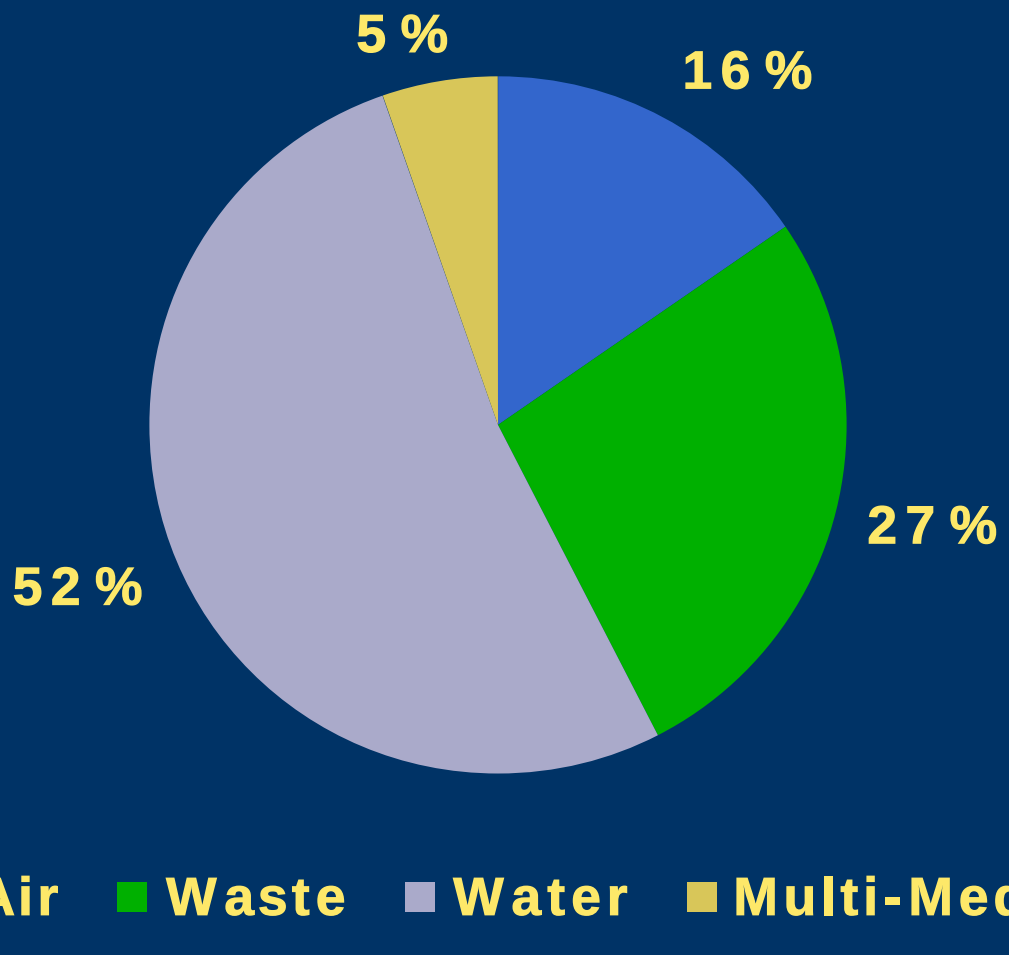
If Settlement Has Not Been Reached…

- Case is referred to LD within 70 days after the initial settlement offer was mailed
- Assigned LD attorney drafts an Executive Director's Preliminary Report and Petition
- If the Respondent does not respond, a Default Order is issued
- The Respondent may request an administrative hearing
- After the hearing, the State Office of Administrative Hearing judge presents a Proposal for Decision at Commission Agenda

Total Number of Administrative Orders Issued by Fiscal Year



Percent of Orders Issued by Media Type



If compliance is still not achieved…

- Referral to the Attorney General
- Referral to the EPA
- Criminal Prosecution
- Emergency Orders

Need Technical Assistance?

TCEQ's Small Business and Local Government Assistance Section (SBLGA) in the Environmental Assistance Division

- Provides Technical Assistance with understanding the rules and meeting requirements
- Can provide one-on-one help and resources

SBLGA Contact Info

Hotline 1-800-447-2827

Monday-Friday 8:00am-5:00pm

www.TexasEnviroHelp.org



The Take Away

Communicate with the assigned Enforcement Coordinator throughout the enforcement process and ask for help

(512)239-2545



Questions?

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Texas Environmental, Health, and Safety Audit Privilege Act

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Outline

- Guide to the Texas Environmental, Health, and Safety Audit Privilege Act
- Immunity
- Notice of Audit
  - Statistics
  - Common NOA Deficiencies
- Request for Extension
- Disclosure of Violations
  - Statistics
  - Common DOV Deficiencies
- Summary

Guide to Audit Privilege Act

- Historical Background
  - In 1995, 74th Texas Legislature passed House Bill 2473
    - Provided limited evidentiary privilege and immunity for conducting voluntary audits
    - Implement prompt corrective action

Guide to Audit Privilege Act

- Historical Background
  - In 1997, 75th Texas Legislature passed House Bill 3459
    - Changes did not significantly affect the way the Audit Privilege Act was implemented
    - Modified scope of audit privilege and immunity to remove references to criminal proceedings
    - Application of the Audit Privilege Act was more explicitly limited to State law

Guide to Audit Privilege Act

- Historical Background
  - In 2013, 83rd Texas Legislature passed Senate Bill 1300
    - Changes did not significantly affect the way the Audit Privilege Act was implemented
    - Added verbiage to the statute concerning audits that take place before the purchase of a regulated entity

Guide to Audit Privilege Act

- Guide to the Texas Environmental, Health, and Safety Audit Privilege Act (Audit Privilege Act)
  - Regulatory Guidance – 173
  - Revised November 2013

Guide to Audit Privilege Act

- Guidance for Submissions under Audit Privilege Act
  - Notice of Audit
  - Request for Extension
  - Disclosure of Violations

Guide to Audit Privilege Act

- Guidance for Privilege and Audit Privilege Act
- Guidance for Immunity and Audit Privilege Act
- Questions and Answers
- Appendix A - Audit Act
- Examples of Model Letters

Immunity

- Audit Privilege Act §10
  - Immunity from administrative or civil penalties
- Disclosed violations may be granted immunity from administrative or civil penalties
  - Proper notice of intent to conduct an audit
  - Prompt, voluntary disclosure of violations
  - Violations corrected in a reasonable amount of time

Notice of Audit (NOA)

- Audit Privilege Act §10(g)
- Notice must be provided of the intent to conduct an audit
- Notice shall specify
  - Facility or portion of the facility to be audited
  - Anticipated time the audit will begin
  - General scope of the audit

Notice of Audit (NOA)

- Submit to Office of Compliance and Enforcement (OCE) Deputy Director
- NOA should include
  - Customer/legal name of the entity conducting the audit
  - Regulated entity name
  - Physical/geographical location of the entity being audited
  - Description of the entity or portion of the entity being audited
  - Time and date of the initiation of the audit
  - General scope of the audit

Notice of Audit (NOA)

- Notice may provide notification of more than one scheduled audit at a time
- Notice for a pre-acquisition audit is not required

Notice of Pre-Acquisition Audit

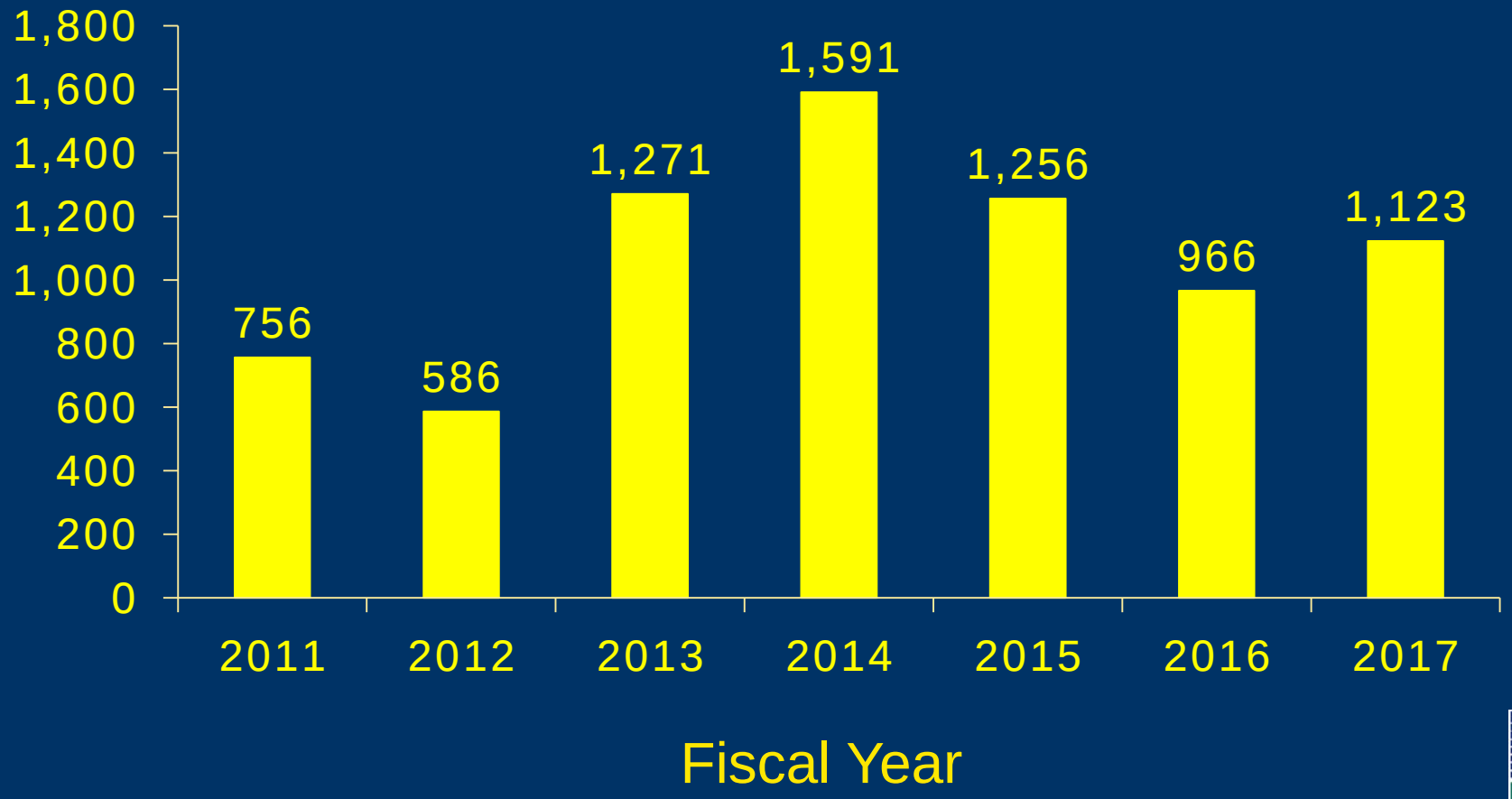
- Prospective buyers are not required to submit a NOA prior to the initiation of a pre-acquisition audit
  - Audit Privilege Act §10(g)

- If new owner wishes to continue the audit, must provide notice per Audit Privilege Act §10(g-1)
  - Within 45 days after the acquisition closing date
  - Proper NOA must be submitted to OCE Deputy Director
  - New owner must provide a certification statement

Notice of Pre-Acquisition Audit

- New owner must certify that before the acquisition closing date
  - New owner was not responsible for the scope of the environmental, health, or safety compliance being audited at the regulated entity or operation
  - New owner did not have the largest ownership share of the previous owner
  - Previous owner did not have the largest ownership share of the new owner
  - New owner and the previous owner did not have a common corporate parent or a common majority interest owner

Number of NOAs Received



Common NOA Deficiencies

- Postmark
  - NOA postmarked after environmental audit commenced
- Scope of audit outside TCEQ's delegated enforcement authority
- Specific site names/locations not provided

Common NOA Deficiencies

- Claim of Privilege or Confidentiality
  - NOAs are not privilege or confidential because it required to be submitted under the Under Act
  - NOAs are filed as public documents

Request for Extension

- Audit Privilege Act §4(e)
- Unless an extension is approved based on reasonable grounds, an audit must be completed within a reasonable time not to exceed six months after the date the audit is initiated or the acquisition closing date

Request for Extension

- Requests must be submitted to OCE Deputy Director
  - At least two weeks before six months of commencing the audit

- Requests for extensions submitted/postmarked after six months of commencing the self-audit investigation will be denied
  - Violations discovered after the end of the self-audit investigation are not subject to immunity under the Audit Privilege Act

Disclosure of Violations (DOV)

- Audit Privilege Act §10
- Person who makes a voluntary disclosure of a violation of an environmental law is immune from an administrative or civil penalty for the violation disclosed

Disclosure of Violations (DOV)

- Disclosure is voluntary, only if
  - Disclosure made promptly upon discovery
  - Disclosure made in writing via certified mail to OCE Deputy Director
  - Investigation of the violation was not initiated or the violation was not independently detected by the regulatory agency before disclosure was made via certified mail

Disclosure of Violations (DOV)

- Disclosure is voluntary, only if
  - Disclosure arises out of a voluntary environmental audit
  - Person who makes the disclosure initiates an appropriate effort to achieve compliance, pursues that effort with due diligence, and corrects the noncompliance within a reasonable time

Disclosure of Violations (DOV)

- Disclosure is voluntary, only if
  - Person making the disclosure cooperates with the regulatory agency of the issues identified in the disclosure
  - Violation did not result in injury or imminent and substantial risk of serious injury to one or more persons at the site or off-site substantial actual harm or imminent and substantial risk of harm to persons, property, or the environment

Disclosure of Violations (DOV)

- Voluntary DOV should include
  - Legal name of the entity that was audited
  - Reference the date of the relevant NOA
  - Date of initiation and completion of the audit
  - Affirmative assertion that a violation was discovered
  - Brief description of the violation
  - Date the violation was discovered
  - Duration of the violation
  - The status and schedule of proposed corrective measures

Disclosure of Pre-Acquisition Violations

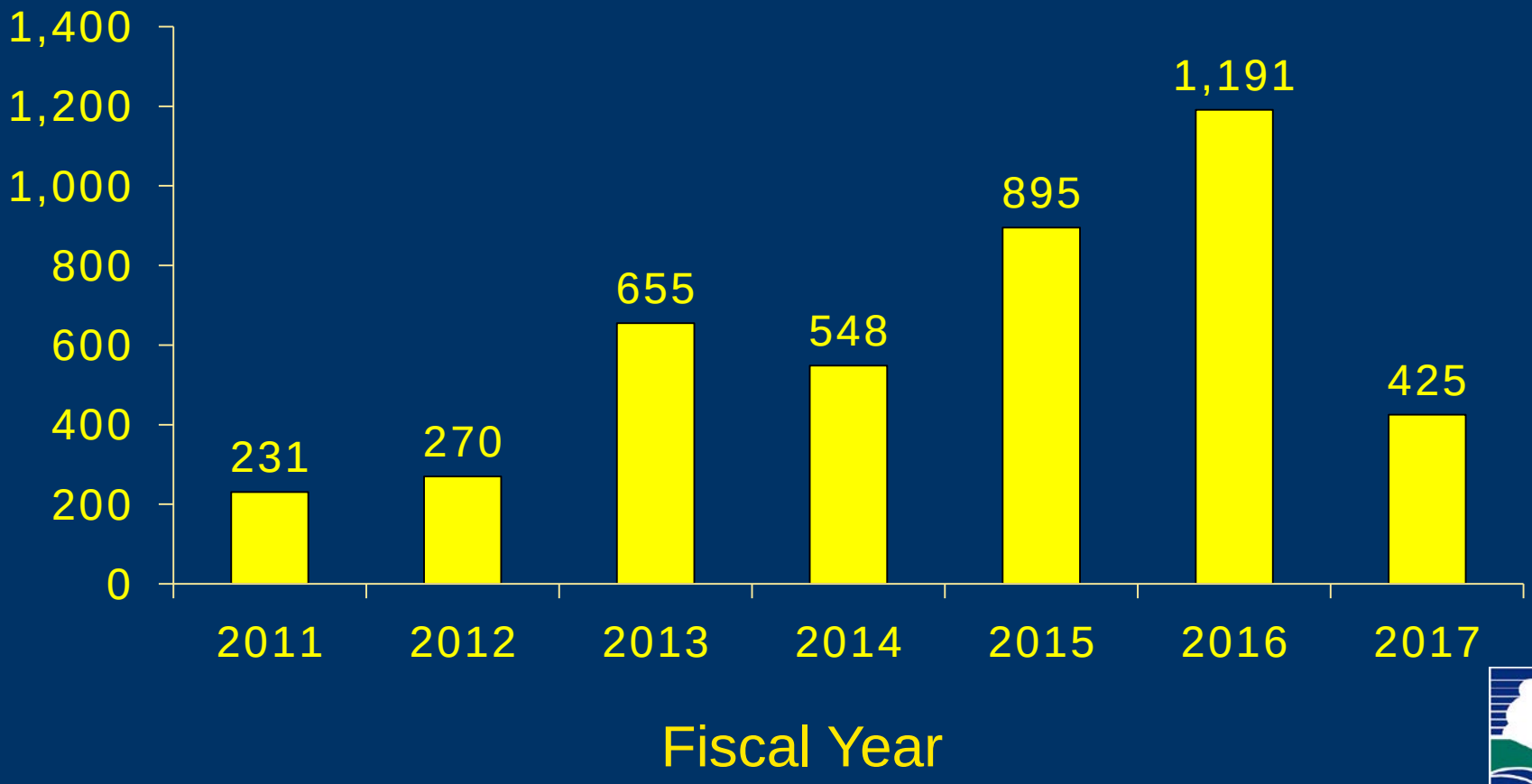
- New owner must submit a proper, voluntary DOV for all violations discovered during the pre-acquisition audit
  - Within 45 days of the acquisition closing date
  - Must provide a certification statement

- If the audit is continued, the violations must be disclosed promptly upon discovery

Disclosure of Pre-Acquisition Violations

- New owner must certify in the disclosure that before the acquisition closing date:
  - New owner was not responsible for the environmental, health, or safety compliance at the regulated entity or operation that is subject to the disclosure
  - New owner did not have the largest ownership share of the previous owner
  - Previous owner did not have the largest ownership share of the new owner
  - New owner and the previous owner did not have a common corporate parent or a common majority interest owner

Number of DOVs Received



Common DOV Deficiencies

- No affirmative assertion that violations were discovered
  - Issues, Potential Violations, Findings, etc.
- Violation not clearly described
- No specific/accurate regulatory citation (cannot cite 40 CFR § 60, Subpart B, or MACT HH, or JJJJ)

Common DOV Deficiencies

- No violation start dates or corrective action completion dates
- Sites were not included in the NOA
- Violation not independently detected
- Claim of privilege or confidentiality

Common DOV Deficiencies

- No explanation how the audit investigation exceeded a reasonable inquiry, for Title V permit holders
- When permit violations disclosed, no permit included
- Disclosed a violation of a rule where TCEQ does not have delegated enforcement authority

TCEQ Does Not Have Delegated Enforcement Authority

- General Land Office jurisdiction (Certain costal/offshore)
- Polychlorinated Biphenyl (PCBs)
- Asbestos
- Surface Impoundment Variance

TCEQ Does Not Have Delegated Enforcement Authority

- Department of Public Safety Jurisdiction (lab glass, etc.)
- Stratospheric Ozone
- City permits
- Railroad Commission jurisdiction (Certain oil and gas)

TCEQ Does Not Have Delegated Enforcement Authority

- EPA Programs
  - Spill Prevention Control and Countermeasure (SPCC)
  - Reformulated Gas (RFG)
  - Risk Management Plan (RMP)
  - Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
  - Emergency Planning and Community Right-to-Know Act (EPCRA)

TCEQ Does Not Have Delegated Enforcement Authority

- EPA Programs
  - Toxic Substance Control Act (TSCA)
  - Toxic Release Inventory (TRI)
  - Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)
  - Clean Water Act 404

Summary

- NOAs, DOVs, and any other Audit Privilege Act correspondence are not privileged or confidential
- Immunity from administrative or civil penalties is granted only if:
  - Proper NOA submitted
  - Prompt, voluntary DOV submitted via certified mail
  - Violations corrected within a reasonable amount of time
- Conducting audits under the Audit Privilege Act avails an owner to compliance history benefits

Points of Contact

Litigation Division Program Staff

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Audit Privilege Act Program Staff

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Questions

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