

## **Regulatory Compliance/Enforcement**

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# Overview

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- Enforcement Process
- Agency Inspections
- Internal Audits/Voluntary Disclosure
- Penalty Offsets

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## **ENFORCEMENT PROCESS**

## Oregon As Primary Enforcer

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- Oregon has independent and delegated authority under RCRA.
- Oregon initiates an action with a notice of violation and an administrative order assessing civil penalties.
- A recipient can appeal to the state administrative forum and then to the state court system.
- EPA may still concurrently initiate enforcement, or overfile.

# Enforcement Actions

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## Types:

- Civil Administrative
- Civil Judicial
- Criminal
- Citizen Suit

## Results:

- Penalties
- Costs or Damages
- Injunctive Relief
- Period of Supervision For Criminal – Imprisonment
- Suspension, Debarment, Disqualification – Government Contracts

# Penalties

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## Administrative and Civil:

- \$37,500/day per violation - Federal
- \$10,000/day per violation - Oregon

## Criminal (Federal):

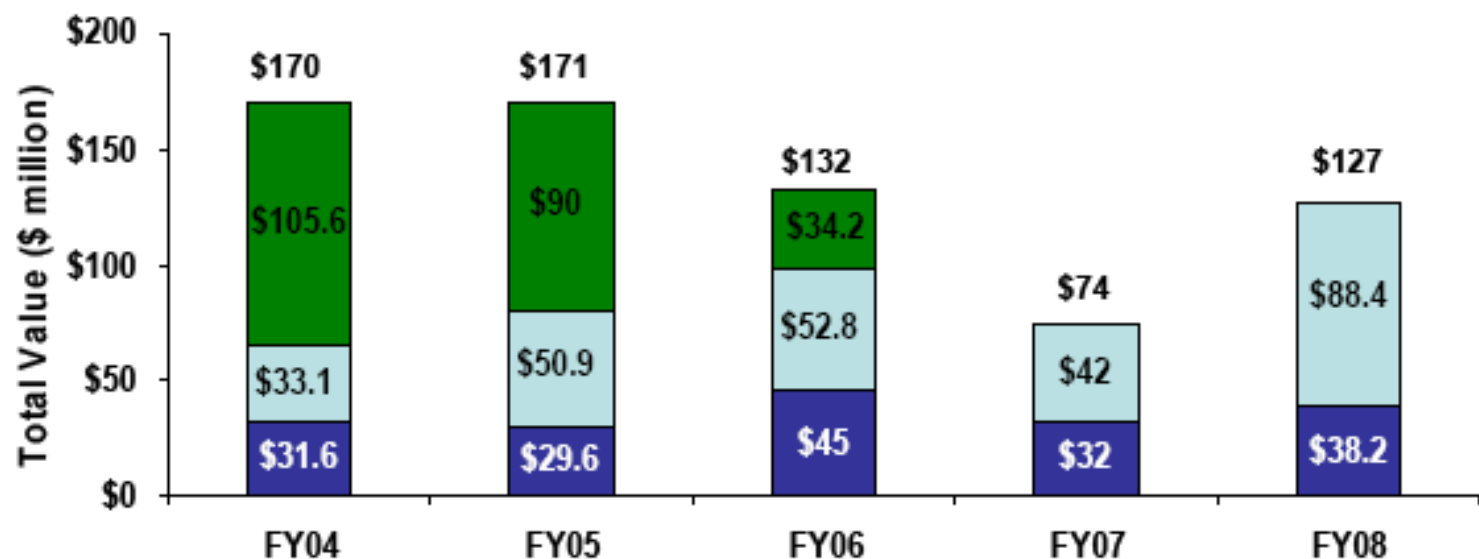
- Generally:
  - \$25,000/day – Negligent
  - \$50,000/day – Knowing
  - Up to 5 years imprisonment
- Alternative Fines for Knowing Endangerment:
  - \$250,000/day – Individuals
  - 15 years' imprisonment
  - \$500,000/day to \$1 million/violation – Corporations
- Possible Suspension, Debarment or Disqualification



## FY2008 Enforcement & Compliance Annual Results

### Results from Concluded EPA Enforcement Actions

Civil Penalties Assessed (\$ million)  
(Inflation Adjusted to FY 08 Dollars)



■ From Administrative Cases ■ From Civil Judicial Cases ■ From Default Judgement Cases

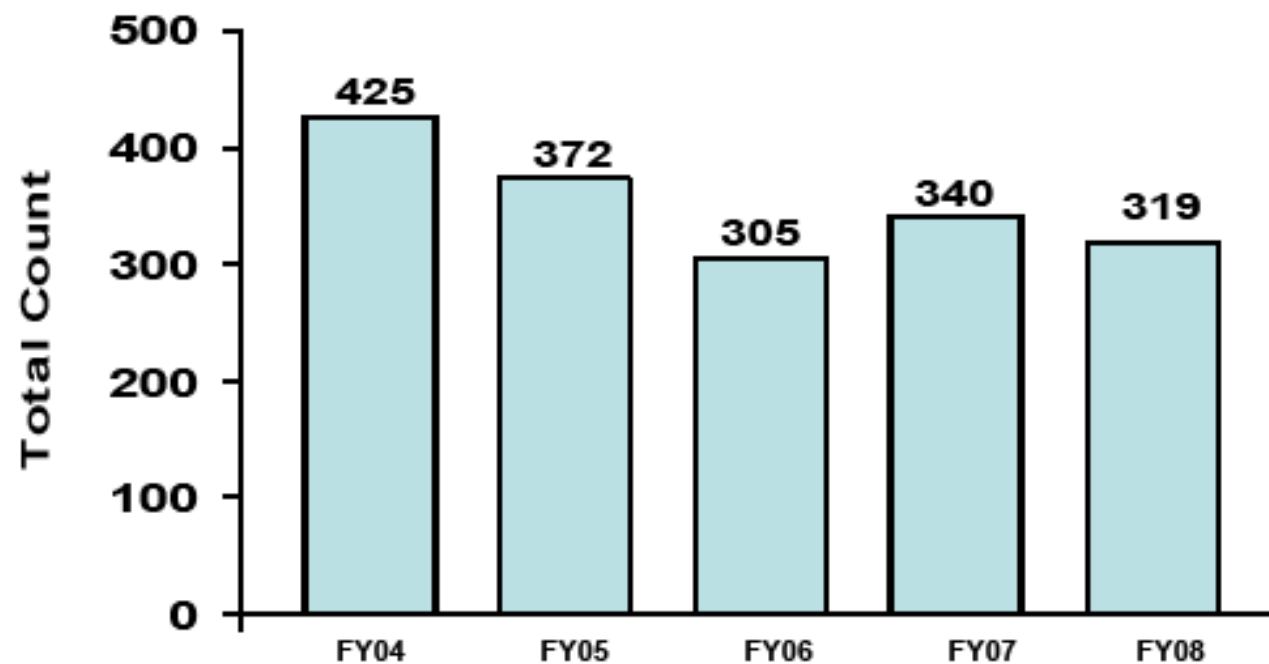
Note: All prior FY dollar figures in this report are adjusted to reflect the current value in FY 2008 dollars based on the monthly rate of inflation as determined by the U.S. Department of Labor Consumer Price Index for All Urban Consumers.

FY2008 Data Source: Integrated Compliance Information System (ICIS), October 11, 2008; data source for previous fiscal years: ICIS



## FY2008 Enforcement & Compliance Annual Results

### Criminal Enforcement Program Environmental Crime Cases Initiated



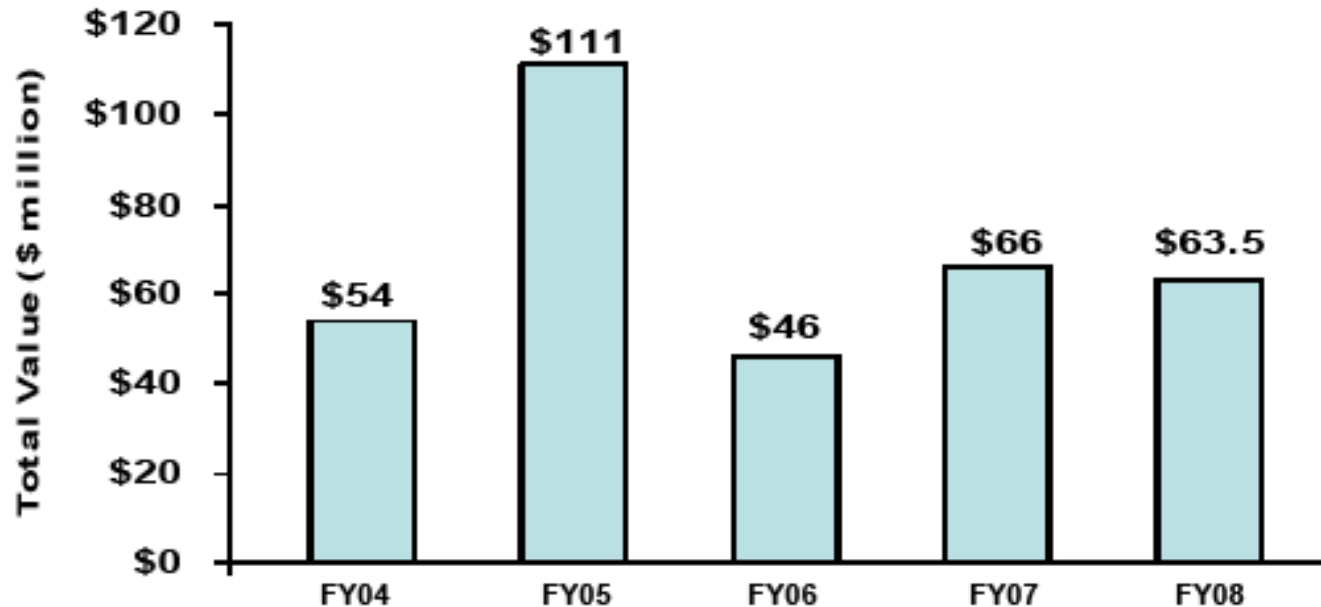
FY2008 Data Source: Criminal Case Reporting System, October 11, 2008; Source for previous years: annual Criminal Case Reporting System data





## FY2008 Enforcement & Compliance Annual Results Criminal Enforcement Program

Sentencing Results  
Value of Fines and Restitution  
(\$ million)  
*(Inflation Adjusted to FY 08 Dollars)*



Note: All prior FY dollar figures in this report are adjusted to reflect the current value in FY 2008 dollars based on the monthly rate of inflation as determined by the U.S. Department of Labor Consumer Price Index for All Urban Consumers.

FY2008 Data Source: Criminal Case Reporting System, October 11, 2008; Source for previous years: annual Criminal Case Reporting System data

## Actual Costs Of Environmental Noncompliance

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- Litigation costs & attorney fees
- Penalties/fines/damages
- Incarceration
- Employee morale costs
- Reputation and public relations costs
- Government overhead and oversight costs
- Lost business opportunity costs
- Lost government contracts

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## **AGENCY INSPECTIONS**

## Four Methods Of Access

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### 1. Consent

- Agents prefer: consenting may be advisable
- Note: Emergencies or “Plain View” access

### 2. Nonconsensual warrantless inspection

- Statute must authorize and define search’s scope
- “Highly regulated industry” – RCRA allows consent
- Might have consented in permit

In both, do ask “why us?”

## Four Methods Of Access (continued)

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### 3. Administrative inspection warrant

- Normally used when access is denied for routine compliance check or when agency receives "written substantiated complaint"
- Issued for less than probable cause to believe crime committed
- Requires a magistrate's (judge's) signature
- Restricted to inspecting or photographing only that listed in the inspection warrant
- May be used only to gather evidence for civil enforcement

## Four Methods Of Access (continued)

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### 4. Criminal search warrant

- Requires “probable cause” to believe that you or your business has committed a crime
- Magistrate's (judge's) signature required

This is not your neutral agency!

- Agency is at your door because it believes there has been or is on-going criminal activity
- Agency is seeking proof to convict a "wrongdoer"
- Agency is not your friend here

## If You Can Review The Warrant

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Determine its scope: are there any:

- limits on areas of access?
- limits on types of documents?
- limits on types of activities?

If agents exceed limits, do not obstruct but do advise them, with witnesses present, that they have exceeded the warrant's scope

If agents ask for consent to go beyond the warrant, do not give it without the appropriate high-level approval and all due consideration

Do not give any appearance of consent (not even just silence) if you are not consenting

Interfering with an agent carrying out a warrant can be a serious crime

## While The Inspectors Are Present

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GOAL: same record as agents/officers

Accompany each and every agent everywhere and take detailed notes of:

- which documents are taken from where
- which samples are taken from where
- which personnel are talked with

When possible, also take photos/ video of activities

Involve high-level personnel familiar with the need not to obstruct, but also to make detailed, accurate observations

Do not freely convey information



## If Any Documents Are Taken

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### For every document:

- without interfering, list each document or set of documents and list where it is taken from
- Try to reach agreement to retain copies, or even originals, so that your business can continue

### For confidential documents:

- If attorney-client documents are taken, note that fact and, in the presence of witnesses, state your objection
- If confidential business information is taken, tell agent, in presence of witnesses, that the documents are protected and cite authority

## If Physical Samples Are Taken

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- Through counsel, have an outside consultant take splits, or best approximation of a split.
- Note or request agent's or officer's methodology.
- Note promptly to agency the need for time-awareness.
  - samples must be tested within certain times.

## If Employees Are Asked Questions

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Distinguish between management and non-supervisory employees

Rules may differ:

- Management nearly always binds entity and can refuse to answer without attorney present.
- Non-supervisory employees can speak to investigators with NO employer representative present but employee can demand that employer or counsel be present.

Management/Employees are not required to speak with agents absent subpoena

# Survival Is Best Arranged In Advance: Prepare!

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Be "inspection ready"

- You cannot "prepare" when officers arrive

Regular environmental and other audit programs

Strong company policy on environmental performance and other compliance, including:

- prompt reporting of noncompliance events
- expeditious corrective actions when needed

Decide in advance to whom counsel will be provided

Manual and wallet cards with key points and numbers

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## **INTERNAL AUDITS/VOLUNTARY DISCLOSURE**

## Why Audit?

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- Compliance with environmental laws/regulations/internal procedures
- Assess the impact of emerging regulatory requirements
- Identify and reduce environmental compliance costs
- Reduce waste
- Identify potential problems and correct them
- Minimize risk of liability for civil and criminal sanctions
- Teach employees the connection between their jobs and environmental compliance
- Enhance your company's environmental reputation/improve your corporate image

# What Steps Are Involved In The Audit Process

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- Pre-audit planning
- Conducting the audit
- Audit closeout
- Post-audit process

# Must You Disclose The Findings Of The Audit?

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- Environmental permits may require disclosure of noncompliance (Discharge Monitoring Reports under NPDES permits, semi-annual and annual reports under Title V Permit)
- Federal and State regulations may also require disclosure of noncompliance (EPCRA reporting, past spill/release disclosure, RCRA)
- Voluntary Disclosure
  - EPA's Environmental Audit and Disclosure Policy
  - DEQ's Environmental Audit and Disclosure Policy
  - Oregon's Audit Privilege Law



## EPA's Voluntary Disclosure Policy

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- EPA's policy, "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations," ("Voluntary Disclosure Policy") first took effect on January 22, 1996 and was published in its final form effective May 11, 2000.
- The Voluntary Disclosure Policy articulates four incentives for self-policing and disclosure:
  - EPA will not seek gravity-based penalties for any violations if the regulated entity meets all of the conditions of the policy
  - EPA will reduce gravity-based penalties by 75% if violations are discovered other than through audits or a compliance management system but the company still meets all of the conditions of the policy

## EPA'S Voluntary Disclosure Policy (continued)

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- EPA will not recommend criminal prosecution if all the conditions are met provided the violation does not demonstrate or involve (i) a prevalent management philosophy or practice that concealed or condoned environmental violations or (ii) high-level corporate officials or manager's conscious involvement in, or willful blindness to, the violations.
- EPA agrees not to request or use an environmental audit report to initiate an investigation of the company, but reserves the right to seek the report if EPA believes a violation has occurred.

## EPA's Voluntary Disclosure Policy Conditions

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A company must meet all nine of the following conditions in order to reduce penalties or avoid criminal prosecution under this policy:

1. **Discovery of the Violation**: The violation must be discovered through “(a) an environmental audit, or (b) a compliance management system;
2. **Voluntary Discovery**: The discovery must be voluntary rather than pursuant to a legally required monitoring, sampling or auditing procedure;
3. **Prompt Disclosure**: The company must promptly and fully disclose the violation to EPA within 21 days of discovery;

## Voluntary Disclosure Policy Conditions (continued)

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4. **Independent of any Legal Action:** The discovery and disclosure must be made independent of any governmental inspection or investigation, whistleblower action, third-party law suit, or environmental citizen suit;
5. **Correction and Remediation:** The violation must be corrected within 60 days of discovery;
6. **Prevent Recurrence:** The company must agree in writing to take steps to prevent recurrence of the violation;

## Voluntary Disclosure Policy Conditions (continued)

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7. **No Repeat Violations**: The violation cannot have occurred previously within the past three years at the same facility or cannot be a part of a pattern of violations by the parent organization within the past five years;
8. **Certain Violations Excluded**: The violation did not (1) result in serious actual harm; (2) present an imminent and substantial endangerment to public health or the environment; or (3) violate the terms of any previous judicial or administrative order or consent decree;
9. **Cooperation**: The company must fully cooperate to provide information necessary to determine the applicability of the policy and any noncompliance.

## EPA's Interim Audit Policy for New Owners

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- Published August 1, 2008
- Gives New Owners additional incentives to self-report and disclose noncompliance discovered during due diligence
- Policy applies if:
  - Prior to the transaction, new owner did not cause and could not have prevented the violation
  - The violation was caused by the prior owner
  - The prior and new owner are not related
- Full penalty mitigation (including EB) for the period before acquisition date
- Within 9 months of the closing, disclose within 21 days of discovering the violation or within 45 days of closing, whichever is greater
- Modifies certain policy conditions

# DEQ's Environmental Audit And Disclosure Policy

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- Internal Management Directive on Self-Policing, Disclosure and Penalty Mitigation (June 5, 2005)
- Same 9 requirements as EPA's policy
- 100% gravity-based penalty reduction if all policy conditions are met
- 50% gravity-based penalty reduction if all policy conditions are met but violations not discovered through an environmental audit or compliance management system
- No criminal recommendations
- No routine request for the Environmental Audit Report

# Oregon's Audit Privilege Law

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## ORS § 468.963

- An environmental audit report is privileged and is inadmissible as evidence in any administrative or civil action.
- does not apply to criminal proceedings
- report must meet the statutory definition on an environment audit:
  - *environmental audit* means a voluntary, internal, and comprehensive evaluation of one or more facilities, or of an activity at one or more facilities, regulated by local, state, or federal environmental statutes, or of management systems related to such a facility or activity, that is designed to identify and prevent noncompliance and to improve compliance with those statutes.
- Not absolute privilege



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## **PENALTY OFFSETS**

# Supplemental Environmental Projects

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- EPA and DEQ allow penalty offsets through completion of Supplemental Environmental Projects (SEPs)
- EPA's Final Supplemental Environmental Projects Policy (April 10, 1998)
- DEQ's Internal Management Directive on Supplemental Environmental Projects (October 15, 2007)

## General Requirements

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- The SEP must improve, protect or reduce the risks to public health or environment
- The SEP must not be a project that the violator is otherwise legally obligated to perform
- EPA/DEQ cannot manage any SEP funds and the SEP will not be funded by federal/state loans, contracts or grants
- Generally, there must be a sufficient nexus between the violation and the SEP (not necessary for Oregon)
- Must fit into one of 8 categories

## Types of SEPs

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- **Public Health Protection:** monitoring or testing (including medical) to determine if anyone has experienced any health problems because of the violations.
- **Pollution Prevention:** preventing waste or pollution by making process changes.
- **Pollution Reduction:** reduce the amount and/or danger presented by some form of pollution, often by providing better treatment and disposal of the pollutant.
- **Environmental Restoration and Protection:** improving the condition of the land, air or water in the area damaged by the violation.
- **Emergency Planning and Preparedness:** providing assistance to responsible state or local emergency response or planning authorities. Cash donations are not generally acceptable but can purchase equipment or training.
- **Assessments and Audits:** completing an environmental audit to determine if the company is causing any other pollution problems or can run its operations better to avoid violations in the future.
- **Environmental Compliance Promotion:** providing training or technical support to other members of the regulated community to achieve environmental compliance.
- **Other Types of Projects:** project that have environmental merit but do not fit within one of the categories listed above.

## Penalty Mitigation

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- DEQ's directive allows for up to 80% mitigation of the final civil penalty usually at 1:1 ratio
- EPA's policy follows a formula:
  - Calculate full civil penalty without SEP (gravity component and economic benefit)
  - Calculate minimum civil penalty with SEP (greater of EB + 10% of the gravity or 25% of the gravity)
  - Determine SEP costs and mitigation percentage (generally 80%)
  - Final civil penalty is greater of (1) full civil penalty minus SEP mitigation amount or (2) minimum civil penalty

## Useful Documents And Web Sites

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### EPA's Audit Policy

- <http://www.epa.gov/compliance/incentives/auditing/auditpolicy.html>

### EPA Audit Policy for New Owners

- <http://www.epa.gov/compliance/incentives/auditing/newowners-incentives.html>

### EPA's SEP Policy

- <http://www.epa.gov/compliance/civil/seps/>

### Oregon Department of Environmental Quality, Compliance and Enforcement

- <http://www.deq.state.or.us/programs/enforcement/intro.htm>

## Questions?



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