

# SOUTH CAROLINA LAW UPDATE

## CAROLINA AIR POLLUTION CONTROL ASSOCIATION

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**WILLIAMS MULLEN**

## **Since October, 2018:**

**Part 1: Administrative  
Procedures:  
Rulemakings**

**Part 2: Private Actions**

**Part 3: Enforcement Trends**

# PART 1: RULEMAKINGS



## 1. Revitalize CISWI

- Federal 60.CCCC/DDDD [78 FR 9112 (Feb. 7, 2013)]
- State Regs [Sept. 26, 2014]
- 1<sup>st</sup> SIP Revision Request [Dec. 19, 2014]

**NOTE:** CISWI means Commercial or Industrial Solid Waste Incinerator.

## PART 1: RULEMAKINGS



- CISWI Reconsideration  
[81 FR 40956 (June 23, 2016)]
- Amendments in State Regs  
[August 25, 2017]
- 2<sup>nd</sup> SIP Revision Request  
[April 27, 2018]

**NOTE: No action by EPA to approve**

**SIP**

## QUESTION

**Is CISWI Federal Rule  
enforceable in South Carolina?**

## 2. General Permitting: Proposed Reg Changes



[43 SR, Issue 1, P. 8 (Jan. 25, 2019)]

## General Permitting

**(1) Adds “and sealed” to Applications**

**(2) “Name used to identify the facility...”**

- Replaces “owner or operator”

### **(3) “... at sole discretion of [DHEC]”:**

- General Permits (even Synthetic Minors or Conditional Major)
- Registration Permits if not requested.



## QUESTION: What about...

- New APC Technologies?
- Dis-Similar sources?
- Innovation?

**(4) “... grant shall be final agency action for... judicial review”:**

- General Permits (or Conditional Major)
- Registration Permits

## **(5) New Posting Language:**

- “posting to a public website”
- Not “[DHEC] website”

## **(6) Stack Tests “specified by applicable regulation”:**

- Rates
- Notifications

**(7) “Non-routine maintenance [defined for clarification]”?**

**QUESTION:** What does that mean?

### **3. 112(r) Amendments Adopted**

**[43 SR, Issue 1, p. 38 (Jan. 25, 2019)]**

#### **(1) Coordinate Annually**

**[68.93(a)]**

- LEPC – RMP and “requested” information
- Request meeting
- Documents : names, dates,

## **(2) Amend Procedures: “Accidental Release”**

- Notify LEPC, State, Federal
- Update: “Changes to source” or “new information”

## **(3) New Incident Information:**

- Time, Location
- Chronology
- Substance
- Factors contributing

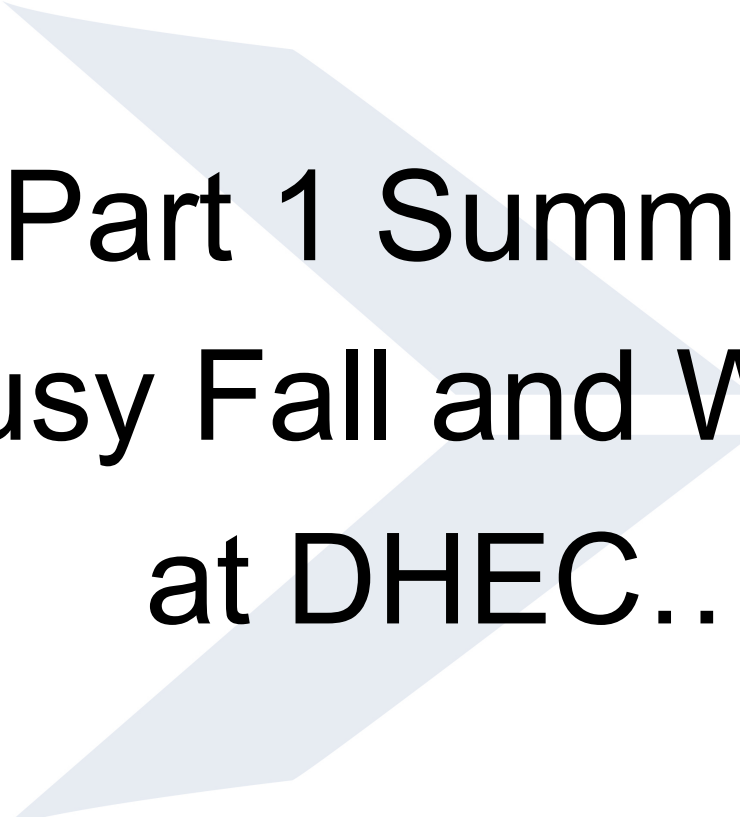


## (4) Future Requirements

March 15, 2021: 3<sup>rd</sup> Part Audits

- Cause Analysis
- Technology
- Exercise

March 14, 2022: Rev. RMP



## Part 1 Summary Busy Fall and Winter at DHEC...

# Recent Case Doctrines



1. Procedural
2. Torts

### “Sanitary Board Doctrine”

EPA may refuse to follow its own guidance, if new guidance:

- History of use
- Discussed with applicant
- Publishes preference

**QUESTION:** What guidance governs?

## PART 2: PRIVATE ACTIONS



**NOTE:** “[When EPA] clearly states... its comments do not constitute approval... they do not...”

[Sanitary Board v. EPA, 918 F. 3<sup>rd</sup> 324 (4<sup>th</sup> Cir. March 12, 2019)]

## PART 2: PRIVATE ACTIONS



### **“Pruitt WOTUS Rulemaking Doctrine”**

**An agency may not simply “suspend rules”:**

- “Prevents any discussion”
- “Few weeks” to comment
- “Content restriction”

**NOTE:** Suspension= Rulemaking

[SCCCL v. Pruitt, 318 F. Supp. 3d. 959

(D.C.S.C. 2018)]

## PART 2: PRIVATE ACTIONS

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### “Chem-Nuclear System Doctrines”

1. Deference: Interpretation of statute or regulation by Department

#### Exceptions

- “Plain language”
- Interpretation “changed within same litigation”

**NOTE:** Attorneys admitted at oral argument rainfall is covered in migration, but brief did not.

### 2. “Minimize” means...

Reduce to the smallest possible amount, extent, size, or degree.

BUT... Does not mean “prevent.”



## PART 2: PRIVATE ACTIONS



### 3. Burden of Proof:

Party asserting the affirmative issue at the administrative proceeding has the burden

**NOTE:** Shifts to “Appellant” on Appeal

[Sierra Club vs. Chem-Nuclear, App.

Case No. 2015-001915 (March 27,

2019)]

# “Harbor Freight Standing Doctrine”

“Standing” Requires:

1. “Injury-in –fact”
  - Concrete particularized
  - Actual/Imminent
2. Causal Connection:
  - Injury and conduct
3. “Likely”

## PART 2: PRIVATE ACTIONS



**Alleging Mere Violation of CAA is not sufficient:**

“Particular”: Must affect plaintiff

“Concrete”: De factor exists


**NOTE:** Alleged lack of warranty may affect the environment in the future.

[S.C. Clean Air Initiative v. Harbor Freight Tools, CA No. 7:16-1631-TMC (5-16-17)]



# Case Doctrine

# New information...

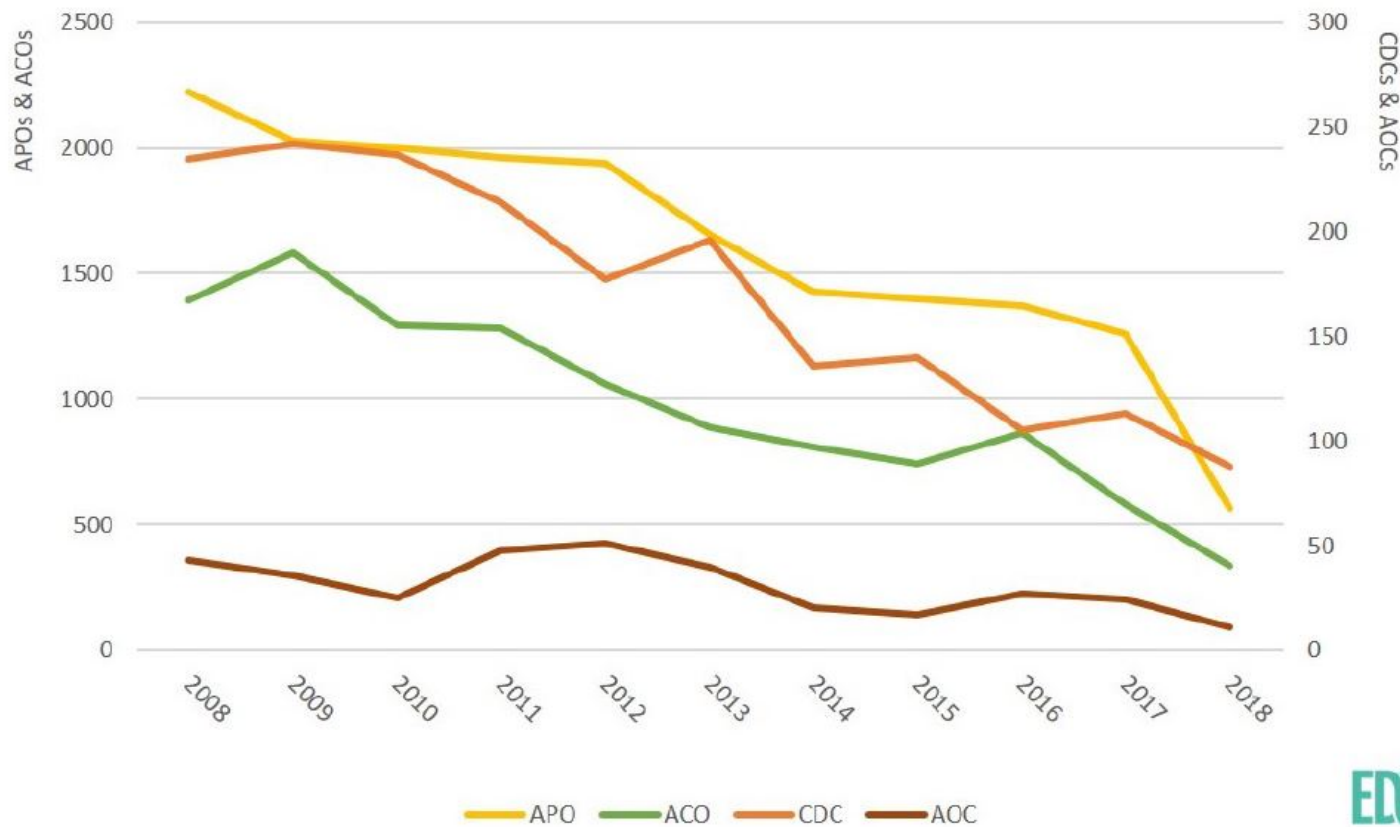


**DHEC Enforcement  
Trends can be Valuable  
Insight...**

# PART 3: ENFORCEMENT TRENDS



Number of Cases Entered for Major Judicial and Administrative Enforcement Actions at EPA, 2008-2018



# PART 3: ENFORCEMENT TRENDS



## Accelerating Decline in EPA Enforcement Actions

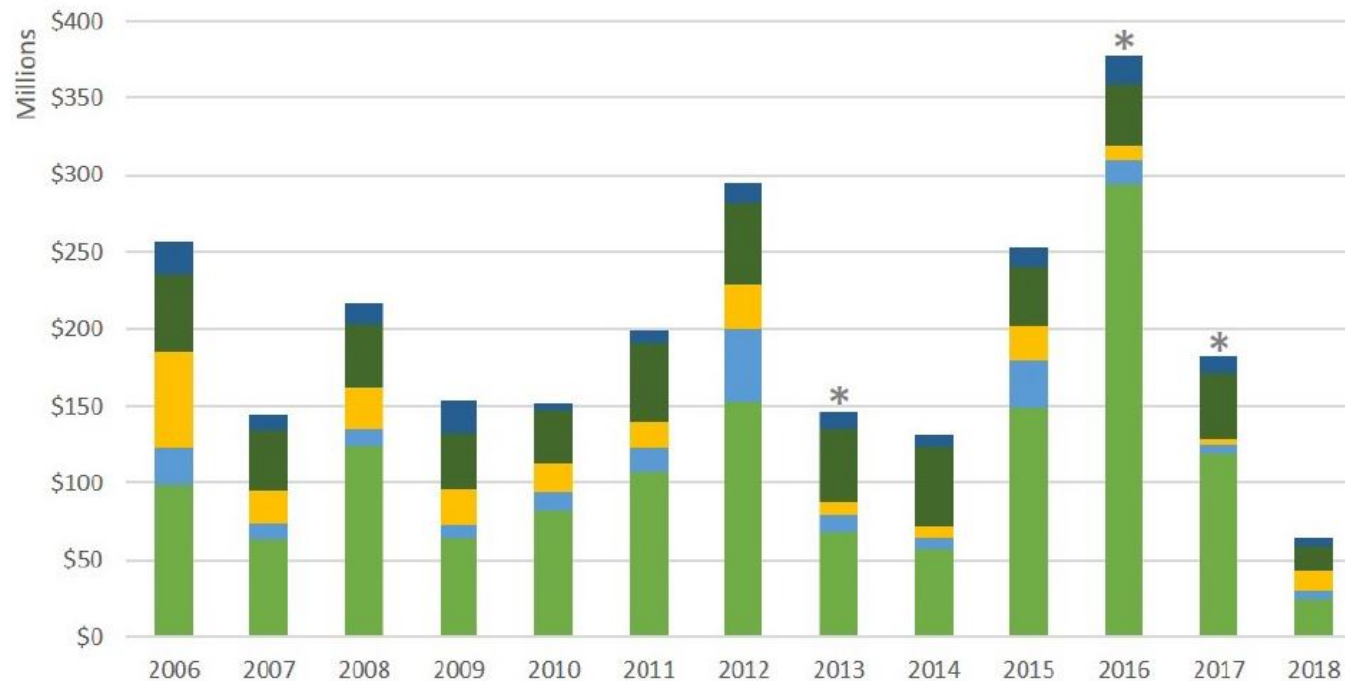
Enforcement Action	Average Annual Percent Change, FY 2008 to FY 2017	Range of Annual Percent Change, FY 2008 to FY 2017	Percent Change, FY 2017 to FY 2018
Judicial Consent Decrees or Court Orders	-7	-31 to +11	-22
Administrative Penalty Orders	-6	-15 to -1	-55
Administrative Compliance Orders	-8	-33 to +17	-42
Administrative Orders for Cost Compliance	+1	-50 to +92	-54



# PART 3: ENFORCEMENT TRENDS



Penalties and SEP Costs Resulting from EPA's Enforcement Actions  
(2009 Dollars), 2006-2018



\* For clarity, this data is presented without the huge federal judicial penalties for BP (in 2009 dollars: \$938 million in 2013; \$4.95 billion in 2016) and Volkswagen (in 2009 dollars: \$1.28 billion in 2017).

■ Judicial (Federal) ■ Judicial (State) ■ SEP (Judicial) ■ Administrative ■ SEP (Administrative)





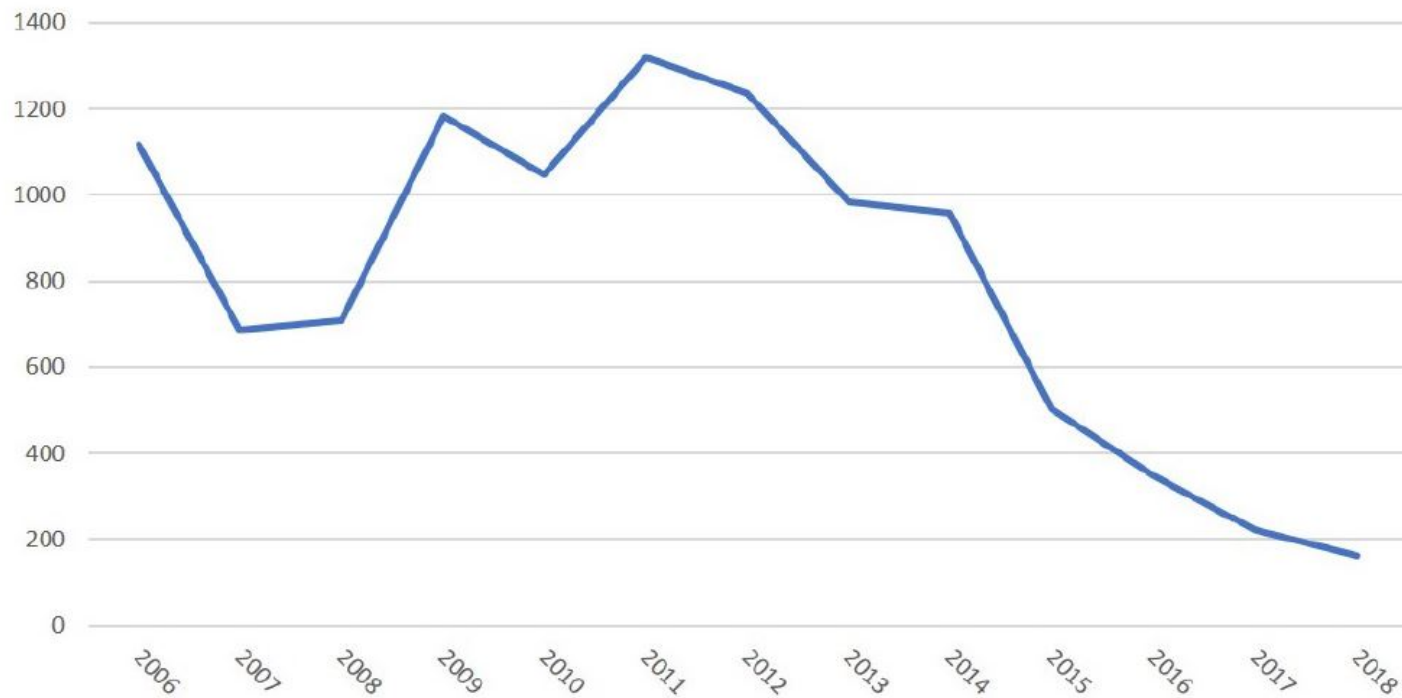



**Informal Actions to bring  
compliance... way down.**

# PART 3: ENFORCEMENT TRENDS



EPA's Informal Enforcement Actions, 2006-2018



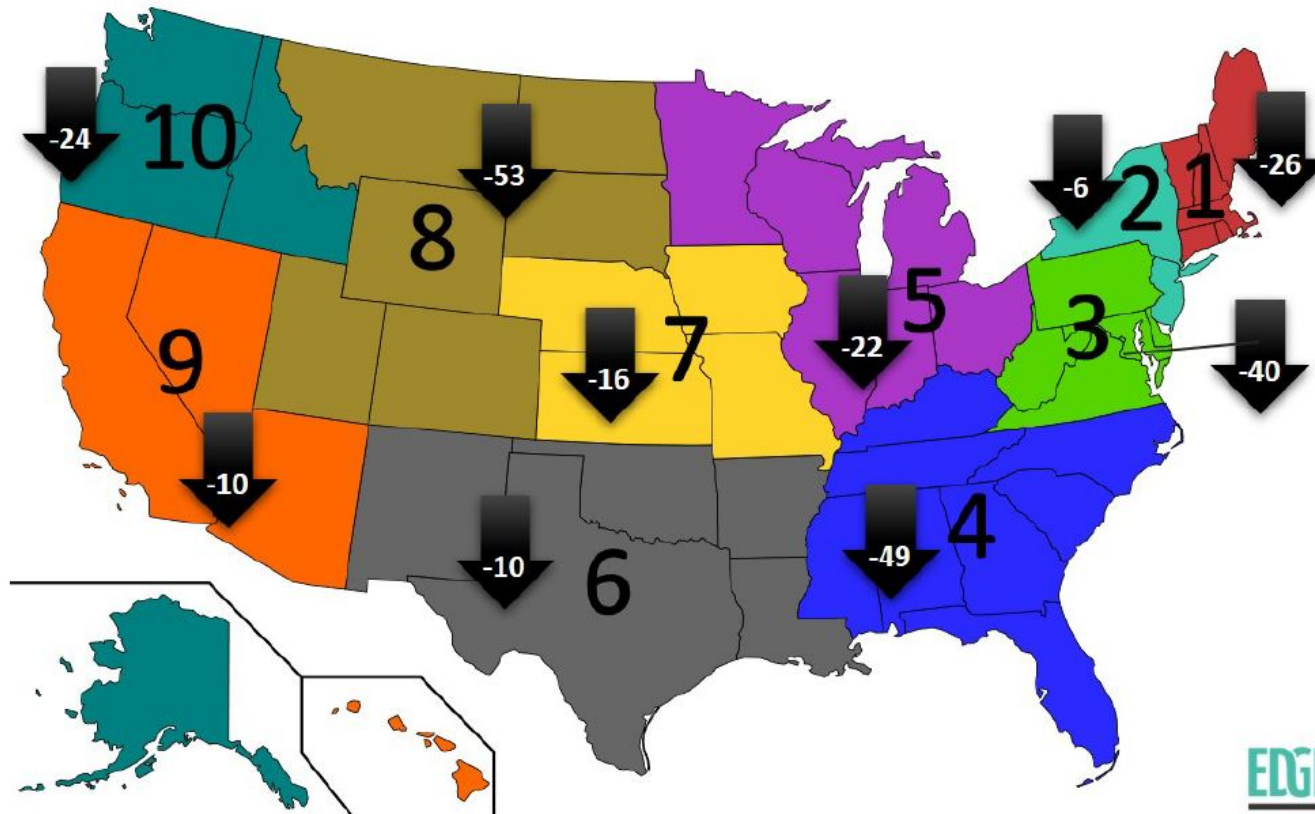


**Even Region 4 has taken a  
step back...**

# PART 3: ENFORCEMENT TRENDS



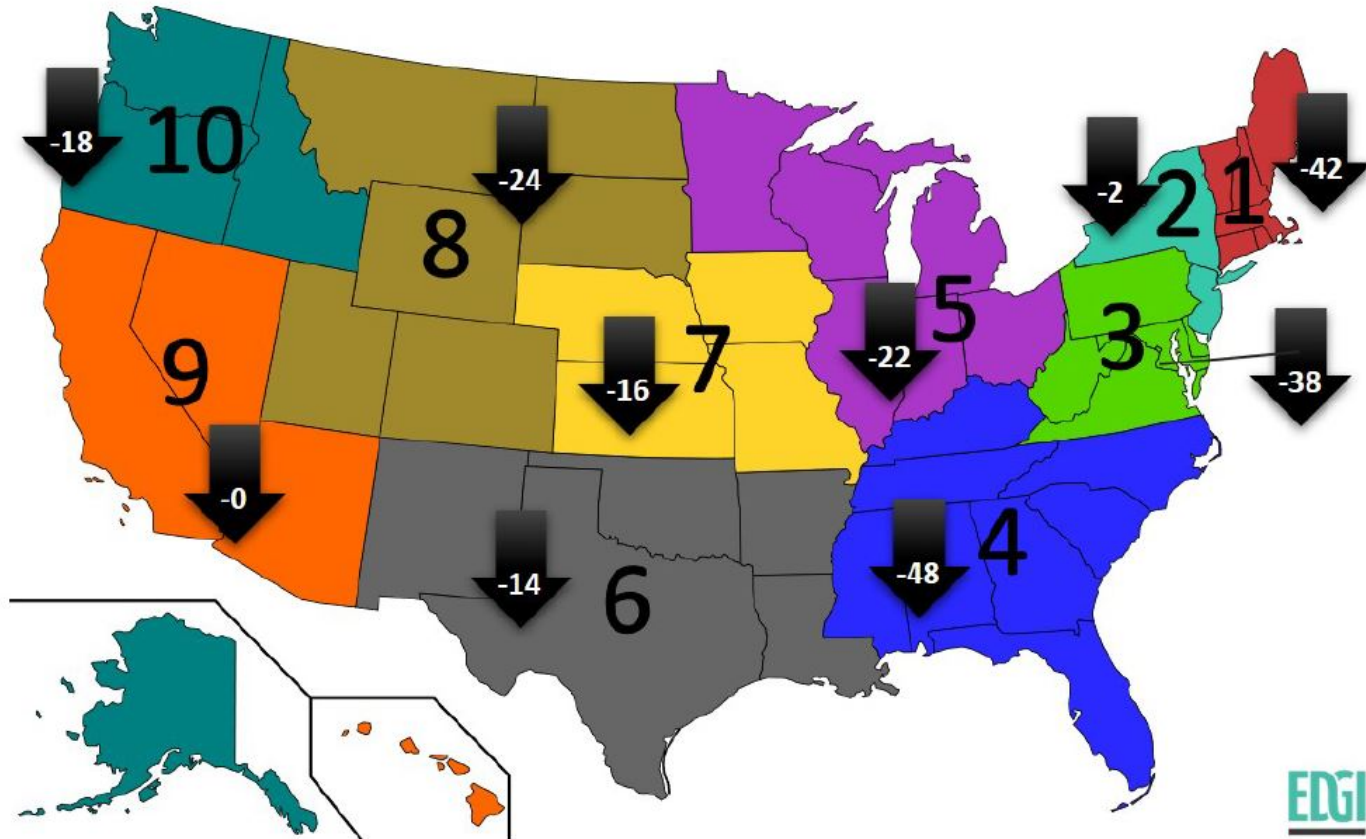
Percentage Decline in Civil Enforcement Cases Initiations by EPA Region,  
Midyear FY 2017 to Midyear FY 2018



# PART 3: ENFORCEMENT TRENDS



Percentage Decline in Civil Enforcement Cases Conclusions by EPA Region,  
Midyear FY 2017 to Midyear FY 2018



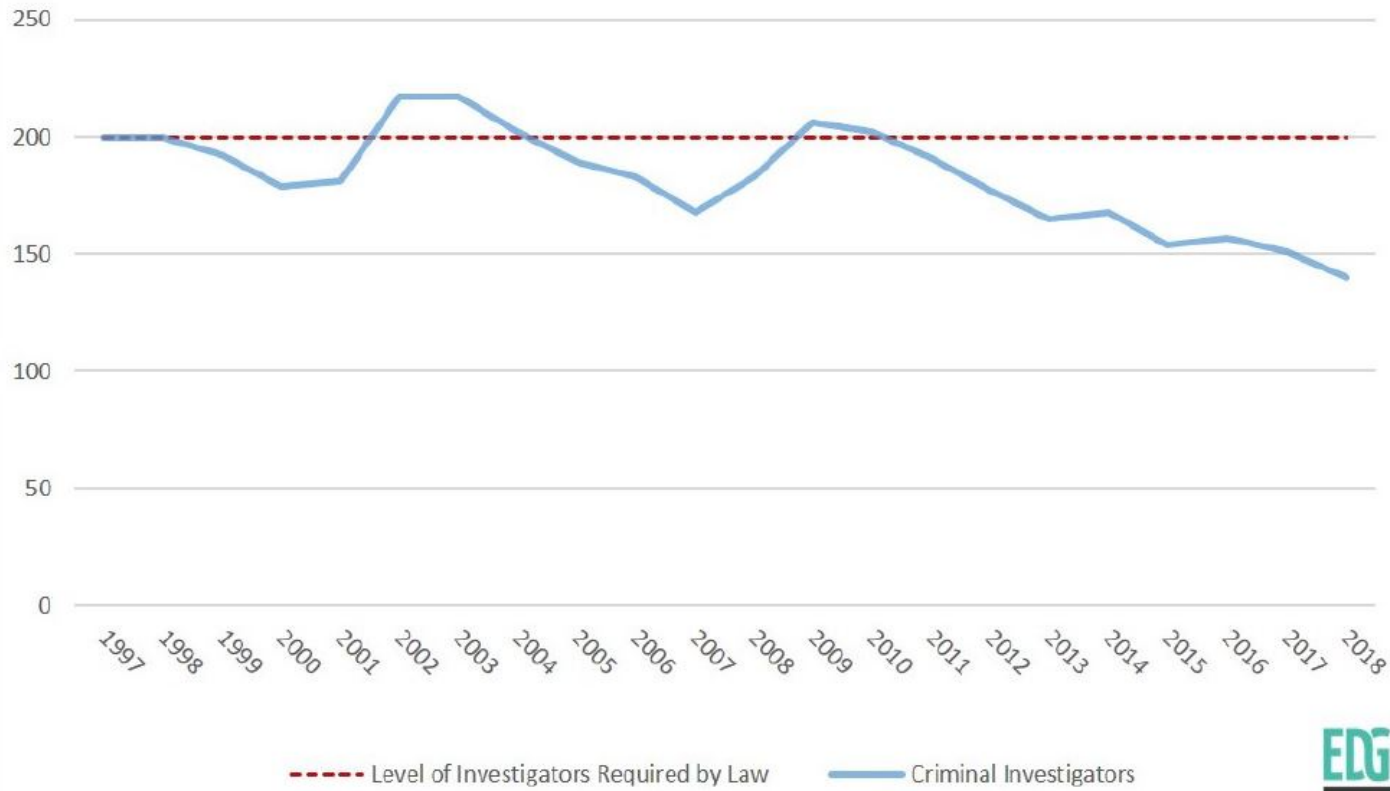


**Criminal Actions have stayed  
about the same...**

# PART 3: ENFORCEMENT TRENDS



Criminal Investigators at EPA, 1997-2018



## PART 3: ENFORCEMENT TRENDS



... But, it costs more for each violation.

“EPA adjusted statutory civil monetary penalties under all statutes.”

[83 Fed. Reg. 1190 (January 10, 2018)].



## PART 3: ENFORCEMENT TRENDS

Penalties assessed after January 15, 2018

EPCRA / CERCLA	\$55,907
Clean Air Act	\$46,192
Clean Water Act	\$46,192
RCRA	\$58,562

NOTE: Per day each violation



**Maybe it was better to  
be a violator before  
2018...**

# **State Air Violations Enforcement Data**

**2017-2018**

**NOTE: 2018 Pro Rata (12 months)**

**Caution!**

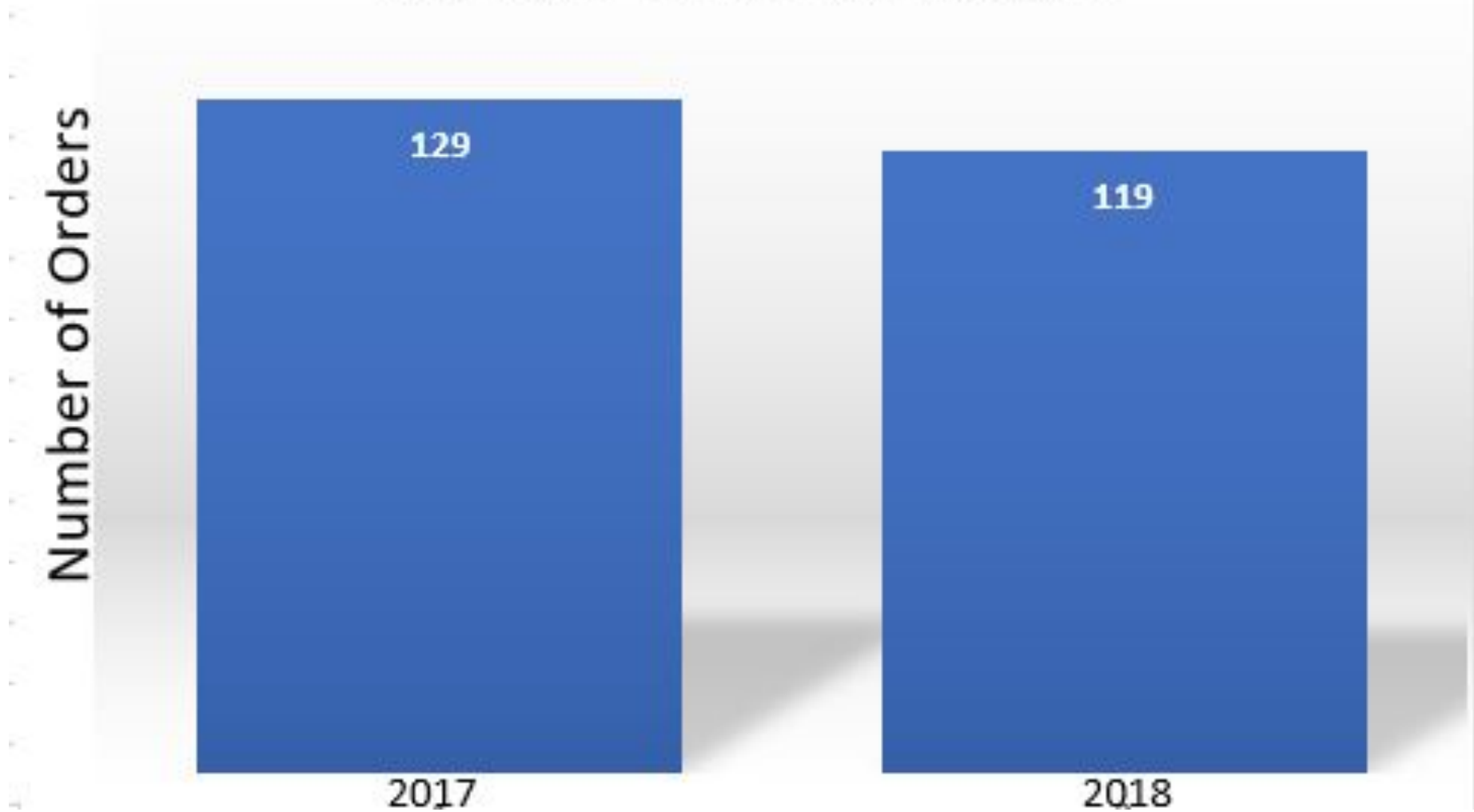
Lawyers Math...

**NOTE:** Rounding errors, 2  
significant figures, etc....

# PART 3: ENFORCEMENT TRENDS



## Number of DHEC Actions



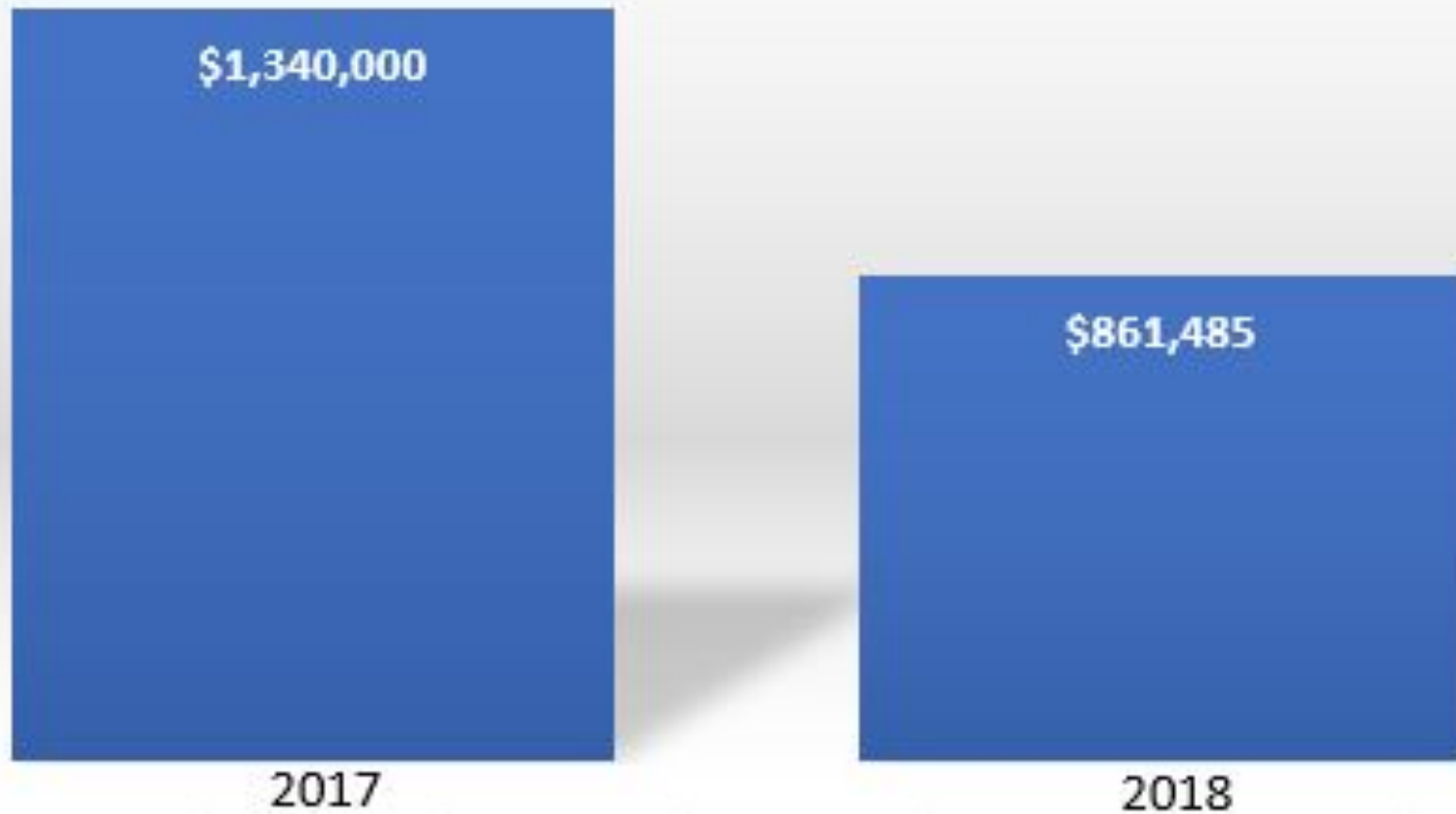


Number of DHEC Actions  
Declined: 16%

# PART 3: ENFORCEMENT TRENDS

## Amount of Total Penalties

Total Penalties





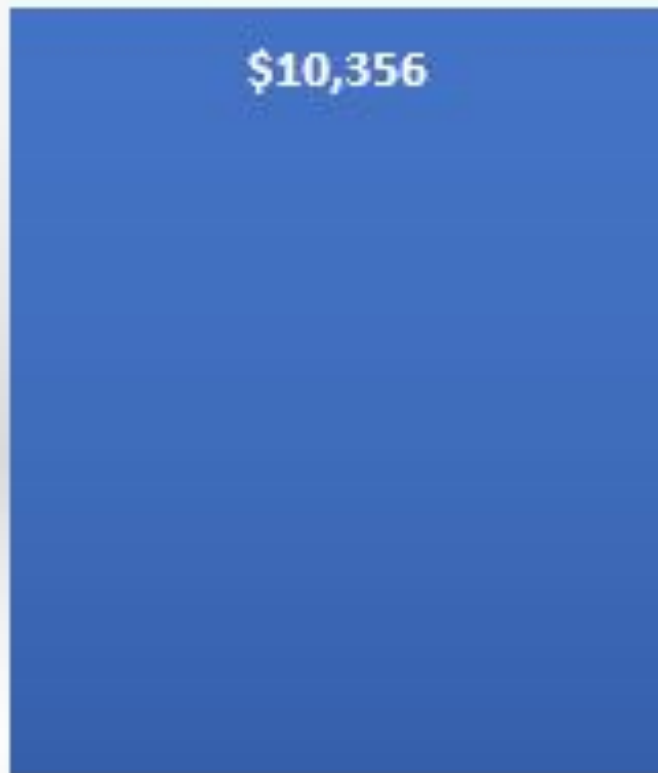
**Amount of Total Penalties  
Declined: 36%**



# PART 3: ENFORCEMENT TRENDS

## Penalties Per Order

Penalty / Order



2017



2018



**Penalties Per Order  
Declined: 24%**

# Practice Areas

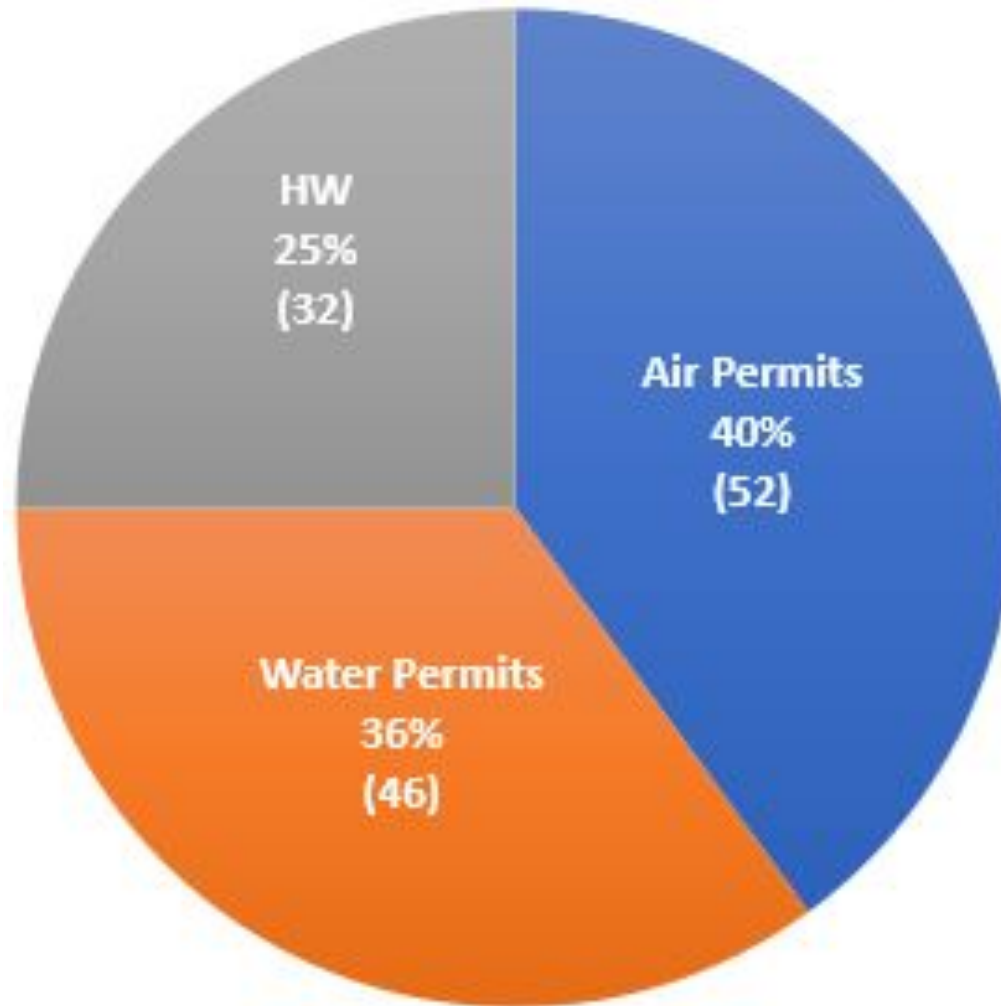
The trends in specific  
practice areas may  
surprise you....

# PART 3: ENFORCEMENT TRENDS



2017

129 DHEC Order

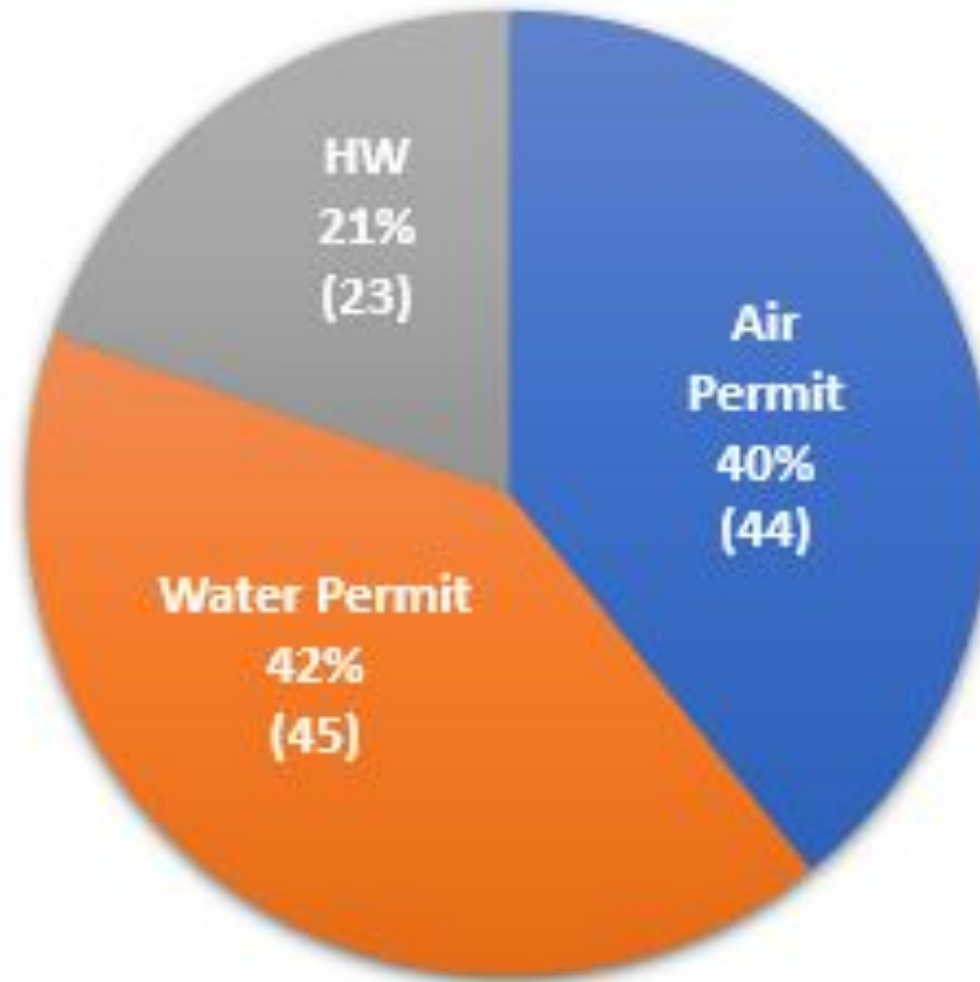


# PART 3: ENFORCEMENT TRENDS



2018

109 DHEC Orders



# PART 3: ENFORCEMENT TRENDS



## Total Number of Orders



No

Change

**But... Penalties  
per specific violations  
are informative.**



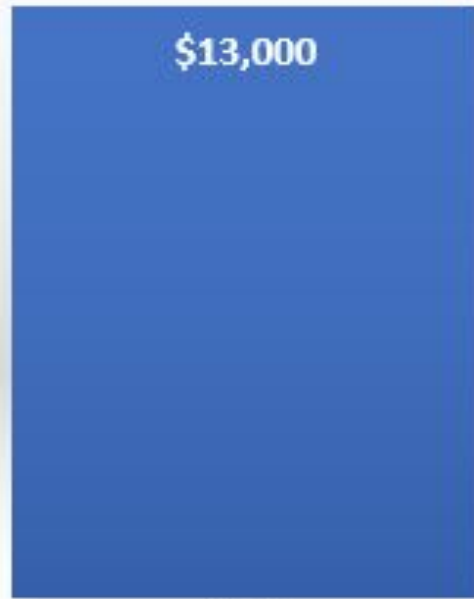
# PART 3: ENFORCEMENT TRENDS



## Penalty Per

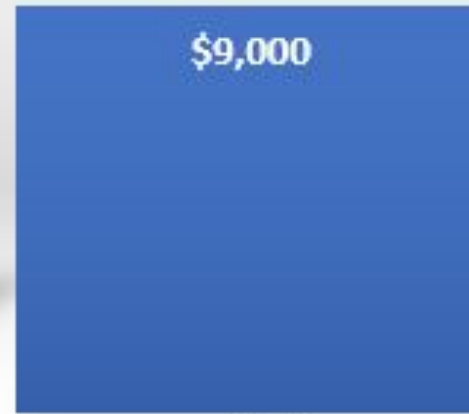
Air Orders

Penalty Per Order



\$13,000

2017



\$9,000

2018

-24%



### **Air Permits**

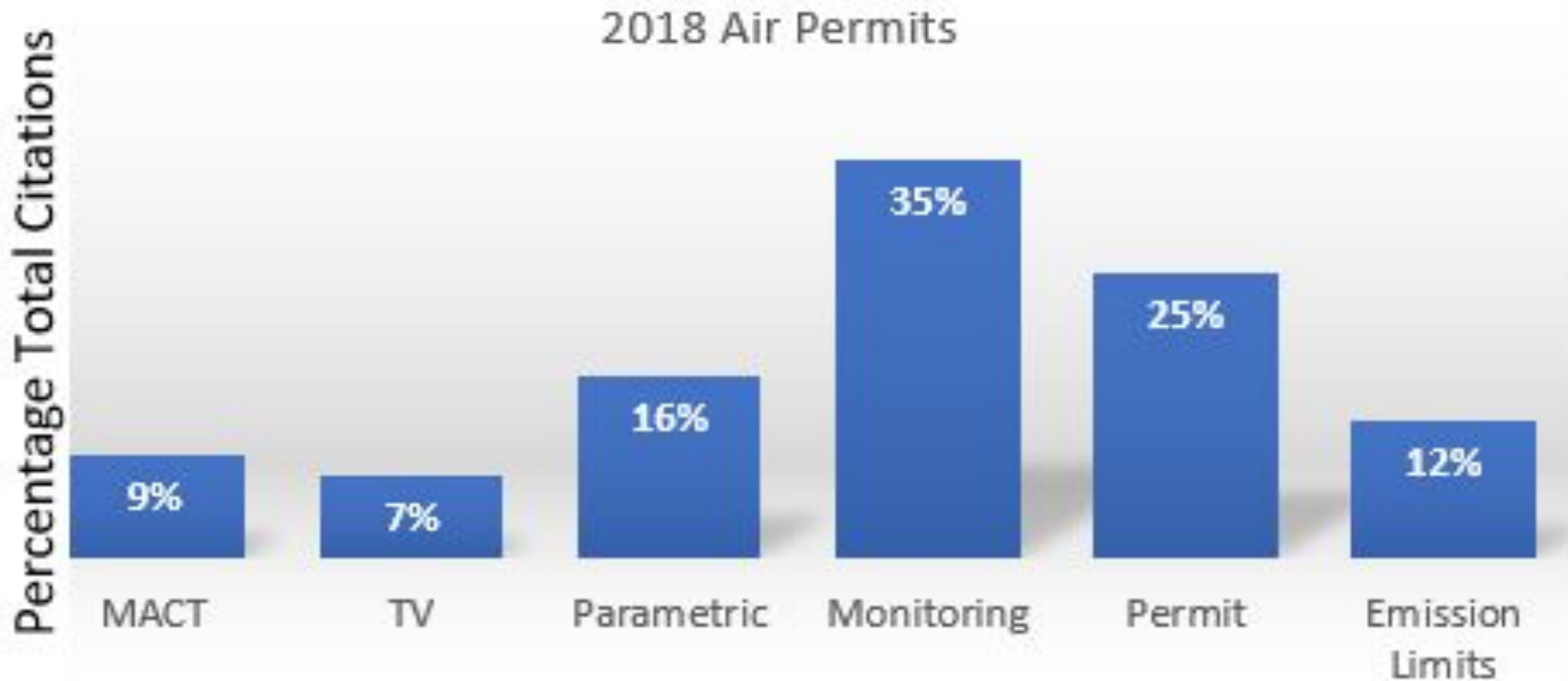
- Monitoring
- Parametric
- Permits
- Emission Limits

# PART 3: ENFORCEMENT TRENDS



**TOTAL: 128 Citations**

# PART 3: ENFORCEMENT TRENDS

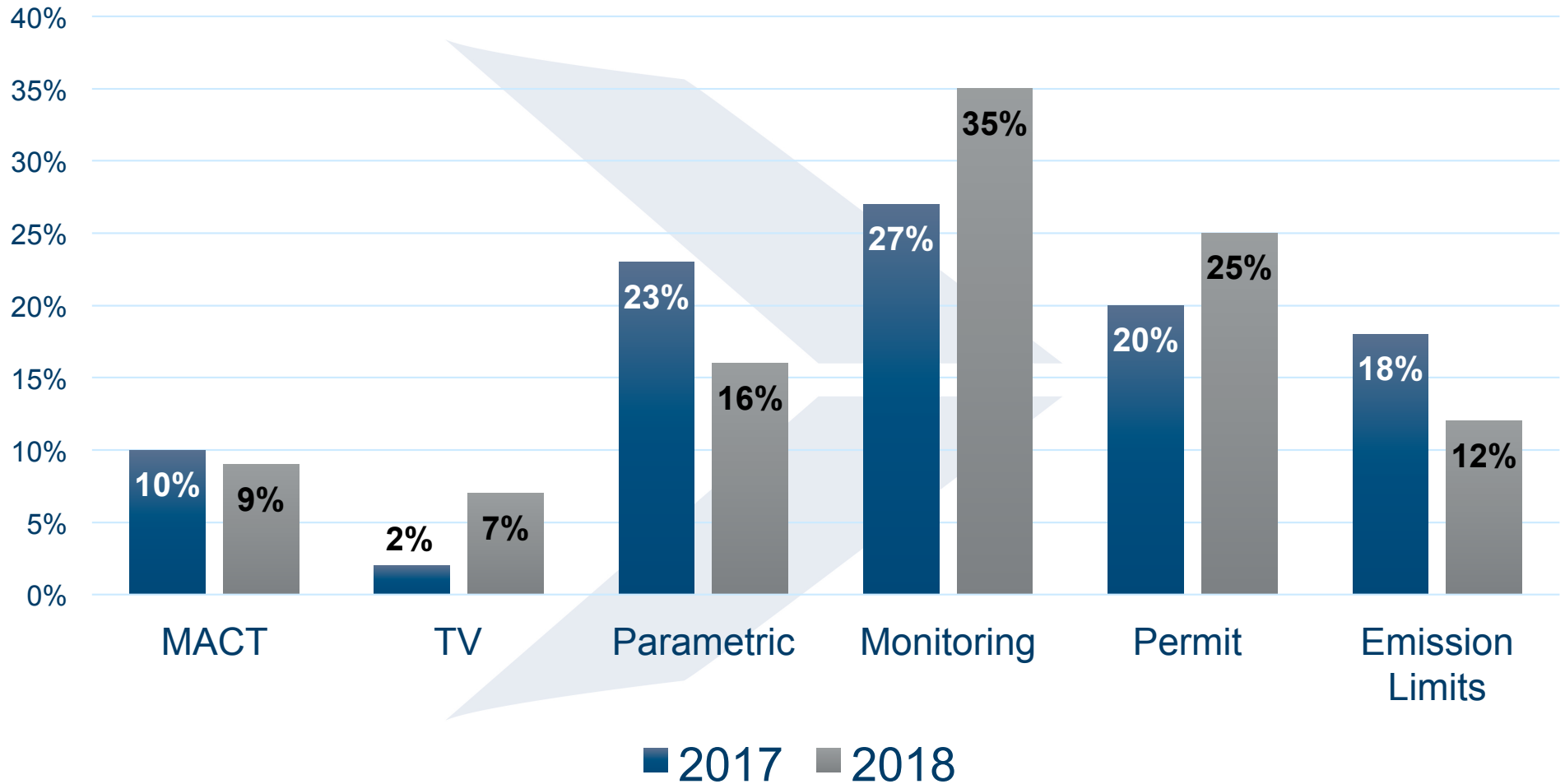


**TOTAL: 108 Citations**

# PART 3: ENFORCEMENT TRENDS



## Compare 2017 and 2018 Air Permits



**Caution!**

**Some Citations counted  
twice...**

### Penalty Per Citation

2017= \$5,016

2018= \$3,667

# PART 3: ENFORCEMENT TRENDS



### Penalty Per Citation





**DHEC Coming?  
Bet on BAQ**