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ESH Management Systems - Benefit or Liability - and Lessons Learned

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Do I need an EHS Management System?

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Do you care about:

- Litigation
- Penalties/fines
- Incarceration
- Employee morale
- Agency relations
- Reputation and public relations
- Lost business opportunities
- Lost government contracts

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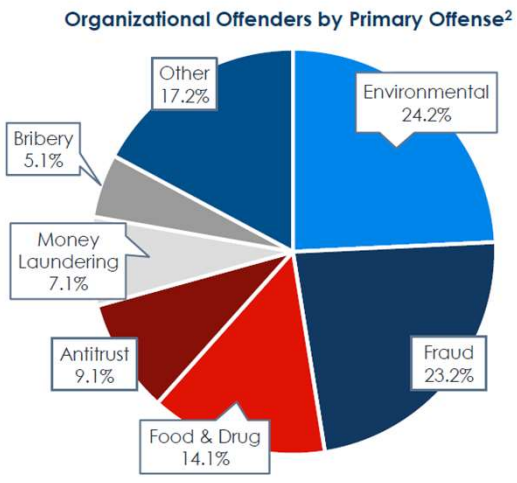
Of the types of environmental offenses, 41.7% were hazardous material related, 33.3% were water related, 16.7% were air related, and 8.3% were wildlife related.



https://www.ussc.gov/research/quick-facts/organizational-offenders (Fiscal Year 2018)

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US DOJ Justice Manual (f/k/a US Attorney's Manual)

Factors to be considered in whether to charge a corporation include:

the adequacy and effectiveness of the corporation's compliance program at the time of the offense

Key Test:

Whether the compliance program is merely a "paper program"

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US DOJ Justice Manual (f/k/a US Attorney's Manual) (cont'd)

In evaluating, prosecutors will typically consider:

- the comprehensiveness of the compliance program
- the extent and pervasiveness of the criminal misconduct
- the number and level of the corporate employees involved
- the seriousness, duration, and frequency of the misconduct
- remedial actions taken by the corporation, including, for example, disciplinary action against employees
- revisions to corporate compliance programs in light of lessons learned
- promptness of any disclosure of wrongdoing

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United States Sentencing Commission Guidelines

Criminal fines against organizations are governed by Chapter 8 of the Sentencing Commission Guidelines

Guidelines set forth two mitigating factors that can substantially reduce the criminal fine:

- An effective compliance and ethics program in place at the time of the offense
- Organization self-reported the offensive, cooperated in the investigation and demonstrates recognition and acceptance of responsibility for its conduct

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USSC Guidelines (cont'd)

Key Factors the Court uses to determine effectiveness of a compliance and ethics program:

- Standards and procedures reasonably capable of preventing criminal conduct
- Knowledge and oversight by high-level personnel
- Due care in hiring supervisory personnel who have engaged in conduct inconsistent with compliance and ethics program
- Effective communication to all levels of employees
- Reasonable steps to ensure the compliance program is followed including monitoring, auditing and creating a program to allow employees to report suspected wrongdoing without fear of retaliation
- Consistent promotion and enforcement of the compliance program
- Reasonable steps to respond to and prevent similar offenses upon detection of a violation

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Suspension and Debarment

Statutory debarments occur by operation of law following criminal conviction under the Clean Water Act or the Clean Air Act. Discretionary under other environmental laws

Conduct that gives rise to suspension and debarment can be imputed from employee to company **and** company to company

Ineligibility lasts until the Debarring Official certifies that the **condition giving rise to conviction has been corrected**

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Suspension and Debarment (cont'd)

EPA's Reinstatement Consideration Guidance includes the following types of information that should be provided:

- Describe and provide a copy of any corporate environmental compliance program
- Describe whether the company has a hotline program in place. If so, describe how the hotline operates
- Describe and provide documentation of any environmental training program before and after the violation(s)
- Describe and provide documentation of any ethics training program before and after the violation(s)

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EPA Voluntary Disclosure Policy

When a company discovers violations through an environmental audit or a compliance management system, timely discloses the violations and meets the other policy conditions, EPA will **not** seek gravity based penalties and generally will not recommend criminal prosecution

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EPA Voluntary Disclosure Policy (cont'd)

Compliance management systems document the company's systematic efforts, appropriate to the size and nature of the business, to prevent, detect and correct violations. Criteria generally follows USSC Guidelines:

- Policies, standards and procedures that identify how the company will comply with relevant laws and permits
- Assignment of overall responsibility company wide and at each facility
- Periodic evaluation of overall performance of the compliance management system including monitoring and auditing and establishing employee "hot-line"
- Communication to all employees
- Appropriate incentives to managers and employees to comply and consistent disciplinary action for failure to comply
- Procedures for prompt correction of any discovered violations and revisions to the compliance management system to prevent reoccurrence

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OSHA – Core Elements of Safety and Health Program

- **Management Leadership**
- **Worker Participation**
- **Hazard Identification & Assessment**
- **Hazard Prevention & Control**
- **Education & Training**
- **Program Evaluation & Improvement**
- **Communication and Coordination for Host Employers, Contracts, and Staffing Agencies**

www.osha.gov/shpguidelines

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So, do I need an EHS Management System?

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Developing a Program

- **Draft and post company environmental policy statement**
- **Incorporate environmental compliance priorities into decisions regarding operations, budget, capital improvements, and staffing**
- **Provide ongoing training to all employees**
- **Provide mechanism for employees to give feedback**
- **Promote innovation and allow for suggested improvements**

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Developing a Program (cont.)

- **Reinforce a culture of compliance**
  - **Environmental compliance is a daily conversation**
  - **Discourage complacency/failure to report noncompliance**
  - **Reward ownership and initiative**

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Questions?

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