



Environmental Regulatory "Over-Compliance" Costing Texas Industry \$ Millions



Texas Association of Environmental Professionals, April 2016 Meeting

Jed Anderson, Attorney, The AL Law Group PLLC



Texas Department of Motor Vehicles



09  15

MCLENNAN

Vehicle Registration



T E X A S

DEPARTMENT OF PUBLIC SAFETY

9

MONTH



Steven C. McCraw
DIRECTOR
TWO YEAR

6

YEAR

APPROVED MOTOR VEHICLE INSPECTION CERTIFICATE



KICK UP YOUR HEELS FOR THE NEW

TEXAS TWO STEP



Prelude and Caveats to Presentation

- Environmental “over-compliance” can increase costs, create additional liabilities, and detract from more productive environmental improvement efforts.
- The term “over-compliance” as used in this presentation does not mean the good kind of “over-compliance” where companies are consciously deciding to do more to protect the environment.
- Companies must comply with the law. Nothing in this presentation should be construed to mean that laws should not be strictly adhered to.
- Significant ambiguity and “greyness” exists in environmental law because of the complexity, size, case-by-case determinations, various jurisdictions, continual litigation, policy changes, etc.
- Laws, rules, guidance, permit conditions, interpretations can be changed—and should be changed if there is a better economical and environmental way to do it.
- Custom ≠ Legal
- Custom ≠ Right

Why is environmental “over-compliance” occurring?

The AL Law Group PLLC



➤ *Accumulation*

- *Requirements come in . . . but they rarely come out*
- *Companies audit for non-compliance, but seldom is over-compliance assessed*

➤ *Complexity*

- *Laws, regulations, and guidance becoming more lengthy and complicated*

➤ *Scrutiny*

- *Many companies are not performing a legal review in addition to their technical review of permit and other agency submissions. Companies sometimes accept initial agency assertions or interpret a rule based on a four-corners reading or a vendor's assertion*
- *Companies are often in a rush to get authorizations and EHS systems into place. Once authorizations and systems are in place, sometimes not much additional incentive for EHS personnel to take the resources and time to reassess (i.e. too busy complying)*

Accumulation



A photograph of an industrial facility, likely a refinery or chemical plant, featuring several tall smokestacks with red and white stripes, complex piping, and storage tanks under a clear blue sky. White smoke is rising from one of the stacks.

Some NSR Special Conditions have
sat in company permits for decades
without being touched

Special Condition 36

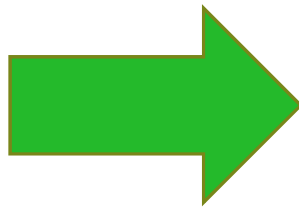
Permits by rule shall not be used at the permitted facility to authorize either additional storage capacity or loading throughput. (6/93)

Some TCEQ Rules are Decades Old— and Rules Keep Accumulating

- I'm not aware that there has ever been a comprehensive effort to review historical TCEQ rules and alter or remove those that no longer bear the environmental fruit the rules were originally intended to produce.

3,796

No. of Rule Records in 1999



4,835

No. of Rule Records in 2016



Some Facility Compliance Methods are Decades Old and are not Regularly Re-Evaluated

- Sometimes SOPs, checklists, EMS software, operator training, and other EMS systems that implement rules, permit conditions, and guidance are not re-evaluated in light of new case law decisions, rules, guidance, permit changes, regulatory interpretations, and applicability determinations.

Date	Time	Inspector	No. of Drums	Status		Comments
				OK	Needs Attn	
4/12/93	8 AM	C. More	20	L		
4/19/93	8 AM	C. More	20	L		
4/26/93	8 AM	C. More	20	L		
5/3/93	P:00	L. Jones	21		X	Acid waste drum leaking Pumped into new drum on 5/7
5/17/93	8:00 AM	J. Smith	21	✓		
5/24/93	8:00 AM	J. Smith	29		✓	Missing bung on drum of spray paint Bung replaced on 5/28
6/4	8:00	L. Jones	29	X		
6/4	8:00	D. Jones	29	✓		
6/18	P:00	D.J.	29	✓		
6/25	8:00	Jones	29	✓		
7/2	P:00 PM	J.S.	11	✓		
7/9	8:15	Smith	11	✓		
7/16	8 PM	C.A.	10	L		

“If you have always done it that way,
it is probably wrong.”

—Charles Kettering



Vine Requires Pruning for New Growth and Better Fruit

“Mature vines left unpruned can become a tangled mess of unproductive wood. Pruning is the key to maintaining healthy wood that will produce fruit. For those that do or have seen grapevines pruned properly realize that you are cutting a lot of growth off the vines. Cutting this much of the vine away can scare some people who are pruning vines for the first time. Grapevines produce a lot of new growth each year, so you need to cut away a large portion of last year’s growth to allow room for new growth next season.”

---NC State University



Complexity



U.S. Environmental Laws are the Most Complicated Laws in Human History

The federal environmental statutes that Congress has addressed to EPA run to more than 2,700 pages in the two large, maroon-colored United States code volumes. The legally binding regulations issued by EPA to implement these statutes fill the 31 ocre-colored volumes of the Code of Federal Regulations. The guidance and other documents issued by EPA to explain or interpret its regulations fill around one million pages and are represented by the 1,250 grey-colored loose-leaf volumes. This does not include the millions of pages of State and local statutes, rules, and guidance that implement the millions of pages of Federal statutes, rules, and guidance.



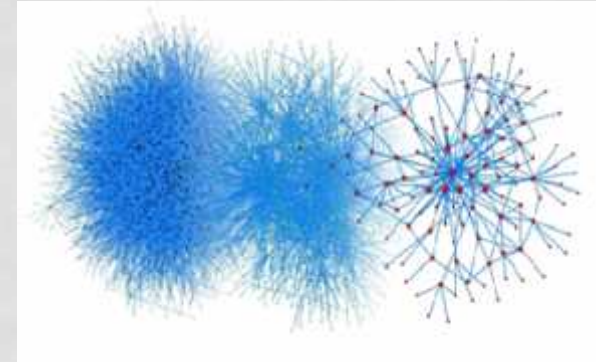
---“I hate that each sector has 17 to 20 rules that govern each piece of equipment and you've got to be a neuroscientist to figure it out.”

---Gina McCarthy, U.S. EPA Administrator



Other Comments About the Complexity of the System

- ❖ **“The Clean Air Act is complicated and contentious”.** --Senate Environment and Public Works Committee
- ❖ **“The federal Clean Air Act alone has been referred to as the most complicated statute in history.”** --
Erich Brich writing for the ABA
- ❖ **“The Act itself has often been called “unreadable” and “incomprehensible.”** —John Quarles and Bill Lewis, Morgan & Lewis
- ❖ **“The statute and its regulatory offshoots are very complicated.”**
---U.S. Department of Justice



“Measuring the Complexity of the Law: The United States Code”

[Daniel Martin Katz](#)

Illinois Tech - Chicago Kent College of Law

[Michael James Bommarito II](#)

Bommarito Consulting, LLC

August 1, 2013

22 *Artificial Intelligence and Law* 337 (2014)

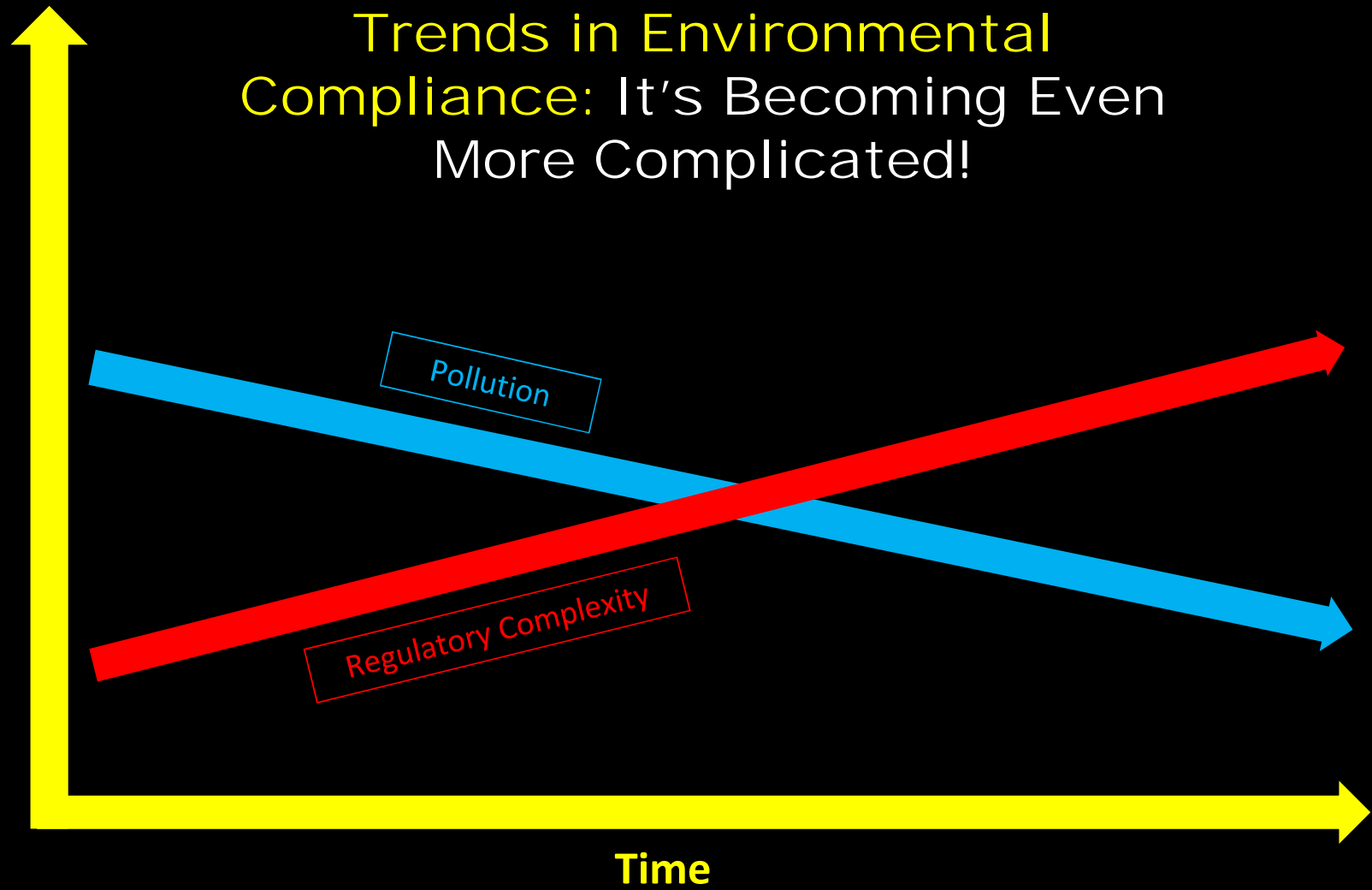


Table 12: Normalized Ranking from Most to Least Complex

Title	NetFlowRank	TokenRank	EntropyRank	DepthRank	CompositeScore	CompositeRank
42	2	8	2	10	5.5	1
26	7	2	29	1	9.75	2
5	1	21	23	2	11.75	3
49	25	11	9	5	12.5	4
31	4	17	18	12	12.75	5

Trends in Environmental Compliance: It's Becoming Even More Complicated!

Amount

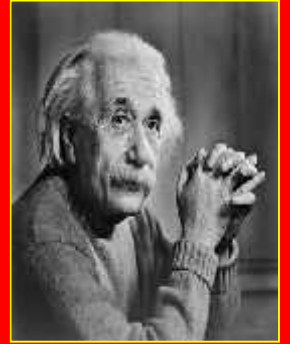


Pollution

Regulatory Complexity

How would these people approach environmental compliance?

- “The definition of genius is taking the complex and making it simple.” ---Einstein
- “Truth is ever to be found in the simplicity, and not in the multiplicity and confusion of things.” ---Isaac Newton
- “That's been one of my mantras - focus and simplicity. Simple can be harder than complex: You have to work hard to get your thinking clean to make it simple. But it's worth it in the end because once you get there, you can move mountains.” ---Steve Jobs
- “In building a statue, a sculptor doesn't keep adding clay to his subject. Actually, he keeps chiselling away at the inessentials until the truth of its creation is revealed without obstructions.”---Bruce Lee
- “All the great things are simple.” --- Winston Churchill

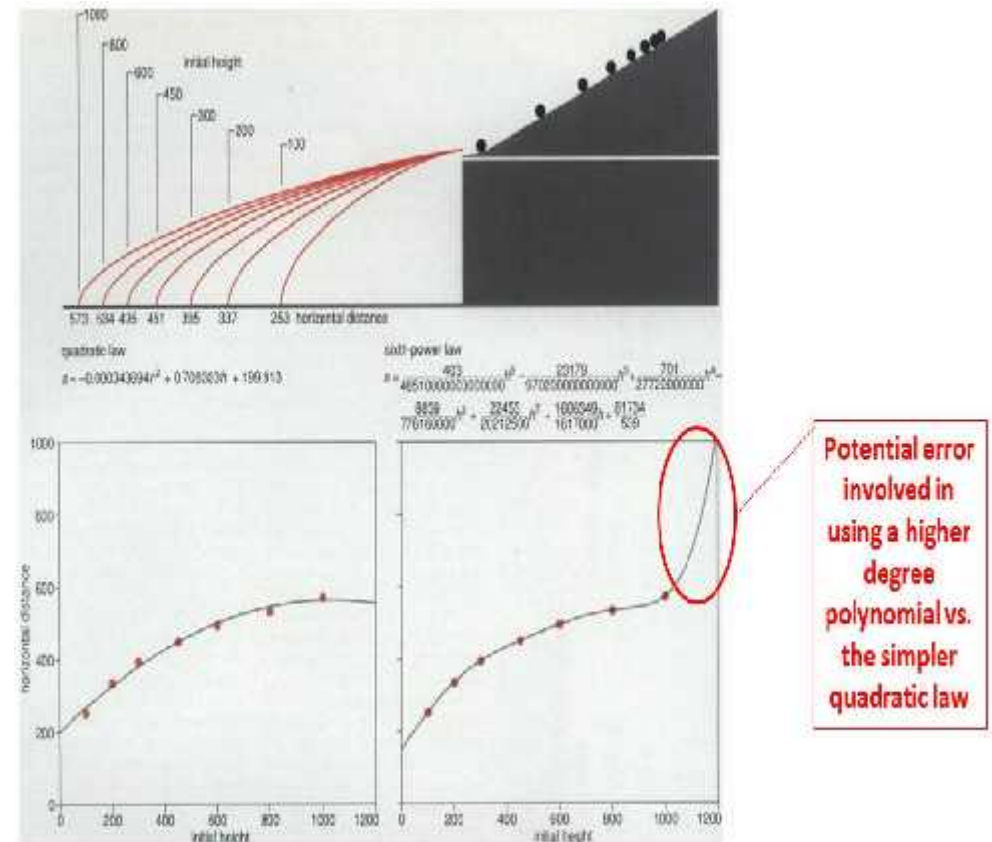


Simplify not just laws—but application of laws

Ex. Applying the laws of gravity and motion

$$S = a + ut + \frac{1}{2}gt^2 + bt^3$$

Neither Galileo nor any student of physics would consider using a higher degree polynomial in calculating the horizontal distance of an object falling from an inclined plane. You might wonder, “a higher degree polynomial would increase accuracy—so why would scientists prefer the simpler equation?” Because adding the higher degree polynomial makes it unnecessarily complicated without significantly improving application of the law. And crazy as this might initially sound, **the higher degree polynomial actually is likely to yield much larger errors than the simpler quadratic law.**



Best Way to Protect Nature is to Emulate Nature

- ❖ **“Nature operates in the shortest way possible.”** Aristotle
- ❖ **“Nature is pleased with simplicity. And nature is no dummy.”** Isaac Newton
- ❖ **“Nature does not multiply things unnecessarily; that she makes use of the easiest and simplest means for producing her effects; that she does nothing in vain, and the like.”** — Galileo

Scrutiny

“Simple can be harder than complex: You have to work hard to get your thinking clean to make it simple. But it's worth it in the end because once you get there, you can move mountains.”

---Steve Jobs



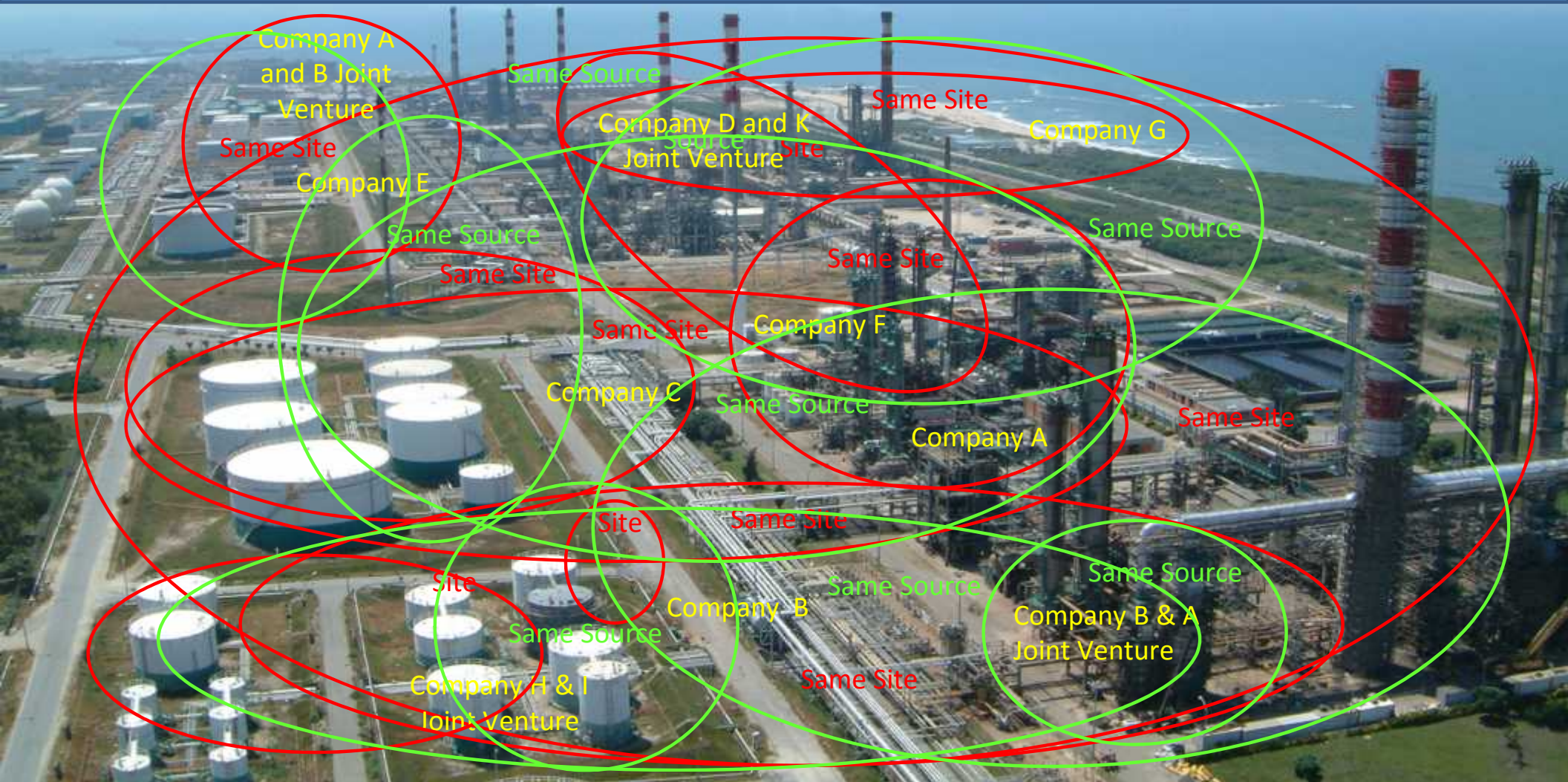
Special Conditions for New Projects

- ❖ Facilities often under pressure to obtain authorizations and, understandably, sometimes do not fully scrutinize conditions (ex./ facility makes \$100k per day x 10 days earlier on authorizations = \$1 million more in profits)
- ❖ *Special conditions sometimes not reviewed by environmental counsel to assess legal basis (i.e. TCEQ has very broad powers to use special conditions, but this power is not unlimited)*
- ❖ *Once a condition gets into a permit, not often reassessed for potential removal until permit renewal (if it is reassessed then).*

Company not always Scrutinizing Case Law and other Legal Precedent that can Affect Permits and Environmental Management Systems

- ✓ *Sierra Club v. Otter Tail Power Co.*, F.3d 2010 WL 3168434 (8th Cir. Aug 12, 2010)
- ✓ *Nat'l Parks & Conservation Ass'n Inc. v. Tenn. Valley Auth.*, 503 F.3d 1316 (11th Cir. 2007)
- ✓ *U.S. v. Midwest Generation LLC*, 694 F.Supp.2d 999 (N.D. Ill. 2010);
- ✓ *New York v. Niagara Mohawk Power Corp.*, 263 F.Supp.2d 650, 661 (W.D.N.Y. 2000);
- ✓ *U.S. v. Southern Indiana Gas and Elec. Co.*, Case No. IP 99-1692-E-M/F, 2002 WL 1760752 (E.D. Ind. July 26, 2002);
- ✓ *U.S. v. Westboro Corp.*, 143 F.Supp.2d 939, 944 (D. Mass. 2001);
- ✓ *U.S. v. Murphy Oil U.S.A. Inc.*, 143 F.Supp.2d 1054, 1083-84 (W.D. Wisc. 2001);
- ✓ *U.S. v. Entech Corp.*, Case No. Civ. 00-2428, 2000 WL 158692 (D. Ark. Sept. 19, 2000);
- ✓ *U.S. v. Campbell Soup Co.*, Case No. CIV-S-95-1854, 1997 WL 258894 (E.D. Cal. March 11, 1997);
- ✓ *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151-53 (1991).
- ✓ *U.S. v. Louisiana Pacific Corp.*, 682 F.Supp. 1122, 1130 (D. Colo. 1987)
- ✓ *Sierra Club v. Portland General Elec. Co.*, 663 F.Supp.2d 983 (D. Or. 2009);
- ✓ *U.S. v. E. Ky. Power Coop.*, 498 F.Supp.2d 970, 974-75 (E.D. Ky. 2007);
- ✓ *U.S. v. Duke Energy Corp.*, 278 F.Supp.2d 619, 652 (M.D.N.C. 2003), *aff'd on other grounds*, 411 F.3d 539 (4th Cir. 2005), *vacated by Env'tl. Def. v. Duke Energy Corp.*, 549 U.S. 561 (2007);
- ✓ *U.S. v. Ohio Edison Co.*, Case. No. 2:99-CV-1181, 2003 WL 23415140 (S.D. Ohio Jan. 17, 2003).
- ✓ *Pennsylvania's Future v. Ultra Resources, Inc.*, No. 4:11-CV-1360 (Feb. 23, 2015)
- ✓ *National Environmental Development Assoc.'s Clean Air Project v. EPA*, 752 F.3d 999 (D.C. Cir. 2014);
- ✓ *Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012).
- ✓ *Chlor-Alkali Workers Union v. EPA*, 550 F.2d 1123 (D.C. Cir. 1977);
- ✓ *MacClarence v. EPA*, 550 F.3d 1123 (9th Cir. 2010)
- ✓ *Wyandotte Chemicals Corp. v. EPA*, 979 F.2d 1021, 1024 (10th Cir. 1992);
- ✓ *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985).
- ✓ *Environmental Defense Fund v. EPA*, 551 F.2d 1063, 1071 (5th Cir. 1977);
- ✓ *Independent U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 852 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 819 (1987).
- ✓ *Reytblatt v. NRC*, 105 F.3d 715, 722 (D.C. Cir. 1997);
- ✓ *Am. Mining Cong. v. EPA*, 907 F.2d 1179, 1188 (D.C. Cir. 1990).
- ✓ *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997);
- ✓ *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)
- ✓ *Capital Network Sys. v. FCC*, 28 F.3d 201, 206 (D.C. Cir. 1994);
- ✓ *Paradissiotics v. Rubin*, 171 F.3d 983, 987 (5th Cir. 1999).
- ✓ *Paralyzed Veterans of Am. v. D.C. Arena*, 117 F.3d 579, 584 (D.C. Cir. 1997).
- ✓ *Gonzalez v. Oregon*, 546 U.S. 243, 258 (2006).
- ✓ *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000);

“Single Site” and “Same Source” and “Single Project” Analysis



Where is "over-compliance" occurring?

- Environmental management systems
- Permits and authorizations
- Special conditions
- Interpretations of rules
- Interpretations of statutes
- Interpretation of guidance
- Interpretation of special conditions
- Monitoring, recordkeeping and reporting



***The AL Law Group's "OCELA" product provides additional examples.



Over-Compliance in Permits and Authorizations that have not been Updated

Ex./ Special Conditions

Special Condition 36

Permits by rule shall not be used at the permitted facility to authorize either additional storage capacity or loading throughput. (6/93)

Over-Compliance in Operator Checklists

Example: RCRA CC Annual Inspection

- Enforcement for failing to perform annual inspection of waste management unit
- Found out that client performing daily and weekly inspections that satisfied the annual requirement
- Containers not at the site for >1 year, so requirement not even necessary
- Recommended client consolidate recordkeeping performed for RCRA CC with other overlapping inspection requirements to reduce confusion, overlap, enforcement potential, and cost





Over-Compliance in Sampling Requirements

Example: Monitoring Requirement

- Client performed weekly monitoring/testing of a certain parameter because of a special condition
- Hadn't seen a hit in over 2 years
- Other changes to facility decreased chance of getting a hit since permit condition put into place
- Provided legal and technical support for altering the requirement
- Worked with TCEQ to pursue a permit amendment to reduce monitoring to bi-monthly unless a hit occurred--in which case weekly would be re-instituted.
- Cost savings to client was approximately \$40k per year

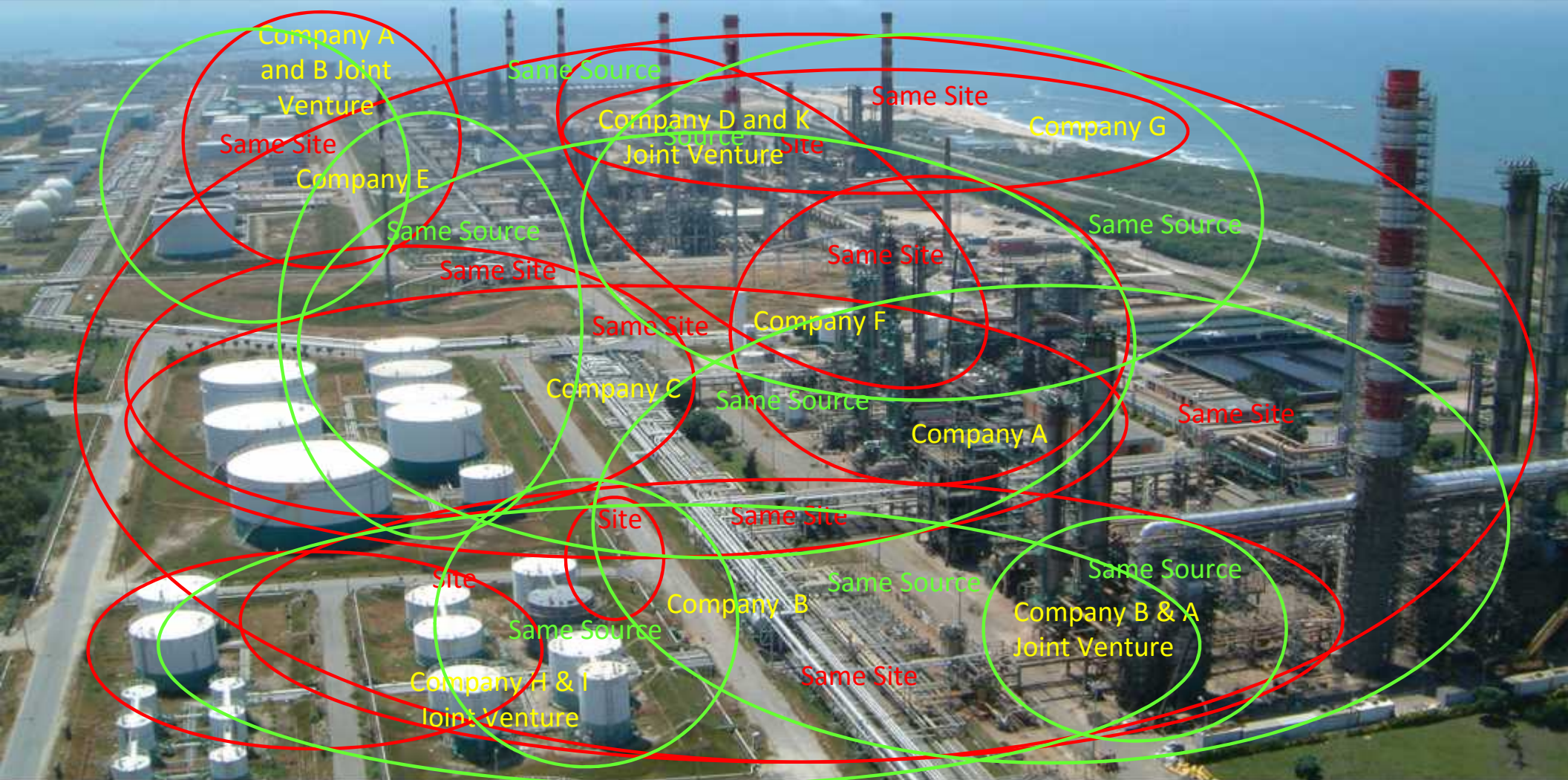
Over-Compliance in Engine Monitoring Requirement

Example

- Separate metering requirements.
- Provided legal and technical reasons why only one meter was needed for all 3 engines because all 3 engines were fueled by same line (e.g. adding 3 meters would be redundant and provide no environmental value).
- Worked with TCEQ to pursue successful rule change.
- Cost savings to client was approximately \$500,000.



Over-Compliance in Regulatory Interpretation: Example - “Single Site”/“Same Source”/“Single Project” Analysis



Over-Compliance in Statutory Interpretation: Texas Industry Spending Billions Offsetting Foreign Pollution

Texas Study of Foreign Pollution Impacts August 2013

Difference in Highest GEOS-Chem 8-hour Ozone
Base Case - No Anthro Outside NA, February, 2012



Min(54,1) = -2.11, Max(44,33) = 11.48

Difference in Highest GEOS-Chem 8-hour Ozone
Base Case - No Anthro Outside NA, July, 2012



Min(38,15) = 0.18, Max(23,101) = 6.80

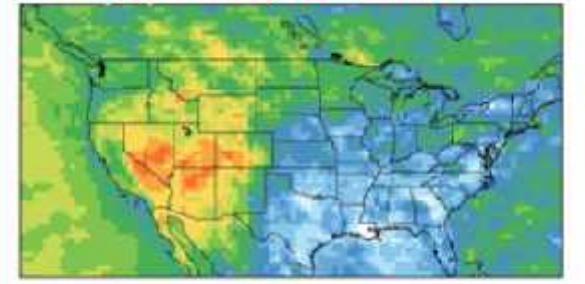
Figure ES-1. Spatial plots of ozone contributions from anthropogenic sources outside of North America (termed the zROW contribution) to February (left) and July (right) maximum 8-hour ozone in the CONUS domain for 2006 (top), 2012 (middle) and 2018 (bottom).

Table ES-1. Annual maximum 8-hour ozone (ppb) in El Paso, Dallas, and Houston, and the corresponding "zROW" ozone contribution from non-North American anthropogenic sources.

Year	El Paso		Dallas		Houston	
	Max	zROW Contribution	Max	zROW Contribution	Max	zROW Contribution
2006	74.8	1.1	88.2	3.0	89.3	1.3
2012	74.0	2.4	78.2	2.8	78.4	2.5
2018	74.4	1.8	77.4	1.8	77.2	1.4

Doesn't even include potential pollution from Mexico

Asian: May-June 2010



0 2 4 6 8 O₃ (ppb)

77. Korea University, Dr. Jin Zhang, "Ozone and aerosol concentration of air mass from Asia and impact on air quality over the United States", March 2013.

EPA August 2014 Staff Report cited Mexico Contributing Up to 12 ppb of Ozone to Texas



(See <http://www.epa.gov/ttn/naaqs/standards/ozone/data/20140829pa.pdf>)

Congress and EPA have told Texas/Industry/Citizens they are not required offset foreign pollution—but that's exactly what Texas is Doing

- “The EPA does not expect States to restrict emissions from domestic sources to offset the impacts of international transport of pollution.” -----U.S. EPA
- “[T]he EPA will not hold States responsible for developing strategies to “compensate” for the effects of emissions from foreign sources”. ----U.S. EPA
- “Congress clearly wanted to avoid penalizing such areas by not making them responsible for control of emissions emanating from a foreign country over which they have no jurisdiction.” ---U.S. EPA
- “The Clean Air Act does not ask States to reduce background levels.” ---Gina McCarthy, U.S. EPA Administrator, Congressional Testimony
- “Under the Clean Air Act, states are not responsible for reducing emissions that are not in their Control.” ---U.S. EPA, November 2014, Memo on Background Pollution and the New Ozone Standard

How can "over-compliance" be alleviated?

Most Common

- New interpretation with legal memorandum to file—then change EMS
 - Reassess exemptions and AMOCs
 - Reassess new case law, new applicability determinations, guidance, etc.
- Authorization change

Other Remedies

- Litigation
- Guidance Change
- Rule Change
- Statutory Change

***The AL Law Group utilizes other tools as provided in OCELA.

Example

The AL Law Group PLLC

Memorandum

To: File

From: Jed Anderson
Keith Lapeze
David Tuckfield
Susan Zachos

AL Law Group, PLLC

Date: April 22, 2016

Re: Over-Compliance Assessment

You asked us to legally assess over-compliance at your ____ facility located in ____ county, Texas.

[Insert Body of Memorandum]

We hope this memorandum was helpful in your consideration of this matter. If you have further questions, please let us know. We look forward to helping you further to save money, reduce liability, and increase environmental performance.

JPA
KWL
DJT
SZG

PRIVILEGED AND CONFIDENTIAL
ATTORNEY WORK PRODUCT
ATTORNEY CLIENT COMMUNICATION

Litigation and Creation of TERP

Engine Mfrs Ass'n v. Huston, 190 F. Supp. 2d 922 (W.D. Tex. 2001)

U.S. District Court for the Western District of Texas • 190 F. Supp. 2d 922 (W.D. Tex. 2001)
June 13, 2001

190 F. Supp. 2d 922 (2001)

ENGINE MANUFACTURERS ASSOCIATION, et al., Plaintiffs

v.

Robert J. HUSTON, et al., Defendants

No. A-00 CA 316 SS.

United States District Court, W.D. Texas, Austin Division.

June 13, 2001.



*Morning-hour construction equipment ban and accelerated equipment purchase programs replaced by more effective incentive program.



Lawyer wants Texans not to pay for smog from Mexico

Outside polluters costing Texas industries; Lawyer wants state to stop paying for foreign smog

MATTHEW TRESAUGUE, HOUSTON CHRONICLE

Published 5:30 am, Sunday, May 22, 2011

Houston is known as a smog factory, but wind-borne pollution from Mexico and other countries is partly to blame for our bad air.

That means oil refiners, chemical makers and other heavy industries are spending billions of dollars on extra **pollution controls** to offset what's blowing into the area from elsewhere, a Houston attorney says.

Jed Anderson, who represents industry on air issues, is asking regulators for an exemption to the rules, saying states should not be forced to make deeper cuts in smog-forming emissions to meet federal limits because of foreign-born pollution.



Best Times for Over-Compliance Review

When and Who?

- Auditing for non-compliance:
 - Can even use the Texas Audit Privilege to help protect you (also consider attorney-client privilege)
- Permit Amendment
- Permit Renewals
- Anytime you want/need to look at reducing costs and liabilities

Who to include in team:

- Internal staff
- Attorney
 - OCELA
- Consultant [we use our own for OCELA or partner with others]

Why should you consider using an attorney to help you assess and address over-compliance?



1. Protect communications--especially on sensitive issues
2. Can assess case law and other legal precedent impacting over-compliance—and can provide legal advice on the matter
3. Technical personnel are trained different, have different skill sets, and can see things lawyers often can't. Lawyers are trained different, have different skill sets, and can often see things that technical personnel can't.
4. Most "over-compliance" reviews, and compliance reviews in general, involve an element of legal judgment. If you get it wrong, you or your client might be looking at civil or criminal enforcement—and potentially your client's personal liberty could be at stake.

Clean Air Act Criminal Liability for Companies and Individuals

Section 7.177. Violations of Clean Air Act

Elements

(1) intentionally or knowingly, with respect to conduct, violates:

- an order, permit, or exemption issued or a rule adopted under Chapter 382, Health & Safety Code.

Punishment

(1) Individual

- a fine not less than \$1,000 nor more than \$50,000 **confinement not to exceed 180 days**, or both fine and confinement

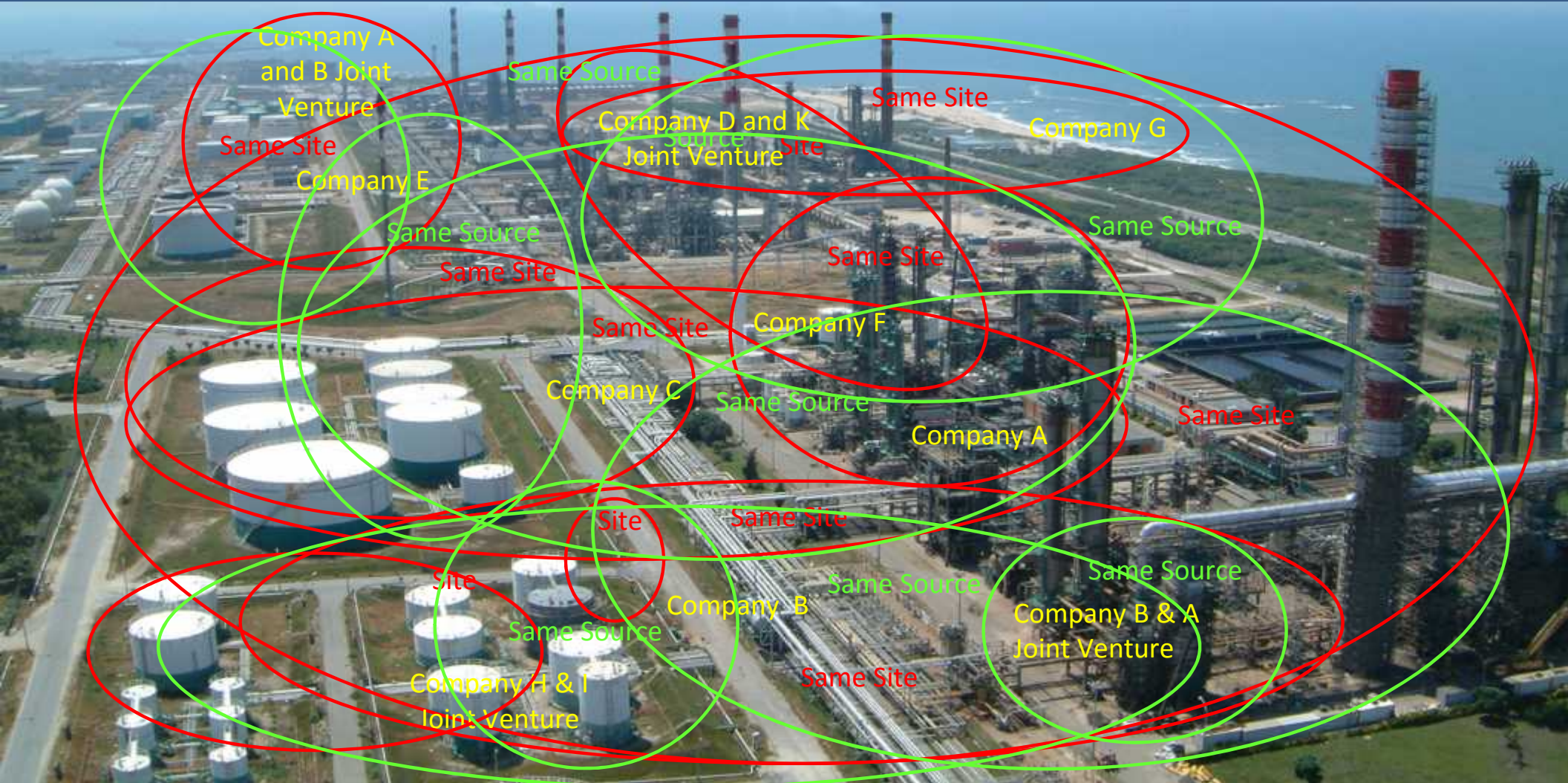
(2) Other than an Individual

- a fine not less than \$1,000 nor more than \$100,000

News Headlines

- “Manager Given Jail Time”
- “Chemical Plant Manager’s Sentenced for Clean Air Act Violations”
- “Pair Accused of Lying About Pollution Figures”
- “Pollution Perps Go Down, but Huntsman Walks”
- “Refinery Manager Pleads Guilty to Clean Air Act Charge”

“Single Site” and “Same Source” and “Single Project” Analysis



Those Companies who Best Understand the Environmental Legal Complexity can Best Position Themselves for the Future

Is your "environmental tax rate" 40% . . . or 20%?

There is a reason that Warren Buffet pays a much lower tax rate than you and I . . . and he has said it himself:

The complexity of the tax code creates opportunities for those who have the knowledge and expertise to navigate these complex laws.

Environmental laws are even more complicated than tax laws. This means even more potential opportunity.*

Citation: http://taxprof.typepad.com/taxprof_blog/2013/08/tax-is-the-.html

The AL Law Group has Designed a Legal Product that Customers can Purchase 'Off-the-Shelf' to Assess and Address Over-Compliance

("OCELA"): "Over-Compliance Environmental Legal Assessment Service" --

- "The AL Law Group helped me save my company thousands of dollars . . . even after I paid their bill." --- Director of Environmental Operations, Fortune 100 Company

The AL Law Group's "OCELA" service is a unique legal product designed to show companies where over-compliance is commonly occurring . . . and share with clients the tools the AL Law Group has successfully utilized to help clients save money, reduce liability, and reinvest in more productive environmental improvement efforts.

For more information, see our website at www.allawgrp.com.

The logo for OCELA, featuring the word "OCELA" in white, sans-serif capital letters centered on a solid green square background.

HOLLER IF Y'ALL

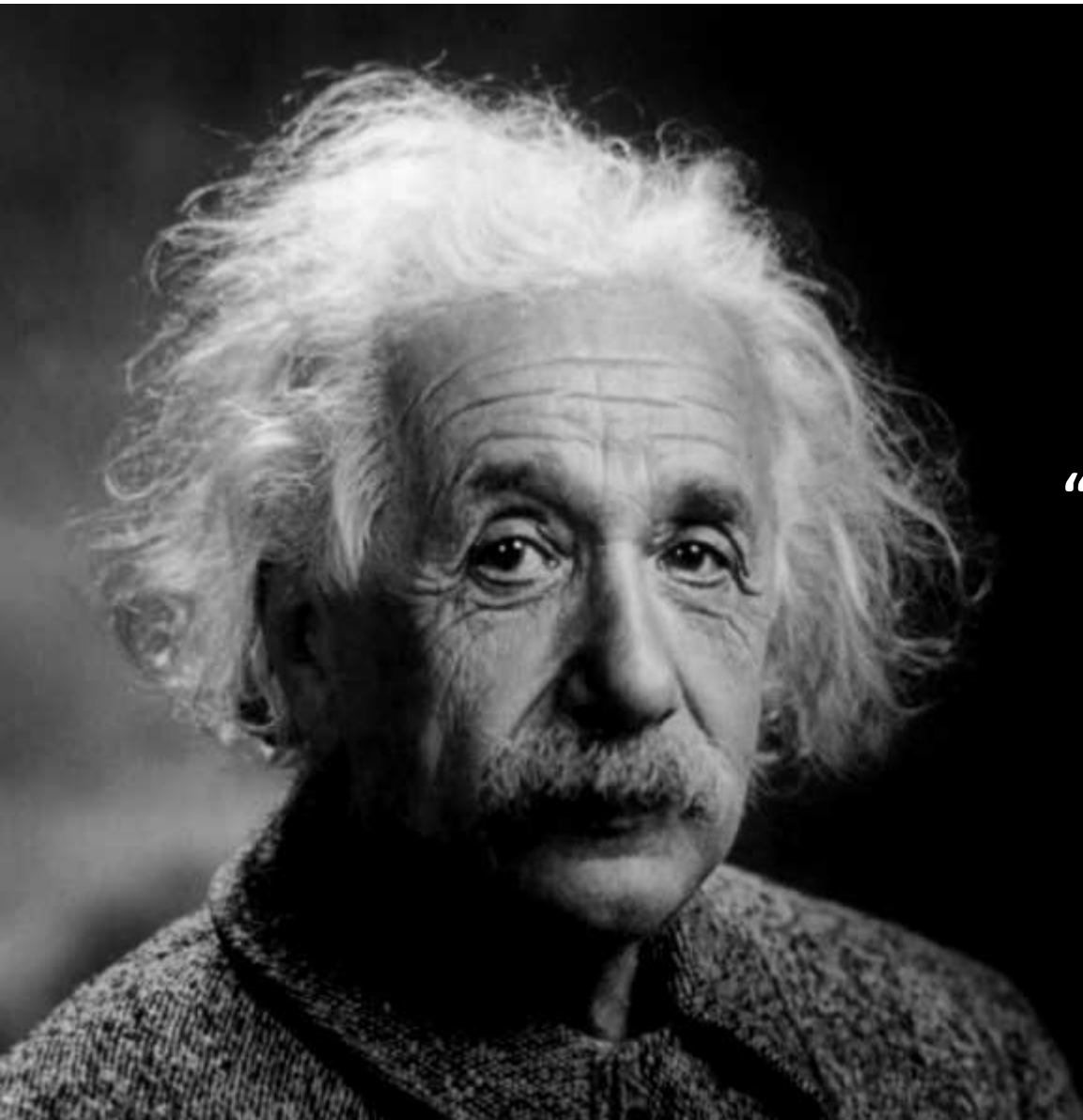
**TWO
STEP**

TwoStepsOneSticker.com



Inspection & Registration — Together At Last!





“Out of clutter, find simplicity.”

Albert Einstein



**“Out of intense
complexities, intense
simplicities emerge.”**

---Winston Churchill



The AL Law Group's
**"Over-Compliance" Environmental
Legal Assessment Service ("OCELA")**

