Anatomy of Environmental Criminal Enforcement: When Does Your Action Become a Crime?

2020 Missouri Environmental Compliance & Enforcement Seminar

March 25, 2020

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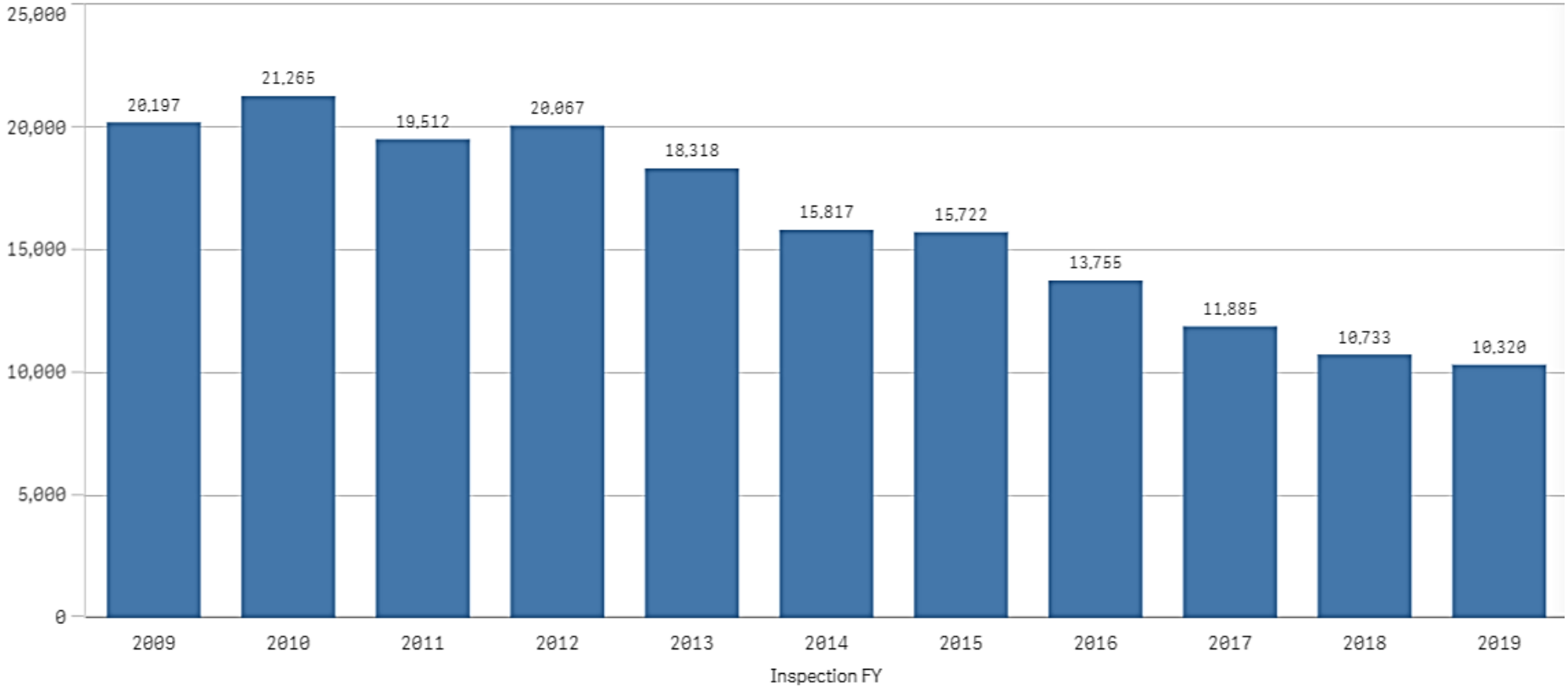
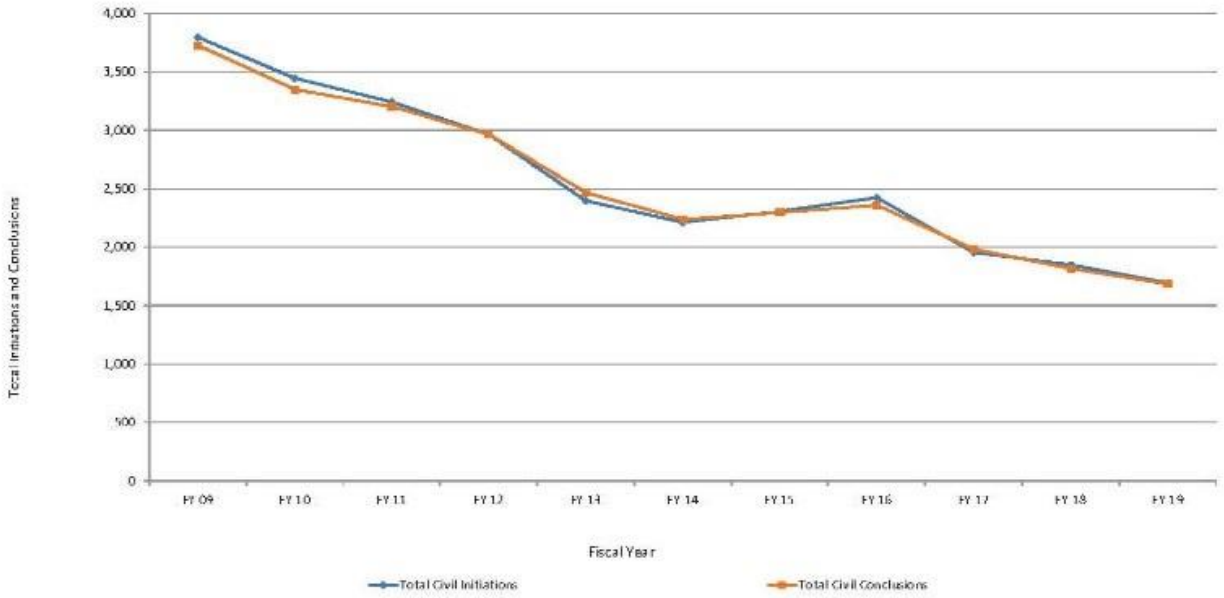
Overview

- FY2019 EPA Criminal Enforcement Statistics
- Federal Environmental Crimes
- DOJ's Worker Endangerment Initiative
- Common Fact Patterns
- Factors in Environmental Prosecution

EPA Inspections – FY2009 to FY2019



Total Civil Enforcement Case Initiations and Conclusions
FY 2009 – FY 2019

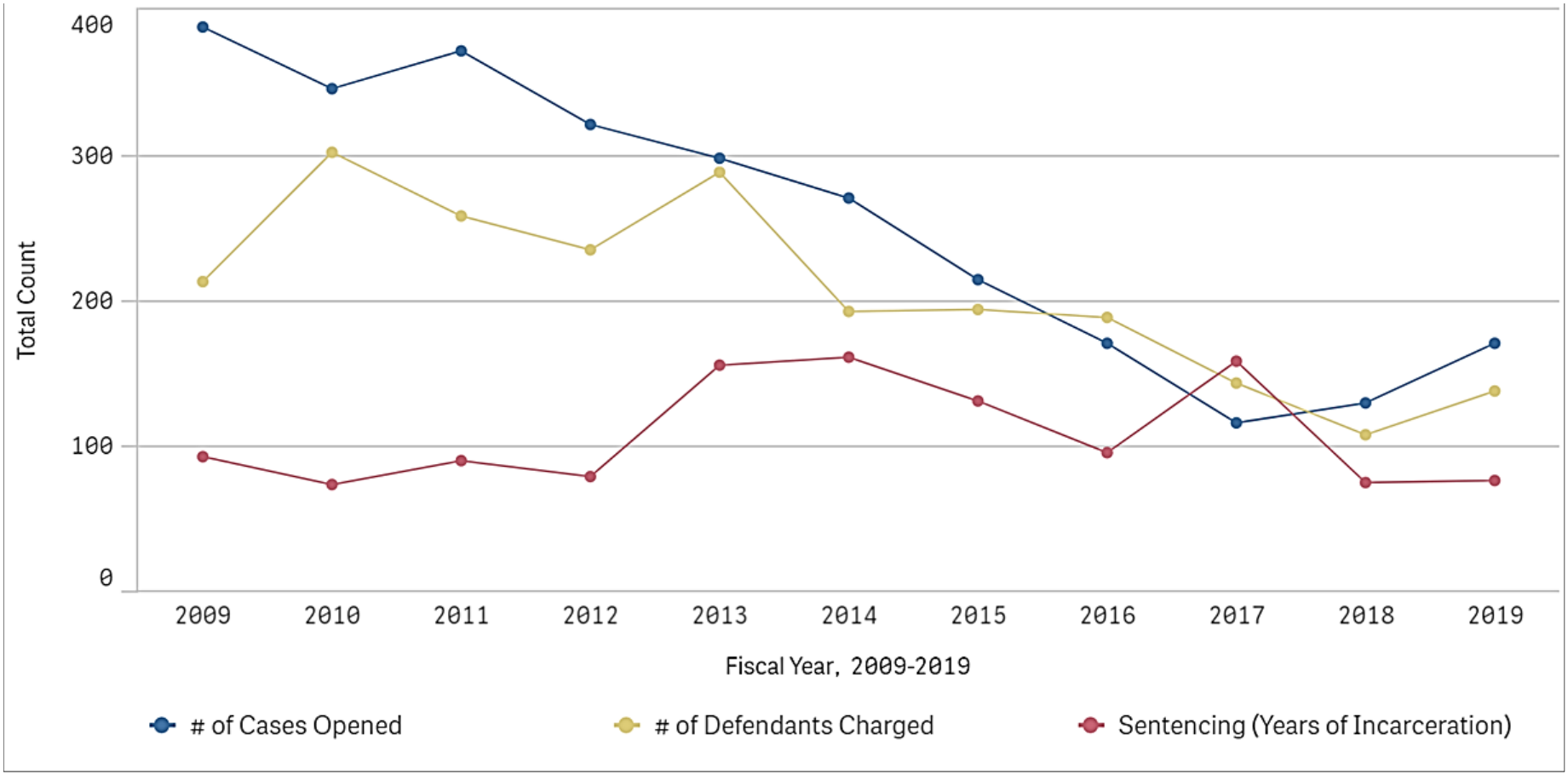


- In FY 2019, EPA initiated and concluded more than 1,600 civil judicial and administrative cases.

1. Totals include CERCLA Initiations and Conclusions.

Data Source: Integrated Compliance Information System (ICIS)
Data as of: January 20, 2020

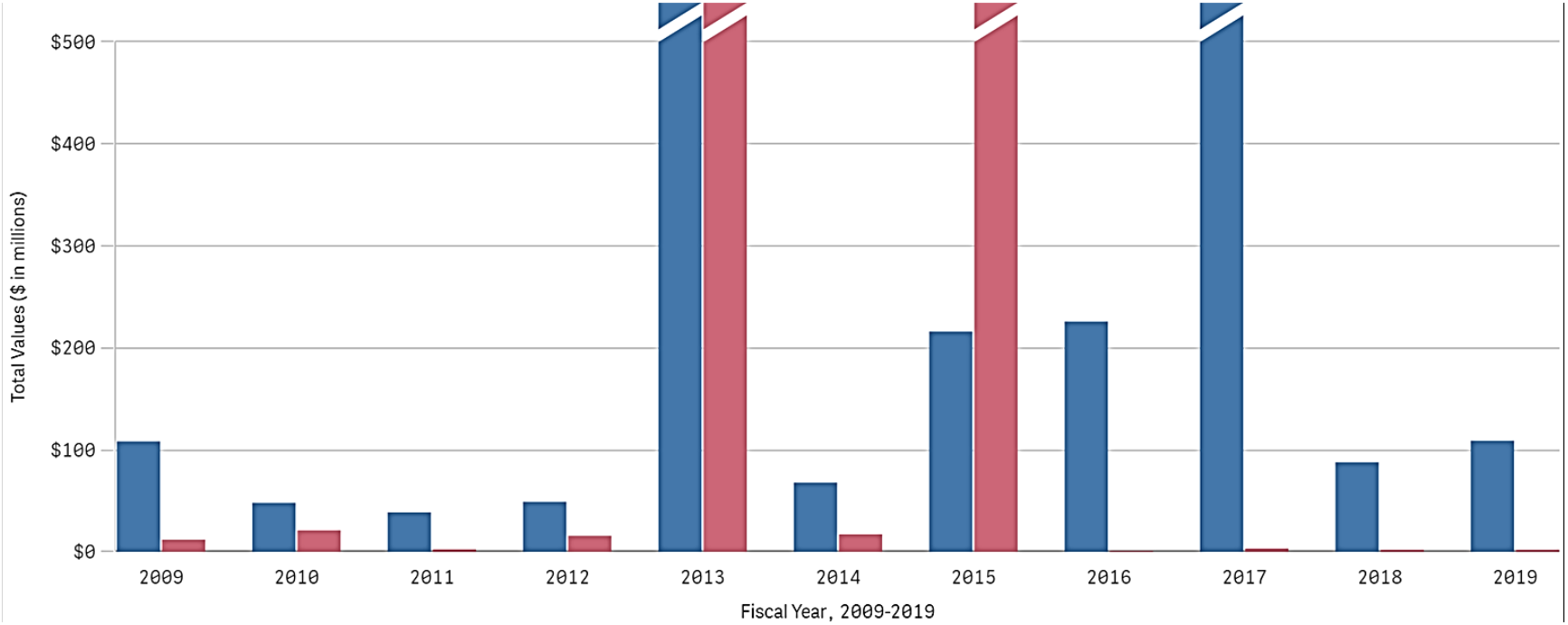
EPA FY2019 - Criminal Cases



EPA's Office of Criminal Enforcement

- The criminal program continued to focus on complex cases that involve a serious threat to human health and the environment and/or undermine program integrity.
- For the first time since FY 2013, the number of defendants charged in environmental crimes increased.
- The number of new environmental crime cases opened increased for the second year in a row.

Criminal Enforcement – Fines, Restitution and Court Ordered Projects



In FY 2019, the total of criminal fines, restitution, and court ordered projects was $111 million.

Annual totals vary due to cases such as BP in 2013, Duke Energy in 2015, and Volkswagen in 2017.

Environmental Crimes

- Clean Air Act
- Clean Water Act
- RCRA
- Title 18 Crimes (conspiracy, wire fraud, false statements, obstruction of justice)
- OSH Act
- HazMat (DOT)
- Wildlife
- Vessel pollution

CAA Crimes – Illegal Asbestos Removal and Disposal

EPA Region 7

- *U.S. v. Fritzel*
- Country club in Lawrence, Kansas
- Roofing material contained ACM
- Feb. 2020 – Sentenced to 3 months in prison and $55,000 fine.

CAA Crimes – Accidental Chemical Releases

- A person negligently/knowingly
  - Releases into the ambient air any hazardous air pollutant listed under Section 7412 of the Clean Air Act or any extremely hazardous substances listed pursuant to 42 U.S.C.11002(a)(2) at the time of the release, negligently/knowingly put another person in imminent danger or death or serious bodily injury
- Knowing: 15 year and/or fines pursuant to 18 USC 3571
- Negligent: 1 year and/or fines pursuant to 18 USC 3571

EPA Region 7- Accidental Chemical Release

- MFA, Inc.
  - Employee injured while loading anhydrous ammonia from bulk tank to nurse tank;
  - Negligent failure to inspect, detect wear, replace valve
  - Guilty plea to negligent release provisions of CAA, resulting in $100,000 fine and $600,000 in required safety upgrades

- Recent case in Atchison, Kansas
  - 2016 chemical incident
  - Two companies have pled guilty to negligent release / negligent endangerment crimes

CWA Crimes

- Direct discharges to waters
  - Negligently or Knowingly
    - Discharges a pollutant from a point source into a water of the United States without a NPDES or 404 Permit or in violation of a permit

- Discharges to POTW
  - Negligently or Knowingly
    - Violates federal pretreatment standards
    - Violates local pretreatment program
    - Discharge to a POTW causing the plant to violate its own Permit/Limitation
    - Introduces a pollutant or hazardous substance into a POTW and knew or reasonably should have known such pollutant could cause injury or damage

CWA Crimes

- CWA False Statements
  - Knowingly
    - Makes a false statement, representation, or certification statement/representation/certification was material in any document filed or required to be maintained under the CWA

- Tampering with Monitoring Equipment or Method
  - Knowingly
    - Falsifies, tampers with, or renders inaccurate monitoring device or method required to be maintained under CWA

RCRA Crimes

- Illegal treatment, storage, or disposal without permit
  - Knowingly, treats, stores, or disposes of a hazardous waste without a permit
- Transportation to an unpermitted facility
- RCRA False Statement
  - Knowingly
    - Omits material information or makes any false statement in any document filed or used for purposes of compliance with Subtitle C (RCRA hazardous waste regulations) a document
    - The false statement or representation is material

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Missouri “Green” Materials

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- MDNR Zero Road Facility
  - Franklin County - Berger, Missouri
- 9 million lbs. of spent blasting media with chromium and other heavy metals
- Sentenced January 2019 - Penny Duncan and Daryl Duncan were each sentenced in the Eastern District of Missouri to 5 years of probation with $1,500,000 dollars of restitution ordered (joint with the other defendants).
  - US Technology Corp.

EPA Region 7 – Beta-Chem Labs

- KDHE issued Order regarding radioactive isotopes
- *U.S. v. El-Sherif*
  - Jan. 2019 - Sentenced to pay $544,000 in restitution for cleanup costs

OSH Act – Criminal Provisions

- Section 17
  - Willful violation of OSHA standard and said violation causes death of employee
  - Providing advance notice of an inspection
  - Knowing false statements, representations, or certifications
- Misdemeanor – a fine no more than $10,000 and/or incarceration for no more than 6 mos.

Worker Endangerment Initiative

- DOJ – December 17, 2015 Memo
  - Prosecutors should charge other felony Title 18 offenses (false statements, obstruction of justice, witness tampering, conspiracy, mail/wire fraud)
  - USAO to work with Environmental Crimes Section
- MOU between DOJ and DOL

Worker Endangerment Initiative

- Endangerment crimes under Clean Air Act, Clean Water Act, and RCRA
- Knowingly commit underlying pollution crime
- Knew that such act(s) put another person in imminent danger of death or serious bodily injury
- CAA also has negligent endangerment

Worker Endangerment Initiative

- Civil Enforcement by DOJ Environmental Enforcement Section
  - Coordination with OSHA on injunctive relief and settlement framework
  - Cross-training EPA and OSHA inspectors
  - Information sharing
  - Worker safety concerns being investigated

Hot Work Violations

- *KTX Limited and KTX Properties Inc. – October 2016, Port Arthur Texas,*

  16-cr-75 E.D.Tx.

Hot Work Violations

- Chemical plant owners had contract employees conducting welding on piping connected to a tank
  - Failed to properly drain, isolate and decontaminate the tank and connecting equipment
  - Welding work ignited vapors causing the tank to explode and release hazardous air pollutants to the environment
- Prosecutors used the Clean Air Act
- Criminal - $3.3 million

Hot Work Violations

- *U.S. v. Black Elk Energy, 15-cr-00197 E.D.La.*

Hot Work Violations

- Nov. 2012 Explosion
  - Three fatalities, 500 bbls into Gulf of Mexico
- Welding being conducted on a hydrocarbon line connected to a tank
- Criminal prosecution based on negligent discharge of oil into the Gulf of Mexico in violation of the Clean Water Act, and violations of the OCSLA

Confined Space Entry

- *U.S. v. Elias, D.Idaho*
- EPA prosecutes case as an environmental case because employee did not die and OSH Act could not be used
- The jury convicted Elias of three counts of violating the federal Resource Conservation and Recovery Act, including illegal disposal of hazardous waste and knowingly endangering his employees and making false statements under Title 18

Common fact patterns

- Bio-diesel renewal fuel credits
  - RIN Fraud
  - Conspiracy, wire fraud
- CAA
  - Asbestos NESHAP violation
- CWA –
  - Illegal discharges to POTW
    - Chrome plating operations
    - Discharge of flammables or toxics
- RCRA –
  - Lab chemicals and lab wastes (illegal disposal)
  - Product versus Waste? When is a useful product no longer useful?
    - Speculative accumulation?
    - Viable market?
    - Shelf life?
  - Spent materials (i.e., sandblasting)

Factors in Environmental Prosecutions

- Repetitive misconduct
  - EPA or state agency warned actor
- False/misleading statements or conduct
  - Sampling, reporting
  - Tampering, concealment, failure to report
- Harm to environment or health
  - Fatalities or serious bodily injury
  - Expensive cleanups
  - Community impact or evacuation orders
- Not playing by the rules (regulatory system)
  - Failure to acquire permits
  - Whistleblower complaints (employees, former employees, neighbor)

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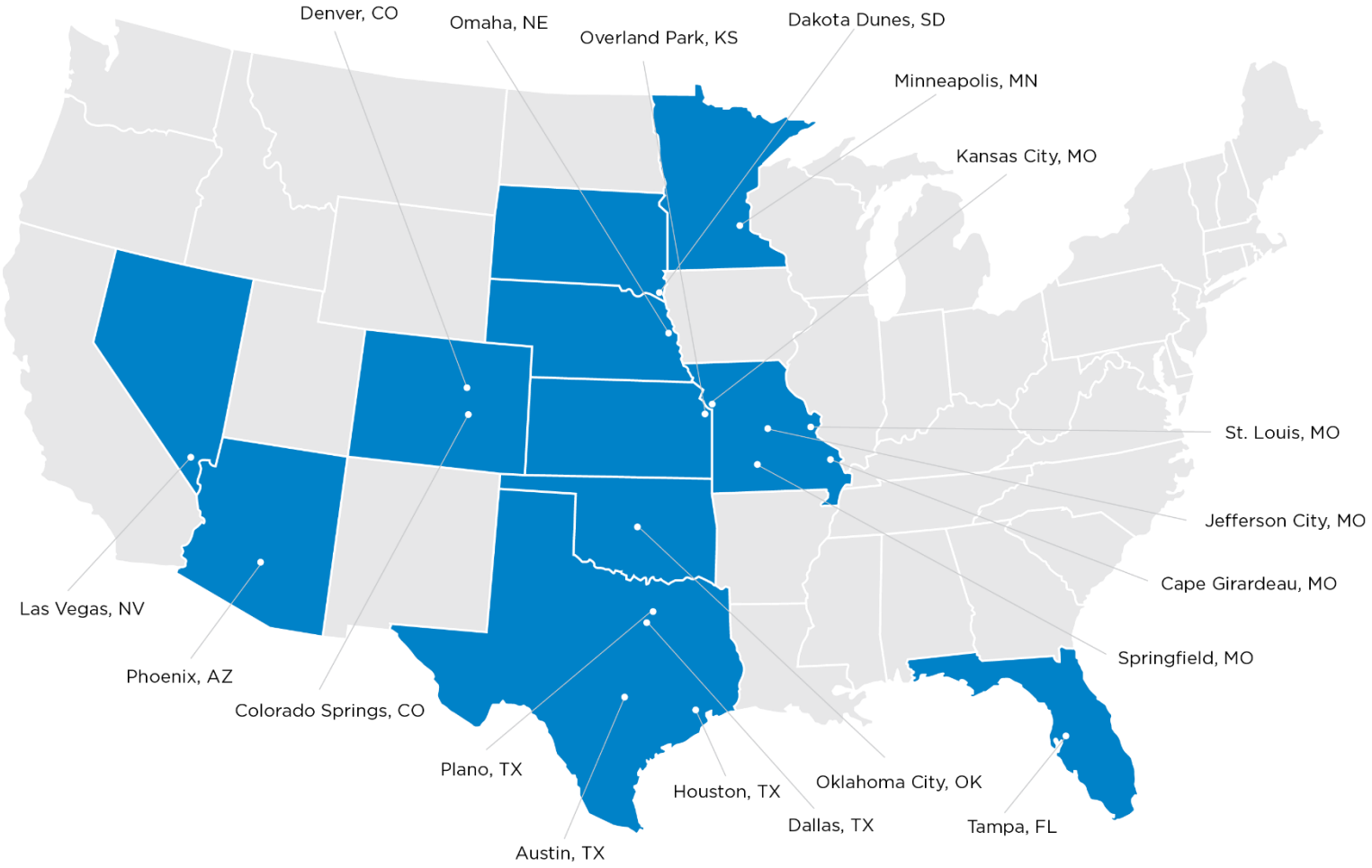
Our Locations



Questions?

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