



Effective Management of Agency Enforcement Process

Sustainability & Environmental, Health and Safety Symposium

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Cooperative Federal/State Partnership

- States authorized to administer regulatory programs
- State law generally not preempted
- Inherent federal/state tension in interpretation and enforcement
- U.S. EPA retains enforcement authority
- U.S. EPA focus on Environmental Justice



Enforcement

■ Extensive enforcement mechanisms

- ▣ Strict liability
- ▣ Broad inspection/information gathering authority
- ▣ Public involvement

■ Significant penalties

- ▣ Federal - \$40,000+ per violation, per day
- ▣ Negotiate – gravity/economic benefit

Enforcement

■ Citizen Suits

- ▣ 60-day notice
- ▣ Bar if government is “diligently prosecuting”
- ▣ Attorney fees

■ Criminal Prosecution

- ▣ Knowing or negligent violations
- ▣ Significant penalties, including imprisonment
- ▣ Debarment from federal contracting

How Do Environmental Crimes Happen?

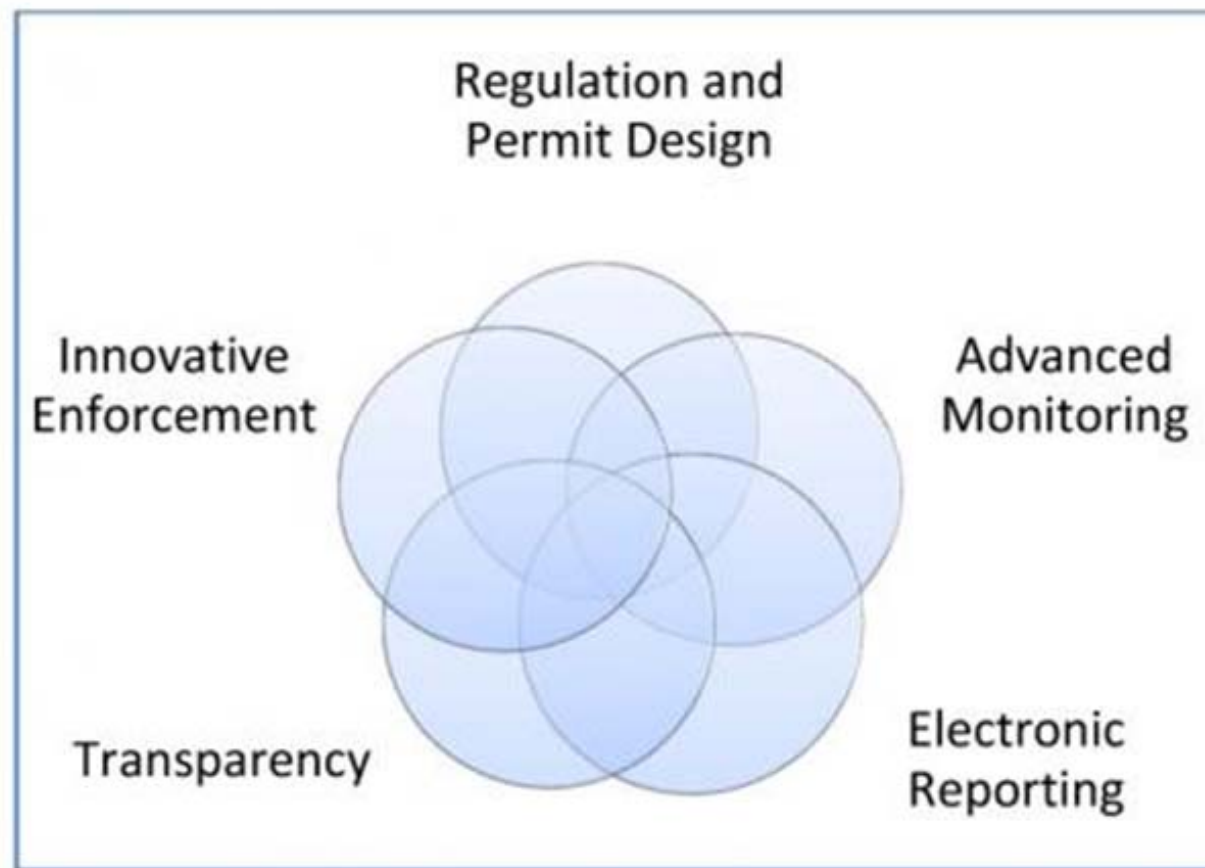
■ Prosecutors look for:

- ▣ Significant environmental harm or injury (actual or threat)
- ▣ Failure to report
- ▣ Illegal conduct is trend or corporate attitude
- ▣ History of repeated violations
- ▣ Deliberate misconduct
- ▣ Concealment
- ▣ Falsification
- ▣ Tampering with monitoring or control equipment

Enforcement Trends

- EPA pursuing fewer but larger cases (civil and criminal)
- Fewer inspections overall with a focus on larger facilities
- More use of info requests/other means not requiring on the ground inspection
- Criminal focus on individuals first and corporations second
- Environmental justice as aggravating factor

Next Generation Compliance: Five Interconnected Components



Enforcement Under Biden Administration

■ EJ Initiatives:

- ▣ Increased transparency and public involvement
- ▣ Increased education and outreach
- ▣ Increased activism and private lawsuits

■ Areas of focus:

- ▣ CAA and CWA enforcement
- ▣ Criminal prosecution of corporations and individuals
- ▣ EJ as aggravating factor

■ Return of SEPs

Preparing for Increased EJ Enforcement

- Take heed of enforcement risks
- Review and update corporate compliance programs
- Reevaluate and improve employee training
- Establish internal reporting systems
- Update compliance audit programs
- Consider self-reporting
- Prepare for inspections
- Ensure integrity of regulatory certification processes
- Use SEPs in settlement agreements
- Proactively engage regulators

Proactively Address Environmental Justice

- Designate global liaisons
- Engage EJ Communities
- Corporate EJ assessment
- Implement actions to mitigate affects
- Update ESG reports

PROTECTING YOUR INTERESTS: Preparing for EHS Inspections and Searches

Government Authority

- Laws and regulations
- Permits, consent orders, etc.
- Defined by laws, constitutions, search warrants or agreements

Private Rights

- Constitutional prohibition against unreasonable searches
- Company can require agency to obtain warrant
 - ▣ Exception – consent
- Cooperation often is the best policy

Inspection Team

- Two-member team is ideal
 - ▣ EHS manager
 - ▣ Facility Engineer/General Manager
- Do not include hourly employees
- Clarify roles

Initial Response

- Inform receptionist
- Obtain inspector's identity
- Identify legal authority
- Determine purpose
 - ▣ Routine regulatory inspection
 - ▣ Response to complaint or accident
- Search warrant scope
- Record information

Require Warrant?

- Require if extraordinary circumstances
 - ▣ Criminal investigation
 - ▣ Ongoing enforcement acts
 - ▣ Risk of loss of CBI
 - ▣ Unreasonable interference with operations

General Conduct

- Professional and courteous
- Answer questions honestly and directly
- Avoid elaboration
- Do not speculate
- Do not admit guilt

General Conduct

■ Take detailed notes

- Areas inspected
- Inspector's comments or questions
- Answers provided
- Other relevant observations

■ Be careful what you write

Plant Tours

- Define inspection area
- Avoid unnecessary site tours
- Diagrams and maps may help in initial briefing
- Provide adequate safety apparel and follow safety rules

Records Inspection

- Inspector entitled to inspect and receive copies of records, data and other required information
- Use discretion in granting access to files
 - ▣ Protect CBI and privileged documents
- Ensure at least one other person is familiar with files
- Keep records of documents reviewed or copied

Employee Interviews

- If possible
 - ▣ Inspection team members should address questions
 - ▣ Avoid employee interviews
- OSHA inspector may invite employee representative
- OSHA allows private employee interviews – reasonable manner
- Non-management employees may decline
- No management interviews without Corporate approval
- Counsel may attend management interviews

Sample Collection

- Split and properly analyze samples
- Document time, location and pertinent conditions
- Observe and record inspector's method of sample collection
- Observe employees participating in IH sampling

After the Inspection

- At closing conference, ask for
 - ▣ Inspector's findings and conclusions
 - ▣ List of sampling parameters
 - ▣ Copy of written inspection report
- Do not admit guilt

After the Inspection

- If appropriate, take corrective actions while inspector is present or commit to prompt corrective actions
- Inspection summary
 - ▣ Prepare immediately
 - ▣ Factual and detailed
 - ▣ Avoid admissions or subjective characterizations
 - ▣ Provide in memorandum to legal counsel

Criminal Investigations

- Require a search warrant
 - ▣ Review and copy
 - ▣ Restrict search to warrant
- Notify legal counsel

Criminal Investigations

- Permit search over objections
- Avoid obstruction of justice charges
- Do not consent to employee interviews until legal counsel is present

Criminal Investigations

- If government demands immediate employee interviews, inform employees that
 - ▣ They may speak with the government agent
 - ▣ If they speak, they must respond truthfully
 - ▣ They have no obligation to speak with agent
 - ▣ They have a right to legal counsel

EHS Incident Reporting and Investigation

Internal Reporting of EHS Incidents

■ EHS incidents include:

- ❑ Regulatory inspections/enforcement actions
- ❑ Spills or releases of hazardous materials
- ❑ Discovery of potential historic contamination
- ❑ Significant accidents
- ❑ Non-routine government request for information
- ❑ Could result in environmental harm or media attention

Policy Objectives

- Avoid pitfalls
- Early warning to Corporate
- Where appropriate, engage legal counsel
- Manage the process
- Minimize risks/liabilities

Internal Reporting of EHS Incidents

- Immediately contact Corporate EHS and/or Legal
- Provide detail regarding EHS incident
- Engage EHS consultants or legal counsel?
- Consult with Corporate before reporting to agency except if immediate reporting is required pursuant to applicable laws

Pitfalls of Internal Investigations

- Be careful what you say to employees – obstructing justice, retaliation, coercion
- Be careful what you write
 - ▣ Stick to the facts
 - ▣ Avoid subjective characterizations
 - ▣ Avoid speculation
- Avoid destruction of evidence

EHS Incident Investigations

- If equipment involved in accident or violation should be taken out of service, follow applicable safety protocols
- Do not discard or destroy before consulting with Legal
- Take protective measures to ensure equipment is not reused during the pending investigation

US EPA Information Requests

- Broad authority under major programs
 - ▣ CAA § 114 (42 U.S.C. § 7414)
 - ▣ CWA § 308 (33 U.S.C. § 1318)
 - ▣ RCRA § 3007 (42 U.S.C. § 6927)
 - ▣ CERCLA § 104 (42 U.S.C. § 9604)
- Authority is **NOT** unlimited
- Often part of enforcement investigation
- Response is mandatory
- Significant penalties for non-compliance

US EPA Information Requests

- Conduct internal investigation
- Request clarification
- Negotiate more limited scope
- Request reasonable extensions
- Protect CBI
- Provide good faith and truthful response
- Consider enterprise issues

Thank you.

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BUILDING A *SMARTER* ENERGY FUTURE®

Agenda: NOVs, Negotiations, and Litigation, Oh my!



Receiving and responding to a notice of violation



What enforcement options an Agency may pursue



The penalty process: policies and pitfalls



The settlement agreement: key terms and considerations



Litigation: when settlement is off the table

Notice of Violation



Notice of Violation

- Post-inspection event
- Typical contents
- Regulations cited

Notice of Violation: Example



Mike DeWine, Governor
Jon Husted, Lt. Governor
Laurie A. Stevenson, Director

February 8, 2022

Transmitted Electronically

NOTICE OF VIOLATION – ACTION REQUIRED



Subject: Failure to Collect Required Water Quality Parameter Samples in the



Dear [REDACTED]

[REDACTED] were designated for this facility in the June 28, 2006 plan approval. During the July – December 2021 monitoring period, these requirements were not followed.

[REDACTED] of Ohio Administrative Code (OAC) Rule 3745-81-87(A)(2) for failing to collect the required number of water quality parameter samples in the distribution system. Total alkalinity, orthophosphate and pH are required to be sampled at least twice from 10 taps in the distribution system every 6-months. During the July – December 2021 monitoring period, 6 taps in the distribution system were sampled twice for pH and total alkalinity and five taps were sampled once for pH and total alkalinity. Orthophosphate was collected at the required number of distribution system taps.

[REDACTED] is also in violation of OAC Rule 3745-81-90 (A)(1) for failing to report the results of required water quality parameter sampling to Ohio EPA within ten days following the end of the month in which the system received the sample results. Water quality parameter monitoring was conducted in the distribution system during December 2021, but the results were not reported to Ohio EPA until January 12, 2022. Therefore,

Action Required



- Do not wait

Response timeframe



- Note key dates

Violations cited



- Rules identified

Facts included



- Underlying factual support

Notice of Violation: How to respond?

- Assemble Key Team Members
 - Technical lead
 - External relations/communications
 - Legal
 - Outside consultants



Notice of Violation: How to respond?

- Acknowledge receipt
- In writing
- Explanation of corrective measures
 - Taken or planned
- Correct the record (if necessary)
- Assemble documented evidence (if needed)

Assess: Level of severity

Agency Enforcement: Options



Inspector Discretion

- Number of NOVs prior to escalation
- Severity of citation identified
- Facility history and past inspections
- Agency priority action item



Enforcement Committee

- More formal action, beyond NOV
- Enforcement referral
- Central Office involvement
- Inspector recommendation
- Expedited settlement?

Agency Enforcement: Findings & Orders

- Administrative enforcement tool
- Director's Final Findings and Orders
 - Sets forth the basis for the Agency's conclusion that violations have occurred.
- Three parts:
 - Findings (What violations observed)
 - Orders (What actions the agency seeks to compel)
 - Penalty (Proposed monetary penalty)
- Another opportunity for negotiation
 - Administrative negotiation
 - Civil penalty negotiation
 - Settlement occurring under heightened threat of litigation
- Key Terms
- Legal advantages or disadvantages to settlement

Last stop on the administrative enforcement route . . .



Enforcement Agency Referral

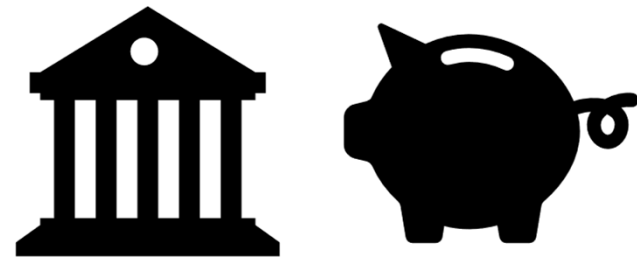
- Final step in escalated enforcement process.
- Referral to Ohio EPA or US EPA
- Invitation to Negotiate and/or Target Letter
- Complaint process
- Settled outcome: Consent Order/Consent Decree
 - Injunctive relief
 - Civil penalty
- Court litigation
- Federal versus State litigation enforcement process
 - Differences
 - Similarities
 - Approaches

Consent Decree/Consent Order

- Key Terms to Include
 - Admissions of fact or liability (no admissions)
 - Stipulated penalties
 - Injunctive Relief
 - Reservation of Rights
 - SEP's?
- Tips for negotiating process
 - Boilerplate terms versus negotiable terms
 - Sticking points
 - Litigated settlement
- Other considerations:
 - Public notice
 - Public comment
 - Court review and approval

Penalty Considerations

- Basis of penalty – how is agency calculating?
- Statutory maximums – what is the worst-case scenario?
- Similar cases – research similar DFFO's and Consent Orders on same media
- Non-monetary interests – what is the client's actual goal, aside from penalty minimization
- Develop best, worst and expected outcome scenarios – review options with key team members



Penalty Considerations



- Administrative versus Litigated
- Penalty Calculation Methodology
- Case law associated with penalties
- Typical practice
- Comparative cases



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Penalty Considerations

- No matter the jurisdiction you are in, there are some key considerations to keep in mind:
 - **Economic Benefit**
 - **Environmental Harm**
 - **Gravity**
- Potential limiting factors:
 - **Cooperation**
 - **Willfulness/negligence**
 - **History**
 - **Ability to pay**

Penalty Considerations: Example

Revised Penalty Matrix for RCRA § 7003

Extent of Deviation				
Potential For Harm		MAJOR	MODERATE	MINOR
	MAJOR	\$3,261 to \$16,307	\$2,446 to \$13,046	\$1,794 to \$9,784
	MODERATE	\$1,305 to \$7,175	\$815 to \$5,218	\$489 to \$3,261
	MINOR	\$326 to \$1,957	\$326 to \$978	\$326

<https://www.epa.gov/system/files/documents/2022-01/7003-penalty-matrix-mem-2022.pdf>

Negotiation: Keys

- Be proactive
- Be courteous
- Be professional
- Maintain relationships
- Make written record
- Engage with counsel



Remember: Typically, a continuing relationship with regulator . . .



THANK YOU!

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Andrew Kolesar is the leader of the firm's Environmental practice group. His practice includes permitting; litigation and administrative practice concerning environmental matters; assisting in all stages of cleanups under state and federal programs; counseling on environmental aspects of corporate and real estate transactions; advising on compliance issues under environmental laws; and developing pro-active environmental compliance programs. Andrew received his law degree from Georgetown University, where he graduated cum laude and was an Olin Fellow in law and economics and an Associate Editor of the Georgetown Law Journal. He previously was Supervisor, Division Environmental Engineering, at Whirlpool Corporation, Marion, Ohio and worked as an engineering consultant for Burgess & Niple, Ltd., Columbus, Ohio. Andrew received a B.S. in civil engineering with honors from Virginia Military Institute and a M.S. in civil/sanitary engineering from Ohio State University. Andrew is admitted to practice in Ohio, Kentucky, and the District of Columbia.

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