Building a Model Compliance/Enforcement Program for States and Tribes

Association of State Wetland Managers Webinar
Sept. 29, 2020
Considerations for an effective compliance/enforcement program

- Establish & adopt written policies, & procedures for enforcement
- Sustainable funding & staffing (including training)
- Create program oversight (inspections, monitoring and reporting, etc.)
- Develop investigation tools & procedures
- Prioritize efforts including public outreach & education
Develop a Strong Regulatory/Legal Foundation

- Constitution, statutes (USC), regulations (CFR) are law/code, guidance is not.
- But be aware of the importance of Case Law as they relate to guidance.
- Following guidance; making policies locally implementable.
- Enforcement programs need to draw upon a mix of skills and expertise (technical & legal).
Example - Clean Water Act

- **Section 301**: Prohibits the discharge of pollutants w/o a permit or exemption. (33 USC 1311)

- **Section 404**: Establishes authority to issue permits for the discharge of dredged or fill material into waters of the U.S. at specified disposal sites. (33 USC 1344)

- **Section 309**: Outlines enforcement procedures and criminal, civil, and administrative penalties under the CWA (33 USC 1319)
404 Enforcement Regulations (33 CFR 326)

- Outlines basic enforcement policies
- Outline enforcement procedures
  - Address activities performed without required Department of the Army 404 permits
  - Activities not in compliance with the terms and conditions of issued Department of the Army 404 permits.
  - Initiating legal action

Is enforcement discretionary for agencies? - YES
Should we treat each violator the same (e.g., developers, government agencies, “mom and pop” landowners)? – Ideally YES, but can also depend on many other factors
Example – Elements of 404 CWA Violation

1. Discharge of Dredged or Fill Material
2. Into Waters of the United States
3. From a Point source
4. By any Person
5. Without authorization or exemption
So Who Does What in 404 CWA Enforcement?

- EPA concentrates its enforcement efforts on unpermitted discharges - with some exceptions;

- The Corps enforces against permit violations and unpermitted activities

- Both Corp & EPA work w/ State agencies on related violations
Securing Program Funding

Environmental enforcement programs use a variety of funding sources, including:

- General Revenues. Many state fund environmental enforcement programs, by allocating funds from general revenues, e.g., income or sales taxes on industry and/or private citizens.

- Pollution Taxes or Fees. Enforcement programs can be funded by taxes levied on or fees charged to facilities based on the amount and/or toxicity of their pollution.

- Inspection Charge. Some programs obtain income by charging facilities for inspections.

- Permit or License Charge. Program income can be obtained by charging facilities for obtaining a state/tribal permit or license.

- Monetary Penalties. Policymakers will need to decide what will be done with monetary penalties collected under the program. These can either be deposited in a general government or environmental program fund, or used directly to pay for enforcement program expenses.
Common Federal Enforcement Options/Tools

- Injunctive Relief
- Penalties
- Supplemental Environmental Projects
- Civil Judicial Actions
- Criminal Judicial Actions
Injunctive Relief Tools

- Request for Information/Notice of Violation (order that asks information of the violator, while serving notice of a potential violation, also used to request site access)
- Administrative Orders (either bilateral agreement, or a unilateral order to a respondent) for restoration or removal
- Tolling Agreements (defers the accumulation of penalties to give time to resolve the violation)
Goal of a federal penalty assessment is to provide deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems.

Considers economic benefits derived from violation or avoiding permits.
Why Use Penalties as a tool

- Effect a deterrent when the sum of the economic benefit and the punitive portion of the penalty is less than the maximum penalty allowed
- Leverage to achieve compliance
- Encourages more efficient resolution of violation than civil or criminal action
- Establishes a history of prior violations for a potential repeat violator that strengthens a subsequent civil or criminal enforcement action
Civil Judicial Actions – Going to Court

Considered on a case by case basis, using the following factors:

✓ Quality of waters affected
✓ Impact of the discharge
✓ Culpability of the violator
✓ Deterrence value
✓ Benefit from the violation
Civil vs. Criminal Tools

- Criminal enforcement uses stringent sanctions to promote deterrence and ensure compliance vs. civil emphasizes compliance through use of less stringent means.
- Criminal enforcement used for serious environmental violations which also involve egregious negligence or conduct involving intentional or knowing disregard of the law.
Criminal Judicial Actions

Four factors are usually considered:

✓ Negligently violates an environmental statute or permit requirement

✓ Knowingly violates environmental statute or permit requirement

✓ Violates an environmental statute or conditions of a permit & knowingly endangers anothers
But First Things First !!!

- Compliance of issued permits is key to maintaining an effective regulatory program.
- Compliance assistance tools are needed to help permittees and the regulated community to understand what is required.
- Adequate and continuous training of staff and consultants of program requirements is also needed.
Compliance Monitoring - Supervision of Authorized Activities
Compliance Inspections

- Review the permit’s administrative record, including monitoring reports and other compliance documents submitted by/for permittee
- Identify issues of potential concern → develop a plan
- Contact permittee/agent to set up site inspection
- Assemble pertinent documents
  ✓ Permit and drawings
  ✓ Mitigation and monitoring plans
  ✓ Aerial photos, maps, notes from prior inspections
- Focus on whether or not permitted activity (or required compensatory mitigation) is in compliance with the terms and conditions of the permit.
Resolution Options for Informal Enforcement Actions

- Voluntary restoration or other corrective measures to bring work into compliance (or sufficiently close to compliance)
  - Administrative Penalty
  - Modify permit
    - Mitigation requirements
    - Special conditions
- No further enforcement action
Factors to Consider for Formal Enforcement

Impact of unauthorized work

- Nature and extent of impact
- Likely duration of impact
  - When did it happen?
  - How long will the effects of the impact persist in the environment?
- Affected resource
  - special aquatic site?
  - priority waterbody/watershed?
Priority Factors (cont.)

- Impacts to State projects or property
- ESA, Tribal, cultural resources, Section 106

The violator

- Mom-and-pop?
- Knowing and willful?
- Repeat violator?
- Prior permit history
- Permit program awareness
- Cooperativeness
- Ability to pay/restore
Priority Factors (cont.)

Legal and enforcement logistics

- Age of violation – statute of limitations?
- Practicability of equitable resolution
- Likelihood of qualifying for After the Fact authorization
- Legal strength of case violation clearly documentable?
- Other regulatory agencies taking legal action?
Consider a Decision Matrix Tool

• This is a tool to help regulators:
  ✓ Ask the right questions consistently
  ✓ Be consistent in evaluation of impacts
  ✓ Assess impacts/seriousness of unpermitted activities
  ✓ Evaluate full range of enforcement resolution options
  ✓ Make consistent, well-informed decisions
Basic Concepts of a Matrix to Prioritize Enforcement

- Simple, intuitive measures; highly adjustable
- Broad range of enforcement considerations
- Not a violation analysis per se, but a tool to help assess an unauthorized activity and plan a resolution strategy
- Useful throughout enforcement process:
  - Initial investigation/site visit
  - Support rationale for violation determination
  - Help determine lead enforcement agency (if other agencies are involved)
  - Support rationale for no further action and other enforcement resolutions
<table>
<thead>
<tr>
<th>Decision Criteria</th>
<th>Points</th>
<th>Score</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Navigation impacts (score = points x 4)</td>
<td>None</td>
<td>Slight (e.g., small structure)</td>
</tr>
<tr>
<td>Impact to cultural resources/historic properties (score = points x 3)</td>
<td>None</td>
<td>Slight</td>
</tr>
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<td>Impact on water quality</td>
<td>None</td>
<td>Slight</td>
</tr>
<tr>
<td>Impact to EFH and ESA-listed species (including designated critical habitat)</td>
<td>None</td>
<td>Slight</td>
</tr>
<tr>
<td>Expected duration of ecological and/or navigational impacts</td>
<td>Fleeting (e.g., &lt;2 months)</td>
<td>Short term (e.g., 1 or 2 years)</td>
</tr>
<tr>
<td>Risk to environment of leaving work in place and unauthorized</td>
<td>None</td>
<td>Slight</td>
</tr>
<tr>
<td>Risk to public health or safety of leaving work in place and unauthorized</td>
<td>None</td>
<td>Slight</td>
</tr>
<tr>
<td>Practicability of quickly implementing measures that reduce or compensate for impacts</td>
<td>Not practicable</td>
<td>Fairly practicable</td>
</tr>
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- Broad range of criteria grouped by basic subject
- Multipliers for certain high-importance criteria
- 10-point scale is simple, functional
- Assign points for each criterion
- Intuitive measures
Using the matrix to inform enforcement decisions

<table>
<thead>
<tr>
<th>Point Range</th>
<th>Suggested initial enforcement strategy</th>
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</thead>
<tbody>
<tr>
<td>≥ 130</td>
<td>Major violation. Consider immediate referral to EPA or U.S. Attorney.</td>
</tr>
<tr>
<td>110 - 130</td>
<td>Serious enforcement action that will likely involve complex resolution (e.g., impact reduction, ATF permit, and/or compensatory mitigation)</td>
</tr>
<tr>
<td>80 - 110</td>
<td>Minor enforcement action. Seek expeditious resolution such as ATF general permit or removal/restoration.</td>
</tr>
<tr>
<td>40 - 80</td>
<td>Document violation and send violator a letter of warning; take no further enforcement action at this time.</td>
</tr>
<tr>
<td>≤ 40</td>
<td>No enforcement action. Complete a JD and field investigation report as appropriate; prepare brief MFR documenting decision. No letter required.</td>
</tr>
</tbody>
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Adjustable

A “starting point” for enforcement regulators
Coordination of Enforcement Actions

- Violations of a S/T environmental statute may also be a federal violation.
- Coordination between agencies on potential cases can facilitate effective resolution (reduce duplication of effort).
- Consider coordination agreements/meetings (ex. FLA meetings between Corp/EPA) to determine lead agency and roles.
Think about communication practices for enforcement

- Respondent;
- Internal via briefings and agency newsletter;
- Notify other Agencies on Cc’ order;
- Cc’ the Corps on State/Tribal Order
- Consider when to issue Press Releases
Summary

- Effective enforcement program development can take time and effort, consider progressive steps.
- Focus limited program resources on highest priority enforcement actions.
- Maximize program integrity and public education benefits of higher priority enforcement actions with a focus on compliance assistance.
- Consider environmental impact, program integrity, enforcement logistics, and available resources when setting enforcement case priorities.
- Develop tools/policies to make consistent decisions and efficiently manage enforcement workload.
Questions?