

SUMMARY OF WORKSHOP 2I: NEGOTIATED COMPLIANCE AGREEMENTS

Facilitators: Susan Bromm, Environmental Protection Agency, United States
Ike Ndlovu, Department of Environmental Affairs and Tourism, South Africa

Rapporteur: Thomas Maslany, Environmental Protection Agency, United States (retired)

GOALS

To explore the salient elements and usefulness of compliance agreements and the motivations of industry and government regarding entry into such agreements.

1 INTRODUCTION

Ms. Susan Bromm opened the workshop by suggesting questions that participants should consider during the discussion:

- What motivations exist to enter into negotiations regarding compliance agreements for industry and for government?
- Are there situations in which governments should not use compliance agreements?
- What are the elements of a good compliance agreement? Should some elements be non-negotiable?
- Are there examples of creative elements that your country has included in compliance agreements?

2 DISCUSSION SUMMARY

2.1 The South African Experience

Mr. Ike Ndlovu gave a presentation on the negotiated agreement experience in South Africa. The South African National Environmental Management Act and Environmental Management Cooperative Act include provisions to negotiate agreements that go beyond compliance with existing requirements, so as to establish new expectations. These provisions are intended to complement – not replace – existing legal requirements.

To facilitate negotiations with concerned parties, the government may indicate that it plans to adopt new requirements in a particular area of concern, presenting an opportunity for parties that create these environmental problems to have their input recognized and addressed. During the negotiations, the government will come to an agreement with the concerned parties on new environmental targets (discharge or emission requirements, product changes, etc.), monitoring requirements, provisions for monitoring progress towards meeting the new expectations (milestones), and periodic progress reports. As part of this process, the government developed Environmental Cooperative Agreement Guidelines to provide a framework for the process. Mr. Ndlovu presented two examples of this negotiated requirement process:

- The Plastic Bag Initiative: The use of thin plastic bags for packing purchase goods was creating a significant trash problem. The South African government negotiated an agreement with the manufacturers of the plastic bags to ban the thin plastic bags and to introduce a charge for the new plastic bags to facilitate recycling of the bags. They also agreed on an acceptable thickness and the type of ink that can be used on the bags.
- The Vesuvius Refractory Company:

This company manufactured building material and created air pollution that was a concern. The government imposed a control program on the company to reduce the emissions, but it did not comply with the program, so the government filed an action with the court. When the court ruled in favor of the company, the government threatened to shut down the facility. The company then indicated a willingness to negotiate a new schedule to reduce their emissions. The agreement resulted in full compliance with the requirements.

2.2 What Constitutes a Negotiated Agreement?

After the presentation of the South African experience and some preliminary discussion, the group recognized that a common understanding on what constitutes a negotiated agreement was needed.

The group recognized four types of negotiated agreements:

- 1) an agreement for a party to make improvement to the environment beyond what it is formally obligated to do,
- 2) an agreement for a party to meet a future compliance date,
- 3) an agreement for a party to go beyond a future compliance date, and
- 4) an agreement for a party to comply with a past compliance date where there is an established violation.

The last three fall into the category of negotiated compliance agreements.

2.3 What Motivations Exist to Enter Into Negotiations for Compliance Agreements for Government and for Industry?

Motivations for government include:

- To secure agreements that get additional benefits beyond compliance
- To increase the likelihood of a successful resolution of the problem, since it recognizes some of the companies' needs (compared to other alternatives)

- To save money and time, since negotiated agreements may be the most cost-effective and timely way for the agency to resolve a non-compliance situation if the alternative is a potentially long and challengeable court action
- To benefit the environment, since it may provide a more timely return to compliance
- To avoid the need to shutdown the facility, especially if the facility is providing an important service
- To fill gaps in the requirements where clarity is necessary.

Motivations for industry include:

- To create goodwill and a positive environmental image
- To resolve disputes in a manner that the company can live with in its business plan
- To provide some certainty.

2.4 Are There Situations in Which Governments Should Not Use the Compliance Agreement Process?

Workshop participants concluded that negotiated agreements should not be used:

- Where the company will get an undeserved benefit
- Where the agreement is unenforceable or will not be enforced
- Where the company has a history of violating past agreements
- Where the public will not accept a negotiated agreement
- Where you have a weak legal basis or can only come up with a weak agreement
- Where other alternative mechanisms are more efficient and effective to bring about compliance.

2.5 What Are the Elements of a "Good" Compliance Agreement?

Workshop participants concluded

that to be a good agreement:

- The agreement must be enforceable
- There should be an established framework for negotiating an agreement
- The agreement should include a dispute resolution process
- All parties must have the authority to sign the agreement
- The agreement should include both milestones and a final compliance date
- The agreement should provide for periodic progress reports
- The agreement should address penalties for missing a milestone
- There should be transparency and public involvement
- The agreement should make the environment whole (such that environmental insults caused by non-compliance are fully remediated).

There was considerable discussion on the issue of “making the environment whole”. It was generally felt that while this concept does not normally appear in negotiated compliance agreements, it is an important element for consideration. This concept would go beyond provisions such as cleaning up spills, to provide for reductions in emissions to the air or discharges to the water that would offset those emis-

sions or discharges previously added to the environment that were beyond the compliance level.

2.6 Are There Examples of Creative Elements That Your Country Has Included in Compliance Agreements?

Workshop participants shared the following elements:

- Miscellaneous or collateral benefits as part of the agreement, e.g., provisions such as mandatory audits or Environmental Management Systems that help prevent future violations
- Training programs established by the violator for audiences outside the violating company
- Supplemental Environmental Programs that provide additional benefits beyond the requirements
- Programs that establish environmental management programs or other requirements in the corporate structure that is above the facility that is in violation

3 RECOMMENDATIONS FOR INECE

Workshop participants requested that INECE develop a guideline document on Negotiated Compliance Agreements.