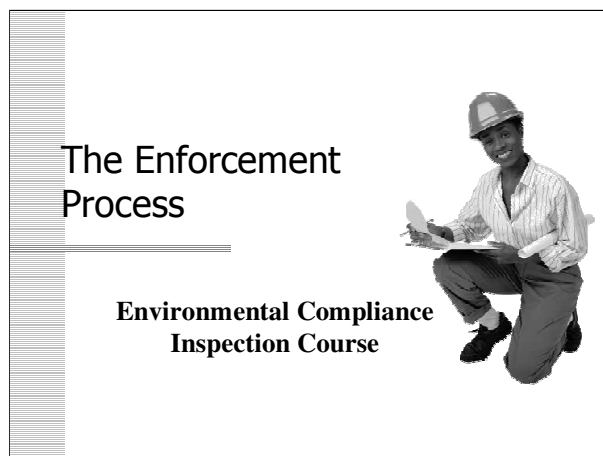


Session 14:	The Enforcement Process
Time:	1 hour 15 minutes
Equipment:	Projector for slides
Preparation:	Invite speaker Discuss expectations for session Study notes
Handouts:	None



*This session is best given in a country specific format by an attorney, case development officer, or enforcement manager from the host country. They should be advised ahead of time of the expectations of the session, and be given the talking points for the presentation. However, they also have the responsibility to change the presentation to suit local laws, policies, and practice. In some cases, they may want to completely change the context of the session to discuss internal procedures for referring cases or to discuss specific steps the inspector must take to develop the case.*

*Begin the session by introducing the speaker and encourage them to elaborate on their background and experience.*

This session will present some things to consider as you take a case through the steps from the determination of a violation to conclusion of a settlement. Since the court process is somewhat out of our control and usually operates under different rules set by the court, I will focus on settling cases with violators through negotiation.

The details of what I say will vary depending on the specific policies and practices in your country. However, the basic ideas should help you understand how you and the information you gather fit into the enforcement process.

It is important to remember, that without some type of enforcement, it is unlikely that everyone will comply with environmental regulations, despite the best efforts during our inspections. Without some sense that compliance is mandatory and non-compliance will be detected and punished, the laws and regulations don't really exist in practice since they will only be seen as suggestions, not mandates. For example, if you know that you will never be stopped for driving over the speed limit, is it a *limit* or just a recommendation?

### Why Proceed With Enforcement?

---

- Recalcitrant violator
- Require remedial actions
- Apply sanctions
  - Monetary penalty
  - Imprisonment
- Equity among industry
- Encourage others to comply



2 Environmental Compliance Inspections

*Bullets will advance when you click the mouse. Encourage the students to answer the question before you continue through the items listed here. Discuss their ideas and suggestions.*

If you remember back to one of the very first sessions, we talked about how enforcement is a tool to bring about a change in behavior that drives people into compliance. What were some of the other tools? *Let audience attempt to answer first.*

- *Compliance assistance*
- *Financial incentives*
- *Public pressure*
- *Liability*

However, we did not discuss the specifics of how enforcement accomplishes these goals. Why should we proceed with enforcement? What are some of your ideas? When might an enforcement option be more desirable than other mechanisms that promote compliance? *Allow class to discuss and make suggestions before going through the ones listed here.*

- Recalcitrant violator – someone continues to violate may deserve a stronger response.
- Remedial actions may involve large expenditures which may require additional force of law.
- You may feel that sanctions such as monetary penalties or jail-time may be justified.
- Enforcement may be a way to provide equity between facilities that comply and those that do not comply (We'll discuss this more in a moment).
- Finally, a strong enforcement response may send a message to others that compliance is important, and the threat of sanctions will provide deterrence and encourage others to comply. This encouragement also applies to the facility in violation, and will provide an incentive for them to comply in the future in order to avoid the enforcement action to start with.

## Enforcement Team

---

- Lawyers
- Inspectors
- Managers
- Technical experts

**All parties must communicate**



3 Environmental Compliance Inspections

When you are conducting your inspections, you can operate reasonably independently. In fact, you have to be able to come up with conclusions, adapt to changing circumstances, and deal with other people on your own, so the ability to work independently is a crucial skill for inspectors.

But, when the decision is made to go forward with enforcement based on your findings, you become part of a larger team, and must give up some of that independence and become part of the group. The enforcement team usually consists of you, your managers, the attorneys that may take the case to court, and any other technical experts such as laboratory technicians or process engineers that are needed to support and develop the case.

All these team member must work together as a team, or the case may not progress in an efficient manner and you may not achieve the results you are seeking. In addition to working as a team, everyone must communicate with everyone else. Otherwise, information can be misinterpreted or misrepresented leading to problems as the case progresses.

## Penalties

- Promotes environmental compliance
- Protect public health by deterring future violations
- Sends message to regulated community
- Ensures no economic benefit from violating law

4

Environmental Compliance Inspections

Penalties are usually the most controversial part of the enforcement process. They are issued for various reasons, but primarily as a way to punish the violators and deter them from violating again and deter others that hear about the penalty and don't want to incur a penalty themselves. Do they always work? *No, but they usually have some impact.*

Let's use an example we may find in our every day life. How many of you regularly stop your car at a red light? *Get a show of hands.* How many of you stop even if there is no traffic coming the other way? *Get another show of hands.* If there is no danger from oncoming traffic, why bother to stop? *Ask someone specifically and discuss their answer.* Has anyone ever gotten a ticket for running a red light? Are you afraid the police might catch you and give you a fine (again)? What is the fine here for running a red light? *(Hopefully it is small enough for the example to work.)* Will that fine cause your family to go into bankruptcy or force you to sell the car? Probably not, but it does deter you from violating the law, and keeps you sitting at a red light with no traffic and no police at 2:00 in the morning, on the chance you might get caught. The penalty has instilled in you a fear or respect of the law. Your buddy stops because now, he/she knows there is a chance for them to get one too, and they don't want to pay the fine, even if they can afford it.

These are example of how the penalty deters you from driving through a red light again, and deters your friends from driving through, too.

What if you could save \$10 in fuel and wear and tear on the car by not stopping, and the penalty was only \$5? Would you stop? *No, the economics of the penalty encourage you not to stop since even if you are penalized, you still make money by running the light.*

The penalty should be higher than the money you would make by breaking the law.

## Factors Governing Penalties

- Economic benefit derived from violation
- Gravity of violation
- Prior compliance history of the facility
- Ability to pay



5

Environmental Compliance Inspections

These are some different factors you should consider as you think about penalties for different environmental violations.

Often, environmental compliance costs the facility extra money. They may have to buy equipment, pay for samples or tests, hire additional staff, spend extra money for waste disposal, or even limit production so they don't exceed pollution limits. All this provides for an economic incentive to violate, not to comply. A penalty issued as part of an enforcement action may take away this incentive by taking back the profit earned. For example, two companies are both required to build a scrubber to remove particulate from the smoke stack and this scrubber costs \$100,000. If one violates the law and does not build the scrubber, they can put the \$100,000 in their pocket while the other loses money because of our requirement. We would penalize the violating company the \$100,000 illegally earned plus any interest or investment income, tax savings, etc. they may have also earned.

Another component of the penalty is determined by the "Gravity" or seriousness of the violation. Were they almost in compliance except for one small detail? Or did they completely ignore the requirement? Were they able to contain an illegal release before it did any harm? Or did they kill thousands of fish by their negligence? This is similar to a traffic violation where the police give you a warning for running a red light at 2:00 am, but they take away your license if you run a light and hit a car during rush hour killing a child.


The prior compliance history and attitude of the facility may also be taken into account. For example, a facility with a long history of violations may merit a higher penalty to make sure they "get the point" and learn this time around.

Finally, should you consider the company's financial status? Can they pay a large penalty? Should the size of the violator matter? *Discuss these and other issues for a 3 – 4 minutes.*

## Penalties

---

- Calculations must be equitable
  - Consistency is important, try to be typical/normal across industry
- Length of violation
  - The duration can add to the penalty
- Penalty types
  - Cash, purchase of equipment, other environmental expenditures



6 Environmental Compliance Inspections

As we've mentioned before, transparency and equity are important in any enforcement program. We have an obligation to treat everyone consistently and must justify variation when it occurs. For that reason, you should calculate the penalties consistently among different facilities. Otherwise, you may be accused of favoritism or of picking on individual companies.

We need to develop and apply policies that provide consistency, yet accommodate variation in circumstances. That allows everyone to understand what's at stake and how they will be treated if they are found in violation. In the United States, we use several different systems that assign values to violations, or at least provide guidance in how to come up with penalties taking into account the factors we discussed earlier. An ideal penalty policy will allow anyone calculating a penalty to arrive at the same amount, and everyone should understand how that amount was determined. That avoids later discussion and argument.

Other factors that may influence the penalty include the duration of the violation, or the number of times the violation occurred. Similar factors may include the amount of pollutant emitted, the number of people affected, the amount of harm caused, or other details.

There are different types of penalties. In some programs, the penalties go into the general governmental budget and are not linked to the violation or environmental work at all. Other programs do direct the penalty directly into environmental improvements. There may be other types of penalties such as having the company buy equipment or provide training for others. This serves two purposes: it is a deterrence to the company and others, and it also provides information and incentives for others to comply.

## Settlements



- Much less resources required than court
- Must be responsive to both side's needs
- May be able to achieve benefits beyond just a cash penalty
- Should consider financial position of company and other concerns

7

Environmental Compliance Inspections

A settlement is an agreement between the government and the violator that resolves the violations without going to court. A settlement may include a penalty, an agreement to perform work or actions that fix the environmental problem and resolve the violation, or other items that are mutually acceptable to both sides. It is similar to a contract in that both sides have to agree and sign the settlement before it has any authority.

Settlements are usually much less resource intensive than a court case. Since we do not have to prove the findings of violation to a judge, the burden of proof is lower. Witnesses may not be required, and you may not need to develop as much evidence as would be needed in court. However, the government must be able to substantiate the violations, or the violator may not agree to settle preferring to take the chances in court.

Settlements can also be more responsive to the specific needs of both sides. The agreement can be more flexible and accommodate a variety of resolutions rather than the one a judge or jury may mandate.

You may also be able to get benefits beyond a cash penalty. In some situations, you may be able to exchange penalties for environmentally beneficial projects that may not be otherwise required, and that the company would not otherwise perform.

Finally, a settlement should consider the financial position of the company. Some courts may be very rigid in their sentencing, and may fine a company more than they can pay. Through settlements, we have the ability to schedule payments or reduce the penalties so the company would not go out of business.

## Negotiations

---

- Purpose of negotiations
- Management of negotiations
- Case study:
  - The un-managed negotiation



Environmental Compliance Inspections

8

In the United States, most environmental enforcement cases are settled through negotiation, not trial. A negotiated settlement is not an undesirable outcome. Generally, such a settlement is more favorable than that obtained in a trial, because it is:

- Quicker
- Less expensive
- Less risky

Such a settlement also produces more specific direction about what a violator must do.

You should always negotiate from a strong position to obtain the type of settlement you seek. The inspector is the cornerstone of that strength, since violations are documented in the inspector's reports—good inspection reports lead to good settlements.

An inspector needs negotiation skills because the inspector:

- May serve as a member of a team negotiating an enforcement case or settlement (or, at a minimum, will be involved in preparing and providing support for the negotiation team)
- May find it necessary to negotiate with facility officials to gain consensual entry and work out other logistical aspects of the inspection
- Frequently will be involved in negotiations with program staff, attorneys, and technical staff on such issues as scope and objectives of an inspection, assignment of responsibilities to inspection team members, and determination of appropriate enforcement action.

Negotiations must be managed and controlled to be effective. There should be one lead negotiator supported by technical experts that help formulate the agency's position. It is crucial that the other side see the negotiation team as a cohesive unit. Any disagreements should be discussed away from the opposition. Most importantly, everyone should understand what is being sought in the negotiation, and focus on achieving that end.

## Negotiation "DO's" ✓

"Give and take" is an important part of the negotiation process

- Teamwork is critical
  - "We are all ignorant, only in different areas" (Albert Einstein)
- Planning is also essential
- Understand the other team's goals and motivation

9

Environmental Compliance Inspections

Negotiating a settlement is similar to haggling over the price of a gift in the market. Each side goes back and forth until they reach an agreement both can accept. It is difficult to teach the art of effective negotiation, because it is a dynamic process that depends largely on personal style and is learned through experience; however, in this session we will try to pass on some pointers to aid inspectors in developing this skill.

To set the stage, here are some key points to remember:

- There are few hard and fast rules for successful negotiation.
- Because each negotiation takes on a life of its own, there is no "right" settlement.
- Negotiations often go together with litigation. While most cases settle before (or during) litigation, the threat of appearing in court often helps bring about a settlement

You should be prepared to give something in the process. The point of negotiation is to give and take on both sides. Otherwise, the defendant has nothing to gain, and no reason to settle. For this reason, we often begin with a penalty demand that is higher than the minimum we will accept so we have some room to move before reaching our "bottom line".

You should work as a team. Everyone on the team has something to add.

Just like everything else, planning for the negotiations is crucial. The team should discuss how their position may change depending on refusal or alterations by the other side. You should also know who is going to represent which issues, and how much flexibility the negotiating team has.

You should also know, as well as possible, what the other side wants. For example, if you know they really want to install a pollution prevention technology in lieu of a penalty, you can use this to your advantage by "allowing" to do what they want in exchange for something else that you want they don't. For this reason, it is imperative that any conversations or documents concerning your position on the settlement or negotiation be kept confidential.

## Negotiation "DON'T S"

- Don't overact to other team's tactics!
  - Stay calm and focused on the issues.
- Don't hide mistakes from your other team members (attorney).
- Don't be rigid and inflexible within a negotiation.
- Try to be realistic.

10

Environmental Compliance Inspections

The other team may start with a position very far away from yours in order to see how far you will move. For example, you have calculated a penalty of \$100,000 and the other attorneys make an offer of \$1,000. Should you get offended and walk away? They may be trying to get you to overact, so stay focused on the issues and keep moving.

Mistakes will be made. Don't ever hide them from the rest of the team. In some cases, you will find information that you didn't know during the inspection that may change your determination. It is better to change your position, than to continue to argue for an unjust determination of violation. It is also always better to admit you don't know something than to make it up during the negotiations.

Be flexible during the negotiation. You may be proposing a solution that the facility does not think will work. They may be right, so have the flexibility to change your ideas as you find more information. For example, sometimes we may propose a technology that will achieve the ultimate solution, but the company proposes a different way to get to the same result.

Finally, try to be realistic, both in your demands and in your approach to the negotiations. I have seen situations where the government negotiators were so determined to get a certain minimum penalty that they would not listen to the companies arguments for alternative ways to spend the same amount of money on environmental projects. At a certain point, we must realize that we may have gotten as much as we can get.

### Biggest Obstacles to Settlement

- Weak evidence
- Weak law/regulation
- Lack of flexibility
- Trying to get too much
- Personalities



11 Environmental Compliance Inspections

*The bullets on this slide will come up when the mouse is clicked. You should ask some questions to have the class think of reasons the company may not agree to settle but would prefer to go to court.*


So, if it is so beneficial and so much easier to settle a case, why would anything ever go to court?

- The defendant may believe that your evidence is weak and would not convince a judge of the violation. The converse is true – the better the evidence and the stronger the case, the more likely the company will agree to a settlement rather than risking a loss in court.
- The law itself may be weak, or the defendant may have found legal flaws with the regulation. For example, the legal requirements for issuing a regulation or permit may not have been followed making the requirement invalid.
- The agency may not have offered the defendant enough flexibility and they believe that they could get a better deal from the court. Or the defendant may believe that the requirement itself doesn't provide enough flexibility, and a court would agree that it is an unreasonable requirement and the agency should take action.
- Either side may believe that the other side is trying to get too much out of a settlement. Their positions may never meet, and they may never be able to reach an agreement.
- Finally, there have been situations where the personalities involved bring the case to court when other people may be able to reach a settlement. There may be people out there who refuse to acknowledge the authority of your agency, and will fight you despite the low chances of winning.

### Taking Case to Court

---

- Much longer process
- Requires additional documentation
- Exchange of information
- Judge/jury decides
  - We loose control
  - May not get desired outcome
- Higher risk



12 Environmental Compliance Inspections

Sometimes, we must take cases to court. Some defendants will not agree to settle and we will need the authority of a judge to get the results we seek. However, before deciding to go to court, you should understand that it is a long process, and may require years to reach a resolution.

It also requires additional documentation to verify the evidence, the penalty, and all the facts of the case. This documentation usually must be shared with the defendant so they can understand the case and properly defend themselves. Both sides will also get to question witnesses such as inspectors, case developers, plant operators and company managers.

Finally, the judge or the jury will decide on the verdict. At this point, the agency loses control of the process. We can usually make recommendations to the judge, but the court is under no obligation to follow our recommendations ( but they must follow the law). As a consequence, even if we win the case, we may not get the result we are seeking.

Because of the uncertainties that we experience in the case room, the risks of going to court are higher for both side. Either side may win the case, but not get what they want from the judge. For this reason, we should always make some attempt to settle the case before it goes to court.

## Post Settlement Follow-up

- Is the company doing what they agreed to do in the settlement
- Verify that schedule/timetable being followed
- Follow-up inspections often required to ensure required activities performed
- Chronic violators need long-term scrutiny

13

Environmental Compliance Inspections

Finally, whether the case concludes with a settlement of an judicial injunction, we need to follow up to ensure that the defendant is performing the actions mandated in the final order.

In cases where the only requirement is that the defendant pay a penalty, we can easily verify whether the payment was made. In other cases, the settlement may require extensive construction or work to be done. In these cases, we should ask to see records or certifications that the required activities were accomplished.

Many times, the defendants will be given a schedule to follow with certain milestones to ensure progress is being made. We need to verify, either by site visits or requiring the defendant to send us documentation, that the work is progressing along the schedule.

In some situations, we will need to inspect the facility again to determine if they have come back into compliance with the regulation and are in compliance with the terms of the order or settlement. These inspections are particular necessary when the defendant has a long record of violations, and has not shown any additional indication that they will independently change their practices.

Sometimes, as part of the settlement you may want to require the company to conduct their own oversight. I have seen cases where the company was required to hire a third party auditor to periodically check the company and confirm that they are in compliance with the terms of the settlement. This is most common where there are long term remedial projects that may take a significant amount of time.