

Building a Model Compliance/Enforcement Program for States and Tribes

Association of State Wetland
Managers Webinar
Sept. 29, 2020

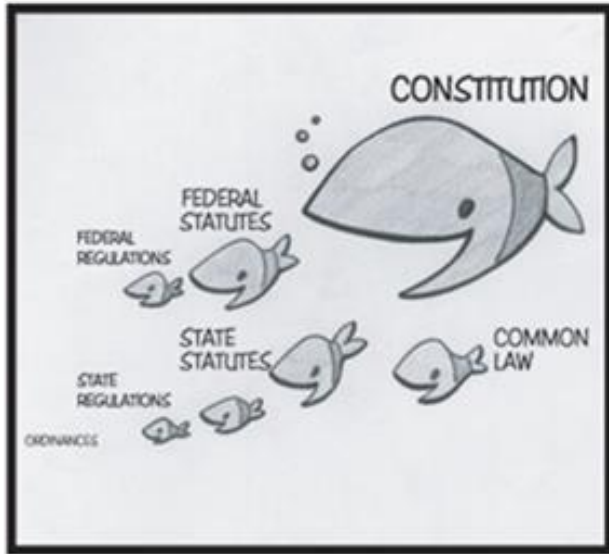
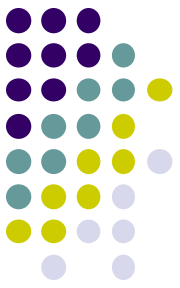


Considerations for an effective compliance/enforcement program



- 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



law hierarchy

- 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



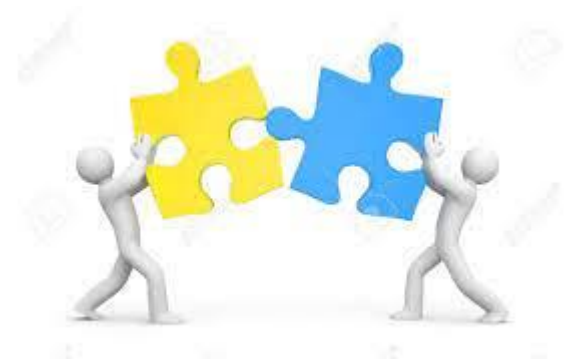
1. Discharge of Dredged or Fill Material
2. Into Waters of the United States
3. From a Point source
4. By any Person
5. Without authorization or exemption



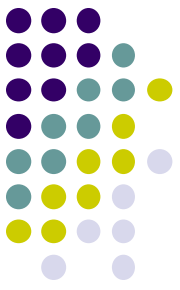
So Who Does What in 404 CWA Enforcement?



- 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 states 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)

\$Penalties\$



- 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



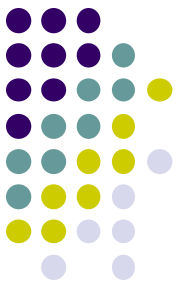
Why Use Penalties as a tool



- 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 another



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



k11574321 www.lotosearch.com

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



Seattle District Enforcement Decision Matrix

Enforcement Action Reference Number:

Decision Criteria		Points					Score
		0	1	3	6	10	
1	Navigation impacts (score = points x 4)	None	Slight (e.g., small structure)	Minor (e.g., restrict neighbor's access)	Moderate (e.g., interfere w/ general navigation)	Severe (e.g., block federal navigation channel)	
2	Impact to cultural resources/ historic properties (score = points x 3)	None	Slight	Minor (e.g., CR near project area)	Moderate	Serious (e.g., NRHP-listed site impacted)	
3	Impact on water quality	None	Slight	Minor	Moderate	High	
4	Impact to EFH and ESA-listed species (including designated critical habitat)	None	Slight	Minor, temporary	Minor, permanent	Serious	
5	Expected duration of ecological and/or navigational impacts	Fleeting (e.g., <2 months)		Short term (e.g., 1 or 2 years)		Long term or Permanent (e.g., > 5 years)	
6	Risk to environment of leaving work in place and unauthorized	None	Slight	Minor	Moderate	High	
7	Risk to public health or safety of leaving work in place and unauthorized	None	Slight	Minor	Moderate	High	
8	Practicability of quickly implementing measures that reduce or compensate for impacts	Not practicable		Fairly practicable		Very practicable	

Intuitive measures

Using the matrix to inform enforcement decisions



Adjustable

A “starting point” for enforcement regulators

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

Coordination of Enforcement Actions



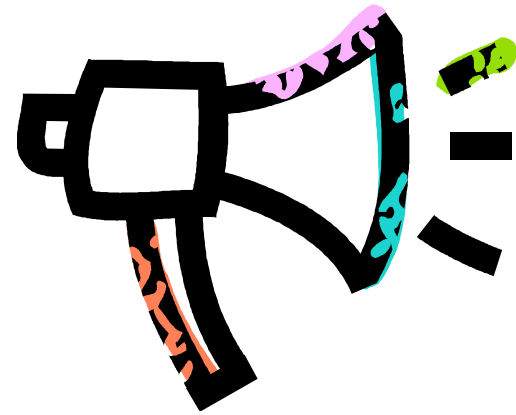
- Violations of a S/T environmental statute may also be a federal violation
- Coordination between agencies on potential cases can facilitate effective resolution (reduce duplication of effort)
- Consider coordination agreements/meetings (ex. FLA meetings between Corp/EPA) to determine lead agency and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

