

ENFORCEMENT ISSUES IN STORMWATER REGULATION

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Key Types of Enforcement

- Civil
- Criminal
- Federal
- State
- Local



Civil Enforcement Actions

- Informal Enforcement:
 - Written
 - Oral (during inspection)
- Administrative Order
- Notice of Violation
- Stipulation Agreements
- Lawsuit:
 - Injunctive Relief
 - Penalties
 - Consent Decree



Administrative Order

- List of Alleged Violations
- References to Statute, Rule, or Permit
- Corrective Actions
- Administrative Penalty
- Forgivable Versus Nonforgivable Penalties
- Right For Review



Stipulation Agreement

- List of Alleged Violations and Authorities
- Corrective Actions Required
- Enforcement Forum
- Civil Penalty Matrix
- Stipulated Penalties
- Dispute Resolution Procedures
- Conditions for Termination



Consent Decree

- Similar to Stipulation Agreement
- Settlement of Enforcement Action Filed in Court
- Filed With Court, Which Maintains Jurisdiction



Federal Actions

- Most Civil Enforcement Actions Brought by States under Delegated Programs
- Potential for Joint Federal/State Enforcement
- Potential for Federal “Overfiling”
- Federal Process Similar to States
- Federal Criminal Actions More Likely than State



Key Elements of Response

- Respond in Writing, in Detail, and On Time
- If Extension Needed, Request As Soon As Possible
- Assess Cost/Benefits of Administrative Appeal
- Negotiate Attainable Corrective Actions
- Negotiate Realistic Stipulated Penalties
- Civil Penalty Process
- Consider Supplemental Environmental Project (SEP)



State Environmental Audit Program

- Potential Penalty Relief if Self Reported Within Certain Timeframes
- Several Limiting Requirements That Make it Difficult to Access



Federal Civil/Criminal Penalty Relief Policies

- EPA Audit Policy
- U.S. Department of Justice Factors



“Incentives for Self Policing: Discovery, Disclosure, Correction and Prevention of Violations”

(EPA Audit Policy Statement, May 2000)

- Consistent with EPA Goal of Greater Compliance Through Self Policing
- Potential for 100% Waiver of Gravity-Based Penalties for Violations
- Does Not Include Potential Economic Benefit Penalties
- Gravity Based Penalties Reduced by 75% if no Systematic Discovery
- No Recommendation for Criminal Prosecution, with Some Exceptions
- No Routine Request for Audit Reports



DOJ Factors

- Factors for Consideration in Criminal Prosecutorial Discretion
- Not a Checklist, For Internal Guidance Only
- Voluntary Disclosure
- Cooperation
- Preventative Measures and Compliance Programs
- Pervasiveness of Noncompliance
- Internal Disciplinary Actions
- Subsequent Compliance Efforts



Environmental Management System

- Program Goals and Policies
- Environmental Structure and Communication
- Approach to Compliance Management
- Education and Training
- Auditing and Reporting
- Achievement, Recognition and Reward Procedures



Environmental Management System

- Overall Compliance Policy for Employees and Agents
- Assignment of Overall Responsibility and Specific Responsibility
- Mechanisms for Assuring Compliance, Including Monitoring and Auditing
- Internal Communication
- Incentives to Managers and Employees
- Procedures for Prompt and Appropriate Correction



Why an EMS Makes Sense

- Liability Protection
- Responsible Corporate Officer Doctrine
- Protect Equity and Reputation
- Systemize Risk Management
- Improve Financial Performance
- Employee Morale, Productivity

