

# 2013 Compliance Assistance Conference

Ohio EPA's Enforcement Program



# Ohio EPA's Compliance Assurance through Enforcement Program

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# Overview

- Director Nally's perspective on compliance and enforcement;
- Types of enforcement and discussion of which violations are likely to become formal cases; and
- Discussion of Ohio EPA's Compliance Assurance through Enforcement Policy
- Separation ("Chinese Wall") between OCAPP and Enforcement at Ohio EPA

# Compliance Philosophy

- “I believe in the concept of working toward establishing compliance first and using enforcement as a tool in our tool belt.”
  - - Director Scott J. Nally

# The Backdrop

- The number of “compliance points” on an annual basis is in the millions
- Over 11,000 Inspections
- 4,800 Complaint Investigations
- 5,800 Notice of Violation Letters

# Priority Cases

- Priorities in determining which cases to pursue are typically a combination of these 3 factors.
  - Protecting Human Health/Environment
  - Recalcitrance in Addressing Noncompliance
  - Programmatic Integrity

# Case Development

- Most cases are referred from district offices
- Some cases are initiated by verified complaints from citizens being impacted by violations
- Staff evaluate options and make a recommendation to the Director on how to proceed

# Key Players

- Divisions' Enforcement Committees and District Inspectors
- Ohio EPA Attorneys
- Ohio Attorney General's Office, Environmental Enforcement Section
- Ohio EPA Office of Special Investigations
- The Director

# Types of Enforcement

- Voluntary Compliance/Technical Assistance
- Director's Findings and Orders
- Judicial Enforcement (i.e. Court)
- Criminal Enforcement

# Voluntary Compliance/Technical Assistance

- Notice of Violation sent by specialist from district office, with suggestions for abating the violation which may include the offer of technical assistance
- Warning letter sent by program chief or director
- If violation is abated, return to compliance letter may be issued

# Administrative Enforcement Process

- Letter sent by the Director
- Settlement discussions conducted with Ohio EPA attorneys and enforcement staff
- May include penalty and injunctive relief requirements
- If case is resolved, resolution is memorialized in Director's Findings and Orders

# Judicial Enforcement (Civil)

- Some cases referred to the Attorney General's Office as initial step
- Some cases are referred because of a lack of resolution in administrative process
- Referral to the Attorney General traditionally results in higher penalties
- Often opportunity to negotiate before complaint is filed

# Criminal Enforcement

- Most of EPA's statutes have criminal sanctions
- Office of Special Investigations along with agents from the Bureau of Criminal Identification and Investigation (BCI& I)
- Criminal Enforcement often coordinated with federal agencies such as US EPA and US Attorney's Office

# Criminal Enforcement

- Not aimed at punishing minor or technical violations
- Types of violations considered for criminal enforcement include:
  - Deliberate misconduct resulting in violation;
  - Concealment of misconduct or falsification of required records;
  - Tampering with monitoring or control equipment;
  - Violators who operate completely outside of OEPA's regulatory scheme.

## Examples of Criminal Investigations

- unpermitted discharges into waters of the state;
- unpermitted emissions of toxic air pollutants;
- open burning;
- bypassing treatment systems;
- filling of wetlands;
- rip-and tear asbestos projects;
- falsification of documents such as manifests, waste receipt logs and monthly operating reports;
- false statements to regulatory personnel;
- illegal disposal or abandonment of hazardous waste, solid waste or construction and demolition debris;
- burial of waste at unpermitted locations.

# Criminal Investigations in 2012

- In SFY12, Ohio EPA criminal investigations resulted in 18 convictions (12 felony counts and 6 misdemeanor counts). These convictions resulted in approximately \$786,000 in fines; \$218,123 in restitution; 60 days of jail time; 23 years of probation; and 650 hours of community service.

# What Will Agency Seek in a Case?

- Administrative/Civil
  - “Injunctive Relief” – enforceable commitments to correct the problem
  - Civil Penalty
  - Stipulated Penalties in most civil cases
- Criminal
  - Fines, Restitution, Jail Time

# Penalty Factors

- Seriousness of the violation
- Level of effort in addressing violations
- Ability to pay

Goal: Deter violations and not allow economic benefit of non-compliance

# Compliance Assurance through Enforcement Program

- Represents Director Nally's vision for how compliance and enforcement will be implemented;
- Internal guidance document;
- Sets forth broad goals and performance standards relating to enforcement;

## 3 Goals

- Return violators to compliance in timely manner and give them the tools to help prevent violations from occurring
- Deter violations and ensure violations have consequences including penalties
- Mitigate environmental and programmatic harm caused by violations

# Key Points

- Expect to see more interaction/outreach from EPA inspectors but also expect to see formal enforcement initiated sooner if violations are not abated.
- For violations deemed significant, will require the development of compliance plan that will serve as a roadmap to bring the facility back into compliance.

# Expedited Settlement Agreement

- Creates new “tool” - Expedited Settlement Agreement (ESA) for a certain universe of violations;
- Violation must be one that can be corrected within 60 days;
- Significantly discounted penalty range from \$500 – \$20,000.

# Compliance Database

- Ohio EPA has an online public database where NOV's, compliance documents and return to compliance letters can be viewed.
- Provides greater transparency and accountability on enforcement/compliance issues.

# Time Frame for Resolution

- If traditional F&Os are proposed, case must be resolved within 9 months of Director's invitation letter
- Failure to resolve case will likely lead to AGO referral
- Requesting AGO to file formal lawsuit if not resolved within one year of referral
- More aggressive timeframe than historically used

# Separation of OCAPP from Enforcement at Ohio EPA

Information obtained or created by employees of OEPA when providing OCAPP services shall be held confidential unless:

- Information reveals clear and immediate danger to the environment and to the health, safety or welfare of the public;
- Information is obtained independently by other components of OEPA (inspection, permit app);
- If Clean Air Act or Water Pollution Control Act expressly prohibit protection.

## Separation of OCAPP from Enforcement at Ohio EPA

- OCAPP's records are not considered public records pursuant to the Ohio Public Records Act which excludes "records the release of which is prohibited by state or federal law." ORC Section 3745.017(c) prohibits the release of OCAPP records.

## Separation of OCAPP from Enforcement at Ohio EPA

- What if court-ordered subpoena demands OCAPP records?

Under rules of discovery, privileged information is not discoverable. Ohio EPA would work with the Ohio Attorney General to prevent disclosure.

# Separation of OCAPP from Enforcement at Ohio EPA

- Prior to September 5, 2013, only records that related to technical assistance provided to small businesses operating stationary air sources were protected as confidential.
- Since September 5, 2013, Ohio law applies OCAPP confidentiality to any business, regardless of size, and regardless of media, not just air related matters.

# Environmental Audit Disclosures

- Ohio's audit privilege and immunity law encourages regulated entities to voluntarily discover, promptly disclose and expeditiously correct violations of environmental laws.

# Environmental Audit Disclosures

- Under the law, the owner or operator of a facility may perform a voluntary self-evaluation (“audit”) designed to improve compliance or identify, correct or prevent noncompliance with environmental laws.

# Environmental Audit Disclosures

- In return for performing a proper audit, the owner or operator can qualify for immunity from the gravity portion of any civil penalty for the violations disclosed. Also, the audit and documents used to conduct the audit are privileged.

# Environmental Audit Disclosures

The privilege does not apply to:

- Information that is required by law to be collected, developed, maintained, reported, disclosed publicly, or otherwise made available to a government agency;
- Information that is obtained from a source other than an environmental audit report (e.g. observation, sampling, monitoring).

# Environmental Audit Disclosures

- For detailed information, see Ohio Revised Code Section 3745.72 and Ohio EPA's Audit Disclosure Response Protocol at

<http://www.epa.state.oh.us/Portals/0/general%20pdfs/audit.pdf>

Questions?