

ENFORCEMENT CASE DEVELOPMENT AND RESOLUTION



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"Law without enforcement is
only good advice"

Abraham Lincoln

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GROUND RULES

1. Listen while others speak
2. Respect other people's opinion
3. Participate
4. Share your ideas and reason
5. Attendance



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Terminology

- Terminology can vary greatly between agencies
- Same document names may have different meaning in different agencies
- We will try to use generic terminology

Policy

- Policies and procedures also can vary greatly between agencies

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Review Agenda

Logistics

Questions

Pre-test

6

Roles & Responsibilities
 Objectives- Understand the responsibilities of each member of an agency and their role in the enforcement process

- Case Development is a team effort
- Members may vary between agency and specific violations

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Roles & Responsibilities

- Inspector
 - Fact finder
 - Performs inspections
 - Samples and records data
 - Prepares inspection report
 - Witness in legal actions
 - May determine compliance

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Roles & Responsibilities

- Enforcement Specialist
 - Determines compliance
 - Collects fact and evidence to support action
 - Negotiates settlement with violators
 - May be a witness in legal actions
 - Ensures follow-up after case resolution

MAIN ADVOCATE FOR THE CASE

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Roles & Responsibilities

- Attorney
 - Ensures proper collection of evidence
 - Makes legal determinations relating to the case
 - Provides legal research to aid inspectors/enforcement specialists
 - May participate in negotiation
 - Represents the agency in certain legal actions

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Roles and Responsibilities

What other agency personnel may be involved in the case?

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Introduction of Participants

- Name
- Position in agency
- What role do you perform in case development
- Does your agency have different roles as it relates to case development or does it depend on size or type of violation

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Review of Compliance Assurance Principles

- Objective
 - Review the principles and tools that constitute an effective compliance assurance program

Reference: Chapter 1

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Compliance Assurance Program

- Ensure compliance using all available tools
- Use resources wisely by being dynamic and evaluating success
- Compliance assurance is not a hard science but a social science

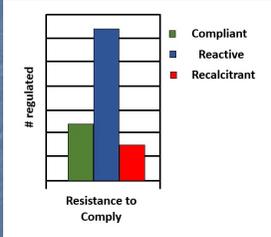
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Why does the regulated community comply?



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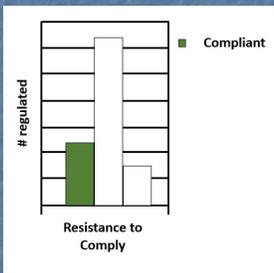
Regulated Community



- Normally follows a bell curve
- Regulated community can be divided into three groups
 - Size changes with different regulated communities
 - Size also changes temporally

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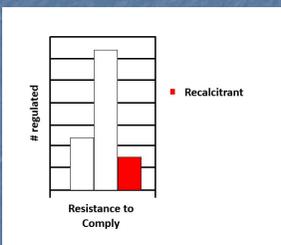
Regulated Community



- That part of the community that will comply regardless of government actions
- Respect for the law and environment
- Part of their business plan

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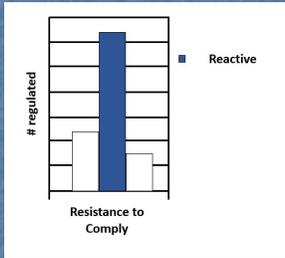
Regulated Community



- That part of the community that will chose to comply based on the actions of the government.

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Regulated Community



- This part of the regulated community will only comply if "forced" to do so
- Direct enforcement by the government or others is necessary
- Corporate culture and/or financial constraints drive them

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Why Do We Enforce?

- Achieve environmental goals
- Level the playing field
- Create integrity in the law
- Create respect for the government and our agency

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What is the Function of Enforcement?

- To bring facilities back into compliance
- To create a direct and indirect deterrence

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Deterrence is the creation of an atmosphere in which many people choose to comply rather than violate the law. There are four elements needed to create deterrence:

- A credible likelihood that a violation will be detected.
- Swift and certain response by the government.

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Deterrence

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Aussie Speeding System

- Periodic cameras on major highways that takes a picture of your license plate and time.
- Average speed is calculated between cameras
- Violators are automatically mailed a citation

- Unmarked contractor cars take picture of license plate and speed on secondary roads
- Violators are automatically mailed a citation

- Fines and "Points" are high
- 12 Points over 3 year and loss of license for 3 months (1st loss)

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Determining Compliance

Evidence  Requirement

Objective

- Explore elements of a rule that need to be proven to establish a violation that is enforceable

Reference: Chapter 4

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Understanding the Requirement

- Documents impacting the requirement
 - Written requirement
 - Other rules
 - Title V permit
 - Other permits
 - Policies and interpretations
 - Test methods

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Determining Compliance

- Each element of the requirement needs to be proven or determined
- Breakdown each element of requirement and compare against information and evidence

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Example Requirement

- No incinerator with a charging rate less than 50 tons per hour and constructed before July 1, 1971 shall emit emissions with an opacity greater than 20 percent except for 3 minutes in an hour or during start-up not lasting more than 30 minutes.

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Determining Compliance Exercise

- Analyze the requirement and determine all the elements that need to be proved
 - For potentially ambiguous elements, apply agency policy to reduce ambiguity
- Remember to think about what is in the requirement and what else you will need to prove

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What is Evidence?



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Evidence

Objective

- To learn the legal requirements that characterize and relate to evidence
- Identify what additional information is useful to collect in working a case

Reference: Chapter 10

34

Evidence is "Stuff"

- Testimony
- Writings
- Materials
- Objects or
- Other things presented to the senses that are offered to prove the existence or nonexistence of a fact.



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When Do You Need Evidence?

- In court
- In an administrative hearing
- To write an NOV
- To check the box "non compliance" or "compliance" on an inspection report



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What Kind of Evidence

- Two Types of Evidence
 - Direct
 - Circumstantial

Give an example of each for the following:
The rule is in allowable pounds per hour and the baghouse on the operation is not working.

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Evidence 101

To establish that evidence is admissible in a legal proceeding you must:

- Establish Relevancy
- Establish Authenticity
- Establish Foundation

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What Constitutes Evidence That Can Be Presented?

- Only relevant evidence is admissible
- Relevant evidence is evidence that
 - Tends to make a fact of consequence more or less probable, or
 - Speaks to the credibility of the witness

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Relevant Evidence

- "A brick is not a wall"
 - A piece of evidence doesn't need to prove an element by itself
 - It only needs to make a relevant fact more or less likely

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Establish Authenticity

- Your evidence is what you say it is.
 - Example: Showing that the sample in court is the same one taken at the defendant's facility.
 - Example: Stating that the photo accurately reflects the conditions at the facility on the day in question.

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Establish Foundation

- Foundation means that preliminary evidence must be presented first in sufficient detail to sustain a finding that the additional evidence is what the proponent says it is

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Types of Evidence

- Testimonial evidence
- Real Evidence
 - Documentary evidence
 - Physical evidence
 - Scientific evidence
- Demonstrative evidence
- Judicially-Noticed evidence

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What Evidence Do We Need

- Break each violation section into its elements
 - Watch definition of terms
- Plus
 - Who ?
 - Where ?
 - When ?

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Example #1—Permit Violation

Elements Evidence

Elements	Evidence		
Facility/Defendant	Wit. statement		Records
Permit			Records
Permit Condition			Records
Permit Condition Violated	Inspector observed	samples photos	Self Reporting
Date	Inspector		Self Reporting
Location	Inspector		Records

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Evidence Exercise

For the previous exercise, where you determined the elements that needed to be proven, identify how that information can be obtained.

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Example Requirements

- No incinerator with a charging rate less than 50 tons per hour and constructed before July 1, 1971 shall emit emissions with an opacity greater than 20 percent except for 3 minutes in an hour or during start-up not lasting more than 30 minutes.

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Evidence + more

In additions to evidence to support the violations we need to collect additional information to build and support the case

- Understanding of operations and process
- Control technology
- Costs of controls
- Information related to penalty
- Many other types of information

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Chain-of-Custody

- Purpose of chain-of-custody procedures
 - Trace possession of a physical evidence from when it was obtained to its introduction at a legal proceedings
 - Maintain integrity of evidence

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Chain-of-Custody

- Keep number of people to a minimum
- Only people associated with case
- Always document transfer of sample
- Always accompany chain-of-custody form with sample
- Samples identification should be legible and in permanent ink

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Chain-of-Custody

- Type of documents
 - Sample tag
 - Field logbook entry
 - Chain-of-custody record
 - Receipt for samples

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Data Collection

Objective

How can an agency collect the evidence information necessary to:

- Ensure compliance
- Prove a violation/support enforcement
- Resolve the violation

Reference : Chapter 3

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Data Collection

- What types of information are needed
 - Inspectors
 - Enforcement Specialist
- Where to get the information

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Data Collection

- Inspections
- Reports
- Written Requests
- Interviewing
- Photography

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Data Collection

- Discussions with others
- Discussions with other programs
- Information from other agencies and organizations
- Internet searches

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Data Collection Exercise

- What sources of special information exists for:
 - Asbestos R&D
 - Other

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Inspections

- Finder of fact
- Not there to find violation but to collect information to determine compliance
- Same effort to document compliance as non-compliance
- Follow-up inspection may just focus on collecting information on the violations

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Inspection

- Adequate planning for an inspection
- Adherence to proper sampling procedures
- Thorough documentation
- Assurance of a complete inspection file

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Inspection Entry

- Credentials - Badge or memo
- Proper entry process
- Denial of entry
- Off-site

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Inspection Documentation

- Forms
- Logbook/complete factual notes
- Photos
- Protocols and Procedures
- Chain-of-Custody

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Post Inspection

- Close-out
- Inspection Report
- Inspection File
- Follow-up

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Title V Permit

- Since the adoption of the Title V program compliance monitoring has changed
- Title V permit file will contain a wealth of information
- Permit identifies what is expected to achieve and demonstrate compliance
- What is in a Title V permit and file?

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Written Request

Most agencies have authority to request information by a written request

Request should

- Should cite legal authority
- List of requested information
- Date to receive response
- Consequences of failing to respond

63

Electronic Evidence

- Computers.
- Network servers.
- Handheld devices: Smart phone, Tablets, Other portable devives.
- Digital cameras & storage media.
- Hard drives, memory cards and thumb drives.
- Non-local storage services and much more.

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Why Gather Electronic Data?

- Computers are an integral part of business today.
- Businesses produce tons of paperwork each year.
- Almost every letter, memo, report, or order has been processed through a computer.
- Some documents are never printed into a physical copy.

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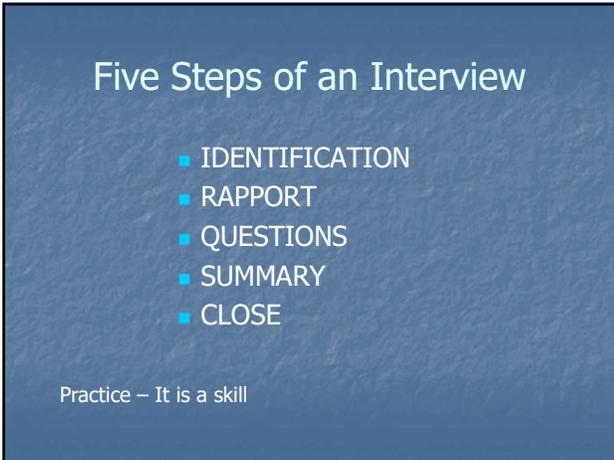
Why Gather Electronic Data?

- Process and control systems are controlled by a computer or through computer.
- More data and evidence can be gathered in the process control rooms then at the process or control device sight

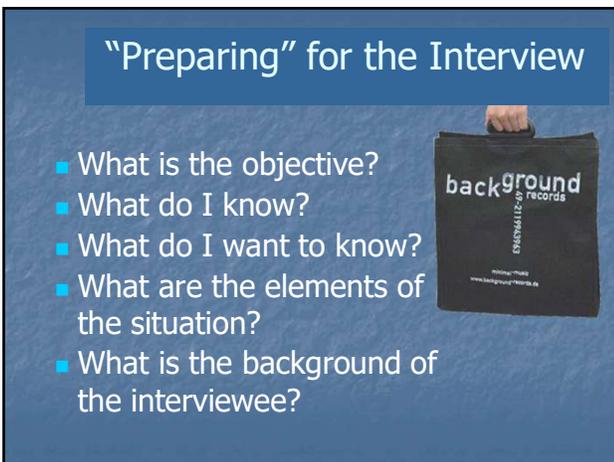
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Set the Stage

- Introduce Yourself
 - no acronyms
 - be professional
- Identify subject
 - Attitude
 - Setting
 - eliminate as much noise as possible
 - eliminate physical communication barriers
 - Non-verbal clues

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Develop Rapport

- *Rapport*: An harmonious or sympathetic relation or connection
- How to develop and maintain rapport:
 - Empathy
 - "Speak to the person"



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The Interview

- Start with open-ended questions requiring narrative responses (story)
- Ask follow-up questions to clarify and increase detail
- Listen attentively
- Pay attention to the facts
- Use silence

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Basic Interviewing Questions

- Who?
- What?
- When?
- Where?
- Why?
- How?



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How To Be An Active Listener

- Remain neutral and professional
- Maintain appropriate eye contact
- Ask about their statements
- Clarify "slang" or acronyms
- Restate their main points
- Get agreement on the facts

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Key Points To Remember

- Interviewing starts with communication
 - Developing rapport
 - Understanding communication system
 - Listening
- Good interviewing is an art
- Good interviewing takes practice

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Gathering Evidence: Photographs

- What are you trying to establish?
 - Impassion the trier of fact
 - Show detail
 - Show reference/location
 - Make sure your photo shows what you need to establish
- Provide frame of reference
 - Establishing shot
 - Subject shot
 - Detail shot

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Gathering Evidence: Photographs

- Provide perspective
- Good lighting
- Full/complete photo
- Watch background
- Watch for other subjects/items in the photo

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Gathering Evidence: Photographs

Showing Reference/Location



Establishing shot

Subject shot

Detail shot

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Gathering Evidence: Photographs

Provide Frame of Reference



Good **Better**

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Gathering Evidence: Photographs

Good Lighting



Good **Better**

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Digital Camera Issues

- Possible loss of data through equipment or software failure
 - Back up data!
- Ease of "high quality" manipulation
- Policies & Procedures are critical
- Chain of Custody must be maintained



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Digital Camera Issues Handling Digital Photos

- Agency policy
- Recommendations
 - Immediately transfer all to secure/non alterable storage
 - Delete no photos
 - Take only photos related to inspection
 - Now – with original photos protected, select photos to use

82

Importance of Photography

- May be the only permanent record of what a person or location looks like at the relevant time
- May be necessary to answer questions and orient people who weren't present



83

Importance of Documentation

- Photographs visually recreate a time & place for people who weren't present
- Photographs can illustrate facts in situations where information can be shown visually
- Photos can be used to answer questions and clarify points long after an event occurs



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Admissibility in Court

- Must be relevant to the case
- Must be a true (or "clear") and accurate representation of the subject
- Must be "more probative than prejudicial"
 - Can't shock the court or "inflammate the jury"
 - Evidentiary value must outweigh any inflammatory effect



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Admissibility in Court

- Photographs can not have been altered or distorted
- In certain situations, may be "enhanced"
 - Essence of photograph can't be changed
 - Must be forthcoming about enhancement process and retain original image



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Determining the Appropriate Response

Objective

- Understand the range of enforcement responses that are available
- Recognize the factors to consider in determining an appropriate response

Reference: Chapter 5

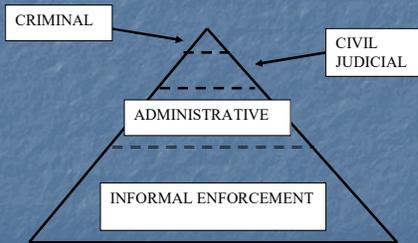
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Determining Appropriate Response

- Wide range of potential responses
 - No action
 - Informal action
 - Administrative Order
 - Consent
 - Unilateral
 - Civil Judicial action
 - Criminal referral

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Enforcement Actions



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Determining Appropriate Response

- What is appropriate?
 - Laws, Agency response policies
 - Past Practices
- Specific facts of case
 - Deviating from policies and practice
 - Documenting differences and why the response should deviate

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Case specific factors

- Deviation from requirement and length of violation
- Complexity of violation or remedial action necessary
- Length of time necessary to return to compliance
- Economic benefit of non-compliance and other penalty considerations
- Compliance history

91

Federal/State/Local Consideration

- Federal, State, and Local(?) enforcement actions for the same violations can legally be pursued independently
- High Priority Violator Policy
- Use of the State or Federal agency as the "gorilla"

92

Gorilla in the Closet



93

Other considerations

- Multi-jurisdictions
- Multi-facility
- Has the past type of enforcement response changed behavior?

94

Building Support for the Case

- Remember the enforcement specialist is the advocate for the case.
- What types of other information might he/she want to present to management or other case decision-makers?

95

Appropriate Action Exercise

- Five different scenarios
- Determine recommended appropriate response
- Report out

96

Types of Enforcement Actions

Objective

- Understand the full range of enforcement policies and laws
- Understand the balance of government resource cost to effectiveness and appropriateness

REFERENCE: Chapters 6, 7, 8, and 9

97

Informal Enforcement

- What is informal enforcement?
 - Actions that encourage a return to compliance but do not provide the potential violator with a "right" to challenge the action
- Types of informal actions

98

Informal Enforcement

- When/Where is it appropriate?
- Who can make that decision?
- Informal enforcement does not mean that the violation should not be documented

99

Administrative Enforcement

- What is administrative enforcement?
 - Agency decision under Administrative Procedure Act
 - Provides respondent with certain "rights" including appeals
 - Agency has complete control of action and final decision-maker is usually within the agency

100

Administrative Enforcement

- Types of administrative enforcement
 - Formal notification of violations?
 - Field Citations?
 - Unilateral orders
 - Consent agreement

101

Administrative Appeals

- Time periods and procedures for appeals established by law
- Appeal will be decided by a special agency official or special state-wide official
- Agency establishes a prima facie case which the respondent can challenge with additional evidence
- Follows procedures similar to a civil court action
- Final decision can be appealed to the courts by respondent

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Civil Judicial Action

- When to consider a civil court action:
 - An administrative order is being violated
 - It is likely an administrative order will not resolve the violation
 - Case warrants a significant penalty beyond what can be achieved in an administrative action
 - Issues are of a precedential nature or complex
 - Multi-jurisdictional or desire to combine action with other agencies

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Civil Judicial Action

Process

- Technical Report Document
- Filing
 - Petition to enforce
 - Complaint
- Service of process
- Motions and Answers

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Civil Judicial Action

- Process (continued)
 - Discovery
 - Deposition
 - Interrogatories
 - Request for Admissions
 - Request for Production of Documents
 - Request for Inspection
 - Trial
 - Appeals

105

Civil Judicial Action

- Outcomes
 - Case dismissed
 - Government loses case
 - Consent Decree
 - Temporary Injunction
 - Permanent Injunction

Once a complaint is filed, the court will continually put pressure on the parties to negotiate a settlement

106

Civil Judicial Action

- Issues to be aware of
 - Attorney work product
 - Clean and orderly files and records
 - Testifying

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Testifying

- Preparation is important
- Show up early and be prepared to go through security
- Business attire or uniform of the agency
- No undignified behavior
- Silence cell phone
- Bring your personal notes and records

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Testifying

- Use your full name (no nicknames).
- Address the judge as "Your Honor".
- Use plain language that a lay person will understand.
- Speak clearly. Answer directly and simply. Avoid broad generalizations.
- If your answer was wrong or unclear, correct it immediately. Say "May I correct something I said earlier."

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Testifying

- Stop instantly when the judge interrupts.
- Always be polite and professional even if the opposing counsel is not.
- Do not show anger or be argumentative and sarcastic.
- Stick to the facts. No opinions or conclusions unless you have been qualified as an expert witness.

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Settlement Provisions

- Objective- Understand provisions that should be in:
 - Administrative orders
 - Court orders
 - Consent agreements
- REFERENCE: Chapter 12

111

Settlement Provisions

- Traditional technical and legal items
- Supplemental Environmental Projects
- Non-traditional conditions
- Unilateral versus Consent

112

Traditional Settlement Provisions Technical

- Corrective actions
- Final compliance date
- Demonstration of compliance
- Interim milestones
- Periodic reporting
- Additional monitoring and record-keeping
- Decision point or events

113

Traditional Settlement Provision Legal

- Finding of fact
- Conclusions of law
- Penalties
- Modification to order
- Order enforceable in court
- Termination
- Effective date and signature

114

Settlement Provisions Consent Agreement

- Admissions of fact
- Stipulated penalties
- Force majeure
- Waiving judicial relief and penalties
- Waiving administrative appeal
- Third party appeals
- Public notice
- Other rights and obligations
- Signature of all parties and date

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Non-traditional Provisions

- Supplemental Environmental Projects
- Training
- Preparation of outreach information
- Misc provision

116

Penalties

- Objective- Understand how penalties are determined and factors that affect consistency

- REFERENCE: Chapter 13

117

What is the difference between a FINE and a PENALTY?

- A FINE is a fixed amount enumerated in a law or regulation.
- A PENALTY considers many factors in determining the amount. The law usually places an upper value on the amount.

118

Penalties

- Penalties should be appropriate for the violation
- Many agencies have written policies to determine "appropriate"
Policies usually contains elements such as
 - Economic benefit
 - Gravity
 - Severity of violation
 - Length of violations
 - Adjustment factors

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Economic Benefit

- Cost Postponed
 - Capital costs or one time costs for equipment or systems that will eventually still have to be installed, purchased, or developed
- Cost Avoided
 - Costs for operating equipment, maintenance, etc. that will never have to be spent

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Additional Economic Benefit

- Advantage in market by avoiding pre-construction permits

121

Gravity

- Severity or potential for harm

- Extent of deviation from requirement

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Adjustment Factors

- History of compliance
- Good faith efforts
- Other factors
 - Ability to pay
 - Factors in settlement discussions
 - SEPs
 - Litigation considerations

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MONETARY PENALTY WORKSHEET

Economic Benefit (Money the facility saved by not complying with the requirements)

Cost Avoided _____ (a)
 Cost Postponed _____ (b)
 Cost Postponed per year (b) X 8% per year _____ (c)
 Total money facility saved (a) + (c) _____ (d)

Gravity (Punitive part of penalty)

EXTENT OF DEVIATION FROM REQUIREMENT

POTENTIAL FOR HARM	HIGH MEDIUM LOW	EXTENT OF DEVIATION FROM REQUIREMENT		
		HIGH	MEDIUM	LOW
		_____	_____	_____

Seriousness of violation (from matrix above) _____ (e)
 Number of days of violation _____ (f)
 Penalty portion for Gravity (e) X (f) _____ (g)

Total unadjusted penalty

Economic benefit plus Gravity (d) + (g) _____ (h)

(THIS MONETARY PENALTY SHEET IS JUST AN ILLUSTRATION)

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MONETARY PENALTY WORKSHEET

Penalty Adjustment Factors (+ or -)

Degree of cooperation high (up to -20%) _____ % (i)
 low (up to +20%) _____ % (i)

History of Compliance good (up to -20%) _____ % (j)
 Poor (up to +20%) _____ % (j)

Ability to pay (-100% to 0%) _____ % (k)

Total percent adjustment [(i) + (j) + (k) + 100]/100 _____ (l)
 If negative enter "0"

TOTAL PENALTY (h) X (l) _____

(THIS MONETARY PENALTY SHEET IS JUST AN ILLUSTRATION)

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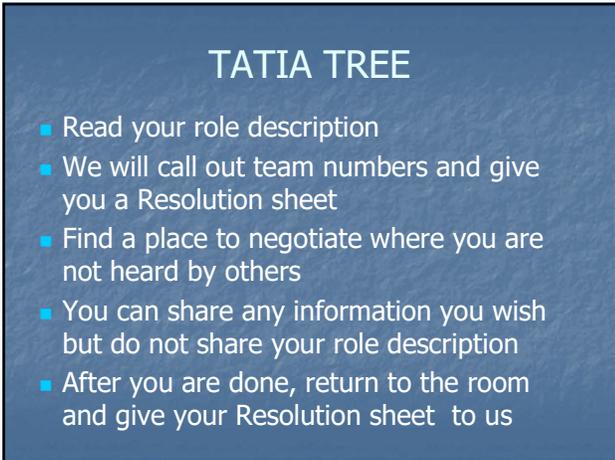
Penalty Exercise

- Read the Penalty Scenario in your handout
- Calculate your recommended penalty using the Monetary Penalty Worksheet
- Work alone
- Bring your Worksheet to the facilitator
- Post calculation discussion

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129

Negotiations

- Why should we negotiate with a violating facility?
- What are the advantages?
- What are the disadvantages?

130

Negotiation Principles

- The most important commodity at the table is TRUST
- Get beyond "position" and to NEEDS
- Be a PROBLEM SOLVER
- Nothing personal, its just BUSINESS
- Speak with AUTHORITY

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The most important commodity at the table is TRUST

- Treat all problems as "our" and not "their" problems
- Where appropriate, ask about feeling or what their thinking
- Do not lie or exaggerate
- Where appropriate, expose weaknesses in the viability of the others' expectations
- Ask for information to verify statements

132

Get beyond "positions" and work to understand each other's NEEDS

- Never assume the other side see the issues as you do.
- Listen to understand. The best negotiators spend more time listening.
- Ask questions and confirm understanding.

133

Don't be a fighter, be a PROBLEM SOLVER

- Start with reasons for agreeing; then disagree, not vice versa.
- Avoid getting stuck on small points, put them aside.
- Explore alternatives to find solutions the best meet both your needs.
- Build inertial for difficult issues by getting many other issues resolved first.
- Look for other allies at the table on the different issues.

134

Nothing personal, its just BUSINESS

- Address the issue, not the person.
- Don't counterattack when attacked.
- Use warnings, not threats.
- Ignore provocation and return to the substance.

135

Speak with AUTHORITY

- Prepare ahead of time to understand the range of solutions that would be acceptable.
- Know your bottom lines and key issues.
- Before sitting at the table, agree on the roles of your team.
- Your teams should speak as unified group, any strategic changes should be debated away from the table.
- Even if you are not the final decision maker, show that you can get an answer quickly.

136

Pre-negotiation Work

- Consider a range of solutions
- Determine what is acceptable to your side
- Know your bottom lines/best alternative to negotiated agreement
- Research to understand the other side's needs
- Determine how to contact needed decision-makers during negotiations
- Determine primary spokesperson

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At the Table

- Set negotiation conditions up-front
- Focus on issues
- Look for Win-win solutions
- Explore various approaches for difficult issues
- Use open-ended questions to learn about the other side's needs

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At the Table

- Don't get stuck on small points
- Put unresolved issue aside for a while
- The more agreed to, the easy it is to resolve more difficult issues
- Listen carefully and verify your understandings

139

At the Table

- Keep a unified team appearance
- Caucus when necessary
- Quickly communicate new issues to decision-makers not at the table
- Determine how and what external communication happens

140

At the Table

- When should penalties be discussed?
- Why?

141

Settlement Document

- The government should write the document
- The settlement document is the record that memorializes your deal
- Be sure that each word is accurate and true
- Try to write a document that is "stand alone" & understandable
 - Why? The audience is more than the parties at the table.

142

Introduction to Case

- Cyclone Cement Company has various environmental problems
 - Hazardous waste
 - Pesticides
 - Air
- All other media violations have been resolved and only air violations remain

143

Remaining problems

- Dust from blasting and roads
- Particulates from Kiln #1
- Particulates from Kiln #2
- Permit condition relating to hazardous emissions

144

Your Assignment

Negotiate a settlement that includes:

- Mitigation of the violations
- Interim measures
- Resolution of the penalty
- Other provisions that will help ensure continuous compliance and improve the environment
- Any other provision you feel are useful

145

Settlement

- Each group should explain their settlement provisions and why this was necessary or desirable.
- Was there any provisions that either side wanted but was unable to get?
- What were the most contentious issues and how were they resolved?

146