



Enforcement Actions and Settlement Strategies: A Lawyer's Perspective

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Presentation to Rocky Mountain EHS Peer Group

Denver, Colorado

Preliminary Matters



Disclaimers

Your Presenter

- 40 years of environmental practice
- Almost exclusively defense oriented
- Rarely get to be a plaintiff

Matters Being Covered

- Engagement Details to Preserve Confidentiality, Privilege
- Realities of Enforcement Defense
- Utilizing the Client's Defense Team Most Effectively
- The Basis for Most Enforcement: IRLs and Inspections
- Responding to Compliance Advisories, NOVs, NOAVs, etc.
- ESAs, COCs, Consent Decrees, etc.
- A Few Words About Audits
- Other Enforcement Contexts
- Questions and Answers

Engagement Details Matter

- Working with Counsel for a Mutual Client: Enforcement Defense is a Team Sport
 - Maintaining and Preserving Privilege and Confidentiality
 - Making a Record that will Support Litigation
- Engagement Details Matter
 - Engagement through Legal Counsel
 - Aiding in the Rendering of Legal Advice
 - Non-Attorney Work Product in Anticipation of Litigation

Realities of Enforcement Defense

- Using APCD Enforcement as the Example: Most Other Agencies and CDPHE Divisions have Similar Criteria and Policies – Know Them
- The Regulator has Many Advantages
 - Deferential Commissions/Boards
 - Broad Discretion to Allege Violations, Propose Penalties
 - Ever-higher Max. Penalties due to Indexing
- Potential Operator Advantages
 - Superior Knowledge of Operations
 - Better Able to Place Allege Conduct in Proper Context
 - Better Understanding of Data and Records?

Utilizing the Enforcement Defense Team

- Consultant(s)
- Counsel
 - In-house
 - Outside
- In-house EHS and Operational Staff
- Maintaining and Preserving Privilege and Confidentiality

IRLs and Inspections

- Information Request Letters: A Prelude to Enforcement
 - Address Promptly, Take Very Seriously
 - IRL Authority of Agencies is Very Broad
 - Recommend Formal Response with General, Specific Objections, Reservations, etc., Think Civil Discovery
 - Very Important to Get Organized Up Front
 - Supplemental Responses Common, can Negotiate Scope?
- Inspections
 - Documents Requested for Inspection
 - General Housekeeping
 - Involvement of Counsel?

Compliance Advisories, NOVs, NOAVs, etc.

- First Response to Allegations of Violation
- An Opportunity to Present Significant Factual and Analytical Information
- Source Response/Answer to Allegations
 - Don't Skimp on Effort, Data to Support This, Attention to Defined Terms, etc.
 - Seek More Time if Necessary
 - Can Usually be Supplemented
 - Typically Need to Provide 10 DAYS Before a CA or NOV Conference
 - Organize with Reference to Penalty Factors in Statute and Rule
 - Claim Inadmissibility Under CRE 408 – Settlement Communications

ESAs and COCs

- Expedited Settlement Agreements
 - Simpler, less opportunity to Negotiate
 - Should be for a Lesser Amount of Penalties
- Compliance Orders on Consent
 - More Formal, Negotiated
- Utility of ESAs and COCs
 - To Authorize Continued Operations, Mitigation of Impacts
- Civil Penalty Policies
 - Gravity Based Penalties and Statutory Factors
 - Equitable Arguments
 - Economic Benefit and the BEN Model
 - Mitigation
 - Consistency with Other Settlements

Gravity-Based Penalty Factors

- Utilize Circumstances of Alleged Violation to Address These: in CRS Sect. 25-7-122 of Air Pollution Prevention and Control Act
- Aggravating and Mitigating
 - Compliance History
 - Good Faith Efforts to Comply
 - Payment of Penalties Previously for Same Violation
 - Duration of Violation
 - Economic Benefit of Noncompliance
 - Impact, Threat to Public Health/Environment
 - Malfeasance/Nonfeasance
 - Advancing Theories for Purposes of Delay?

Additional GBP Factors

- Voluntary and Complete Disclosure by the Violator
- Full and Prompt Cooperation
- Existence and Scope of a Regularized and Comprehensive Environmental Compliance and/or Audit Program
- Substantial Economic Impact of a Penalty on Violator
- Other Mitigating Factors

A Word About Audits

- A Very Useful Tool
- State and Federal Requirements Vary
- May Have Both Federal and State Disclosures
 - EPA eDisclosure Online
 - EPA Audit Policy – 21 Days
- Must Generally be Voluntary Disclosure Driven
- After Inspection is Generally Too Late
- Instituting Audit/EMS Program Could be Part of a COC/CD

Other Enforcement Contexts

- Permit Appeals
- Citizen Suits
- Constitutional Challenges
- Other?

The image features a dark, blue-tinted background of a city street scene with various buildings and a traffic light. In the top left corner, the company name 'DAVIS GRAHAM' is written in a bold, white, sans-serif font. A vertical yellow bar is positioned to the left of the text.

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Questions?

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