

Compliance Monitoring and Enforcement for Environmental Obligations

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Abstract: Compliance Monitoring & Enforcement (CME) in the regime of Environmental Protection is an absolute necessity. It however remains a subject so little understood, both by the regulators and the regulated, that the real intent and purpose gets defeated. What are those basic fundamentals & principles behind framing of legislations, and its compliance monitoring & subsequent enforcement, how an effective CME is required to be undertaken to achieve the desired results, are the substance & element of this paper. It is pitched at the policy and the legislation designers, implementers / enforcement agencies and the regulated community alike.

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1. WHAT IS COMPLIANCE

The first step is legislation. Legislation has become the essential foundation for environment protection. Once the legislation is in place, and then the second step is to get the groups that are regulated, to fully implement the requirements. This is Compliance.

What is to be understood is that, achieving compliance usually involves efforts to encourage and compel the behavior changes needed to achieve compliance. This, change in behavior, has always been difficult to accomplish, both, at social and personal level.

2. WHAT IS ENFORCEMENT

Compliance occurs when requirements are met and desired changes are achieved. There is no magic formula for achieving compliance. There is merely trial, evaluation and response to what works and does not work in a particular setting. The key is designing of requirements. If the requirements are well designed, then compliance will achieve the desired results.

Enforcement is a set of actions that governments or others take to achieve compliance within the regulated community and to correct or halt situations that endanger the environment or public health.

Compliance Monitoring and Enforcement for Environmental Obligations

Compliance with the nation's environmental laws is the goal, but enforcement is a vital part of encouraging governments, companies and others who are regulated, to meet their environmental obligations. Enforcement deters those who might otherwise profit from violating the law, and levels the playing field with environmentally compliant companies. [1]

Enforcement usually includes, -

- (i) Inspections - to determine compliance status and to detect violations
- (ii) Negotiations - with those, out of compliance, to develop mutually agreeable schedules and approaches for achieving compliance.
- (iii) Legal Action - to compel compliance and to impose some consequence for violating the law as posing threat to public health environment.

Enforcement may also include: -

- (iv) Compliance Promotion – for example educational programmes, technical assistance, subsidies etcetera, to encourage voluntary compliance.[2]

The components of an effective Enforcement Programme are: -

- a. Creating requirements that are enforceable
- b. Knowing who is subject to the requirements
- c. Promoting compliance in the regulated community
- d. Monitoring of compliance
- e. Responding to violations
- f. Clarifying roles & responsibilities
- g. Evaluating the success of the programme and holding programme personnel accountable for its success.

3. WHY CME IS IMPORTANT

- a) It ensures improved environmental quality.
- b) It reinforces credibility of Environmental Protection & the legal system that supports them, and,
- c) It ensures fairness for those who willingly comply with environmental requirements.

4. ROLE OF CME

To be sure that IMO and individual countries' requirements are properly implemented, it is necessary to have an accompanying mechanism to monitor compliance, and to provide enforcement. CME forms part of the national strategy, designed to establish if a ship has met the IMO and Port State requirements or not, and when necessary to 'enforce' those requirements.

As one of the primary goals of CME is to change human behavior, this involves –

- i. Motivating the regulated community
- ii. Removing of barriers that prevent not compliance, and
- iii. Overcoming existing factors that encourage non-compliance

The basic approach thus being that of 'Carrot', and 'Stick'.

One of the main factors that affect compliance is 'deterrence'. [3]

In a regulatory situation, some people comply voluntarily, some will not comply, and some will comply only if they see others receive a sanction for non-compliance. This phenomenon that people change their behavior to avoid a sanction is called 'deterrence'. This multiplier or leverage effect makes enforcement a powerful tool.

There are however, 4 factors that are critical to "deterrence".

- a. There is a good chance that violation will be detected
- b. The response to violation will be swift and predictable
- c. The response will include an appropriate sanction, and
- d. Those subject to requirements perceive that the above 3 factors are present.

The other factors those motivate or are barriers to compliance can be enumerated as below: -

Factors motivating compliance

Barriers to Compliance

ECONOMIC

- Desire to avoid penalty
- Desire to avoid future liability
- Desire to save money by more
- Cost-effective & sound practices for resources

- Lack of funds
- Greed to achieve competitive advantage
- Competing demands

SOCIAL/MORAL

- Values for Env. Quality
- Clear Govt. will to enforce law

- Lack of respect for env.
- Lack of public support
- Lack of Govt. willingness

PERSONAL

- Positive personal relationship with Enforcing authority
- Desire to avoid jail/ legal process

- Fear of change
- Inertia
- Ignorance

MANAGEMENT

- Jobs / Training dedicated to compliance
- Bonus / Salary increases on compliance

- Lack of accountability
- Lack of systems
- Lack of training

TECHNOLOGICAL

- Availability of affordable technology

- Lack of appropriate Tech
- Unreliable technology

5. MONITORING COMPLIANCE

Monitoring of compliance is about collecting & analyzing information on compliance status of the regulated community. Monitoring is essential to

- a. Detect & Correct violations
- b. Provide evidence to Support Enforcement Action
- c. Evaluate programme progress by establishing the Compliance Status.

5.1 *Primary sources of compliance information*

There are 4 primary sources of compliance information

(i) Inspections - Conducted by programme Inspectors. These provide the most relevant & reliable information. However, this can be resource intensive, hence, must be carefully targeted and planned.

(ii) Self Monitoring - self record keeping and self-reporting by regulated community. This provides extensive information and shifts the economic burden of monitoring to the regulated community.

This, however, relies on the integrity and capability of source to provide accurate data.

(iii) Citizen Complaints - Can detect violations not detectable by Inspectors, but, it is sporadic

(iv) Monitoring Environmental Condition near facility - This is useful as can be done without entering the facility, but, many a times it becomes difficult to demonstrate connection between pollution & source.

5.2 *Targeting inspections*

Inspections thus being the best option, it becomes imperative to target and plan them out; as any enforcement programme, no matter how adequately funded, will never have enough resources.

Several factors are considered when targeting inspection, example,

- a. Source's potential to harm environment
- b. Complexity of inspection needed
- c. Compliance history, and,
- d. Availability of self reported data.

5.3 *Tiered inspections*

Tiered inspection level is another strategy – start with less expensive inspection and take it to more intense level only if suspect.

In other words, incorporation of 'risk' and 'risk assessment' becomes imperative in the CME system. For example in the ballast water regime, risk posed by each ship is potentially different. This depends on ballast water uptake ports. One of the first decisions by regulatory authority is to assess the risk posed by a ship. The Port Ballast Water Management plan determines this risk & enables the CME to be applied in such a way as to target the 'high risk' vessels. This enables a 'selective' approach rather than a 'uniform' application approach of CME.

5.4 Stages of Inspection

Inspections being established as the backbone of any Enforcement Programme, must be carried out in 4 distinct stages of

- a. Planning
- b. Gathering data
- c. Recording, and,
- d. Reporting.

The Inspector shoulders tremendous responsibility and his conduct needs to be impeccable. He/she must realize that they are the personification of entire agency. Polite diplomacy thus becomes a mandatory skill. Aggressiveness needs being through a thorough work and not through on overbearing demeanor. Every inspection must be conducted as if it would go to court and hotly contested. Many times the agency's entire case hinges on an inspector's professionalism.[4]

6. ENFORCEMENT RESPONSE TO VIOLATIONS

As a result of the CME process, either

- a. the ship is deemed to have complied, or
- b. ship has not complied, and an enforcement/ mitigation measure needs to be considered.

6.1 Type of enforcement actions

6.1.1 Remedial Action

- Authority to impose a schedule of compliance
- Authority to shut down an operation permanently
- Authority to shut down an operation temporally
- Authority to deny permit
- Authority to require facility to clean up
- Emergency Powers to enter and correct immediate dangers

6.1.2 Others

- Authority to require specific testing & reporting
- Authority to request information on process

6.1.3 Sanctions

- Authority to impose monetary penalty
- Authority to seek imprisonment (jail term)
- Authority to seek reimbursement for clean-up expense
- Authority to ban facility entry

6.2 Enforcement Mechanism

Enforcement Mechanism is designed to perform one or more of following functions:

- Return violators to compliance
- Impose a sanction
- Remove the economic benefit of non-compliance

- Require that specific action be taken to test, monitor or provide more information
- Correct environmental damage
- Correct internal company management problems

6.3 Categories of Response Mechanism

6.3.1 Informal

Informal response is for example through phones, warning letters, notices etcetera, to violators.

Such informal response advises what violations are found, what should be done to correct it and by what date; the goal being to bring the violator into compliance. It could also be to initiate a legal process.

6.3.2 Formal

Formal response is always backed by law and accompanied by procedural requirements to protect the right of the individual.

6.3.3 Civil Administrative

Civil Administrative is a response directly imposed by the Enforcement Programme Manager. Here, a legal, independently enforceable order is issued. If the recipient violates, then, the managers can take further action by additional order or court system to directly force compliance.

There are two advantages in this system –

- a. that it does not require coordination with separate judicial agency, &
- b. it can be resolved more quickly & with less expense

This serves a number of important goals, including, returning violators to compliance and deterring misconduct in others, eliminating or preventing environmental harm, and preserving a level playing field for responsible companies that abide by the laws.

6.3.4 Civil Judicial

Civil Judicial are formal lawsuits before the court. These however require more time and more expenses. Nevertheless, they are more powerful and they set precedents.

6.3.5 Criminal Judicial

Criminal Judicial response is evoked when knowingly or willfully the law is violated, or the offence is very serious in nature. These responses seek criminal sanctions, which may include monetary penalties and / or imprisonments.

It is to be noted that for environmental enforcement, this is the most preferred response. It creates the most significant ‘deterrence’ as it personally affects the lives of people and also it is a social stigma. It however requires intensive investigation & case development, proof of violation & specially trained criminal investigators.

This is used against the most serious environmental violations as well as those which involve egregious negligence or conduct involving intentional, willful or knowing disregard of the law.

7. ENFORCEMENT PROCESS

Foremost comes the protection of basic right. Common to all democratic institutions are processes to balance the rights of the individual; and governments need to act often quickly on behalf of the public.

Notice of violation is issued prior to any enforcement action, with opportunity to contest the findings, appeals & dispute resolutions.

7.1 *Negotiations*

Negotiations are an integral part of the enforcement process as it sends signal that the government is responsive to concerns and difficulties faced by the regulated community and to work co-operatively to develop satisfactory solutions.

7.2 *Creative Settlements*

Creative settlements are often used where enforcement is leveraged for broader results. For example,

- Prevention of pollution – an agreement by facility to reduce or eliminate generation of pollutants at source
- Pollution reduction beyond compliance
- Restoration of the damaged environment
- Publicity sponsors
- Training sponsors
- Pay into a Bond account or a Fund.

This however is linked to

- Reduction in monetary penalty
- Extended compliance schedule
- Limited ability to pay
- Strong level of cooperation with Government.

7.3 *Categories of Noncompliance*

Categories of Noncompliance are

- a. a non-compliance that results in a potential risk & a mitigative action is required, or,
- b. that does not result in a potential risk

In case of (a) above, the situation must be discussed with the ship's master as soon as possible and action taken that is commensurate with the risk, with a minimum delay to the ship and be safe to ship and its crew.

It must then be ensured that the ship does undertake the mitigation measure, which may call for a re-sample or re-check.

In case of (b) above, when noncompliance does not result in a potential risk, example, a case of incomplete record keeping, the CME process must determine the action considering the degree of offence, potential seriousness, and compliance history of the ship.

7.4 Penalties and Sanctions

This action must have statutory backing.

Penalties and sanctions are proportional to the seriousness of the offence and the risk. This may vary from simple, unintentional and inconsequential to a more serious and deliberate attempt to deceive.

The offence must be confirmed with the appropriate authority, example the ship's master and penalty/sanction applied in accordance with national legislation and consistent with provisions relating to international shipping.

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