COMPLIANCE STRATEGIES: A REGULATOR'S VIEWPOINT

Casey O. Ruud, Jack W. Donnelly,
Laura E. Russell, G. Thomas Tebb, and Darci D. Teel
Washington State Department of Ecology
Nuclear and Mixed Waste Management Program
Kennewick, Washington 99336

ABSTRACT

This paper describes the compliance and enforcement strategies used by the Washington State Department of Ecology (Ecology) in overseeing the management and cleanup of hazardous and radioactive mixed waste at the United States Department of Energy's (USDOE) Hanford Nuclear Reservation in Richland, Washington. Ecology believes that sharing these strategies will assist the facility owner, USDOE, its operators, and other regulated communities in understanding the benefits of effectively dealing with state agency representatives. Potential benefits include 1) reduced or limited enforcement actions, 2) improved public understanding, 3) better working relationships, and 4) increased ability to plan and prioritize projects.

Compliance is a standard measured many different ways, and there are as many strategies to achieve compliance as there are agencies to dictate compliance. For example, two prominent governing regulations at the Hanford Site, the Resource Conservation and Recovery Act of 1976 (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), contain different compliance criteria. In Washington, Ecology has authority, via the State's Hazardous Waste Management Act (HWMA), to administer the federal RCRA program, and within the Hanford Federal Facility Agreement and Consent Order, also called the Tri-Party Agreement, to administer both RCRA and CERCLA programs for the cleanup and management of past and present hazardous and mixed waste activities at Hanford. Although Ecology has developed various strategies for achieving compliance under the individual regulations, the ultimate goal is the same: Facility owners and operators with compliance/enforcement problems need to work with Ecology in achieving compliance by identifying, discussing, and fixing problems together in addition to allowing Ecology to uncover the problems through field inspections and investigations. Ecology encourages early identification by site owners as an addition to our own inspection program.

Unique circumstances at Hanford and other USDOE facilities require realistic yet effective regulatory oversight. For example, special consideration must be taken to deal with radiological hazards as well as overwhelming unknown and yet-to-be-discovered chemical hazards threatening human health and the environment. Incorporating such considerations into a compliance/enforcement strategy is essential to ensure the proper management and cleanup of these sites.

INTRODUCTION

The union between the United States Department of Energy (USDOE) and the Hanford Site began in 1943 when approximately 560 square miles of the Columbia River Basin were acquired and devoted to providing the means to produce plutonium for World War II. Initially, the union worked well for the goal set out to attain: plutonium was produced though the environment suffered. Hanford's production successes were held in awe and technological abilities admired. Although most of the world was unaware of activities taking place within the boundaries of Hanford, the final products and technical advances were considered triumphs.

Throughout this period, secrets existed inside the realm of Hanford's fences. From the beginning days at Hanford, the USDOE was self-regulated. No other federal agency, state agency, or public interest group were allowed to be involved or oversee Hanford. In the 1940's, all but the selected elite were unaware that it was plutonium they were producing. The government's need for confidentiality was certainly required in the early years when the race was on to produce atomic weapons.

However, in recent years, since Hanford's switch from defense production missions to the cleanup of waste units resulting from past operations, USDOE's guarded demeanor originating from the plutonium production days has yet to be fully erased.

An inevitable separation has taken place between USDOE and the environment. The people of the Columbia River Basin no longer accept the role of silent neighbor and USDOE is no longer allowed the role of self-regulator. Environmental laws have been enacted which establish a regulatory framework for protecting the environment and managing hazardous wastes. Congress has enacted the Solid Waste Disposal Act of 1965 (SWDA)(1), the Resource Conservation and Recovery Act of 1976 (RCRA)(2), and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)(3). Subsequently, the State of Washington passed the Hazardous Waste Management Act of 1976 (4). Prior to 1965, environmental laws were virtually nonexistent. It was not until October 1992, when President Bush signed the Federal Facilities Compliance Act (5), that the federal government truly became susceptible to enforcement under hazardous waste law for waste management practices at federal facilities.

The Hanford Federal Facility Agreement and Consent Order (6), also known as the Tri-Party Agreement, is one of our nation's first agreements to clean up a federal facility. Signed in 1989 by the Washington State Department of Ecology (Ecology), the United States Environmental Protection Agency (EPA), and the USDOE, the Tri-Party Agreement recognizes state and federal jurisdiction to administer RCRA and CERCLA programs for the cleanup and management of past and present hazardous and mixed

waste activities at Hanford. The Tri-Party Agreement outlines steps (milestones), agreed upon by the three parties, required to remediate the Hanford Site.

Ecology has been developing compliance strategies to achieve compliance under environmental laws and the Tri-Party Agreement while overseeing the management and cleanup of hazardous and mixed waste at Hanford. Ecology believes that sharing these strategies will assist USDOE, its operators, and other regulated communities in understanding the benefits of openly dealing with state agency *representatives*. Shared understandings can produce many potential benefits: reduced or limited enforcement actions, improved public perception, and increased success in planning and prioritizing projects. In addition, facility owners and operators with state environmental compliance and enforcement problems need to work with Ecology in achieving compliance by identifying, discussing, and fixing problems together rather than waiting for problems to be uncovered through field inspections and investigations.

Authority for overseeing and enforcing environmental compliance at Hanford is documented in the Tri-Party Agreement and the Washington State Dangerous Waste Regulations Chapter 173-303 Washington Administrative Code (WAC)(7). The authorities under CERCLA activities versus RCRA activities differ and therefore require different strategies.

CERCLA COMPLIANCE STRATEGIES

Unlike RCRA, CERCLA laws are enforceable through EPA rather than Ecology at the Hanford Reservation. However, powerful mechanisms exist within the Tri-Party Agreement which allot Ecology the authority to review and comment on all documents relating to remediation technologies and field investigations proposed by DOE involving Hanford waste sites. In this process, DOE, EPA, and Ecology must agree and render signature agreement before remediation efforts can begin. Another influential vehicle granted to Ecology stipulated in the Tri-Party Agreement is the use of Applicable or Relevant and Appropriate Requirements (ARAR's). ARAR's are other pertinent laws, either state or federal, which are mutually agreed to and inserted into the Record of Decision (ROD). Once in the ROD, these requirements will be followed during the remediation of the contaminated waste site. Addition of this language in the Tri-Party Agreement allows Ecology authority to enforce those laws designated as "state ARAR's," such as the Model Toxics Control Act (MTCA)(8), a prominent, thorough state cleanup standard for past and present hazardous substance releases. Although extension of authority under ARAR's includes state laws, overall jurisdiction of CERCLA remains with the EPA.

What plagues the public in comprehending remediation efforts is the amount of dollars spent compared to the amount of cleanup performed--viable concern. Instead of justifying the possible reasons why the process seems drawn out, all parties need to focus on becoming part of the solution and not part of the problem. CERCLA's ultimate goal is to accelerate cleanup at Hanford and eliminate any potential human or environmental threat. In application, making decisions and gathering data based on the observational approach, evaluating existing data, and performing fast-pace cleanups in accordance with the Expedited Response Action (ERA) pathway for areas that impose an immediate health risk aids in this goal. This common sense approach reduces the extensive amount of paperwork and time in conducting field investigations and studies, whereby sufficient data already exist or are obtainable through the observational method. CERCLA staff are striving to assist the DOE and its contractors in formulating a more effective method of obtaining and gathering useful data to increase the productivity in terms of remediation. Advocating the construction of a Hanford site laboratory is one example of Ecology's efforts to influence DOE and its contractors. The projected advantages of this laboratory will include: 1) shortened laboratory sample turn-around times, 2) faster data transfer enabling decisions to be made more readily, and 3) extensive saving of tax dollars by work being performed in the Hanford area.

Another improvement Ecology's CERCLA staff must accomplish within the DOE to promote more efficient cleanup is positive, deliberate coordination between DOE's internal organizations, such as D&D (Decommissioning and Decontamination), Operations, and Environmental Restoration Programs. Parallel efforts by each internal organization optimizes use of time and resources. EPA and Ecology are promoting closer coordination between these entities to create an effective remediation effort. Coordinating cleanup activities at Hanford waste sites is a problem that can lead to difficulties in achieving milestone completion dates.

To circumvent or foresee milestone completion problems for CERCLA activities, Ecology's strategy is one of intense administrative review and continuous field presence. Ecology staff thoroughly review all remedial decisions involving the proposed plans, but our presence in the field allows us to verify the actions are taking place in accordance with agreed upon work plans and eliminates the penchant to halt work and await regulatory approval. Managing time to cater to the administrative and physical aspects of remediation permits Ecology staff greater oversight and an overall comprehension of how the decisions made are applied in the field.

If necessary Ecology CERCLA staff may request halting work in the field if a violation of any law is committed. Enforcement through the request for stopping work and recording the events is the only immediate solution. EPA, if agreeing with Ecology's assessment, may determine to issue a penalty and both parties would integrate their respective strategies to determine the appropriate action. If EPA does not agree with Ecology's assessment, then EPA has jurisdiction to not pursue the matter, leaving Ecology to resolve the issue with the disputing field party to gain compliance or clarify the issue.

RCRA COMPLIANCE STRATEGIES

Unlike CERCLA, RCRA laws are enforceable by Ecology at the Hanford Site. Under the provision of the Revised Code of Washington (RCW) 70.105.080 and .095 (9), Ecology has been given the authority by EPA to take enforcement action against any violator of the state's dangerous waste laws and regulations. This authority includes the ability to require compliance with the regulations and impose penalties for noncompliance up to a maximum of $10,000 per day of non-compliance per violation. The RCW also provides criminal sanctions for certain gross misdemeanors, and strict liability for felony violations such as knowing endangerment of persons or property. The state regulations implementing RCRA and the RCW are in Chapter 173-303 WAC, and are at least as stringent as the federal RCRA laws.

Ecology's compliance strategies under RCRA vary; however, the goal is one--to have a facility reach competent, proficient, self-regulated status. This is Ecology's biggest challenge in securing compliance at Hanford. To become effectively self-regulated, facilities must be able to turn to the regulators for guidance and assistance in achieving compliance. Ecology is also responsible for enforcing violations of the State's dangerous waste regulations. As a result, these diametrically opposed situations result in continual compliance dilemmas. So, what can be done to circumvent this problem?

Compliance Philosophy

Ecology maintains a compliance philosophy that facility owners and operators with state environmental compliance and enforcement problems need to work with Ecology in achieving compliance by identifying, discussing, and fixing problems together rather than waiting for problems to be uncovered through Ecology field inspections and investigations. Although Ecology cannot absolve facility owners and operators of potential liability, Ecology believes that, no matter what the issue or violation, it will be better for the regulated community to come forth with problems and work together to find solutions rather than conceal the problems and have Ecology discover them while performing field inspections and investigations. However, USDOE and its contractors have voiced a reluctance due to fear of reprisal. In recent months, Ecology inspectors have worked with USDOE and its contractors to resolve internally identified issues that could have resulted in enforcement actions and/or penalties.

Compliance Guidelines

To aid in developing appropriate case-by-case compliance strategies, Ecology has developed guidelines which are used as tools by hazardous and radioactive mixed waste program staff (10). Policy allows staff to consider discretion factors, such as a willingness to work together and solve problems, when securing compliance decisions. The guidelines specify that staff first evaluate and classify the violation(s) irrespective of any other circumstances which may exist, and then review and evaluate discretion factors, enforcement examples, and EPA High Priority Violation (hpv) criteria. The last step is selecting an appropriate enforcement action. These steps are illustrated in Fig. 1., Selecting An Enforcement Action. Regardless of the chosen enforcement, Ecology's goal with any compliance strategy is to achieve compliance with environmental law. This may include taking severe action to send a needed message to others in the regulated community (Hanford).

The process of initiating compliance actions begins with Ecology's RCRA compliance inspector. The inspector prepares a recommendation for enforcement (RFE) citing dangerous waste violations and choosing an enforcement action. The inspector submits the RFE to their immediate supervisor who makes a recommendation and sends the RFE up the management chain. Depending on the severity of the RFE, i.e., a compliance letter versus an order/penalty, enforcement action may be swift or slow.

Step 1

Violations are evaluated and classified depending on the seriousness of the violation. Class I violations are those which either result, or could result in an imminent threat to human health and/or the environment. *Examples of Class* I violations (and their section within the WAC) include:

- failure to determine if a waste generated is hazardous under either the federal or state lists/characteristics or state mixtures (WAC 173-303-070);
- failure to use the manifest system for transportation (WAC 173-303-180);
- failure of a generator to send waste to a properly permitted treatment, storage, or disposal (TSD) facility (WAC 173-303-200);
- failure to develop a contingency plan (WAC 173-303-350).

Class II violations are those which would not be considered Class I, general violations of an administrative nature of lesser environmental hazard. Examples of Class II violations include:

- failure to accurately complete any portions of the manifest which are not related to waste description and designation (WAC 173-303-180);
- failure to submit the annual report on time (WAC 173-303-220);
- inadequate documentation of training (WAC 173-303-330);
- omissions in the operating record; omissions would not impair the facility's ability to properly handle waste or respond to emergencies (WAC 173-303-380).

Step 2

Once violations have been classified, the inspector reviews discretion factors, enforcement examples, and hpv criteria. Enforcement personnel are accorded discretionary power when determining an appropriate enforcement response. Discretion factors include consideration of the risk posed by the waste, the violator's compliance history, available state agency resources, and the impact that any action would have on the regulated community (e.g., if the enforcement action would act as a deterrent against improper action and bring about a behavioral change by both the violator and the regulated community).

Once staff have evaluated discretion factors and reviewed enforcement examples, EPA's hpv designation is considered. The EPA's concern is that Ecology treat all hpv's in a consistent manner. Examples of hpv's include those who:

- have caused exposure of dangerous waste or dangerous waste constituents to humans or the environment;
- are chronic or recalcitrant violators;
- substantially deviate from the terms of a permit or order by not meeting the requirements in a timely manner and/or by failing to perform work as required by the terms of a permit or Order;
- substantially deviate from applicable RCRA and 70.105 RCW statutory requirements.

Step 3

The next step is determining if discretionary or mandatory options are available. There are only two cases where legal enforcement action is mandatory: The first case is if staff classify the violator as an hpv. The second case is if staff determine that the violations pose an actual or imminent

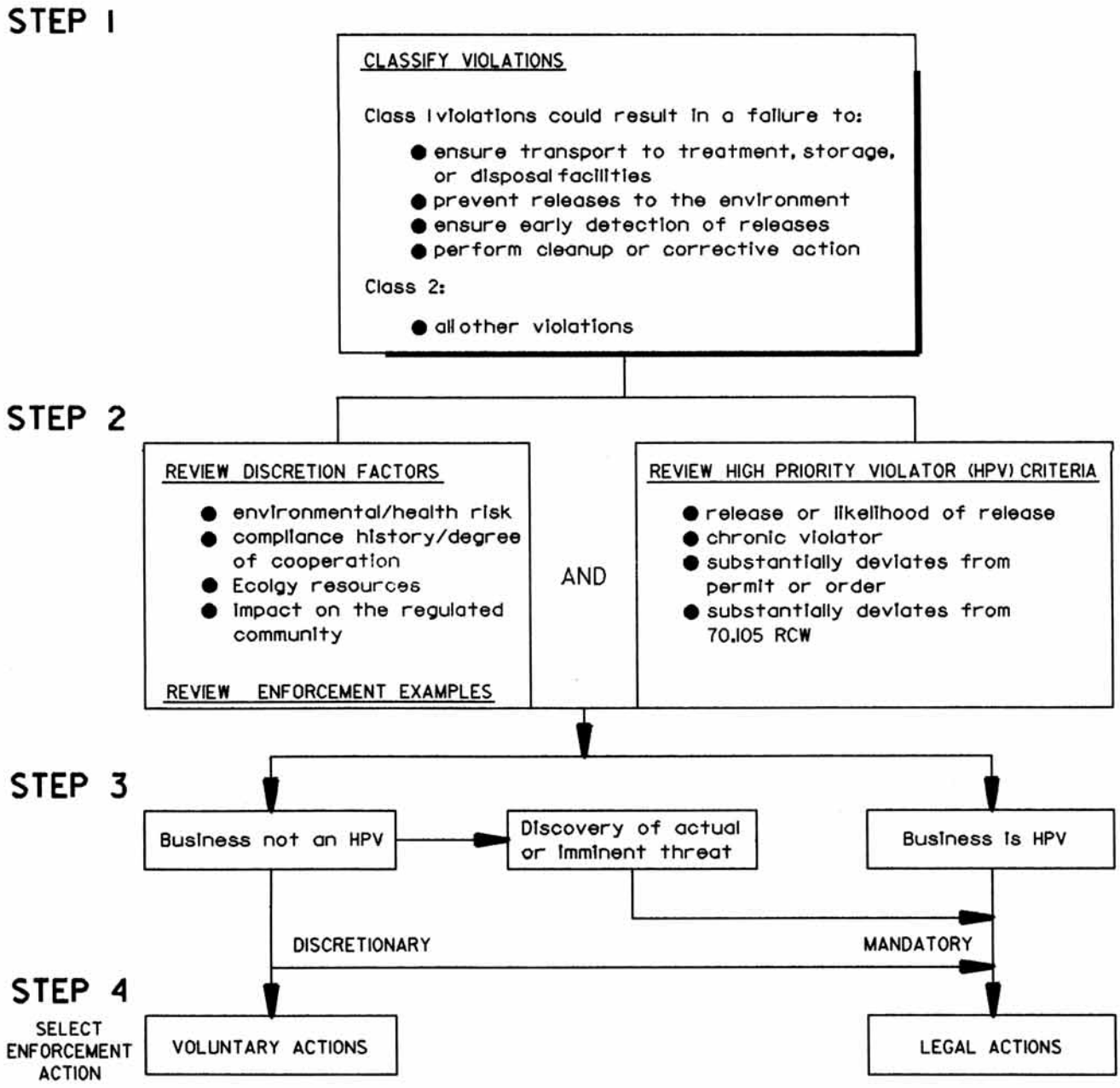

Fig. 1. Selecting an enforcement action.

threat to human health or the environment. In other cases, the decision to initiate legal versus voluntary enforcement is determined by program staff.

Step 4

The last step is selecting the appropriate enforcement action. The goal of the chosen action should be to achieve compliance and deny any economic benefit realized by the noncompliance of the facility owners and/or operators. Enforcement actions range from voluntary to legally mandated depending on the circumstances and severity of the violation.

Voluntary actions: Voluntary actions can take the form of a verbal warning or noting of the violation during the inspection on a field compliance letter, or by issuing a formal compliance letter. Though directives in compliance letters are not binding by law, if ignored or not satisfactorily met, the compliance letter becomes a useful papertrail if legally mandated enforcement is initiated.

Legal actions: Legal actions can take the form of Administrative Actions, Consent Agreements/Orders, Judicial Actions, and Criminal Actions. Legally mandated enforcement actions should be initiated for the following reasons: 1. achieve compliance as quickly as possible, 2. provide an economic disincentive, and 3. communicate to the regulated community the importance of complying with environmental law.

Administrative Actions: The most commonly used administrative actions are orders which require compliance with laws or regulations, payment of penalty, or both.

Consent Agreements/Orders: Consent agreements should be done when compliance will be expedited. Consent

orders may be appropriate when the violator has major areas of noncompliance but is very motivated to comply with the regulations. The Tri-Party Agreement is a good example.

Judicial Actions: When immediate action is needed to stop an imminent threat to public health and/or the environment, the Office of the Attorney General may file a judicial action in Superior Court. Judicial actions may be considered when a violator fails to respond to an administrative order.

Criminal Actions: Criminal behavior is generally defined as a violation which was conducted knowingly, or intentionally and/or willfully. When Ecology staff discover possible criminal activities, they contact the Ecology's and EPA's Criminal Investigation Unit. Review in these cases is naturally rigorous.

Ecology has issued several voluntary enforcement actions at Hanford. Additionally, several legally mandated enforcement actions have been recommended and are in the process of management review and/or approval.

SUMMARY

Although Ecology has developed various strategies for achieving compliance under individual environmental laws and the Tri-Party Agreement, true progress towards full compliance cannot be possible until USDOE finally divorces itself from guarded, negative associations of the past and embraces open, positive relationships with the regulators and the public. In doing so, facility owners and operators with state environmental compliance/enforcement problems need to work with Ecology in achieving compliance by identifying, discussing, and fixing problems together rather waiting for problems to be uncovered through field inspections and investigations.

The legacy of ignoring environmental concerns at Hanford in previous years torments Hanford today. We all need to focus our energy and enthusiasm on Hanford's environmental restoration program with the same level of effort and fervor that was demonstrated when Hanford was built fifty years ago. The regulators, EPA and Ecology, must work with USDOE and its contractors to provide technical advice, establish priorities, and help achieve compliance with federal and state environmental law. We must also work together to deliver to the public an understanding of the issues and decisions encompassing Hanford's cleanup efforts. Ecology is the public's eye. With sound decision making and mutual cooperation, USDOE, Ecology, and EPA can adequately execute the largest environmental remediation effort sought in the United States and hopefully create a positive image with a common underlying goal--clean and protect our environment.

Ecology is at a crossroads with USDOE and its contractors. We have ventured far enough down the path to recognize inherent pitfalls with the Tri-Party Agreement. However, Ecology needs to continue to press for measurable progress in achieving site cleanup, and yet meet the day to day requirements of state and federal environmental laws. To meet these goals, all parties must be part of the solution, look for innovative answers, and be risk takers. At stake is the past, present, and future legacy of the Hanford Site for our children's children.

REFERENCES

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