



Sustainable Water  
Integrated Management (SWIM) -  
Support Mechanism



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Water is too precious to waste

UNESCO-IHE  
Institute for Water Education



**TRAINING WORKSHOP “Training workshop & study tour for developing the capacity of prosecutors & investigators for the enforcement of water & environment legislations”**  
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# **3- Reliability and credibility of evidence of non compliance**

# Evidentiary Considerations

- Chain-of-custody procedures & prescribed analytical standard methods in monitoring & inspection reports will assist the admission of evidence.
- Individuals who collected, kept & analyzed samples are qualified to testify in court.

- If the non-complier does not intend to contest the integrity of the sample or testing evidence, admission of evidence can save a great deal of trial time.
- To avoid contesting the case, the procedures followed in the collection, preparation & analyses of evidentiary samples need to be standardized & **detailed in a manual**, which, if necessary, can be offered as evidence of the regularly conducted procedures followed by the laboratory in generating results.
- Thus, whether or not the inspector anticipates that a report will be introduced as evidence, the inspector should make certain that the report is as accurate & objective as possible.

# Investing in Credible Evidences

- Results generated from water & environment monitoring systems in support of regulations compliance monitoring requirements, **have the potential of ending up in court**, sometimes in criminal court where the evidentiary requirements are much more stringent.
- This implies that all analysts need to be trained if legal defensibility of data is to be maintained.

## Staff Should be Qualified as Expert Witness:

- Regulatory agencies responsible for water & environment testing laboratories & monitoring stations should have staff that can provide indisputable evidences of non-compliance & serve as expert in testimony for prosecution.
- An important part of the essential evidence used to support scientific proof in court cases is the demonstration & documentation of the level of training of the analyst.
- Much scientific evidence has been refused admission or severely tainted due to a lack of documented training of the "expert witness".

# Weaknesses in Analyst (Witness Expert) Training as Tempting Targets for Legal Challenges in Court

- **Six known weaknesses:**
  1. The expert witness is unqualified to swear for the theory's validity
    - Lack of understanding of the theory.
    - Lack or insufficiency of theoretical background
  2. The expert witness is unqualified to vow for the instrument's reliability.
    - Unfamiliarity with the instrumentation & techniques

4. The expert witness was unqualified to maintain the equipment.
5. The expert witness was unqualified to operate the equipment and conduct the test.
  - Whether a credential is required
  - Whether the witness possesses the credential
6. The expert witness did not use prescribed standard procedures in conducting the test.
7. The expert witness is unqualified to interpret the test result.



# Conclusion

- Expert testimony is evidence presented by a person where **both sides & the court agree that the person is an expert on the subject** at issue because of his education, qualification, training and/or knowledge of the subject matter.
- As with all evidences, **a witness must describe why, where, who, and what the results were,** because the witness saw these occurrences or was personally involved in the act.

# **Why Noncompliance with Water & Environment Legislations?**

- Three main reasons that come to mind:
  1. Violator not aware of the legislation.
  2. Violator don't know how to comply.
  3. Violator is reaping some economic benefits by non-complying.

- Compliance can be achieved through the following:
  1. Issue the water & environment requirements.
  2. Promote compliance through communication of legislation, publication of relevant information, etc...
  3. Enforce legislation through the following:
    - Development of inspection capacities, **credible** monitoring & **accredited** measuring systems.
    - Preparation of procedures for **investigations of violations & rules for assessment of penalties**.
    - Identification of the measure taken to compel compliance without resorting to formal court action.
    - Development of measures to compel compliance through court action.

# ENFORCEMENT RESPONSE TO VIOLATIONS

## 1-CRITERIA FOR RESPONSES TO VIOLATIONS

Whenever a violation is discovered, enforcement officials should apply the following factors in deciding on the kind of enforcement action they must take:

- Nature of the violation (intent, attempt to conceal information, repeated occurrence)
- Effectiveness in achieving the desired result with the violator (history of compliance, willingness to cooperate)
- Consistency & predictability in enforcement.

## 2- LEVELS OF ENFORCEMENT ACTIONS AVAILABLE TO REpond TO WATER & ENVIRONEMNT VIOLATIONS:

### a) Administrative Actions:

- Informal administrative actions are basically notices of noncompliance or warning letters issued from regulator. They are usually advisory in nature.
- Formal administrative actions are legal actions that result in an order requiring the violator to correct the violations & in most cases, the violators pay a civil penalty that commensurate with the seriousness & circumstances of the violation.

- It is recommended that administrative actions can be taken under the regulator internal administrative trial system. This system is very comparable to any court system, except that it is presided over by regulator's administrative law judges, whose salaries in this case should be paid by the regulating agency.
- Violators should always have the right to appeal the initial rulings of the administrative judge.

## ***b) Civil Judicial Actions:***

- The civil judicial action requires efficient and prompt court systems with **judges familiar with water & environmental issues and regulations.**
- The number of judges who are familiar with water & environment laws & requirement in some SWIM Countries is insufficient.



### *c) Criminal Judicial Actions:*

- Criminal actions are taken when a person has **knowingly and willfully** committed a violation of the water & environment law.
- In a criminal case, the magistrate prosecutes the alleged violator in a court system, seeking criminal sanctions, usually including fines and incarceration.

# INCORPORATION & ASSESSEMENT OF PENALTIES FOR VIOLATORS

- Penalties for noncompliance should be incorporated with the water & environment ordinances, including standards & Maximum Permissible Levels (MPL)
- In addition to cash penalties, regulators in SWIM-PCs should use other sanctions, such as: denying or revoking permits, partial/full shutdown of operations, cutting essential services, imposing additional compliance conditions, incarceration, & publicizing enforcement actions.

# **CRITERIA TO ASSESS SANCTIONS FOR DETERRENCE**

- A penalty should include an amount reflecting the seriousness or gravity of the violation
- Factors that regulating agency should take into consideration:
  1. Actual or possible damage caused by the violation
  2. Relative impact of a penalty on the violator
  3. Amount of pollutant released to the environment
  4. Degree of toxicity of the discharged pollutant
  5. Sensitivity & vulnerability of the environment

6. The duration of time a violation continued.
7. The degree of willfulness or negligence.
8. The degree of cooperation or non-cooperation in reporting of noncompliance & prompt correction of environmental problems.
9. History of noncompliance.
10. Ability of the violator to pay the fine.

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Thank you  
for your attention

Merci pour  
votre attention



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