



Asian Environmental Compliance and Enforcement Network

PRINCIPLES AND PRACTICES FOR
IMPROVING ENVIRONMENTAL COMPLIANCE
AND ENFORCEMENT IN ASIA

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INTRODUCTION

Asia is the most economically dynamic region in the world, yet is home to two-thirds of the world's poor. While this impressive economic progress has raised 270 million people out of poverty, it has triggered a decline in Asia's natural capital – shrinking forests, declining biodiversity, disappearing water sources, barren lands. Exploitation of natural resources, industrial production, and urbanization continue to pose serious environmental challenges.

In response, Asian countries have developed an array of environmental laws and judicial decisions that seek to implement international principles, including the principle of sustainable development. Enforcement of the resulting legal requirements, however, remains weak and uneven, due in part to limitations in financial resources and human and institutional capacity.

To overcome these limitations, Asian governments have introduced innovative mandatory and voluntary approaches that leverage market and community forces, and are less resource intensive than traditional command-and-control approaches. These innovative approaches also promote voluntary compliance by educating and assisting the regulated community, and providing opportunities to publicize good corporate citizenship.

To support these efforts, Asian environmental agencies have established the Asian Environmental Compliance and Enforcement Network (AECEN), which works to promote improved compliance with environmental legal requirements in Asia through regional exchange of innovative policies and practices. Composed of national and sub-national environmental agencies, the objectives of the Network are to:

- Promote the development and implementation of improved environmental policies, laws, regulations and institutional arrangements;
- Strengthen practitioner capacity through specialized training and skills development; and
- Facilitate regional sharing of best practices and information on strategies for strengthening compliance and enforcement.

One core AECEN activity is to pilot innovative policies and practices at the country level and facilitate further adoption and dissemination through regional cooperation.

To support these efforts, AECEN has prepared these principles to guide environmental agencies in strengthening their enforcement and compliance programs. The principles presented here are based on international law and national experiences within Asia and worldwide. While the principles are universal, the emphasis and approach are tailored to the challenges in Asia. In applying these principles, countries should develop their own courses of action based on their legal and institutional frameworks, developmental policies and priorities, and available resources.

In framing these principles, AECEN relied in part on two documents which also address principles of environmental enforcement: Principles of Environmental Enforcement of the U.S. Environmental Protection Agency (1992), and the Guiding Principles for Reform of Environmental Enforcement Authorities in Transition Economies of Eastern Europe, Caucasus, and Central Asia (2003) prepared by the Organization for Economic Co-operation and Development (OECD).

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I

INSTITUTIONAL ARRANGEMENTS

Principle 1: Agency mandates.

Laws should provide environmental agencies with clearly-defined mandates, responsibilities and resources to protect public health and the environment.

Legislation should clearly define the goals, responsibilities, powers and functions of the implementing environmental agency, as well as its relationship with other governmental bodies with environmental responsibilities. The legal framework should provide the agency with the power to promote or compel compliance with environmental requirements through regulatory incentives, technical assistance, or the threat of penalties. An agency's regulatory authority should encompass the full range of powers and responsibilities, including standard setting, permitting, monitoring and inspection, investigation and enforcement actions. Since these powers and functions are interconnected, incomplete mandates can seriously limit the agency's capacity to ensure compliance. The roles and responsibilities of the principal enforcement agency should not overlap or conflict with those of other governmental agencies.

Laws establishing the environmental agency should define its mandate and powers in the context of government policies on the protection of public health and the environment, and sustainable development. Ultimately, the agency should measure the results of compliance and enforcement activities with regard to national policies and environmental improvements.

An environmental agency should have the institutional autonomy to develop and implement its compliance and enforcement program free from political intervention or external pressure related to economic development or other governmental or private sector priorities. The credibility of the agency will depend on the public's perception of its independence.

Principle 2: Subsidiarity.

Decision-making in the environmental agency should be made at the lowest agency level that possesses the competency to effectively carry out the required tasks.

An environmental agency should have a well-defined organizational structure that clearly identifies and assigns functional responsibilities to specific units at each organizational level. In keeping with the principle of subsidiarity, functional responsibilities and tasks should be completed by the lowest competent unit. At the national or central level, the agency should perform only those tasks which cannot be performed effectively at a lower level.

For effective decentralization of environmental compliance and enforcement functions, the national level should delegate authority in proportion to the responsible unit's technical and resource capability. While the overall trend in Asia is to decentralize enforcement and implementation authority, the national government should ensure that the enforcement program is consistent, uniform and fair throughout the country. At the national level, the agency should also build and strengthen the capacity of sub-national units, provide necessary oversight, implementation support and coordination, including providing policy guidance, training staff, reporting results and establishing appropriate funding and reporting mechanisms. National agencies should retain enforcement powers over delegated authorities.

Principle 3: Devolution.

National or central governments should grant environmental compliance and enforcement powers to regional or local authorities that are best positioned to effectively carry out the required tasks.

Regional or local authorities are better positioned to address regional or local environmental challenges through solutions that leverage local capabilities and capacities. For some compliance and enforcement functions, regional or local authorities have a more complete understanding of conditions and needs, and can better respond to program needs within national framework. Overall, devolution and autonomy can foster increased efficiency and equity.

While devolution of environmental compliance and enforcement powers from national agencies to local authorities can reduce overdependence on the national authority, the challenge in developing enforcement programs is to strike a balance on what responsibilities are retained at the national level and what are devolved to local levels. At a minimum, national agencies should retain authority on national standard-setting and policy-making, transboundary pollution, or potential to create pollution havens within certain administrative areas or localities. National agencies should retain ultimate enforcement powers over responsibilities devolved to local authorities.

Principle 4: Inter-agency cooperation.

Governmental agencies with complementary enforcement and compliance responsibilities should cooperate closely through clearly defined coordination mechanisms that address strategic planning and implementation.

Where separate governmental agencies have complementary compliance and enforcement responsibilities, interagency cooperation is crucial for effective enforcement of environmental requirements. A country's principal environmental agency should work with other related agencies to ensure effective cooperation and coordination. Relevant sectors and governmental functions include: health and safety, natural resources management, agriculture, energy, transportation, land use planning, economic development, and criminal investigation and customs.

In coordinating with other agencies, environmental agencies should address gaps and overlaps in authority, and ambiguity in operational roles. A lack of cooperation and coordination among governmental agencies can result in the competition for jurisdiction and budget. Possible interagency cooperation mechanisms can include: interagency agreements that establish clear coordination procedures, joint research programs; and multi-agency committees or task forces. Sharing information among national and local agencies can also be an effective strategy for understanding their inter-linked responsibilities, and facilitating coordinated decision-making.

II

PLANNING, PERFORMANCE AND EVALUATION

Principle 5: Priority setting.

Environmental Agencies should develop clear strategies and implementation plans that address program priorities, realistically reflect available human and institutional capacity, and deploy the optimal mix of regulatory instruments.

For under-funded environmental agencies, priority setting and planning is a critical function. Recognizing limitations in capacity, environmental agencies should formulate clear strategies and plans that address priority challenges and set realistic targets.

When setting priorities, agencies should consider a range of objectives, including protecting the environment and public health, advancing new or innovative objectives and policies, and targeting resources to ensure maximum impact or optimal deterrent effect. Agencies should lead stakeholder-based planning initiatives that incorporate a wide range of information and inputs from other agencies, local governments, the regulated community, civil society and experts.

In developing an enforcement strategy, environmental agencies should deploy a combination of enforcement instruments that enable the agency to achieve its goals and test new approaches within existing program constraints. These instruments should address both preventive and punitive tools that can be applied to potential and actual violators. The resulting strategy should be a well-balanced combination of command-and-control and incentive-based measures that take into account Asia's regulatory culture, for example, preference for consensus-building.

Agencies should base strategic planning on up-to-date information on the composition and conduct of the regulated community, and agency human and institutional constraints. Agencies should focus their efforts on controlling pollution from small and medium-sized enterprises (SME) and local

governments, which are the principal sources of environmental pollution in Asia. Agencies should also periodically reexamine their organizational structure and make readjustments in accordance with emerging challenges.

Agencies should clearly communicate new priorities and plans to program personnel and the regulated community to improve program implementation.

Principle 6: Monitoring and evaluating performance.

Environmental Agencies should adopt appropriate performance management systems to support planning, performance evaluation and continuous improvement of programs based on performance indicators.

To ensure effective implementation of compliance and enforcement programs, environmental agencies should establish performance management systems that enable decision-makers to measure progress toward achievement of priority goals and objectives. Based on performance indicators that track agency inputs, outputs and expected outcomes related to environmental impacts, the performance management system should provide a basis for continuously improving core program activities and initiatives, such as planning, inspection and monitoring, enforcement actions and incentives-based programming.

Environmental agencies should use performance management systems to evaluate program strengths and weaknesses, inform planning decisions, justify increased governmental expenditures, and inform the public of status and achievements. To support performance management systems, the agency should deploy computerized information management systems to store and analyze indicator information.

Principle 7: Capacity building.

Environmental compliance and enforcement programs should include capacity development activities that build the human and institutional capacity necessary for environmental agencies to carry out their responsibilities effectively.

Strengthening human and institutional capacity in environmental compliance and enforcement requires a comprehensive personnel management and

support system that not only strengthens employee capabilities, but also provides incentives for improved performance and commitment to the agency mission. Staff member capacity building should include hands-on technical skills, management and leadership training. On the institutional side, agencies need to dedicate resources to necessary equipment, laboratories, information management systems, etc.

Since the environment is not a funding priority of many Asian governments, there are significant limitations in human and institutional capacity in environmental agencies. Since budgetary constraints are a perennial problem in Asia, agencies should focus available resources on strategic capacity development activities that address priority challenges. In times of chronic budget shortfalls, they should also work to develop funding mechanisms such as economic instruments that increase their internal agencies budgets and enable increased expenditures in staff, equipment and other program requirements.

III

COMPLIANCE MONITORING AND INSPECTION

Principle 8: Compliance Monitoring and Inspection.

Environmental agencies should monitor compliance and conduct inspections in accordance with standard procedures that reduce risks to public health and the environment.

Environmental agencies should develop compliance monitoring programs that enable detection of violation, correction of violations and support enforcement actions. Environmental agencies should monitor compliance via information developed from facility inspections, self-monitoring, and citizen complaints. To ensure effectiveness, uniformity and fairness, enforcement agencies should develop and adopt standardized monitoring and inspection procedures and practices, and manage the resulting information in computerized data management systems.

Given that monitoring and inspection is resource intensive, Asian government agencies should develop innovative approaches for improving efficiencies, such as multi-media inspections, community monitoring, and mobilizing trained and certified third-party inspectors.

Principle 9: Self-monitoring, recordkeeping and self-reporting.

Environmental agencies should require the regulated community to self-monitor, self-report and keep records on their environmental performance.

Self-monitoring, recordkeeping and self-reporting are effective, fair and efficient means for environmental agencies to monitor compliance. By requiring the regulated community to measure and report their performance, environmental agencies are able to shift some of the burden for compliance monitoring to the regulated community. Self-monitoring can also lead to prompt responses by the government and regulated sources to situations of non-compliance. Through sanctions defined in regulations or permit

requirements for false reporting or non-reporting, agencies can ensure the accuracy of the reports and their usefulness as a management tool.

IV

ENFORCEMENT RESPONSE

Principle 10: Rule of law in environmental enforcement.

Environmental agencies should demonstrate commitment to the rule of law by developing timely enforcement responses that deter noncompliance and accomplish a range of objectives, including correcting violations and rectifying or compensating environmental harm .

Environmental agencies should demonstrate a commitment to upholding the rule of law by acting to correct detected non-compliance through carefully designed response mechanisms. Enforcement of environmental requirements is a fundamental element of any compliance assurance program, and provides the basis for all command-and-control and incentives-based program elements by deterring non-compliance and correcting or redressing harm.

In designing its enforcement responses, environmental agencies should adopt the full range of response mechanisms that include warnings (site visits, letters and notices of violation), and penalties that include administrative or judicial enforcement (revocation of permits, monetary penalties), or criminal enforcement (fines, imprisonment). Responses should achieve a range of objectives: obtain information on violator conduct, return violators to compliance, impose sanctions, eliminate economic benefits of non-compliance, correct or redress environmental harm, and publicize results.

Given the emphasis in Asia on criminal sanctions for environmental enforcement and the procedural challenges posed by criminal enforcement, environmental agencies should develop strategies for pursuing administrative and judicial enforcement as more effective and efficient response mechanisms. In addition, environmental agencies should build on the preference in Asia for negotiation and settlement and identify improved methods for alternative dispute resolution.

Principle 11: Fair, consistent and proportionate responses.

Environmental agencies should develop procedures that clearly define enforcement responses and associated remedies that are timely, fair, consistent and proportionate to the conduct.

Enforcement actions should not be arbitrary. Environmental laws and regulations must define the standards of compliance, penalties for violations, and enforcement procedures that include minimum requirements of due process: legal notice, opportunity to be heard, right to an objective and timely process of adjudication, and right to an appeal.

In accordance with the law, environmental agencies should pursue enforcement responses that are timely, fair and proportionate to the conduct. Where possible, agencies should develop clear guidelines and procedures that define selection criteria in applying informal or formal response mechanisms and related remedies. Guidance should cover such activities as issuance of field citations, terms and conditions of permit revocation or facility closure, and calculation of penalties, and clearly define the discretion of implementing authorities.

In responding to violations, agencies should act in a timely manner to reduce adverse environmental impacts and to ensure an atmosphere of deterrence. To guarantee fairness, agencies should also employ a consistent and transparent approach that makes clear what enforcement actions may be taken, in which situations, and for what reasons. Transparency helps the regulated community, other agencies, and the public understand the enforcement process and promotes confidence in the agency.

Acting with a solid legal and factual justification, environmental agencies should select an appropriate response from the full range of available remedies that is commensurate with the risks to the environment and severity of the violation, taking into account any mitigating factors.

V

COMPLIANCE PROMOTION AND INCENTIVES

Principle 12: Compliance promotion.

Environmental agencies should promote compliance with regulatory requirements by providing information and technical assistance, sharing best practices and promoting adoption of voluntary measures.

Environmental agencies should integrate compliance promotion as a core tool in their compliance and enforcement programs. Through the provision of information and technical assistance, and the sharing of best practices, environmental agencies can assist the regulated community in overcoming barriers to compliance.

Compliance promotion is an especially practical tool for Asian governments, which face significant challenges in controlling the significant and growing levels of pollution from SMEs and local governments. Given that most agencies lack adequate resources and regulatory tools to employ an effective command-and-control program, they should work closely with the regulated community to notify them of environmental requirements and possible approaches for compliance. Agencies can also promote adoption of voluntary programs that support the principles and practices of corporate social responsibility.

Principle 13: Incentives-based instruments.

Environmental agencies should employ economic and other incentives-based instruments to promote compliance.

As a complement to command-and-control regulation, environmental agencies should develop economic- and incentives-based instruments, that provide incentives for the regulated community to adopt technologies and practices which ensure compliance with environmental standards. Possible instruments include: pollution charges on effluents or emissions, fiscal incentives or subsidies for compliance or adoption of environmental management systems, or performance bonds.

To address chronic funding deficits, environmental agencies should devise programs to raise off-budget revenue that can include permit fees and monetary penalties. The additional revenues should be set aside in an independent revolving fund dedicated to support agency programs and priorities, and other environmental investments. Agencies should take care, however, to integrate incentives schemes with its command-and-control operations to ensure that combined measures serve to deter polluting behavior.

Environmental agencies should also develop performance rating schemes that publicly disclose environmental performance information to exert public pressure on violators. Public disclosure programs can either enhance or tarnish a company's reputation with consumers and others, which has proven an important tool for modifying polluting behavior in Asia.

VI

PUBLIC PARTICIPATION

Principle 14. Access to information.

Environmental agencies should facilitate citizen access to relevant agency information, subject to reasonable rules.

Public participation in environmental enforcement is meaningful only if the public has the information necessary to make informed interventions. In line with legal and regulatory requirements, environmental agencies should give civil society reasonable access to information on the activities of the agency and regulated community without prematurely revealing information on enforcement cases or compromising confidentiality. Agencies should establish procedures for citizens to request and receive specific information via all available media within a reasonable timeframe, subject to rules on trade and national security secrets. This would also encourage citizen participation in ensuring environmental compliance.

Principle 15. Stakeholder participation.

Environmental agencies should provide clear mechanisms for stakeholder participation in decision-making on compliance and enforcement.

Environmental agencies should facilitate stakeholder involvement in governmental decision-making on enforcement and compliance plans, policies and actions that have a direct affect on their well-being. Per legal requirements, agencies should devise administrative procedures for notice and comment on proposed agency actions (i.e. permitting decisions) through clearly defined participation and consultation processes. Agencies decisions should document their due consideration of public comments.

Principle 16. Citizen enforcement.

Environmental agencies should involve civil society in compliance monitoring and filing of complaints or law suits.

Citizens play a vital role as environmental watchdogs. To promote citizen support in enforcement programs, environmental agencies should establish effective mechanisms for citizen participation in compliance and enforcement, including citizen monitoring and citizen enforcement through the courts. In developing these mechanisms, agencies should safeguard the rights of persons subjected to enforcement actions.

Environmental agencies should support development of citizen monitoring activities that facilitate involvement by citizens in spotting and reporting instances of noncompliance. Agencies can equip individuals and citizen groups with the necessary knowledge and tools to assist with end-of-pipe, visual and ambient monitoring efforts. Agencies can also establish hotlines to support citizen participation.

Through cooperative support for citizen law suits, agencies can also leverage civil society support in enforcement actions. Through public interest litigation, courts can relax procedural requirements and allow cases that empower citizens to confront violators and enforce standards.