United States
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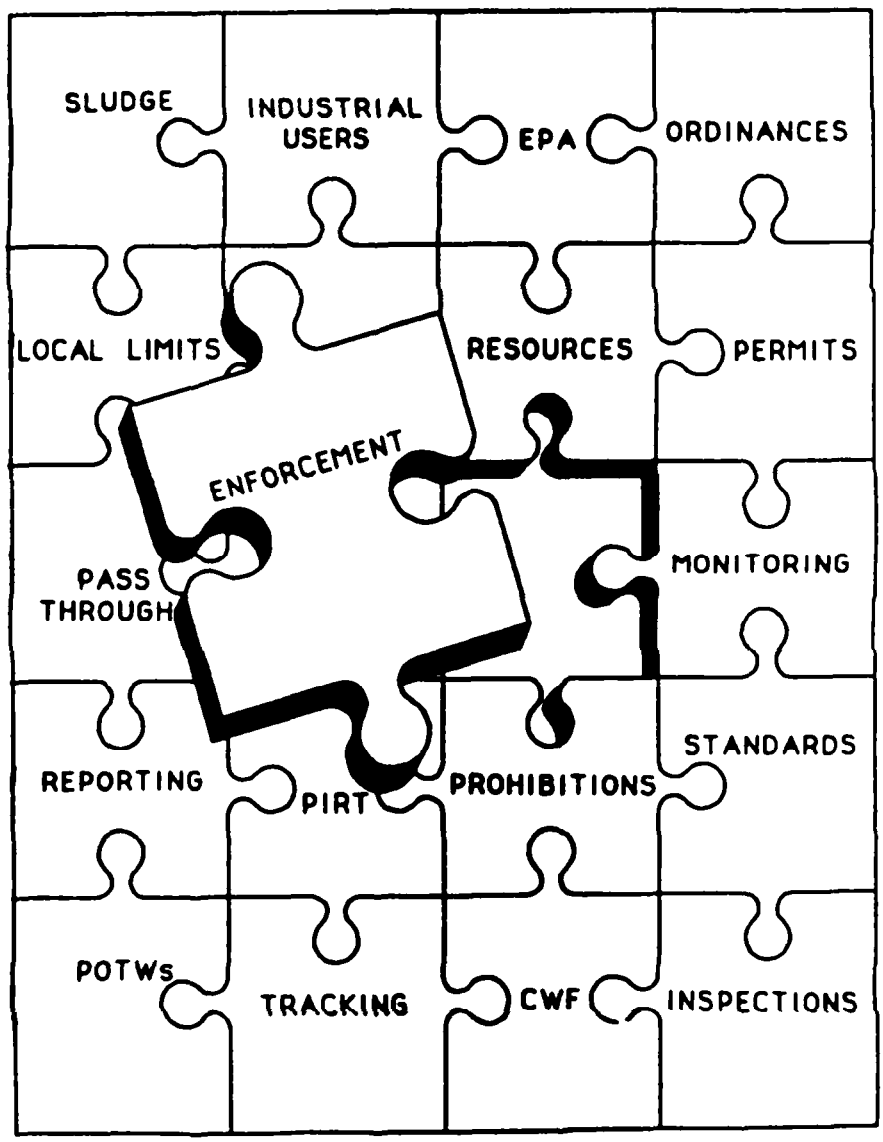
Office of Water Enforcement
and Permits
Washington, DC 20460

September 1989

Water

Guidance for Developing Control Authority Enforcement Response Plans



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
WATER

To All Approved Pretreatment Programs:

One of the most important requirements of pretreatment program implementation for Publicly Owned Treatment Works (POTWs) is an effective enforcement program to deal with Industrial User (IU) noncompliance. EPA expects POTWs to identify all violations, to respond with appropriate action and to follow up those violations with escalated levels of enforcement, if needed to ensure compliance. In January 1990 EPA expects to promulgate amendments to the General Pretreatment Regulations requiring all POTWs with approved pretreatment programs to develop enforcement response plans describing how the POTW will investigate and respond to instances of noncompliance.

In response to this coming requirement, the Office of Water Enforcement and Permits has developed the attached "Guidance for Developing Control Authority Enforcement Response Plans". This Guidance is intended to provide municipal pretreatment personnel with recommendations for assessing enforcement authorities, determining appropriate enforcement roles for personnel and deciding upon enforcement remedies for specific violations. To assist Control Authorities in meeting the changes to the General Pretreatment Regulations, the manual includes a model enforcement response guide and a detailed analysis of each of the common enforcement remedies.

If you have any questions or comments concerning the development of your own Enforcement Response Plans, please contact your Approval Authority or the Pretreatment Coordinator in your USEPA Regional Office.

Sincerely,

James R. Elder

James R. Elder, Director
Office of Water Enforcement
and Permits

GUIDANCE FOR DEVELOPING CONTROL AUTHORITY ENFORCEMENT RESPONSE PLANS

September 1989

Office of Water Enforcement and Permits
U.S. Environmental Protection Agency
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CONTENTS

CONTENTS (Continued)

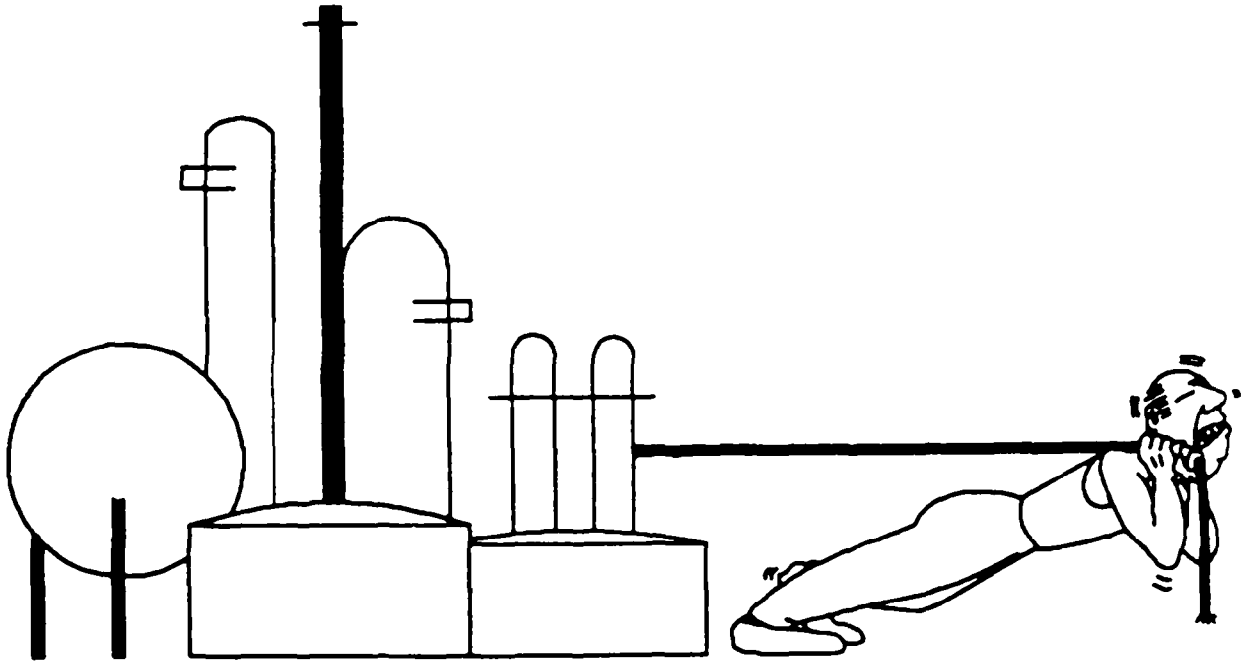
CONTENTS (Continued)

TABLES

FIGURES

CHAPTER 1

INTRODUCTION



1. INTRODUCTION

1.1 PURPOSE OF THE MANUAL

This manual provides guidance to Control Authority personnel in developing an enforcement response plan to remedy violations of a local pretreatment program. An enforcement response plan outlines, in a step-by-step fashion, the procedures to be followed by Control Authority staff to identify, document, and respond to pretreatment violations. Once adopted, the plan provides guidance in selecting initial and follow-up enforcement actions, indicates staff responsibilities for these actions, and specifies appropriate time frames in which to take them.

Although all violations of its pretreatment program should be met with some type of enforcement response, the Control Authority may be unclear about exactly how to respond. For example, should the Control Authority issue a Notice of Violation, assess an administrative fine, or seek a judicial remedy, (e.g., civil penalty), for the noncompliance?

To ensure that POTWs develop and implement specific enforcement procedures, the U.S. Environmental Protection Agency (EPA) has proposed, on November 23, 1988 (53 Fed. Reg. 47632), to amend the General Pretreatment Regulations to require all POTWs with approved pretreatment programs to develop and implement enforcement response plans. An enforcement response plan specifies criteria by which POTW personnel can determine the enforcement action most appropriate to the nature of the violation.

The purpose of this guidance manual is to help the Control Authority use its own enforcement expertise to develop a flexible and appropriate enforcement response plan tailored to its particular situation.

1.2 ELEMENTS OF AN ENFORCEMENT RESPONSE PLAN

A comprehensive and effective enforcement response plan must:

- Describe how the POTW will investigate instances of noncompliance
- Describe the types of escalated enforcement actions that the POTW will take in response to all anticipated types of industrial user violations and the time periods within which to initiate and follow up these actions
- Adequately reflect the POTW's primary responsibility to enforce all applicable pretreatment standards and requirements.

In addition, the plan should also contain:

- Criteria for scheduling periodic inspection and/or sampling visits to industrial users. EPA recommends that the date and location for routine inspections be established four to six months in advance.
- Forms and guidelines for documenting compliance data in a manner which will enable the information to be used as evidence in administrative and judicial enforcement actions.

- Systems to track due dates for self-monitoring reports, compliance schedule milestones, compliance status generally and pending enforcement actions (e.g., dates for show cause hearings or permit suspension/revocation proceedings).

- Criteria, responsible personnel and procedures to select and initiate an enforcement response from among those provided in the plan.

Each of these elements is discussed in detail in the following chapters.

1.3 BENEFITS OF AN ENFORCEMENT RESPONSE PLAN

Adoption of the enforcement response plan will alleviate many difficulties which Control Authorities frequently experience in enforcing pretreatment programs. First, the Control Authority's internal management is strengthened by improving task coordination among staff. The enforcement response plan should clearly establish the enforcement responsibilities of each person involved in the pretreatment program: the pretreatment coordinator, laboratory personnel, sampling crews, attorney, and any other staff affected. Once each person involved is assigned responsibility for an enforcement task, they should be fully informed about their role. For example, each staff person should read the enforcement response plan in order to clearly understand the importance of his/her tasks. In this way, POTW personnel will be capable of performing these responsibilities decisively when enforcement actions are necessary.

A second benefit is the enhancement of the Control Authority's reputation as a responsible public agency. Adherence to the plan makes the POTW less likely to react inconsistently to similar instances of noncompliance or to arbitrarily select enforcement measures. Because the Control Authority is following documented enforcement procedures, industries will not view the Authority's enforcement actions as subjective or unreasonable; rather, the regulated community will understand that certain types of violations always bring particular enforcement responses. Thus, by adopting an enforcement response plan and by consistently observing its provisions, the Control Authority alerts its industrial users to the consequences of noncompliance. To further educate the regulated community about the plan, the Control Authority may send its major provisions to industries by letter or hold meetings with industry representatives to discuss the implications of the plan for pretreatment enforcement.

Finally, the plan provides an opportunity to involve other public service and regulatory agencies in the pretreatment program. For example, the local police department is an excellent source of expertise about proper procedures for gathering evidence of violations, devising methods to assess fines, and preparing cases for civil litigation and criminal prosecution. Many Control Authorities have police officers trained to recognize pretreatment violations (e.g., evidence of illegal discharges to manholes) and have found their assistance to be invaluable in conducting criminal investigations. The enforcement response plan may also help promote an information network with these other agencies. For example, area hospitals may be requested to report injuries caused by industrial accidents to the Control Authority (prompting investigations to determine whether spills or illegal discharges may have also occurred). Similarly, area fire departments, labor boards, fish and wildlife agencies, and building inspectors may also be consulted for any information related to possible discharge violations. This data exchange will enable information about problems of mutual concern to be pooled.

1.4 ORGANIZATION OF THE MANUAL

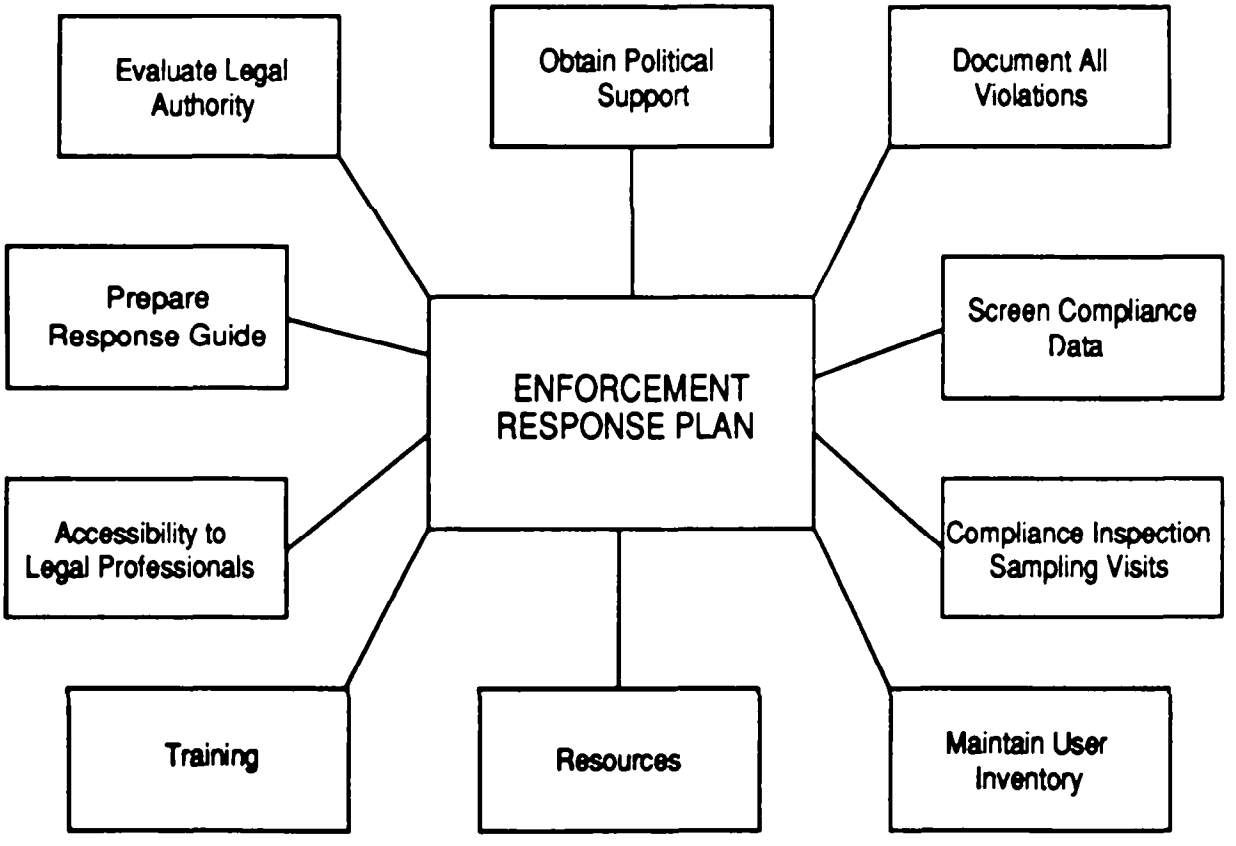
The remainder of the manual is organized into five chapters. Chapter 2, "Developing an Enforcement Response Plan," discusses activities that the Control Authority should perform as it develops the enforcement response plan. Chapter 3, "Evaluating the Sewer Use Ordinance," outlines considerations in reviewing the POTW's sewer use ordinance, including the adequacy and effectiveness of available enforcement mechanisms and procedures. This Chapter also contains model language for the enforcement section of a local ordinance. Chapter 4, "Developing an Enforcement Response Guide," describes how to put together a matrix which establishes a narrow range of enforcement responses and time frames for enforcement actions and follow up. Chapter 4 also contains a model enforcement guide. Finally, Chapter 5, "Basic Enforcement Responses," provides detailed descriptions of the following basic enforcement responses commonly used by Control Authorities:

- Notice of Violation
- Administrative Fines
- Administrative Orders
- Civil Litigation
- Criminal Prosecution
- Termination of Industrial User Service
- Supplemental Enforcement Responses.

Each of these responses is described in a separate subsection of Chapter 5. The descriptions include the advantages and disadvantages of each response and the most appropriate circumstances in which the response may be used. Examples of administrative enforcement documents, such as notices and orders are also presented to assist Control Authorities and their legal counsel in drafting similar documents.

CHAPTER 2

DEVELOPING AN ENFORCEMENT RESPONSE PLAN



2. DEVELOPING AN ENFORCEMENT RESPONSE PLAN

There are five basic tasks which should be undertaken when developing an enforcement response plan:

- Identify appropriate personnel to draft the plan
- Review the industrial user inventory
- Establish or review compliance monitoring procedures
- Create procedures to screen compliance monitoring data
- Evaluate the sewer use ordinance.

These steps will generate relevant background information and expedite formulation of the plan. The following sections describe how the POTW can accomplish the first four steps. Because of the complexities of evaluating the sewer use ordinance, it is discussed separately in Chapter 3.

2.1 IDENTIFYING APPROPRIATE PERSONNEL

Developing the plan should not be delegated to a single individual. Rather, a team of qualified and experienced personnel familiar with local water pollution enforcement policies should work together to draft the plan. This approach allows the Control Authority to profit from the team's knowledge and ensures that the plan reflects a broad range of viewpoints. One individual may, however, be responsible for coordinating the development of all aspects of the plan.

If the Control Authority is a Regional Sewer Authority with the power to revise its sewer use ordinance, an enforcement response plan may be developed using in-house staff (principally the pretreatment or toxics coordinator), a senior inspector, and the Control Authority attorney. The attorney's involvement is particularly important because of his/her drafting skills and knowledge of procedures for obtaining entry warrants and for formulating enforcement measures appropriate to significant violations, such as civil litigation and criminal prosecution. Once involved in the plan's development, the attorney will also serve as a strong advocate of the plan's merit to other interested parties.

If the Control Authority is an agency of a municipal government, it should invite other interested municipal officials to assist in drafting the enforcement response plan. For example, the Control Authority may create a task force comprised of representatives from the mayor's office, city council, health department, planning board, police and fire departments, water authority, and other concerned offices. Comments from these officials should be sought on early drafts. This approach will promote the consensus and support necessary to officially adopt the plan. Since final decisions to bring enforcement actions against industries frequently rest with elected officials (especially those enforcement actions which involve judicial proceedings), mayors or city managers (or their representatives) should be asked to chair the task force. Participation of elected officials demonstrates the importance of pretreatment enforcement and facilitates the cooperation of other local officials. Alternatively, the task force might be directed by the Director of Public Works, the POTW Superintendent, or other officials of equivalent authority.

As the task force completes various elements of the enforcement response plan, drafts should be circulated to key members for comment. To consider all perspectives, the task force may also wish to request comments on the draft plan from industry representatives and citizens groups. The entire document(s) should eventually be brought before a meeting of the full group for discussion.

Once consensus is reached on the plan, procedures for its adoption should be set in motion. Formal approval or concurrence should be obtained from representative officials of each municipal department. If the mayor or city council members are on the committee (or represented on the committee), it is particularly important that they approve the plan. A copy of the enforcement response plan must be forwarded to the Approval Authority for review and to allow for its incorporation in the Control Authority's approved pretreatment program. Note that when a plan involves ordinance revisions, a decrease in POTW compliance monitoring frequencies or other significant changes in program operations, it will be considered to be a "substantial" program modification and must be subjected to public notice and comment. The Control Authority may wish to publicly announce completion of the plan and/or publish it in order to place the regulated community on notice of its existence. For example, several Control Authorities have already chosen to mail a copy of the plan to all of their industrial users.

2.2 REVIEWING THE INDUSTRIAL USER INVENTORY

At the time of program approval, each Control Authority conducted an industrial waste survey to identify its industrial users and to determine the wastewater constituents discharged by those users into its sewer systems. However, the Control Authority must regularly update this information. In small towns, it may be relatively easy to determine when a new industrial user discharges to the POTW or when an existing industrial user expands or reduces its operations or relocates. However, informal updating methods will seldom be appropriate for Control Authorities serving large cities or regional (multiple jurisdiction) areas.

The General Pretreatment Regulations require the Control Authority to provide its Approval Authority with an updated list of industrial users annually, including an indication of whether these industries are regulated by categorical standards, local limits, or both.[1] Although this reporting requirement is imposed on an annual basis, the Control Authority should systematically update its inventory more frequently (for example, every two to six months, depending on the number of users it has). The enforcement response plan should identify which staff are responsible for keeping the inventory accurate and should explain the procedures used to accomplish this task.

Many Control Authorities frequently rely on other municipal or State offices for assistance with "user tracking." For example, offices that issue business licenses, building permits, and water service will typically agree to forward the names and addresses of all new commercial and industrial applicants or accounts to the Control Authority. At least one Control Authority has obtained an agreement with a local lending institution to inform the pretreatment office of business loan applicants. Another Control Authority has made similar arrangements with its local Chamber of Commerce.

Control Authorities have also used the following in-house techniques to keep the user inventory up-to-date:

- Periodic review of area phone books, manufacturer's listings, and commercial indices
- Inspections of commercial areas (e.g., industrial parks) to identify new tenants
- Periodic (e.g., every three to five years) industrial user survey questionnaires to ensure that industries previously identified as having dry processes remain dry and to learn of any new process lines added by an industry.

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[1] The Control Authority should review its NPDES permit to determine whether more frequent reporting is required.

Several Regional Sewage Authorities have delegated responsibility for updating the user inventory to member (or contributing) jurisdictions. Under this scenario, the contributing jurisdiction identifies new industries and Control Authority personnel follow up to determine if the facility is a significant industrial user. Control Authorities are encouraged to use as many sources of industrial user information as are available.

2.3 ESTABLISHING OR REVIEWING COMPLIANCE MONITORING PROCEDURES

The Control Authority's compliance monitoring activities must detect and document violations in a manner that ensures that the results are admissible as evidence in judicial proceedings. Compliance data are collected in two ways: (1) self-monitoring by industrial users, with findings reported to the Control Authority; and (2) inspections and direct sampling by the Control Authority itself. Regardless of the frequency of self-monitoring, the Federal pretreatment regulations require the Control Authority to have legal authority to conduct its own compliance evaluations to verify the accuracy of the user's self-monitoring data. For more information on establishing self monitoring requirements, see Section 8.4 of the Industrial User Permitting Guidance (1989). For recommendations and guidance on scheduling inspecting and sampling activities and documenting site visits in a manner which preserves these findings as evidence, see the Pretreatment Compliance Monitoring and Enforcement (PCME) Guidance (July 1986). The PCME Guidance document also suggests ways for the Control Authority to document compliance activities in order to facilitate completion of the POTW's own reporting requirements.

2.4 CREATING PROCEDURES TO SCREEN DATA

Few Control Authorities have difficulty in collecting industry self-monitoring and Control Authority monitoring data. However, many local program deficiencies are linked to a basic failure to carefully examine this data to accurately determine the compliance status of each significant user. The Control Authority should develop procedures which ensure that all compliance data, whether generated through self-monitoring reports or by Control Authority field personnel, are screened (i.e., systematically analyzed) to identify violations. This process must identify all violations, including nondischarge violations. While discharge violations are of obvious concern, other types of noncompliance, such as a failure to submit reports are equally important since such action may be motivated by an industry's desire to conceal violations. At a minimum, they suggest that the industrial user may not be taking its pretreatment obligations seriously.

The enforcement response plan should clearly designate responsibilities for this screening task. A number of Control Authorities have assigned the task to field personnel (inspectors) because of their familiarity with the facility. Others have placed the responsibility in the hand of the pretreatment coordinator or used clerical staff for the job. Each of these approaches are appropriate if the reviewer is trained to spot non-compliance and to alert enforcement personnel of the possible need for action.

Timing is an important element to be considered when developing screening procedures. The Control Authority may choose to review this information on a "rolling" (as-received) basis or may set aside a specific period to review recently acquired data. To facilitate such a system, the due dates for industrial user reporting should be staggered. In order to initiate an enforcement action in a timely manner, the data should be screened as soon after its receipt as possible. Based on its own experience, EPA recommends that data be screened no later than five working days after receiving the information.

First, the Control Authority should have procedures to track when reporting requirements are due and to take enforcement action if reports are not submitted on time. Second, all analytical data, whether collected by the Control Authority or submitted by the industrial user, should be screened by comparing it to categorical and local limits and to any additional prohibited discharge standards which may apply. If a violation is detected through the screening process, the Control Authority should highlight it and document it in the industrial user's file. This may be accomplished by circling the violation, using a highlight marker, listing it in a log kept inside the file, or entering the information on an automated data system, such as the PCME software.[2] All violations should be identified and a record made of the response, even where the decision is made to take "no action." In addition to recording the violation, the person responsible for screening the data must alert enforcement personnel to the noncompliance. This notification is necessary to allow the Control Authority to determine its enforcement response in a timely manner.

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[2] EPA has developed a software package which tracks industrial user violations and identifies those in significant noncompliance. It is available by contacting the Enforcement Division (EN-338), Office of Water Enforcement and Permits, U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460.

CHAPTER 3

EVALUATING THE SEWER USE ORDINANCE

3. EVALUATING THE SEWER USE ORDINANCE

3.1 NATURE AND PURPOSE OF A SEWER USE ORDINANCE

The Control Authority's ability to take effective enforcement action is largely determined by its legal authority. Regardless of whether the Control Authority is a municipal POTW or a Regional Sewerage Authority, its legal authority derives from State law. Thus, the Control Authority must always work within the limitations of State law in developing an enforcement response plan that will withstand legal challenge.

Most Control Authorities have broad regulatory powers. For example, many State laws authorize Control Authorities to enforce "pretreatment requirements" against users discharging wastes to their sewer systems. This broad legal authority allows the local pretreatment program to be tailored to the individual circumstances of each Control Authority while, at the same time, satisfying minimum Federal program requirements. If the Control Authority is a municipality, the basic implementation and enforcement requirements of its pretreatment program are detailed in its sewer use ordinance. Typically, this ordinance is part of a city or county code. Regional POTW's frequently adopt similar provisions in the form of regulations. Likewise, State agencies implementing a State-wide program under 40 CFR 403.10(e) set out pretreatment requirements as agency regulations, rather than a sewer use ordinance.

The sewer use ordinance and regulations "implement" the legal authority which State law confers on the Control Authority. However, the ordinance cannot give the Control Authority greater enforcement powers (such as higher penalty authority) than are allowed under State laws which created or empowered the Control Authority. If an industry asserts that the Control Authority has acted beyond its powers under State law or contrary to its ordinance, it could successfully challenge the enforcement action in court. Therefore, the Control Authority must also implement its legal authority with clear and precise ordinance language to ensure that a reviewing court upholds an enforcement action brought under the ordinance. In the absence of such clear language, the court may interpret the ordinance in ways which restrict the Control Authority's enforcement discretion. For example, an ordinance provision which authorizes Control Authority officials to "inspect" the facilities of an industrial user may not be construed to authorize photocopying of industry self-monitoring records. Thus, the Control Authority should ensure that its legal authority is both comprehensive and specific.

This Chapter provides guidance on evaluating the sewer use ordinance. This evaluation should be performed prior to finalizing the enforcement response plan so that the ordinance: (1) provides authority to impose pretreatment standards and requirements on industrial users; (2) provides the Control Authority with a sufficient range of enforcement responses; and (3) does not create obstacles to effective enforcement. To meet these goals, the Control Authority's attorney should be actively involved in the evaluation process. The attorney should also coordinate this review with the pretreatment coordinator and consult other pretreatment personnel to ensure that revisions include all applicable Federal, State, and local requirements and provide for the broadest possible range of enforcement remedies allowed under State law.

After completing the ordinance review, the Control Authority will know which provisions to strengthen in order to support an effective enforcement program. Section 3.3 provides example ordinance provisions which the Control Authority should consider in revising its authority. As noted previously, any change to the Control Authority's ordinance is considered a "substantial modification" to its pretreatment program and must be submitted to the Approval Authority for approval.

3.2 ASSESSING AUTHORITY TO IMPOSE PRETREATMENT REQUIREMENTS

The Control Authority should use the following four fundamental questions as a basis for conducting its ordinance review:

1. Are all industrial users discharging to the POTW subject to regulation?

2. Does the ordinance authorize the Control Authority to implement and enforce program requirements under 40 CFR 403.8, including local limits to prevent pass through and interference?

3. Does the ordinance incorporate all enforcement authorities allowable under State law?

4. Does the ordinance contain any obstacles to effective enforcement?

Each of these questions is discussed in the following subsections.

3.2.1 Authority Over All Industrial Users

The sewer use ordinance must apply to all nondomestic (industrial) users of the POTW. Thus, the "Scope" or "Applicability" section of the ordinance should specify that all users are subject to regulation. If the ordinance lacks an "Applicability" section, its definitions of "person" and "user" must describe all dischargers. For example, many ordinance definitions of these terms fail to include "government facilities" (that is, Federal, State, or local government entities or their agents) as part of the regulated community. Since such governmental entities are subject to Federal pretreatment regulations, they must not escape regulation through vaguely worded definitions of "person" or "user." If the ordinance contains similar omissions or does not explicitly regulate all industrial dischargers, the Control Authority must revise it.

Many Control Authorities receive and treat wastewater from industries located outside their political boundaries. Since these industries are not subject to the Control Authority's sewer use ordinance, such "multijurisdictional" situations require special legal/contractual mechanisms to ensure that the Control Authority has the necessary legal authority. At a minimum, the Control Authority should negotiate an agreement with the neighboring jurisdiction which clearly establishes responsibility for permitting, compliance monitoring, and enforcement activity in the neighboring jurisdiction.

3.2.2 Implementation of Federal Program Requirements

The General Pretreatment Regulations establish a number of minimum Federal requirements for industrial users. The Control Authority must examine its ordinance to determine whether these Federal requirements are satisfied since it has primary responsibility for implementing and enforcing pretreatment requirements. However, the Control Authority will not be able to fulfill this obligation unless its ordinance includes provisions which incorporate these Federal requirements as local ones. Federal requirements may be made local requirements by incorporating them into the ordinance verbatim or by reference. While both techniques are legally enforceable, EPA recommends that incorporation by reference be used (where allowed by State law) because it is much less burdensome administratively.

Normally, if an ordinance provides a specific citation to the Federal law being incorporated, the incorporation is valid. For example, to incorporate the national

categorical standards, language similar to the following could be used: "Industrial pretreatment permits shall minimally include applicable National Categorical Pretreatment Standards for new and existing sources set out in 40 CFR, Subchapter N, Parts 401 through 471."[3] However, State law may contain additional content and format requirements with which the Control Authority must comply.

In addition to incorporating Federal law, the ordinance must also clearly authorize enforcement of more stringent or supplemental local standards and requirements (local limits) adopted to prevent pass through and interference. Local limits become Federal pretreatment standards if properly adopted pursuant to 40 CFR 403.5. These limits may be either narrative discharge prohibitions or a set of pollutant-specific numeric limits. For more information on local limits development, see the Guidance Manual for the Development and Implementation of Local Discharge Limitations (December 1987).

3.2.3 Enforcement Authority Under State Law

The Control Authority must enforce pretreatment program requirements on a strict liability basis. Strict liability means that every instance of noncompliance (regardless of fault, negligence, or intent on the part of the industrial user) is a violation of the sewer use ordinance and subjects the user to enforcement. However, while every instance of noncompliance may be a violation, all violations will not be met with the same initial enforcement response. For example, a slug load which upsets the POTW should not receive the same response as a report which is a week late. Therefore, the Control Authority should review its ordinance to provide a range of administrative and judicial enforcement options as necessary to exercise case-by-case discretion in responding to violations.

In assessing the enforcement authorities available to it, the Control Authority should first identify enforcement actions which its ordinance currently authorizes as well as any constraints upon the use of these actions. To facilitate this identification, the Control Authority may find it helpful to complete a chart similar to the one provided in Table 3-1. As the Control Authority identifies available enforcement actions (and constraints on their use), it can readily discern obstacles to their effective use.

3.2.4 Identifying Obstacles To Enforcement

The Control Authority must be confident that enforcement responses are free from procedural obstacles which could delay their use. The Control Authority should scrutinize its sewer use ordinance to eliminate provisions which restrict the selection and use of enforcement responses. In reviewing sewer use ordinances nationwide, EPA has identified many common procedural obstacles to enforcement. One of the most common obstacles is reserving authority to invoke an enforcement response to municipal officials outside of the POTW. For example, ordinances frequently vest enforcement authority in the Mayor, City Council, or the City Engineer. These officials may be unavailable or consider POTW matters

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[3] The Control Authority should be aware that incorporation of future (as yet unpromulgated) Federal rules is usually considered invalid by reviewing courts. Generally, only regulations which are in existence on the date that the ordinance is adopted may be incorporated into the ordinance. For instance, an ordinance provision adopted in 1983, incorporating the Federal categorical pretreatment standards and requirements, will only effectively incorporate Federal regulations promulgated as of 1983. Therefore, the Control Authority must periodically reincorporate new or revised Federal regulations in order to ensure its own authority to impose and enforce these requirements.

TABLE 3-1. EVALUATION OF CURRENT ENFORCEMENT RESPONSES

	Authority	Penalty Limit	Constraints
Notice of Violation	Y/N		
Administrative Fines	Y/N		
Administrative Orders	Y/N		
Civil Litigation	Y/N		
Criminal Prosecution	Y/N		
Termination of Service	Y/N		
Supplemental Enforcement Responses	Y/N		

INSTRUCTIONS:

Determine whether the listed enforcement responses are present in the sever use ordinance and circle Y (for yes) or N (for no). For responses which involve monetary fines and penalties (i.e., administrative fines and civil and criminal penalties), the Control Authority should enter these amounts in Column Two. If the ordinance provides a range of amounts, the table should also reflect this information. Finally, any constraints on the use of these responses should be noted in Column Three. For example, if Administrative Fines may be assessed only after a NOV has been issued, this precondition should be noted.

as low priorities and this causes delay in initiating enforcement actions. Enforcement should be vested in the POTW Superintendent or his/her designee whenever possible. While other senior city officials should be kept informed of enforcement activities, experience has shown that enforcement is most expeditious if taken by officials who are familiar with the wastewater plant and its pretreatment program. In turn, the Superintendent should delegate the use of particular (e.g., administrative) enforcement responses as appropriate. The final enforcement response plan should clarify which Control Authority personnel are authorized to take particular enforcement responses.

Another common obstacle is narrowly defining the use of particular enforcement responses. For example, the ordinance should not require issuance of a notice of violation (NOV) prior to initiation of a more stringent response. The Control Authority must have discretion to use whatever action it deems appropriate as an initial action. Similarly, a show cause hearing should not be established as a precondition to the issuance of an administrative order. The Control Authority must be able to respond to emergency situations quickly and be authorized to issue a cease and desist order or to seek an injunction without waiting to schedule a hearing for the industrial user. To address procedural due process concerns, the Control Authority may build in an "appeals process" after the immediate danger has passed.

Other common obstacles include making the maximum duration of a compliance schedule so brief (for example, requiring full compliance to be achieved in not more than ten days) that the schedule is an unrealistic mechanism for effecting remedial action. In addition, the ordinance should not specify an automatic grace period between identification of the violation and the availability of an enforcement response (for example, provisions which read "where the violation is not corrected within 15 days of being notified of the non-compliance by the POTW, the POTW may seek appropriate legal action"). Every violation by the industrial user should trigger immediate liability, and each day that the violation(s) continues must count as a separate instance of noncompliance.[4]

Occasionally, an ordinance restricts the Control Authority's access to information about the industrial user. For instance, provisions may limit the right of entry and inspection to the industry's pretreatment facility or monitoring area. To make a comprehensive determination of an industry's compliance status, Control Authority personnel need access to all areas of the facility, including areas where chemicals and raw materials are stored and records are kept. Therefore, the ordinance should authorize such broad access.

Additional examples of obstacles commonly encountered include:

- Incorrectly designating analytical procedures to be conducted in accordance with Standard Methods, rather than 40 CFR Part 136 or equivalent methods approved by EPA.

- Authorizing special agreements that waive ordinance (pretreatment) requirements. Such waivers should not be available for Federal standards and requirements or any local limits or other requirements designed to protect the POTW, its sludge use and disposal, and its receiving stream from pass through or interference.

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[4] Note that while violations of "daily average" pollutant limits are considered one violation, noncompliance with "monthly average" pollutant limits are considered to represent all of the business days within that month (i.e., 20 violations).

- Failing to require significant industrial users to immediately report any noncompliance and resample for those parameters found to be in violation as required in 40 CFR 403.12(g).

- Failing to specify authorized signatures for reports and applications submitted by industrial users. This omission may allow someone without proper authority to act on behalf of the company to submit permit applications and reports. The industry would then be allowed to disavow responsibility for violations or misrepresentations in these documents.

- Failing to require the use of the certification statement of 40 CFR 403.6(a)(2)(ii) for compliance reports by industrial users.

- Authorizing enforcement actions for "willful" and "negligent" violations only (all violations must be actionable: under Federal law, "knowing" and/or "negligent" violations are criminal offenses).

- Excusing or absolving any noncompliance (e.g., accidental spills) from enforcement or limiting the enforcement response to a recovery of actual damages.

The Control Authority should identify any obstacles to enforcement which it uncovers while evaluating its ordinance. It should then eliminate these obstacles by revising or deleting ordinance provisions. The Control Authority may wish to consider the model ordinance language in Section 3.3 to guide it in modifying its enforcement provisions.

3.3 EXAMPLE SEWER USE ORDINANCE ENFORCEMENT PROVISIONS

Readers are cautioned that this Section only addresses the enforcement-related provisions of a sewer use ordinance. It does not contain provisions for permitting, adopting pretreatment standards, and requirements or compliance monitoring language. Since these provisions are not present, this Section must not be substituted for a municipality's entire existing ordinance and any provisions adopted by Control Authorities must be consistent with State law.

3.3.1 Administrative Enforcement Remedies

3.3.1.1 Notification of Violation

Whenever the Superintendent finds that any industrial user has violated or is violating this Ordinance, or a wastewater permit or order issued hereunder, the Superintendent or his agent may serve upon said user written notice of the violation. Within 10 days of the receipt date of this notice, an explanation of the violation and a plan for the satisfactory correction and prevention thereof, to include specific required actions, shall be submitted to the Superintendent. Submission of this plan in no way relieves the user of liability for any violations occurring before or after receipt of the Notice of Violation.

3.3.1.2 Consent Orders

The Superintendent is hereby empowered to enter into Consent Orders, assurances of voluntary compliance, or other similar documents establishing an agreement with the industrial user responsible for the noncompliance. Such orders will include specific action to be taken by the industrial user to correct the noncompliance within a time period also specified by the order. Consent Orders shall have the same force and effect as administrative orders issued pursuant to Section 3.3.1.4, below.

3.3.1.3 Show Cause Hearing

The Superintendent may order any industrial user which causes or contributes to violation of this Ordinance or wastewater permit or order issued hereunder, to show cause why a proposed enforcement action should not be taken. Notice shall be served on the user specifying the time and place for the meeting, the proposed enforcement action and the reasons for such action, and a request that the user show cause why this proposed enforcement action should not be taken. The notice of the meeting shall be served personally or by registered or certified mail (return receipt requested) at least 10 days prior to the hearing. Such notice may be served on any principal executive, general partner or corporate officer. Whether or not a duly notified industrial user appears as noticed, immediate enforcement action may be pursued.

3.3.1.4 Compliance Order

When the Superintendent finds that an industrial user has violated or continues to violate the ordinance or a permit or order issued thereunder, he may issue an order to the industrial user responsible for the discharge directing that, following a specified time period, sewer service shall be discontinued unless adequate treatment facilities, devices, or other related appurtenances have been installed and are properly operated. Orders may also contain such other requirements as might be reasonably necessary and appropriate to

address the noncompliance, including the installation of pretreatment technology, additional self-monitoring, and management practices.

3.3.1.5 Cease and Desist Orders

When the Superintendent finds that an industrial user has violated or continues to violate this Ordinance or any permit or order issued hereunder, the Superintendent may issue an order to cease and desist all such violations and direct those persons in noncompliance to:

a) Comply forthwith

b) Take such appropriate remedial or preventive action as may be needed to properly address a continuing or threatened violation, including halting operations and terminating the discharge.

3.3.1.6 Administrative Fines

Notwithstanding any other section of this ordinance, any user who is found to have violated any provision of this Ordinance, or permits and orders issued hereunder, shall be fined in an amount not to exceed one thousand dollars ($1,000.00) per violation. Each day on which noncompliance shall occur or continue shall be deemed a separate and distinct violation. Such assessments may be added to the user's next scheduled sewer service charge and the Superintendent shall have such other collection remedies as he has to collect other service charges. Unpaid charges, fines, and penalties shall constitute a lien against the individual user's property. Industrial users desiring to dispute such fines must file a request for the Superintendent to reconsider the fine within 10 days of being notified of the fine. Where the Superintendent believes a request has merit, he shall convene a hearing on the matter with 15 days of receiving the request from the industrial user.

3.3.1.7 Emergency Suspensions

a. The Superintendent may suspend the wastewater treatment service and/or wastewater permit of an industrial user whenever such suspension is necessary in order to stop an actual or threatened discharge presenting or causing an imminent or substantial endangerment to the health or welfare of persons, the POTW, or the environment.

b. Any user notified of a suspension of the wastewater treatment service and/or the wastewater permit shall immediately stop or eliminate its contribution. In the event of a user's failure to immediately comply voluntarily with the suspension order, the Superintendent shall take such steps as deemed necessary, including immediate severance of the sewer connection, to prevent or minimize damage to the POTW, its receiving stream, or endangerment to any individuals. The Superintendent shall allow the user to recommence its discharge when the endangerment has passed, unless the termination proceedings set forth in Section 3.3.1.8 are initiated against the user.

c. An industrial user which is responsible, in whole or in part, for imminent endangerment shall submit a detailed written statement describing the causes of the harmful contribution and the measures taken to prevent any future occurrence to the Superintendent prior to the date of the hearing described in paragraph b above.

3.3.1.8 Termination of Permit

Significant industrial users proposing to discharge into the POTW, must first obtain a waste water discharge permit from the Control Authority. Any user who violates the following conditions of this Ordinance or a wastewater discharge permit or order, or any applicable or State and Federal law, is subject to permit termination:

a) Violation of permit conditions

b) Failure to accurately report the wastewater constituents and characteristics of its discharge

c) Failure to report significant changes in operations or wastewater constituents and characteristics

d) Refusal of reasonable access to the user's premises for the purpose of inspection, monitoring, or sampling.

Noncompliant industrial users will be notified of the proposed termination of their waste water permit and be offered an opportunity to show cause under Section 3.3.1.3 of this ordinance why the proposed action should not be taken.

3.3.2 Judicial Remedies

If any person discharges sewage, industrial wastes, or other wastes into the wastewater disposal system contrary to the provisions of this Ordinance or any order or permit issued hereunder, the Superintendent, through the City Attorney, may commence an action for appropriate legal and or equitable relief in the _____ Court for _____ County.

3.3.2.1 Injunctive Relief

Whenever an industrial user has violated or continues to violate the provisions of this Ordinance or permit or order issued hereunder, the Superintendent, through counsel may petition the Court for the issuance of a preliminary or permanent injunction or both (as may be appropriate) which restrains or compels the activities on the part of the industrial user. The Superintendent shall have such remedies to collect these fees as it has to collect other sewer service charges.

3.3.2.2 Civil Penalties

a. Any industrial user who has violated or continues to violate this Ordinance or any order or permit issued hereunder, shall be liable to the Superintendent for a civil penalty of not more than [maximum allowable under State law, e.g., $10,000 but at least $1000, State law permitting] plus actual damages incurred by the POTW per violation per day for as long as the violation continues. In addition to the above described penalty and damages, the Superintendent may recover reasonable attorney's fees, court costs, and other expenses associated with the enforcement activities, including sampling and monitoring expenses.

b. The Superintendent shall petition the Court to impose, assess, and recover such sums. In determining amount of liability, the Court shall take into account all relevant circumstances, including, but not limited to, the extent of harm caused by the violation.

the magnitude and duration, any economic benefit gained through the industrial user's violation, corrective actions by the industrial user, the compliance history of the user, and any other factor as justice requires.

3.3.2.3 Criminal Prosecution

Violations - Generally

a. Any industrial user who willfully or negligently violates any provision of this Ordinance or any orders or permits issued hereunder shall, upon conviction, be guilty of a misdemeanor, punishable by a fine not to exceed $1,000.00 per violation per day or imprisonment for not more than one year or both.

b. In the event of a second conviction, the user shall be punishable by a fine not to exceed $3,000.00 per violation per day or imprisonment for not more than 3 years or both.

Falsifying Information

a. Any industrial user who knowingly makes any false statements, representations, or certifications in any application, record, report, plan or other document filed or required to be maintained pursuant to this Ordinance, or wastewater permit, or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required under this Ordinance shall, upon conviction, be punished by a fine of not more than $1,000.00 per violation per day or imprisonment for not more than one year or both.

b In the event of a second conviction, the user shall be punishable by a fine not to exceed $3,000.00 per violation per day or imprisonment for not more than 3 years or both.

3.3.3 Supplemental Enforcement Remedies

3.3.3.1 Annual Publication of Significant Violations

The Superintendent shall publish, at least annually in the largest daily newspaper circulated in the service area, a description of those industrial users which are found to be in significant violation, as defined in Section ____ of this Ordinance, with any provisions of this Ordinance or any permit or order issued hereunder during the period since the previous publication.

3.3.3.2 Performance Bonds (Optional)

The Superintendent may decline to reissue a permit to any industrial user which has failed to comply with the provisions of this Ordinance or any order or previous permit issued hereunder unless such user first files with it a satisfactory bond, payable to the POTW, in a sum not to exceed a value determined by the Superintendent to be necessary to achieve consistent compliance.

3.3.3.3 Liability Insurance (Optional)

The Superintendent may decline to reissue a permit to any industrial user which has failed to comply with the provisions of this Ordinance or any order or previous permit

issued hereunder, unless the industrial user first submits proof that it has obtained financial assurances sufficient to restore or repair POTW damage caused by its discharge.

3.3.3.4 Water Supply Severance (Optional)

Whenever an industrial user has violated or continues to violate the provisions of this Ordinance or an order or permit issued hereunder, water service to the industrial user may be severed and service will only recommence, at the user's expense, after it has satisfactorily demonstrated its ability to comply.

3.3.3.5 Public Nuisances (Optional)

Any violation of the prohibitions or effluent limitations of this Ordinance or permit or order issued hereunder is hereby declared a public nuisance and shall be corrected or abated as directed by the Superintendent or his designee. Any person(s) creating a public nuisance shall be subject to the provisions of the City Code ***(Insert Citation)*** *governing such nuisances, including reimbursing the POTW for any costs incurred in removing, abating, or remedying said nuisance.*

3.3.3.6 Informant Rewards (Optional)

The Superintendent is authorized to pay up to $500 for information leading to the discovery of noncompliance by an industrial user. In the event that the information provided results in an administrative fine or civil penalty levied against the user, the Superintendent is authorized to disperse up to ten (10) percent of the collected fine or penalty to the informant. However, a single reward payment may not exceed $10,000.

3.3.3.7 Contractor Listings (Optional)

a. Industrial users which have not achieved consistent compliance with applicable pretreatment standards and requirements are not eligible to receive a contractual award for the sale of goods or services to the ***(Insert Name of Municipality)****.*

b. Existing contracts for the sale of goods or services to the ***(Insert Name of Municipality)*** *held by an industrial user found to be in significant violation with pretreatment standards may be terminated at the discretion of the municipality.*

3.3.4 Affirmative Defenses

3.3.4.1 Treatment Upsets

a. Any industrial user which experiences an upset in operations that places it in a temporary state of noncompliance, which is not the result of operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation, shall inform the Superintendent thereof immediately upon becoming aware of the upset. Where such information is given orally, a

written report thereof shall be filed by the user within five days. The report shall contain:

(i) A description of the upset, its cause(s), and impact on the discharger's compliance status

(ii) The duration of noncompliance, including exact dates and times of noncompliance, and if the noncompliance is continuing, the time by which compliance is reasonably expected to be restored

(iii) All steps taken or planned to reduce, eliminate, and prevent recurrence of such an upset.

b. An industrial user which complies with the notification provisions of this Section in a timely manner shall have an affirmative defense to any enforcement action brought by the Superintendent for any noncompliance with this Ordinance, or an order or permit issued hereunder by the user, which arises out of violations attributable to and alleged to have occurred during the period of the documented and verified upset.

3.3.4.2 Treatment Bypasses

a. A bypass of the treatment system is prohibited unless all of the following conditions are met:

(i) The bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(ii) There was no feasible alternative to the bypass, including the use of auxiliary treatment or retention of the wastewater; and

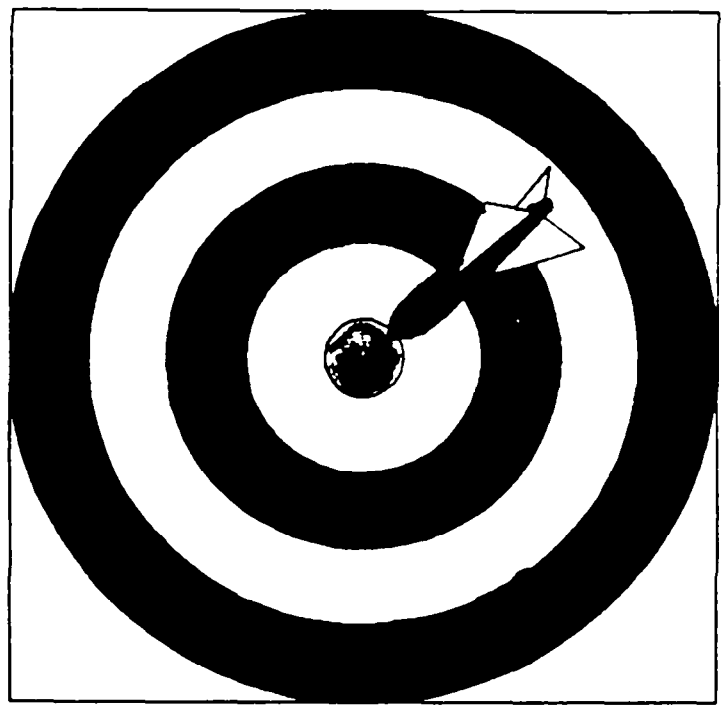
(iii) The industrial user properly notified the Superintendent as described in paragraph b., below.

b. Industrial users must provide immediate notice to the Superintendent upon discovery of an unanticipated bypass. If necessary, the Superintendent may require the industrial user to submit a written report explaining the cause(s), nature, and duration of the bypass, and the steps being taken to prevent its recurrence.

c. An industrial user may allow a bypass to occur which does not cause pretreatment standards or requirements to be violated, but only if it is for essential maintenance to ensure efficient operation of the treatment system. Industrial users anticipating a bypass must submit notice to the Superintendent at least 10 days in advance. The Superintendent may only approve the anticipated bypass if the circumstances satisfy those set forth in paragraph a., above.

CHAPTER 4

DEVELOPING AN ENFORCEMENT RESPONSE GUIDE



4. DEVELOPING AN ENFORCEMENT RESPONSE GUIDE

The centerpiece of the Control Authority enforcement response plan is the enforcement response guide. This guide is a matrix which describes violations and indicates a range of appropriate enforcement options. EPA first introduced the concept of an enforcement response guide in its PCME Guidance document. According to that guidance, an enforcement response guide serves two main functions:

- Defines the range of appropriate enforcement actions based on the nature and severity of the violation and other relevant factors
- Promotes consistent and timely use of enforcement remedies. In addition to eliminating uncertainty and confusion concerning enforcement, this consistency lessens the likelihood of a successful legal challenge based on charges of "selective enforcement" or harassment.

This Chapter complements information presented in the PCME Guidance document on developing the enforcement response guide. It outlines how the Control Authority can determine which responses are appropriate (Section 4.1), identifies the personnel who should take these responses (Section 4.2), discusses the time frames for taking such actions (Section 4.3), and presents a model enforcement response guide to assist the Control Authority in developing its own guide (Section 4.4.2).

4.1 ESTABLISHING A RANGE OF ENFORCEMENT RESPONSES

The Control Authority's first step in drafting a response guide is to anticipate the types of noncompliance that it is likely to encounter. It should anticipate as many types and patterns of violation as possible since the more violations it anticipates, the more useful the guide will be. The model enforcement response guide in Section 4.4.2 identifies many common discharge and nondischarge violations. Once these situations are identified, the Control Authority can proceed to the second step: identifying enforcement responses appropriate for each violation. However, the Control Authority should remember that its enforcement responses are always limited to those authorized under State law and implemented in its sewer use ordinance.

The enforcement response guide should allow the Control Authority to select from several alternative initial and follow-up actions. The Control Authority may initially rely on informal actions such as NOVs where violations are nonsignificant or when the industrial user is cooperative in resolving its problems. However, when the violation is significant or when the industrial user does not promptly undertake corrective action, the Control Authority must respond with more severe enforcement responses including judicial proceedings. Similarly, when the user fails to return to compliance following the initial enforcement response, the Control Authority must "escalate" its enforcement response in a follow-up (more stringent) action.

The Control Authority should also evaluate appropriate enforcement responses in the context of the user's prior violations. For example, if the user continues its minor noncompliance despite informal enforcement measures (that is, despite issuance of repeated NOVs), the Control Authority should adopt a more stringent approach. Similarly, if a user has committed several types of violations, the Control Authority's response should address each violation. If the Control Authority seeks remedies for only the most serious violation, the less significant violations could inadvertently escape enforcement. The Control Authority should be aware that, since pretreatment enforcement is a matter of strict

liability, the knowledge, intent, or negligence of the user should not be taken into consideration except when deciding to pursue criminal prosecution.

The enforcement response selected must also be appropriate to the violation. This determination is often a matter of common sense. For example, while telephone calls may be appropriate responses for late reports, treatment plant upsets merit a more immediate and stringent response. The Control Authority should consider the following criteria when determining a proper response:

- Magnitude of the violation
- Duration of the violation
- Effect of the violation on the receiving water
- Effect of the violation on the POTW
- Compliance history of the industrial user
- Good faith of the industrial user

These six criteria are discussed in detail below.

4.1.1 Magnitude of the Violation

Generally, an isolated instance of noncompliance can be met with an informal response or a NOV. However, since even an isolated violation could threaten public health and the environment, damage public and private property, or threaten the integrity of the Control Authority's program (e.g., falsifying a self-monitoring report), EPA recommends that Control Authorities respond to any "significant noncompliance" with an enforceable order that requires a return to compliance by a specific deadline. EPA has defined significant noncompliance in its proposed revision to the General Pretreatment Regulations (see 53 Fed. Reg. 47650) as violations which meet one or more of the following criteria:

1. Violations of wastewater discharge limits.

   a. Chronic violations. Sixty-six percent or more of the measurements exceed the same daily maximum limit or the same average limit in a six-month period (any magnitude of exceedance).

   b. Technical Review Criteria (TRC) violations. Thirty-three percent or more of the measurements exceed the same daily maximum limit or the same average limit by more than the TRC in a six-month period.

   c. Any other violation(s) of effluent limit (average or daily maximum) that the Control Authority believes has caused alone or in combination with other discharges, interference or pass-through or endangered the health of the sewage treatment personnel or the public.

   d. Any discharge of a pollutant that has caused imminent endangerment to human health/welfare or to the environment and has resulted in the POTW's exercise of its emergency authority to halt or prevent such a discharge.

2. Violations of compliance schedule milestones contained in a local control mechanism or enforcement order, for starting construction, completing construction, and attaining final compliance by 90 days or more after the schedule date.

3. Failure to provide reports for compliance schedules, self-monitoring data, or categorical standards (baseline monitoring reports, 90-day compliance reports, and periodic reports) within 30 days from the due date.

4. Failure to accurately report noncompliance.

5. Any other violation or group of violations that the Control Authority considers to be significant.

4.1.2 Duration of the Violation

Violations (regardless of severity) which continue over prolonged periods of time should subject the industrial user to escalated enforcement actions. For example, an effluent violation which occurs in two out of three samples over a six-month period or a report which is more than 30 days overdue is considered significant, while a report which is two days late would not be deemed significant.

The Control Authority's response to these situations must prevent extended periods of noncompliance from recurring. EPA recommends issuance of administrative orders for chronic violations. If the industrial user fails to comply with the administrative order, the Control Authority should assess administrative penalties or initiate judicial action. If the prolonged violation results in serious harm to the POTW, the Control Authority should also consider terminating service or obtaining a court order to halt further violations as well as to recover the costs of repairing the damage.

4.1.3 Effect on the Receiving Water

One of the primary objectives of the National Pretreatment Program is to prevent pollutants from "passing through" the POTW and entering the receiving stream. Consequently, any violation which results in environmental harm should be met with a severe response. Environmental harm should be presumed whenever an industry discharges a pollutant into the sewerage system which:

- Passes through the POTW
- Causes a violation of the POTW's NPDES permit (including water quality standards)
- Has a toxic effect on the receiving waters (i.e., fish kill).

At a minimum, responses to these circumstances should include an administrative order and an administrative fine. In addition, the response should ensure the recovery from the noncompliant user of any NPDES fines and penalties paid by the Control Authority. Where authorized, the Control Authority may also wish to pursue damages for the destruction or harm to local natural resources. If a user's discharge causes repeated harmful effects, the Control Authority should seriously consider terminating service to the user.

4.1.4 Effect on the POTW

Some violations may have negative impacts on the POTW itself. For example, they may result in significant increases in treatment costs, interfere or harm POTW personnel, equipment, processes, operations, or cause sludge contamination resulting in increased disposal costs. These violations should be met with an administrative fine or civil penalty and an order to correct the violation in addition to recovery of additional costs and expenses to repair the POTW. For example, when the industrial user's discharge upsets the treatment plant, damages the collection system through pipe corrosion, causes an obstruction or explosion, or causes additional expenses (e.g., to trace a spill back to its source), the POTW's response should include cost recovery, civil penalties, and a requirement to correct the condition causing the violation.

4.1.5 Compliance History of the User

A pattern of recurring violations (even of different program requirements) may indicate either that the user's treatment system is inadequate or that the user has taken a casual approach to operating and maintaining its treatment system. These indications should alert the Control Authority to the likelihood of future significant violations. Accordingly, users exhibiting recurring compliance problems should be strongly dealt with to ensure that consistent compliance is achieved. Compliance history is an important factor for deciding which of the two or three designated appropriate remedies to apply to a particular violator. For example, if the violator has a good compliance history, the Control Authority may decide to use the less severe option.

4.1.6 Good Faith of the User

The user's "good faith" in correcting its noncompliance is a factor in determining which enforcement response to invoke. "Good faith" may be defined as the user's honest intention to remedy its noncompliance coupled with actions which give support to this intention. Generally, a user's demonstrated willingness to comply should predispose the Control Authority to select less stringent enforcement responses. However, good faith does not eliminate the necessity of an enforcement action. For example, if the POTW experiences a treatment upset, it should recover its costs regardless of prior good faith Good faith is typically demonstrated by cooperation and completion of corrective measures in a timely manner (although compliance with previous enforcement orders is not necessarily good faith).

4.2 ESTABLISHING RESPONSIBILITIES OF CONTROL AUTHORITY PERSONNEL

The Control Authority should clearly establish staff responsibilities for taking enforcement actions in its guide. As it matches personnel with enforcement responsibilities, the Control Authority should remember this general rule: the time necessary to take enforcement actions decreases as the authority to initiate the action is delegated. For example, by allowing field personnel to initiate certain types of administrative actions (such as issuing NOVs), the Control Authority ensures that these actions are taken soon after the noncompliance is discovered. Further, the written delegation of specific responsibilities to staff (including the circumstances under which the delegated authority may be exercised) helps the Control Authority's response to be consistent and appear more routine to industrial users, the public, and the Approval Authority. However, some decisions (such as whether to pursue civil litigation or to terminate service) must involve Control Authority management and should not be delegated. The following subsections provide recommendations on assigning pretreatment responsibilities to Control Authority personnel.

4.2.1 Inspectors/Field Personnel

Frequently, the pretreatment coordinator of the Control Authority conducts compliance sampling and inspections personally. However, many local programs rely on sewer line crews or other field personnel for these activities. Several Control Authorities have trained field personnel to: (1) screen compliance monitoring data, including their own inspection reports; (2) detect noncompliance; and (3) inform the pretreatment coordinator of violations. In addition, a number of Control Authorities authorize field personnel to immediately respond to noncompliance with informal warnings, NOVs, or other similar citations. EPA supports the involvement of field personnel in enforcement activities to the fullest extent possible.

4.2.2 Pretreatment Coordinator/Industrial Waste Manager

Nearly every Control Authority has a pretreatment coordinator or other similar position. Individuals in this position should be thoroughly familiar with program requirements and responsible for ensuring implementation of the Control Authority's pretreatment program requirements. Moreover, industrial users typically perceive that program requirements originate with this person and look to him/her for guidance and assistance. Consequently, the pretreatment coordinator should be responsible for issuing NOVs and administrative orders, assessing fines, and publishing the annual list of significant violators.

4.2.3 POTW Director/Superintendent

The wastewater treatment plant Superintendent is responsible for compliance with the terms and conditions of the POTW's NPDES permit and for the overall operation and maintenance of the POTW, including employee safety, protection of the collection system and the treatment plant, effluent quality, and sludge use and disposal. Given these responsibilities, the Superintendent should have authority to issue administrative orders, terminate service, conduct show cause hearings, and initiate judicial proceedings.

4.2.4 Control Authority Attorney

The Control Authority attorney advises technical and managerial personnel on enforcement matters and orchestrates the judicial responses deemed necessary by the Superintendent. Consequently, the attorney should be consulted on all matters requiring the interpretation of the sewer use ordinance and the enforcement response plan. Many Control Authorities have attorneys prepare model NOVs and administrative orders which may (with simple modifications) be easily issued by technical staff. In addition, many Control Authorities also routinely copy the attorney with administrative orders and fine assessments since further responses against the user may involve judicial action.

4.3 DETERMINING TIME FRAMES FOR ENFORCEMENT ACTIONS AND FOLLOW-UP

In order for an enforcement action to be effective, it must be timely. For an action to be timely, the violation must be detected and responded to promptly after its occurrence. Therefore, review of compliance reports (for both effluent violations and timeliness) should be a high priority at the time of their submission. Generally, Control Authority staff should review industrial user reports within five days of receipt. Violations observed by Control Authority field personnel should receive even swifter attention.

EPA recommends that no more than 30 days be allowed to elapse between the detection of the violation(s) and the initiation of an enforcement response. If the appropriate response is an informal warning or a NOV, the response time should be much shorter. For example, a NOV should be sent to the noncompliant user within a week of the violation's detection.

After its initial enforcement response, the Control Authority should closely track the industrial user's progress toward compliance. For example, the Control Authority should not wait several weeks to determine whether a compliance schedule milestone has been met or to verify that a report which was to be submitted within ten days of receiving a NOV was in fact submitted. Instead, the Control Authority should make this determination on or about the milestone date. One method to ensure that user compliance is closely tracked is to increase the frequency of user self-monitoring. For instance, an administrative order may

increase self-monitoring from once per quarter to once a month. Similarly, the Control Authority's own inspections of the user's facility should be increased until consistent compliance is demonstrated. Generally, these follow-up compliance activities should begin no later than 30 to 45 days after the initial enforcement response is taken. When follow-up activities indicate that the violation persists or that satisfactory progress is not being made, the Control Authority is expected to escalate its enforcement response. These follow-up enforcement actions should be taken within 60 to 90 days of the initial enforcement action. The model enforcement response guide presents time frames in which enforcement actions should be taken.

4.4 APPLYING THE ENFORCEMENT RESPONSE GUIDE

As noted above, a comprehensive enforcement response guide designates several alternative enforcement options for each type (or pattern) of noncompliance. Once developed, Control Authority personnel who detect noncompliance need only select an appropriate response from the short list of enforcement options indicated by the matrix. There are a number of factors to consider when selecting a response from among these options. Several of these factors are identical to those used in originally establishing the guide:

- Good faith of the user
- Compliance history of the user
- Previous success of enforcement actions taken against the particular user (e.g., if NOVs have not previously succeeded in returning the user to compliance, an administrative order is the more appropriate response)
- Violation's effect on the receiving waters
- Violation's effect on the POTW.

Since the remedies designated in the matrix are all considered appropriate, the Control Authority must weigh each of the above factors in deciding whether to use a more or less stringent response.

The Control Authority should consistently follow the response guide. To do otherwise sends a signal to industrial users and the public that the Control Authority is not acting in a predictable manner and may subject the Control Authority to charges of arbitrary enforcement decision making, thereby jeopardizing future enforcement.

Section 4.4.2 presents a model enforcement response guide for the Control Authority to review as it develops its own guide. This guide identifies types of violations, indicates initial and follow-up responses, and designates personnel and time frames for these responses. The Control Authority may choose to specify responses different than those on this model. However, as indicated earlier, all formal enforcement responses must be expressly authorized by local and State laws.

4.4.1 Using the Model Enforcement Response Guide

The enforcement response guide is used as follows:

1. Locate the type of noncompliance in the first column and identify the most accurate description of the violation.

2. Assess the appropriateness of the recommended response(s) in column two. First offenders or users demonstrating good faith efforts may merit a more lenient response. Similarly, repeat offenders or those demonstrating negligence may require a more stringent response.

3. Apply the enforcement response to the industrial user. Specify corrective action or other responses required of the industrial user, if any. Column three indicates personnel to take each response and the time frame in which that response should be taken.

4. Follow-up with escalated enforcement action if the industrial user's response is not received or violation continues.

The Control Authority should remember to maintain all supporting documentation regarding the violation and its enforcement actions in the industrial user's file.

4.4.2 Description of Terms

Terms and abbreviations used in the model guide are defined below. Specific enforcement responses that appear on this guide are described in more detail in Chapter 5.

AO	- Administrative Order.
Civil Litigation	- Civil litigation against the industrial user seeking equitable relief, monetary penalties and actual damages.
Criminal Prosecution	- Pursuing punitive measures against an individual and/or organization through a court of law.
Fine	- Monetary penalty assessed by Control Authority officials. Fines should be assessed by the pretreatment coordinator or the POTW Superintendent.
I	- Inspector.
IU	- Industrial User.
Meeting	- Informal compliance meeting with the IU to resolve recurring noncompliance.
NOV	- Notice of Violation.
PC	- Pretreatment Coordinator.
S	- Superintendent.
SV	- Significant Violation.
Show Cause	- Formal meeting requiring the IU to appear and demonstrate why the Control Authority should not take a proposed enforcement action against it. The meeting may also serve as a forum to discuss corrective actions and compliance schedules.

4.4.3 Model Enforcement Response Guide

UNAUTHORIZED DISCHARGES (No permit)

	NONCOMPLIANCE	NATURE OF THE VIOLATION	ENFORCEMENT RESPONSES	PERSONNEL
1.	Unpermitted discharge	IU unaware of requirement; no harm to POTW/environment	Phone call; NOV with application form	PC
		IU unaware of requirement; harm to POTW	- AO with fine - Civil action	PC S
		Failure to apply continues after notice by the POTW	- Civil action - Criminal investigation - Terminate service	S S S
2.	Nonpermitted discharge (failure to renev)	IU has not submitted application within 10 days of due date	Phone call; NOV	PC

DISCHARGE LIMIT VIOLATION

1.	Exceedance of local or Federal Standard (permit limit)	Isolated, not significant	Phone call; NOV	I, PC
		Isolated, significant (no harm)	AO to develop spill prevention plan and fine	PC
		Isolated, harm to POTW or environment	- Show cause order - Civil action	PC, S S
		Recurring, no harm to POTW/environment	AO with fine	PC
		Recurring; significant (harm)	- AO with fine - Show cause order - Civil action - Terminate service	PC PC, S S S

MONITORING AND REPORTING VIOLATIONS

NONCOMPLIANCE	NATURE OF THE VIOLATION	ENFORCEMENT RESPONSES	PERSONNEL
1. Reporting violation	Report is improperly signed or certified	Phone call or NOV	PC
	Report is improperly signed or certified after notice by POTW	- AO - Show cause order	PC PC, S
	Isolated, not significant (e.g., 5 days late)	Phone call; NOV	I, PC
	Significant (e.g., report 30 days or more late)	AO to submit with fine per additional day	PC
	Reports are always late or no reports at all	- AO with fine - Show cause order - Civil action	PC PC, S S
	Failure to report spill or changed discharge (no harm)	NOV	PC
	Failure to report spill or changed discharge (results in harm)	- AO with fine - Civil action	PC S
	Repeated failure to report spills	- Show cause order - Terminate service	PC, S S
	Falsification	- Criminal investigation - Terminate service	S S

MONITORING AND REPORTING VIOLATIONS (Continued)

	NONCOMPLIANCE	NATURE OF THE VIOLATION	ENFORCEMENT RESPONSES	PERSONNEL
2.	Failure to monitor correctly	Failure to monitor all pollutants as required by permit	NOV or AO	PC
		Recurring failure to monitor	- AO with fine - Civil action	PC S
3.	Improper sampling	Evidence of intent	- Criminal investigation - Terminate service	S S
4.	Failure to install monitoring equipment	Delay of less than 30 days	NOV	PC
		Delay of 30 days or more	AO to install with fine for each additional day	PC
		Recurring, violation of AO	- Civil action - Criminal investigation - Terminate service	PC S S
5.	Compliance Schedules (in permit)	Missed milestone by less than 30 days, or will not affect final milestone	NOV or AO with fine	PC
		Missed milestone by more than 30 days, or will affect final milestone (good cause for delay)	AO with fine	PC
		Missed milestone by more than 30 days, or will affect final milestone (no good cause for delay)	- Show cause order - Civil action - Terminate service	PC, S S S
		Recurring violation or violation of schedule in AO	- Civil action - Criminal investigation - Terminate service	S S S

OTHER PERMIT VIOLATIONS

	NONCOMPLIANCE	NATURE OF THE VIOLATION	ENFORCEMENT RESPONSES	PERSONNEL
1.	Wastestreams are diluted in lieu of treatment	Initial violation	AO with fine	PC
		Recurring	- Show cause order	PC, S
			- Terminate service	S
2.	Failure to mitigate noncompliance or halt production	Does not result in harm	NOV	PC
		Does result in harm	- AO with fine	PC
			- Civil action	S
3.	Failure to properly operate and maintain pretreatment facility	See No. 2 above		

VIOLATIONS DETECTED DURING SITE VISITS

1.	Entry Denial	Entry denied or consent withdrawn Copies of records denied	Obtain warrant and return to IU	I
2.	Illegal Discharge	No harm to POTW or environment	AO with fine	PC
		Discharges causes harm or evidence of intent/negligence	- Civil action	S
			- Criminal investigation	S
		Recurring, violation of AO	Terminate service	S

VIOLATIONS DETECTED DURING SITE VISITS (Continued)

	NONCOMPLIANCE	NATURE OF THE VIOLATION	ENFORCEMENT RESPONSES	PERSONNEL
3.	Improper Sampling	Unintentional sampling at incorrect location	NOV	I, PC
		Unintentionally using incorrect sample type	NOV	I, PC
		Unintentionally using incorrect sample collection techniques	NOV	I, PC
4.	Inadequate recordkeeping	Inspector finds files incomplete to missing (no evidence of intent)	NOV	I, PC
		Recurring	AO with fine	PC
5.	Failure to report additional monitoring	Inspection finds additional files	NOV	I, PC
		Recurring	AO with fine	PC

TIMEFRAMES FOR RESPONSES

A. All violations will be identified and documented within five days of receiving compliance information.

B. Initial enforcement responses [involving contact with the industrial user and requesting information on corrective or preventative action(s)] will occur within 15 days of violation detection.

C. Follow up actions for continuing or reoccurring violations will be taken within 60 days of the initial enforcement response. For all continuing violations, the response will include a compliance schedule.

D. Violations which threaten health, property or environmental quality are considered emergencies and will receive immediate responses such as halting the discharge or terminating service.

E. All violations meeting the criteria for significant noncompliance will be addressed with an enforceable order within 30 days of the identification of significant noncompliance.

4.5 EVALUATING THE EFFECTIVENESS OF AN ENFORCEMENT RESPONSE GUIDE

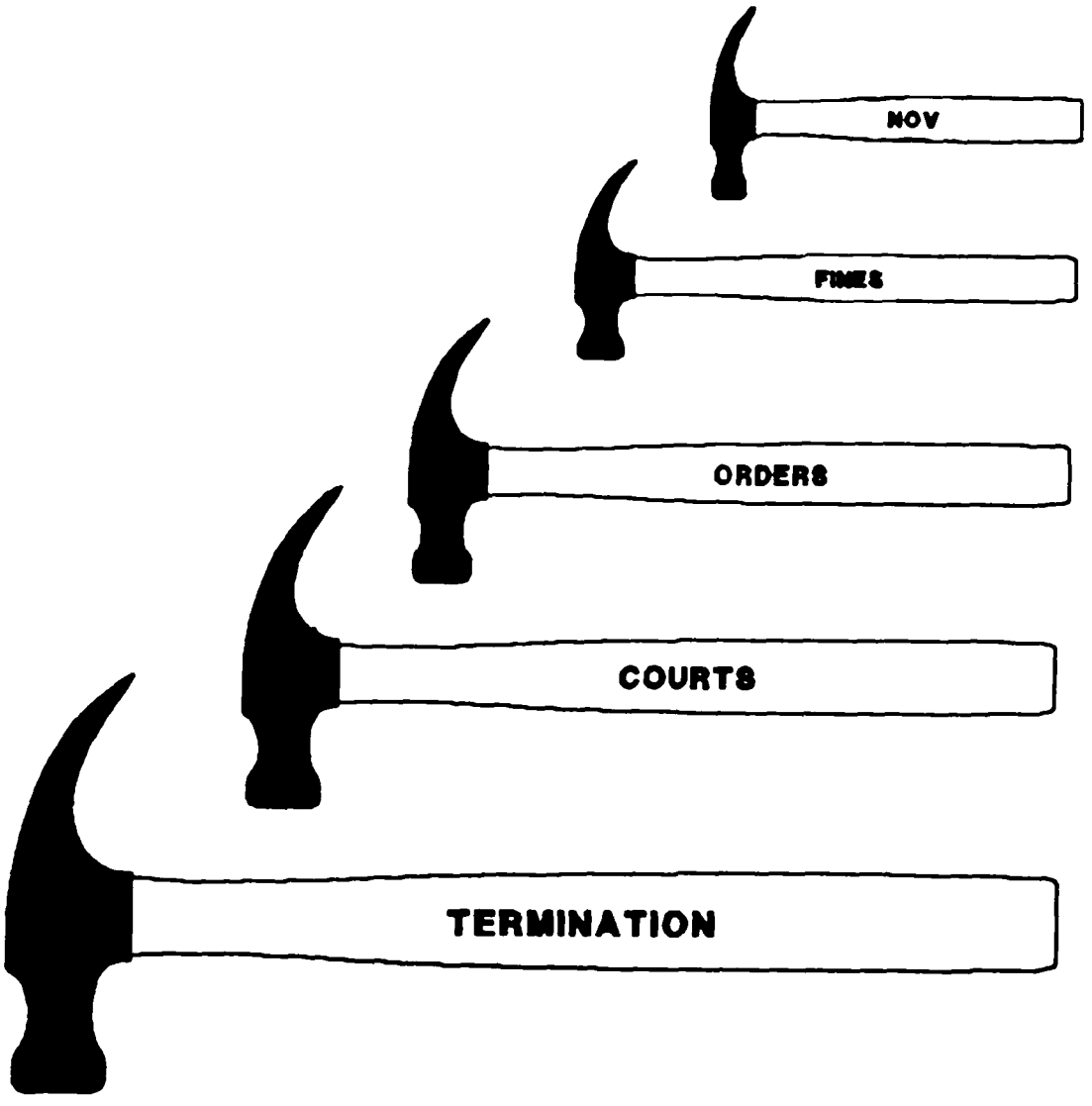
Once the enforcement response guide has been adopted, the Control Authority should periodically reassess its effectiveness in accomplishing pretreatment program goals. This review should be conducted in light of the primary objectives for developing an enforcement response guide:

- To ensure that violators return to compliance as quickly as possible
- To penalize noncompliant users for pretreatment violations
- To deter future noncompliance
- To recover any additional expenses incurred by the Control Authority attributable to the noncompliance.

When the Control Authority identifies aspects of the guide which require improvement or adopts innovations to increase its effectiveness, it should promptly incorporate these amendments. For example, if the Control Authority revises its ordinance to increase its administrative fine penalty authority, the guide should be revised accordingly.

CHAPTER 5

THE ENFORCEMENT RESPONSES



5. ENFORCEMENT RESPONSES

The Control Authority begins its enforcement process by identifying an industrial user's violation. Once a violation is identified, the Control Authority must determine whether the violation should be considered significant or nonsignificant. Chapter 4 discusses factors in making this determination. If the violation is significant, the Control Authority must determine the most appropriate response. This response should be proportionate to the violation's severity, promote compliance in a timely manner, and be authorized under State law and the Control Authority's sewer use ordinance or regulations.

This chapter provides an overview of seven types of enforcement responses commonly available to Control Authorities. Which response, or combination of responses to use depends on the violation's severity, its duration, its effect on the environment and the treatment plant, and the user's compliance history as well as its good faith in taking corrective action. The seven enforcement responses described in this chapter are:

- Notice of violation
- Administrative fines
- Administrative orders
- Civil litigation
- Criminal prosecution
- Termination of sewer service
- Supplemental enforcement responses

Each section highlights the legal authority necessary to use the response, discusses how and when to use it (including a summary of the response's advantages and disadvantages), and presents examples of situations where Control Authorities have used it successfully.

Before using any of these responses, the Control Authority is cautioned to review State law and the ordinance to determine whether it is available (see Chapter 3). Where necessary, the Control Authority may have to revise its ordinance prior to the use of some of these responses.

NOTICE OF VIOLATION

5.1 NOTICE OF VIOLATION

The most common form of a Notice of Violation (NOV) is an official communication from the Control Authority to the noncompliant industrial user which informs the user that a pretreatment violation has occurred. The NOV is an appropriate initial response to nonsignificant violations. In case of significant noncompliance, a NOV may also be issued prior to issuing an administrative order or pursuing judicial remedies. The NOV's purpose is to notify the industrial user of the violation(s); it may be the only response necessary in cases of infrequent and generally minor violations. Some POTWs use NOVs as a vehicle to assess administrative fines or to impose compliance schedules, for purposes of this discussion the NOV is defined in its basic function: to inform industrial users that a pretreatment violation has taken place. If the user does not return to compliance following receipt of the NOV, the Control Authority should proceed to more stringent enforcement measures.

5.1.1 Legal Authority Necessary to Issue NOVs

Since the NOV is simply a communication from the Control Authority to a noncompliant user, the sewer use ordinance ordinarily need not authorize its use. However, the Control Authority may have difficulty issuing NOVs where the ordinance creates burdensome procedural restrictions. For example, many sewer use ordinances specify that only the Director of Public Works, the City Council, or the Mayor may issue NOVs. Limiting authority to high executive officials delays the enforcement process and prevents NOVs from being routinely used upon discovery of noncompliance. Thus, authority to issue NOVs should be delegated to the Control Authority's inspectors and/or its pretreatment coordinator.

Another common ordinance provision requires a hearing to be conducted before a NOV may be issued. While hearings may be important and appropriate elements of administrative order issuance or administrative fine assessment, they should not be used for NOV issuance. Finally, the Control Authority should not adopt ordinance provisions authorizing NOV issuance which impede subsequent (and more stringent) enforcement responses. These provisions typically require the Control Authority to issue a NOV and allow the user a predetermined period of time to correct the noncompliance (e.g., 30 days) before the Control Authority may assess administrative fines or seek judicial remedies. While the NOV can be an effective tool, its use is not appropriate in every circumstance and terms should not delay implementation of more severe responses.

5.1.2 When to Issue NOVs

The NOV is issued for relatively minor or infrequent violations of pretreatment standards and requirements. Although it may lack the deterrent effect of an administrative fine or criminal indictment, a NOV can nevertheless be an effective response for several reasons. First, the NOV provides the industrial user with an opportunity to correct noncompliance on its own initiative rather than according to a schedule of actions determined by the Control Authority, and thus fosters a cooperative environment between the industrial user and the Control Authority. Second, the NOV documents the initial attempts of the Control Authority to resolve the noncompliance. Should circumstances require the Control Authority to subsequently take a more stringent approach, the NOV establishes that the Control Authority escalated its response according to its enforcement response plan, rather than reacting to the noncompliance with arbitrary or unnecessarily harsh enforcement. Finally, by providing the Control Authority with an inexpensive and prompt response to violations, the NOV demonstrates to the regulated community the viability of the Control Authority's enforcement program.

Table 5-1.1 details several instances where the issuance of a NOV is considered an appropriate enforcement response. While this list is not all-inclusive, it indicates the categories of violation which are properly addressed by NOVs.

5.1.3 How to Issue NOVs

Since NOVs are official communications, they should be issued on Control Authority letterhead. A NOV may take the form of a letter to the industrial user or a preprinted form with the particular offense(s) written (or typed) in the blanks provided. A number of Control Authorities use citation booklets, similar in design to parking ticket booklets, which contain these preprinted forms.

The contents of the NOV vary, depending on the Control Authority's objectives. Some Control Authorities issue brief NOVs which indicate only that the Control Authority has detected a violation. Many Control Authorities issue an NOV which includes a statement detailing the pretreatment standards violated and the circumstances surrounding the violation. Typically, a more detailed NOV contains the following minimum findings of fact:

- The Control Authority is charged with constructing, maintaining, and regulating the use of the sewer system (and treatment works)
- To protect the sewer system (and treatment works), the Control Authority administers a pretreatment program
- Under this program, the industrial user was issued a permit
- The permit contained numerical limits on the quality of pollutants which the industry could discharge as well as self-monitoring requirements and other duties
- On (date), pollutant analysis showed that the quantity of (pollutant) exceeded the permit limitation, etc.

A sample NOV appears as Figure 5-1.1.

5.1.4 Recommendations for NOV Issuance

For maximum effectiveness, the NOV should be written and delivered to the user immediately upon detection of the violation. As a general rule, the NOV should be received by the user no later than five business days after discovery of the noncompliance. To ensure that NOVs are promptly issued, the Control Authority should predetermine which of its personnel may issue and/or deliver the NOV. The NOV should either be hand-delivered to the industrial user by Control Authority personnel or be sent to the industrial user via certified mail.

Authenticated copies of NOVs may serve as evidence in judicial proceedings. Therefore, a copy of each NOV, signed by the responsible Control Authority official, should be placed in the industrial user's file, along with the certified mail receipt or similar statement by the person who delivered it. In addition, the official responsible for tracking pre-treatment compliance (if not the issuer) should be informed of the NOV's issuance. If the Control Authority uses an automated compliance tracking system (such as the PCME software), issuance of the NOV should be entered into the system. These actions will facilitate closer monitoring of the noncompliant user's corrective actions and self-monitoring reports. Many

TABLE 5-1.1. VIOLATIONS WHICH MAY BE ADDRESSED BY A NOTICE OF VIOLATION

1. Unpermitted Discharges
   - Failing to file permit reneval application but continuing to comply with expired permit
   - Reported spill with no known adverse effects

2. Effluent Limit Violations
   - Isolated, insignificant exceedances

3. Monitoring and Reporting Violations
   - Inadvertently using incorrect sample collection procedures
   - Failing to submit more frequent self-monitoring information
   - Failing to properly sign or certify monitoring reports
   - Failing to notify of slug load, which has no known adverse effects
   - Filing late report, including compliance schedule reports (less than 30 days)

4. Missed Compliance Schedule Deadlines
   - Missing interim or final deadline by 90 days or less

EXAMPLE NOV

DIVISION OF WATER AND WASTEWATER SERVICES

[NAME OF CITY]

IN THE MATTER OF

NAME OF INDUSTRY
ADDRESS

NOTICE OF VIOLATION

LEGAL AUTHORITY

The following findings are made and notice issued pursuant to the authority vested in the Superintendent of Wastewater Services, under Section __ of the City's Sewer Use Ordinance. This order is based on findings of violation of the conditions of the wastewater discharge permit issued under Section __ of the City's Sewer Use Ordinance.

FINDINGS

1. ***[Name of City]*** *is charged with construction, maintenance, and control of the sewer system and treatment works.*

2. *To protect the sewer system and treatment works,* ***[Name of City]*** *administers a pretreatment program.*

3. *Under this pretreatment program,* ***[Name of Industry]*** *was issued a discharge permit.*

4. *The discharge permit issued to* ***[Name of Industry]*** *contained numerical limits on the quality of pollutants, which* ***[Name of Industry]*** *could discharge and self monitoring requirements.*

5. *On* ***[Date]****, pollutant analysis revealed that the quantity of* ***[pollutant]*** *exceeded the permit limitation.*

NOTICE

THEREFORE, BASED ON THE ABOVE FINDINGS, [NAME OF INDUSTRY] IS HEREBY NOTIFIED THAT:

1. ***It is in violation of its discharge permit and the sewer use ordinance of [Name of City].***

Signed: _____

[Name]
Superintendent of Sewer Services
[Address]

FIGURE 5-1.1

Control Authorities schedule routine inspection and sampling visits to focus on facilities which have recently received NOVs.

If the user does not return to compliance, the Control Authority should escalate to more stringent enforcement responses rather than repeatedly issuing NOVs which do not result in a return to compliance.

ADMINISTRATIVE FINES

5.2 ADMINISTRATIVE FINES

An administrative fine is a monetary penalty assessed by the Control Authority for violations of pretreatment standards and requirements. Administrative fines are among the most effective responses to user noncompliance because they may be assessed at the Control Authority's discretion and the amount of the fines may be determined on an individual basis. Administrative fines differ from civil penalties (penalties imposed through court proceedings), since fines are assessed by the Control Authority directly and do not require court intervention unless the user contests the action or refuses to pay the fine. Administrative fines are punitive in nature and are not related to a specific cost born by the Control Authority. Instead, fines are to recapture the full or partial economic benefit of noncompliance, and to deter future violations.

5.2.1 Legal Authority Necessary to Assess Administrative Fines

The Control Authority must establish clear legal authority to assess administrative fines. This authority must be within the scope of the Control Authority's enforcement powers as delegated by State law and must be expressly implemented in its sewer use ordinance. The Control Authority should consult its attorney to determine the extent of its authority under State law and how best to detail these powers in the sewer use ordinance.

If State law confers broad authority to assess administrative fines, the Control Authority (as noted above) must adopt specific ordinance provisions or regulations detailing this authority. At least one industrial user has successfully appealed an administrative fine by alleging that the sewer use ordinance did not expressly establish authority to issue administrative fines. By enacting these provisions, the Control Authority also declares its intention to use this enforcement response to punish noncompliance.

In addition to authorizing assessment of the fines, the sewer use ordinance should detail procedures for their assessment. For example, the ordinance should provide that fines may be assessed prior to or subsequent to a hearing, and further provide that both the fine itself and the dollar amount assessed are subject to appeal.

The ordinance should also set forth the maximum specific dollar amounts (per violation per day) which the Control Authority may assess. By citing maximum amounts, the Control Authority retains its discretion to assess fines in lesser amounts when appropriate. For example, by stating that users are subject to administrative fines not to exceed $1,000, the Control Authority may fine users that submit late reports $25, while fining users responsible for interference or pass through $1,000. Some Control Authorities have also published fine schedules (that is, matrices of predetermined fines for various degrees of violation). To preserve its discretion to respond to noncompliance on a case-by-case basis, a Control Authority which adopts this method of determining appropriate fines should warn its users that fine schedules are merely guidance and that the maximum fine available may be used as an appropriate first response.

The New York City Department of Environmental Protection has promulgated an administrative fines provision in its "Rules and Regulations Relating to the Use of the Public Sewers, Including Sewer Surcharges" which incorporates many of the elements of administrative fines discussed above. This provision states:

> **Any person who violates or fails to comply with any of the provisions of the (Rules and Regulations) or any order, rule or regulation issued by the Board or Commissioner pursuant thereto shall be liable for a civil penalty of not less than fifty nor more than one thousand dollars for, each violation. In the case of a continuing violation,**

each day's continuance shall be a separate and distinct offense. The Environmental Control Board shall have the power to impose such penalties. A proceeding to impose such penalties shall be commenced by the service of a notice of violation returnable to such Board. Such Board, after a hearing as provided by the rules and regulations of the board, shall have the power to enforce its final decisions and orders imposing such civil penalties as if they were money judgments. . . . The Board, in its discretion, may, within the limits set forth in this subdivision in any court of competent jurisdiction establish a schedule of civil penalties indicating the minimum and maximum penalty for each separate offense.

5.2.2 When to Assess Administrative Fines

Administrative fines are recommended as an escalated enforcement response, particularly when NOVs or administrative orders have not prompted a return to compliance. Whether administrative fines are appropriate responses to noncompliance also depends greatly on the circumstances surrounding the violation. When using this enforcement response, either singly or in conjunction with another response (e.g., an administrative order requiring the industrial user to take steps to return to compliance), the Control Authority should consider the following factors:

- The type and severity of the violation
- The number of violations cited
- The duration of the noncompliance
- The impact of the violation on the wastewater treatment plant and the environment (e.g., whether the violation caused pass through or interference)
- Whether the violation threatened human health
- Whether the industrial user derived any economic benefit or savings from the noncompliance
- The compliance history of the user
- Whether the user is making good faith efforts to restore compliance
- Other policy considerations normally involved in an enforcement decision.

Suggestions for instances when fines are particularly appropriate include:

- When the industrial user remains in noncompliance after receiving repeated NOVs
- When the industrial user violates the terms of an administrative order (such as failing to meet a compliance schedule deadline).

The City of New York (through the ordinance provision quoted above) is authorized to assess administrative fines for every instance of user noncompliance. This provision gives the City the broadest possible discretion in the use of its administrative fine authority.

5.2.3 How to Assess Administrative Fines

The process of assessing administrative fines involves three steps: (1) determining the amount of the fine; (2) selecting a mechanism through which to impose the fine; and (3) collecting the fine. To successfully assess administrative fines, the Control Authority must have adequate legal authority, well-defined procedures, and complete documentation of the noncompliance (such as chain-of-custody forms and detailed sampling records). If the industrial user challenges the fine in court, the Control Authority must be prepared to defend its actions.

Determining the Amount of the Fine

The amount of the fine should be proportionate to the economic benefit enjoyed by the industrial user from the noncompliance and the harm caused by the violation. Two primary methods exist for determining fine amounts: assessing on a case-by-case basis (based upon well-defined criteria) and following a schedule of fines (also based upon well-defined criteria). While each method has advantages, it is strongly suggested (for reasons explained more fully below) that the Control Authority adopt one of the two approaches rather than attempting to combine elements of each.

Determining the amount of the fine on a case-by-case basis is more flexible and may ultimately allow for broader consideration of appropriate fine amounts than adherence to a predetermined fine schedule. However, unless this amount is based on previously determined criteria, the Control Authority may not be able to justify its decision and is therefore more vulnerable to user charges of arbitrary or selective enforcement. If the Control Authority develops and uses a predetermined fine schedule, its response will be prompt and unlikely to be challenged (unless the fine amount was inconsistent with the schedule or the schedule amounts were used in setting fines for some users and disregarded for others).

Developing a Fine Schedule

Control Authorities have used several varieties of fine schedules ranging from a flat rate for any violation to a sliding scale based on the type and nature of noncompliance. Some examples are provided below:

- Flat Rate. New York City has the authority to issue administrative fines up to $1000 per violation per day. The City's policy is to issue the maximum fine regardless of the nature of the violation.

- Flat Rate with Escalation. The Town of Lisbon, Maine, uses a fine schedule for violations of industrial discharge permits that begins at $100 per violation and increases by $100 increments for each subsequent violation to a maximum of $1000 per violation. If the industry remains in compliance for a period of one year, the cycle begins anew and subsequent fines are assessed at $100 and increased by $100 increments.

- Fine Calculated Using Matrix. Control Authorities in Boston, Massachusetts and Seattle, Washington, have each developed a matrix to determine the size of an administrative fine. The matrices address such criteria as magnitude of violation, potential impact to the POTW or the environment, violator culpability, and the frequency of the violation.

- Fine Based on Type of Noncompliance. Washington County, Oregon, has developed specific fines for various types of noncompliance as well as for repeat offenses.

- Fine in Addition to Cost Recovery. The City of Niagara Falls, New York, has established a schedule of fines for categories of violations. This schedule also states that the violator will cover any costs incurred by the City because of the violation.

- Fine Based on Economic Benefit of Noncompliance. There may be some industries in deliberate noncompliance because the penalties of noncompliance are less than the costs of achieving compliance. In these situations, the Control Authority must remove the economic advantage of noncompliance. For guidance on calculating fines based on the economic benefit of noncompliance, see the Guidance Manual for Calculation of Economic Benefit of Noncompliance with Pretreatment Standards (1989).

Determining a fine amount which reflects the violation's significance is extremely important. If a fine is too small, its deterrent value is lost and the amount may be regarded by the user as a tax or nominal charge to pollute. If the fine is too great, it is more likely to be contested and could bankrupt the industry (making necessary investments in pretreatment equipment impossible and potentially forcing unnecessary closure). In cases of extreme hardship, the Control Authority may consider reducing or suspending the fine as part of a consent order or a show cause proceeding.

Methods of Assessing Administrative Fines

Once the violation is documented and an appropriate fine amount determined, the Control Authority must notify the industrial user of the fine assessed and collect the fine. A variety of mechanisms are used by Control Authorities around the country to assess administrative fines.

- Assessment on Sewer Bill. The Control Authority adds the administrative fine to other sewer charges when billing the industry for sewer services. The Control Authority identifies the additional charge as a fine for noncompliance and also includes a comment indicating that if compliance is not achieved before the next billing period, an escalated enforcement action will be taken against the industrial user.

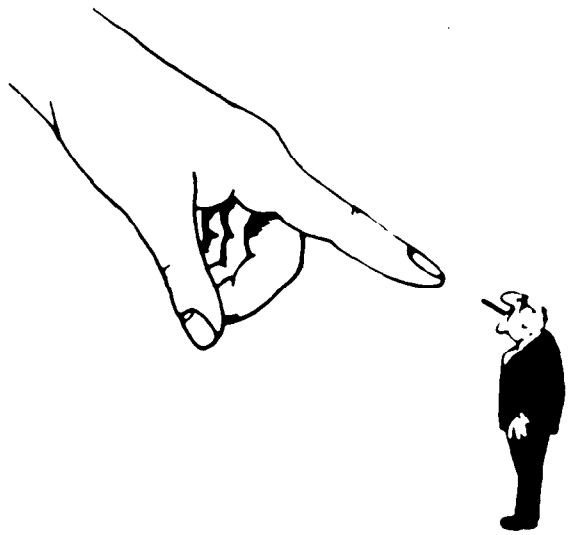
- Notice of Violation. A NOV is used to notify the industrial user of its pretreatment violation(s) and to inform the user that a fine has been assessed. The Notice should include a provision explaining that full payment is due to the city treasurer within a specified period of time.

- Administrative Order. A formal order is issued by the Control Authority specifying that the industrial user is in noncompliance and outlining actions which are required of the industry including the payment of an administrative fine.

- Show Cause Hearing. A formal or informal meeting between the noncompliant industry and the Control Authority. One outcome of this meeting may be the assessment of an administrative fine. In some cases, a show cause hearing is granted to give the industry an opportunity to appeal the fine.

Whatever the assessment process selected, it should at a minimum specify the violations for which the penalty is being assessed, indicate the amount of the penalty, and order the industrial user to take corrective action to return to compliance. These procedures must be detailed in the enforcement response plan.

ADMINISTRATIVE ORDERS



5.3 ADMINISTRATIVE ORDERS

Administrative Orders (AOs) are enforcement documents which direct industrial users to undertake or to cease specified activities. The terms of AOs may or may not be negotiated with industrial users. Administrative orders are recommended as the first formal response to significant noncompliance (unless judicial proceedings are more appropriate), and may incorporate compliance schedules, administrative penalties, and termination of service orders. This section focuses on four common types of administrative orders:

- Cease and desist orders
- Consent orders
- Show cause orders
- Compliance orders.

Examples of each type of AO appear at the end of this section.

5.3.1 Legal Authority Necessary To Issue Administrative Orders

The Control Authority's ability to issue administrative orders depends upon the extent of its enforcement authority in its sewer use ordinance and its enabling authorities as delegated by State law. If State law provides that Control Authorities "may enforce" their pretreatment programs through "orders," the Control Authority can likely issue any of the four types of orders discussed below. Control Authority officials should seek legal opinions on the extent of their authority to issue AOs and resolve any ambiguities regarding this authority before issuing orders to noncompliant users.

If State law confers general authority to issue AOs, the sewer use ordinance will normally specify which types of orders the Control Authority intends to issue. Ordinance provisions which vest discretion in Control Authority officials to determine which order(s) are appropriate may read as follows:

> **If the user fails to correct a violation within 15 days of receiving notice of the violation, the Control Authority shall issue an administrative order for the correction of this violation; provided, however, that the user is not relieved of responsibility for unauthorized discharges which occur within the 15 day interval.**

If the Control Authority adopts ordinance provisions similar to this one, the ordinance must also specify that the user is not relieved of civil or criminal liability for violations which occur in the 15 day interval (to avoid granting users a "grace period" in which unauthorized discharges do not subject the user to enforcement action).

The sewer use ordinance can specify the types of orders which may be issued and limit the circumstances in which they may be issued. For example, Control Authority officials may be authorized to issue cease and desist or termination orders only in cases of discharges which threaten to endanger human health and the environment or interfere with the POTW. However, these provisions may not confer adequate legal authority to immediately halt all discharges because of treatment plant malfunctions or slug loads by other users which force the treatment plant to temporarily halt its operations. A California Control Authority authorizes cease and desist orders under the following provision:

> **When the agency finds that a discharge of wastewater has taken place, in violation of prohibitions or limitations of this ordinance or the provisions of a wastewater discharge permit, the manager may issue an order to cease and desist, and direct those**

persons not complying with such prohibitions, limits, requirements or provisions to comply forthwith, to comply in accordance with a time schedule set forth by the agency, or take appropriate remedial or preventive action in the event of a threatened violation.

Legal authority to issue show cause orders and to conduct show cause hearings should also be detailed in the sewer use ordinance. A Florida Control Authority uses the following ordinance provision to establish its authority to conduct show cause hearings:

The City may order any user who causes or allows an unauthorized discharge to show cause before the Code Enforcement Board why the proposed enforcement action should not be taken. A notice shall be served on the user specifying the time and place of a hearing to be held regarding the violation, the reasons why the action is to be taken, and the proposed enforcement action, and directing the user to show cause why the proposed enforcement action should not be taken.

Ordinance provisions which provide notice of the hearing to the user and detail how the hearing is to be conducted are contained in the sample sewer use ordinance in Chapter 3 of this guidance.

5.3.2 Common Elements Of Administrative Orders

The following elements are common to all AOs:

- Title. The title should specify the type of order being issued, to whom it is being issued, summarize the purpose(s) of the order, contain an identification number, and be printed on the letterhead of the Control Authority.

- Legal authority. The authority under which the order is issued, i.e., its enabling legislation and/or sewer use ordinance (with complete citations to State law and ordinance provisions) should be provided.

- Finding of noncompliance. All violations must be carefully described, including the date(s), the specific permit conditions/ordinance provisions violated, and any damages attributable to the violation.

- Ordered activity. All orders should clearly set out all ordered activity including installation of treatment technology, additional monitoring, appearance at a show cause hearing, etc.

- Milestone dates for corrective actions. Where compliance schedules are used, all progress or "milestone" dates must be clearly established, including due dates for any required written reports.

- Standard clauses. Clause(s) which provide that: (1) compliance with the terms and conditions of the AO will not be construed to relieve the user of its obligation to comply with applicable Federal, State or local law; (2) violation of the AO itself may subject the user to all penalties available under the sewer use ordinance; (3) no provision of the order will be construed to limit the Control Authority's authority to issue supplementary or additional orders or take other action deemed necessary to implement its pretreatment program; and (4) the provisions of the order shall be binding upon the user, its officers, directors, agents, employees.

successors, assigns, and all persons, firms, and corporations acting under, through, or on behalf of the user.

5.3.3 Types Of Administrative Orders

The circumstances of an industrial user's noncompliance frequently dictate the type of order needed to achieve an early return to compliance: no single type of AO is appropriate for all situations, and even when a particular order is the best choice, there are potential disadvantages which the Control Authority should consider before issuing it. In fact, the Control Authority may use more than one type of order when responding to a particular instance of noncompliance. For example, an industrial user which discharges a slug load may be issued an order which requires the industrial user to cease and desist (to immediately halt the unauthorized discharge) and to show cause (i.e., to appear before the Control Authority and explain why more severe enforcement actions should not be taken).

Cease and Desist Orders

A cease and desist order directs a noncompliant user to cease illegal or authorized discharges immediately or to terminate its discharge altogether. A cease and desist order should be used in situations where the discharge could cause interference or pass through, or otherwise create an emergency situation. The order may be issued immediately upon discovery of the problem or following a hearing. In an emergency, the order to cease and desist may be given by telephone. However, a subsequent written order should be served on the industrial user, either in person or by registered mail. If necessary (and within its legal authority), the Control Authority may order immediate cessation of any discharge to its collection system, regardless of a user's compliance status. In nonemergency situations, the cease and desist order may be used to suspend or permanently revoke industrial wastewater discharge permits. If the user fails to comply with the order, the Control Authority may take independent action to halt the discharge, such as terminating water service or blocking the user's connection point.

Advantage of the Cease and Desist Order

- The order allows for immediate cessation of unauthorized discharges, thus halting the noncompliance and removing any threat to the POTW or receiving stream.

Disadvantage of the Cease and Desist Order

- The cease and desist order may damage municipal/industrial relationships by forcing an industry to halt production before being given an opportunity to solve the problem.

Consent Orders

The consent order combines the force of an AO with the flexibility of a negotiated settlement. The consent order is an agreement between the Control Authority and the industrial user normally containing three elements: (1) compliance schedules: (2) stipulated fines or remedial actions: and (3) signatures of Control Authority and industry representatives.

A consent order is appropriate when the user assumes responsibility for its noncompliance and is willing (in good faith) to correct its cause(s). The user need not admit the noncompliance in the text of the order. Thus, signing the order is neither an admission of liability for purposes of civil litigation nor a plea of guilty for purposes of criminal prosecution. However, the Control Authority must make sure that the consent order prohibits future violations and provides for corrective action on the part of the industry. The clause below illustrates how a Control Authority in Rhode Island uses consent orders:

> **None of the foregoing agreements, statements, stipulations and actions taken by the industrial user shall be deemed an admission by the user of the allegations contained within the notice of violation referred to herein. The agreements, statements, stipulations, findings, and actions taken herein are made for the purpose of settling this matter economically and amicably and they shall not be used for any purpose, except for any proceedings to enforce the provisions of this consent order.**

In determining the terms to include in the consent order, the Control Authority may take a user's extenuating circumstances (e.g., financial difficulties, technical problems, and other impediments to necessary corrective action) into consideration.

The consent order should address every identified (and potential) deficiency in the user's compliance status at the time of the order. An example of the detail needed in a consent decree can be seen in the following provisions negotiated between a Maryland Control Authority and a noncompliant food processor. The order directed the user to:

- Obtain the services of a licensed professional engineer specializing in wastewater pretreatment to design a pretreatment system
- Submit plans of the proposed pretreatment system to the Control Authority and the State for review and approval
- Install a pretreatment system
- Achieve compliance with the limits established in the Control Authority's ordinance within six months
- Pay $500 per day for each day the user failed to comply with any of the requirements/deadlines contained in the order, on written demand of the Control Authority
- Notify the Control Authority and State of any failure to comply with deadlines set forth in the order, within one working day after expiration of the deadline, in writing, and describe the reason(s) for the failure, additional amounts of time to complete the necessary work, and steps to be taken to avoid further delays.

Advantages of the Consent Order

- The consent order is generally the easiest order to draft since its terms have been agreed to by both parties. These terms may include findings of show cause hearings or outcomes of confidential settlement negotiations.
- The consent order offers the best means to reach compliance while preserving constructive Control Authority/industrial user relationships. Because the consent order allows the user to influence approaches to corrective action, it fosters cooperation and may also be the fastest means to attain compliance.

- Although the provisions of a consent order reflect a voluntary agreement, its enforceability is equal to that of a cease and desist or compliance order.

Disadvantages of the Consent Order

- Since the user has influence in drafting the agreement, final terms may compromise the Control Authority's desire for stringent enforcement.
- The Control Authority may delay implementing additional enforcement measures while negotiating terms of the consent order.
- The provisions of a consent order, unless carefully drafted, are subject to conflicting interpretations by the parties.

Show Cause Orders

An order to show cause directs the user to appear before the Control Authority, explain its noncompliance, and show cause why more severe enforcement actions against the user should not go forward. The order to show cause is typically issued after informal contacts or NOVs have failed to resolve the noncompliance. However, the show cause order/hearing can also be used to investigate violations of previous orders.

The show cause hearing can be conducted by the Control Authority's attorney, its Board of Directors (or City Council), the POTW superintendent, city engineer, pretreatment coordinator, or an impartial official designated by the ordinance. The hearing may be formal (i.e., conducted according to the rules of evidence, with verbatim transcripts and cross-examination of witnesses) and open to the public. Alternatively, the Control Authority may choose to conduct an informal hearing or close it to the public. However, findings resulting from informal hearings should also be carefully documented. For example, the Control Authority could use an informal hearing to interview employees of the industrial user, examine discharge records, or negotiate the installation of a pretreatment system.

If a formal hearing is held, the Control Authority will typically put forth evidence of noncompliance. In response, the user may admit or deny the noncompliance, explain mitigating circumstances, demonstrate its eventual compliance and describe all other corrective measures. During the hearing, the Control Authority can explore the circumstances surrounding the noncompliance and evaluate the sufficiency of the evidence for subsequent civil or criminal actions. If the user does not understand the violation's nature (that is, what constitutes a violation under the ordinance), the hearing can serve to educate the user while saving the Control Authority litigation expenses.

The hearing officer or review board must then determine whether further action is warranted and, if so, its nature and extent. For example, if the problems causing the noncompliance appear to be resolved or nearly resolved at the hearing's conclusion, a consent decree may be drafted which incorporates the findings of the review board. If the user must install pretreatment equipment to achieve compliance, the circumstances surrounding the noncompliance should be weighed and a reasonable schedule for installation and start-up developed. Completion of this schedule and any additional requirements will normally be administered through the consent order.

Should the hearing result in an impasse between the user and the hearing officer, the Control Authority may follow up the meeting by issuing a compliance order, including a schedule, impose a fine or refer the case to its attorney for civil litigation or criminal prosecution. The results of a formal show cause hearing, along with any data and testimony

(recorded by tape machine or stenographer) submitted as evidence, are generally available to the public and may also serve as evidentiary support for future enforcement actions.

Advantages of the Show Cause Order

- Unlike judicial enforcement in which the Control Authority (as plaintiff or prosecutor) must affirmatively prove the noncompliance, show cause hearings place the burden of proof on the user to show why its permit should not be suspended or revoked or why it should not be fined or sued for its noncompliance.

- The hearing process allows the user to present its case, explain mitigating circumstances or criticize the quality or accuracy of the Control Authority's compliance information.

- The hearing can improve Control Authority/industrial relationships by promoting communication about noncompliance before judicial remedies are sought.

- The hearing process gives the Control Authority an opportunity to assemble evidence of noncompliance and make it a matter of public record, thus establishing documentation for future enforcement actions.

Disadvantages of the Show Cause Order

- The show cause hearing involves a greater amount of time and a greater expenditure of resources to effectuate than cease and desist or compliance orders. The hearing may allow a user an excessive length of time to achieve compliance, thereby presenting a disadvantage not only to the pretreatment program but also to other competitors bearing the costs of compliance.

Compliance Orders

A compliance order directs the user to achieve or restore compliance by a date specified in the order. It is issued unilaterally and its terms need not be discussed with the industry in advance. The compliance order is usually issued when noncompliance cannot be resolved without construction, repair, or process changes. Compliance orders are also frequently used to require industrial users to develop management practices, spill prevention programs and related Control Authority pretreatment program requirements.

The compliance order should document the noncompliance and state required actions to be accomplished by specific dates, including interim and final reporting requirements. In drafting the compliance schedule, the Control Authority should be firm but reasonable, taking into consideration all factors relevant to an appropriate schedule duration. For example, if the user must install a complete pretreatment system, time should be allowed to obtain the necessary construction permits, and to design and construct the system. However, in such cases the Control Authority should require intermediate measures to ensure that the user is making acceptable progress.

Once these milestones are set, the Control Authority must track the user's performance against them and escalate its enforcement response as needed. For example, the Control Authority may order the user to show cause for failing to meet a major milestone, impose a additional fine or initiate judicial proceedings.

The utility of the compliance order as an enforcement response is illustrated by the example shown in Figure 5-3.4 in which an order requires corrective action to be undertaken and sets out a series of penalties which are automatically triggered in the event that the user fails to comply with the compliance schedule:

- Pay $2,500 for discharges of grease in violation of the Control Authority's sewer use ordinance
- Pay $2,500 for failure to notify the Control Authority of the excessive grease discharges
- Pay $25,000 for failure to construct and maintain metering and sampling facilities (this fine was stayed, however, pending completion of the system by a specified date).
- Reimburse the Control Authority for all expenses, loss and damage directly or consequentially caused by the violations
- Pay the full costs of the proceedings, including the technical, administrative, and other costs of the Control Authority in developing its proof, and attorneys' fees, in accordance with a sewer use ordinance provision authorizing these penalties.

Advantage of the Compliance Order

- When confronted with a user not making good faith efforts to achieve compliance, the compliance order is an effective means of ensuring that necessary corrections are implemented. The Control Authority may design compliance schedules, set milestone dates, prescribe additional or supplementary reporting requirements, or order the industrial user to achieve compliance by a certain date.

Disadvantage of the Compliance Order

- Without the user's involvement, the compliance schedule designed by the Control Authority may not be feasible. Considerable time and effort may be required to enforce milestone dates and procedures that might have been better spent negotiating the terms of a consent order.

EXAMPLE CEASE AND DESIST ORDER

DIVISION OF WATER AND WASTEWATER SERVICES

[NAME OF CITY]

IN THE MATTER OF

NAME OF INDUSTRY
ADDRESS

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*
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*
*

CEASE AND DESIST ORDER

LEGAL AUTHORITY

The following findings are made and order issued pursuant to the authority vested in the Superintendent of Wastewater Services, under Section ___ of the City's Sewer Use Ordinance. This order is based on findings of violation of the conditions of the wastewater discharge permit issued under Section ___ of the City's Sewer Use Ordinance.

FINDINGS

1. *[Industry] discharges nondomestic wastewater containing pollutants into the sanitary sewer system of the City of _____.*

2. *[Industry] is a "significant industrial user" as defined by Section ___ of the City's Sewer Use Ordinance.*

3. *[Industry] was issued a wastewater discharge permit on January 1, 1988 which contains prohibitions, restrictions, and other limitations on the quality of the wastewater it discharges to the sanitary sewer.*

4. *Pursuant to the ordinance and the above-referenced permit, data is routinely collected or submitted on the compliance status of [Industry].*

5. *This data shows that [Industry] has violated the Sewer Use Ordinance in the following manner:*

   a. *[Industry] has continuously violated its permit limits for copper and zinc in each sample collected between January, 1986 and January, 1989.*

   b. *[Industry] has also failed to comply with an administrative compliance order requiring the installation of a pretreatment system and the achievement of compliance with its permit limits by July 1, 1989.*

   c. *[Industry] has failed to appear at a show cause hearing pursuant to an order requiring said attendance.*

FIGURE 5-3.1

ORDER

THEREFORE, BASED ON THE ABOVE FINDINGS, **[INDUSTRY]** IS HEREBY ORDERED TO:

1. *Within 24 hours of receiving this order, cease all nondomestic discharges into the City's sanitary sewer. Such discharges shall not recommence until such time as* ***[Industry]*** *is able to demonstrate that it will comply with its current permit limits.*

2. *Failure to comply with this order may subject* ***[Industry]*** *to having its connection to the sanitary sewer sealed by the City, and assessed the costs therefor.*

3. *Failure to comply with this order shall also constitute a further violation of the sewer use ordinance and may subject* ***[Industry]*** *to civil or criminal penalties or such other enforcement response as may be appropriate.*

4. *This order, entered this 12th day of August, 1989, shall be effective upon receipt by* ***[Industry]****.*

Signed: _____

[Name]
Superintendent of Sewer Services
[City] Municipal Building
[Address]

FIGURE 5-3.1 (Continued)

EXAMPLE CONSENT ORDER

DIVISION OF WATER AND WASTEWATER SERVICES

[NAME OF CITY]

IN THE MATTER OF

NAME OF INDUSTRY
ADDRESS

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SUPERINTENDENT OF SEWER SERVICES
ADDRESS

CONSENT ORDER

***WHEREAS**, the City of _____ Division of Sewer Services pursuant to the powers, duties and responsibilities vested in and imposed upon the Superintendent by provisions of the City's Sewer Use Ordinance, have conducted an ongoing investigation of [Industry] and have determined that:*

1. *The City owns and operates a wastewater treatment plant which is adversely impacted by discharges from industrial users, including **[Industry]**, and has implemented a pretreatment program to control such discharges.*

2. ***[Industry]** has consistently violated the pollutant limits in its wastewater discharge permit as set forth in Exhibit 1, attached hereto.*

3. *Therefore, to ensure that **[Industry]** is brought into compliance with its permit limits at the earliest possible date, **IT IS HEREBY AGREED AND ORDERED, BETWEEN [Industry] AND THE SUPERINTENDENT OF SEWER SERVICES FOR THE CITY OF _____, that [Industry] shall:***

   a. *By July 15, 1989, obtain the services of a licensed professional engineer specializing in wastewater treatment for the purpose of designing a pretreatment system which will bring **[Industry]** into compliance with its wastewater discharge permit.*

   b. *By September, 30, 1989, submit plans and specifications for the proposed pretreatment system to the City for review.*

   c. *By December 31, 1989, install the pretreatment system in accordance with the plans and specifications submitted in item b above.*

   d. *By January 15, 1989, achieve compliance with the limits set forth in Exhibit 1.*

   e. ***[Industry]** shall pay $1,000 per day for each and every day it fails to comply with the schedule set out in items a-d above. The $1,000 per day penalty shall be paid to the cashier of the Division of Sewer Services within 5 days of being demanded by the City.*

FIGURE 5-3.2

4. *In the event **[Industry]** fails to comply with any of the deadlines set forth, **[Industry]** shall, within one (1) working day after expiration of the deadline, notify the City in writing. This notice shall describe the reasons for **[Industry]**'s failure to comply, the additional amount of time needed to complete the remaining work, and the steps to be taken to avoid future delays. This notification in no way excuses **[Industry]** from its responsibility to meet any later milestones required by this Consent Order.*

5. *Compliance with the terms and conditions of this Consent Order shall not be construed to relieve **[Industry]** of its obligation to comply with its wastewater discharge permit which remains in full force and effect. The City reserves the right to seek any and all remedies available to it under Section ___ of the City's Sewer Use Ordinance for any violation cited by this order.*

6. *Violation of this Consent Order shall constitute a further violation of the City's Sewer Use Ordinance and subjects **[Industry]** to all penalties described by Section ___ of the Sewer Use Ordinance.*

7. *Nothing in this Consent Order shall be construed to limit any authority of the City to issue any other orders or take any other action which it deems necessary to protect the wastewater treatment plant, the environment or the public health and safety.*

SIGNATORIES

FOR [INDUSTRY]

_____ _____

Date **Name**
[Industry]

FOR [NAME OF CITY]

_____ _____

Date **Name**
Superintendent of Sewer Services
Address

FIGURE 5-3.2 (Continued)

EXAMPLE SHOW CAUSE ORDER

DIVISION OF WATER AND WASTEWATER SERVICES

[NAME OF CITY]

IN THE MATTER OF

[NAME OF INDUSTRY]
ADDRESS

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ADMINISTRATIVE

SHOW CAUSE ORDER

LEGAL AUTHORITY

The following findings are made and order issued pursuant to the authority vested in the Superintendent of Wastewater Services, under Section ___ of the City's Sewer Use Ordinance. This order is based on findings of violation of the conditions of the wastewater discharge permit issued under Section ___ of the City's Sewer Use Ordinance.

FINDINGS

1. ***[Industry]*** *discharges nondomestic wastewater containing pollutants into the sanitary sewer system of the City of ____ (hereafter, "City").*

2. ***[Industry]*** *is a "significant industrial user" as defined by Section ___ of the City's Sewer Use Ordinance.*

3. ***[Industry]*** *was issued a wastewater discharge permit on January 1, 1988, which contains prohibitions, restrictions, and other limitations on the quality of the wastewater it discharges to the sanitary sewer.*

4. *Pursuant to the ordinance and the above-referenced permit, data is routinely collected or submitted on the compliance status of* ***[Industry]***.

5. *This data shows that* ***[Industry]*** *has violated its wastewater discharge permit in the following manner:*

   a. ***[Industry]*** *has violated its permit limits for copper and zinc in each sample collected between January, 1988, and January, 1989, for a total of 24 separate violations of the permit.*

   b. ***[Industry]*** *has failed to submit a periodic compliance report due March 31, 1989.*

   c. *All of these violations satisfy the City's definition of significant violation.*

FIGURE 5-3.3

ORDER

THEREFORE, BASED ON THE ABOVE FINDINGS, **[INDUSTRY]** IS HEREBY ORDERED TO:

1. *Appear at a meeting with the Superintendent of Sewer Services to be held on June 21, 1989, at 2:00 p.m., in room 211 of the Municipal Building.*

2. *At this meeting, **[Industry]** must demonstrate why the City should not pursue a judicial enforcement action against **[Industry]** at this time.*

3. *This meeting will be closed to the public.*

4. *Representatives of **[Industry]** may be accompanied by legal counsel if they so choose.*

5. *Failure to comply with this order shall also constitute a further violation of the Sewer Use Ordinance and may subject **[Industry]** to civil or criminal penalties or such other appropriate enforcement response as may be appropriate.*

6. *This order, entered this 19th day of May, 1989, shall be effective upon receipt by **[Industry]**.*

Signed: _____

[Name]
Superintendent of Sewer Services
[Address]

FIGURE 5-3.3 (Continued)

EXAMPLE COMPLIANCE ORDER

DIVISION OF WATER AND WASTEWATER SERVICES

[NAME OF CITY]

IN THE MATTER OF

[NAME OF INDUSTRY]
[ADDRESS]

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ADMINISTRATIVE

COMPLIANCE ORDER

LEGAL AUTHORITY

The following findings are made and order issued pursuant to the authority vested in the Superintendent of Wastewater Services, under Section ___ of the City's Sewer Use Ordinance. This order is based on findings of violation of the conditions of the wastewater discharge permit issued under Section ___ of the City's Sewer Use Ordinance.

FINDINGS

1. ***[Industry]*** *discharges nondomestic wastewater containing pollutants into the sanitary sewer system of the City of _____ (hereafter, "City").*

2. ***[Industry]*** *is a "significant industrial user" as defined by Section ___ of the City's Sewer Use Ordinance.*

3. ***[Industry]*** *was issued a wastewater discharge permit on January 1, 1988, which contains prohibitions, restrictions, and other limitations on the quality of the wastewater it discharges to the sanitary sewer.*

4. *Pursuant to the ordinance and the above-referenced permit, data is routinely collected or submitted on the compliance status of* ***[Industry]***.

5. *This data shows that* ***[Industry]*** *has violated its wastewater discharge permit in the following manner:*

   a. ***[Industry]*** *has violated its permit limits for copper and zinc in each sample collected between January, 1988, and January, 1989, for a total of 24 separate violations of the permit.*

   b. ***[Industry]*** *has failed to submit all periodic compliance reports due since March 31, 1989.*

   c. *All of these violations satisfy the City's definition of significant violation.*

FIGURE 5-3.4

ORDER

THEREFORE, BASED ON THE ABOVE FINDINGS, [INDUSTRY] IS HEREBY ORDERED TO:

1. *Within 180 days, install pretreatment technology which will adequately treat [Industry]'s wastewater to a level which will comply with its wastewater discharge permit.*

2. *Within 5 days, submit all periodic compliance reports due since March 31, 1989.*

3. *Within 10 days, pay to the cashier's office of the Division of Sewer Services, a fine of $2,000.00 for the above-described violations in accordance with Section ___ of the Sewer Use Ordinance.*

4. *Report, on a monthly basis, the wastewater quality and the corresponding flow and production information as described on page 9 of the wastewater discharge permit for a period of one year from the effective date of this order.*

5. *All reports and notices required by this order shall be sent, in writing, to the following address:*

Pretreatment Coordinator
Wastewater Treatment Plant
[Address]

6. *This order does not constitute a waiver of the wastewater discharge permit which remains in full force and effect. The City of [Industry] reserves the right to seek any and all remedies available to it under Section ___ of the Sewer Use Ordinance for any violation cited by this order.*

7. *Failure to comply with the requirements of this order shall constitute a further violation of the sewer use ordinance and may subject [Industry] to civil or criminal penalties or such other appropriate enforcement response as may be appropriate.*

8. *This order, entered this 19th day of May, 1989, shall be effective upon receipt by [Industry].*

Signed: _____

[Name]
Superintendent of Sewer Services
[Address]

FIGURE 5-3.4 (Continued)

CIVIL LITIGATION

5.4 CIVIL LITIGATION

Civil litigation is the formal process of filing lawsuits against industrial users to secure court ordered action to correct violations and to secure penalties for violations including the recovery of costs to the POTW of the noncompliance. It is normally pursued when the corrective action required is costly and complex, the penalty to be assessed exceeds that which the Control Authority can assess administratively or when the industrial user is considered to be recalcitrant and unwilling to cooperate. The term "civil litigation" also includes enforcement measures which require involvement or approval by the courts, such as injunctive relief and settlement agreements. Civil litigation is similar to criminal prosecution in that it requires the full cooperation of the attorney and may result in court trials of industrial users and assessment of penalties. However, civil litigation is conducted for different purposes and requires a less stringent burden of proof in order for the Control Authority to prevail.

5.4.1 Legal Authority Necessary to Use Civil Litigation

The General Pretreatment Regulations require the Control Authority to have legal authority to seek or assess civil (or criminal) penalties in at least the amount of $1,000 a day for each violation by industrial users of pretreatment standards and requirements. If State law allows a greater award, the Control Authority should design its ordinance to allow it to seek more than $1,000. Similarly, this Federal regulation does not prohibit Control Authority from seeking or assessing penalties of less than $1,000 when lesser fines are appropriate (e.g., for late submission of self-monitoring reports).

The General Pretreatment Regulations also require the Control Authority to have legal authority to seek injunctive relief for noncompliance by industrial users with pretreatment standards and requirements. This authority must also be established in the sewer use ordinance. Some Control Authorities adopt ordinance provisions which authorize enforcement of environmental violations as "public nuisances." The concept of "public nuisance" is a civil cause of action which allows the Control Authority (if successful) to recover costs associated with noncompliance and obtain a court order for abatement (a court order to halt activities judged to be nuisances). "Public nuisances" affect an interest common to the general public, and a typical example is the pollution of a stream. However, ordinance provisions designating violations of the ordinance as "public nuisances" do not serve as substitutes for the penalty authority required by Federal law because pretreatment violations required to be remedied through civil (or criminal) judicial actions may not be deemed "public nuisances." For example, an industry's failure to provide authorized signatures for its self-monitoring reports may not affect the general public to the degree necessary to establish a "public nuisance."

For civil litigation to be an effective response to noncompliance, the Control Authority must both enact ordinance provisions which establish all requisite legal authority and adopt procedures which facilitate its use. Many sewer use ordinances are deficient in one or both of these respects. The following are common legal authority or procedural obstacles to the use of civil litigation as an effective enforcement response:

- Ordinance provisions which limit the availability of injunctive relief to discharge violations. These provisions typically provide that the Control Authority may seek injunctive relief to halt or prevent discharges in violation of the ordinance. To comply with Federal law, the Control Authority must be empowered to seek injunctive relief for nondischarge violations as well (for example, if an industrial user refuses to allow Control Authority personnel access to its facility, the Control

Authority has authority to seek an injunction which requires the user to submit to compliance inspections).

- Ordinance provisions which authorize civil penalties for "intentional and negligent" violations only. By linking civil liability to intent or negligence, the Control Authority is forced to prove that the industrial user knew, or should have known, that it was violating the ordinance or its wastewater permit. The Clean Water Act designates that industrial users are strictly liable for all pretreatment violations (see 33 U.S.C. 1319). "Strict liability" is a legal standard which means that users are held legally responsible for noncompliance, regardless of intent or negligence.

- Ordinances which authorize civil penalties in inadequate amounts, (e.g., of "not more than $50"). Civil fines in these amounts have little deterrent value and may not allow the Control Authority to recover court costs associated with civil litigation. As noted above, the Control Authority must have authority to seek penalties up to $1,000 (per violation per day) and are encouraged to seek penalties in even greater amounts. Several Control Authorities can seek fines of up to $6,000 per day per violation.

- Ordinance provisions which inadvertently insulate industrial users from civil liability during the period following issuance of a notice of violation. These "grace periods" are created by ordinance language which: (1) requires that the Authority notify an industrial user of its noncompliance; and (2) allows a noncompliant user a short period (e.g., 30 days) to correct the violation, after which the Control Authority may seek civil penalties. Ordinance provisions which mandate this procedure prohibit the Control Authority from seeking civil penalties until the expiration of this "grace period."

A final procedural obstacle to effective civil litigation arises with regard to responsibility for its initiation on behalf of the Control Authority. Frequently, whether by ordinance-mandated procedures or unwritten policy, decisions to file suit are made by the Control Authority's Board of Directors, City Council, or Mayor. While the decision to take an industrial user to court cannot be made lightly, Control Authority officials more directly involved in program implementation may be in a better position to determine the advisability of civil litigation, particularly in cases of routine violations or cost recovery actions. By delegating responsibility for initiating civil litigation to the chief executive responsible for operations and enforcement (e.g., the Wastewater Superintendent), the Control Authority ensures that this enforcement response will begin as efficiently and as effectively as possible.

5.4.2 When to Pursue Civil Litigation

Civil litigation is an appropriate enforcement response in three general situations: (1) emergency situations where injunctive relief is necessary to halt or prevent discharges which threaten human health or the environment, or interfere with the POTW; (2) when efforts to restore compliance through cooperation with the industrial user have failed and a court supervised settlement (consent decree) is necessary to enforce program requirements; or (3) to impose civil penalties and recover losses incurred due to the noncompliance. Finally, successfully concluded civil litigation helps to deter future noncompliance through establishment of favorable judicial precedent. Since (in most instances) courts are bound to follow established precedent, successful cases encourage Control Authorities within the same State to bring actions based on similar facts. In addition, the awareness that litigation is a viable enforcement option will influence industrial users to respond promptly to less formal enforcement measures, such as notices of violation or administrative

orders. Although the different types of civil litigation are discussed separately below, they are frequently used in combination (e.g., the Control Authority may seek an injunction to halt or prevent discharges while a civil enforcement suit is pending).

One major concern with pursuing both civil and criminal enforcement is the applicable Statute of Limitations. A Statute of Limitations restricts the amount of time the Control Authority will have to initiate the law suit once it becomes aware of a violation. Generally this "litigation window" is 3-5 years (depending on State law) after which time the Control Authority will have forfeited its ability to pursue an action for that violation. For example, if a slug load upsets the wastewater plant, the Control Authority may only have 3 years to file its suit to recover its costs and appropriate civil penalties.

Consent Decrees

Consent decrees are agreements between the Control Authority and the industrial user reached after a lawsuit has been filed. To be binding, the decree must also be signed by the judge assigned to the case. Consent decrees are used when the violator is willing to acknowledge and correct the noncompliance and the Control Authority and the violator agree on the penalty. Such an agreement can be formalized prior to a full hearing on the issues. For example:

- A Control Authority in Okmulgee, Oklahoma, negotiated a consent decree with an industry which required the industry to conduct training for its employees, undertake an engineering study of its effects on the Control Authority, and pay a civil penalty of $20,000. In addition, the consent decree required the City to hold public compliance meetings on a quarterly basis and revise the permitting provisions of its sewer use ordinance.

- A Control Authority in Green Bay, Wisconsin, negotiated a consent decree with a meat packer which included a stipulated penalty of $25,000, plus the City's costs for the litigation.

- A Control Authority in Atlanta, Georgia, negotiated a consent decree with a steel mill requiring the industrial user to install a pretreatment system and pay a stipulated penalty of $23,000. The decree contained an escalated penalty provision (the fine doubled) for each subsequent violation. However, if the industry achieved compliance within six months, only one-half of stipulated penalty was to be collected.

Injunctions

Injunctions are court orders which direct parties to do something or refrain from doing something. The Control Authority should seek injunctive relief if the delays involved in filing suit would result in irreparable harm. The General Pretreatment Regulations require a Control Authority to have authority and procedures to immediately and effectively halt or prevent any discharge of pollutants which reasonably appears to present an imminent danger to the health or welfare of persons. If the Control Authority is empowered by its sewer use ordinance to issue cease and desist orders (see Section 5.3 of this manual), it is unlikely that injunctive relief will be necessary to halt or prevent the discharge. However, if the Control Authority does not have authority to issue AOs, or if the industrial user refuses to comply with the cease and desist order, the Control Authority may be forced to seek injunctive relief.

Injunctions to halt or prevent discharges are usually temporary in nature (that is, they have a fixed expiration date). Generally, they may be sought without prior notice to the user. However, the Control Authority may also seek injunctions which have permanent effect if the injunction is necessary to protect the POTW. When the injunction sought is permanent in nature, the industrial user is given the opportunity to present arguments against the granting of the injunction. Examples of permanent injunctive relief awarded to Control Authorities are as follows:

- A Control Authority in Austin, Texas, obtained an injunction (as a term of a compliance agreement) which permanently enjoined an electroplater from violating any term or condition of its industrial waste ordinance, or any provision of the user's industrial waste discharge permit.

- A Sanitary District in California, obtained an injunction which required a chemical company to disconnect a pipe which caused periodic spills of formaldehyde. The court also required the company to conduct additional self-monitoring, conduct spill prevention and response training for employees, and pay the Control Authority $31,901 in damages and $25,000 in civil penalties.

Civil Penalties and Cost Recovery

Civil litigation (i.e., going to trial) may be necessary to recover costs associated with noncompliance and to impose civil penalties. For example, if an industrial user releases a slug load into the collection system, the discharge could:

- Upset the treatment works (which must be restored) or damage the collection system (which must be repaired)

- Cause physical harm to Control Authority personnel (personal injury)

- Require the Control Authority to conduct special monitoring activities to trace the spill

- Cause the Control Authority to violate its NPDES permit (which may, in turn, result in fines assessed against the Control Authority by EPA or the State).

A successful civil suit may force the industrial user to pay for all such expenses which the Control Authority incurred in responding to the non-compliance, including restoration of the Control Authority's physical plant, payment for medical treatment of injured employees, and indemnification of the Control Authority for all fines assessed against it for NPDES permit violations.

Even in situations where a noncompliant discharge has not caused actual damage to the Control Authority, the prospect of civil penalties (in conjunction with adverse publicity and injunctions against future violations) and the costs associated with defending civil suits may be sufficient to convince potentially noncompliant industries that no alternative exists to consistent compliance. Since amounts recoverable as administrative fines are likely to be less than those imposed as civil penalties, the Control Authority may be forced to sue users to recover penalties of appropriate severity.

Control Authorities have found civil litigation to be an effective means of enforcing pretreatment program requirements. For example, in January 1988, a Control Authority in Utah was awarded a judgment of $32,876 in damages (for copper and lead violations) and a

civil penalty of $125,000. The following are additional examples of successful civil litigation:

- A Control Authority in Baltimore, Maryland, was awarded $114,000 in civil penalties from an electroplater.
- A Control Authority in Sunnyvale, California, successfully sued an electroplater and obtained an injunction to compel the industry to submit a spill prevention plan and to improve its pretreatment system.
- A Control Authority in Orange County, California, obtained civil penalties of $10,000 and an injunction against a noncompliant electroplater requiring the following:
  - Installation of a pretreatment system within 180 days
  - Installation of an automatic shut off valve (for the discharge) accessible to the Control Authority
  - Increased self-monitoring frequency (weekly)
  - Distribution of a letter to all other industrial users acknowledging illegal discharges

5.4.3 How to Pursue Civil Litigation

To make an informed decision on the advisability of civil litigation, the Control Authority must understand the legal procedures involved in preparing a lawsuit. These procedures include identification of parties to be named as defendants in the complaint and the relief to be requested from the court. In addition, the Control Authority must be prepared to cooperate with the industrial user during the "discovery" process (i.e., the pretrial investigation and exchange of information between the parties). The remainder of this section addresses these concerns. The Control Authority is cautioned that what follows is an overview and is not intended to substitute for full consultation with the Control Authority's attorney.

Preliminary Decisions

Once a Control Authority decides to pursue litigation, several choices must be made regarding: (1) parties to be sued; and (2) relief to be requested.

Who to Sue? At first glance who to sue (i.e., who to name as defendant in the complaint filed on behalf of the Control Authority) appears obvious: the industrial user. However, for purposes of determining liability, the user's corporate identity may not be readily apparent. For example:

- If the facility is operated by a contractor: should the suit name the owner of the facility, the operator under contract to the owner to manage the premises, or both?
- If the facility is owned by a corporation: should the suit name the Board of Directors, the shareholders, the corporate officers, the corporation itself, or all of these parties?

- If the facility is owned or operated by a partnership: should all of the partners be named or only those with direct responsibility for the industry's compliance status?

The Control Authority's attorney can help to identify the correct parties, but he or she will require the assistance of pretreatment personnel who have first-hand knowledge of persons responsible for the industry's compliance status.

As a general rule, the Control Authority should name all "appropriate" parties in the complaint and allow the liability of each to be determined through the litigation process. If the industry is an office or agency of the local government (e.g., a print shop or vehicle maintenance station), the Control Authority may elect to enforce its program administratively by alerting the City's elected officials and issuing appropriate AOs. However, the Control Authority should not refrain from pursuing litigation if it is the appropriate response under the criteria provided above.

What to Sue For? In the formal complaint which the Control Authority (as plaintiff) files with the court, it must ask for the specific relief to which it is entitled under State law and its sewer use ordinance. In consultation with its attorney, the Control Authority should determine in advance of trial: (1) the provisions of its sewer use ordinance and/or wastewater permit which the user has allegedly violated; (2) the amount to seek as recovery of damages (including spill response expenses, additional compliance monitoring costs, attorney's fees, court costs, and reimbursement of any fines levied upon the Control Authority for NPDES violations); and (3) whether to seek civil penalties and the appropriate amounts of these penalties. Since it is unlikely (and may be impossible) that the Control Authority will be awarded a greater sum in damages and penalties than it seeks in the complaint, the maximum amount of civil penalties allowed under the ordinance should routinely be sought. For instance, if the sewer use ordinance provides that civil penalties of up to $1,000 may be recovered per violation per day and the industry has violated 4 of its wastewater permit conditions 50 times within the applicable Statute of Limitations, the Control Authority should seek $200,000 in penalties.

The Basic Process

Having made these preliminary decisions, the Control Authority can now proceed to file its lawsuit. The length of time necessary to conclude the entire litigation process (from the filing of the complaint to the collection of damages and penalties following a favorable verdict) will vary from case to case. A full trial may take 6 to 12 months to conclude. However, the Control Authority may always reach a settlement agreement with the industrial user prior to (or during) the trial.

Figure 5-4.1 depicts the litigation process, which begins when the Control Authority decides to file, through its legal counsel, a complaint against the industrial user. The complaint contains a brief statement of the user's pretreatment obligations, a short description of the alleged violations and a request for specific relief from the court. The industrial user then responds to the complaint by filing a answer which admits or denies each of the Control Authority's allegations. Taken together, the complaint and the answer define the issues to be contested at trial.

Once the complaint and answer are filed with the court, a date for trial is set. Before the trial begins, both sides prepare their cases by collecting information which may be in the possession of the other party and by interviewing witnesses which the other party intends to call. This process, called "discovery," allows each side to become familiar with all evidence likely to be used in court; and is intended to encourage settlements and prevent either party from gaining an unfair advantage. As part of the discovery process,

THE CIVIL LITIGATION PROCESS

- Control Authority Decides to Sue Industrial User to Recover Costs, Seek Civil Penalties, and Corrective Actions
- Control Authority Files Complaint Alleging Pretreatment Violations (Ordinance or Permit)
- Industrial User Files Answer Admitting or Denying Allegations
- Trial Date Set
- Discovery Process Involving Control Authority and Industrial User
- Settlement Negotiations
  - If Successful = Consent Decree
  - If Unsuccessful = Proceed to Trial
- Trial
- Verdict
  - If Industrial User Held Liable, Court Awards Cost Recovery and/or Civil Penalties
  - If Industrial User Not Held Liable,
- Appeals

FIGURE 5-4.1

Control Authority employees may be called upon to provide depositions (oral or written sworn statements); answer interrogatories (written questions which must be answered in writing and under oath); or respond to requests for production (requests by the industrial user to produce and allow inspection and copying of any designated documents, such as writings, photographs, recordings or data compilations). Similarly, the industrial user may be obligated to provide the Control Authority with all of its self-monitoring records and to submit to interviews by the Control Authority's attorney.

In addition to cooperating with attorneys for the industrial user during the discovery process, Control Authority personnel may also be involved in trial preparation through creation of visual evidence for its own attorney to use in court (such as photos, videotapes, diagrams, or models which illustrate the POTW's operation and the effects of unauthorized industrial discharges). Other pretrial tasks include assisting the attorney in preparing for cross-examination of the industrial user's witnesses.

If the litigation involves numerous and complex issues, the trial judge may request a pretrial conference with the Control Authority and the industrial user to narrow the range of issues to be contested at trial and to encourage an amicable settlement of the conflict. These pretrial conferences provide another opportunity for the negotiation of a consent decree.

Assuming the Control Authority does not agree to drop the case or enter into a consent decree, the case proceeds to trial. The trial is held before a jury or a judge sitting without a jury (at the request of the defendant). The Control Authority, as plaintiff, presents evidence to prove the industrial user's noncompliance, including the testimony of Control Authority officials as expert witnesses.

If the violations in question were detected through the Control Authority's compliance monitoring program, the Control Authority must present evidence of the validity of these results. For example, the Control Authority may have to demonstrate that its wastewater samples were properly collected, stored, and analyzed; and that its equipment was adjusted and in good working condition. Assuming that the Control Authority has documented its activities well and has used chain-of-custody procedures to show that samples were not tampered with or incorrectly identified, it should be able to authenticate its results.

If the violations were disclosed through data contained in industrial user self-monitoring reports, the Control Authority normally will not have to prove the violations by independent means. If the user's self-monitoring reports were properly signed and their accuracy certified to by an authorized representative of the user, a decision favorable to the Control Authority is likely. However, the Control Authority should, as a matter of policy, conduct independent sampling and analysis whenever ordinance or permit violations are disclosed in industrial user self-monitoring reports.

At the conclusion of the Control Authority's evidence, the industrial user presents its defense. A verdict is then issued on the extent (if any) of the user's liability, its responsibility for cost recovery, necessary corrective action, and the amount of civil penalties assessed against it. If found liable, the industrial user may appeal the judgment; if the industrial user is judged not liable, the Control Authority may appeal the findings. For appeals to be successful (by either party), the appealing party (appellant) must prove that an error was made at trial and that this error was severe enough to warrant a reversal of the verdict, a reduction in the amount of damages and penalties awarded, or a new trial.

CRIMINAL PROSECUTION

5.5 CRIMINAL PROSECUTION

Criminal prosecution is the formal process of charging individuals and/or organizations with violations of ordinance provisions that are punishable, upon conviction, by fines and/or imprisonment. The purposes of criminal prosecution are to punish noncompliance established through court proceedings and to deter future noncompliance. Criminal offenses are traditionally defined as either felonies or misdemeanors. Under Federal law, felonies are offenses punishable by death or imprisonment for a term exceeding one year. Examples of environmental crimes characterized as felonies under the Clean Water Act are knowing violations of the Act and knowing endangerment of human health. Knowing violations of the Act are punishable by fines up to $50,000 per day of violation, imprisonment for up to 3 years, or both; knowing endangerment (placing another person in imminent danger of death or serious bodily injury) is punishable by fines up to $1,000,000 (in the case of a corporation), imprisonment of up to 15 years, or both. Fines and prison sentences under the Act are doubled for second offenses.

Federal law defines misdemeanors as offenses other than felonies. Misdemeanors are generally punishable by fines of up to $1,000 or imprisonment for less than 1 year. Most offenses punishable under local sewer use ordinances such as tampering with monitoring equipment, falsifying self-monitoring reports, or failing to report illegal discharges are misdemeanors.

There are two elements to a crime: (1) an act in violation of the law; and (2) criminal intent. Acts which might themselves be characterized as "criminal" may not result in prosecution if the prosecutor cannot prove intent or criminal negligence. In other words, the industrial user either must have intended to break the law or was so indifferent to the nature and implications of its act that it could be deemed criminally negligent. Unless a prosecutor can prove both of these elements, criminal prosecution is not a viable enforcement option. Figure 5-5.1 illustrates the differences between civil litigation and criminal prosecution.

5.5.1 Legal Authority Necessary to Use Criminal Prosecution

To successfully use criminal prosecution as an enforcement tool, the Control Authority must enact and maintain legal authority adequate to satisfy Federal and State constitutional standards of fairness and due process. Since its powers regarding criminal enforcement are delegated by State law, the Control Authority should review State statutes authorizing local governments (and their agencies) to levy fines and impose prison sentences. If the ordinance provision authorizing criminal penalties does not specify fines or prison terms but rather refers to a standard scheme of criminal penalties (e.g., "Class B misdemeanor") the applicable fine and prison term are predetermined by this classification system. It is also noted that some Control Authorities such as Regional Sewage Authorities may not have any access to criminal prosecution under State law. A comprehensive review of these statutes should be completed before the Control Authority revises the criminal penalty provision(s) of its ordinance. The Control Authority should consult its attorney regarding all legal authority issues and interpretations of State and local law.

The provision(s) of a ordinance authorizing criminal penalties for ordinance violations must be clearly identified as criminal penalties. If the ordinance contains a penalty provision under the heading "penalties" or "civil penalties" but the substantive provision contains the phrase "upon conviction," the nature of the proceedings so authorized may be unclear and criminal prosecution may be unavailable.

CIVIL LITIGATION VS. CRIMINAL PROSECUTION

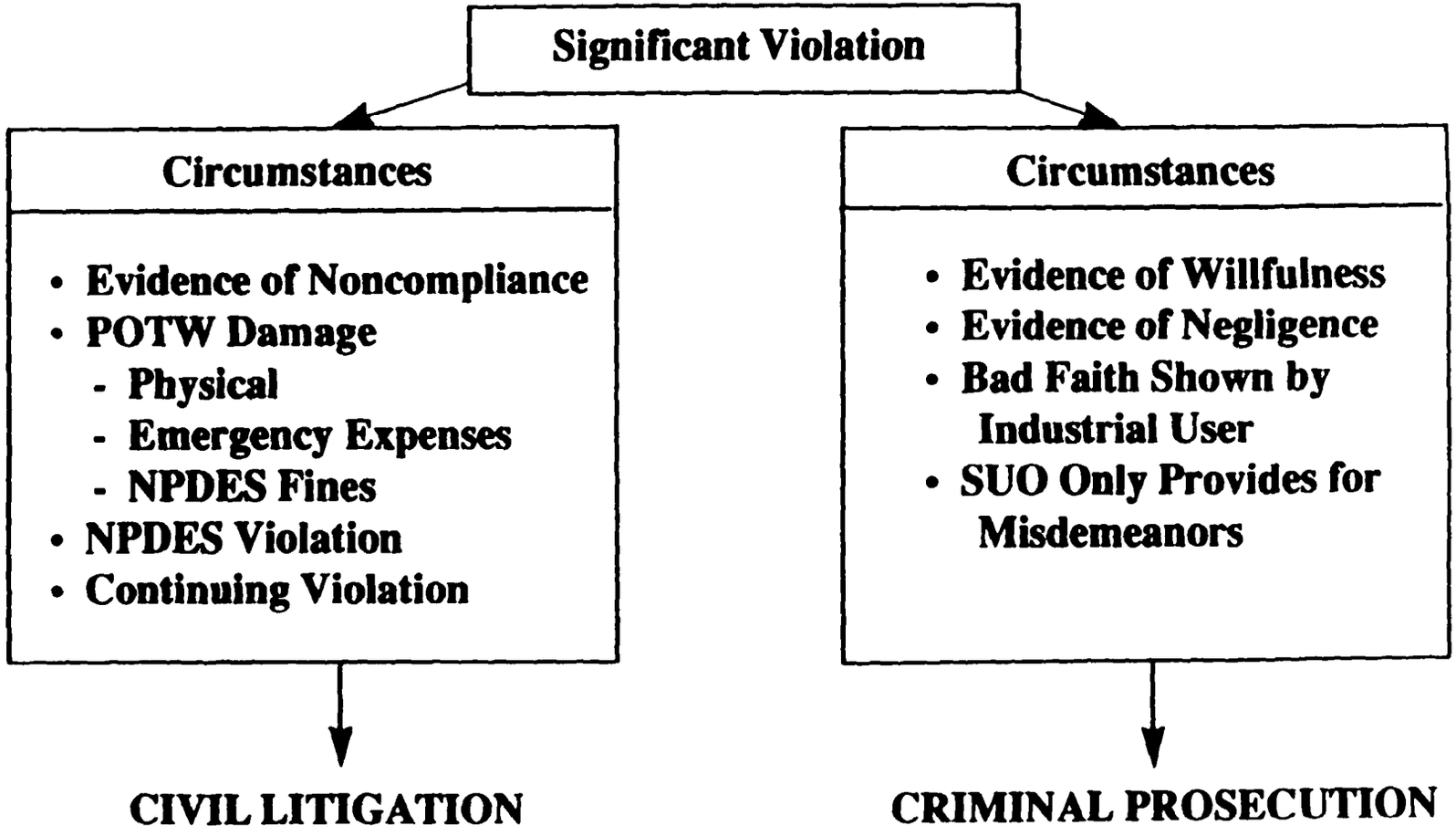

FIGURE 5-5.1

Other Elements of Legal Authority

A comprehensive evaluation of legal authority requirements must also include relevant Federal and State criminal procedure case law. Constitutional requirements change as courts decide particular cases. The Control Authority and its legal representatives must stay informed of these developments to ensure the admissibility of evidence prepared for use in criminal prosecutions. Control Authority employees may therefore wish to request briefings on criminal procedure from the Control Authority attorney.

Types of Environmental Crimes

The Control Authority should ensure that its ordinance provisions authorizing criminal penalties are broadly written. The "criminal penalties" provision should authorize criminal prosecution for willful or negligent:

- Violations of the ordinance
- Violations of sewer connection permits or industrial wastewater discharge permits (such as construction of unauthorized connection points, discharges in excess of permit limits, or failure to submit self-monitoring reports)
- Violations of administrative orders issued to implement pretreatment program requirements (such as orders to cease and desist illegal discharges or show cause orders)
- Violations of regulations which implement general grants of authority in the ordinance
- Failure to notify the Control Authority of unauthorized discharges (such as slug loads).

Violations which continue for more than one day must be deemed separate and distinct offenses to preclude defense arguments based on double jeopardy (discussed in Section 5.5.5 below) and to maximize the fines recoverable due to noncompliance. A provision prohibiting the falsification of records and/or monitoring equipment should also be adopted. It may read as follows:

> **Any person who knowingly makes false statements, representations or certifications in any application, record, report, plan or other document filed or required to be maintained pursuant to this ordinance, or wastewater contribution permit, or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required under this ordinance, shall, upon conviction, be punished by a fine of not more than one thousand dollars ($1,000) or by imprisonment for not more than six (6) months, or by both.**

Other Related Crimes

Noncompliance may also be prosecuted under ordinance provisions not directly related to environmental protection. For example, industry employees who alter monitoring reports and tamper with sampling equipment may be charged with conspiracy to commit crimes. In 1980, an industry in Philadelphia, Pennsylvania, was successfully prosecuted for theft of sewer services and conspiracy. The plant superintendent pleaded guilty to charges (brought under the Pennsylvania State Code) that he conspired with other employees to tamper with water

pollution monitoring equipment and to dilute wastewater samples. Similarly, in the County of Los Angeles, California, unintentional and inadvertent hazardous waste dumping has been successfully prosecuted under general provisions prohibiting "unlawful business practices." Another jurisdiction has successfully prosecuted industry officials for the death of an employee under a homicide (murder) statute. The Attorney General of Illinois charged that the victim was killed by exposure to hydrogen cyanide in the company's suburban Chicago plant. Three company officials (the former president, the plant supervisor, and the plant foreman) were convicted of murder and the corporation was convicted of involuntary manslaughter. These examples illustrate the variety of criminal offenses which may be prosecuted in conjunction with environmental violations.

5.5.2 When To Use Criminal Prosecution

Criminal prosecution is appropriate when the Control Authority has evidence of noncompliance which shows criminal intent; it is recommended in cases involving repeated violations, aggravated violations (such as discharges which endanger the health of treatment plant employees), and when less formal efforts to restore compliance (such as notices of violation and AOs) have failed. Criminal prosecution may be brought prior to, concurrently with, or subsequent to civil litigation.

Although civil litigation and criminal prosecution are not mutually exclusive (e.g., prosecutors may seek injunctions in civil proceedings while preparing or prosecuting criminal cases), evidence that the named defendant(s) committed an illegal act with criminal intent must be present before an indictment is sought. When evidence sufficient to indict and convict is present, other factors may lead the Control Authority to try different enforcement tools before initiating criminal prosecution. Examples of these mitigating factors include prompt and complete disclosure of the noncompliance and good faith efforts at cooperation with the Control Authority in trying to restore compliance (such as voluntarily installing pretreatment equipment or exceeding compliance schedule requirements). Likewise, efforts to conceal the scope and extent of violations or to mislead investigators should be fully examined when deciding whether to proceed with criminal prosecution.

Because of the presumption of innocence in criminal trials, prosecutors (with the support of Control Authority employees) must determine if each element of an offense can be proved. The presumption of innocence means that the defendant industrial user does not have to prove its innocence. Unless the prosecution convinces the jury (or judge, if the defendant waives a jury trial) that an illegal act was performed with criminal intent, the defendant will be acquitted. Unless there is strong evidence of noncompliance, the prosecutor may exercise discretion and decline the case. Since weak enforcement actions could actually encourage noncompliance (by destroying the rationale/credibility of deterrence), the ability of Control Authority officials to convince prosecutors to take the case may itself be an accurate indication of whether criminal prosecution is appropriate.

Evidence of Crimes

Evidence of Criminal Act - Pretreatment defendants fall into two general categories. The first category includes industries which ignore the pretreatment program by disposing of wastes without authorization, frequently referred to as "midnight dumpers." The County of Los Angeles, California, has criminally prosecuted industrial users for a variety of environmental offenses; in 1986, one user pleaded guilty to 54 counts of discharging without a permit and was fined $100,000 (plus $28,000 in costs). Another user pleaded guilty to hazardous waste disposal and transportation violations and was ordered to pay a criminal penalty of $400,000 plus costs. Evidence necessary to convict such defendants consists of

discharge samples, witnesses to the dumping, testimony from employees of the defendant, discharge records (or satisfactory explanations for their absence), and soil/water samples of the areas where the discharge/dumping occurred.

The second category of defendants includes industries which misrepresent or conceal the extent of pollutants which they discharge, allow their pretreatment technology to deteriorate through neglect, or fail to prevent anticipated spills. To convict these defendants, Control Authority officials must establish three factors: 1) that records were inaccurate representations of a user's processes or discharge constituents (because of an intent to mislead or negligent preparation); 2) that pretreatment technology was lacking, outdated, or poorly maintained; and (3) that spills were intentional or could have been prevented had adequate safeguards been in place. On-site inspections, independent sampling, and records examination will be necessary to prove these violations.

Evidence of Criminal Intent - Assuming admissible evidence of a criminal act exists, the Control Authority must address the additional requirement of criminal intent or negligence. There are two fundamental types of intent in environmental crimes: general intent and specific intent. General intent means intent to do an act, such as intent to release a pollutant loading (a voluntary act rather than an accidental act). Specific intent means intent to break the law such as intent to release a loading certain to pass through the POTW.

If the prosecutor cannot prove an industrial user intended to perform the act which produces criminal liability (for example, a pass through discharge released accidentally, but which should have been contained by adequate spill prevention measures), the case may be brought under negligence theory. Criminal negligence means reckless indifference to the possible consequences of an act (such as releasing a discharge without knowing its constituents when the user could or should have possessed such knowledge).

The Clean Water Act and similar State laws generally do not require proof of specific intent to break the law. The Clean Water Act uses the term "knowingly" to describe the element of intent in criminal violations. A Federal court has held that the Act:[5]

> **[I]s not the type of criminal statute which requires the government to prove the defendants specifically intended to violate the statute. To sustain a conviction . . . it is necessary only that the defendants acted willfully or negligently and that they intended to do the acts for which they were convicted. In order to convict, it is not necessary that the defendants intended to violate the law.**

In some situations, plant employees do not know (or have not been told) constituents of the discharges they are releasing. Similarly, management or upper level corporate personnel, such as the chief executive officer or members of the Board of Directors may not have personal knowledge of illegal acts (such as illegal discharges) because of the organization's structure. In these cases, it may be impossible to prove specific intent and prosecutors can only seek indictments and convictions based on criminal negligence. If defendants are careless to the point of recklessness or deliberately remained ignorant of the facts to avoid responsibility, they may be prosecuted under criminal negligence provisions. These provisions ensure that enforcement is available when industrial users purposefully shield themselves from incriminating knowledge.

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[5] United States vs. Frezzo Brothers, Inc., 546 F. Supp. at 713, (E.D. Pa. 1982), aff'd, 703 F.2d 62, (3d Cir.), cert. denied, 464 U.S. 829 (1983)

5.5.3 How To Use Criminal Prosecution

Since an industrial user may be imprisoned as a result of criminal prosecution, the Control Authority must observe all Federal and State constitutional requirements of criminal procedure such as protections against unreasonable search and seizure (inspections), privileges regarding self-incrimination (self-monitoring data), the defendant's rights to trial by jury and to confront adverse witnesses, and protections against double jeopardy. These constitutional rights remain applicable if prosecutors seek only monetary fines (in lieu of prison terms) in criminal trials of defendants which are organizations.

The criminal prosecution process can be organized into the six steps shown on Figure 5-5.2. Each step is outlined below.

Step One - Discovering the Crime. Criminal prosecution begins when Control Authority officials believe crimes have been or are about to be committed. This belief must have some foundation in fact. For example, a Control Authority official must have personal knowledge or trustworthy information from an informant regarding the crimes. This information may result from routine inspection and monitoring activities conducted by Control Authority officials, observations by citizens groups, incriminating reports from industrial users, or interviews with potential defendants and informants.

Step Two - Gathering Evidence. The Control Authority must gather evidence of noncompliance which will be admissible in a criminal trial. Investigating officials must act immediately upon receiving information about violations since incriminating evidence may be destroyed. When gathering this evidence, the Control Authority must observe the constitutional protection against unreasonable searches and seizures guaranteed under the Fourth Amendment. Materials seized during an unreasonable search is inadmissible (i.e., it cannot be used in court to prove a law was broken). To ensure that all necessary evidence may actually be used against defendants in court, Control Authority officials may wish to solicit the assistance of the local police department and obtain search warrants before entering the industrial user's premises.

Step Three - Initiating Criminal Prosecution. Formal criminal prosecution begins when Control Authority officials bring evidence of noncompliance to the prosecutor and consensus is reached to seek an indictment. Initially, the prosecutor must decide who to name as defendant(s) in the indictment. If the potential defendant is an individual, this is a relatively simple decision. If the potential defendant is a franchise, limited partnership, or partnership, the prosecutor must choose whether to name the organization, the responsible officials, or both. If the potential defendant is a corporation, the prosecutor must resolve a procedural dilemma: corporations are artificial legal entities which can act only through agents/employees. If non-managerial employees have tampered with sampling equipment, the prosecutor must decide whether to name the employees in question, their supervisor(s), or all corporate officials administratively responsible for compliance with environmental laws.

The prosecutor then requests a grand jury whose sole purpose is to determine whether enough evidence exists to try particular defendants for specific crimes. If the prosecutor proves to the grand jury that a crime has been committed and that the named defendant(s) should be put on trial, indictments are handed down against the defendant.

Step Four - Pretrial Options. After being named in the indictment issued by the grand jury, the defendant is arraigned (brought before a judge to plead to the criminal charge in the indictment). If the defendant pleads guilty to the charge(s) in the indictment, a sentencing hearing is scheduled. If the defendant pleads not guilty, a trial date is set.

CRIMINAL PROSECUTION

1. **Control Authority Receives Information of Criminal Activity**

2. **Control Authority Gathers Evidence of Criminal Activity**

3. **Control Authority Takes Evidence to Prosecutor**

   Prosecutor Seeks Indictment of Industrial User

   Grand Jury Indicts Industrial User

4. **Defendant Pleads to Criminal Charges in Indictment**
   - **If Pleads Guilty, Sentencing Hearing Scheduled**
   - **If Pleads Not Guilty, Trial Date Set**

5. **Criminal Trial**

   Verdict Issued

6. **Sentence Pronounced**

   Defendant Appeals
   - **If Successful, New Trial or Reduced Sentence**
   - **If Unsuccessful, Sentence is Served**

FIGURE 5-5.2

Depending on the strength of the evidence, the prosecutor may offer the defendants a plea bargain. In exchange for a plea of guilty (which is a waiver of the right to trial by jury), the prosecutor may indict the industrial user on a lesser charge (e.g., reduce felony charges to misdemeanors), seek reduced sentences, or drop the charges altogether. For example, to provide an incentive to full cooperation, the prosecutor may offer immunity to defendants willing to testify against other defendants.

Step Five - The Criminal Trial. Persons accused of criminal offenses have a constitutional right to trial by jury. However, defendants may waive this right and request that the judge rule on the defendants guilt based on the evidence presented. At the trial, each side may present evidence, call witnesses, question the evidence, and cross-examine the witnesses of the other side. At the conclusion of the trial, a verdict is issued. If the defendant is acquitted, the charges are dismissed, and according to the Fifth Amendment, the defendant may not be tried a second time (double jeopardy) for that particular offense.

As noted in Section 5.5.2, however, separate permit violations (for example, illegal discharges on successive days) are separate offenses. Therefore, double jeopardy does not prevent the Control Authority from trying the same industrial user for subsequent illegal discharges of an identical nature. Additionally, double jeopardy only applies to trials by the same jurisdiction. The Control Authority may therefore seek a criminal trial in a local court if the industrial user was acquitted in Federal court. However, municipalities and the States in which they are situated are not different jurisdictions, so industrial users acquitted in local courts may not be tried in State courts for the same offense. For these reasons, local prosecutors must charge defendant industrial users with all possible ordinance and State code violations, both felonies and misdemeanors, arising from particular illegal event(s), and be extremely cautious when waiving counts of an indictment for plea bargaining purposes.

Step Six - Sentencing and Appeal. If the defendant industrial user is convicted, it may receive a fine, a prison sentence, or both. However, the fines and/or prison terms may be suspended (not required to be executed at time of sentencing), if the industrial user takes the desired corrective action(s) or agrees to make other good faith efforts to achieve compliance. Depending on State law, sentences may be handed down by juries or judges. Courts may also authorize alternative sentencing, that is, sentences other than fines or imprisonment, such as community service or educational projects.

Defendants may appeal convictions on all counts or choose to appeal one or more counts. The appeal itself may challenge the verdict, the sentence, or both. To successfully appeal, the defendant industrial user must prove that there were mistakes made at trial and that these mistakes were severe enough to justify a reversal of the verdict or a new trial altogether. The prosecution's right of appeal is extremely limited in criminal cases. The prosecution may only appeal when a second trial is not necessary to resolve the issue on appeal. For example, if the jury finds the defendant guilty but the judge sets aside the verdict as a matter of law, the prosecution may appeal since the appellate court will either affirm the action of the trial judge, thus ending the matter, or overrule the judge and reinstate the jury's verdict. In either case, a second trial is not necessary.

5.5.4 Advantages and Disadvantages of Criminal Prosecution

There are several advantages to the use of criminal prosecution as an enforcement tool:

- Criminal prosecution is a strong deterrent to noncompliance. While the impact of fines on individual and corporate defendants may be lessened by passing on costs to the public (through increased prices for goods and services), the prospect of serving time in prison and the stigma of having a criminal record encourage industry

managers to develop a sense of personal responsibility for compliance. Prison sentences cannot be rationalized as "costs of doing business."

- By closely cooperating with city attorneys and the local judicial system, the Control Authority can maintain a credible threat of criminal enforcement.

- Criminal prosecution generates publicity which is generally beneficial to the Control Authority and adverse to the violator.

- Criminal prosecution deters industrial users from testing the boundaries of a Control Authority's enforcement program.

There are also disadvantages to the use of criminal prosecution:

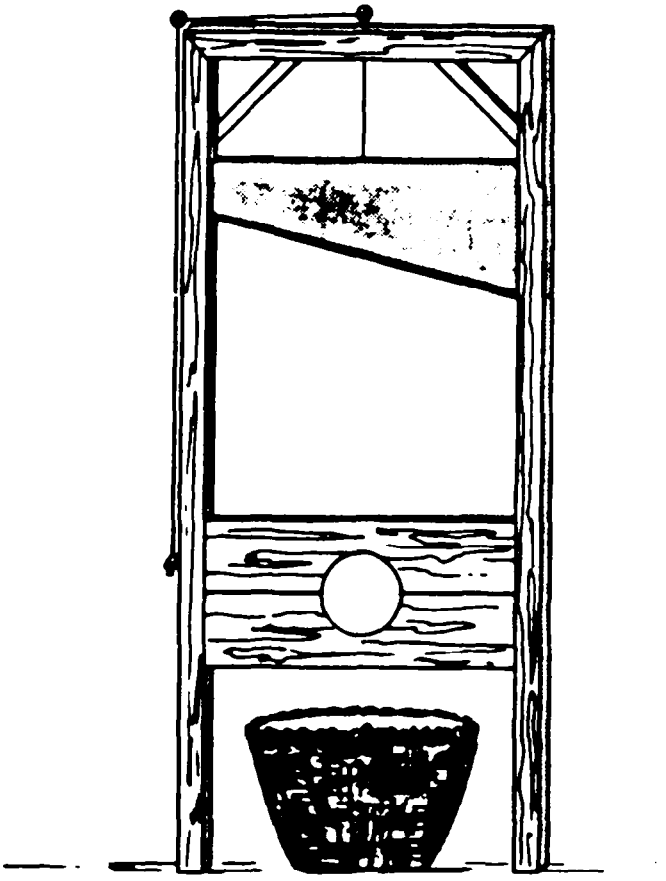
- The Control Authority must sustain a higher burden of proof to secure criminal convictions than to impose civil penalties or administrative fines. The term "burden of proof" is a legal concept which means the necessity of proving facts in dispute. The burden of proof in a criminal trial is "beyond a reasonable doubt." This means that the prosecutor must prove every element of a crime beyond a reasonable doubt. Given that environmental crimes by definition involve highly complex subject matter, this is a formidable task for the prosecutor. If the defense effectively rebuts prosecution evidence on a single element, the industrial user is entitled to an acquittal.

- Criminal prosecution is resource intensive. It is expensive, time consuming, and uncertain of result. Local police forces and courts may be reluctant to divert scarce resources from violent crime to the prosecution of environmental crime.

- Control Authority officials must relinquish control of the case. Unlike using administrative or civil remedies, Control Authority officials must relinquish control (and responsibility) for the case to the prosecutor.

- With corporate defendants, it is difficult to establish personal responsibility for environmental crimes sufficient to impose criminal sanctions on individuals.

TERMINATION OF SEWER SERVICE



5.6 TERMINATION OF SEWER SERVICE

Termination of service is the revocation of an industrial user's privilege to discharge industrial wastewater into the Control Authority's sewer system. Termination may be accomplished by physical severance of the industry's connection to the collection system, by issuance of an AO which compels the user to terminate its discharge, or by a court ruling. However, since termination of service may force industries to halt production and may force closure (if discharge privileges are not reinstated), the Control Authority must carefully consider all of the legal and operational implications of termination before using this enforcement response.

5.6.1 Legal Authority Necessary to Terminate Service

According to the General Pretreatment Regulations, the Control Authority must have legal authority to immediately and effectively halt or prevent any discharge of pollutants to the POTW which reasonably appears to present an imminent endangerment to the health or welfare of persons, or to the environment, or which threatens to interfere with the POTW's operation. The Control Authority must ensure that it incorporates clear authority to terminate service by physical severance, cease and desist order, or both, in its sewer use ordinance.

Regardless of which method is chosen to terminate sewer service, the Control Authority should have procedures to accomplish termination of service in its enforcement response plan or in its ordinance. For example, in El Paso, Texas, the sewer use ordinance reads:

> **Six violations in any time period shall be cause for the sewer service to be disconnected . . . Sewer service will not be restored for a property until sufficient evidence is presented to E.P.A. and El Paso Water Utilities that adequate facilities have been installed to insure that there will be no recurrence of violation of Public Sewer Service Board or E.P.A. Rules and Regulations.**

Another example of a sewer use ordinance that clearly establishes authority to terminate service is that of a Municipal Water District in Southern California, whose ordinance provides that the General Manager may terminate service to any industrial user violating the ordinance or its industrial user discharge permit. The ordinance also defines the General Manager as the General Manager of the Municipal Water District or his deputy, agent, representative, or inspector. For an additional example of ordinance language, see Chapter 3 of this guidance.

These examples confer clear authority to terminate service upon the Control Authority. However, not all ordinances are adequately drafted and many contain obstructions which delay or limit the use of this enforcement response. Some examples of provisions which interfere with effective termination of service are:

- Reserving the authority to terminate service to the City Council, Mayor, or similar high-ranking official(s)
- Requiring a City Council or similar body to convene a hearing before a cease and desist order may be issued
- Only allowing the Control Authority to terminate service by seeking a court order for injunctive relief (i.e., a temporary restraining order or preliminary injunction).

5.6.2 When to Terminate Service

Termination of service is an appropriate response to industries which have not responded adequately to previous enforcement responses. When the Control Authority must act immediately to halt or prevent a discharge which presents a threat to human health, the environment or the POTW, cease and desist orders and termination of service are the only appropriate responses. Unlike civil and criminal proceedings, termination of sewer service is an administrative response which can be implemented directly by the Control Authority. For example, a facility manufacturing bleach in Phoenix, Arizona, discharged wastewater with high concentrations of chlorine residual into the collection system. The chlorine fumes were noticed immediately and forced evacuation of the treatment plant and collection system. Sampling detected a chlorine residual concentration of 10,000 parts per million (ppm) while the City's standard for chlorine residual was only 1 ppm. The situation was declared an imminent hazard and service was terminated immediately. Once the danger had passed, service was restored within a week. This situation illustrates the importance of the Control Authority's ability to terminate service to an industrial user. This power should be available regardless of the user's compliance status, (e.g., when a sewer line is broken or destroyed).

The decision to terminate service requires careful consideration of its legal and procedural consequences. It is likely that forcing an industrial user to halt production will damage the industry's economic position. Nonetheless, this drastic measure is sometimes necessary to address emergency situations or industries resistant to previous enforcement measures. Service termination is sometimes used as an initial response to noncompliance which causes or threatens to cause an emergency situation. However, it is more frequently used as an escalated response to a significant violation when other enforcement responses fail to bring the industrial user into compliance.

Assuming other enforcement responses are unsuccessful, the types of violations warranting termination of service are:

- Unpermitted discharge(s) which violate the POTW's NPDES permit or which create a dangerous situation threatening human health, the environment, or the treatment plant
- Discharge(s) that exceed local or categorical discharge limits and result in damage to the environment
- Slug loads causing interference, pass through, or damage to human health, the environment, or the treatment plant
- Failure of the industrial user to notify the Control Authority of effluent limit violations or slug discharge which resulted in environmental or POTW damage
- Complete failure of the industrial user to sample, monitor, or report as required by an AO
- Failure of the industrial user to install required monitoring equipment per the condition of an AO
- Major violation of a permit condition or AO accompanied by evidence of negligence or intent.

Several Control Authorities have used termination of service in response to industrial noncompliance. For example, an electroplater in Boise, Idaho, was cited for violating

reporting, compliance schedule, and discharge requirements; failure to perform self-monitoring as required; and falsification of data. Initially, the industry was issued a NOV. However, when noncompliance persisted, an AO was issued to force the industry to achieve consistent compliance. Finally, sewer service was terminated.

Another example where termination of service was used as a last resort to achieve compliance was in San Diego, California. An oil refining company was issued an NOV for exceeding its phenol and zinc limits. Because it failed to come into compliance, a show cause hearing was scheduled and a 90-day compliance order issued. At the end of the 90-day period, the company was still out of compliance for phenol and zinc. A notice of intent to terminate service was issued and, two weeks later the City plugged this industry's sewer connection.

These two cases illustrate how a Control Authority should escalate its administrative enforcement response to effectively address persistent noncompliance. In Kansas City, Missouri, a Control Authority used termination of service in conjunction with criminal prosecution. An electroplating industrial user was taken to court for ongoing violations of cyanide discharge limits. The judge delayed the proceedings because the user had contacted a contractor about installing a pretreatment system to eliminate the illegal discharge. However, the industry then began discharging even greater quantities of cyanide into the sewer. The Control Authority deemed the increased illegal discharges a health hazard, issued a notice of immediate sewer service termination, and then plugged the industry's sewer connection.

In addition to being an effective remedy for past or continuing noncompliance, the prospect of termination of service deters unauthorized or illegal discharges. For users whose service is terminated, two alternatives to local sewer service exist: (1) having wastewater hauled away; or (2) obtaining a direct discharge (NPDES) permit. If these alternatives are not feasible for an industry, it has a strong incentive to avoid termination of sewer service and remain in compliance. For example, a Sanitary District in Fremont, California, threatened to terminate service to an industrial user which failed to submit a baseline monitoring report. The report was submitted shortly after the notice of termination. Similar success has been enjoyed by Denton, Texas. When the regulated community is aware that this enforcement response is available and likely to be used as an escalated response, industrial users generally respond more quickly to preliminary (less severe) enforcement measures.

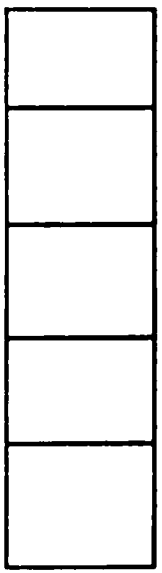
5.6.3 How to Terminate Service

There are three basic methods to terminate sewer service: physically sever (or plug) the industry's connection to the POTW's collection system, halt the discharge by revoking the industry's discharge permit, and issue a cease and desist order. There are advantages and disadvantages to each of these methods. Severing the sewer line is immediately effective but even a temporary plug may be costly to install and remove. Revoking discharge permits or issuing cease and desist orders are easy policies to reverse but rely on the industry to carry out the Control Authority directives.

All of theses methods of termination require notice to the industrial user which should be specified in the ordinance. This notice fulfills the legal due process requirements associated with service termination and enables the user to halt production in time to avoid backflows, spills and other harm to its facility as well as time to look for alternative means of wastewater disposal. Figure 5-6.1 outlines the minimal contents of a notice for termination of service. The notice should be delivered to a responsible party at the industry by personal delivery or certified mail. For example, the Control Authority in Orlando, Florida, uses a standard form (see Figure 5-6.2) to notify industrial users that

CONTENT OF NOTICE OF TERMINATION OF SERVICE

(Due Process Checklist)



1. **Identify Violation**
2. **Cite Legal Authority to Terminate Service**
3. **Describe Method for Terminating Service**
4. **Specify Date and Time When Service Will be Terminated**
5. **Hearing Date to Determine Whether Service May be Restored**

FIGURE 5-6.1

CITY OF ORLANDO
SUSPENSION OF WASTEWATER SERVICE ORDER

Environmental Control
Phone 849-2662

Environmental Services Dept.
5100 L. B. McLeod Road
Orlando, Fl. 32811
Phone 849-2213

Date of Notice_____

Business or Individual:_____

Address:_____

Person Contacted/Title:_____

City Code Section Violation:_____

Results of Analysis:_____

_____

Due to the serious nature of your violation, the City of Orlando is ordering you to immediately stop the discharge of the effluent (in violation), and to eliminate any further industrial discharging by 5:00 p.m. _____, 19____.

In the event of your failure to voluntarily comply with this suspension order, the City shall take such steps as deemed necessary including, but limited to, immediate severance of your sewer connection, to prevent or minimize damage to our POTW system or endangerment to any individuals (City Code Section 30.10(4).

_____ Refused to sign ☐
Signature of person contacted

_____
Signature of Code Inspector or City Representative

cc: White - Office
Pink - Business or Individual
Canary - Code Inspector

FIGURE 5-6.2

they are to immediately stop noncompliant discharges by 5:00 p.m. on the day that the notice is received. This form also alerts the industry that its failure to comply will result in severance of its sewer connection. For recommendations on content and issuance of permit revocations and cease and desist orders, see Section 5.3 of this guidance.

SUPPLEMENTAL ENFORCEMENT RESPONSES

5.7 SUPPLEMENTAL ENFORCEMENT RESPONSES

Many Control Authorities are discovering the utility of "supplemental" or innovative enforcement responses to complement the more traditional enforcement responses described in the preceding sections. Normally, these responses will be used in conjunction with more traditional approaches. Supplemental enforcement responses are typically low cost and are designed to reinforce the compliance obligations of industrial users. The application of these responses must be determined on an individual basis.

Many supplemental responses require actions on the part of noncompliant users. To ensure that users are legally bound to perform these actions, the techniques should be included as terms of administrative orders or settlement agreements. When considering supplemental enforcement responses, the Control Authority should not consider itself limited to those responses discussed in this section and is encouraged to experiment to develop additional supplemental responses.

5.7.1 Legal Authority Necessary for Supplemental Enforcement Responses

Many supplemental enforcement responses do not require specific legal authorization in sewer use ordinances. However, specific legal authority is advisable whenever the supplemental response requires the industrial user to pay fees or to take particular actions. For example, if a Control Authority wants to require its noncompliant users to post a bond or to obtain liability insurance, it is advised to establish its authority to do so in the enforcement section of its sewer use ordinance. Specific legal authority may also be appropriate for several enforcement responses implemented by the Control Authority itself. For instance, clear authority to publish the names of significant violators will put the regulated community and the public on notice of the potential for being published, thereby reducing the likelihood of a challenge to future publications.

Supplemental enforcement responses may be organized into two categories. The first category consists of responses for which specific legal authority is recommended (see Table 5-7.1 and Section 5-7.2). The second category are responses for which specific authority is not generally necessary (see Table 5-7.2 and Section 5-7.3). For recommendations on ordinance language authorizing supplementary enforcement techniques, see Section 3.5 of this guidance.

5.7.2 Supplemental Enforcement Responses for Which Specific Legal Authority is Necessary

The Control Authority is encouraged to enact legal authority for each of the following supplemental enforcement responses.

Public Notices

According to EPA regulations, all Control Authorities must comply with the public participation requirements of 40 CFR Part 25. Among these requirements is annual publication of a list of industrial users which were significantly violating applicable pretreatment standards or requirements [see 40 CFR 403.8(f)(2)(vii)]. Publication of this list is intended to deter industrial users from committing pretreatment violations and to satisfy the public's right to know of violations affecting its immediate environment and causing additional expenditures of public funds to operate and maintain the treatment system.

Although Federal law requires only annual publication of the list of significant violators, it does not prohibit publication on a more frequent basis. Some Control Authorities have found publishing the names of violators at quarterly or semiannual intervals to be an effective means of encouraging compliance. While public notice is not a direct enforcement action against a user, awareness that significant violations result in public notice will deter users concerned with their public image. Once users are put on public notice, reaction from the general public and from environmental interest groups may hasten a return to compliance. Publication on a more frequent basis may also avoid noticing users which have already returned to compliance.

Publishing the names of noncompliant industries (prior to admissions of liability or formal adjudications) raises the prospect of suits for libel. However, a Control Authority can take steps to discourage such suits. First, the Control Authority must ensure that its legal authority to publish is clear and unrestricted. Although not required by EPA regulations, it is recommended that an intent to publish be stated in the sewer use ordinance and wastewater discharge permits to provide notice to users and to deter violations. By clarifying that a significant violation will lead to publication, the notice itself may deter many suits. Second, the public notice should contain details regarding both the violation and any subsequent remedial measure taken by the user. A detailed, balanced notice will preclude many suits based on the assertion that the notice was unfair or misleading. Finally, the Control Authority must be able to establish the validity of its data establishing violations. Thorough and consistent QA/QC procedures and chain-of-custody practices are an absolute necessity. Careful documentation of compliance and enforcement activities will enable the Control Authority to rebut charges of inaccurate publication.

The manner in which the public notice is published can also avert accusations of unfair or inequitable treatment. EPA regulations require only that a list of the names of significant violators be published and that an accompanying statement regarding the violations during the previous twelve months (or whatever publication period is adopted) be included. However, the notice may also explain mitigating circumstances surrounding the violation, such as:

- Current compliance status
- Methods being used to attain compliance
- Type and severity of the violation
- Duration of the violation.

By balancing the text of the notice with favorable information, the user receives credit for any "good faith" efforts it is making.

The list of significant violators may be placed in the legal notices section of the newspaper or elsewhere, at the discretion of the Control Authority. In fact, placement in a forward section of the newspaper may result in a significantly larger readership and greater effectiveness. In some cases, Control Authorities furnish a press release to the newspaper to provide this information. This approach eliminates the cost of buying space and may result in more favorable placement. However, the Control Authority must ensure that the notice will be published and must also be careful to provide concise, accurate information that will not be misinterpreted by the reporter. Therefore, complete reliance on a newspaper's editorial judgment is not recommended.

Costs of publication are frequently cited as a principal reason for a Control Authority's failure to publish the significant violator notice. Some means of reducing, or even eliminating the costs of publication have already been mentioned above such as including it with other city-run notices, locating the notice within the newspaper, and press releases. The Control Authority may negotiate with the paper for lower cost or consider passing the cost on to the user through a surcharge, fee or other similar means.

TABLE 5-7.1. SUPPLEMENTAL RESPONSES FOR WHICH SPECIFIC LEGAL AUTHORITY IS NECESSARY

- Public Notices
- Water Service Termination
- Performance Bond/Liability Insurance
- Contractor Listing Program

TABLE 5-7.2. SUPPLEMENTAL RESPONSES FOR WHICH SPECIFIC LEGAL AUTHORITY IS NOT NECESSARY

- Increased Monitoring and Reporting
- Rewards for Informants
- Short Term Permits
- Special Community Awareness Programs
- Case Referral to Approval Authority

However, if costs remain a cause of concern, the Control Authority should recognize that, as an enforcement tool with good potential to lower the number of significant violations (thus, lowering enforcement costs), publication is a sound investment.

Water Service Termination

Common procedures for terminating sewer services to noncompliant industrial users (including its effectiveness as an enforcement response) were discussed above (see Section 5.6). However, where available to the Control Authority, termination of water service has proven equally effective.

Like sewer termination, the lack of fresh water will force industries to halt production until service is restored (that is, once corrective measures acceptable to the Control Authority are undertaken by the user). Some Control Authorities have jurisdiction over both water and sewer services, making termination of water service for noncompliance with the pretreatment program a relatively simple matter. Others have entered into interagency agreements with the local water works which provide that either agency will terminate a user's service at the request of the other agency.

Regardless of the jurisdictional situation, the Control Authority should clearly indicate to its industrial users that violations of the ordinance or any permits and orders issued pursuant to the ordinance may also result in the severance of water services. For more information on specific ordinance language, see the language set out in Chapter 3 of this guidance.

Performance Bonds/Liability Insurance

Yet another supplemental enforcement response is to require, through an AO or as part of a consent agreement, a noncompliant industrial user to post a performance bond covering expenses which the POTW might incur in the event of future violations. Similarly, several Control Authorities have required industrial users responsible for upsetting the treatment works to obtain sufficient liability insurance to cover the cost of restoring the treatment works in the event a second upset occurs.

A requirement for posting a bond or obtaining insurance coverage can be placed in an AO and, thereafter, included as a condition of the industrial user's permit. A Control Authority using these responses in its enforcement response plan should establish its authority to require such "financial assurances" in its sewer use ordinance.

Contractor Listing Program

The Control Authority may have another source of economic leverage against noncompliant industrial users with significant contracts with the Control Authority or other municipal entities: the threat that existing contracts may be terminated or new contracts not awarded to industries violating pretreatment standards. Generally, this response will not be available unless the local ordinance specifically includes such a provision Moreover, a contractor listing program will only be effective with industries that have contracts of a greater value than the cost of compliance.

5.7.3 Supplemental Enforcement Responses for Which Specific Legal Authority is Not Necessary

The following supplemental enforcement responses are normally available without specific legal authority.

Increased Monitoring and Reporting

Generally, industrial users demonstrating a history of noncompliance should be subject to increased surveillance (i.e., sampling and inspections) by the Control Authority. Since recurring violations indicate that at least one chronic problem exists at the facility, the Control Authority should monitor the user closely and require additional user self-monitoring until the problem is corrected and consistent compliance is demonstrated. For example, where a pretreatment system is found to be inadequate to meet applicable limits, an AO requiring the installation of additional technology should also include an increased self-monitoring frequency (e.g., a requirement to monitor quarterly may be increased to monthly). Increased surveillance and more stringent self-monitoring requirements for chronic violators will also provide a powerful incentive to return to compliance.

The increased compliance information will aid the Control Authority's enforcement program in several ways. First, it provides greater data on the extent of the user's noncompliance. Second, given the expense involved in monitoring, requiring the user to perform more frequent pollutant analyses serves to deter further violations. Finally, the additional data will allow the user to demonstrate that consistent compliance has, in fact, been achieved. Of course, the Control Authority should also schedule its own inspection and sampling visits on a more frequent basis to verify the increased self-monitoring data. A number of Control Authorities have also found that charging the industry for this additional Control Authority monitoring (both sampling and analysis) increases the effectiveness of the enforcement response. Furthermore, these additional monitoring fees will ensure that the Control Authority has adequate resources to screen and interpret the additional compliance information received from the noncompliant industry, and not force a reduction in monitoring for other industrial users.

The requirement to monitor more frequently must not be "open-ended," and should automatically terminate on a specific date or when a specific contingency has been satisfied. For example, an AO may only require the increased monitoring for a six-month period (assuming the problem can be corrected in six months). Alternatively, the order could require the intensive monitoring to continue until six consecutive months show compliance.

It is essential that the Control Authority's compliance information be as current as possible. Consequently, the frequency of the industrial user's reporting schedule must also be increased to coincide with increased self-monitoring requirements. For example, semiannual reporting should be increased to monthly or bi-weekly, depending on the severity of the problem while the additional self-monitoring is being conducted.

Rewards for Informants

To a great extent, the pretreatment program relies on self-monitoring activities conducted by industrial users. Since this self-monitoring information can form the basis of an enforcement action, there is an inherent danger that an industrial user will resort to fraud or misrepresentation to conceal noncompliance. Therefore, the Control Authority must verify self-monitoring results to the greatest extent possible. Several Control Authorities have gone beyond simply conducting periodic analysis themselves and have instituted programs

designed to encourage individuals with information about an industrial user's noncompliance to come forward. A significant reward and the promise of anonymity often encourage such individuals or groups to submit noncompliance information to the Control Authority.

This outside information may come from several sources, including industry employees, laboratories conducting discharge analyses, and honest competitors who discover the noncompliance. In many cases the reward program is set out in the Control Authority's sewer use ordinance. Frequently, a base reward of $100 to $500 is offered for information which leads to effective enforcement. In addition, informants may receive up to 10 percent of any administrative, civil, or criminal penalty collected from the noncompliant user.

Short Term Permits

For Control Authorities with large numbers of industrial facilities (for example, 15 or more), the permit renewal process represents the best opportunity to evaluate the sufficiency of treatment and the compliance status of each industrial user. Permit reapplications provide updated data on the facility and are often cause for a comprehensive sampling and inspection visit by the Control Authority. The process also helps to make industries aware of new or revised pretreatment requirements and obligations and to evaluate the need for onsite spill control plans.

Most local ordinances prohibit permit durations of "more than five years." However, few contain a minimum permit duration. Consequently, the length of a permit's effective period is a discretionary matter. The Control Authority can use a permit's duration to force an "early look" at a noncompliant industry by issuing it a short-term permit. In addition to scheduling a comprehensive review of the industrial user's circumstances, a short-term permit can be used to increase self-monitoring and reporting requirements as well as to impose a compliance schedule which concludes shortly before permit expiration.

The permit renewal process provides both an opportunity to accurately measure the industrial user's progress and leverage to ensure that necessary improvements in the facility's operation are being accomplished. Generally, an effective period of between 12 and 18 months will serve as a sufficient interval for a facility to achieve consistent compliance. Control Authorities which charge a substantial permit renewal fee (e.g., $1000) have also found the issuance of short-term permits to be an effective deterrent to noncompliance.

Special Community Awareness Programs

Requiring violators to convince other industrial users that consistent compliance must be maintained is another innovative response to noncompliance. This may involve requiring a noncompliant user to draft letters to other significant industrial users explaining its violation(s) and outlining the corrective measures being taken to ensure that the violation(s) is not repeated. Alternatively, users may be required to speak directly to other industries, interested groups, or the general public at pretreatment meetings or seminars sponsored by the Control Authority. These testimonials illustrate that the Control Authority responds to noncompliance in a fair but firm manner and that it is serious about pretreatment enforcement. Such testimonials may have a significant deterrent effect on other industrial users. Generally, these community awareness activities are either elements of AOs or are included as terms of settlement agreements. Consequently, no special legal authority explicitly providing for such activities need be adopted.

Case Referral to the Approval Authority

The Approval Authority always has the option to take independent enforcement action when it deems necessary. Even though a Control Authority's enforcement authorities may be extensive, there may be occasions when it finds it impossible to force a particular industrial user to achieve consistent compliance. For example, a Fortune 500 corporation may be financially able to withstand fines or penalties of $1000 per day without achieving consistent compliance for a considerable period. In these circumstances, it may be appropriate for the Control Authority to refer the matter to the Approval Authority (or EPA if different). This referral may result in joint action with the Approval Authority or action by the Approval Authority alone.

The penalties available to most Approval Authorities are substantially greater than those available to Control Authorities. For example, the Clean Water Act allows EPA to impose administrative fines of up to $125,000 per action and to seek civil penalties of up to $25,000 per day per violation and criminal penalties of up to $1 million and/or 15 years imprisonment (see 33 U.S.C. 309). While State sanctions may not be as severe as EPA's enforcement responses, most provide for substantial civil and criminal penalties. Even where the Approval Authority undertakes enforcement, the Control Authority is expected to continue to track an industrial user's compliance and take such additional enforcement actions, including joining the State or Federal action when necessary. Cooperation with the Approval Authority in enforcement actions also provides Control Authority training in enforcement methods (both investigatory and legal), increases the deterrent value of initial Control Authority responses, and results in more constructive public relations (i.e., the community is reassured that stringent enforcement of its environmental laws is a reality).

APPENDIX A

GLOSSARY OF TERMS RELEVANT TO ENFORCEMENT

- **ABSOLVE** - To excuse; to free from an obligation or the consequences of guilt or liability.
- **ADMINISTRATIVE ACTION** (a fine or order) - An enforcement action authorized by the Control Authority's legal authority which is taken without the involvement of a court.
- **ADMINISTRATIVE FINE** - A punitive monetary charge unrelated to actual treatment costs which is assessed by the Control Authority rather than a court.
- **ADMINISTRATIVE ORDER** - A document which orders the violator to perform a specific act or refrain from an act. For example, the order may require users to attend a show cause meeting, cease and desist discharging, or undertake activities pursuant to a compliance schedule.
- **ADMISSIBLE EVIDENCE** - Evidence which can be presented in court.
- **AFFIDAVIT** - A sworn statement in writing under oath before an authorized magistrate or officer.
- **APPROVAL AUTHORITY** - EPA or States with an EPA-approved pretreatment program. The Approval Authority is responsible for approval and oversight of Control Authority pretreatment programs, including an evaluation of the effectiveness of local enforcement.
- **ARBITRARY OR CAPRICIOUS ALLEGATION** - An assertion that a decision or action taken by the Control Authority was unreasonable or not founded upon sound judgment.
- **BURDEN OF PROOF** - The duty of proving a disputed assertion or charge in court.
- **CEASE AND DESIST ORDER** - An administrative order directing an industrial user to immediately halt illegal or unauthorized discharges.
- **CHAIN-OF-CUSTODY** - A written record of sample possession for all persons who handle (collect, transport, analyze, dispose of) a sample, including names, dates, times, and procedures followed.
- **CIVIL LITIGATION** - A lawsuit filed in a civil court. If the court rules that the defendant industrial user violated the law the court may impose civil penalties, injunctions or other equitable remedies and/or cost recovery.
- **CIVIL PENALTY** - A punitive monetary award granted by a court to the Control Authority against a noncompliant industrial user.
- **COMPLIANCE ORDER** - An administrative order directing a noncompliant industry to achieve or restore compliance by a date specified in the order.

- **COMPLIANCE SCHEDULE** - A schedule of required activities (also called milestones) necessary for an industrial user to achieve compliance with all pretreatment program requirements.

- **CONSENT DECREE** - A court supervised settlement agreement, the violation of which may be considered contempt of court.

- **CONSENT ORDER** - An administrative order embodying a legally enforceable agreement between the Control Authority and the noncompliant industrial user designed to restore the user to compliance status.

- **CONTROL AUTHORITY** - The entity directly administering and enforcing pretreatment standards and requirements against industrial users. For purposes of this manual, the Control Authority is an approved local POTW program.

- **CRIMINAL INTENT** - A state of mind which is a necessary element of all crimes. Criminal intent may be general (intent to perform an act) or specific (intent to break a law).

- **CRIMINAL NEGLIGENCE** - Negligence of such a character, or occurring under such circumstances, as to be punishable as a crime (such as a flagrant and reckless disregard of the safety of others or willfull indifference to the injury likely to follow).

- **CRIMINAL PROSECUTION** - A criminal charge brought by the Control Authority against an accused violator. The alleged criminal action may be a misdemeanor or a felony and is defined as willful, negligent, knowing, and/or intentional violations. A court trial-by-jury is generally required and upon conviction, punishment may include a *monetary penalty, imprisonment, or both.*

- **DEFENDANT** - The party against whom relief or recovery is sought.

- **DEPOSITION** - A discovery device by which one party addresses verbal questions to the other party or to a witness for the other party. Depositions are conducted under oath outside the courtroom, usually in the office of an attorney. A transcript is made of the deposition which may be used as evidence at trial.

- **DETERRENT VALUE** - A threat of reprisal which is sufficient to discourage the industrial user from future violations.

- **DISCOVERY** - A variety of pretrial devices used by one party to obtain relevant facts and information about the case from the other party.

- **DOUBLE JEOPARDY** - The prohibition against a second prosecution after a trial for the same offense.

- **ENABLING LEGISLATION** - A state law or charter which creates and empowers a Control Authority.

- **FELONY** - A crime punishable by imprisonment for greater than one year (depending on State law).

- **FEES** - A schedule of charges imposed to recover treatment costs (not punitive in nature).

- **FINE** - A punitive monetary charge for a violation of the law. Often used synonymously with "penalty," although the term "fine" generally implies the use of administrative rather than civil (judicial) procedures.

- **GOOD FAITH EFFORT OR PROGRESS** - Prompt and vigorous pollution control measures undertaken by the discharger which shows that extraordinary efforts (not a "business-as-usual" approach) have been made to achieve compliance.

- **GRAND JURY** - A body of citizens whose duties consist of determining whether probable cause exists that a crime has been committed, and whether an indictment should be returned against a named defendant.

- **INADMISSIBLE** - Evidence not allowed to be presented in court.

- **INDICTMENT** - A written accusation of criminal conduct by a grand jury.

- **INJUNCTION, INJUNCTIVE RELIEF** - A court order which restrains or compels action by the industrial user.

- **INTERRORGATORIES** - A discovery device consisting of written questions submitted by one party to the other party or witness.

- **JUDICIAL ACTION OR CASE** - An enforcement action that involves a court. (The action may either be civil or criminal in nature).

- **JURISDICTION** - The extent of authority of a governmental entity's power to make and enforce laws.

- **LEGAL AUTHORITY** - The source of a Control Authority's jurisdiction and regulatory powers.

- **LIBEL SUIT** - A suit against a person who is responsible for a written statement that allegedly conveys an unjustly unfavorable impression of another person.

- **LITIGATION** - An enforcement action brought in a judicial (court) forum.

- **MISDEMEANOR** - A crime punishable by imprisonment of less than one year (depending on State law).

- **NOTICE OF VIOLATION** - A Control Authority document notifying an industrial user that it has violated pretreatment standards and requirements. Generally used when the violation is relatively minor and the Control Authority expects the violation to be corrected within a short period of time.

- **NPDES (NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM)** - A permit system for the direct discharge of pollutants into U.S. waterways.

- **PENALTY** - A monetary or other punitive measure, usually associated with a court action. For purposes of this manual, the term is used synonymously with fine.

- **PLAINTIFF** - A person or organization seeking remedy from a court. For purposes of this manual, the plaintiff is the Control Authority.

- **PLEA BARGAIN** - An agreement between a prosecuting attorney and a criminal defendent whereby the defendent pleads guilty to a lesser charge and/or a reduction of sentence in exchange for cooperation in investigating or prosecuting the crime (e.g., waiving a trial).

- **PRIORITY POLLUTANTS** - A list of 126 pollutants established by EPA and considered hazardous to the environment and to humans.

- **PROPRIETARY INFORMATION** - Information about a commercial chemical, product, or process which is considered to be confidential business information or a trade secret by an industrial user because if divulged, the information could be put the industrial user at an unfair competitive disadvantage with competitors in the same industry.

- **PUBLICLY OWNED TREATMENT WORKS OR POTW** - A system of conveyances and treatment for sewage and industrial wastes. Also refers to the government officials responsible for operation and maintenance of the collection system or treatment plant and the administration of the pretreatment program.

- **REPORTABLE NONCOMPLIANCE** - Criteria for identifying when a Control Authority should be reported in the NPDES Quarterly Noncompliance Report for failure to implement its approved pretreatment program.

- **REQUEST FOR ADMISSION** - A discovery device where a written statement of fact concerning the case is submitted to the adverse party and which that party is required to affirm or deny. Those statements that are admitted will be treated by the court as having been established and need not be proved at trial.

- **REQUEST FOR PRODUCTION** - A discovery device which requests the opposing party to produce some document or thing which may tend to resolve an issue in dispute in the case.

- **SEARCH WARRANT** - A document issued by a magistrate or judge which authorizes government entry into private premises to either observe compliance with applicable laws or collect evidence of noncompliance.

- **SELF MONITORING** - Sampling and analysis of wastewater performed by the industrial user.

- **SHOW CAUSE ORDER** - An administrative order directing a noncompliant user to appear before the Control Authority, explain its noncompliance, and show cause why more severe enforcement actions against the user should not go forward.

- **SIGNIFICANT NONCOMPLIANCE** - Criteria used by Control and Approval Authorities to identify important violations and/or patterns of noncompliance. This criteria is used to establish enforcement priorities and comply with special reporting requirements.

- **STANDARD OF STRICT LIABILITY** - Liability which attaches without regard to the user's "negligence" or "intent" to violate. Noncompliant industrial users will be found liable for pretreatment violations if the Control Authority proves that a violation occurred.

- **STATUTE OF LIMITATIONS** - A law which prescribes the period within which an enforcement action may be pursued by the Control Authority.

- **STIPULATION** - A voluntary agreement between opposing parties as to facts or issues in controversy.

- **SURCHARGE** - The charge for treating excessive pollutant loadings.

- **TERMINATION OF SERVICE** - A physical blockage of the sewer connection to a noncompliant user or issuance of a formal notice of termination to the industrial user.

- **TESTIMONY** - A solemn declaration made by a witness under oath in response to interrogation by a lawyer or public official which is used as evidence.