Enforcement

As part of its implementation responsibilities, the Control Authority should establish requirements for IU pollution control, monitoring and reporting, and should incorporate these requirements into control mechanisms. Pollution control requirements should reflect Federal categorical standards, general pretreatment standards, and local limitations. Each control mechanism should enable the Control Authority to monitor and control discharges to its sewer system, implement its pretreatment program, and meet the goals of the General Pretreatment Regulations. To administer the pretreatment program efficiently, the Control Authority should have a system to determine whether IUs are complying with pretreatment standards and requirements in the control mechanisms and how and when to respond to noncompliance by IUs.

On July 24, 1990 (55 FR 30082), EPA promulgated regulations that require all publicly owned treatment works (POTWs), or Control Authorities, to adopt an Enforcement Response Plan (ERP) as part of their approved pretreatment programs, an example ERP is provided in Appendix 9-A. The regulations require POTWs to describe their compliance monitoring procedures, and use an escalation of various enforcement responses, as well as time frames and responsibilities for taking these actions. To assist POTWs in meeting this requirement, EPA, in September 1989, issued its *Guidance for Developing POTW Enforcement Response Plans*.

- The identification of the individuals or unit responsible for each element.
- Procedures for collecting and disseminating information (e.g., developing standardized reporting forms, computerizing data, notifying IUs of violations, etc.).
- A method of tracking program activities at any given time, including issuance of control mechanisms, compliance reviews, and enforcement actions.
- A system of evaluating specific activities in terms of their quality, timeliness, results, and accomplishment of program objectives.

Exhibit 9-1, ERP Provisions

The principles identified in this chapter describe the process for obtaining and evaluating information on IU compliance by identifying noncompliance, selecting an appropriate enforcement action, and resolving noncompliance in a timely, fair, and consistent manner. These principles establish a framework for managing an enforcement process, while providing the flexibility for each Control Authority to develop management procedures that best suit its operations and resources.

Throughout the enforcement process, it is important for all levels of management to be able to assess the effectiveness of the program and identify progress or deficiencies. Consequently, the Control Authority's enforcement procedures should give management the information it needs to ensure that the program makes timely decisions and successfully implements its local program. ERP provisions are detailed in Exhibit 9-1; a DEP ERP review checklist is provided in Appendix 9-B.

The foundation of a compliance tracking and enforcement system is a complete and accurate compilation of the pertinent data on all industrial dischargers to the WWF. Therefore, the Control Authority must maintain a current inventory of IUs (see Chapter 8). The IU data inventory should provide an index of the nature and type of IUs in the Control Authority system. The list can be used to plan monitoring, enforcement, and permitting activities. For each IU on the list, a separate file should be maintained to include descriptions of the facility, monitoring data, inspection reports, summaries of violations and enforcement actions, and other detailed, relevant information. This historical information should be maintained to evaluate the performance of IUs and the success of enforcement actions.

Collect and Dispense Information

To ensure that its system has the needed information and that the information is current, the Control Authority should actively manage the flow of information into its system.

The Control Authority should specify reporting requirements for the IU in the permit or other control mechanism used. The Control Authority then must track the submission of reports. If the information submitted is deficient or late, the IU should be notified and required to submit the information within a fixed time period.

The Control Authority should have an inspection plan for scheduling field investigations, which may include site visits, sample collection, facility inspections, and flow monitoring. During field investigations, IU activities and procedures, such as sample collection and plans for emergency or remedial actions, should be observed and reviewed to verify the compliance status determined from IU self-monitoring activities. Field investigations may be routine compliance monitoring or special monitoring in response to violations, technical problems, or for permit modification support. The Control Authority must plan routine field investigations and collection of wastewater samples of each significant IU <u>at least once a year</u>. The Control Authority should develop checklists and procedures for these routine visits and ensure the results of each visit are documented and IUs are advised of any deficiencies found during an inspection.

Special onsite investigations may require warrants (if entry is refused or limited), specialized sampling equipment, and additional resources. These investigations should be conducted according to established procedures. Warrants should be obtained with advice from legal counsel. The Control Authority should advise DEP of its routine and special field investigation activities each year in its annual report. The Control Authority and DEP inspectors should conduct some joint inspections of IUs to promote consistency and technical understanding of the inspection activities. These joint inspections would typically be conducted during pretreatment program audits.

Other sources of information exist that should be consulted routinely to update or add information. The Control Authority may monitor water and sewage usage, issuance of building permits, violations of other local ordinances, and local news outlets to identify changes that have occurred (or are planned

for an IU) and may affect its wastewater contribution to the Control Authority. The Control Authority should plan the receipt, processing, and retaining of routine and nonroutine data to ensure they are available when needed to make the decisions on compliance activities (such as inspections or meetings) and, if necessary, as evidence in enforcement proceedings.

The Control Authority must retain all records of monitoring activities and results for at least 3 years. This period is to be extended during the course of any unresolved litigation or when requested by DEP [paragraph 62-625.600(14)(b), F.A.C.].

In addition to collecting data, the Control Authority needs to dispense certain information. IUs must be notified of applicable pretreatment standards and hazardous waste disposal requirements under the Solid Waste Disposal Act (42 U.S.C. 6901). IUs should be continually apprised of their compliance status, changes in pretreatment requirements, the results of inspections, and other pertinent information. IUs should also be informed of the Control Authority's enforcement strategy and its general responses to noncompliance.

The Control Authority should also make a concerted effort to inform the public of the progress of its pretreatment program. As required by DEP [subparagraph 62-625.500(2)(b)8., F.A.C.], it must publish a list of IUs in significant noncompliance in the newspaper. In addition, it might undertake public education efforts in such areas as proper disposal of household chemicals, used motor oil, or fats, oils and grease (FOG).

Compliance Screening

The compliance screening process involves reviewing all available information to sort out non-complying dischargers for appropriate enforcement response. This initial review should assess, as appropriate, compliance with schedules, reporting requirements (including "slug" discharge notices), and applicable pretreatment standards. Since this step is designed primarily to identify apparent violations and not to determine the appropriate enforcement response, non-technical personnel can usually handle this review. In any case, the person responsible for screening should be clearly specified.

The screening process should verify that the reports are submitted on schedule, cover the proper time period, include all information required, and are properly signed and certified. The reviewer should compare the parameters reported, the number of measurements for each parameter, the method of analysis, the sampling procedures, the discharge concentration (or mass per day), and other information supplied by the IU with the requirements in the IU's permit or other control mechanism. Any discrepancy is a violation that the IU should be required to correct. If a report lacks a required certification or signature, it is incomplete. All alleged violations (including those arising from inspections and private complaints) should be identified by the Control Authority and recorded in a violation summary specific to each IU. This summary will serve as a log for the compliance history of the IU and the enforcement responses of the Control Authority.

The compliance screening process may also include notifying an IU when certain types of obvious noncompliance are found. For example, the Control Authority might establish procedures for routinely notifying the IU when a report is not received. This notification should include a deadline by which the IU must respond. The Control Authority should have a time frame for follow-up by screening personnel to ensure that the IU has complied.

Although all violations must be identified and responded to, Control Authorities must identify IUs in significant noncompliance and respond swiftly to the violation(s) with an appropriate enforcement action.

Enforcement Evaluation

The violations and discrepancies that were identified during the compliance screening process should be reviewed to evaluate the type of enforcement response needed. Technical personnel normally should conduct this review, although legal consultation may be necessary in some cases. EPA uses an Enforcement Response Guide (ERG) to assist in this evaluation. The guide identifies types of responses that are appropriate based on the nature of the violation (effluent: instantaneous, average or maximum limit; reporting: late or deficient; or compliance schedule: begin or complete construction); the duration of the violation; the frequency of the violation (isolated or recurring); the potential impact of the violation (such as interference, pass through, or WWF worker safety); economic benefit enjoyed by the violator and their attitude.

Control Authorities are encouraged to develop a similar type of guide for use in managing enforcement actions taken against violating IUs. An example ERG that a Control Authority might use is included with the ERP in Appendix 9-A. This example ERG should be tailored to include the enforcement for optional provisions adopted in the Control Authority's sewer use ordinance. Optional provisions, e.g. best management practice requirements or NSCIU certification requirements, are outlined in the EPA's model sewer use ordinance.

The responses available will vary among Control Authorities depending on legal authority, but will normally include informal responses and formal responses. Informal responsesmay include telephone calls, email, meetings or written notices of violation, and formal responses such as Administrative Orders with or without penalties, judicial actions, and termination of sewer service. The guide should reflect five basic concepts (Exhibit 9-2).

The Control Authority should set deadlines for the IU to respond to notification of violations and should ensure that unfulfilled due dates are noted in violation summaries. Frequently, direct contact with the IU may appear to resolve the problem. However, such contacts and commitments should be confirmed in correspondence between the parties and noted in the violation summary. Otherwise, there is no permanent record that would be necessary to enforce the commitment.

Formal Enforcement and Follow-up

A decision to seek formal enforcement is generally triggered by a failure to achieve compliance in a specified time period through less formal means, a review of the violation records, and in some cases, the advice of counsel. Formal enforcement should be considered for each violation or group of violations that satisfies the DEP definition of significant noncompliance [subparagraph 62-625.500(2)(b)8., F.A.C.].The decision to pursue formal action should be supported by a well-documented record of the violations by the IU and any prior efforts to obtain compliance on the part of the Control Authority. The Control Authority should review all records to assure that proper procedures were used to collect the information and that all contacts with the IU are recorded. If the IU has received conflicting information regarding its compliance status, the status should be clarified in writing. The Control Authority should consider a special onsite review or inspection to verify the data available, including a review of original analysis records to confirm the accuracy of information contained in periodic reports. The Control Authority may also consider a "show cause" meeting with the IU before commencing formal enforcement action. Verification of data should be completed quickly (usually within 1 or 2 weeks).

- All violations of requirements must be reviewed and responded to by the Control Authority;
- Generally, the Control Authority should notify the IU when a violation is found;
- For most violations, the Control Authority should receive an explanation and, as appropriate, a plan from the IU to correct the violation within a specified time period;
- Where the violations persist or the explanation and the plan are not adequate, the Control Authority's response should become more formal and commitments (or schedules, as appropriate) for compliance should be established in an enforceable document; and
- The enforcement response selected should be related to the seriousness and frequency of the violation(s). Enforcement responses should be escalated if compliance is not achieved expeditiously after taking the initial action. A serious initial violation requires a formal enforcement action.

Exhibit 9-2, ERG Concepts

The Control Authority should specifically designate time frames and responsibilities for initiating each enforcement action or for providing the necessary information to legal counsel and should develop its own guidance covering the form and substance of the formal enforcement action for use by the staff. Additionally, the guidance should cover procedures for escalating the action if compliance is not achieved expeditiously. The Control Authority needs to coordinate closely with the city solicitor or other counsel in developing and processing the action.

Enforcement Mechanisms

To achieve a maximum degree of compliance by IUs, Control Authorities will need to use a range of enforcement mechanisms. The range of enforcement mechanisms available will depend on the specific legal authorities the Control Authority has been given by local or State legislatures. These mechanisms may range from a simple reminder call to significant criminal penalties. In decision making, the Control Authority should recognize that some violations are also violations of Federal

(and State) law, and that under such circumstances (e.g., significant noncompliance by a major corporation with extensive resources), the Control Authority may seek the assistance of DEP. The range of available enforcement mechanisms that is generally available to an approved pretreatment program is briefly discussed as follows (example formats are included as Appendices 9-C through 9-H);

- Informal Notices to Industrial Users
  Informal notice is the least coercive of the enforcement mechanisms and rarely requires specific authority. Informal notice may consist of a telephone call or "reminder" letter to an appropriate official (e.g., plant manager or environmental coordinator) of an IU. Such a call or letter may be used to notify an official of a minor violation (e.g., a report submitted a few days late) and to seek an explanation, to suggest the exercise of more due care, and/or to notify the "violator" that subsequent violations of the same type may be dealt with more severely. Such informal notice may be used to correct minor, inadvertent noncompliance and to demonstrate that the Control Authority will note and follow-up all instances of noncompliance.

- Informal Meetings
  If a telephone call does not produce compliance or an adequate explanation of the reason for the noncompliance, a meeting between officials of the Control Authority and the IU may produce the desired results. At such a meeting, Control Authority officials might emphasize the importance of maintaining compliance. If informal meetings are unsuccessful in obtaining the firm's commitment to complying with its pretreatment obligations, the Control Authority might inform the IU representatives of stronger enforcement mechanisms that are available. The Control Authority should record all informal contacts, notices, and meetings with representatives of IUs in its violation summary.

- Warning Letter or Notice of Violation (NOV)
  The warning letter or notice of violation is a written notice to the IU that the Control Authority has observed a violation of pretreatment standards or requirements and expects the noncompliance to be corrected and explained. The warning letter, if State law provides, can also require specific corrective actions and schedules to which the Control Authority expects the IU to adhere and a statement that additional enforcement action may be pursued if corrective actions are not accomplished as scheduled. The letter should also make it clear that compliance with the requirements of the letter does not excuse previous violations.

  Such warning letters should be sent by certified mail[1] with return receipt requested. Copies should be maintained in the IU file. Certified mail will bring the notice to the serious attention

[1] The certified mail number should be recorded on the original letter, prior to making copies for internal files.

of appropriate industry officials. Moreover, the return receipt will serve as proof that the IU received the notice in the event that more formal enforcement proceedings are necessary.

- Administrative Orders

The Control Authority may wish to consider meeting with the IU or issuing an Administrative Order to "show cause" to the IU prior to taking formal enforcement action and/or to discontinuing service. Generally, the Control Authority presents facts which it believes demonstrate noncompliance and the IU is asked to "show cause" why the Control Authority should not initiate formal action or discontinue sewer service. However, this hearing is not a prerequisite to taking a formal enforcement action or to discontinuing sewer service.

Section 309(a) of the Clean Water Act authorizes EPA to issue orders, without notice or opportunity for prior hearing, requiring compliance with standards or other requirements developed under the authority of the Act. To the extent that their legal authorities allow, some Control Authorities may issue similar orders. Although the exact nature of these orders will vary among Control Authorities, they can be used to place an IU on an enforceable schedule to comply with pretreatment standards (e.g., install treatment and operate and maintain facilities), including appropriate interim limits.

- Penalties[2]

Penalties and administrative fines are tools that the Control Authority may use to enforce its local pretreatment program. Administrative fines are assessed by Control Authorities against IUs for violations and are intended to recapture partial or full economic benefit for the noncompliance. Civil penalties are normally sought by Control Authorities as a result of administrative fines topping out at a level below that necessary to recapture the benefit gained by the IU for the noncompliance and/or to recover the cost associated with damage caused by the noncompliance. Civil penalty amounts are generally limited through State or municipal laws. However, the General Pretreatment Regulations require Control Authorities to have the legal authority to seek or assess civil or criminal penalties of at least $1000 per day for each violation. The Control Authority should consider the range of options available under State law to collect penalties.

- Civil Suit for Injunctive Relief

Approved pretreatment programs must have the authority to file a civil suit against alleged violators of applicable pretreatment standards to seek injunctive relief. In a civil suit for injunctive relief, the Control Authority collects pertinent information sufficient to prove the violations at issue and turns the information over to the city solicitor (or appropriate Control

[2] Surcharges are not penalties. Surcharges should generally recover the Control Authority's cost of treatment, but they must not be used to allow discharges of toxic pollutants that cause interference or pass through

Authority counsel) for case filing. The city solicitor asks the court to order the discharger to take specific actions (e.g., comply with pretreatment requirements) or to refrain from specific actions (e.g., cease a prohibited discharge). The civil suit for injunctive relief may be used when the IU is unlikely to successfully execute the steps that the Control Authority believes are necessary to achieve or maintain compliance, when the violation is serious enough to warrant court action to deter future similar violations, or when the danger presented by an IU's noncompliance does not permit lengthy negotiation of a settlement. If the Control Authority is able to show irreparable harm to the WWF operation, its workers, or the receiving stream as a result of an ongoing IU violation, a court may issue a temporary restraining order or preliminary injunction restraining the IU from violating standards pending the outcome of the suit. Injunctive court relief may require such actions as installation of facilities needed to come into compliance, or cessation of prohibited discharges.

- Criminal Prosecution

  Section 309(c) of the Act authorizes the Federal Government to seek criminal punishment for any person who willfully or negligently violates pretreatment standards, among other standards, or for any person who knowingly makes a false statement regarding any report, application, record, or other document required by the General Pretreatment Regulations. Approved pretreatment programs may contain similar authority for the Control Authority. DEP also has this option. Therefore, a Control Authority with insufficient authority may seek the assistance of DEP in this matter.

  Several factors should be considered to determine when violations necessitate criminal prosecution. These factors include the willfulness of the violation, negligence of the IU, nature and seriousness of the offense, adequacy of the evidence, and the adequacy of penalties and sanctions available through civil or administrative enforcement actions. For criminal cases, there must be proof beyond a reasonable doubt that the violation occurred through the "willful or negligent action" of the IU[3]. Examples of criminal violations include falsification of data, tampering with results or equipment, willful or negligent failure to provide notice of slug discharges, or willful violation of a permit. All suspected instances of criminal violation should be evaluated.

  Many cases of willful or negligent noncompliance (e.g., late night dumping of toxic substances into the collection system) could seriously damage the Control Authority treatment system and the environment. Such acts should be punished severely when adequate proof exists.

[3] The CWA provides that users are held legally responsible for noncompliance, regardless of intent or negligence. This is commonly referred to as “strict liability”.

- Termination of Service
  Approved pretreatment programs must have the authority to halt immediately an actual or threatened discharge to the WWF that may represent an endangerment to the public health, the environment, or the WWF [sub-subparagraph 62-625.500(2)(a)5.b., F.A.C.]. Additionally, the Control Authority must be able to deny or condition new or increased discharges or changes in the nature of pollutants discharged to the WWF by an IU if the discharges do not meet applicable pretreatment standards or will cause the WWF to violate its NPDES permit. Use of these remedies can be effective in bringing recalcitrant users into compliance. Without sewer service, a firm may have to obtain a NPDES permit to discharge wastes directly to the waters of the United States, and thus, be required to install treatment equipment to achieve direct discharge limitations. Alternatively, the IU must either arrange for its wastewater to be hauled off or cease operations.

Approval Authority Overfiling

DEP and EPA have a responsibility to ensure that the Control Authority is effectively implementing its approved pretreatment program, including timely and appropriate enforcement of pretreatment requirements. In this role, DEP will routinely review the overall performance of the Control Authority in monitoring IUs and in enforcing regulations where violations are identified. DEP will evaluate performance based on WWF self-monitoring data, written enforcement response plans, audits, inspections, and pretreatment program reports and discuss its evaluation with the Control Authority. If an IU's noncompliance persists after notification by a Control Authority, DEP may proceed to enforce directly against the IU and/or Control Authority, where the Control Authority has not taken timely action or has failed to impose adequate sanctions. The Control Authority and DEP may jointly decide what action by DEP is preferable in a given situation. Also, EPA retains authority to take its own enforcement action if it deems action by either DEP or the Control Authority is inappropriate.

Finally, Section 505 of the Act allows citizens to file suit against a Control Authority that has failed to implement its approved pretreatment program as required by its wastewater discharge permit. A citizen may sue the Control Authority to obtain judicial enforcement of that approved program. Thus, the Control Authority may be compelled to apply standards to IUs, to enforce violations of pretreatment standards, or to otherwise implement its approved program in a court order.