Legal Authority

The ability to develop and implement a successful pretreatment program depends on adequate legal authority at the local level. Subparagraphs 62-625.500(2)(a)1.-6., F.A.C. and 40 CFR §403.8(f)(1)(i-vii) require Control Authorities (i.e., POTWs and WWFs) seeking pretreatment program approval or that have obtained program approval to have the legal authority to:

- Deny or condition new or increased contributions of pollutants, or changes in the nature of pollutants, to the WWF by IUs where such conditions do not meet applicable pretreatment standards and requirements or where such contributions would cause the WWF to violate its permit;
- Require compliance with applicable pretreatment standards and requirements by IUs;
- Control through permit, order, or similar means, the contribution to the WWF by each IU to ensure compliance with applicable pretreatment standards and requirements. In the case of SIUs, this control shall be achieved through permits or equivalent control mechanisms issued to each such SIU;
- Require a compliance schedule by each IU for the installation of technology required to meet applicable pretreatment standards and requirements, and submission of all notices and self-monitoring reports from IUs as are necessary to assess and assure compliance by IUs with pretreatment standards and requirements;
- Carry out all inspection, surveillance and monitoring procedures necessary to determine, independent of information supplied by industrial users, compliance or noncompliance with applicable pretreatment standards and requirements by IUs;
- Obtain remedies for noncompliance by any IU with any pretreatment standard and requirement; and
- Comply with the confidentiality requirements set forth in Rule 62-625.800 F.A.C. (40 CFR §403.14).

Regardless of whether the Control Authority is a single municipality or a regional sewerage authority composed of several jurisdictions, its legal authority derives from State law (general statutes). This broad legal authority allows the local pretreatment program to be tailored to individual circumstances while, at the same time, satisfying minimum Federal program requirements. When the Control Authority is a municipality, the basic implementation and enforcement requirements of its pretreatment program are detailed in a sewer use ordinance. Typically, this ordinance is part of city or county code. Regional Control Authorities frequently adopt similar provisions in the form of rules and regulations. If State law does not confer adequate authority on the Control Authority to comply with minimum Federal requirements, the Control Authority must request the State to enact or amend statutory provisions granting such authority.

Sewer use ordinances and regulations "implement" the legal authority that the general statutes confer on the Control Authority. The sewer use ordinance cannot give the Control Authority greater enforcement powers (such as higher penalty authority) than are allowed under the general statutes that created or empowered the Control Authority. Therefore, once the ordinance is adopted, it defines the Control Authority's legal authority. If an IU believes that the Control Authority has acted beyond or contrary to

its ordinance when enforcing against that IU, the IU may challenge the action in court. If, in turn, the reviewing court finds that the Control Authority has indeed acted beyond its authority or in an arbitrary or capricious manner, the court may prevent or overturn the enforcement action. Thus, the Control Authority must ensure that its legal authority is both specific and comprehensive, particularly with regard to its enforcement provisions.

EPA's Model Sewer Use Ordinance is provided as Appendix 3-A. A State of Florida's Model Sewer Use Ordinance is locate in Appendix 3-E. A public utility should not adopt the model verbatim. Instead, the model should be used as a guide for adopting new or revised legal authority to implement and enforce a pretreatment program that fulfills requirements set out in the general pretreatment regulations and the F.A.C. The EPA Model contains optional provisions that each Control Authority should consider when developing its sewer use ordinance. Optional provisions are listed in Exhibit 3-1. After developing this ordinance, the Control Authority must submit it and a statement from an attorney confirming its adequacy to DEP for review and approval. The DEP checklist for legal authority review is provided as Appendix 3-B with the checklist for the required Attorney's statement provided as Appendix 2-D. Control Authorities should periodically assess their authority to impose pretreatment requirements.

- Non-Significant Categorical Industrial Users (NSCIUs).
- Mid-Tier or Reduced Reporting Significant Industrial Users.
- Use of General Control Mechanisms.
- Grant of Monitoring Waiver for Categorical Industrial Users.
- Use of Best Management Practices (BMPs) as enforceable local limits.

Use of Equivalent Mass or Concentration for Categorical Industrial Users.

Exhibit 3-1: Optional Sewer User Ordinance Provisions

The Control Authority's sewer use ordinance must be applicable to all nondomestic (industrial) users of the Control Authority. The "Scope" or "Applicability" section of the ordinance should specify that all users are subject to regulation. The definitions of "person" and "user" should also be reviewed to determine whether they encompass all dischargers. For example, definitions of these terms in a number of ordinances fail to include "government facilities" (that is, Federal, State, or local government facilities) as part of the regulated community. Since such governmental entities are subject to the pre-treatment program, they must not be excluded from consideration as regulated dischargers. The Control Authority must revise the ordinance if it contains similar exclusions or does not explicitly address all industrial dischargers.

Sewer Use Ordinances

The General Pretreatment Regulations establish minimum Federal requirements for industrial users. While these requirements are Federally enforceable (which means that U.S. Attorneys can enforce them in Federal court), a Control Authority has the primary responsibility for implementing and enforcing pretreatment requirements. However, the Control Authority will not be able to fulfill its obligations unless these Federal requirements are specifically applied by its ordinance. For the Control Authority to successfully impose and enforce Federal pretreatment requirements in local courts, its ordinance must either include these requirements verbatim or incorporate them by reference. The Control Authority

should examine its ordinance to determine whether Federal requirements are satisfied and in which manner they are satisfied. EPA recommends that incorporation by reference be used to require compliance with categorical pretreatment standards since reiteration of these standards could be cumbersome.

Generally, a proper incorporation by reference includes specific language evidencing the intent to incorporate the standards and includes a citation to where the standards are found (i.e., "the National categorical pretreatment standards, located in 40 CFR Chapter I, Subchapter N, Parts 405-471, are hereby incorporated"). References to Chapter 62-625, F.A.C., should be made where applicable.

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 that are in existence on the date that the ordinance is adopted may be incorporated into the ordinance. For instance, an ordinance provision adopted in 1993, incorporating the Federal categorical pretreatment standards and requirements, will only effectively incorporate Federal regulations promulgated as of 1993. 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 against local industrial users. It is recommended that the Control Authority evaluate the need to reincorporate Federal and State requirements within 6 to 9 months of the effective date of new or revised categorical standards or revisions to the General Pretreatment Regulations.

In addition to including Federal requirements, the Control Authority should examine its ordinance to make sure that it clearly authorizes enforcement of more stringent discharge requirements (local limits) adopted to prevent pass through and interference. Local limits, including best management practices (BMP), become Federal pretreatment standards if properly adopted pursuant to Rule 62-625.400 F.A.C. These limits may be narrative discharge prohibitions, narrative BMPs, a set of pollutant-specific numeric limits, or a combination of all three.

The Control Authority must be confident that its choice and implementation of enforcement responses are free from procedural obstacles which could delay their swift and effective use. The Control Authority should, therefore, closely scrutinize its sewer use ordinance to identify and eliminate requirements that restrict the selection and use of particular enforcement responses. In reviewing sewer use ordinances nationwide, EPA has identified numerous procedural obstacles to enforcement common to local programs. Too often, ordinances vest enforcement authority in a single public official, such as the Mayor or the Director of Utilities, which results in extensive delays in initiating enforcement actions. While officials should be informed of enforcement activities, experience has shown that enforcement is most expeditious if it is taken by officials who fully understand the pretreatment program's goals and requirements. Therefore, it is suggested that the Control Authority make sure that its sewer use ordinance assigns enforcement authority to the "Public Utility Superintendent or his/her designee." In turn, the Superintendent should delegate the use of particular enforcement responses as appropriate.

Another common obstacle is defining the use of particular enforcement responses in too narrow a manner. For example, the ordinance should not require the use of a Notice of Violation (NOV) prior to

initiation of a more stringent response. The Control Authority must be free to use whatever action it deems appropriate as an initial action. Similarly, it should not establish a show cause hearing 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 a court order without delaying to schedule a hearing for the industrial user. However, 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 (e.g., no more than 10 days) that it is an unrealistic mechanism for effecting remedial action. The ordinance should not specify an automatic grace period between identification of the violation and issuance of the enforcement response (that is, language such as the following: "if the violation is not corrected within 15 days of being notified of the noncompliance by the Control Authority, the Control Authority may seek appropriate legal action"). Any violation by the industrial user should trigger immediate liability, and each day that a violation continues must count as a separate instance of noncompliance.

Sometimes a sewer use ordinance is written so that it restricts the Control Authority's access to information about the industrial user. For instance, it may limit the right of entry and inspection to only the pretreatment facility or monitoring areas. Control Authority personnel need access to all areas that are potentially relevant to the wastewater discharge, including areas where chemicals and raw materials are stored. Consequently, the sewer use ordinance (and discharge permit) should specify that original or duplicate monitoring records be kept by the industry and that the Control Authority may examine and copy those records.

A final obstacle commonly encountered involves provisions which operate to undermine the program or which are contrary to Federal or State law. Some examples are:

- Incorrectly designating analytical procedures to be conducted in accordance with Standard Methods, rather than 40 CFR Part 136 or equivalent method approved by EPA.
- Authorizing special agreements that waive ordinance (pretreatment) requirements. For example, this waiver should not be available for Federal standards and requirements or any local limits or other requirements designed to protect the POTW, or WWF, and its receiving stream from pass through or interference. Any waiver provision must also be in accordance with explicit procedures outlined in the ordinance.
- Failing to require significant industrial users to immediately report any noncompliance and repeat sampling for those parameters found to be in violation as required in Rule 62-625.600(6) F.A.C.
- Failing to specify authorized signatures for reports and applications submitted by industrial users. This omission may allow someone without proper authority to respond on behalf of the industrial user and submit permit applications and reports to the Control Authority. The industry would then be allowed to disavow responsibility for violations or misrepresentations in these documents.
- Failing to require a certification statement as contained in Rule 62-625.410(2)(b)2. F.A.C. for compliance reports submitted 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 that it uncovers while evaluating its ordinance. It should then eliminate these obstacles by adding, redrafting, or deleting ordinance provisions.

Multijurisdictional Issues

Many Control Authorities treat wastewater from industrial users located outside their political boundaries. These "multijurisdictional" arrangements require special legal/contractual mechanisms to ensure adequate authority to enforce program requirements. EPA has published guidance to assist Control Authorities in addressing multijurisdictional issues (1994 *Multijurisdictional Pretreatment Programs - Guidance Manual*) a copy of which is provided as Appendix 3-C. In general, multijurisdictional agreements should address the following elements:

- **Sewer Use Ordinance** The contributing jurisdiction should agree to adopt a pretreatment sewer use ordinance that is no less stringent then the Control Authority's ordinance.
- **Local Limits** The contributing jurisdiction should agree to adopt local limits for industrial discharges into its collection system that are at least as stringent as the Control Authority's local limits or should agree to specific maximum total mass loading of pollutants that the contributing jurisdiction's system will discharge to the WWF. If the contributing jurisdiction has its own WWF or is serviced by another WWF in another area, there may be a conflict in local limits. In this event, the contributing jurisdiction can adopt the most stringent local limits for each pollutant and apply these limits to all users located in its jurisdiction regardless of the WWF to which they discharge. Alternatively, the contributing jurisdiction may choose to adopt two sets of local limits and apply to each user the limit appropriate to the WWF to which the user discharges.
- **Control Mechanism** The agreement should indicate whether the contributing jurisdiction or the Control Authority is responsible for issuing control mechanisms to industrial users located within the contributing jurisdiction. If joint control mechanisms are to be issued, the agreement should indicate which party will take the lead in preparing the draft control mechanisms.
- **Transfer of Records** The contributing jurisdiction should agree to provide the Control Authority access to all records compiled as part of the contributing jurisdiction's pretreatment program activities. The agreement should also provide for notice to the Control Authority of key activities (e.g., enforcement actions and permit issuance).
- **Right of Entry/ Inspection and Sampling** The contributing jurisdiction should grant the Control Authority the power to enter facilities of industrial users to periodically verify compliance with applicable pretreatment standards and requirements. Procedures and responsibility for conducting inspections and other compliance evaluation activities should be established explicitly.

- **Enforcement** The agreement should indicate whether the contributing jurisdiction or the Control Authority has primary responsibility for enforcing pretreatment standards and requirements against industrial users located within the contributing jurisdiction. If the contributing jurisdiction has primary responsibility for enforcing the ordinance, the agreement should specify whether the Control Authority can enforce if the contributing jurisdiction fails to do so.
- **Remedies for Breach** Where the contributing jurisdiction has primary responsibility for permitting, compliance monitoring, and enforcement, it should agree that the Control Authority has the right to take legal action, as necessary, to enforce the terms of the agreement and take action directly against non-compliant industrial users in the event that the contributing municipality is unable or unwilling to do so. The agreement should also provide for remedies available against the non-complying municipality, including indemnification and specific performance of pretreatment activities.
- **Residential Areas** If no industrial users are located within the contributing jurisdiction, the agreement should state:
  (1) No industrial users are currently located within the contributing jurisdiction; and
  (2) None shall be allowed to operate unless prior notification is provided to the Control Authority and a new agreement is entered into addressing implementation and enforcement of the pretreatment program. A similar agreement might be appropriate if the only existing nondomestic users are light commercial establishments (e.g., restaurants and hotels).

A DEP checklist for evaluating the adequacy of multijurisdictional agreements is provided as Appendix 3-D.