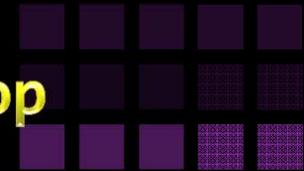


Enforcement Response Plans

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Enforcement Authority

- Derived from the Clean Water Act, 40 CFR Part 403, state law and regulations and your local program authority.
- Remember: Your local program (legal authority) is what you are bound by when taking an enforcement action.

Selected Citations: Enforcement

CFR Citation	A Few General References
40 CFR 403.8(f)(1)(vi) (A) and 53 FR 40562. October 17, 1988.	Obtain remedies for noncompliance by any Industrial User with any Pretreatment Standard and Requirement. All POTWs shall be able to seek injunctive relief, have authority to seek or assess civil <u>or</u> criminal penalties in at least the amount of \$1,000 a day for each violation.
40 CFR 403.8(f)(1)(vi) (B)	<p>The POTW shall have <u>authority and procedures</u> to immediately and effectively halt or prevent any discharge of pollutants which reasonably appears to present an imminent endangerment to the health or welfare of persons.</p> <p>The POTW shall also have authority and procedures to halt or prevent any discharge to the POTW which presents or may present an endangerment to the environment or which threatens to interfere with the operation of the POTW.</p> <p>EPA or the state shall have authority to take a separate action where a POTW has not issued adequate penalties.</p>

Selected Citations: Enforcement

CFR Citation	A Few General References
40 CFR §403.5(e)	If, within 30 days after notice of an Interference or Pass Through violation has been sent by EPA to the POTW, and to persons or groups who have requested such notice, the POTW fails to commence appropriate enforcement action to correct the violation, EPA may take appropriate enforcement action under the CWA.
40 CFR 403.8(f)(1)	The POTW shall operate pursuant to legal authority enforceable in Federal, State or local courts, which authorizes or enables the POTW to apply and to enforce the requirements of the CWA.
40 CFR 403.8(f)(2)(vii)	Investigate instances of noncompliance with Pretreatment Standards and Requirements. Sample taking and analysis and the collection of other information shall be performed with sufficient care to produce evidence admissible in enforcement proceedings or in judicial actions;

Selected Citations: Enforcement

CFR Citation	Enforcement Response Plans (ERPs)
<p>40 CFR 403.8(f)(5)</p> <p>And</p> <p>55 FR(142) 30082. July 24, 1990.</p>	<p>The POTW shall develop and implement an enforcement response plan. This plan shall contain detailed procedures indicating how a POTW will investigate and respond to instances of industrial user noncompliance. The plan shall, at a minimum:</p> <ol style="list-style-type: none"><li data-bbox="625 613 1711 716">1. Describe how the POTW will investigate instances of noncompliance;<li data-bbox="625 786 1913 1003">2. Describe the types of escalating enforcement responses the POTW will take in response to all anticipated types of industrial user violations and the time periods within which responses will take place;<li data-bbox="625 1073 1822 1175">3. Identify (by title) the official(s) responsible for each type of response; and<li data-bbox="625 1245 1772 1398">4. Adequately reflect the POTW's primary responsibility to enforce all applicable pretreatment requirements and standards.

Enforcement Response Plans (ERPs)

CFR Citation	Enforcement Response Plans (ERPs)
<p>Preamble</p> <p>62 FR (137) 38406. July 17, 1997.</p>	<p>The ERP is a standard operating procedure (SOP). They cannot be used to create additional enforcement authority or make existing enforcement authority less stringent.</p> <p>If there is a conflict between the ERP and the legal authority, the legal authority takes precedence and the ERP must be changed.</p> <p>Because the ERP is a SOP and only reflects existing approved legal authorities and procedures, EPA does not foresee changes to this document as being deemed “substantial” by EPA or states.</p>

POTW Legal Authority Enforcement Provisions

Legal Authority Note

In your legal authority, it must state that taking one enforcement action does not prevent the municipality from taking other types of enforcement actions for the same violation (as allowed by law). This would mean that by issuing a Notice of Violation, the City may also issue an Administrative Order, Penalty Order, etc. for the same violation.

Note: 40 CFR Part 403 only requires a municipality to have civil or criminal enforcement authority and injunctive relief. Other informal and formal enforcement actions are not required by the regulations. However, from a management standpoint, administrative actions are smart options.

Type of Enforcement Responses

Enforcement Activities Not Typically in Legal Authorities

Meetings with Industrial Users (Should be documented in the ERP). Always suggest that the POTW have more than one person present at such meetings. Meeting notes should include the approval of each POTW representative at the meeting.

Phone calls (Should be documented and in the ERP). Do not require anything verbally without backup in writing.

Submittal of Compliance Schedules (outside of a formal enforcement action or permit). These are enforceable. Happens most often as a result of an NOV or meeting. Document.

Email inquiries/follow-up (Should be documented and in the ERP).

Important: All submittals by a regulated user, not just self-monitoring reports, need to include the signatory certification statement (40 CFR §403.6(a)(2)(ii)) by the Authorized Representative.

POTW Legal Authority - Informal

Notice of Violation/Letter of Violation: Typically issued within a few days of identifying a violation. It will provide the specifics of the violation, section of legal authority violated, and often requires the violator to respond within 5 days.

Annual publication of SNC status: This cannot be used to satisfy an acceptable enforcement response by a POTW. This is specifically designed to meet public participation and notification requirements. It may occur long after the violation.

Note: The Federal regulations only dictate that you must be able to enforce your program, issue civil or criminal penalties of at least \$1000 per day per violation, are able to seek injunctive relief and halt certain discharges. All the other enforcement options are by your choice.

POTW Legal Authority - Formal

Administrative Order, Cease and Desist Order: These orders will cite the violations and require specific actions to be taken by the user in a specified timeframe. This is the most common formal enforcement response for SNC violations.

Consent Order: Issued by the municipality and reflects an agreed on settlement of violations, penalties (assessed and/or stipulated), compliance schedules, etc. with an industrial user. This is typically not a “timely” action and is subsequent to the issuance of an administrative order.

Show Cause Hearing: This is where the violator is ordered to appear before a board, city council or review committee. This Hearing is typically allows the POTW to present the alleged violations and the industrial user to present its defense. There is a final ruling and some type of transcript should be employed. This is more typically the result of continuing violations, after issuance of other formal actions, and may be the result of an appeal of another enforcement action.

POTW Legal Authority - Formal

Penalties: Administrative and Civil. The general process for applying these penalties is a part of your ERP (keep it general and flexible). Including specific language in your legal authority for administrative penalties is strongly recommended to streamline enforcement and minimize the resource drain of a civil action.

Permit Revocation: The legal authority must spell out the conditions that result in permit revocation. Does not typically result in physical disconnection from the sewer system (this is an administrative action removing their authorization to discharge). This needs to be done “cleanly” since this will impact a business to a greater degree than a monetary penalty.

Suspension of Sewer Service: This would be the physical disconnection of service. POTWs need to be aware of other provisions in their legal authority establishing a right of discharge for domestic-only waste. This may require that all physical connections to the sewer that allow for discharge of non-domestic waste be temporarily or permanently severed while allowing domestic-only waste to be discharged.

POTW Legal Authority - Formal

Injunctions/restraining orders: These are issued by the Court. Used when the municipal attorney wants the court to take an action or prohibit an activity. This will often be just one of a series of enforcement actions against a user.

Emergency Orders: Imminent Endangerment to Health of Persons, the POTW or the Environment. May include concurrent actions of obtaining injunctions, permit revocation, and suspension of service. Not commonly adopted by POTWs. However, may be used to provide specific notice to an industrial user.

Criminal Action: Let the state or EPA do this unless you can meet the requirements of evidence collection, documentation, etc.

Remember: Civil litigation is to prove by the preponderance of the evidence whereas criminal prosecution is to prove beyond a reasonable doubt.

Criminal Prosecution

Section 309 (c) of the CWA authorizes the Federal Government to seek criminal punishment for any person who willfully or negligently violates Pretreatment Standards, or who knowingly makes a false statement regarding any report, application, record or other document required by the POTW Pretreatment Program. POTWs draw their authority from state law.

POTWs do not generally have the experience (city attorneys and pretreatment programs) to prosecute CWA criminal cases. In addition many programs do not have procedures in-place that assures data collection and documentation would meet the stringent evidence requirements required by courts. POTWs are advised to consult state or EPA criminal investigation agencies when criminal activity is suspected (the POTW can do a concurrent administrative or civil case).

POTW Legal Authority - Formal

Important Consideration

Suspension of Water Service

Some POTWs have adopted this as a response to a violation. I understand that it sounds good. However, I would recommend that the municipality consider potential liability of doing this. If water service is disconnected and a fire breaks out at the facility, the sprinkler systems may be compromised (hate to see the fire spread to other adjacent buildings). If there is a cooling system that is reliant on domestic water and the lack of water causes catastrophic failure, it would be of concern.

I have a hard time viewing this as a response to a violation of a sewer discharge when terminating sewer service will protect the POTW.

The one time that I can see this as a legitimate action is where the industrial user creates a hazard by not installing backflow prevention and termination of water service will protect the drinking water system from potential impact.

Appropriate Responses to Violations

- ❑ Every violation must have a response (and follow-up)
- ❑ Every response must be timely and appropriate.
- ❑ Every response must be documented.
- ❑ If a User has a violation that results in Significant Noncompliance (SNC) a formal enforcement action should be undertaken.

Enforcement Response Plans and Approval Authorities

- EPA and states will hold you to what you have written in the ERP. So will defense attorneys. If you lock yourself into a specific response, you will remove the POTW flexibility and incident specific response that EPA discussed in the preambles to its rulemaking.
- If you create an enforcement response in your legal authority, it must be reflected in your ERP.
- ERPs cannot create new enforcement authorities not already in your legal authorities.

Enforcement Response Plan Components

1. Specific reference to the POTW Legal Authority.
2. Description of how the POTW will investigate instances of noncompliance (general brief, discussion of compliance monitoring, self-monitoring, inspections, etc). Do not establish mandatory, set-in-stone requirements for the POTW.
3. Describe the types and range of enforcement responses for violations, incorporate enforcement escalation for continuing violations, and timeframe for responses.

Note: Timeframes have to be consistent with your legal authority. If timeframes are not in your legal authority, be sure to indicate these are general timeframes (don't lock yourself in).

4. Identify who develops, reviews and signs each type of enforcement actions.
5. Penalty Policy (not specifically required).
6. Settlement Policy (not specifically required).

Typical ERP Table of Contents

Background

Compliance and Enforcement Responsibilities

Enforcement Authorities and Responsibilities

Enforcement Response Guide

Penalty and Settlement Guide

Definitions

If your ERP is longer than 30 pages, you really need to evaluate what is in the ERP. Complexity creates confusion. Confusion creates litigation considerations. Litigation considerations kill enforcement cases. So much for that anticipated raise or promotion!

Example: Section 1 Background

Reference to your legal authority.

Cite objectives of ERP (e.g. consistency of response, return to compliance, penalizing non-compliant users, deterring future violations, etc.).

Cite general enforcement concepts (e.g. all violations receive a response, all SNC get formal action, as violations continue enforcement escalates, etc.).

Example: Section 2 Compliance and Enforcement Responsibilities

Authority to Implement ERP – good time to make sure you have the ERP incorporated by reference or have correctly cited all applicable legal authority program sections.

List and short discussion of compliance oversight methods (e.g. scheduled, unscheduled, on-demand, etc).

Short section on compliance monitoring (e.g. municipal oversight, industrial user, etc.).

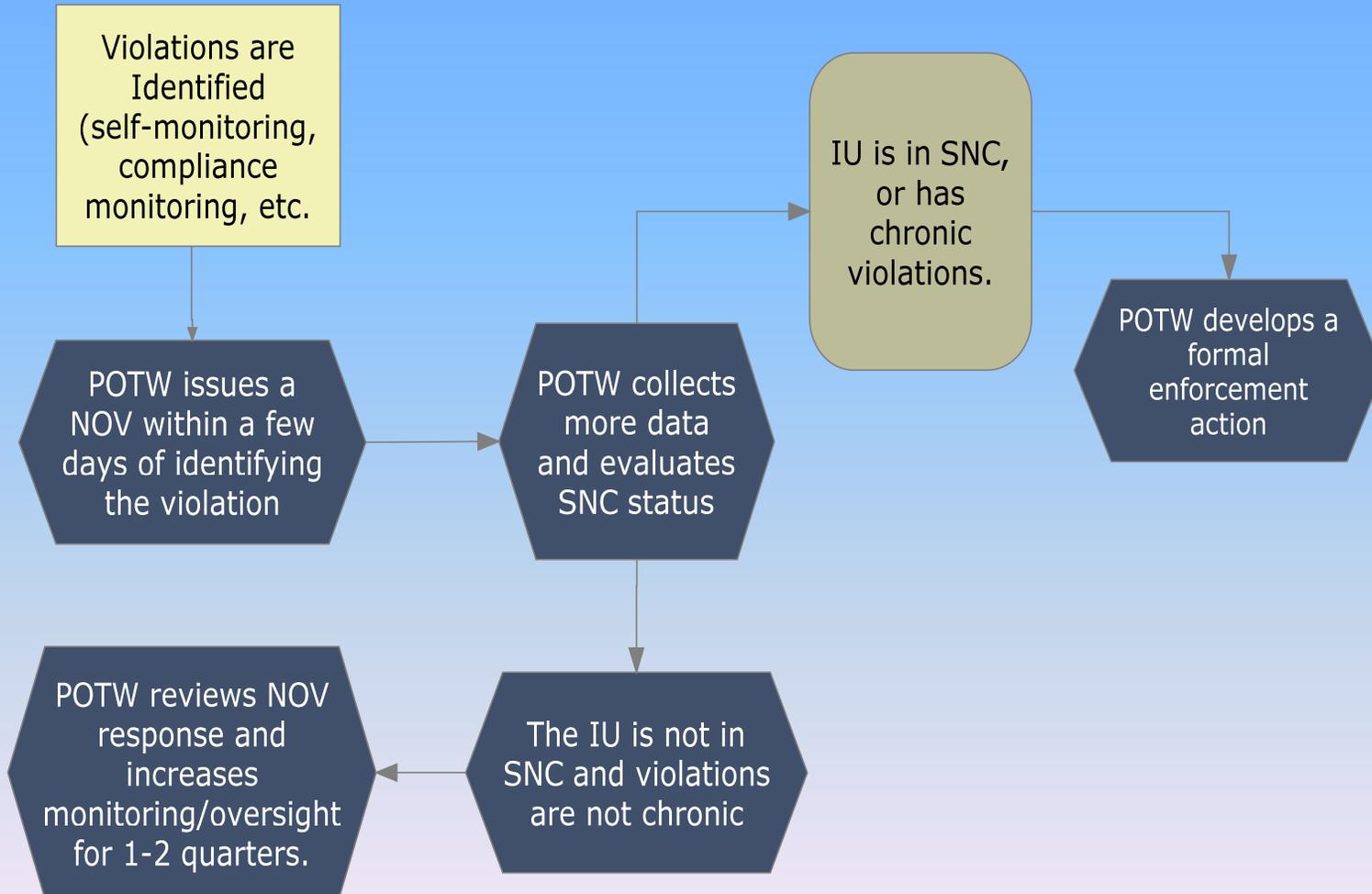
Staffing and Responsible Officials. Who does what? What levels of staff and management are involved. Do this by position title.

Example: Section 3 Enforcement Authorities and Responsibilities

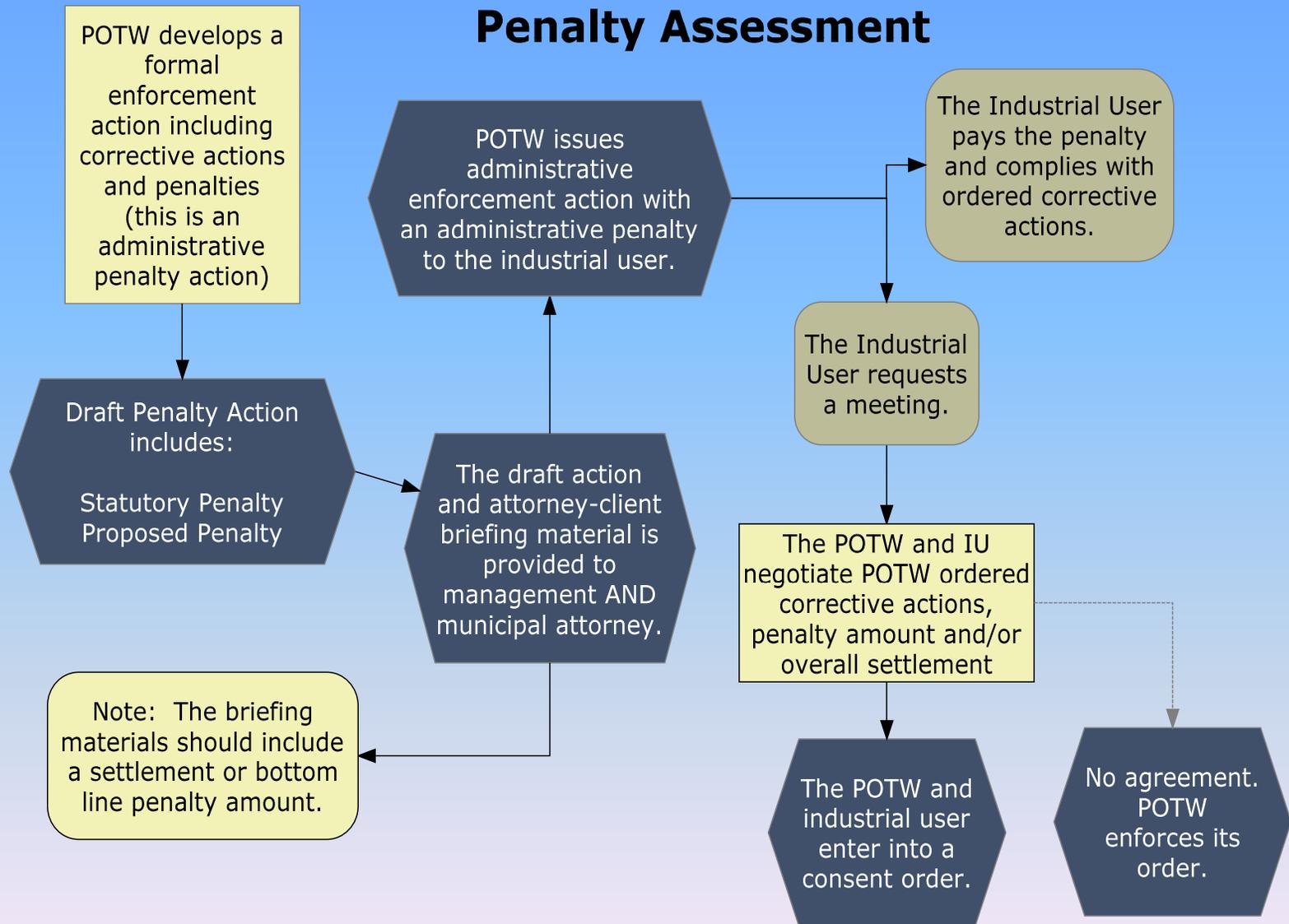
This is a good place to list all the informal and formal enforcement authorities you have. Should reflect your legal authority.

It is OK to include informal responses (e.g. meetings, phone calls, email, etc.) here even if not in your legal authority. These actions are viewed as records (must document and keep in file), but are not used to direct actions to be taken by the Industrial User. If you are going to direct the Industrial User to do something and enforce if they don't, put this in a response that is in your legal authority (compliance schedule, AO with compliance schedule, permit compliance schedule, consent order, etc.).

Typical Enforcement Process



Typical Enforcement Process - Penalty Assessment



Example: Section 4 Enforcement Response Guide

This is typically the table everyone remembers seeing. It is important to continue to communicate that taking one enforcement action does not prevent the municipality from taking another action. Further, the municipality may take an immediate and formal action, including penalties, for a first violation.

Do not lock yourself into one action, or taking actions in a stepwise manner or responding to violations within a certain timeframe. For the latter, the table heading should read similar to “Typical timeframe for initiating the enforcement response”.

Example: Section 5 Penalty and Settlement Guide Optional and Sometimes a Separate Document

This section uses the legal authority administrative penalty authority (e.g. up to \$1000 per violation per day....).

There is no regulatory requirement on how to calculate and/or issue penalties. If the penalty is not appropriate (e.g. lets the user gain economic benefit), EPA or the state may take a separate action.

EPA has developed penalty policies for internal use (see at end of talk). The policies may be too complex for POTWs to follow. There is nothing wrong with simplifying to make penalty calculations easier to complete (recommend).

The following slides are use the EPA policies as a basis for penalties, but have modified for pretreatment.

Types of Penalties in an Enforcement Action

1. Statutory Maximum Penalty
2. Proposed Penalty
3. Bottom-line or Minimum Settlement Penalty

1. Statutory Maximum Penalty = Maximum penalty authority x # of violations (last 3-5 yrs)

Records retention refers to 3 years. However, 5 years (28 USC 2462) is what is often used because this is how long regulators can generally go back on prosecuting past violations. This amount may be included in the penalty order for impact, but should definitely be included in the management/legal briefing notes.

2. Proposed Penalty: This is the penalty that the POTW has determined is appropriate for the violation(s). This is included in the penalty order/civil action.

Types of Penalties in Enforcement Actions

3. Bottom-Line or Minimum Settlement Penalty.

This generally reflects the economic benefit plus a punitive penalty and is not generally disclosed to the violator (enforcement sensitive/attorney-client confidential).

However, I have found that where a case can settle quickly (saves resources), the industry immediately returned to compliance, has been cooperative and did not cause "harm", keeping this information "secret" is not always the best approach (only the amount, not the calculations and adjustment factors). Useful where the IU has countered with a penalty that is less than, but close to, the proposed penalty.

For EPA, the following is their position: *"The bottom-line figure resulting from application of this Section 311 civil penalty settlement policy and the specific calculation that led to it are not public. Each is privileged, enforcement-confidential information. It is work product developed for negotiation purposes, and should not be shared with administrative judges, respondents or defendants, or the public."*

Negotiating Penalties

Many industries will argue that if you penalize them, they will be forced to shut down. I have had this happen on many occasions. Considerations:

1. You can require them to submit all their tax returns for the last 3 years and have a business tax expert evaluate ability-to-pay.
2. If a business is really that marginal (where a penalty will put them out of business) something else will probably cause them to shut down. Additionally, if they are arguing that they cannot even pay economic benefit (from non-compliance) how much comfort does the POTW have that they will be able to consistently comply in the future and dedicate required resources? There are always businesses that should not be in operation. The POTW has to honestly evaluate these concerns.
3. If you grant them relief for ability to pay, are they going to continue to use that precedent whenever they violate and treatment is ordered or penalties assessed? Do these continuing violations become knowing violations and require criminal enforcement? What is the POTW's plan to address this situation?

The POTW Penalty Policy Components

The POTW should formally establish a formal penalty policy. The following factors that may be considered in penalty actions and addressed in a penalty policy:

1. Economic Benefit
2. Seriousness of the violation
3. History of noncompliance
4. Cooperativeness
5. Environmental and Health Impacts (sewer system impacts)
6. Penalty Reduction Factor for Small Facilities
7. Quick Settlement Adjustment Factor
8. Litigation Considerations

The POTW Penalty Policy Components

1. Economic Benefit

Economic Benefit is the savings (cost plus interest) to the user from not installing treatment, instituting source control, or otherwise taking steps to mitigate the violations. Approval authorities will generally expect a POTW collect this amount in cash, at a minimum.

EPA states that “Every effort should be made to calculate and recover the economic benefit of noncompliance”. It is important to make sure a violator does not benefit from its noncompliance. Delayed and avoided costs include:

- ✓ Monitoring and reporting costs (Easy to Calculate)
- ✓ Avoided permit fees or other pretreatment fees (Easy)
- ✓ Capital equipment improvements or repair. (Harder to calculate avoided cost. Tougher to calculate delayed costs).
- ✓ O&M costs avoided (Relatively Easy)

The POTW Penalty Policy Components

Gravity Components

2. Significance of the Violation

This factor is used to increase the amount of the penalty based upon how significant the effluent violations are (monthly more serious than daily, how much above the limit the violation was, whether it was for a toxic pollutant or a conventional pollutant, etc).

Example: The POTW increases the bottom-line penalty amount 50% due to 6 months of chronic violations of a toxic pollutant limit over the last 12 months.

The POTW Penalty Policy Components

Gravity Components

3. History of noncompliance

This factor is used to increase the amount of the penalty based upon how many violations are identified. This is where the POTW may increase the penalty for chronic violations and/or continuing SNC.

Example: The POTW could establish a range of 0-50% increase in the penalty (e.g. 20% increase in penalty for each quarter the IU is in SNC).

The POTW Penalty Policy Components

Gravity Components

4. Cooperativeness

Based upon a violator's bad faith to comply with or an unjustified delay in preventing, mitigating or remedying the violation.

Example: The industrial user has continued to violate, has not installed treatment or prevented violating wastewater from being discharged or has continued to fail to report: The POTW increases the penalty up to 100% based upon this factor.

The POTW Penalty Policy Components

Gravity Components

5. Environmental and Health Impacts (sewer system impacts)

If actual harm to human health or the environment occurred (interfering with drinking water, fishing, caused the POTW to violate toxicity test, caused the POTW to exceed a permit limit or water quality standard, caused sewer line corrosion, etc) the penalty would be increased.

Example: The POTW increases the penalty 100% due to the industry causing Pass Through.

Settlement Adjustment Factors

Penalty Reduction Factor for Small Facilities: Does not apply to facilities if the facility or parent corporation employs >100 employees. May also include consideration of small facility flows. There is no specific reduction percentage associated with this factor, but any reduction should be documented in the confidential enforcement file.

Example: Industry is a metal finishing industry (phosphater of mild steel). The IU violated zinc – no impact, SNC because they monitor once per six months, they immediately change from zinc phosphate to iron phosphate, no pH issues, no late reports, etc. The POTW reduces the penalty by 10% because the facility has few employees and has a very small flow.

Settlement Adjustment Factors

Quick Settlement Adjustment Factor

This provides an incentive for violators to negotiate quickly and be reasonable in getting settlements finalized. A quick settlement saves the regulatory agency (POTW) significant resources and really is worth something.

Example: The POTW lets the IU know that a quick settlement will have a favorable impact the final penalty. The IU agrees to FAST settlement (and compliance). The POTW decreases the penalty by 10%.

Settlement Adjustment Factors Litigation Considerations

No enforcement case is without potential litigation considerations. The POTW should recognize these and consider these factors in a settlement penalty calculation. Some relevant factors include:

- a. Known (suspected) problems with the evidence
- b. Credibility or reliability of the witnesses
- c. The informed, expressed opinion of the judge
- d. The past record of the judge or hearing officer
- e. Statements by regulators that led defendant to believe it was complying
- f. Past penalty payments for the same violations (reduces penalty)
- g. New case law

Note: The failure of the POTW to initiate a timely enforcement action, by itself, is not a litigation consideration. There is no hard and fast percentage reduction associated with this. It is based upon research and **experience**. However, it is important for the POTW to recognize these (enforcement confidential/work product/attorney-client confidential file).

Settlement Process

1. The POTW has calculated the statutory maximum and the proposed penalty.
2. The enforcement action and penalty are issued.
3. The industry agrees to comply with all actions that are ordered.
4. The industry counters with a settlement penalty that is significantly below the proposed penalty.

Note: The POTW could reject any counteroffer and demand full payment of the proposed penalty. That is a good approach where you do not mind going to hearing or court. However, there are a lot of advantages to settling a case without expenditure of resources for litigation. As you develop your case, you may find weaknesses that you had not previously identified

Settlement Process

5. The POTW does not like the industrial user's offer and the POTW makes one final counter offer (and states this is final). The POTW informs the industry that you appreciate their willingness to negotiate, but the POTW believes it has fairly evaluated the violations and the penalty is appropriate.

Note: If a facility is recalcitrant, negotiating a penalty may be inappropriate. There is no requirement to negotiate a penalty.

6. The POTW issues the action final and tracks compliance.

Other Options: Supplemental Environmental Projects

EPA has a relatively stringent application of SEPs in settling enforcement cases. Pretreatment programs have more flexibility to determine what is correct for them (may be limited by state law).

If a POTW wishes to use SEPs, consult the EPA SEP document, get examples and talk to your Approval Authority. The SEP will be designed to have a nexus with the Pretreatment Program and the violation.

SEPs are used to offset penalty amounts (e.g. for every \$1 the penalty is reduced, the violator spends \$2-\$4). SEPs should not be used to offset the cost of required treatment or other actions that the violator must take to come into compliance.

Example: Section 6 Definitions

These are up to the POTW. If you want to distribute this document, it is worthwhile providing definitions of specific legal authority references for the terms. Not required.

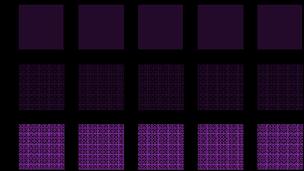
Selected References

EPA. Interim CWA Settlement Penalty Policy: March 1, 1995

EPA. Issuance of Final Supplemental Environmental Projects Policy: April 10, 1998

EPA. Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the CWA: August 1998.

Questions?



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