

**POTW Legal Authority
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Legal Disclaimer

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Type of Document	Enforceability
Clean Water Act	Yes
EPA or state regulations	Yes
Policy	Yes: If public noticed for comment No: If no public participation
Strategy	No
Guidance	No
Approved Pretreatment Program	Yes: Public Noticed
POTW Legal Authority	Yes: Public Noticed
Local Limits	Yes: Public Noticed (EPA, state or municipal city council/board process)
Industrial User Permits	Yes: Authority established in legal authority
Inspection Required Actions	Yes: If required actions are based upon enforceable requirements.
Inspection Recommended Actions (POTW, EPA, state)	No
Sector Control Programs (FOG, Mercury, Silver)	Yes, if public participation was allowed No, if there was no opportunity to comment



POTW Pretreatment Programs (approved and non-approved)

Activity	Approved Programs – Required?	Non-Approved Programs – Required?
Adequate Funding	Yes	No, but have to get required items completed.
Local Limits to be established	Yes	Yes, as needed.
Inventory of non-domestic users	Yes	Yes (Categorical and non-Categorical SIUs)
Legal Authority	Yes	Yes – to allow POTW to do required activities
SOPs (ERPs, IWS, etc)	Yes	As needed
IU Permits	Yes	No
Enforcement against non-domestics	Yes	No: Unless causing Pass Through or Interference or a violation of the Specific Prohibitions. State or EPA is the Control Authority.

Part 403 cities for POTW Legal Authority

CFR Citation	Description
40 CFR §403.8(f)(1)	Consistent with Federal, State and local law. Must be included in statute, ordinance, contracts, or joint powers agreements. Must allow POTW to deny or condition discharge of pollutants where Pretreatment Standards are not being met or the POTW NPDES permit to be violated.
	Require compliance with Pretreatment Standards and Requirements.
	Control through permit, order or similar means discharges to the POTW by non-domestic dischargers. This is mandatory for SIUs and permits must have minimum specific Pretreatment Standards and Requirements.
	Require enforceable compliance schedules for the installation of treatment to meet applicable Pretreatment Standards and Requirements.



Legal Authority Cite: Legal Authority

CFR Citation	Description
40 CFR §403.8(f)(1) (continued)	Authority to require each Industrial User to submit self-monitoring reports and other reports.
	Authority to enter property for the purposes of inspection and sampling.
	Take enforcement for violations of Pretreatment Standards and Requirements. Civil <u>or</u> criminal enforcement authority. Must have ability to seek injunctions.
	Authority to address potential imminent endangerment to health and welfare of persons. Additional authority to halt a discharge that presents or may present an endangerment to the environment or threatens the operation of the POTW.
	Adopt confidentiality requirements that are consistent with state law and 40 CFR 403.14.



POTW Legal Authority

City = Ordinance
District = Rules and Regulations

Both are the same regarding enforceability and both require that administrative procedures are followed when adopting.



POTW Legal Authority

For states that have been authorized, the POTW legal authority is based upon state law. Many authorized states incorporate 40 CFR Part 403 by reference, so POTWs tend to reference the Part 403 regulations.

For states that have not been authorized, the POTW legal authority is based upon 40 CFR Part 403 and state law (e.g. confidentiality, penalty authority are the most common items from state law).



General Considerations when Revising Pretreatment Legal Authorities

1. Do not use another POTW's legal authority as a boilerplate (may be good to review).
2. Do not use EPA's model legal authority without reading specific paragraphs first (errors were not corrected before publication). However, this model legal authority will provide a good framework for your legal authority.
3. As with local limits, do not get carried away. You have to enforce everything that is included.
4. Do not "*create*" definitions that are defined elsewhere.
5. Learn what is required and what is optional to incorporate (if you want to adopt optional Pretreatment Streamlining items, ask for advice or check your sanity).



General Considerations when Revising Pretreatment Legal Authorities

6. Use the opportunity to organize all pretreatment program requirements into one article, chapter, etc. (e.g. Chapter 13.07)
7. The more complex you make your legal authority, the more resources you need to allocate for implementation.
8. Incorporate specific Federal Standards (or applicable state standards) by reference (e.g. Categorical Standards, Part 136 test methods, FDF, Removals Credits, Combined Wastestream Formula, Net/Gross, Bypass, Upsets, etc). Language needs to be clear that it is being incorporated by reference and a specific citation included. Generally no prospective incorporation by reference (has to be as of the date of the legal authority, not into the future).



Public Participation

Clean Water Act, Section 101(e): Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan or program established by the Administrator or any State under this Act shall be provided for, encouraged and assisted by the Administrator and the states.

The Administrator, in cooperation with the States, shall develop and publish regulations specifying the minimum guidelines for public participation in such processes.



Public Participation for Pretreatment

Where Does it Occur?

1. This includes the publication and readings through your City Council or Board (1st and 2nd reading). This is a public process and allows interested parties to comment.
2. Substantial modifications: The Approval Authority public notices changes allowing interested parties to comment.
3. Non-substantial modifications: Limited to reallocation of the approved Maximum Allowable Industrial Loading.

From a practical standpoint, it is much easier to enforce a permit or control mechanism where a POTW can demonstrate that a User has been provided the opportunity to comment.



Specific Notice

Specific notice relates to how the User is informed of applicable requirements. There are three areas that POTWs typically incorporate specific notice:

1. Public participation when adopting/revising legal authority.
2. When permitting industrial users or applying BMPs.
3. Other notifications (e.g. newspaper notices, direct mailings, etc.) to individual Users of their responsibility (i.e. notify IUs of applicable Pretreatment Standards and Requirements and RCRA reporting requirements).



Due Process

Public participation, the opportunity to comment and specific notice must follow established administrative procedures (adopted by your municipality, the State and EPA).

Failure to provide due process can result in Constitutional challenges to your program and compromise enforcement actions. This can result in significant liability.



Due Process

Changes that make it more stringent require you to provide specific notice and opportunity to comment by interested parties. This is because to “take” someone’s property (money) through enforcing regulations (penalties), you have to provide for an opportunity to comment on new Pretreatment Standards and Requirements.

When modifying your legal authority, follow the general concept:

If you are going to enforce something with the possibility of penalties for violations, make sure you have included a public participation process into the development of these requirements. City Council/Board readings meet this requirement. The EPA/state public notice satisfies these requirements. Think about your FOG programs if not included in your legal authority.

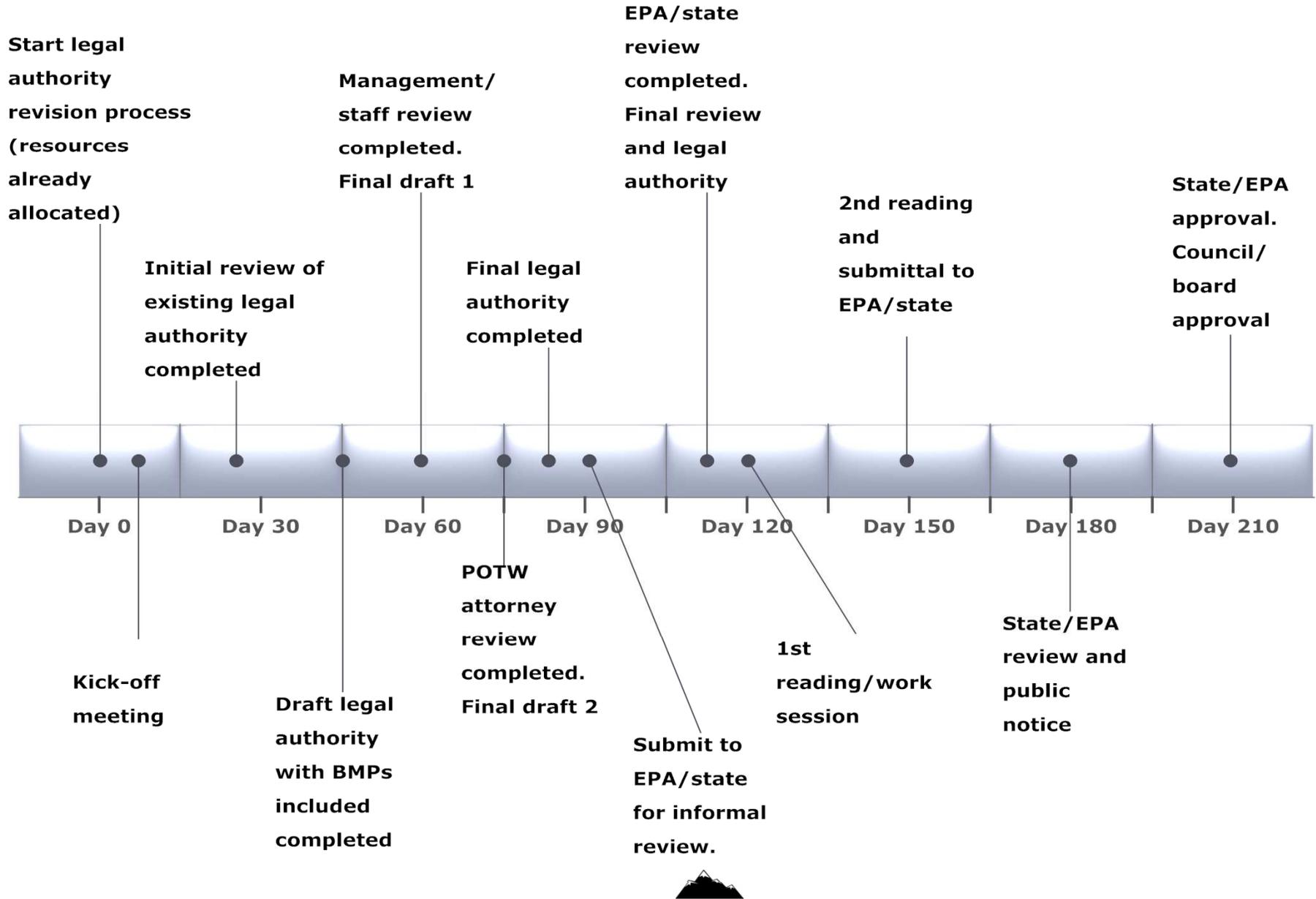


Management Issues for Revising Legal Authority

- 1. Define tasks and timeframes.**
- 2. Allocate time and resources to do the work.**
- 3. Establish lines of communication.**
- 4. Stay organized and focused (maintain timeframes).**
- 5. Identify and anticipate conflict.**



Legal Authority Development Timeline



POTW Rights, Responsibilities, and Liability

The Approval Authority makes the following decisions:

1. Is the legal authority consistent with state and Federal statute and regulations?
2. Will the approval assure the objectives of the 403 regulations are implemented?

Remember: The POTW, not EPA or the state, will have to defend the legal authority if challenged. State and EPA cannot be relied upon to provide regulatory support in a court action (their legal counsels will not allow them to testify for the POTW in Court).

Typical Structuring for Legal Authority Organization

1. Definitions and Abbreviations
2. Applicability and Objectives
3. Regulation of Industrial Users from Outside Jurisdictions.
4. Responsibility and Authority of the City/District
5. Prohibited Discharges and Limitations
6. Pretreatment and Monitoring Facilities
7. Industrial Discharge Permitting
8. Recordkeeping
9. Confidential Information



Typical Structuring for Legal Authority Organization

9. Special Agreements and Contracts
10. Sample Collection and Analytical Methods
11. Reporting Requirements
12. Right of Entry
13. Search Warrants
14. Sector Control Programs
15. Program Cost Recovery
16. Compliance and Enforcement
17. Affirmative Defenses to Discharge Violations



THE FOLLOWING SLIDES

The following slides reflect what POTWs typically forget or do not consider when drafting language. The slides DO NOT include any discussion or reference to what the viewer may consider standard language.



Definitions and Abbreviations

Make sure definitions are consistent with 40 CFR Part 403.

Eliminate outdated definitions (e.g. Monthly Average, Significant Violator, etc.).

For definitions that are not EPA definitions, use scientifically/legally accepted definitions.



Applicability and Objectives

Include EPA Objectives (§403.2)

Good place to include statement that non-domestic users cannot discharge process or sanitary wastewater to storm sewer systems or natural waterways.

May want to include Owner/Tenant Responsibility to comply and be held responsible.



Regulation of Outside Users

Define Outside Jurisdictions and Intergovernmental Agreements (IGA).

Define IGA content.



Responsibility and Authority of the City/District

Establishes authority of City/District and delegates authority to a specific management position.

The City/District shall attempt to notify IUs of applicable Standards and Requirements and RCRA.

Requires an SIU to apply for and receive a permit whether or not identified and formally requested to do so.

If wastewater containing pollutants, including excess flow, are discharged or proposed to be discharge, the City/District may take any action (define options).



Prohibited Discharges and Limitations

General and Specific Prohibitions: Include all from §403.5

Before including any others, review and decide whether or not you would be will to enforce. There are good ones to include.

Upper pH: Decide if needed (or maybe set at pH 12.5).

Local Limits: Make sure that you clearly define who the limits apply to (e.g. SIUs only, permitted IUs, etc.).



Pretreatment and Monitoring Facilities

Include treatment required, wastewater discharge control, flow equalization, monitoring facilities, multitenant buildings, and metering (pH, flow and LEL).



Industrial Waste Discharge Permits

Bring in Other Industrial User as an optional sector you may apply permits to.

Permit application: Good to use BMR contents as the basis for defining content.

Adopt permit administrative extension language.

Criteria that drive permit modification and revocation should be clearly defined.



Recordkeeping

Define “reports deemed submitted” by using date postmarked or date of receipt if hand delivered.

Confidential Information

Cite your state Open Records Act.

Make sure it is consistent with §403.14 AND state law.



Special Agreements and Contracts

Politicos love this authority, so make sure the language does not allow or cause:

1. Any adverse affect to the POTW;
2. A violation of the POTW NPDES permit;
3. A violation of a general or specific prohibition;
4. A MAIL to be exceeded for any local limit;
5. A violation of a federal or state law; or
6. Any waiver of applicable Categorical Standards.



Sample Collection and Analytical Methods

Include the Pretreatment Streamlining definitions for sample type (§403.12)

Incorporate 40 CFR Part 136 by reference.

Good place to define what analytical records from IUs must contain.



Reporting

Good place to include all required reports and notifications in one place.

A paragraph should be included that refers to the City/District authority to require reports from non-SIUs.

Hazardous Waste Notification: If you understand the existing federal language (I do not think most people understand the exemption – very complicated – and the one time notification is not in the POTWs interest), you should consider making all hazardous waste discharges reportable.



Right of Entry

Do not refer to “prior notice”, “reasonable times”, “upon showing proper credentials”.

Clarify it may be announced or unannounced.

Define use of a camera.

Define failure to allow entry or unreasonable delays.



Sector Control Programs

Include in Legal Authority or incorporate BMPs that can be specifically referenced with a title of a document and a date. Make sure all referenced BMPs go through public participation.

Good place to put all of your BMP programs (e.g. FOG, Dental Mercury, Silver, Nonylphenols, Dry Cleaners, Sand/Oil Separators, Trucked and Hailed Waste, etc).



Compliance and Enforcement

Good place to incorporate ERP by reference.

Good place to provide notice publication of users in SNC.

Administrative penalty authority: YES

Civil OR Criminal enforcement authority: Unless you collect all data and perform all inspections in a manner that makes them admissible in criminal proceedings, recommend civil enforcement authority only and let state/EPA do the criminal enforcement (you still get to do your enforcement).

Water Supply Severance: Discussed in ERP talk.



Affirmative Defenses

Upsets, Bypass: Incorporate by reference from Part 403. If you adopt them, it must be verbatim.

Local Limits: Best to include in legal authority.



Liability of the City/District Employees

I like a section limiting liability for any damages to persons or property. Any notice like this will buffer pretreatment staff from some potential liability.



Options for Incorporating Limits into Legal Authority

Method for Adopting Limits	Uniform Concentration Local Limits - Comments
List limits in Legal Authority	This is the most common. It ensures that the limits and legal authority are approved following required administrative and public participation procedures.
Reference an outside document that contain the limits. <u>Not Recommended</u>	The POTW may fail to provide due process and specific notice as required when limits are modified. This may create confusion among IUs on the total listing of applicable limits. The general public and interested parties may not be informed. Potential to impact enforceability.
Reference in Legal Authority and include in the IU permits <u>Not Recommended - Avoid</u>	All IU permits must be issued in order to apply local limits (individual and specific notice). The POTW may fail to provide due process and specific notice as required. This may create confusion among IUs on the total listing of applicable limits. The general public and interested parties may not be informed. Potential to impact enforceability.



Thanks for Attending!

