



PRETREATMENT PITFALLS

State and Federal Enforcement Case Studies

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Objective for Presentation

- Point out how the implementation of the EPA pretreatment program leads to unintended violations.
- Illustrate how to avoid pretreatment violations.
- Provide perspectives on defending regulatory enforcement actions by EPA



PURPOSE OF PRETREATMENT PROGRAM

- (a) To prevent the introduction of pollutants into POTWs which will interfere with the operation of a POTW including interference with its use or disposal of municipal sludge
- b) To prevent the introduction of pollutants into POTWs which will pass through the treatment works or otherwise be incompatible with such works...40 CFR 403.2

Summary: To protect the integrity of the POTWs and to protect receiving waters and sludge.

CWA Section 307(33 U.S.C. 1317)

- Mandates Pretreatment Standards
- Operation of discharge in violation of standards is unlawful.
See also CWA Section 309 (33 U.S.C. 1319)

Types of Prohibited discharges

General and Specific Pretreatment Standards

- **General prohibitions** forbid the discharge of any pollutant(s) to a POTW *that can cause pass through or interference*.
- **Specific prohibitions** are of discharges that can harm the POTW, sewage collection system and workers and include discharges that:
 - create a fire or explosion hazard,
 - cause corrosive structural damage to the POTW (**or are less than 5 pH**),
 - solid or viscous pollutants in amounts which will cause obstruction to the flow in the POTW resulting in Interference;
 - any pollutant, including oxygen demanding pollutants (BOD, etc.) released in a discharge at a flow rate and/or pollutant concentration which will cause interference with the POTW;
 - heat in amounts which will inhibit biological activity in the POTW resulting in Interference (**and not greater than 104 degrees**)
 - Petroleum oil, nonbiodegradable cutting oil, or products of mineral oil origin in amounts that will cause interference or pass through;
 - Pollutants which result in the presence of toxic gases, vapors, or fumes within the POTW in a quantity that may cause acute worker health and safety problems;
 - Any trucked or hauled pollutants, except at discharge points designated by the POTW.

Types of Prohibited Discharges, cont.

Categorical Pretreatment Standards

- Uniform national standards developed by EPA for specific industrial categories, based on pollutant reductions economically achievable for each industry.

Local Limits

- Local limits are municipal ordinances that address the specific needs and concerns of a publicly owned treatment works (POTW), its sludge, and its receiving waters.

IUs CIUs and SIUs

- Industrial Users – non-domestic dischargers
- Categorical Industrial Users – non domestic industrial users that fall into one of the categories promulgated under CWA Section 306 as required by CWA Section 307
- Significant Industrial Users

Regulation of CIUs

- Separate regulations for each category
- Different effluent limitations for new and existing sources

Definition of SIU

- SIUs – Significant Industrial Users
 - All CIUs plus those that
 - Discharge > 25,000 GPD or
 - Discharge > 5% of the design capacity of the receiving POTW or
 - Are designated as an SIU by the ***control authority*** “on the basis that the Industrial User has a reasonable potential for adversely affecting the POTW's operation or for violating any Pretreatment Standard or requirement”

Section 309 – Enforcement

- Authorizes State enforcement, including compliance orders
- EPA Administrative enforcement authorized
- Federal civil judicial enforcement authorized
- Criminal enforcement authorized for negligence, intentional conduct and knowing endangerment
- Wrongful introduction of pollutant into treatment works
- Penalties of up to \$53,484/violation/ day

State Program Authorization by EPA

National Pretreatment Program

States must develop an approved pretreatment program as a condition of obtaining and retaining general NPDES authority.

Authorization, Continued

- POTWs in approved states must develop a program for state approval if greater than 5 million gallons per day and receive from Industrial Users pollutants which may Pass Through or Interfere with the operation of the POTW or are otherwise subject to Pretreatment Standards
- NPDES States have the option to elect to retain *control authority* as provided in 40 CFR 403.10(e). (This does not preclude POTW's from independently developing pretreatment programs.)
- *One state in Region 4 has made this election.*

Key definition

- *Control Authority:* (1) The POTW if the POTW's Pretreatment Program Submission has been approved (by the state) or (2) The Approval Authority (the state) if the submission has not been approved.

Regulation of SIUs

The Control Authority must be able to regulate through permits, orders, or similar means the contributions of its Industrial Users to ensure that the requirements of the General Pretreatment Regulations are met [40 CFR 403.8(f)(1)(iii)].

Control Authority Regulates POTWs

- Control authorities are required to regulate SIUs using “control mechanisms” (permits), oversight and enforcement mechanisms.

“EPA recommends that POTWs satisfy the control mechanism requirement [40 CFR 403.8(f)(1)(iii)] and the requirement that the POTW have procedures to notify SIUs of applicable Pretreatment Standards [40 CFR 403.8(f)(2)(iii)] by issuing permits to SIUs (for further details, see 55 FR 30082; July 24, 1990.”

- A POTW without control authority must depend on state’s regulation of SIUs and any independent program it may implement

Case #1 – the Odyssey

- Client in Region 4 state is CIU (metal plating) and thus an SIU
- Client discharges 10 years as directed by POTW and environmental consultant
 - POTW issues discharge limits and did not require regular effluent monitoring
- The state agency had elected to retain control authority
- Consultant interprets regulations and concludes client not an SIU or CIU
- Agency tells them to rely on what the POTW requires
- EPA inspects client and sends NOV
- EPA settlement offer at show cause meeting: \$1.4 million (“We could penalize you \$millions in per violation/per day penalties”)
- CLIENT calls lawyer

Initial Settlement approach

The case should be dropped because of overwhelming mitigating factors

- Client was misled by the POTW and the consultant
- Discharged contaminants were de minimis
- There was no threat whatsoever to the POTW
- A much worse discharger to same POTW is virtually unpunished
- Remedied violations immediately, including costly conversion to no discharge

The mass loading from CLIENT is such that the parameters must be measured in fractional micrograms per liter at the POTW headworks and would likely be non-detectable if not for other dischargers to the POTW. For example, the concentration of cadmium at the head works is 34 parts per trillion and lead is 5 parts per trillion. The highest contribution of metals is of copper and the concentration of copper at the headworks, from CLIENT is .2 parts per billion. The contribution of these metals as a percentage of what other contributors send the facility is 1.7% and .2% of the overall POTW mass of these parameters in the waste biological sludge sent to the landfill. The other 99.8% of these metals come from other dischargers to POTW. These data indicate the contribution of CLIENT water to POTW has only the slightest impact on the quality of influent to the plant and no practical impact on POTW effluent and sludge.

Pointing the finger at the real bad guy

- Discharger to same POTW was the largest discharger to the POTW by far
- Multiple violations from 2008 until at least 2018
- Caused pass through and interference to POTW for at least 10 years
- Enforcement:
 - State CO v. POTW in 2012
 - State CA with discharger in 2013 (state fines total \$30,000)
 - EPA AO vs. discharger in 2013 (no penalty!!!!)
 - (After our settlement a citizen suit filed v. POTW in for discharges caused by the bad guy)

Argue within confines of EPA penalty policy

INTERIM CLEAN WATER ACT SETTLEMENT PENALTY POLICY

March 1, 1995

PENALTY CALCULATION METHODOLOGY:

Economic Benefit

Gravity Component

Gravity Adjustment Factors

Litigation Considerations

Ability to Pay

Evaluate prospects of penalty-only litigation

CIVIL PENALTIES; FACTORS CONSIDERED IN DETERMINING AMOUNT Any person who violates section 1311, 1312, 1316, 1317, 1318, 1322(p), 1328 civil penalty not to exceed \$25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. 33 USC 1319(d).

Result

- \$300,000 penalty
- Consent Order with DOJ enumerating violations of CIU standards SIU requirements (neither admit nor deny)
- Recovery of 25% from consultant

How did this happen?

- The POTW was not the ***control authority*** (the state was) but held itself out to be.
- Consultant mistakenly concluded client was not a CIU or SIU and approved the Client looking at the POTW for guidance rather than the state
- The POTW “regulations” did not comply with the law
- If the client had properly identified the state as “in charge” it would have avoided this mess

Case 1.1

- CLIENT is POTW from CASE 1 two years later
- Citizen suit by local river keeper for pass-throughs *still being caused by the “bad guy”* in CASE 1
- Lessons:
 - Without control authority, POTW unable to stop discharges that caused interference and pass-throughs
 - The state was not properly exercising its control authority
 - Citizen suits lurk when compliance issues linger

Case #2: SFDP

- Manufacturer client with a new discharge source inquires with the POTW about what to do to get started
- POTW pretreatment program operated by environmental consultant
- POTW instructs discharger to have POTW's consultant design its pretreatment system
- Client is metal finisher and CIU but the POTW does not inform client
- Client hires same consultant to do annual environmental compliance audits and inform it of regulatory changes
- EPA inspects and finds non-compliance with CIU/SIU regulations
- EPA demands \$350,000

Consulting agreement

COMPLIANCE MONITORING

Consultant will conduct a facility environmental and safety compliance audit once per year. The facility will be evaluated for compliance with all federal and state environmental regulations.

NOV

1. Significant industrial user discharge without a valid pretreatment permit.
2. New CIU Source - failure to install and operate pretreatment equipment prior to discharge.
3. Failure to report/record initial compliance with categorical standards.
4. Failure to submit periodic reports on continued compliance with categorical standards.

The defense

- As in case 1, client hire counsel after show cause
- Also, like Case 1, they justifiably believe the facts of the case warranted lenient treatment
- EPA demands \$350,000 to settle
- As in case 1, counsel argues exculpatory facts.
- Client ability to pay issue

Ability to pay

The adjustment for ability-to-pay may be used **to reduce the settlement penalty to the highest amount that the violator can reasonably pay and still comply with the CWA.** The violator has the primary burden of establishing the claim of inability to pay. The violator must submit the **necessary information** demonstrating actual inability to pay as opposed to unwillingness to pay. Further, the claim of inability to pay a penalty should not be confused with a violator's aversion to make certain adjustment in its operations in order to pay the penalty.

INTERIM CLEAN WATER ACT SETTLEMENT PENALTY POLICY

March 1, 1995

The Wild Card - Pacific Legal Foundation

About Pacific Legal Foundation:

Pacific Legal Foundation is a nonprofit legal organization that defends Americans' liberties when threatened by government overreach and abuse. **We sue the government when it violates Americans' constitutional rights—and win!**

Each year, **PLF** represents **hundreds of Americans, free of charge, who seek to improve their lives but are stymied by government.** We give them their day in court to vindicate their rights and set a lasting precedent to protect everyone else.

Result

- \$10,000 penalty
- Consultant settled with client

CASE 3 – WILL SOMEONE ISSUE US A PERMIT PLEASE?!?!?!?

FACTS:

- Client – multi-national corporation with multiple manufacturing facilities.
- Owns facility in Region 4 state that discharges rinse water to a small town POTW under provisional “permit.”
- Client is CIU/SIU for metal finishing.
- Client attempts to get permanent permit when provisional original permit expires but is unable to. It too, improperly looked toward the POTW for help.
- EPA somehow finds out about these difficulties and sends 308 information request.
- SURPRISE!
 - The POTW is not the control authority (and thus has no authority to issue a permit).
- Counsel attempts to help client get permit from the state – applying for the only permit available. “Nondischarge state operating permit.”

Really?

State does not even have an approved pretreatment program!!!

RESULT?

Case closed by EPA without further enforcement. Why?

Speculation:

- Without an approved program, EPA was the *control authority* and responsible for all SIUs (including CIU) in the state, including permitting.
- The state was essentially unable to regulate the client
- EPA had not attempted to do so
- Is there even a federal SIU permit?

Lessons for dischargers and advisors

- Whenever you want to become a pretreatment discharger, do your homework.
 - Verify with regulator and POTW what the requirements are and document advice in writing.
 - Carefully choose professional assistance.
 - Consider non-discharge options even if marginally more costly.
 - If contacted by EPA or state enforcement personnel, don't wait to obtain legal representation - things can get worse while you wait.
- There are states in Region 4 whose pretreatment programs are understaffed and underfunded so independently ensure discharger has a good program
- Do not rely on the POTW as your regulator without verifying its regulatory status, especially in smaller cities and towns. (What the POTW requires to operate properly is not sufficient to comply with regulations, especially for SIUs).

Questions?



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