

City of Yakima

Pretreatment Program

ENFORCEMENT RESPONSE PLAN

INTRODUCTION

In 1988, the federal Environmental Protection Agency (EPA) amended the General Pretreatment Regulations of the 1972 Clean Water Act by requiring that all publicly owned treatment works (POTWs) with approved pretreatment programs develop and implement individual Enforcement Response Plans (ERPs). In keeping with these laws, the City of Yakima (the City) has prepared this ERP.

The purpose of the City's ERP is to ensure that dischargers to the City's POTW correct violations of the City's Sewer Use and Pretreatment Ordinance (SUO) (Ch. 7.65 Yakima Municipal Code) in a timely manner and that dischargers who violate the City's SUO are treated consistently. Enforcement Response Actions (ERAs) are meant to focus the attention of dischargers on correcting violations. They are not intended as punitive measures.

The City's ERP specifies criteria by which its pretreatment personnel can best determine the most appropriate ERA to any violation of the City's SUO. Specifically, this ERP:

- describes how the City will investigate instances of noncompliance;
- describes the various types of escalating ERAs that the City may take in response to all anticipated types of violations, and the time periods within which to initiate and follow-up these actions;
- adequately reflects the City's primary responsibility to enforce all applicable pretreatment standards and requirements;
- specifies criteria for scheduling periodic inspection and/or sampling visits to dischargers;
- specifies systems to track due dates for self-monitoring reports, compliance schedule milestones, and pending ERAs; and
- specifies the criteria, responsible City pretreatment personnel, and procedures utilized to select and initiate an ERA from among those provided in the ERP.

The use of this ERP is based on a review of all facts and circumstances surrounding a discharger's noncompliance, including the nature of the noncompliance and the prior compliance history of the discharger.

This ERP will benefit the City by:

- strengthening internal management through improved task coordination among the staff;
- enhancing the City's reputation as a responsible public agency; and
- providing an opportunity for involvement by other public service and regulatory agencies in the City's Pretreatment Program.

Most importantly, the ERP will provide a consistent, reasonable and equitable basis for undertaking ERAs against dischargers who fail to comply with the City's SUO.

The City will periodically reassess, and set change to the ERP as necessary, concerning the ERP's effectiveness in accomplishing these following important pretreatment enforcement goals:

- to make noncompliant dischargers aware of SUO violations;
- to ensure that violators return to compliance as quickly as possible;
- to determine future noncompliance; and
- to recover any additional expenses incurred by the City attributable to noncompliance.

PREPARATION OF A TYPICAL ERA

The City's pretreatment personnel will regularly inspect discharger premises, review discharger reports and self-monitoring data, investigate complaints of noncompliance, and sample wastewater discharges from dischargers, (especially Significant Industrial Users or SIUs) throughout each year. These City pretreatment personnel will also subsequently receive discharge composition analysis data from either the POTW's own analytical laboratory or an outside certified lab.

City pretreatment personnel must follow these steps in preparing a typical ERA:

Step 1: Identify Violation

Within ten (10) working days after receipt of information on a discharge, the City's pretreatment personnel will screen and verify the information to identify any type of violation, even non-discharge violations. Non-discharge violations (such as a failure to submit reports) are important because such violations may be motivated by discharger's desire to conceal actual discharge violations. At a minimum, non-discharge violations suggest that discharger might not be making a serious "good-faith" effort toward its pretreatment obligations. For this screening, the City's POTW has established:

- procedures to track due dates of all reporting requirements and to take enforcement action if reports are not submitted on time; and
- procedures for comparing pollutant analysis data to categorical standards, local limits, and any other prohibited discharge standards which may apply.

The City's pretreatment personnel will pursue ERAs in the following instances:

- when results from the City's independent monitoring samples show violations outside the standard confidence levels of any analytical test performed;
- when dischargers' self-monitoring data shows any violation or continuing violations of pretreatment standards and requirements;
- when dischargers fail to submit complete and accurate reports on time or not at all;
- when dischargers fail to satisfactorily complete installation of an on-site pretreatment system or other required facility improvement which the City's Pretreatment Program deems necessary;
- when dischargers fail to properly operate and/or maintain any on-site pretreatment system or other required facility improvement;
- when dischargers falsify or otherwise misrepresent any aspect of self-monitoring data or other pretreatment related reports; or
- when dischargers commit any other observable violation of the City's SUO.

Step 2: Notify Discharger of Violation

Once a violation has been identified, City pretreatment personnel will inform the violating discharger by telephone, as soon as possible, of the following:

- that a violation has occurred;
- that the discharge must be controlled to correct said violation;
- that written notification of the sample results will be sent; and
- that any required ERAs will soon follow.

Generally, during this same telephone conversation, City pretreatment personnel will also ask the noncompliant discharger for all the possible reasons pertaining to why and/or how the violation occurred. City pretreatment personnel will then request the discharger to begin contemplating possible modifications and/or improvements that will bring the discharge back into compliance and that will prevent future violations from occurring.

Step 3: Prepare Appropriate ERA Document

Within fifteen (15) calendar days of detecting the violation and notifying the noncompliant discharger (as described above), City pretreatment personnel will prepare the appropriate ERA document. To prepare this document, City pretreatment personnel should first consult the "Summary of ERAs" section of the ERP for a listed violation which best matches the actual situation. They should then note which one of the various corresponding ERAs is warranted, in light of the sections on ERAs and "Other Appropriate ERA Determining Factors." Finally, they should fill in the appropriate ERA document. (Examples of actual ERA documents are found in Appendix A.)

A draft of each ERA document must be directed to either the Wastewater Division Manager or the Assistant Wastewater Division Manager for review comments prior to mailing. City pretreatment personnel will incorporate any such comments into the final

draft of the ERA document, provide the ERA document to the appropriate official for signing, and distribute copies to all involved personnel.

Step 4: Deliver ERA Document to Discharger

City pretreatment personnel should deliver in person, or by "certified mail/return receipt requested", to an authorized representative of the noncompliant discharger any document pertaining to a discharge violation or an ERA. Such representative must sign for receipt of all documents delivered by either method, acknowledging only the receipt of such documents.

Confidentiality of Documentation for ERAs

All documents prepared in response to an ERA that are sent to the discharger (with exception of any inspection report and the ERA itself) are considered confidential and should be removed from the files prior to any public disclosure requests. Each page considered for such action shall be clearly marked "CONFIDENTIAL".

During appeals, City pretreatment personnel may need to prepare separate documentation of ERAs taken and the City's justification for such ERAs.

Please remember: City pretreatment personnel should verbally notify dischargers of all violations, with the possible exception of those which cause or threaten to cause an emergency situation, before any documents are sent to the noncompliant discharger. City pretreatment personnel may wish to read EPA's Pretreatment Compliance and Enforcement Guidance document for additional guidance on the preparation of ERAs.

SUMMARY OF ERAS

Violations and ERAs

The following summarizes typical discharge violations and appropriate ERAs (in escalating order). It also indicates those City pretreatment personnel who have the authority to initiate each of the corresponding ERAs. Before selecting the appropriate ERA, City pretreatment personnel should review the sections of the ERP on "Common ERAs", "Supplemental ERAs" and "Appropriate ERA Determining Factors".

Type of Violation:	Appropriate ERA:	Enforcement Official
1. Reporting violations:		
Report improperly signed, certified, or completed with minor deficiencies (computational or typographical):	NOV	PS
Report improperly signed, certified, or completed with gross deficiencies (missing information):	NOV AO with \$250 fine	PS AS
Report improperly signed, certified, or completed, >10 but < 30 days after notice by POTW:	NOV AO with \$500 fine	PS AS
Report improperly signed, certified, or completed, ≥ 30 days after notice by POTW [SV]:	AO with \$500 fine AO with \$1000 fine	AS AS
Late filing of any report, > 10 but < 30 days:	NOV AO with \$500 fine	PS AS
Late filing of any report, >10 but <30 days after notice by POTW:	AO with \$250 fine	AS
Late filing of any report, ≥ 30 days after notice by POTW [SV]:	AO with \$500 fine AO with \$1000 fine	AS AS

Description of Terms

AS = Assistant Wastewater Division Manager
 AO = Administrative Order
 CL = Civil Litigation
 CP = Criminal Prosecution
 ES = Emergency Suspension

IU= Industrial User
 NOV= Notice of Violation
 PS= Environmental Analyst
 S= Wastewater Division Manager
 [SV]= Significant Violation
 TSS=Termination of sewer service

Type of Violation:	Appropriate ERA:	Enforcement Official
1. Reporting violations:		
Repeated late filings, does not follow through on verbal/written agreements, +or no reports at all [SV]:	AO with \$1000 fine CL CP TSS	AS S S S
Failure to report spill, slug load, or change in discharge (no harm):	AO with \$250 fine AO with \$500 fine	AS AS
Failure to report spill, slug load, or change in discharge (harm results):	AO with \$1000 fine CL	AS S
Repeated failure to report spills or changes in discharge (no harm):	AO with \$500 fine AO with \$1000 fine CL	AS AS S
Repeated failure to report spills or changes in discharge (harm results) [SV]:	AO with \$1000 fine CP TSS	AS S S
Falsification of any information in any report or document [SV]:	CP TSS	S S
2. Un-permitted discharge violations:		
IU unaware of requirement (no harm):	NOV with application form	PS
IU unaware/aware of requirement (causing, either alone or in combination with other discharges, harm to human health, the environment, or the POTW itself, including interference or pass through) [SV]:	AO with \$1000 fine CL CP TSS	AS S S S
IU aware of requirement (no harm):	NOV AO with \$500 fine AO with \$1000 fine	PS AS AS
Repeated violations after notice by the POTW (with/without harm) [SV]:	AO with \$1000 fine CL CP TSS	AS S S S

Type of Violation:	Appropriate ERA:	Enforcement Official:
3. Un-renewed permitted discharge violation		
Failure to renew \leq 15 days of due date:	NOV AO with \$500 fine	PS AS
Failure to renew >15 but \leq 45 days of due date, after notice by POTW:	AO with \$500 fine AO with \$1000 fine	AS AS
Failure to renew >45 days of due date, after notice by POTW [SV] :	AO with \$1000 fine CL CP TSS	AS S S S
Any discharge causing little or no harm:	NOV AO with \$500 fine AO with \$1000 fine	PS AS AS
Any discharge causing, either alone or in combination with other discharges, harm to human health, the environment, or the POTW itself, including interference or pass through [SV] :	AO with \$500 fine AO with \$1000 fine CL CP TSS	AS AS S S S
Repeated violations after notice by the POTW (with/without harm) [SV] :	AO with \$1000 fine CL CP TSS	AS S S S
4. Exceedance of local or federal standards:		
Isolated, minor violation ($<150\%$ of any limit), little or no harm:	NOV AO with \$250 fine	PS AS
Isolated, minor violation, causing, either alone or in combination with other discharges, harm to human health, the environment, or the POTW itself, including interference or pass through [SV] :	AO with \$250 fine AO with \$500 fine AO with \$1000 fine CL CP	AS AS AS S S
Isolated, major violation ($>150\%$ of any limit), little or no harm:	AO with \$250 fine AO with \$500 fine	AS AS

Type of Violation:	Appropriate ERA:	Enforcement Officials
4. Exceedance of local or federal standards:		
Isolated, major violation, causing, either alone or in combination with other discharges, harm to human health, the environment, or the POTW itself, including interference or pass through [SV]:	AO with \$500 fine	AS
	AO with \$1000 fine	AS
	CL	S
	CP	S
	ES/TSS	S
Repeated, minor/major violation, little or no harm [SV]:	AO with \$500 fine	AS
	AO with \$1000 fine	AS
Repeated, minor/major violation, causing, either alone or in combination with other discharges, harm to human health, the environment, or the POTW itself, including interference or pass through [SV]:	AO with \$1000 fine	AS
	CL	S
	CP	S
	TSS	S
5. Self-monitoring problems:		
Failure to monitor all pollutants as required by permit (equipment installed):	NOV	PS
	AO with \$250 fine	AS
	AO with \$500 fine	AS
	AO with \$1000 fine	AS
Failure to install required monitoring equipment:	AO with \$500 fine	AS
	AO with \$1000 fine	AS
	CL	S
Repeated failure to monitor all pollutants (equipment installed) [SV]:	AO with \$1000 fine	AS
	CL	S
	CP	S
	TSS	S
Repeated failure to install required monitoring equipment [SV]:	AO with \$1000 fine	AS
	CL	S
	CP	S
	TSS	S
If 33% of all measurements, over any six (6) month period, indicate a violation of the same parameter's daily limit by more than the TRC (=1.4x for conventionals; =1.2x for heavy metals and others) [SV]:	AO with \$500 fine	AS
	AO with \$1000 fine	AS
	CL	S
	CP	S
	TSS	S

Type of Violation	Appropriate ERA:	Enforcement Official
5. Self-monitoring problems:		
If 66% of all measurements, over any six (6) month period, indicate a violation of the same parameter's daily limit by any amount [SV]:	AO with \$500 fine	AS
	AO with \$1000 fine	AS
	CL	S
	CP	S
	TSS	S
Failure to resample after a non-compliance sample [SV]:	AO with \$500 fine	AS
	AO with \$1000 fine	AS
	CL	S
Tampering with any pretreatment, sampling, or monitoring equipment (no harm) [SV]:	AO with \$1000 fine	AS
	CL	S
	CP	S
	TSS	S
Tampering with any pretreatment, sampling, or monitoring equipment (harm) [SV]:	CP	S
	TSS	S
6. Improper sampling technique:		
No evidence of intent:	NOV	PS
	AO with \$250 fine	AS
	AO with \$500 fine	AS
	AO with \$1000 fine	AS
Repeated improper sampling:	AO with \$500 fine	AS
	AO with \$1000 fine	AS
	CL	S
	CP	S
	TSS	S
Evidence of intent [SV]:	CP	S
7. Failure to install pretreatment or monitoring equipment:		
Delay of < 30 days:	NOV	PS
	AO with \$500 fine	AS
	AO with \$1000 fine	AS
Delay of ≥ 30 but ≤45 days after notification:	AO with \$500 fine	AS
	AO with \$1000 fine	AS
	CL	S

Type of Violation	Appropriate ERA:	Enforcement Official
<u>7. Failure to install pretreatment or monitoring equipment:</u>		
Delay of >45 days [SV]:	AO with \$1000 fine CL CP TSS	AS S S S
Repeated violation [SV]:	AO with \$1000 fine CL CP TSS	AS S S S
<u>8. Compliance schedules (in permit or AO):</u>		
Missed milestone by < 30 days, or missing milestone will not affect final milestone:	NOV AO with \$250 fine AO with \$500 fine	PS AS AS
Missed milestone by ≥ 30 but <45 days after notification (no good reason for delay):	AO with \$500 fine AO with \$1000 fine S	AS AS S
Missed milestone by >45 days after notification (no good reason for delay) [SV]:	AO with \$1000 fine CL CP TSS	AS S S S
Repeated violation [SV]:	AO with \$1000 fine CL CP TSS	AS S S S
[Insert A] [Is this reference correct?]		
<u>9. Compliance schedule in AO:</u>		
Missed milestone by < 30 days, or missing milestone will not allow final milestone:	NOV/stipulated penalty	AS
Missed milestone by >30 but <45 days after notification (no good reason for delay):	NOV/stipulated penalty	AS
Missed Milestone by >45 days after notification (no good reason for delay) [SV]:	NOV/stipulated penalty CL CP TSS	AS S S S

Type of Violation	Appropriate ERA:	Enforcement Official
9. Compliance schedule in AO:		
Repeated violation [SV]:	CL	S
	CP	S
	TSS	S
[Insert A] [Is this reference correct?]		
10. Wastestreams diluted in lieu of treatment:		
Initial violation:	NOV	PS
	AO with \$500 fine	AS
	AO with \$1000 fine	AS
Repeated violation [SV]:	AO with \$1000 fine	AS
	CL	S
	CP	S
	TSS	S
11. Failure to mitigate noncompliance or halt production:		
Does not result in harm:	NOV	PS
	AO with \$500 fine	AS
	AO with \$1000 fine	AS
Does result in harm:	AO with \$1000 fine	AS
	CL	S
Failure to mitigate continues after 45 days [SV]:	CL	AS
	CP	S
	TSS	S
12. Failure to properly maintain and/or operate pretreatment facility (regardless of reason):		
Initial violation:	AO with \$500 fine	AS
	AO with \$1000 fine	AS
Repeated violation [SV]:	AO with \$1000 fine	AS
	CL	S
	CP	S
	TSS	S
13. Entry denial:		
Entry denied, consent withdrawn, or copying of records denied (Obtain warrant and return) [SV]:	AO with \$1000 fine	AS
	CL	S

Type of Violation	Appropriate ERA:	Enforcement Official
13. Entry denial:		
Repeated denial [SV]:	CL	S
	CP	S
	TSS	S
14. Illegal discharge:		
No harm to POTW or environment:	NOV	PS
	AO with \$500 fine	AS
	AO with \$1000 fine	AS
Harm to POTW or environment or evidence of intent and/or negligence [SV]:	AO with \$500 fine	AS
	AO with \$1000 fine	AS
	CL	S
	CP	S
	TSS	S
Repeated violation [SV]:	AO with \$1000 fine	AS
	CL	S
	CP	S
	TSS	S
15. Improper sampling:		
Unintentionally sampling at incorrect location:	NOV	PS
	AO with \$250 fine	AS
	AO with \$500 fine	AS
Unintentionally using incorrect sample techniques:	NOV	PS
	AO with \$250 fine	AS
	AO with \$500 fine	AS
Repeated violation after POTW notification [SV]:	AO with \$500 fine	AS
	AO with \$1000 fine	AS
	CL	S
	CP	S
16. Inadequate recordkeeping:		
Inspector finds files incomplete or missing (no evidence of intent):	NOV	PS
	AO with \$250 fine	AS
	AO with \$500 fine	AS
Inspector finds files incomplete or missing (evidence of intent) [SV]:	AO with \$1000 fine	AS
	CL	S
Repeated violation [SV]:	AO with \$1000 fine	AS
	CL	S
	CP	S
	TSS	S

Type of Violation	Appropriate ERA:	Enforcement Official
17. Failure to report additional monitoring:		
Initial violation:	NOV	PS
	AO with \$500 fine	AS
	AO with \$1000 fine	AS
Repeated violation [SV]:	AO with \$1000 fine	AS
	CL	S
	CP	S
	TSS	S
18. Emergency actions implemented:		
Any violation of any effluent standard or requirement which the City believes has caused imminent danger to human welfare or to the environment and has resulted in the City exercising its emergency authority to halt or prevent such discharge [SV]:	AO with \$1000 fine	AS
	CL	S
	CP	S
	TSS	S

Timeframes for ERAs

1. All violations should be identified and documented, and initial telephone contact be made within five (5) working days of receiving compliance information and/or a report of laboratory analyses.
2. Written contact (including ERAs) with the noncompliant discharger should occur within fifteen (15) calendar days of detecting the violation.
3. Follow-up actions for continuing violations of the same nature should be made within forty-five (45) calendar days of detecting the initial violation. For any repeated violation, follow-up actions should proceed as in 1 and 2, above, except that ERAs will be elevated. The ERAs for either a continuing or repeated violation should include both a strict compliance schedule and an elevated fine corresponding to the extent of the violation.
4. All violations which are considered emergencies should be subject to immediate (as soon as possible) ERAs such as an injunction or emergency suspension/termination of sewer service.

DESCRIPTION OF POSSIBLE ERAS

The City's ERAs range from a Notice of Violation to an Emergency Suspension/Termination of Sewer Service. ERAs and fines will always be escalated if a discharge violation continues or worsens. Escalation will also occur when a noncompliant discharger is either not making a "good-faith" effort (described below) to correct a violation, or is flagrantly violating any section of the City's SUO.

In ascending order of severity, the most common ERAs available to the City are:

1. Notice of Violation (NOV);
2. Administrative Orders with Fines
 - A. Consent Order (Con-O);
 - B. Compliance Order (Com-O);
 - C. Cease and Desist Order (CDO);
3. Civil Litigation (CL)
4. Criminal Prosecution (CP); and
5. Emergency Suspension/Termination of Sewer Service (ES/TSS).

Although these ERAs are listed in order of severity, and as such normally would begin with a NOV, it is not absolutely necessary that any specific response precede another during application of this ERP. For example, the City may be compelled to issue an ES/TSS without issuing a less severe ERA where the noncompliance threatens POTW operations, the environment, or human health.

In addition to the above mentioned typical ERAs, the City may utilize other various supplemental, less formal, responses to ensure compliance by a discharger violating the City's SUO. These supplemental-enforcement response actions (SERAs) are:

- Public Notices;
- Requiring Performance Bonds/Liability Insurance;
- Increased Monitoring and Reporting;
- Case Referral to the Control/Approval Authorities; and
- Participation in a Community Awareness Program.

COMMON ERAS

1. Notice of Violation (SUO 7.65.180)

The {NOV} is an official communication from the City informing the noncompliant discharger that an SUO violation has occurred. The NOV is considered an appropriate initial response to any **nonsignificant** violation and may be the only response necessary to bring the noncompliant discharger into compliance in such situations. However, in the case of a **significant** violation, an NOV need not be issued prior to either an {AO} or the pursuance of judicial remedies. The following procedures apply when the City issues an NOV:

Authority to issue:	Usually the Environmental Analyst.
When to issue:	As soon as possible upon detection of violation, but no later than fifteen (15) calendar business days after discovery of a violation.
How to write:	Use proper template and fill in the blanks. Use City letterhead only.
How to issue:	Either send via certified mail or hand-deliver by issuing City pretreatment personnel.
POTW retains:	A signed copy of NOV along with certified mail receipt, or a signed statement by City pretreatment personnel who delivered it. These are to be placed in the discharger's file.
Response time limit:	Ten (10) business days from receipt of NOV.
Response required:	A written explanation of the violation as well as a written plan, including time frames, for the satisfactory correction and prevention of such violation in the future. The plan shall include any and all specific actions required by the City and shall be subject to its final approval.
POTW approval method:	If approval is immediate then City pretreatment personnel shall telephone said approval directly to an authorized representative of the respondent business. However, if specific changes and/or additions are required, then City pretreatment personnel shall, within ten (10) business days, hand-deliver a letter outlining such changes and/or additions to an authorized representative of the respondent business.
If violation continues:	If the violation was nonsignificant, City pretreatment personnel shall send another NOV. However, if violation was significant, or violation continues to occur after more than two NOVs have been sent, then escalate next ERA to either an AO with fine, or any of the more stringent ERAs.

2. Administrative Orders with Fine (SUO 7.65.190, .200, .210, .220)

An Administrative Order (AO) is an ERA document which directs a noncompliant discharger to undertake or to cease specified activities. The terms of an AO will normally include a fine and compliance schedule, the latter which may be negotiated with the discharger. AOs with fines are generally recommended as the first formal ERA to any significant violation (unless judicial proceedings are more appropriate), or when an NOV has not prompted compliance to a non-significant violation. The City will use three common types of AOs: consent orders (Con-Os), compliance orders (Com-Os), and cease and desist orders (CDOs).

Escalation to harsher AOs and larger fines shall be deemed appropriate and necessary when a discharger continues to be in violation, and/or violates any term of a previously issued AO (such as refusal to pay a fine or follow a compliance schedule).

A fine is a monetary assessment by the City for violation of a SUO requirement or standard, and is highly recommended as an escalated ERA to be used in conjunction with an AO. Fines are among the most effective ERAs to discharger noncompliance because they are assessed at the City's discretion. The City Pretreatment Program's schedule of fines is based on three (3) "per-day-of-violation" rates: \$250, \$500, and \$1000. The amount of the fine appropriate for a given situation will be determined in accordance with four (4) factors:

- the type of noncompliance;
- the potential impact to the City's POTW, the environment, or human health;
- the violator's culpability, or "good faith"; and
- the frequency of the violation.

The recommended fines listed in the "Summary of ERAs" section of this ERP manual have taken into account these four (4) factors. Additionally, an Economic Benefit of Noncompliance (EBN) fine may also be calculated and assessed in those situations where the basic rate fines for noncompliance are significantly less than the costs of achieving and maintaining compliance. This additional EBN fine is extremely important for obtaining compliance from SIUs since SUO regulations and/or standards must not be ignored simply because it is cheaper to pay the basic fine. These fines are intended to force the discharger into compliance and are not related to other incident-specific costs which may be borne by the City and assessed separately (such as maintenance, repair, and cleanup).

The following procedures apply when the City issues any one of the following common types of AOs: Con-Os, Com-Os, and CDOs .

Authority to issue: The Wastewater Division Manager or the Assistant Wastewater Division Manager.

When to issue: Immediately upon detection that: (1) any single NOV has not been responded to; (2) two or more consecutive non-significant NOVs have not produced a return to compliance; or (3) any single significant NOV has not produced a return to compliance.

What to include:	<p><u>CDO</u>: direction to comply forthwith with SUO requirements and/or standards, and take such appropriate remedial or preventative action as may be needed, or required by the City, to properly address a continuing or threatened violation, including halting operations and terminating the wastewater discharge.</p> <p><u>Con-O</u>: specific agreed-upon actions to be taken by the discharger to correct the noncompliance within a specified time period, together with an agreed-upon fine for past violations and stipulated penalty for any future violations of the Con-O, if appropriate.</p> <p><u>Com-O</u>: notification that, following a specified time period, sewer service shall be discontinued unless adequate treatment facilities, devices, or other related appurtenances have been installed and are properly operated and maintained; may also include such other requirements as might be necessary and appropriate to satisfactorily address the noncompliance, including the installation of approved pretreatment technology, additional self-monitoring, and management practices designed to minimize the amount of pollutants discharged to the sewer; may also include a fine for past violations and stipulated penalty for future violations of the Com-O, as appropriate.</p>
How to write:	Use proper template and fill in the blanks. Use City letterhead only.
How to issue:	Either send via certified mail or hand-deliver by issuing City pretreatment personnel.
POTW retains:	A signed copy of AO along with certified mail receipt, or a signed statement by actual City pretreatment personnel who delivered it. These are to be placed in the discharger's file.
Response time limit:	Within time period specified by the AO.
Response required:	As specified by the AO.
POTW approval method:	As specified by the AO.
If violation continues:	If noncompliant discharger does not respond or violation continues or worsens, then escalate to an AO with a higher fine and/or a more stringent ERA.

3. Civil Litigation (SUO 7.65.340, .350, and .360)

CL is the formal process of filing lawsuits against dischargers in order to secure court-ordered action to correct situations of noncompliance and to secure corresponding fines or reimbursements, including the recovery of costs incurred by the City due to noncompliance. This ERA shall normally be pursued when:

- the corrective action required by the discharger is costly and complex;
- the penalty to be assessed exceeds that stipulated in the ordinance; or
- the discharger is considered to be recalcitrant and unwilling to cooperate.

CL is similar to CP in that it requires the full cooperation of the City Attorney and may result in court trials. It requires, however, a less stringent burden of proof. Successful CL will result in one or more of the following:

- signing of a Consent Decree (CD);
- issuance of an injunction; and/or
- recovery of civil penalties and costs.

Consent Decrees

CDs are agreements between the City and a noncompliant discharger which have been reached after a lawsuit has been filed. The decree must be signed by the judge assigned to the case to be legally binding. CDs are used when the violator is willing to acknowledge and correct noncompliance, and both the City and the violator agree on the terms of compliance.

Injunctions

Injunctions are court orders which direct a defendant to do something or to refrain from doing something. The City should seek injunctive relief if the actions of the noncompliant discharger have or will result in irreparable harm to the City's POTW, the environment, or human health. Normally a CDO should prevent a continued noncompliant discharge; however, if the discharger does not respond, injunctive relief should be sought at once. Injunctions for halting or preventing noncompliant discharges are usually temporary in nature (that is, they have a fixed expiration date), but the City may also seek injunctions which have permanent effect.

Civil Penalties & Cost Recovery

As stated previously, CL may be necessary to impose civil enforcement and to recover other costs associated with noncompliance. A successful civil suit should force the discharger to pay for all the expenses which the City incurred in responding to the noncompliance, including:

- restoration of the City's POTW facility or other involved equipment and/or structures;

- payment for medical treatment of any injured persons and/or employees; and
- indemnification of the City for any and all fines and/or legal actions assessed or brought against the City by federal, State, and/or private parties and which were due to the noncompliance.

The following procedures apply when the City commences CL:

Authority to commence civil litigation:	The City Attorney with the Wastewater Division Manager
When to commence civil litigation:	(1) In emergency situations where injunctive relief is necessary to halt or prevent discharges which threaten human health, the environment, or the POTW and/or its collection system; (2) when efforts to restore compliance through cooperation with the noncompliant discharger have failed, and a court supervised settlement (CD) is necessary to enforce SUO requirements and/or standards; or (3) when necessary to impose civil enforcement and to recover any and all losses incurred due to the specific noncompliance.
Preliminary decisions:	<p><u>Proper parties:</u> Normally the City should name all the 'appropriate' parties in the complaint and allow the liability of each to be determined through the litigation process.</p> <p><u>Reasons for bringing suit and amount of damages:</u> The City needs to make the following determinations before commencing CL: (1) the provisions of its SUO and/or city issued permit which have allegedly been violated; (2) the monetary amount sought as recovery of damages, additional compliance monitoring costs, all attorney's fees plus court costs, and any reimbursement of fines levied upon the City by third parties; and finally (3) the appropriate amount of the penalties it wishes to recover.</p>
How to commence civil litigation:	The Wastewater Division Manager must first direct that this type of ERA be taken. Secondly, the City Attorney shall write, file, and direct the application of the ERA. Unfortunately, the length of time necessary to conclude the litigation process will vary from case to case. The time-frame usually ranges from six (6) to twelve (12) months, however, the City may shorten this period if it settles the case.

4. Criminal Prosecution (SUO 7.65.370 and .380)

{CP} is the formal process of charging individuals and/or organizations with criminal violations of the City's SUO provisions that are punishable, upon conviction, by fines and/or imprisonment. The two major purposes of CP are:

- to regain compliance from noncompliant dischargers through established court proceedings, and
- to determine continued or future noncompliance.

Criminal offenses are traditionally defined as either felonies or misdemeanors. The two necessary elements for determining whether a crime has been committed are:

- an act in violation of the law, and
- criminal intent or criminal negligence.

The following procedures apply when the City commences CP:

Authority to commence criminal prosecution:	The City Attorney with the Wastewater Division Manager.
When to commence criminal prosecution:	When the City has evidence of noncompliance which shows a violation of the SUO, and criminal intent or criminal negligence.
Evidence of Criminal Act:	<p>Pretreatment CP defendants fall into two general categories:</p> <p>A. Those defendants who choose to ignore the City's Pretreatment Program and SUO by disposing of wastes without authorization (midnight dumpers). Evidence for these violations includes, but is not limited to: (1) variations in normal wastewater constituents; (2) third-party witnesses to the disposal act; (3) testimony from employees of the defendant; (4) discharge records (or explanations for their absence); and, (5) soil/water samples of the areas where the discharge/dumping occurred.</p> <p>B. Those defendants who choose to conceal or misrepresent the extent of their pollutant discharges, allow their on-site pretreatment technology to deteriorate, or fail to prevent anticipated spills. Evidence for these violations includes, but is not limited to: (1) records which intentionally gives an inaccurate representation of a discharger's processes or wastewater constituents; (2) on-site pretreatment technology that was outdated; and (3) spills that were either intentional or could have been prevented if adequate safeguards had been in place.</p>
Evidence of criminal intent/negligence:	Assuming admissible evidence of a criminal act exists, the City must also prove criminal intent or criminal negligence. A person acts with criminal intent when he or she acts with the objective or purpose to accomplish a result which constitutes a crime. A person acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure

to be aware of such substantial risk constitutes a gross deviation from the standard of care a reasonable person would exercise in the same situation.

Preliminary decisions:

Proper parties: Normally the City should name all the 'appropriate' parties in the complaint and allow the liability of each to be determined through the litigation process.

Reasons for bringing suit: The City needs to make the following determinations before commencing the CP: (1) the provisions of its SUO and/or city issued permit which have been violated; (2) the sufficiency of its evidence to establish the violation and criminal intent/criminal negligence; and (3) the penalty and/or prison sentence it would recommend.

How to commence criminal

The City Attorney must write, file, and direct this type of ERA. Length of time necessary to conclude entire litigation process will vary from case to case, due to the possibility of appeals by either the defendant or prosecutor.

5. Emergency Suspension/Termination of Sewer Service (SUO 7.65.240 and .250)

Emergency Suspension/Termination of Sewer Service (ES/TSS) is the revocation of a discharger's privilege to discharge to the City's POTW. Unlike CL and CP, an ES/TSS is an administrative ERA which can be implemented directly by the City at its discretion. An ES/TSS may be accomplished by either:

- physical severance of the noncompliant discharger's connection to the collection system;
- issuance of an AO which compels the noncompliant discharger to terminate its discharge; or
- a court ruling.

Since an ES/TSS may force discharger to halt production and may force closure, the City must carefully consider all of the legal and operational implications of an ES/TSS before using this ERA. An ES/TSS may be used as an initial ERA, along with an NOV, to a discharge which causes or threatens to cause an emergency situation (e.g. threat to human health, the environment, or the City's POTW). However, it is more frequently used as an escalated ERA to a very significant violation when other ERAs have failed to bring the violator into compliance.

Authority to issue:

The Wastewater Division Manager (in consultation with the City Attorney).

When to issue:

When the City must act immediately to halt or prevent a discharge which presents an emergency (e.g. threat to human health, the environment, or the POTW); or when the noncompliant discharger has not responded adequately to previous ERAs.

How to write:

Use proper template and fill in the blanks. Use City letterhead only.

How to issue: Hand-deliver by issuing City pretreatment personnel.

POTW retains: A signed copy of a Notice of Emergency Suspension/Termination of Sewer Service (ES/TSS) along with a signed statement by actual City pretreatment personnel who delivered it. These are to be placed in the discharger's file.

Response time limit: Emergency Suspension: the discharger notified of an ES/TSS shall cease immediately all wastewater discharges. In the event the discharger fails to comply immediately, the City may terminate sewer service at five (5) p.m. on the same day of receipt of ES/TSS.

Termination: after all appeals or appeal periods have ended.

How to terminate: There are three basic methods to terminate sewer service: (1) physically sever (or plug) the connection to the POTW's collection system; (2) revoke the discharge permit; or (3) issue a Cease and Desist Order (CADO). Severing the connection may be very effective but may also be costly to install or remove, whereas revoking discharge permits or issuing CADO's are easily reversible but rely on the discharger to carry out the POTW directives.

SUPPLEMENTAL ENFORCEMENT RESPONSE ACTIONS (SERAs)

SERAs to complement the more traditional ERAs described above. SERAs are usually low-cost and are designed to reinforce the compliance obligations of dischargers. The application of these SERAs will be determined on an individual basis. SERAs are organized into two categories: those which require legal authority from the SUO and those which do not. Relying on legal authority is advisable when the ERA requires the discharger to pay fees or to take particular actions.

1. SERAs Which Require Legal Authority

Public Notices

Section 7.65.280 of the City SUO requires the City to publish, at least annually, a list of dischargers which were in significant noncompliance with applicable SUO standards and/or requirements. The publication of this list is intended to deter dischargers from committing and/or continuing pretreatment violations. It also satisfies the public's right to know of noncompliant discharges affecting human health, the environment or the POTW, and of the additional expenditure of public funds to bring into compliance and mitigate any damages caused by such discharges.

Publishing the names of noncompliant dischargers raises the prospect of libel suits. However, legal authority exists for such publication of public notices and should therefore discourage such suits. Additionally, it is recommended that any remedial action taken by the noncompliant discharger be published along with the violation. The public notice should also explain the mitigating circumstances surrounding the violation, such as:

- current compliance status;
- methods being used to attain compliance;
- type and severity of the violation; and
- duration of the violation.

The public notice should be placed in the legal notices section of the largest local daily newspaper of general circulation. Placement in the forward section of the newspaper may result in a significantly larger readership and greater effectiveness.

Performance Bonds/Liability Insurance

Section 7.65.290 of the City's SUO authorizes the City to require, usually through a Administrative Order or as part of a Consent Agreement, that a discharger obtain a performance bond and/or liability insurance covering expenses which the POTW might incur in the event of future violations.

2. SERAs Which Do Not Require Legal Authority

Increased Monitoring and Reporting

Generally, dischargers demonstrating a history of noncompliance should be subject to increased surveillance by the City and be required to perform additional self-monitoring until the violation has been corrected and consistent compliance subsequently demonstrated. The resulting increased surveillance and more stringent and costly self-monitoring requirements should provide a powerful incentive for the noncompliant discharger to return to compliance.

It is important to realize that the requirement to monitor more frequently must not be "open-ended" and should automatically terminate on a specific date or when a specific contingency has been satisfied (such as correction of the violation). In addition, the frequency of the discharger's reporting schedule must be increased to coincide with the increased self-monitoring requirements.

The City will require that, if the discharger fails to complete the required amount of self-monitoring, the discharger shall perform three times said amount of monitoring during the next consecutive month. If the discharger knows that the self-monitoring data will not be forthcoming, the discharger shall notify the City in advance of the due date. City pretreatment personnel should then require the discharger to send a letter explaining the reason for the missing data and also indicating that the triple self-monitoring will be performed in the next consecutive month. If the discharger notifies the City properly and also performs the increased self-monitoring, no ERA will be required. If, however, there is no prior notification and/or no completion of the increased self-monitoring requirement, then an ERA is mandatory.

Case Referral to EPA/WDOE.

Cooperation with the federal (EPA) and the Washington State Department of Ecology (WDOE) in ERAs provides the City with ERA training (both investigatory and legal) and increases the legal leverage that can be placed on noncompliant dischargers. Such cooperation should result in more constructive public relations and a more effective City Pretreatment Program.

Therefore, the City retains the right to refer a violation case to the EPA and/or WDOE when the City finds it impossible to ensure a particular discharger's compliance. A violator may be able to withstand the City's \$1,000 per day maximum fine for a considerable time; however, the violator may not wish to be subject to the substantially greater per-day fines available to the EPA and/or WDOE. The Clean Water Act allows EPA to seek civil penalties of up to a maximum of \$25,000 per day, with criminal penalties up to \$1,000,000 and/or 15 years imprisonment; whereas the WDOE can seek a maximum fine of \$10,000.00 per day.

Community Awareness Program

The City's Pretreatment Program has established a "Pretreatment Quarterly" newsletter which is distributed to the City's SIUs, Minor Industrial Users (MIUs), and other specific community individuals/organizations which may be interested in or affected by the City's SUO. This newsletter will contain up-to-date information concerning federal, state, and local pretreatment legislation, ERAs, and glimpses of new products related to the pretreatment of industrial wastewater.

APPROPRIATE ENFORCEMENT RESPONSE ACTION DETERMINING FACTORS

Magnitude of the Violation

Violations may range from the relatively minor (i.e., reports submitted a week late, or numerical pretreatment standards and/or requirements exceeded by 5%) to quite serious (i.e., reports submitted months late, refusal to submit reports, or numerical pretreatment standards and/or requirements exceeded by greater than 50%). The extent of the violation should be an important factor in determining the best ERA. If a periodic report is late by a week or so, a simple phone call may be sufficient to ensure compliance. On the other hand, a single serious violation of a reporting requirement or numerical standard could be a signal of a significant compliance problem. Such problems could be due to a decline in personnel commitment toward pretreatment obligations, or they could be the result of equipment failures or overdue maintenance. A full explanation of the cause of any violation should be obtained before the appropriate ERA can be determined.

Apparent "Good Faith" of the Responsible Discharger

The City should take into account the "good faith" efforts of a discharger to comply with pretreatment requirements and/or standards. Good faith does not, however, eliminate the necessity of an enforcement action. "Good faith" may be defined as the user's honest intention to remedy its noncompliance, coupled with actions which give support to this intention. "Good faith" must be measured against the following standard expressed by Congress in the Legislative History of the Clean Water Act (No. 95-14, Vol. 3, p. 463):

"The Act requires industry to take extraordinary efforts if the vital and ambitious goals of the Congress are to be met. This means that business-as-usual is not enough. Prompt, vigorous, and in many cases expensive pollution control measures must be initiated and completed as promptly as possible. In assessing the good faith of a discharger, the discharger is to be judged against these criteria. Moreover, it is an established principle, which applies to this act, that administrative and judicial review are sought on the discharger's own time."

Thus, if a discharger deliberately refuses to comply with pretreatment requirements and standards, stalls in complying, or challenges the City's efforts to require compliance, it will not be considered to be acting in "good faith". On the other hand, if a discharger tries promptly to comply, it may be considered to be acting in "good faith".

To make sure all dischargers are treated equitably, the City will use the criteria listed below in determining whether a discharger is acting in "good faith":

- Dischargers should make requests for extensions as soon as they are aware that a deadline will not be met.
- When requesting a first extension, the discharger must contact the City at least a week in advance of the compliance deadline, and not have a record of repeatedly requesting extensions or chronically missing deadlines. City pretreatment personnel may approve the first extension.
- When requesting a second extension, the discharger must contact the City at least two weeks in advance of the compliance deadline. The Wastewater Division Manager or Assistant Wastewater Division Manager must approve the second extension.
- When requesting subsequent extensions, the extension must be requested as soon as the company is aware the compliance deadline will not be met, but in no case less than two weeks in advance. The Wastewater Division Manager or Assistant Wastewater Division Manager must approve subsequent extensions. Except in extreme circumstances, these requests are likely to be denied.

Violation Duration and History of Past Violations

The City should bring more serious ERAs against a discharger who has a history of recurring violations or whose violations persist over prolonged periods of time. In such cases, the City should seek specific explanations concerning the cause of the frequent or persistent violations, apply increased fines, and seek specific commitments from the discharger by means of a Com-O.

Noncompliance Affecting POTW Treatment System Performance

The City should bring more serious ERAs against a discharger whose discharge is contributing to the POTW's inability to meet its NPDES permit limitations.

Noncompliance Affecting Receiving Water or Sludge Quality

A discharger whose discharge is contributing to adverse effects on receiving water or the POTW's sludge should also be a candidate for a more serious ERA.

Pollutant Type

Sometimes the type of pollutant associated with discharge violations of the City's pretreatment standards and/or requirements is a significant factor in the determination of an ERA. Thus, if a discharger is late in complying with a highly toxic pollutant standard and/or requirement, it would merit a higher priority than another discharger who is late in complying with a conventional pollutant.