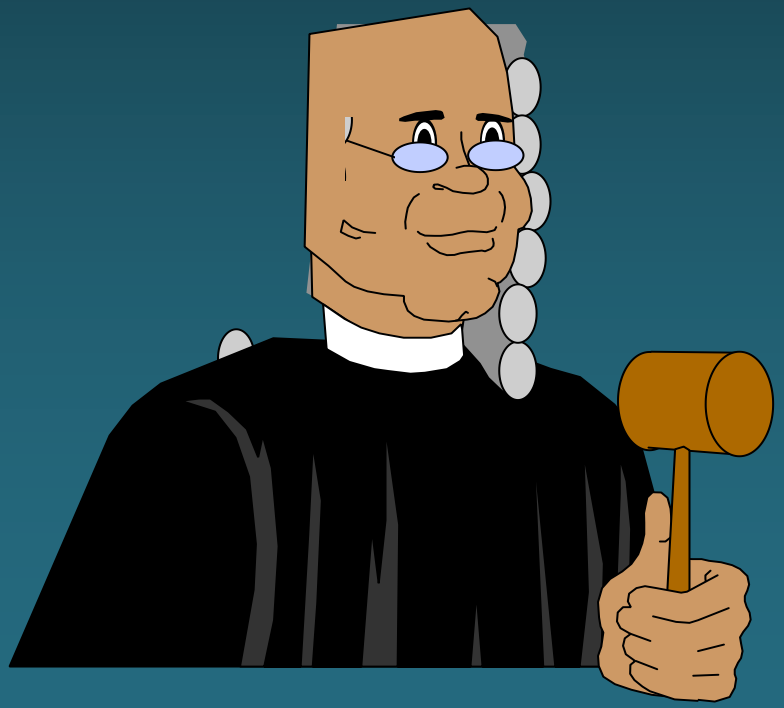
Pretreatment Toolbox

Enforcement



RVIPA Pretreatment Workshop

August 13, 2018

Enforcement Legal Authority

- 40 CFR § 403.8(f)(1)(vi)(A)
  - Obtain remedies for noncompliance by any IU with any pretreatment standard or requirement
- Local Regulations
  - enforce against any industrial user (IU)
  - all violations must be actionable
  - remedies must be non-exclusive
- Derived from state law

Violations

Unauthorized Discharges

Prohibited Standards

Permit Limits

Monitoring Requirements

Reporting Requirements

Permit Conditions

Compliance Schedule Deadlines

Enforcement Orders/Actions

Best Management Practices (BMPs) Requirements

Enforcement Actions

Informal Notice

Notice of Violation

Administrative Fines

Show Cause Orders

Consent Orders

Compliance Orders

Cease and Desist Orders

Injunctive Relief

Civil Penalties

Criminal Prosecution

Supplement Enforcement

Types of Violations

- **Unauthorized Discharges**
  - Can be unpermitted or non-permitted, with or without resulting harm to the POTW
  - Unpermitted: unaware of requirement to obtain a permit or notified of requirement to apply but fails to.
  - Non-permitted: fails to make application for permit renewal.
- **Prohibited Standards**
  - With or without harm to POTW
- **Violations of permit limits**
  - isolated or chronic;
  - minor or significant; and/or
  - with or without harm to POTW.

Types of Violations

- **Monitoring requirements violations**
  - Can be the result of a user's failure to perform:
    - all self-monitoring required or a portion thereof
      - (e.g., did not perform required monthly self-monitoring);
    - compliance monitoring as required
      - (e.g., had self-monitoring limit violations but failed to perform required resampling and analyses)
    - monitoring in accordance with 40 CFR Part 136

Types of Violations

- **Reporting requirements violations**
  - failure to comply with record keeping requirements as specified in 40 CFR §403.12(o);
  - failure to provide 24 hour notice;
  - failure to provide notifications (notice of changed discharges, potential problems, violation, etc.), reports (compliance monitoring, etc.) or plans (slug discharge, etc.);
  - failure to provide reports by specified deadlines;
  - falsification or “doctoring” of paperwork;
  - failure to provide schedule of compliance activity reports by specified deadlines; and
  - failure to properly sign or certify reports

Types of Violations

- **Permit condition violations**
  - failure to mitigate;
  - dilute wastestream in lieu of (adequate) pretreatment;
  - failure to install or maintain monitoring point and/or pretreatment equipment.
- **Compliance schedule deadlines violations**
  - failure to perform specified activity by imposed deadline
- **Enforcement orders/actions**
  - failure to respond as required

Legal Authority

- Applies to all IUs of POTW
- Need a range of administrative and judicial enforcement options

Enforcement Remedies

- Administrative
- Judicial
- Supplemental

Administrative Enforcement Remedies

- Notice of Violation
- Consent Orders
- Show Cause Hearing
- Compliance Order
- Cease and Desist Order
- Administrative Fines
- Emergency Suspension
- Termination of Permit

Notice of Violation

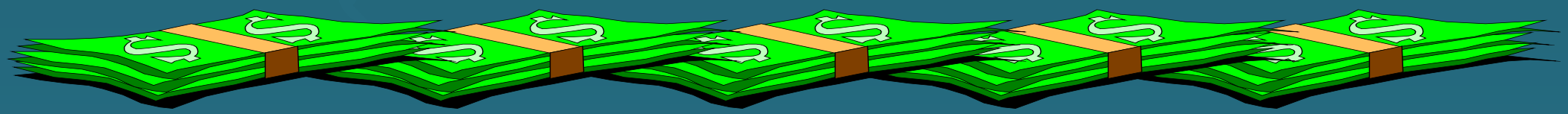
- Initial POTW response
- Official notice
- Provides IU opportunity to correct deficiency
- Provides consistency
- Issued for minor (nonsignificant) or infrequent violations

When to Issue a Notice of Violation?

- Violations typically addressed with an NOV:
  - Unpermitted discharges
  - Effluent limit violations
  - Monitoring violations
  - Reporting violations
  - Missed Compliance Schedule deadlines

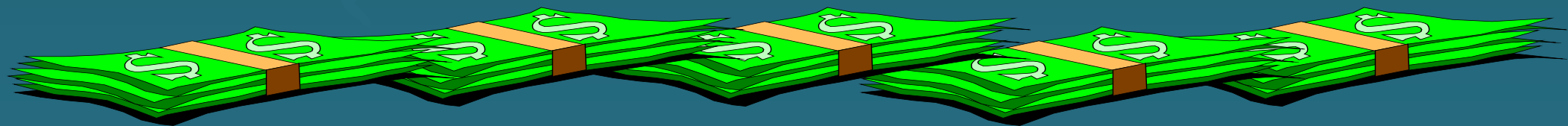
Administrative Fines

- Issued at POTW's discretion
- Punitive in nature
- Deterrent for future violations
- Monetary penalty
- Assessed directly by the Control Authority – no court order interference



Administrative Fines

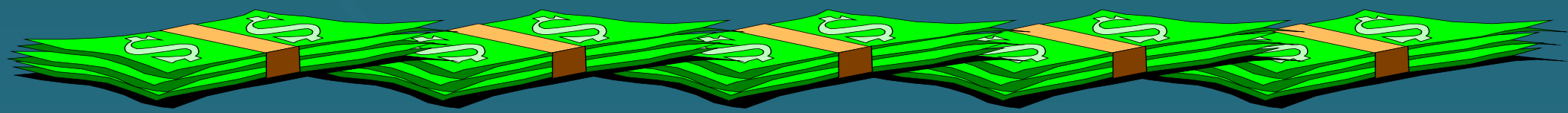
- In determining whether fines should be used and the amount of the fines, the CA should consider:
  - The type, severity, and number of the violations
  - The duration of the noncompliance
  - The impact of the violation on the: POTW, environment, human health
  - Whether the IU derived any economic benefit or savings from the noncompliance
  - Whether the IU is making good faith efforts to restore compliance
  - Other policy considerations normally involved in an enforcement decision



Administrative Fines

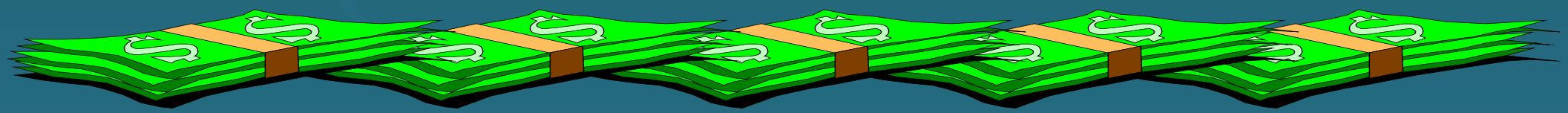
- **Types of fine schedules:**
  - **Flat rate**
  - **Flat rate with escalation**
  - **Fine calculated using a matrix**
  - **Fine based on type of noncompliance**
  - **Fine in addition to cost recovery**
  - **Fine based on economic benefit of noncompliance**

See EPA's *Guidance Manual for Calculation for Economic Benefit of Noncompliance with Pretreatment Standards* **(1989)**



Administrative Fines

- Methods to assess administrative fines:
  - Sewer bill
  - NOV
  - Administrative Order
  - Show Cause Hearing



Administrative Orders

- Direct IUs to undertake or cease specified activities
- Recommended as first formal response to SNC
- May incorporate:
  - Compliance schedules
  - Administrative penalties
  - Termination of service orders

Administrative Orders

- Common elements of administrative orders:
  - Title
  - Legal authority
  - Finding of noncompliance
  - Ordered activity
  - Milestone dates for corrective actions
  - Standard clauses

Administrative Orders

- Types of Administrative Orders:
  - Cease and Desist Order
  - Consent Order
  - Show Cause Order
  - Compliance Order

Administrative Orders

- **Cease and Desist Order:**
  - An administrative order directing an IU to immediately halt illegal or unauthorized discharges
  - Used where the discharge could cause interference or pass through or otherwise create an emergency situation

Administrative Orders

- **Consent Order:**
  - An administrative order embodying a legally enforceable agreement between the CA and the noncompliant IU
  - Designed to restore the IU to compliance status

Administrative Orders

- Elements of Consent Orders
  - Compliance schedule
  - Fines or remedial actions
  - Signatures of CA and IU representatives

Administrative Orders

- **Show Cause Order:**
  - An administrative order directing a noncompliant IU
    - to appear before the CA,
    - explain its noncompliance, and
    - show cause why more severe enforcement actions against the IU should not go forward

Administrative Orders

- Compliance Order:
  - An administrative order directing a noncompliant IU to achieve or restore compliance by a date specified in the order

Administrative Orders

- Compliance Order:
  - Issued when noncompliance cannot be resolved without
    - construction, repair, or process changes
  - Used to require development of management plans or spill plans

Judicial Enforcement Remedies

- Injunctive Relief
- Civil Penalties
- Criminal Prosecution

Civil Litigation

- **Normally pursued when:**
  - The corrective action required is costly and complex
  - The penalty to be assessed exceeds that which the CA can assess administratively
  - When the IU is considered to be unwilling to cooperate, and court supervised settlement is needed

Civil Litigation

- Normally pursued when:
  - Emergency situations where injunctive relief is necessary to halt or prevent discharges which threaten human health, the POTW, or the environment
  - To impose civil penalties and recover losses due to noncompliance

Civil Litigation

- Remedies available:
  - Consent decree
  - Injunctions
  - Civil penalties & cost recovery

Civil Litigation

- Consent Decree:
  - A court supervised settlement agreement, the violation of which may be considered contempt of court
  - Used when the IU is willing to acknowledge and correct the noncompliance and agree on penalty

Civil Litigation

- Injunctions, Injunctive relief:
  - A court order which restrains or compels action by the IU

Civil Litigation

- **Civil Penalties:**
  - A monetary or other punitive measure, usually associated with a court action
  - For the pretreatment program, the term may be used synonymously with “fines” (although fines generally imply the use of administrative rather than civil procedures)

Civil Litigation

- Cost Recoveries
- For expenses that the CA incurred when:
  - Responding to the noncompliance
  - Restoring the wastewater treatment plant and/or conveyances
  - Paying for medical treatment of injured employees
  - Paying for any fines assessed to the CA for NPDES permit violations

Civil Litigation

- **Basic Process:**
  - The CA decides to sue IU to recover costs, seek civil penalties, and corrective actions
  - The CA files complaint alleging violation(s)
  - The IU files answer admitting or denying allegations
  - Trial date set
  - Discovery process involving CA and IU
  - Settlement negotiations
  - Trial
  - Verdict
  - Appeals

Clean Water Act

Strict Liability

Users are held legally responsible for noncompliance, regardless of intent or negligence

Criminal Prosecution

- Acted upon when violations of the law are punishable, upon conviction, by fines and/or imprisonment
- The prosecutor must *prove* criminal intent / negligence
- Burden of proof is on the CA to compile strong evidence of noncompliance

Criminal Prosecution

- The IU:
  - Must have *intended* to break the law or
  - Was so indifferent to the nature and implications of its act that it could be deem criminally *negligent*
- Criminal offenses are traditionally defined as either felonies or misdemeanors

Criminal Prosecution

- Felonies:
  - Offenses punishable by imprisonment for a term exceeding one year or death
- Misdemeanors:
  - Offenses other than felonies
- Each violation, each day, a separate offense

Supplemental Enforcement

- Public notice in the newspaper
- Water service severance
- Termination of sewer service
- Performance bond / liability insurance
- Increased monitoring / reporting
- Required pollution prevention activities

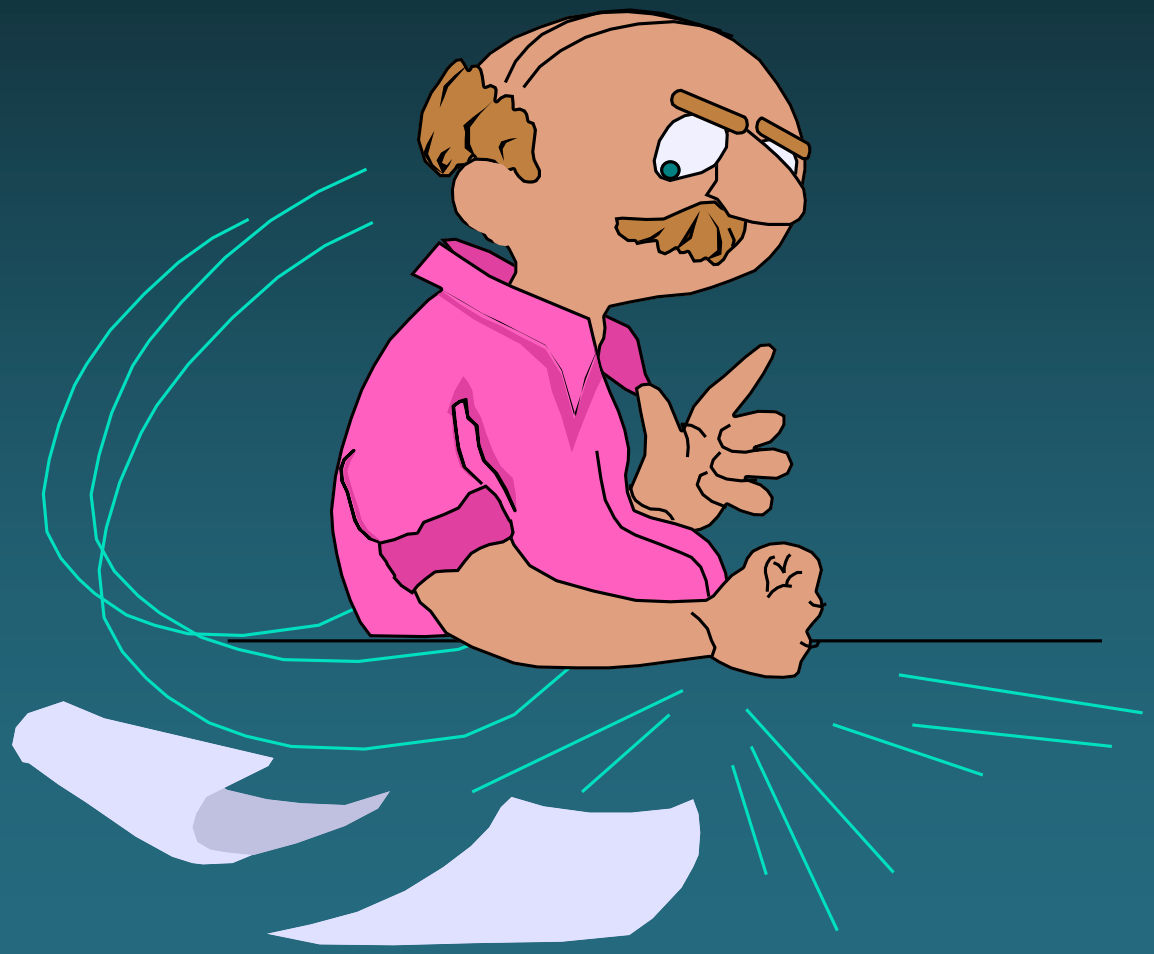
Enforcement Response Plans
[40 CFR § 403.8(f)(5)]

- Reflect POTW's responsibility to enforce pretreatment requirements & standards
- Identify how the POTW will investigate noncompliance
- Specifies officials responsible for each type of enforcement
- Specifies types of and time frames for taking escalating enforcement for anticipated types of violations

Factors to Consider for Appropriate Enforcement Response

- Magnitude of violation
- Duration of violation
- Effect on POTW, including a violation of BMPs, which will adversely affect the operation and implementation of the pretreatment program
- Effect on receiving water
- Pattern of past violations / success of previous enforcement actions
- Attitude and actions of the IU

Effective enforcement actions are timely



Enforcement Data Management

- Specify reports and compliance certifications required from IUs
- Notify IUs of late submittals
- Review reports and certifications received
- Notify users, *within specified timeframes*, of deficiencies and violations in reports and any noncompliance issues, including BMP violations
- Schedule IU responses
- Track IU responses
- Escalate enforcement

Enforcement Documentation

- Comprehensive explanation of violation
- Assume any action could be used in an enforcement case
- Document ALL actions
  - Includes: telephone calls, e-mails, meetings, etc.

Data Tracking
IU related

- Industrial waste survey
- Permit reissuance
- IU report due dates
- IU reporting requirements
- IU compliance status and violation dates, including BMPs
- Timeframe due dates for BMP key activities

Data Tracking
POTW related

- Compliance monitoring
- Inspection reports
- Enforcement actions with due dates and received dates

Significant Noncompliance (SNC)

- 40 CFR §403.8(f)(2)(viii) applies to:
  - SIUs
  - IUs which violate paragraphs (f)(2)(viii)(C), (D), and (H)

Significant Noncompliance (SNC)

- Violation of a Pretreatment Standard or Requirement, as defined by 40 CFR §403.3(l):
  - daily maximum,
  - long-term average, or
  - instantaneous limit, or
  - narrative standard

  that causes pass through or interference

Significant Noncompliance (SNC)

- Discharge that causes imminent endangerment or results in the POTW exercising its emergency authority
- Failure to accurately report noncompliance

SNC (continued)

- Failure to meet, within 90 days, a compliance schedule milestone
- Failure to submit a report [including compliance certifications] within 45 days of the due date

SNC (continued)

- Other violation or group of violations, which may include *a violation* of BMPs, which the POTW determines will adversely affect the operation or implementation of the local Pretreatment Program

SNC (continued)

- **Chronic violations**
  - 66% or more of all the measurements during a 6-month period exceed allowable numeric limits
  - measurements for same pollutant

SNC (continued)

- **Technical Review Criteria (TRC) violations**
  - **33% or more of all the measurements during a 6-month period equal or exceed**
    - **the *product* of the allowable numeric limit multiplied by the applicable TRC**
      - **TRC = 1.4 (for BOD, TSS, FOG) or**
      - **TRC = 1.2 (for all other pollutants, except pH)**
  - **measurements for same pollutant**

SNC (continued)

- **Chronic and TRC violations**
  - **now limited to *numeric* pretreatment standards or requirements**
  - **include instantaneous limits**

Chronic and TRC SNC Calculations

- Calculate SNC quarterly "rolling quarters"
- Evaluate *a numeric* Pretreatment Standard or Requirement, including instantaneous limits, as defined by 40 CFR §403.3(l)
- Categorical daily maximums and monthly averages
- "But I only collected one sample for the month"

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 9 1991

OFFICE OF WATER

MEMORANDUM

SUBJECT: Application and Use of the Regulatory Definition of Significant Noncompliance for Industrial Users

FROM: Michael B. Cook, Director
Office of Wastewater Enforcement and Compliance

TO: Water Management Division Directors, Regions I-X
Approved Pretreatment State Coordinators

Background:

On July 24, 1990, the Agency replaced the definition of "significant violation" with the definition of "significant noncompliance" (SNC) [see 40 CFR 403.8(f)(2)(vii) and 55 Fed. Reg. 30082]. This change eliminated the inconsistencies which arose in applying the significant violation criteria and established more parity in tracking violations committed by industrial users. The definition of SNC parallels the Pretreatment Compliance Monitoring and Enforcement Guidance (PCME) definition of SNC published in 1986.

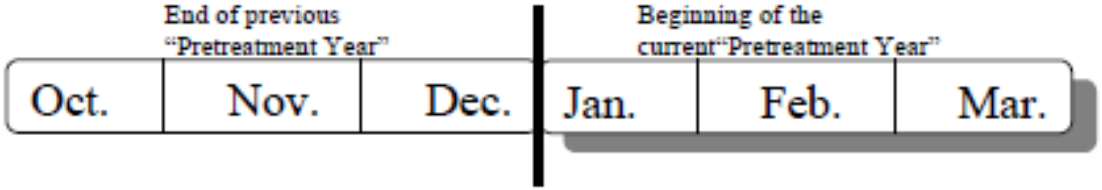
This memorandum responds to several questions from States, publicly owned treatment works (POTWs), and industry regarding the application of the SNC definition. One frequently asked question is whether the time frame for determining SNC for technical review criteria effluent violations is a static six month period (i.e., a fixed six month calendar interval) or a rolling six month time frame (i.e., the current day minus six months). POTWs and industry have also inquired whether all data must be used to calculate SNC. The following discussion is provided to promote consistency in the application of this definition. Regions, States and POTWs should determine SNC in the manner prescribed below.

Determination of Industrial User (IU) Significant Noncompliance (SNC)

1. The POTW (in conjunction with the Approval Authority) must establish its "Pretreatment Year."

2. At the end of each quarter, POTWs and States should evaluate their IU's compliance status for the two criteria which are evaluated on a six month time frame (i.e., the "A" and "B" criteria – 403.B(f)(2)(vii) (A) and (B) as illustrated below. The example below assumes a "Pretreatment Year" equal to the calendar year.

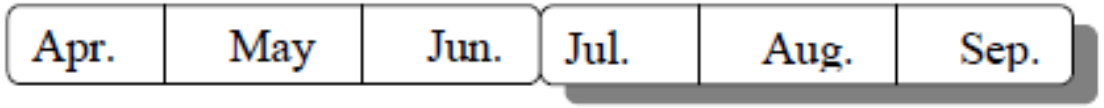
FIRST EVALUATION PERIOD



3. At the end of the first quarter (March 31st in our example), the POTW must evaluate the data from an industrial user for the previous six months (i.e., beginning with October 1 of the previous "Pretreatment Year" as in our example). Likewise, the POTW must evaluate six months of data at the end of each subsequent quarter (i.e., June 30th, September 30th, and December 31st).

SECOND EVALUATION PERIOD

THIRD EVALUATION PERIOD



4. At the end of the "Pretreatment Year," the POTW must summarize the compliance status of its industrial users over the reporting period and report on this compliance status to the Approval Authority. The POTW must publish all industrial users which were identified in SNC during the "Pretreatment Year," unless the IU was previously published for violations which ocurred solely in the last quarter of the previous "Year."

SNC Calculations

Metal Finishing PSES

Cadmium - Monthly Ave. = 0.07

Started Jan 2010

TRC = 1.2 * (0.07) = *0.084*

Month	Self-Monitoring
Jan	0.05
Feb	0.06
Mar	0.09
Apr	0.1
May	0.04
Jun	0.04
Jul	0.08
Aug	0.04
Sep	0.03
Oct	0.08
Nov	0.08
Dec	0.08
Jan	0.02
Feb	0.02
Mar	0.02
Apr	0.12
May	0.11
Jun	0.02
Jul	0.09
Aug	0.03
Sep	0.03

Second Quarter Jan-Jun

SNC (TRC)

Third Quarter Apr-Sep

Not SNC

Fourth Quarter Jul-Dec

SNC (Chronic)

Indicators of an Effective Enforcement Response Plan

- Ensure violators return to compliance as soon as possible
- Penalize noncompliant users for pretreatment violations
- Deter further noncompliance
- Recover additional expenses incurred by POTW attributable to noncompliance

Approval Authority Oversight

- EPA or the State WILL review the files
  - the files need to make sense
  - the files need to present a clear picture of the chronology of events
- Expect each violation (reporting, discharge, and required BMPs) to be noted with POTW / IU response
- Anything less will complicate the review

Key to Effective Enforcement

- Follow the approved:
  - enforcement response plan (ERG)
  - enforcement response guide (ERP)
- Documentation
- Notification
- Escalation

RESOURCES

- *Pretreatment Streamlining Rule, Federal Register, October 14, 2005*
- *Guidance for Developing Control Authority Enforcement Response Plans, September 1989*