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# PRETREATMENT ENFORCEMENT MANAGEMENT SYSTEM

## 10.1 INTRODUCTION

The purpose of the Pretreatment Enforcement Management System (PEMS) is to document the Metro District's policies and procedures to be followed in identifying, documenting, and responding to Pretreatment Program violations. These policies and procedures are developed with four primary objectives in mind:

- Ensuring that violators return to compliance as quickly as possible.
- Deterring future noncompliance.
- Penalizing noncompliant industrial users for pretreatment violations.
- Recovering any expenses incurred by the District or its connectors because of the noncompliance.

The District's Pretreatment Program encompasses 60 separate programs, but a number of connectors have delegated primary responsibility for enforcement activities in their jurisdictions to the Metro District. This unique organization makes a cohesive enforcement management system all the more necessary to ensure that enforcement is applied equitably to all of the District's industrial users (IUs).

### 10.1.1 Description of the Pretreatment Enforcement Management System

This section provides a detailed description of the PEMS. It is divided into four general sections which include: the violation review process; general enforcement policies; descriptions of informal, formal (administrative), civil and criminal enforcement processes; and lists of supporting documents, abbreviations, and definitions.

The original PEMS was approved by EPA on July 20, 1990, and was distributed to all connectors for inclusion in their copies of the *Procedures for Implementing the Pretreatment/Industrial Waste Control Program of the Metro District* (Procedures Manual). The District and its connectors are required to follow the guidelines outlined in the PEMS.

## 10.2 VIOLATION REVIEW PROCESS

This section contains the Enforcement Response Guide, which provides assistance to the District and its connectors in selecting initial and follow-up enforcement actions. It contains a discussion of the District's connector oversight policy, and provides District personnel with guidance on appropriate remedies for inadequate connector response to industrial user noncompliance. In addition, this section contains a description of the District's authority to directly impose penalties on violating IUs.

### 10.2.1 Enforcement Response Guide

Table 10-1 (the Enforcement Response Guide) lists recommended enforcement responses and provides a guide for District and connector enforcement activities. The guide is intended to serve three purposes:

- Establish appropriate enforcement responses for different levels and types of Pretreatment Program violations.
- Ensure a uniform enforcement response for comparable violations.
- Provide a quick reference for Pretreatment Program enforcement personnel.

In carrying out enforcement responsibilities, connectors should coordinate closely with Metro District Pretreatment personnel. The District must be informed of all enforcement actions taken against IUs and notified prior to a connector's taking formal administrative or judicial action.

District personnel are available to assist non-delegated connectors in determining the proper enforcement response to violations. Once the proper response is determined, however, it is up to the non-delegated connector to initiate enforcement action. While the District has the authority to enforce Pretreatment regulations where the connector is unable or unwilling to do so, the District would prefer that such enforcement be undertaken by the non-delegated connectors. The District retains authority in enforcement actions, however, and may recommend more severe action if it believes a connector is being too lenient with an IU or if the IU is not showing good faith in resolving its compliance problems. The District also has the authority to overfile on a connector's enforcement action in the event the connector fails to take appropriate action, or to escalate enforcement in cases where the IU fails to comply with initial actions. Sections 10.4.5 and 10.5.1 contain a more detailed explanation of the District's overfiling authority.

Table 10-1 encompasses three types of enforcement responses: informal, formal, and judicial. These responses are discussed in more detail in later Sections.

The Enforcement Response Guide lists several alternative enforcement responses for each type of violation. Semicolons separate these alternatives. Determination of the appropriate alternative must include consideration of the criteria described below. The reasons for choosing a particular response should be documented. The response guide must be followed in all cases. Not to do so may jeopardize future enforcement due to allegations of arbitrary decision making.

The Enforcement Response Guide also contains a range of penalty amounts for different types of violations. The District established the penalty ranges based on the penalty amounts available to its connectors in their legal authorities and on information obtained from EPA enforcement guidance documents. Many connectors have a \$1000/violation/day maximum penalty amount in their legal authorities, so each of the penalty amount ranges listed in the Guide reflect what the District believes are reasonable allocations of the maximum penalty amount. For example, a frequent nonsignificant discharge violation calls for a \$100-\$500 per violation penalty, while a frequent significant violation calls for a \$300-\$1000 per violation penalty. Discharge violations causing known damage to the POTW or the environment require the

assessment of the maximum penalty amount available. The criteria used to select a penalty amount from the specified ranges are discussed in more detail in Section 10.5.2.

Determination of appropriate enforcement response is, in large part, based on common sense. For example, revocation of an IU's permit would not be an appropriate response to a late report. On the other hand, a verbal warning would not be appropriate if an IU failed to notify the POTW of a spill that caused a treatment plant upset and subsequent CDPS/NPDES permit violations. The following criteria should be kept in mind when using the Enforcement Response Guide to determine an appropriate enforcement response:

- Magnitude of the violation.
- Duration of the violation.
- Effect of the violation on the environment.
- Effect of the violation on the POTW (including the collection system).
- Compliance history of the IU.
- Good faith of the IU.
- Occurrence of Significant Noncompliance (SNC).

Violations should be evaluated both individually and in light of other violations. For example, if a minor violation recurs, or if several minor violations occur together, a more serious response would be indicated than if the violations were looked at individually. It should also be noted that Pretreatment enforcement is a matter of strict liability; i.e., the regulations were either violated or they weren't. Violations of Pretreatment regulations must always be acknowledged and some type of enforcement action taken, even if it is only a verbal warning. The knowledge and intent of the IU is only considered when determining the severity of the enforcement action to be taken.

The criteria used in determining appropriate enforcement action are discussed in more detail below:

### **10.2.2 Magnitude of the Violation**

In general, the response to isolated, infrequent instances of noncompliance is an informal response such as a telephone call or Notice of Violation. Some isolated violations can, however, be quite serious and require more extreme enforcement measures. For example, a spill that causes damage to the sewer system may occur only one time, but that one time is a serious violation and calls for serious enforcement action. Table 10-1 is written to provide a variety of enforcement options based on the magnitude of the violation.

The DISCHARGE LIMIT VIOLATIONS section of the Enforcement Response Guide requires enforcement personnel to determine if a violation is significant or nonsignificant. The District considers a discharge violation to be significant if the concentration (or mass, in the case of production-based standards) of pollutant discharged is more than 1.2 times the effluent limitation for metals and organics, and 1.4 times the limitation for

oil and grease. In the case of pH, violations are considered significant if the pH value is more than 1.0 pH unit above the upper pH limit or below the lower pH limit.

Other examples of significant violations are: discharges of a pollutant(s) that cause, alone or in combination with other discharges, Interference or Pass Through, or cause imminent endangerment to human health/welfare or to the environment; criminal convictions for Clean Water Act violations; violations of compliance schedule milestones by 90 days or more after the schedule date; failure to provide required reports within 30 days after their due dates; and failure to accurately report noncompliance.

### **10.2.3 Duration of Violation**

Regardless of severity, violations that continue over prolonged periods of time subject the industrial user to escalated enforcement action. For example, if an effluent violation occurs monthly for six months, or if reports are frequently submitted more than 30 days overdue, escalated enforcement action is indicated. Chronic violations that result in harm to the sewer system or environmental damage will require even more serious action, including suspension of sewer service and recovery of costs.

The DISCHARGE LIMIT VIOLATIONS section of the Enforcement Response Guide requires enforcement personnel to determine if a violation is frequent or isolated. The District considers discharge violations to be frequent if the violations occur at a rate equal to or greater than 33% of all monitoring events within a 6 calendar month period per parameter. A discharge violation is considered isolated if it occurs at a rate of less than 33% of all monitoring events within a 6 calendar month period per parameter.

### **10.2.4 Effect on the Environment**

One of the primary goals of the National Pretreatment Program is to prevent pollutants discharged from industrial sources from "passing through" the treatment plant into the receiving waters. Evidence of Pass Through includes violations of numerical or toxicity limits of the District's CDPS/NPDES permit. At a minimum, discharges that cause CDPS/NPDES violations require issuance of an Administrative Order and assessment of penalties. The District may also recover costs incurred due to CDPS/NPDES violations. If the violations continue, revocation of the permit or suspension of sewer service may be in order. In addition, causing (or contributing to causing) exceedances of Colorado Water Quality Standards for Segment 15 of the South Platte River may also subject the IU to enforcement action.

### **10.2.5 Effect on the POTW**

Another goal of the National Pretreatment Program is to prevent "interference" with the POTW caused by industrial discharges. Interference includes upsets to the treatment system, damage to the collection system caused by corrosion, blockages or explosions, increased treatment costs, or biosolids contamination. Violations of this type call for penalties as well as cost recovery. If the violations continue, revocation of the permit or suspension of sewer service may be in order.

### **10.2.6 Compliance History of the IU**

Chronic violations of permit limitations may indicate that an IU needs to install a pretreatment system or, if a system already exists, that it is inadequate for the waste treated or is not being properly operated or maintained. IUs that have other chronic

compliance problems, such as always submitting reports late or failing to achieve Compliance Schedule deadlines, may have a lackadaisical or even contemptuous attitude towards Pretreatment compliance. Either case must be dealt with more severely than the IU who only has an occasional violation or submits a report two or three days late once every three years. Compliance history is an important consideration when determining which of several appropriate enforcement actions should apply to a particular violation.

### **10.2.7 Good Faith of the IU**

The IU's good faith in correcting its noncompliance may also be a factor in determining which enforcement action to take. Good faith is typically demonstrated by cooperation and completion of corrective measures in a timely manner. However, compliance with previous enforcement orders is not necessarily good faith if violations continue to occur. The IU's willingness to comply should generally result in the less stringent of the appropriate enforcement actions being taken. Good faith, however, does not eliminate the necessity to take enforcement action. As mentioned previously, Pretreatment enforcement is based on strict liability, and a user's good faith must not be used as an excuse to avoid taking some kind of enforcement action.

### **10.2.8 Significant Noncompliance**

An IU whose discharge and/or other violations meet certain criteria set forth in the federal Pretreatment regulations [40 CFR 403.8(f)(2)(vii)] may be found to be in Significant Noncompliance (SNC) with Pretreatment standards and requirements. These criteria include:

- Chronic violations of wastewater discharge limits, in which 66% or more of all the measurements taken during a six-month period exceed (by any magnitude) the daily maximum limit or the average limit for the same pollutant parameter;
- Technical Review Criteria (TRC) violations, in which 33% or more of all the measurements for each pollutant parameter taken during a six-month period equal or exceed the product of the daily maximum limit or the average limit multiplied by the applicable TRC (TRC=1.4 for BOD, TSS, Oil and Grease, and 1.2 for all other pollutants, except pH);
- Any other violation of a Pretreatment effluent limit that the District determines has caused, alone or in combination with other discharges, Interference or Pass Through (including endangering the health of POTW personnel or the general public);
- Any discharge of a pollutant that has caused imminent endangerment to human health, welfare, or to the environment, or has resulted in the District's or its connectors' exercise of their emergency authority to halt or prevent such a discharge;
- Failure to submit required reports within 30 days of their due dates;
- Failure to meet, within 90 days after the schedule date, a Compliance Schedule milestone;
- Failure to accurately report noncompliance.

- Criminal convictions for violation(s) of the Clean Water Act;
- Any other violation or group of violations that the District determines will adversely affect the operation or implementation of the local Pretreatment Program.

In addition to requiring enforcement actions against IUs in SNC as described below, the District annually publishes the names of these IUs in the newspaper. This publication is described in more detail in Sections 8.1.3 and 10.5.3 of this document. An example of this publication appears in Appendix EE.

District Pretreatment Program staff make a determination each calendar quarter of those IUs in SNC. The procedure for making this determination is as prescribed by EPA and is shown in Appendix GG.

Regardless of the range of enforcement options shown in the Enforcement Response Guide for various types of violations, a finding of SNC requires, at a minimum, the specific enforcement actions described below. If an IU is in SNC only because of violations of discharge limitations that are in the process of being amended, and the amendments will eliminate the SNC, the following enforcement actions need not be taken.

An IU found to be in SNC for the first time must be notified of the finding of SNC and issued one of the following:

- An Administrative Order requiring that the IU come into immediate compliance and remain in compliance with all permit requirements, and participate in an enforcement meeting; or
- If appropriate, given the compliance history of the IU and other factors, an Administrative Order placing the IU on a Compliance Schedule as described in Section 10.7.2 of this document and requiring that the IU participate in an enforcement meeting; or
- If appropriate, given the seriousness of the violations or the potential for environmental or other damage, an Administrative Order requiring the immediate cessation of discharge.

Any of the above Orders may include additional monitoring requirements and/or an assessment of penalties for the specific violations, as determined from the Enforcement Response Guide. If the District performs additional monitoring, all sampling and analytical costs may be passed on to the violator.

Enforcement meetings are held to stress the importance of correcting situations that may lead to another finding of SNC, to emphasize the necessity of maintaining consistent compliance, and to advise the IU of additional elevated enforcement actions that may be taken for failure to comply.

Because the method used to determine SNC for each calendar quarter actually includes an evaluation of two quarters' data, an IU may be found to be in SNC for two successive quarters because of the same violation(s). Where this is the case, the second finding of SNC "doesn't count" for the purpose of accelerating enforcement actions as described below.

An IU found to be in SNC a second (or subsequent) time, where such SNC is a result of violations occurring after the date of the Administrative Order described above, must be assessed penalties for all accumulated violations as determined from the Enforcement Response Guide, except in the following instances:

- If the violations resulting in the second (or subsequent) SNC determination occurred more than two years after the last AO notification of SNC, the new SNC may, at the District's discretion, be considered another "first occurrence" of SNC.
- If the violations resulting in the second (or subsequent) SNC determination were discharge-only violations for an IU currently on an Administrative Order Compliance Schedule, the IU must be notified of its second (or subsequent) SNC determination and ordered to complete the schedule. In this case, any determination of SNC for the IU within two years after the completion of the Compliance Schedule must result in the assessment of penalties for all accumulated violations.
- If the District determines the second (or subsequent) SNC determination resulted from conditions reasonably beyond the control of the IU, the new SNC may, at the District's discretion, be considered another "first" occurrence of SNC. The District will document the circumstances and determine the appropriate enforcement action.

An IU who remains or reappears in SNC, even after the assessment of penalties and the completion of Compliance Schedules as appropriate, must have service terminated until and unless the IU is able to satisfactorily demonstrate that a resumption of discharge will no longer result in findings of SNC.

At the end of the Enforcement Response Guide is a section entitled "Time Control Goals" which indicates the amount of time in which the Metro District (or non-delegated connectors) should initiate enforcement action after detection of violation(s). The time control goals are not meant to indicate the amount of time required to finalize the enforcement, however, particularly in the case of civil or judicial actions which may require considerable time to resolve. While the multi-jurisdictional organization of the District's Pretreatment Program makes it difficult to establish rigid deadlines, the District and its connectors must make every effort to conform to the time control goals in this section.

**TABLE 10-1**

**ENFORCEMENT RESPONSE GUIDE  
ILLEGAL DISCHARGES**

<b><u>Noncompliance</u></b>	<b><u>Circumstances</u></b>	<b><u>Response</u><sup>1</sup></b>
Unpermitted discharge (no permit or permit not transferred or amended) of nonprohibited wastes.	Discharger unaware of permit requirement.	Administrative Order (AO) requiring permit application and BMR (if categorical).
	Discharger aware of permit requirement.	AO requiring permit application and BMR (if categorical) and penalty of \$100-\$500/per day; cease discharge; terminate service.
	Discharger failed to notify of change in ownership.	AO to immediately halt discharge and require permit application and BMR (if categorical).
Discharge of wastes specifically prohibited in a discharge permit or as defined in the District's <i>Rules and Regulations</i> .	Discharger unaware of prohibition and no known environmental or POTW damage.	AO to immediately halt discharge; penalty of \$100-\$500 per day.
	Discharger unaware of prohibition and discharge results in environmental or POTW damage or dangerous situation.	AO to immediately halt discharge and penalty of \$500-\$1000 per day and recovery of any costs and CDPS/NPDES penalties; cease discharge; terminate service.
	Discharger aware of prohibition and no known environmental or POTW damage.	AO to immediately halt discharge; penalty of \$500-\$1000 per day; cease discharge.
	Discharger aware of prohibition and discharge results in environmental or POTW damage or dangerous situation.	AO to immediately halt discharge and penalty of \$1000-\$5000 (depending on approved legal authority) per day and recovery of any costs and CDPS/NPDES penalties; cease discharge; terminate service.
Discharge with expired permit.	Discharger failed to apply for permit renewal.	Notice of Violation (NOV); penalty of \$100-\$500/per day.

**TABLE 10-1 (continued)**

**DISCHARGE LIMIT VIOLATIONS**

<b><u>Noncompliance</u></b>	<b><u>Circumstances</u></b>	<b><u>Response</u></b>
Exceedance of discharge limits (local, site-specific or categorical) <sup>2</sup>	Isolated, nonsignificant violations.	Telephone call <sup>3</sup> ; NOV.
	Frequent, nonsignificant violations.	NOV; meeting with IU; AO to submit Compliance Schedule; Show Cause (repeat offense); penalty of \$100-\$500 per violation per day.
	Isolated, significant violations, and no known environmental or POTW damage.	NOV; penalty of \$200-\$700 per violation per day.
	Frequent, significant violations and no known environmental or POTW damage.	Meeting with IU or Show Cause; AO to submit Compliance Schedule; penalty of \$300-\$1000 per violation per day; cease discharge until compliance is achieved.
	Caused known damage to environment or POTW. SNC.	AO to halt discharge and penalty of \$1000-\$5000 (depending on approved legal authority) per violation per day and recovery of any costs and CDPS/NPDES penalties; cease discharge; terminate service.
Reported accidental or slug load discharge.	Isolated, no known environmental or POTW damage.	NOV; AO to develop Spill/Slug Control Plan or revise existing Plan(s) to prevent future recurrence.
	Isolated, known Interference, Pass Through or other damage. SNC.	Penalty of \$500-\$1000 per day of violation and recovery of CDPS/NPDES penalties and damages; cease discharge; terminate service.
	Recurring discharge, known environmental or POTW damage. SNC.	Penalty of \$1000-\$5000 (depending on approved legal authority) per day of violation & recovery of CDPS/NPDES penalties & damages; cease discharge; terminate service.

**TABLE 10-1 (continued)  
REPORTING VIOLATIONS**

<b><u>Noncompliance</u></b>	<b><u>Circumstances</u></b>	<b><u>Response</u></b>
Failure to report or late reports (routine reports, discharge monitoring reports).	Isolated or infrequent and reports <30 days late.	Telephone call <sup>3</sup> or NOV requiring reports to be submitted immediately.
	Continuing failure to report or reports frequently <30 days late.	NOV; penalty of \$200-\$700 per day per violation; Show Cause.
	Reports >30 days late. SNC.	AO; penalty of \$300-\$1000 per day per violation; Show Cause.
Failure to report (one-time reports, e.g., Industrial Waste Questionnaire, Baseline Monitoring Reports, 90-day reports).		Telephone call <sup>3</sup> or NOV requiring reports to be submitted immediately; penalty of \$100-\$500 per day per violation.
Failure to notify of effluent limit violation or slug discharge.	Isolated incident and no known effect.	Telephone call <sup>3</sup> or NOV.
	Frequent or continuing and no known effect.	NOV; meeting with IU; penalty of \$200-\$700 per day per violation; Show Cause.
	Known environmental or POTW damage. SNC.	Penalty of \$1000-\$5000 (depending on approved legal authority) per day per violation and recovery of costs and CDPS/NPDES penalties; cease discharge; terminate service.
Failure to accurately report noncompliance.	Isolated incident or no known effect. SNC.	AO to correct violations and reporting deficiencies.
	Frequent or continuing or known effect. SNC.	AO to correct violations; penalty of \$200-\$700 per occurrence; Show Cause; cease discharge.

**TABLE 10-1 (continued)  
REPORTING VIOLATIONS**

<u>Noncompliance</u>	<u>Circumstances</u>	<u>Response</u>
Any reporting violation.	Evidence of negligence <sup>4</sup> or intent or submission of false information. SNC.	Referral to proper authority for criminal investigation; civil litigation and/or criminal prosecution seeking maximum penalties allowed by State law (at least \$1000 per day per violation); cease discharge; terminate service.
Minor reporting deficiencies (computational or typographical errors; missing dates, missing or unauthorized signatures).	Isolated or infrequent.	Telephone call <sup>3</sup> or NOV; corrections to be made on next submittal; missing or unauthorized signatures must be corrected immediately.
	Frequent or continuous.	AO to correct deficiencies; penalty of \$100-\$500 per occurrence.
Major reporting deficiencies (missing self-monitoring data; wrong test procedures used; failure to report process changes or hazardous waste discharges or required batch discharges).	Isolated or infrequent.	NOV and corrections to be made within specified time frame; meeting.
	Frequent or continuous.	AO to correct deficiencies; penalty of \$200-\$700 per occurrence; Show Cause.
Complete failure to report.	IU does not respond to phone calls, letters, NOVs or AOs. SNC.	Penalty of \$1000-\$5000 (depending on approved legal authority) per day; cease discharge; termination of service.

**TABLE 10-1 (continued)  
COMPLIANCE SCHEDULE VIOLATIONS**

<u>Noncompliance</u>	<u>Circumstances</u>	<u>Response</u>
Failure to submit Compliance Schedule.	Violation of Administrative Order.	Civil and/or criminal penalties of \$1000-\$5000 (depending on approved legal authority) per day until schedule is submitted.
Missed Compliance Schedule milestone within 90 days of deadline.	Will not cause final date or other interim dates to be missed.	Telephone call <sup>3</sup> ; NOV.
	Will cause final date or other interim dates to be missed; violation for good cause.	NOV requiring documentation of factors causing violation; meeting; AO to submit new Compliance Schedule.
	Will cause final date or other interim dates to be missed; violation not for good cause.	AO and penalty of \$200-\$700 per day of violation; Show Cause hearing; cease discharge until compliance achieved.
Missed Compliance Schedule milestone by more than 90 days of deadline.	SNC.	AO requiring documentation of factors causing violation and/or new Compliance Schedule and penalty of \$300-\$1000 per day of violation; cease discharge until compliance achieved.

**TABLE 10-1 (continued)  
OTHER PERMIT VIOLATIONS**

<b>Noncompliance</b>	<b>Circumstances</b>	<b>Response</b>
Other minor violations of permit conditions (includes inspection deficiencies; e.g., failure to maintain required records or post spill notification procedures or calibrate metering equipment, or minor plan deficiencies).	No evidence of negligence <sup>4</sup> or intent.	NOV or Notice of Deficiency; meeting; AO to correct violations.
	Evidence of negligence <sup>4</sup> or intent.	AO to correct violations; penalty of \$100-500 per day per violation.
Other major violations of permit conditions (e.g., failure to perform minimum required self-monitoring, to resample, to collect representative samples, to provide information, to submit or update required plans or major plan deficiencies, to properly operate and maintain pretreatment equipment, to make timely permit reapplication).	No evidence of negligence <sup>4</sup> or intent.	NOV; meeting; AO to correct violations; penalty of \$100-\$500 per day per violation; Show Cause.
	Evidence of negligence <sup>4</sup> or intent.	AO to correct violations; penalty of \$300-\$1000 per day per violation; Show Cause; possible criminal prosecution; cease discharge; terminate service.
Failure to maintain monitoring facilities.	Isolated or no evidence of negligence <sup>4</sup> or intent.	Meeting; NOV; AO to correct violations and prevent recurrence.
	Recurring or continuing or evidence of negligence <sup>4</sup> or intent.	AO to correct violations and prevent recurrence and/or to submit Compliance Schedule and penalty of \$100-\$500 per day per violation; recover costs of failed agency monitoring events; cease discharge until compliance achieved.

**TABLE 10-1 (continued)  
OTHER VIOLATIONS**

<u>Noncompliance</u>	<u>Circumstances</u>	<u>Response</u>
Reporting false information.	Any instance.	Referral to proper authority for criminal investigation; civil litigation and/or criminal prosecution seeking maximum penalties allowed by State law (at least \$1000 per day per violation); terminate service.
Tampering with monitoring equipment.	Isolated or no evidence of negligence <sup>4</sup> or intent.	Telephone call <sup>3</sup> ; meeting; NOV.
	Recurring or evidence of negligence <sup>4</sup> or intent.	Referral to proper authority for criminal investigation; civil litigation and/or criminal prosecution seeking maximum penalties allowed by State law (at least \$1000 per day per violation); terminate service.
Denial of access or refusal of entry.	Any instance.	Refer to proper authority to obtain and execute a search warrant; penalty of \$1000 per day of violation; terminate service.
Failure to comply with requirement to cease discharge.	Any instance.	AO to immediately halt discharge and penalty of \$1000 per day of violation; terminate service.

- 1 In the event the violator has previously been assessed penalties for similar violations, or the violations have resulted in a criminal conviction under the Federal Clean Water Act, the penalty may be increased by the Metro District up to five thousand dollars (\$5,000) per day per violation, in accordance with Section 6.28.6 of the District's *Rules and Regulations*. In addition to any penalties, the Metro District may recover reasonable attorney's fees, court costs, court reporter's fees, and other expenses of litigation by appropriate suit at law against the violator. Such penalties shall be in addition to any actual damages the District may incur because of such violations. Where a violation is found to have caused Interference or Pass Through the maximum penalty of \$5,000 per violation may be increased as necessary to allow the District to recover any fines or penalties paid by the Metro District for NPDES (CDPS) Permit violations due to the Interference or Pass Through.
- 2 Exceedance of discharge limits may result in the industry being found to be in Significant Noncompliance with Pretreatment standards. See Sections 8 and 10.2.8 for more information.
- 3 Telephone calls should be followed up with warning letters if information is not received within the agreed upon time frame.
- 4 Negligence is defined as violations that are ongoing despite several warnings.

**TABLE 10-2**  
**TIME CONTROL GOALS**

<u><b>ENFORCEMENT RESPONSE</b></u>	<u><b>TIME CONTROL GOAL*</b></u>
Informal Responses  Telephone Notification Notice of Violation Meetings	  14 days 21 days 30 days
Formal Responses  Compliance Schedule Order to Show Cause Monetary Penalty (Administrative) Revoke Permit/Suspend Service	  60 days 60 days 60 days 60 days
Judicial Response  Injunctive Relief Consent Decree Civil Penalties Criminal Penalties	  60 days 60 days 60 days 90 days

\* Indicates the amount of time in which the Metro District (or non-delegated connectors) should initiate enforcement action after detection of the violation(s). Violations which threaten health, property or the environment are considered emergencies and will receive immediate attention.

### **10.3 VIOLATION SUMMARY FORMS**

The District uses a computer-generated Monitoring Results report to track industrial user violations. In addition to providing a summary of an industry's monitoring results, the Monitoring Results report lists all of the violations (instantaneous, daily, monthly, and 4-day) for the reporting period. Examples of these reports are shown in Appendix HH. Monitoring Results reports for all of the District's industrial users are reviewed regularly as described in Section 10.4.

### **10.4 INTERNAL MANAGEMENT CONTROLS/CONNECTOR OVERSIGHT**

The Metro District relies on its non-delegated connectors to respond with appropriate enforcement responses to industrial user violations. In most cases, connector responses are adequate. In some cases, however, a connector may take action which the District considers inappropriate, or the connector may fail to take any action at all. The District has developed a set of internal management controls to review connector enforcement actions and to commence action where no action or inadequate action has been taken.

In most other cases, the District takes direct enforcement action against permittees, specifically those in jurisdictions that have delegated Pretreatment Program responsibilities back to the District. However, some delegation agreements (e.g., City and County of Denver) require the District and connector to co-issue formal enforcement actions. In these cases, the District's oversight of the connector is identical to that for non-delegating connectors.

#### **10.4.1 Informal Enforcement Actions - Connector Initiated**

A few of the District's connectors take informal enforcement actions (Notices of Violation, telephone calls) for minor violations without prior notice to the District. When the District receives a copy of the Notice of Violation or telephone call documentation, the action is entered into the enforcement dataset. A Metro District Industrial Waste (IW) Specialist or Investigator prints a computer-generated summary of the IU's monitoring and compliance history and reviews the enforcement action in light of the industry's compliance history to determine the appropriateness of the action taken. The paperwork plus any comments or recommendations are forwarded to the Industrial Waste (IW) Coordinator for review.

If the IW Coordinator determines that the enforcement action was appropriate, the paperwork is sent to Records Management for filing. If the IW Coordinator determines that the enforcement action was inappropriate, the IW Specialist or Investigator will contact the connector requesting the appropriate action.

The District's time goal for review of informal connector enforcement actions and request to the connector for further action is 21 days from the time the notice of enforcement action is received at the Metro District. The connector is normally given 21 days to inform the District what action will be taken in response to the request. These time goals are summarized in Table 10-3.

#### **10.4.2 Informal Enforcement Actions - District Initiated**

The District initiates informal enforcement action in most situations. For non-delegating connectors, if the District receives monitoring results containing violations but no action has been taken, the IW Specialist or Investigator will contact the connector requesting that the violation be responded to. If District-generated monitoring results contain

violations, the violation is noted in the cover memo transmitting the monitoring results to the connector and the connector is directed to initiate the appropriate enforcement response. (See example in Appendix II.) For delegating connectors, the District takes the enforcement action itself.

The District's time goal for responding to monitoring results requiring enforcement action is 21 days from the time the monitoring information is received by staff. The connector is normally given 21 working days in which to inform the District what action will be taken in response to the request for enforcement action. These time goals are summarized in Tables 10-2 and 10-3.

#### **10.4.3 Formal Enforcement Actions**

Some of the District's connectors have initiated formal enforcement actions against violating IUs. It has been the District's experience, however, that most connectors will generally not take formal enforcement action against IUs unless they are requested to do so by the District. The District has established procedures for dealing with serious enforcement actions which include Administrative Orders, Compliance Schedules, Show Cause hearings, monetary penalties, court action, or permit revocation.

The IW Coordinator makes the preliminary determination, based on information provided by staff, that a formal enforcement action should be taken. The proposed enforcement action, and the reasons therefor, are documented with a request in writing that the non-delegating connector take the proposed enforcement action. The connector is normally given no more than 21 days in which to inform the District what action will be taken in response to the District's request for further enforcement action. If the connector does not agree with the District's request, or proposes an alternative action, the IW Coordinator will indicate concurrence or non-concurrence with the connector's proposal within 21 days. Upon agreement of the connector and the District, the enforcement action will be initiated by the connector within 21 days of the agreement. District time goals for responses are summarized in Table 10-3.

In the case of penalty actions taken by the District, upon concurrence of the Director of Regulatory and Connector Relations (Director), the recommendation is forwarded to the District Manager for concurrence. The District Manager will decide whether or not to involve District Counsel at this or at any subsequent time. The District's time goal for sending the recommendation to the District Manager is 21 days from the time staff supplies the information to the IW Coordinator.

The District Manager will approve or disapprove the recommendation within 21 days. If the District Manager does not approve the recommendation, Pretreatment staff will propose an alternative enforcement action. Once approved, the same procedure as described above is followed.

#### **10.4.4 Enforcement Actions – Long-Term Average Violations**

Violations of long-term average discharge limitations, particularly violations of four-day average limitations, are somewhat difficult to track because violations are not apparent from individual monitoring results, and long time frames may be required before data can be evaluated. For example, if an industry collects self-monitoring samples quarterly, and is sampled by the connector twice a year, several months may go by before a long-term average violation is detected. For this reason, the District has developed procedures to

review monitoring data on a regular basis for the express purpose of detecting long-term average violations.

Every two months, District-generated computer printouts of monitoring results and violations are sent to the connectors that request them. The printouts are reviewed by District staff and the connectors for long-term average violations (monthly and four-day) and to verify that the information in the District's database is consistent with that in the connectors' files. The two-month schedule allows for all monitoring data to be received and entered before long-term averages are evaluated. Notices of Violation will be issued, or other appropriate enforcement actions will be taken, when long-term average violations are detected, as described earlier.

Every three months, the District's Pretreatment staff reviews a computer-generated printout of the monitoring results and violations and enforcement action summaries for all permitted industries to evaluate Significant Noncompliance. This process provides an additional review of instantaneous, daily, monthly and four-day average violations, reporting violations, and patterns of noncompliance. In addition, monitoring events are reviewed to ensure that the proper amount of sampling is being performed at each industry. If violations are detected that have not been responded to by the responsible connector, the District will direct the connector to take enforcement action, or will itself take action in the case of delegating connectors.

#### **10.4.5 Overfiling**

In any of the above enforcement scenarios, if the non-delegating connector and the District are unable to agree on an enforcement action, or if the connector fails to respond to the District's request within 21 days, the District Manager will decide how the District is to proceed. The District may issue an additional notice to the connector setting forth remedial actions to be taken and a time schedule for complying. If, after 30 days notice, the connector has not taken steps to comply, the District may assume Pretreatment Program responsibilities in whole or in part in lieu of the connector.

The District may also proceed with its own enforcement action against the industrial user if the connector fails to take action satisfactory to the District within the time goals contained in Table 10-3. If the District Manager determines that the District will proceed with its own enforcement action, the procedures outlined in Section 10.5.1 will be followed.

#### **10.4.6 Communication Procedures**

The review procedures described above depend upon the efficient exchange of information between the Metro District and its connectors.

In June of 1984, the District mailed to all of its connectors copies of its Procedures Manual. This manual contains procedures for identifying, permitting and monitoring industrial facilities, as well as taking basic enforcement actions. The District's connectors are bound by the District's *Rules and Regulations* to follow the procedures contained in the Procedures Manual and to forward copies to the District of all compliance information received from their industries, or generated by the connectors themselves, to the District. This information includes copies of Compliance Schedule status reports, plant and process change notifications, periodic compliance reports, accidental discharge reports, inspection and monitoring reports, relevant correspondence, and records of communication.

In turn, the District provides its connectors with the same information, if appropriate, and with any updates or changes to the Procedures Manual, copies of applicable federal regulations and copies of monitoring reports from District monitoring events.

In addition to ensuring the orderly flow of relevant material between the District and its connectors, connectors must also ensure that their legal authority complies with all federal, state, and District requirements, and that the connector's local limits are at least as stringent as those developed by the District. The District reviewed each connector's existing or proposed legal authority during development of the District's Pretreatment Program and made any necessary corrections or changes at that time. Connectors are now required to submit any changes to their Pretreatment legal authorities to the District. In the event there is a conflict between the District's *Rules and Regulations* and a connector's legal authority, the District's *Rules and Regulations* will take precedence.

**TABLE 10-3**

**METRO DISTRICT INTERNAL MANAGEMENT TIME GOALS <sup>1</sup>**

<b><u>Activity</u></b>	<b><u>District Time Goal Days from Receipt of Activity (Violation Information)</u></b>
<u>Informal Enforcement Action - Connector Initiated</u>  Request to connector to take further action  Connector response to District request	  21 days  21 days
<u>Informal Enforcement Action - District Initiated</u>  Request to connector to take enforcement action  Connector response to District request	  21 days  21 days
<u>Formal Enforcement Actions</u>  Recommend proposed enforcement action to District Manager/IW Coordinator  District Manager/IW Coordinator reviews and approves proposed action  District Manager/IW Coordinator reviews and disapproves action; Pretreatment staff resubmits recommendation; District Manager/IW Coordinator reviews  Request to connector for enforcement action after District Manager/IW Coordinator approval  Connector response to District request District Manager/IW Coordinator decision on alternative enforcement proposal from connector	  21 days  21 days  21 days  21 days  28 days  21 days

<sup>1</sup> These time goals indicate the estimated amount of time required to complete the indicated task under normal circumstances. The time goals are to be used as guidelines, and are not considered inflexible. Unforeseen complications, due in part to the multi-jurisdictional organization of the District's Pretreatment Program, may delay action in some cases. The District will make every effort, however, to comply with the indicated time goals.

## **10.5 GENERAL ENFORCEMENT POLICIES**

### **10.5.1 Overfiling on Connectors**

The District's Pretreatment enforcement program relies on its non-delegated connectors taking enforcement actions against violating industries within their jurisdictions. However, most dischargers are regulated directly by the District and the District takes direct enforcement action against those permittees for violations.

The District reviews monitoring reports submitted by connectors and IUs for violations and to determine if non-delegated connectors have taken the appropriate enforcement action. (The procedure used to review enforcement actions is described in Section 10.4). If the action taken by a non-delegated connector is found to be inadequate, or if the connector has not taken an enforcement action, the District will work with the connector to resolve the inadequacy. If the inadequacy cannot be resolved, or if the connector refuses to take what the District believes is an appropriate enforcement action, the District will proceed as described below.

If a connector fails to take appropriate enforcement action against one of its industries, the District, under the remedy authority in Article 4, Section 409-I of its Service Contract and Section 6.9 of its *Rules and Regulations*, can issue a notice to the connector requiring that action be taken within 10 days. If, after 10 days, the connector has failed to or refuses to comply with the notice, the District may issue an additional notice setting forth remedial actions to be taken and a time schedule for complying. If, after 30 days notice, the connector has not taken steps to comply, the District may assume Pretreatment/Industrial Waste Control Program responsibilities in whole or in part in lieu of the connector. The District may also seek injunctive relief against both the connector and the IU.

The District also has the authority to directly issue Administrative Orders and assess monetary penalties up to \$5,000 against IUs without the necessity of preempting a connector's Pretreatment Program responsibilities. Administrative Orders may be issued and penalties assessed by the District in cases where a connector refuses to take action within the time control goals listed in Table 10-3, or where the District believes the action taken by the connector is inadequate.

### **10.5.2 Penalty Policy**

Each of the District's connectors has, in its industrial waste resolution or ordinance, the authority to assess monetary penalties against its IUs for violations of Pretreatment standards and requirements. The District evaluates each assessment made by its connectors using the guidelines in the Enforcement Response Guide (Table 10-1) to determine if the amount is appropriate for the violation. If the District determines that an assessment is inadequate, it may request that the connector assess additional penalties. The District may assess its own penalties if it determines the connector's assessment is inadequate and if the connector fails to assess additional penalties. In addition, the District assesses penalties directly on IUs in delegated connector jurisdictions and on connector permittees.

The Enforcement Response Guide (Table 10-1) contains a range of penalty amounts for different types of violations. The amounts were chosen based on EPA guidance documents and the penalty amounts available to the District's connectors in their legal authorities. In most cases, the maximum penalty amount is limited to \$1,000 per day per

violation. Penalties for monthly average discharge limit violations may be assessed for every day of that month or for every day of that month during which discharge occurs. Penalties for 4-day average discharge limit violations will be assessed as 4 (four) days of violation.

The District does not require use of an economic benefit calculation to determine penalties, although it does not discourage its connectors from doing so. If a connector wishes to consider economic benefit in its penalty assessment, the District will provide any assistance needed to calculate the penalty.

Penalty amounts are chosen from the ranges listed in the Enforcement Response Guide based on the following criteria:

- the severity of the violation and its impact (or potential impact) on the connector, the Metro District, and/or the environment.
- the compliance history of the industrial user.
- the relative importance of the violation in comparison with other violations.
- the impact of an enforcement action on other industrial users.
- considerations of fairness and equity.

The District itself may assess penalties up to \$5,000 per day per violation, except in cases where a violation has caused Interference or Pass Through. In these cases, the maximum penalty may be increased as necessary to allow the District to recover any fines or penalties paid by the District for CDPS/NPDES permit violations due to the Interference or Pass Through.

In addition to penalties, the District may recover reasonable attorney's fees, court costs, and other expenses of litigation. The penalties and legal costs recovery are in addition to any actual damages the District may incur because of the violations.

### **10.5.3 Listing of Noncomplying Industries**

The District annually publishes a list of industries found to be in Significant Noncompliance with Pretreatment Program requirements during the previous year. This publication is a requirement of the General Pretreatment Regulations [40 CFR 403.8(f)(2)(vii)], and is made on behalf of the District's connectors who do not separately publish lists of noncomplying industries in their jurisdictions. The procedures used to publish this list are found in Section 8.1.3.

## **10.6 INFORMAL ENFORCEMENT PROCESSES**

Minor administrative or discharge violations will normally be corrected by using an informal enforcement action. Informal actions are generally less resource-intensive than formal actions and usually involve less confrontation, thereby facilitating open communication and a cooperative posture with industry. However, when it is expected that informal actions will not achieve immediate compliance by IUs, these actions will not be considered as sole responses. Informal enforcement actions include, but are not limited to:

- Telephone notification
- Meetings
- Notices of Violation/Deficiency

In general, when an informal action is the sole enforcement action taken, the industry will be allowed no more than 30 days to correct the violation. In many cases less time, such as 7 days, is adequate. If more than 30 days are required to correct the violation, formal administrative actions may be more appropriate.

Records of all enforcement communications with an IU will be forwarded to the Metro District by connectors and/or maintained by the District. Records include summaries of telephone calls, written notices, meetings, and compliance inspections.

#### **10.6.1 Telephone Notification**

Telephone contact with the IU provides a cost-effective means of obtaining information and resolving isolated or infrequent violations. Prompt response to such violations shows the IU that the connector and the Metro District are serious about enforcing Pretreatment Program requirements. It also helps to deter future violations.

Enforcement personnel will note the date and time, the person contacted, and the substance of the conversation. A form such as that found in Appendix JJ may be used, or a "Note to File" or "Record of Communication" memo may be prepared. These notes are placed in the IU's file and serve to provide evidence if additional or escalated enforcement action becomes necessary. It is also noted if the IU cannot be contacted by telephone, or fails to return phone calls.

#### **10.6.2 Meetings**

Clarification of an IU's legal responsibilities, exposure to accelerated enforcement and penalties, and agreement on necessary corrective action can often be obtained through an informal meeting. In scheduling the meeting, it should be emphasized that while the meeting will be informal it does not preclude formal enforcement proceedings.

Typically, attendance at informal meetings is limited to technical staff but the presence of the IU's responsible official may also be necessary. If the IU plans to include legal counsel at the meeting, the Director or a representative from the Metro District's or connector's legal counsel may need to attend. Staff will take notes on the discussion at the meeting and record all decisions made. A copy of the notes will become a part of the District's file on the IU. Alternately, with the concurrence of all parties, the meeting may be tape recorded with only minimal written notes sent to the IU's file. The audio cassettes will be maintained by the District.

#### **10.6.3 Notices of Violation/Deficiency**

Notices of Deficiency (NODs) are generally issued as a result of a compliance inspection and serve to notify the IU of minor deficiencies noted during the inspection. The NOD may suggest means for improvement or require corrective actions. An example of a NOD is included in Appendix JJ.

Notices of Violation (NOVs) are considered more serious enforcement actions than telephone notification or NODs, but less serious than Administrative Orders. NOVs are

primarily issued in response to inspection findings, or discharge and reporting violations. The NOV will contain the following information:

- The specific violations that have occurred.
- Specific actions required on the part of the IU (e.g., actions taken to prevent recurrence, resampling to show return to compliance, etc.) and dates for completion of the actions.
- Warning that further enforcement action may be taken for failure to comply or remain in compliance.
- Warning that issuance of the NOV does not preclude further enforcement action for the particular violation.

Examples of types of NOVs are included in Appendix JJ.

## **10.7 FORMAL ENFORCEMENT ACTIONS**

Significant administrative or discharge violations, or the failure of an industry to comply with informal enforcement responses, will lead to the use of formal administrative actions. The type of administrative action that can be used depends upon the authority contained in the Metro District's *Rules and Regulations* or the connector's industrial waste control ordinance or resolution.

Types of formal actions include:

- Administrative Orders
- Compliance Schedules
- Orders to Show Cause
- Monetary Penalties
- Revoking Discharge Permits/Suspending Service

### **10.7.1 Administrative Orders**

An Administrative Order (AO) is a formal notification directing the industrial user to comply with certain tasks by a certain date to eliminate the cause of noncompliance. Examples of Administrative Orders are found in Appendix JJ. The AO may be used in conjunction with revoking an industry's discharge permit, suspending service, or assessing penalties. If the AO is not complied with, additional enforcement action will be taken.

### **10.7.2 Compliance Schedules**

If deemed necessary the Metro District or a connector may issue the violating industry a Compliance Schedule for corrective action. The Compliance Schedule is a formal plan indicating the tasks that must be completed by the industry and the dates by which the tasks must be completed to eliminate the cause of the violation. An example of a Compliance Schedule and cover letter is found in Appendix JJ.

Issuing a Compliance Schedule is a corrective action less severe than revoking an industry's discharge permit or suspending service. It may be used in conjunction with a

monetary penalty assessed against the industry for the violations. Issuance of a Compliance Schedule does not relieve the industry of having to meet its existing discharge limits, nor does it necessarily protect the industry from having additional fines levied against it during the Compliance Schedule period. The Compliance Schedule simply allows the industry to continue to discharge as long as it demonstrates adequate progress in providing a permanent solution to the cause of its discharge violations.

The industry's actions will be monitored to ensure that schedule deadlines are met. This is done by requiring the industry to submit Compliance Schedule progress reports, by increasing monitoring requirements and/or by site inspections. An example of a Compliance Schedule progress report is found in Appendix JJ. In case of serious violations, corrective actions will be verified in person. If the Compliance Schedule is not met, additional enforcement action will be taken.

### **10.7.3 Orders to Show Cause**

Prior to taking formal enforcement action and/or discontinuing service, the IU may be issued an order to appear at a hearing to show cause as to why additional enforcement action should not be taken. An example of an Order to Show Cause is found in Appendix JJ. The hearing notice is usually served personally by an authorized connector employee or sent by certified mail at least 10 days before the hearing. Upon review of the evidence at the hearing, the designated official(s) or board may order that additional formal actions be brought against the violating industry. The Show Cause hearing is not a prerequisite to taking additional formal enforcement action or discontinuing sewer service.

### **10.7.4 Monetary Penalties**

Connectors may, consistent with their legal authorities, assess administrative penalties or civil penalties against violating industries. The particular option available to the connector is specified in its industrial waste ordinance or resolution as is the range of monetary penalties that can be assessed for each violation. An example of an administrative penalty assessment is found in Appendix JJ. Civil penalties are discussed in more detail in Section 10.8.3.

The District also has the authority to assess monetary penalties directly against IUs. This authority will be used in cases where the connector has delegated enforcement authority to the District, or a non-delegated connector has failed to assess a penalty when necessary or has assessed a penalty not consistent with the severity of the violation. The District's penalty policy and overfiling authority are discussed in more detail in Section 10.5.

In addition to or in lieu of monetary penalties, IUs may be required to perform Supplemental Environmental Projects according to the guidance established by EPA (see Appendix JJ).

### **10.7.5 Revocation of Permit/Suspension of Service**

The District and its connectors have the authority to revoke an IU's wastewater contribution permit, suspend wastewater treatment service, or both. Revocation and/or suspension will generally be used for significant discharge violations, especially where the discharge presents a danger to the public, the environment, the treatment system, or may cause the District to violate its CDPS/NPDES discharge requirements. Permit

revocation and/or suspension can also be used against industries that fail to comply with previous Administrative Orders.

To suspend service, a written suspension order requiring immediate termination of the discharge will be served on the industry (an example of this type of order is found in Appendix JJ). If the industry fails to voluntarily comply with the order or prevents it from being served, all necessary steps will be taken, including seeking injunctive relief or severing the sewer connection, to prevent or minimize any damage that the discharge might cause. Once service has been suspended, the industry will be required to submit a detailed written statement that describes the cause of the harmful discharge and outlines measures that will be taken to alleviate the problem and prevent recurrence. Upon verifying that the problem has been resolved, the industry's permit can be reinstated and service can be resumed.

## **10.8 CIVIL JUDICIAL ENFORCEMENT PROCEDURES**

Civil judicial enforcement is the formal process of filing lawsuits against IUs to secure court-ordered action to correct violations and to secure penalties for violations, including the recovery of costs to the connector and the District. Civil action is an appropriate enforcement response in several situations:

- when injunctive relief is necessary to halt or prevent discharges which threaten human health, the environment, or the treatment plant.
- when efforts to restore compliance through less formal actions have failed and a court supervised settlement (Consent Decree) is necessary to enforce program requirements.
- when an IU fails to pay assessed penalties or the District or the connector wishes to recover losses due to the IU's noncompliance.

### **10.8.1 Injunctive Relief**

Injunctions are court orders which direct a party to do something or refrain from doing something. Injunctive relief may be sought when delays in filing a civil suit will result in irreparable harm to the sewer system. The Metro District and its connectors have authority to suspend an IU's wastewater treatment service in the event a discharge may cause imminent or substantial endangerment, and injunctive relief may not be necessary to halt or prevent the discharge. Injunctive relief may be necessary, however, if the IU refuses to comply with the suspension order. An example of an injunctive relief petition is found in Appendix JJ.

### **10.8.2 Consent Decrees**

Consent Decrees are agreements between the regulatory authorities and the IU reached after a lawsuit has been filed, and prior to the suit going to trial. To be binding, the decree must be signed by the judge assigned to the case. Consent Decrees are used when the IU acknowledges and is willing to correct the violation, and agrees on penalties. An example of a Consent Decree is found in Appendix JJ.

### **10.8.3 Failure to Pay Penalties/Cost Recovery**

Civil action may be necessary in cases where an IU refuses to pay assessed penalties. In addition, civil action may be pursued to recover costs incurred as a result of an IU's noncompliance, including damages to the collection system, injury to personnel, or increased monitoring and surveillance.

The civil litigation process is essentially the same for the Metro District and all of the its connectors. Generally, the Pretreatment Coordinator or District Manager will bring the matter to the attention of the authority's attorney after discussing it with the Board of Directors or appropriate municipal officials. The attorney, in consultation with Pretreatment personnel, will determine who is to be sued and for what. The attorney will then file the suit in the court of competent jurisdiction, depending upon the penalty amount. If the amount is less than \$5,000, the suit would be filed in county court. If the amount is over \$5,000, the suit would be filed in the district court. The procedure is outlined below:

1. A decision is made to sue the IU to recover costs, seek civil penalties, and/or corrective actions.
2. The attorney files a complaint alleging the violations.
3. The IU files an answer admitting or denying allegations.
4. A trial date is set.
5. Both sides prepare their cases (discovery process).
6. Settlement negotiations may take place.
7. If negotiations are successful, parties enter into a Consent Decree.
8. If negotiations are unsuccessful, the case proceeds to trial.
9. If the IU is held liable, the court awards cost recovery and/or civil penalties. The IU may appeal the judgment.
10. If the IU is held not liable, the District or the connector may appeal the findings.

In addition, the Metro District may also bring civil action against its IUs and/or connectors in cases where it is necessary to stop a discharge that appears to present an imminent endangerment to the District's system, in the event a District-assessed penalty is not paid, or if a connector refuses to take appropriate enforcement action against a violating IU. The civil litigation procedure would be as described above.

## **10.9 CRIMINAL ENFORCEMENT PROCEDURES**

Criminal prosecution is the formal process of charging individuals and/or organizations with violations of ordinance provisions that are punishable, upon conviction, by fines and/or imprisonment. It is an appropriate enforcement action where there is evidence of noncompliance which shows criminal intent. It is recommended in cases involving aggravated violations (e.g., discharges which endanger the health of treatment plant employees), and when

less formal efforts to restore compliance (Notices of Violation and Administrative Orders) have failed.

The overall criminal enforcement process can be summarized in the steps outlined below:

### **10.9.1 Discovering the Crime**

The criminal enforcement process begins when the connector or the District has reason to believe crimes have been or will be committed. This belief must have some foundation in fact. For example, there must be personal knowledge or trustworthy information from an informant regarding the crime. This information may be gathered during routine inspection and/or sampling activities, reports from employees, competitors, other regulatory agencies or the public, or incriminating reports from the industry itself.

If the connector or District suspects that criminal activity is taking place, the connector's or District's attorney should be notified as soon as possible. He or she can provide invaluable legal advice to ensure that correct procedures are followed during the criminal enforcement process.

### **10.9.2 Gathering Evidence**

Evidence gathered during this step of the process must be admissible in a criminal trial. Therefore, the connector or the District must ensure that the constitutional protection against unreasonable search and seizure is upheld, including the use of search warrants if necessary. Once admitted, the evidence must also be defensible, requiring the use of chain-of-custody procedures during sample collection and analysis. Law enforcement agencies may be asked to provide assistance during this step of the process.

### **10.9.3 Initiating Criminal Prosecution**

The connector or the District will bring the evidence of noncompliance to the prosecutor (either the connector's or the Metro District's attorney or the prosecutor in the court of competent jurisdiction) and a determination will be made, based on the evidence, whether to proceed with criminal enforcement. If sufficient evidence exists, and the prosecutor believes each element of the offense can be proved, he or she will determine whom to name as defendant(s) in the indictment. From this point on, the enforcement action is essentially turned over to the prosecutor, although he or she will undoubtedly continue to rely on the technical expertise of the Pretreatment staff.

If the potential defendant is an individual, that individual will be named. If the potential defendant is a franchise, limited partnership, or partnership, the organization, responsible officials, or both, may be named. If the potential defendant is a corporation, individual employees, their supervisor(s), or the corporate officials responsible for compliance with environmental laws, may be named.

In some cases, plant employees, management or corporate personnel may not have personal knowledge of illegal acts. In these cases, it is nearly impossible to prove specific intent, and the prosecutor may only seek indictments and convictions based on criminal negligence.

After the defendants are named, the prosecutor will request a grand jury to determine whether enough evidence exists to try the defendants for specific crimes. If the grand

jury determines that a crime has been committed and that the named defendant(s) should be put on trial, indictments are handed down against the defendant(s).

#### **10.9.4 Pretrial Options**

Once the indictment has been handed down by the grand jury, the defendant is brought before a judge (arraigned) to plead to the criminal charge. If the defendant pleads guilty to the charge(s), a sentencing hearing is scheduled. If the defendant pleads not guilty, a trial date is set. Depending upon the strength of the evidence, the prosecutor may offer the defendant(s) a plea bargain.

#### **10.9.5 Criminal Trial**

Persons accused of criminal offenses have a constitutional right to a jury trial. Defendants may waive this right and request that the judge rule on the case. At the conclusion of the trial, a verdict is issued. If the defendant is found not guilty, the charges are dismissed, and the defendant may not be tried a second time (double jeopardy) for that particular offense. Double jeopardy does not prevent the Metro District or the connector from seeking a criminal trial in federal court, however, if the defendant was acquitted in a local court, and vice versa.

#### **10.9.6 Sentencing and Appeal**

If the defendant is convicted, he/she may receive a fine, a prison sentence, or both. The sentences may be suspended if the IU takes the desired corrective action(s) or agrees to make other good faith efforts to achieve compliance.

The defendant(s) may appeal the conviction on one or more counts, challenging the verdict, the sentence or both. The prosecutor may also appeal the case only if a second trial is not necessary to resolve the issue on appeal. For example, if the jury finds the defendant guilty, but the judge sets aside the verdict as a matter of law, the prosecution may appeal. The appellate court will either affirm the action of the trial judge, or overrule the judge and reinstate the jury's verdict, neither of which require a second trial.

A number of the District's connectors have authority to directly assess criminal penalties against IUs for Pretreatment violations. These are the cities of Arvada, Aurora, Denver, Edgewater, Englewood, Federal Heights, Golden, Lakewood, Thornton, Westminster, and the Town of Mountain View. Generally in these jurisdictions, the connector's Pretreatment staff will proceed, under the direction of the City Attorney, with the evidence-gathering step of the criminal enforcement process. Depending on how comfortable the connector is with conducting a criminal investigation, assistance may be requested from law enforcement and/or fire departments or code enforcement personnel. Once sufficient evidence is gathered, it, along with any other necessary information, is turned over to the City Attorney. He or she will make the decision whether sufficient evidence exists to pursue criminal enforcement.

The District's remaining connectors, and the District itself, have no criminal enforcement authority. If criminal violations are suspected, a joint investigation will be conducted by the District and/or the connector, and an appropriate law enforcement agency (e.g., Adams County Sheriff's Department, EPA-CID, FBI) or the District Attorney's office. Technical expertise to evaluate the nature and effects of the violations will be provided by District and, in some cases, connector personnel. Assistance with the actual

investigation, such as obtaining search warrants and surveillance procedures, will be provided by the law enforcement agency or the District Attorney's office.

Once the evidence is gathered, it is turned over to the District Attorney, who will decide whether to pursue criminal prosecution. Depending on the type of violation, the evidence will be referred as indicated below:

If it is a violation of federal law, it is referred to the United States Attorney's Office for prosecution.

If it is a violation of state law, it is referred to the District Attorney's Office for the district in which the violation took place.

If it is a violation of a local ordinance, it is referred to the County Attorney or the legal office that has jurisdiction over the matter.

In any of these cases, it is the discretion of the Attorney's Office to determine whether or not the matter will be prosecuted. The decision is based on the presence of adequate evidence to indict and convict on criminal charges. Even if sufficient evidence is available, mitigating factors may be present that would dictate the use of other enforcement tools before initiating criminal prosecution. These include prompt and complete disclosure of the violation by the industry and its good faith efforts to restore compliance.

Because criminal prosecution is resource intensive, and requires the prosecution to prove every element of the crime "beyond a reasonable doubt," it is not an enforcement action to be taken lightly. It is a strong deterrent to noncompliance, however, and sends a message to the regulated community that the connector and the Metro District are serious about Pretreatment enforcement. For that reason, while criminal enforcement will probably remain a "last resort" enforcement action in most cases, the District will proceed with criminal prosecution when appropriate.

## 10.10 LISTS

### 10.10.1 Supporting Documents

Metropolitan Denver Sewage Disposal District No. 1. September 30, 1985. Pretreatment/Industrial Waste Control Program.

\_\_\_\_\_. 1984. Pretreatment/Industrial Waste Control Program Sampling and Chain-of-Custody Procedures.

\_\_\_\_\_. 1984 (rev. 1985). Procedures for Implementing the Pretreatment/Industrial Waste Control Program of the Metro District.

\_\_\_\_\_. 1986 (rev. 1991). Rules and Regulations Governing the Operation, Use and Services of the System.

\_\_\_\_\_. 1964 (rev. 1992). Sewage Treatment and Disposal Agreement (Service Contract).

U.S. Environmental Protection Agency. Sept., 1989. Guidance for Developing Control Authority Enforcement Response Plans. U.S. EPA, Office of Water Enforcement and Permits, Washington, D.C.

U.S. Environmental Protection Agency. Sept., 1986. Pretreatment Compliance Monitoring and Enforcement Guidance. U.S. EPA, Office of Water Enforcement and Permits, Washington, D.C.

Copies of connector legal authorities were submitted as part of the Metro District's initial Pretreatment Program submittal (Pretreatment/Industrial Waste Control Program, September 30, 1985). However, EPA's December 29, 1993, letter (Appendix KK) stated that "EPA has viewed the Metro Rules and Regulations as adequate for implementation and enforcement of its approved pretreatment program without Metro having to secure amendments to the connector cities legal authorities," therefore, current copies may not be on file.

### **10.10.2 Abbreviations**

AO	-	Administrative Order
CDPHE	-	Colorado Department of Public Health and Environment
CDPS	-	Colorado Discharge Permit System
CFR	-	Code of Federal Regulations
EPA	-	Environmental Protection Agency
IU	-	Industrial User
IWA	-	Industrial Waste Administration
IWS	-	Industrial Waste Survey
NOV	-	Notice of Violation
NPDES	-	National Pollutant Discharge Elimination System
PCR	-	Periodic Compliance Report
PEMS	-	Pretreatment Enforcement Management System
POTW	-	Publicly Owned Treatment Works
R&CR	-	Regulatory and Connector Relations (Department)
RCRA	-	Resource Conservation and Recovery Act
SIC	-	Standard Industrial Classification
SNC	-	Significant Noncompliance
TRC	-	Technical Review Criteria

### 10.10.3 Definitions

ADMINISTRATIVE ACTION (Formal Action) - An enforcement action authorized by the District's or the connector's legal authority rather than a court.

ADMINISTRATIVE PENALTY - A punitive monetary charge unrelated to actual treatment costs which is assessed by the connector or the District, rather than by a court.

ADMINISTRATIVE ORDER - A document which orders a violator to perform a specific act or refrain from an act. The Order may require actions of the violator such as to attend a Show Cause hearing, cease discharging, or perform activities pursuant to a Compliance Schedule.

CDPS - A permit system for the direct discharge of pollutants into U.S. waterways.

CHAIN-OF-CUSTODY - A written record of sample possession for all persons who handle (collect, transport, analyze, dispose of) a sample, including names, dates, times, and procedures followed.

CIVIL LITIGATION - A lawsuit filed in a civil court. If the court rules the defendant IU violated the law, the court may impose civil penalties, injunctions or other equitable remedies and/or cost recovery.

CIVIL PENALTY - A punitive monetary award granted by a court to a connector or the Metro District against a noncompliant IU.

COMPLIANCE SCHEDULE - An Administrative Order directing a violating industry to achieve or restore compliance by a date specified in the order.

CONNECTOR - Any city, incorporated town, sanitation or water and sanitation district, or other special district that contributes sewage to the facilities of the Metro District. Connectors are obliged by their Service Agreement with the District and/or the District's *Rules and Regulations*, to design and administer Pretreatment/Industrial Waste Control Programs as necessary to enable the District to comply with all Pretreatment and effluent limitation conditions of its CDPS/NPDES permit(s).

CONSENT DECREE - A court supervised settlement agreement, the violation of which may be considered contempt of court.

CRIMINAL INTENT - A state of mind which is a necessary element of all crimes. Criminal intent may be general (intent to perform an act) or specific (intent to break a law).

CRIMINAL NEGLIGENCE - Negligence of such a character, or occurring under such circumstances, as to be punishable as a crime (e.g., flagrant and reckless disregard for the safety of others or willful indifference to the injury likely to follow).

CRIMINAL PROSECUTION - A criminal charge brought by a connector or the Metro District against an accused violator. The alleged criminal action may be a misdemeanor or a felony and is defined as a willful, negligent, knowing, and/or intentional violation. A court trial-by-jury is generally required and upon conviction, punishment may include monetary penalties, imprisonment, or both.

DEFENDANT - The party against whom relief or recovery is sought in civil litigation or criminal prosecution.

DISCOVERY - A variety of pretrial devices used by one party to obtain relevant facts and information about the case from the other party.

DISTRICT or METRO DISTRICT - Refers to the Metro Wastewater Reclamation District.

DOUBLE JEOPARDY - The prohibition against a second prosecution after a trial for the same offense.

FORMAL ENFORCEMENT ACTION - Also known as administrative enforcement actions, this includes but is not limited to Compliance Schedules, Orders to Show Cause, administrative penalties, and permit revocation.

GOOD FAITH EFFORT OR PROGRESS - Prompt and vigorous pollution control measures undertaken by the discharger which shows that extraordinary efforts (not a "business-as-usual" approach) have been made to achieve compliance.

GRAND JURY - A body of citizens whose duties consist of determining whether probable cause exists that a crime has been committed, and whether an indictment should be returned against a named defendant.

INDICTMENT - A written accusation of criminal conduct by a grand jury.

INFORMAL ENFORCEMENT ACTION - Enforcement action used to respond to minor violations. This includes, but is not limited to, telephone calls, warning letters, requests for information, meetings, and Notices of Violation/Deficiency.

INJUNCTION, INJUNCTIVE RELIEF - A court order which restrains or compels action by an IU.

JUDICIAL ACTION - An enforcement action that involves a court (may be either civil or criminal in nature).

JURISDICTION - The extent of authority of a connector's power to make and enforce laws.

LITIGATION - An enforcement action brought in a judicial (court) forum.

MISDEMEANOR - A crime punishable by imprisonment of less than one year.

NOTICE OF VIOLATION - A connector or District document notifying an IU that it has violated pretreatment standards and/or requirements. It is generally used when the violation is relatively minor and it is expected that the violation will be corrected within a short period of time.

NPDES (NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM) - A permit system for the direct discharge of pollutants into U.S. waterways.

**PENALTY** - A monetary or other punitive measure, often, but not necessarily, associated with a court action. For purposes of this manual, the term is used synonymously with a fine.

**PERMIT REVOCATION** - The process of revoking an IU's wastewater discharge permit. May also be referred to as Suspension of Service.

**PLAINTIFF** - A person or organization seeking remedy from a court. For purposes of this manual, the plaintiff will be a connector or the Metro District.

**SELF-MONITORING** - Sampling and analysis of an IU's wastewater performed by the user itself.

**SHOW CAUSE HEARING** - An administrative enforcement action in which the IU is required to appear before a connector, explain its noncompliance, and show good cause why more severe enforcement action should not be taken.

**SHOW CAUSE ORDER** - An administrative enforcement Order directing a noncompliant IU to appear before a connector for a Show Cause hearing.

**SUSPENSION OF SERVICE** - Physical blockage of a noncompliant IU's sewer connection or issuance of a formal notice of suspension to the user. For those users with discharge permits, may be referred to as Permit Revocation.