

Industrial Pretreatment Permits (IPPs) Civil/Criminal Penalties

QUESTION

The following question was distributed to the NACWA Legal Affairs Committee via e-mail on March 9, 2007:

“A NACWA member agency is currently engaged with EPA in discussions regarding the agency's Industrial Pretreatment Program (IPP) permits. The agency would like to develop information on the following two questions:

1. Is any NACWA member aware of an IPP permit or local ordinance containing language specifically stating that a permittee "is subject to civil and/or criminal penalties of a minimum of \$1000 per day" as a result of permit violations, either with or without a statement about the maximum penalty?
2. Is any NACWA member aware of an IPP permit or local ordinance that combines civil and criminal penalties, or are the civil and criminal penalties listed separately?”

RESPONSES

NACWA received the following responses from members. We received one general response, listed below. All other responses are organized by the state or city from which the response originated:

General Response: The \$1,000 is a “minimum-maximum.” The regulations (403.8(f)(1)(vi)(A)), in essence require that the POTW have the authority to assess a penalty of at least \$1,000/day, either as a civil or criminal penalty. That does NOT mean that a \$1,000 must be assessed for each violation.

The IPP permit, however, must contain a statement of applicable civil and criminal penalties. (403.8(f)(1)(iii)(B)(2)). Usually, language is included reflecting the maximum penalty that the permittee can be subject to. Very often it will reference the CWA (now \$32,500/day) penalty, rather than the State or local penalty which are likely to be lower.

As to whether the local penalty is civil or criminal, sometimes it is unclear, particularly when there is no element of intent or negligence provided by the local law. It is going to be based upon the underlying State law, charter, etc, upon which the penalty is based.

Additional information can be found in EPA's model ordinance (you can look at the recent 2007 version and the prior version) as well as the EPA's IU permitting guidance.

Little Rock, AR: The ordinances in the City of Little Rock list the civil and criminal penalties separately.

Georgia: The Georgia Environmental Protection Division (EPD) pretreatment program rules require that the following language be in an authority's pretreatment rules and most authorities adopt it verbatim.

"Rule 391-3-6-.09(9)5. Obtain remedies for noncompliance by any industrial user with any pretreatment standard and requirement. All POTWs shall be able to seek injunctive relief for noncompliance by industrial users with pretreatment standards and requirements. All POTWs shall also have authority to seek or assess civil or criminal penalties in at least the amount of \$1,000 a day for each violation by industrial users of pretreatment standards and requirements."

As an example, Cobb County, GA has the following in its ordinance:

Sec. 122-48. Civil liabilities and penalties.

(a) Any person violating the provisions of this article, discharge permit, federal or state pretreatment requirements or any order of the county board of commissioners shall be liable to the county for a maximum civil penalty under O.C.G.A. § 36-1-20 of \$1,000.00 per violation per day. In the case of monthly or other longterm average discharge limit, penalties shall accrue for each day during the period of the violation.

(b) The department director may recover reasonable attorneys' fees, court costs and other expenses associated with enforcement activities, including sampling and monitoring expenses and the cost of actual damages incurred by the county.

(c) In determining the amount of civil liability, the court shall take into account all relevant circumstances including, but not limited to, extent of harm caused by the violation, the magnitude and duration of the violation, any economic benefit gained through the user's violation, corrective actions by the user, the compliance history of the user and any other factor as justice requires.

(d) Filing a suit for civil penalties shall not be a bar against, or a prerequisite for, taking any other action against a user.

(Ord. of 6-28-88, § 3-26-178)

Sec. 122-50. Criminal penalties.

(a) A user who willfully or negligently violates, or continues to violate, any provision of this article, discharge permit or order issued pursuant to this article, or any other pretreatment standard or requirement shall upon conviction be guilty of a misdemeanor, punishable by a fine of not more than \$1,000.00 per violation per day or imprisonment for not more than six months, or both.

(b) A user who willfully or negligently introduces any substance into the POTW which causes personal injury or property damage shall upon conviction be guilty of a misdemeanor and subject to a penalty of at least \$1,000.00, or be subject to imprisonment for not more than six months, or both. This penalty shall be in addition to any other cause of action for personal injury or property damage available under state law.

(c) A user who knowingly makes any false statements, representations or certifications in any application, record, report, plan or other documentation filed, or required to be maintained, pursuant to this article, wastewater discharge permit or order issued pursuant to this article or who falsifies, tampers with or knowingly renders inaccurate any monitoring device or method required under this article shall upon conviction be punished by a fine of not more than \$1,000.00 per violation per day, or six months' imprisonment, or both.

(d) In the event of a second conviction, a user shall be punished by a fine of not more than \$1,000.00 per violation per day, or imprisonment for six months, or both.
(Ord. of 6-28-88, § 3-26-180)

Phoenix, AZ: The City of Phoenix lists the civil and criminal penalties separately.

Honolulu, HI: The Honolulu city ordinance on this issue is Honolulu ROH Section 14-5.19. The civil and criminal penalties are listed separately. The fine is the same for both but the criminal penalty includes the possibility of jail time.

Roanoke, VA: Roanoke does not have any specific language as referred to in the first question. The civil penalties and criminal penalties are listed separately although both list a \$2,500.00 maximum per violation per day.

Los Angeles, CA: LAMC SECTION 64.30.E.7a (Ordinance) Criminal Penalty states:

“Except as expressly provided, violation of this section or any order issued by the Board or the Director as authorized by this section is a misdemeanor punishable by a fine not to exceed \$1,000.00 per violation per day or by imprisonment in the County jail for a period of not more than six (6) months, or by both such fine and imprisonment. In other words the City of LA has a max of \$1,000 per day per violation. This is consistent with Section 11.2 of the EPA Model Pretreatment Ordinance which states the municipality must have the authority to seek civil or criminal penalties in the amount of at least \$1,000 per day per violation. The EPA Ordinance requires the municipality to refer to State law to make sure the penalties are allowable.”

Additionally, the City of LA's Ordinance has criminal and civil penalties listed separately. This appears to be the case in the EPA Model Pretreatment Ordinance which has the civil penalties in Section 11.2 and criminal prosecution in Section 11.3. LA is not aware of municipalities that combine them.

Hampton Roads Sanitation District, VA: Hampton Roads Sanitation District's (HRSD's) Enabling Act states that the HRSD commission is authorized and empowered “to seek civil penalties or civil charges against others who have been charged with violation of or found to be in violation of the pretreatment standards incorporated in the permit or other requirement of the District's approved industrial waste control program. The penalties which the District may seek, and the procedures to be followed by the District, shall be the same as those set forth in the State Water Control Board, as set forth in S 62.1-44.32 of the Code of Virginia.”

The Act also states “With the consent of any owner who has violated any provision of this subsection or is charged by the District with having violated the provisions of this subsection, the District may provide, in an order issued by it against such owner, for the payment of civil charges for such violation in specific sums, not to exceed \$10,000 for each violation. Each day of violation shall constitute a separate offense. Such civil charges shall

be instead of any appropriate civil or criminal penalties imposed under the provisions of this subsection.”

HRSD’s Industrial Wastewater Discharge Regulations lists Civil Penalty (Section 510) and Criminal Penalty (Section 511) separately.

King County, WA: Title 28 of King County’s local ordinance provides for civil penalties up to \$10,000 per violation per day. EPA does the criminal penalties in KC service area.

Lynchburg, VA: The language for the assessment of civil penalties in the City's ordinance was modified in April 2004 as per requirements arising from the 2003 DEQ pretreatment audit. The audit report summary section contained the following language:

"The SUO must be revised to include language that the POTW has the authority to seek and assess civil or criminal penalties of at least \$ 1,000 per day per violation. Note that a maximum penalty can be included as long as it is greater than \$1,000 and the minimum noted above is included; i.e.. a minimum of \$1,000 and a maximum of \$2,500."

The City did not necessarily agree with this interpretation of EPA's legal requirements, but decided to comply with the DEQ requirement.

The following language is taken from the City Ordinance.

(d) Civil penalties. Any user who fails to comply with any provisions of this article and the orders, rules, regulations and permits issued hereunder shall be fined through a civil action in the courts of the Commonwealth not less than one thousand dollars (\$1,000.00) nor more than two thousand five hundred dollars (\$2,500.00) for each offense. Each day on which a violation shall occur or continue shall be deemed a separate and distinct offense. In addition to the penalties provided herein, the City may recover reasonable attorney's fees, court costs, court reporters' fees and other expenses of litigation by appropriate suit at law against the person found to have violated this ordinance or the orders, rules, regulations and permits issued hereunder.

(e) Criminal penalties. Any user who is found in a court of the Commonwealth to have willfully or negligently violated an order of the city or to have willfully or negligently failed to comply with any provision of the article and the orders, rules, regulations and permits issued hereunder shall be guilty of a class 2 misdemeanor. (Ord. No. O-95-269, 9-26-95; Ord. No. O-04-050, 4-13-04)

Narragansett Bay, RI: The following language comes from a pretreatment permit:

“Noncompliance with any term or condition of this permit shall constitute a violation of the NBC's Rules and Regulations and may subject the user to an **Administrative or Civil Penalty** of up to \$25,000 per violation per day as defined in R.I.G.L. §46-25-25.2. Willful or criminally negligent violations shall be punishable by the aforementioned fine and/or imprisonment as defined in R.I.G.L. §46-25-25.3.”

Both civil and criminal penalties are listed in the statute, but the Narragansett Bay Commission only enforces the civil side, while the Department of Environmental Management would address any criminal concerns.

Charlottesville, VA: Part V of the Rivanna Water and Sewer Authority's user regulations state as follows:

Section 4. Criminal/Civil Liability

Any person who willfully or negligently violates any provision of these Regulations may be subject to criminal penalties or a fine of up to \$ 1000 per day of violation, or by imprisonment for up to twelve months, or by both fine and imprisonment.

Further, any person who violates any provision of these Regulations or any condition or limitation of a Permit, or plan approval related thereto, shall be financially responsible and liable to the Authority, in addition to normal service charges and surcharges, for all costs incurred by the Authority associated with the violation of these Regulations, including, but not limited to the following:

- a. Cost of mileage and labor incurred in detecting and correcting the violation.
- b. Laboratory analysis costs associated with detecting and correcting the violation.
- c. Additional treatment costs caused by the violation or associated with detecting and correcting the violation.
- d. Costs of any additional equipment acquired or expended by the Authority for detecting or correcting the violation.
- e. Repair and/or replacement of any part of the sewage system damaged by the violation.
- f. Any liability, damages, fines or penalties incurred by the Authority as a result of the violation.
- g. Other costs as are associated with the detecting and correcting of the violation.

Alexandria, VA: Alexandria's ordinance states “not more than \$1,000 per day for each violation” Criminal and civil penalties are listed in separate subsections.

Washington, DC: The District of Columbia Water and Sewer Authority (DCWASA) does not have a minimum specified. Maximum is \$10,000 per day and civil and criminal penalties are listed in separate subsections.

Detroit, MI: A big part of this question depends on the nature of legal authority that an IPP Authority is working under. Legal authority originates from State constitutions, and legislative acts, with these usually stating either a maximum penalty only, or the range of penalty for a state court to consider for the particular infraction.

It is unclear how any IPP Authority could (or would) want to state a minimum penalty without a maximum in either its Ordinance or permit. Questions of Due Process, and the likelihood of arbitrary and capricious penalty assessment would seem to preclude such a step.

However, an IPP Authority having the authority to assess penalties directly might include a statement of the minimum penalty but would need to either refer to a maximum or a schedule of penalties developed for the range of infractions. An example of this would be the civil infractions applied by some Michigan IPP Authorities.

The statement of “minimum penalties” in the Ordinance or Permit could be interpreted as the maximum also and limit the recovery or deterrent purpose of the penalty. Unless the penalty is part of a published schedule of penalties, it is probably not advisable to state it in this manner.

Civil and Criminal authority is generally separated under an IPP Authority’s legal grant. Criminal penalties are generally based upon deterrent/punitive approaches, whereas civil penalties are more likely recovery-based, seeking to recover the benefits of non-compliance from the party.

The only area where these may be combined are for communities who have adopted the Civil Infraction approach. Under this approach, violations are de-criminalized to civil infractions having a schedule of penalties for the first, second, etc. offense. One community using this approach is Wayne County Michigan. A copy of their ordinance can be found at the <http://www.municode.com> site.

Civil and criminal penalties are generally not combined. Even under the civil infraction approach, there is a creation of a new class to achieve higher fee assessments for infractions of an ordinance, while retaining criminal penalties as a separate authority.

Columbus, OH: The City of Columbus does not have a permit or ordinance containing the specific language. However, city ordinance [<http://www.ordlink.com/codes/columbus/index.htm>] does provide administrative fines up to \$1000, civil penalties up to \$25,000 for negligent conduct, and criminal penalties of up to 6 months in jail and/or up to \$5000 in penalties for reckless conduct. Likewise, the specific language is not included in IPP permits, although a penalty section recites the administrative, civil and criminal penalties provided by city ordinance. City ordinance and the IPP permits list the civil and criminal penalties separately.