

ADMINISTRATIVE FINES



5.2 ADMINISTRATIVE FINES

An administrative fine is a monetary penalty assessed by the Control Authority for violations of pretreatment standards and requirements. Administrative fines are among the most effective responses to user noncompliance because they may be assessed at the Control Authority's discretion and the amount of the fines may be determined on an individual basis. Administrative fines differ from civil penalties (penalties imposed through court proceedings), since fines are assessed by the Control Authority directly and do not require court intervention unless the user contests the action or refuses to pay the fine. Administrative fines are punitive in nature and are not related to a specific cost born by the Control Authority. Instead, fines are to recapture the full or partial economic benefit of noncompliance, and to deter future violations.

5.2.1 Legal Authority Necessary to Assess Administrative Fines

The Control Authority must establish clear legal authority to assess administrative fines. This authority must be within the scope of the Control Authority's enforcement powers as delegated by State law and must be expressly implemented in its sewer use ordinance. The Control Authority should consult its attorney to determine the extent of its authority under State law and how best to detail these powers in the sewer use ordinance.

If State law confers broad authority to assess administrative fines, the Control Authority (as noted above) must adopt specific ordinance provisions or regulations detailing this authority. At least one industrial user has successfully appealed an administrative fine by alleging that the sewer use ordinance did not expressly establish authority to issue administrative fines. By enacting these provisions, the Control Authority also declares its intention to use this enforcement response to punish noncompliance.

In addition to authorizing assessment of the fines, the sewer use ordinance should detail procedures for their assessment. For example, the ordinance should provide that fines may be assessed prior to or subsequent to a hearing, and further provide that both the fine itself and the dollar amount assessed are subject to appeal.

The ordinance should also set forth the maximum specific dollar amounts (per violation per day) which the Control Authority may assess. By citing maximum amounts, the Control Authority retains its discretion to assess fines in lesser amounts when appropriate. For example, by stating that users are subject to administrative fines not to exceed \$1,000, the Control Authority may fine users that submit late reports \$25, while fining users responsible for interference or pass through \$1,000. Some Control Authorities have also published fine schedules (that is, matrices of predetermined fines for various degrees of violation). To preserve its discretion to respond to noncompliance on a case-by-case basis, a Control Authority which adopts this method of determining appropriate fines should warn its users that fine schedules are merely guidance and that the maximum fine available may be used as an appropriate first response.

The New York City Department of Environmental Protection has promulgated an administrative fines provision in its "Rules and Regulations Relating to the Use of the Public Sewers, Including Sewer Surcharges" which incorporates many of the elements of administrative fines discussed above. This provision states:

Any person who violates or fails to comply with any of the provisions of the (Rules and Regulations) or any order, rule or regulation issued by the Board or Commissioner pursuant thereto shall be liable for a civil penalty of not less than fifty nor more than one thousand dollars for, each violation. In the case of a continuing violation,

each day's continuance shall be a separate and distinct offense. The Environmental Control Board shall have the power to impose such penalties. A proceeding to impose such penalties shall be commenced by the service of a notice of violation returnable to such Board. Such Board, after a hearing as provided by the rules and regulations of the board, shall have the power to enforce its final decisions and orders imposing such civil penalties as if they were money judgments. . . . The Board, in its discretion, may, within the limits set forth in this subdivision in any court of competent jurisdiction establish a schedule of civil penalties indicating the minimum and maximum penalty for each separate offense.

5.2.2 When to Assess Administrative Fines

Administrative fines are recommended as an escalated enforcement response, particularly when NOV's or administrative orders have not prompted a return to compliance. Whether administrative fines are appropriate responses to noncompliance also depends greatly on the circumstances surrounding the violation. When using this enforcement response, either singly or in conjunction with another response (e.g., an administrative order requiring the industrial user to take steps to return to compliance), the Control Authority should consider the following factors:

- The type and severity of the violation
- The number of violations cited
- The duration of the noncompliance
- The impact of the violation on the wastewater treatment plant and the environment (e.g., whether the violation caused pass through or interference)
- Whether the violation threatened human health
- Whether the industrial user derived any economic benefit or savings from the noncompliance
- The compliance history of the user
- Whether the user is making good faith efforts to restore compliance
- Other policy considerations normally involved in an enforcement decision.

Suggestions for instances when fines are particularly appropriate include:

- When the industrial user remains in noncompliance after receiving repeated NOV's
- When the industrial user violates the terms of an administrative order (such as failing to meet a compliance schedule deadline).

The City of New York (through the ordinance provision quoted above) is authorized to assess administrative fines for every instance of user noncompliance. This provision gives the City the broadest possible discretion in the use of its administrative fine authority.

5.2.3 How to Assess Administrative Fines

The process of assessing administrative fines involves three steps: (1) determining the amount of the fine; (2) selecting a mechanism through which to impose the fine; and (3) collecting the fine. To successfully assess administrative fines, the Control Authority must have adequate legal authority, well-defined procedures, and complete documentation of the noncompliance (such as chain-of-custody forms and detailed sampling records). If the industrial user challenges the fine in court, the Control Authority must be prepared to defend its actions.

Determining the Amount of the Fine

The amount of the fine should be proportionate to the economic benefit enjoyed by the industrial user from the noncompliance and the harm caused by the violation. Two primary methods exist for determining fine amounts: assessing on a case-by-case basis (based upon well-defined criteria) and following a schedule of fines (also based upon well-defined criteria). While each method has advantages, it is strongly suggested (for reasons explained more fully below) that the Control Authority adopt one of the two approaches rather than attempting to combine elements of each.

Determining the amount of the fine on a case-by-case basis is more flexible and may ultimately allow for broader consideration of appropriate fine amounts than adherence to a predetermined fine schedule. However, unless this amount is based on previously determined criteria, the Control Authority may not be able to justify its decision and is therefore more vulnerable to user charges of arbitrary or selective enforcement. If the Control Authority develops and uses a predetermined fine schedule, its response will be prompt and unlikely to be challenged (unless the fine amount was inconsistent with the schedule or the schedule amounts were used in setting fines for some users and disregarded for others).

Developing a Fine Schedule

Control Authorities have used several varieties of fine schedules ranging from a flat rate for any violation to a sliding scale based on the type and nature of noncompliance. Some examples are provided below:

- **Flat Rate.** New York City has the authority to issue administrative fines up to \$1000 per violation per day. The City's policy is to issue the maximum fine regardless of the nature of the violation.
- **Flat Rate with Escalation.** The Town of Lisbon, Maine, uses a fine schedule for violations of industrial discharge permits that begins at \$100 per violation and increases by \$100 increments for each subsequent violation to a maximum of \$1000 per violation. If the industry remains in compliance for a period of one year, the cycle begins anew and subsequent fines are assessed at \$100 and increased by \$100 increments.
- **Fine Calculated Using Matrix.** Control Authorities in Boston, Massachusetts and Seattle, Washington, have each developed a matrix to determine the size of an administrative fine. The matrices address such criteria as magnitude of violation, potential impact to the POTW or the environment, violator culpability, and the frequency of the violation.
- **Fine Based on Type of Noncompliance.** Washington County, Oregon, has developed specific fines for various types of noncompliance as well as for repeat offenses.

- o Fine in Addition to Cost Recovery. The City of Niagara Falls, New York, has established a schedule of fines for categories of violations. This schedule also states that the violator will cover any costs incurred by the City because of the violation.
- o Fine Based on Economic Benefit of Noncompliance. There may be some industries in deliberate noncompliance because the penalties of noncompliance are less than the costs of achieving compliance. In these situations, the Control Authority must remove the economic advantage of noncompliance. For guidance on calculating fines based on the economic benefit of noncompliance, see the Guidance Manual for Calculation of Economic Benefit of Noncompliance with Pretreatment Standards (1989).

Determining a fine amount which reflects the violation's significance is extremely important. If a fine is too small, its deterrent value is lost and the amount may be regarded by the user as a tax or nominal charge to pollute. If the fine is too great, it is more likely to be contested and could bankrupt the industry (making necessary investments in pretreatment equipment impossible and potentially forcing unnecessary closure). In cases of extreme hardship, the Control Authority may consider reducing or suspending the fine as part of a consent order or a show cause proceeding.

Methods of Assessing Administrative Fines

Once the violation is documented and an appropriate fine amount determined, the Control Authority must notify the industrial user of the fine assessed and collect the fine. A variety of mechanisms are used by Control Authorities around the country to assess administrative fines.

- o Assessment on Sewer Bill. The Control Authority adds the administrative fine to other sewer charges when billing the industry for sewer services. The Control Authority identifies the additional charge as a fine for noncompliance and also includes a comment indicating that if compliance is not achieved before the next billing period, an escalated enforcement action will be taken against the industrial user.
- o Notice of Violation. A NOV is used to notify the industrial user of its pretreatment violation(s) and to inform the user that a fine has been assessed. The Notice should include a provision explaining that full payment is due to the city treasurer within a specified period of time.
- o Administrative Order. A formal order is issued by the Control Authority specifying that the industrial user is in noncompliance and outlining actions which are required of the industry including the payment of an administrative fine.
- o Show Cause Hearing. A formal or informal meeting between the noncompliant industry and the Control Authority. One outcome of this meeting may be the assessment of an administrative fine. In some cases, a show cause hearing is granted to give the industry an opportunity to appeal the fine.

Whatever the assessment process selected, it should at a minimum specify the violations for which the penalty is being assessed, indicate the amount of the penalty, and order the industrial user to take corrective action to return to compliance. These procedures must be detailed in the enforcement response plan.