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IPP Spring Training 2008

User Permitting, Compliance, and Enforcement

*East Lansing, Michigan
May 28, 2008*

A. General – IPP Required by Federal and State Laws and Regulations

1. Federal

a. Clean Water Act

- (1) Originally passed in 1972.
- (2) Intended to restore and maintain integrity of nation's waters.
- (3) Requires elimination of discharge of pollutants into waters; and achievement of fishable/swimmable water quality levels.
- (4) Established NPDES permitting program as key component to accomplish objectives.
- (5) Requires NPDES permit for all "point source" discharges (such as POTW).

b. General Pretreatment Regulations (40 CFR Part 403)

- (1) National Pretreatment Program established as component of NPDES permitting program to address discharges from industries to POTWs ("indirect dischargers").
- (2) Requires industrial/commercial ("nondomestic") dischargers to treat or control pollutants in wastewater before discharge to POTW ("pretreat").
- (3) Requires all "large" POTWs (> 5 MGD/day) and smaller POTWs with SIUs or CIUs to establish local IPPs.
- (4) Local IPPs must enforce all national pretreatment standards and requirements, and any more stringent "local limits" and requirements as needed to protect POTW.

2. State

a. NREPA Part 31 ("Water Resources Protection") (Part 31 of Act 451 of the Public Acts of Michigan of 1994, MCLA 324.3101 et seq.)

- (1) State "clean water act" – but not as comprehensive as Federal CWA.
- (2) Deals primarily with "direct" dischargers – "pretreatment" not mentioned.

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- (3) But provides authority to establish rules, including rules necessary to comply with Federal requirements.

b. Michigan Part 23 Rules (Michigan Administrative Code, R 323.2301 et seq.)

- (1) Part 23 Rules promulgated to implement pretreatment responsibilities under Federal CWA and NREPA Part 31.
- (2) Apply to state and local governments, as well as POTWs, and also any person that discharges to POTW (either via sewer, trucked/hailed, or any other means of discharge).
- (3) Very similar to Federal General Pretreatment Rules – but also a number of differences (e.g., MIPP = < 5MGD/day, but CIU, unless FIPP per MDEQ).
- (4) Use Michigan Part 23 Rules as primary source of authority and requirements.
- (5) http://www.state.mi.us/orr/emi/admincode.asp?AdminCode=Single&Admin_Num=32302301&Dpt=EQ&RngHigh=

3. IPP Required by POTW's NPDES Permit

- a. Actual requirement for POTW to develop/implement IPP arises as condition of POTW's NPDES permit issued by MDEQ.
- b. Primary purpose – Ensure that POTW meets its own NPDES permit limits.

B. Specific Regulatory Requirements – User Permitting, Compliance, and Enforcement

1. Minimum Elements.

At a minimum, IPP must provide POTW legal authority to regulate and implement the following requirements under the federal and state regulations:

- a. Regulate prohibited discharges:
 - (1) General prohibitions (pass through/interference) (R 323.2303(1))
 - (2) Specific prohibitions (oxygen demanding pollutants, heat, petroleum oil...) (R 323.2303(2))
 - (3) Local limits
 - (4) Dilution prohibition
 - (5) Categorical standards
- b. Deny/condition new or increased contributions that do not meet standards or may cause violation of NPDES permit.

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- c. Control discharges by permit (or other control mechanism). R 323.2306(a)(iii) and the pretreatment streamlining regulations require IU permits to have, at a minimum, conditions that deal with all of the following:
 - (1) Statement of duration (in no case more than 5 years)
 - (2) Statement of nontransferability
 - (3) Effluent limits, including Best Management Practices
 - (4) Self-monitoring requirements
 - (5) Identification of pollutants to be monitored
 - (6) Sampling location
 - (7) Sample type
 - (8) Sampling frequency
 - (9) Reporting requirements
 - (10) Notification requirements
 - (11) Record keeping requirements
 - (12) Statement of applicable civil and criminal penalties
 - (13) Applicable compliance schedules
 - (14) Requirements to control Slug Discharges, if determined by the POTW to be necessary

- d. Require development of compliance schedules to install pretreatment technology and require submission of notices and reports.

- e. Right to carry out all inspections, surveillance and monitoring procedures necessary to independently determine compliance, including:
 - (1) Right to enter at reasonable times
 - (2) Right to inspect premises
 - (3) Right to take samples
 - (4) Right to require installation of monitoring equipment
 - (5) Right to inspect and copy records

- f. Enforcement:
 - (1) Non-emergency response: Authority to seek/assess civil/criminal fines of at least \$1,000 per day per violation; and to seek injunctive relief.
 - (2) Emergency response: Authority (and procedures) to immediately halt or prevent discharges that threaten human health, the environment, or the POTW.

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- g. IPP Written Procedures: There are also minimum requirements for IPP written procedures. For example, IPP needs all procedures required by R 323.2306(c) through (h), which includes procedures to:
 - (1) Identify/locate IUs
 - (2) Prepare IU list
 - (3) Identify character/volume of pollutants contributed by IUs
 - (4) Randomly sample/analyze IUs, conduct surveillance
 - (5) Public participation requirement procedures
 - (6) Develop ERP
 - h. IPP must also have procedures to immediately and effectively halt or prevent discharges to POTW which may endanger environment or interfere with POTW or endanger health/welfare of persons (R 323.2306(a)(vi)).
 - i. IU permits must incorporate minimum civil and criminal penalty provisions, including \$1000 municipal civil infraction authority.
2. Additional Recommended Provisions and Requirements – IU Permits.
- a. In addition to the minimum conditions required by R 323.2306(a)(iii), IU permits should include any conditions determined reasonably necessary by the POTW Superintendent to prevent pass through or interference, to protect the quality of the receiving waters, to protect worker health and safety, to facilitate POTW sludge management and disposal, to protect ambient air quality, to protect against damage to the POTW, or to otherwise achieve the objectives of the pretreatment laws and regulations, including, but not limited to, the following (this list also includes the minimum permit condition requirements):
 - (1) Limits on the average and/or maximum rate of discharge, time of discharge, and/or requirements for flow regulation and equalization.
 - (2) Limits on the average and/or maximum concentration, mass, or other measure of identified wastewater constituents or properties.
 - (3) Effluent limits in the form of Best Management Practices, based on applicable federal general Pretreatment Standards, categorical Pretreatment Standards, local limits, and state and local law.
 - (4) Requirements for installation of pretreatment technology or construction of appropriate containment devices, or similar requirements designed to reduce, eliminate, or prevent the introduction of pollutants into the treatment works.

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- (5) Development and implementation of slug discharge control plans, spill control plans, or other special conditions, including additional management practices necessary to adequately prevent accidental or unanticipated discharges.
- (6) Requirements for installation, maintenance, repair, calibration and operation of inspection and sampling facilities and discharge flow monitors.
- (7) Specifications for monitoring programs which shall include, but are not limited to, sampling locations, frequency of sampling, number, types, and standards for tests, and reporting schedules.
- (8) Compliance schedules.
- (9) Requirements for submission of technical reports or discharge reports.
- (10) Requirements for maintaining and retaining plant records relating to wastewater discharge as specified by the POTW and affording the POTW access to those records.
- (11) Requirements for notifying the POTW if self-monitoring indicates a violation, and for repeat sampling and analysis.
- (12) Requirements for notification of any new introductions of wastewater constituents or of any substantial change in the volume or character of the wastewater being introduced into the POTW, including listed or characteristic hazardous waste for which the User has submitted initial notification under MAC R 323.2310(15).
- (13) Requirements for the notification of any change in the manufacturing and/or pretreatment process used by the permittee.
- (14) Requirements for notification of accidental or slug discharges, or discharges that exceed a discharge prohibition.
- (15) Requirements for notification and need for prior approval from the POTW Superintendent for any proposed change in a sampling location.
- (16) A statement regarding limitations on transferability of the permit.
- (17) A statement of the duration of the permit.
- (18) A statement that compliance with the permit does not relieve the permittee of responsibility for compliance with all applicable pretreatment standards and requirements, including those that become effective during the term of the permit.
- (19) Requirements for a written certification signed by the permittee that acknowledges that the permittee has read and fully understands all terms and conditions of the permit; and acknowledges that the permittee accepts all of the terms and conditions of the permit as written and accepts full responsibility for complying with the permit as approved.
- (20) A statement of applicable civil and criminal penalties for violation of discharge limitations, pretreatment standards and requirements, and compliance schedules.
- (21) Requirements regarding development by a User of a pollutant prevention, minimization or reduction plan (e.g., for mercury or PCBs) or requirements regarding use of best management practices to control, contain, treat, prevent, or

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reduce the discharge of wastewater, pollutants or other substances to the POTW, or otherwise meet the purposes, policies and objectives of the sewer use ordinance.

- (22) Other conditions as determined necessary by the POTW Superintendent to ensure compliance with the sewer use ordinance and other applicable laws, rules and regulations.

3. Additional Recommended Provisions and Requirements – Compliance and Enforcement.

a. Municipal civil infraction (MCI) checklist

- (1) Designate which violations are MCI
- (2) And which remain criminal misdemeanors — use NREPA Part 31 as guideline — criminal limited to \$500/90 days
- (3) Set fine amounts for MCIs
 - (a) First offense (minimum \$1,000; range)
 - (b) Repeat offenses (define; ramp up)
 - (c) No maximum specified in statute for MCI
 - (d) Use NREPA Part 31 as guideline
- (4) Establish Municipal Ordinance Violations Bureau, if desired
- (5) Designate local officials authorized to issue citations/notices

b. Orders — at a minimum, SUO should provide for:

- (1) Compliance orders — unilateral authority to require anything consistent with purposes of SUO (require pretreatment, terminate service, etc.)
- (2) Consent orders (Consent agreements) — authority to enter settlement agreement with violator to resolve disputed claims, specify compliance schedules, remedial actions, stipulated penalties, etc.

c. Authority to condition or refuse to accept discharge

- (1) Reasonable potential to adversely affect POTW
- (2) Pass through/interference
- (3) Cause NPDES violation
- (4) Impacts uncertain/unknown
- (5) Regardless of whether permit issued for discharge

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- d. Full cost reimbursement authority
- (1) If user violates ordinance, damages/obstructs POTW, user pays
 - (2) Specify in detail costs to be reimbursed, with catch-all
 - (3) Repair, replacement, sampling, surveillance, treatment, prosecuting, etc.
 - (4) Any resulting fines, penalties, claims against POTW by government or third parties
 - (5) Full value of staff time (including overtime), consultant and engineering fees, actual attorney fees and defense costs, etc.
 - (6) Cost should not be a reason to be shy about enforcement — you get your costs back
- e. Determining amount of fines
- (1) Specify factors to consider
 - (a) Type, severity, frequency, duration, preventability
 - (b) Potential and actual effect
 - (c) Economic benefits to violator (delayed/avoided costs, competitive advantage)
 - (d) Compliance history, efforts to comply; etc.
 - (2) Subject to stated MCI fine minimums
- f. Calculating number of violations
- (1) Per day, per violation, continuing, separate offenses
 - (2) Effluent limit exceedences
 - (a) Count separately for each parameter
 - (b) Single violation for each day on which daily maximum violation occurs or continues
 - (c) Single violation for each instantaneous maximum exceedence, and may be multiple violations for each day on which such a violation occurs or continues
 - (d) Violation for each day of the month (week, etc.) during which the violation occurs, regardless of number of days samples actually taken (e.g., in month with 31 days, violation of monthly average limit = 31 violations)
 - (e) If permit regulates more than one outfall, each outfall considered separately

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- g. Review IPP procedures and regulations to ensure consistency with SUO
 - (1) Enforcement Response Plan (ERP)
 - (2) Notice and order forms

- h. Responding to Minor Violations
 - (1) MCI authority — use in conjunction with existing enforcement tools and procedures
 - (2) Follow ERP — choose response appropriate to significance of violation (phone call, letter, NOV, order to show cause, appeal procedures, etc.)
 - (3) If appropriate to assess fine, can issue MCI citation (or notice, if Bureau) — alternatively, enter into consent agreement to resolve matter (no MCI citation or notice required)

- i. Responding to Major Violations/Bad Actors
 - (1) Beauty of MCI authority — Ability to quickly get violators and recalcitrants to the table
 - (2) Example of highly successful enforcement approach using MCI authority
 - (a) Prepare “proposed” compliance order (“hammer”)
 - i. Spell out authority to act (assess fines, recover costs, terminate discharge, etc.) in detail
 - ii. Specify all violations (use tables, as appropriate) — for each parameter, date of sample, result, ordinance limits, percent exceedence, etc. — include sampling, reporting violations.
 - iii. Calculate number of violations — maximize using ordinance guidelines
 - iv. Calculate amount of MCI fine to be assessed — maximize using ordinance guidelines
 - v. Calculate required cost reimbursement (staff, legal, engineering, etc.) — include all costs you can document
 - vi. Specify required actions (pretreatment, compliance schedules, provision of financial assurances, etc.) and associated compliance deadlines
 - vii. Include order to pay all fines, reimbursable costs, etc., and to take all required actions by date certain (30 days of date of order)
 - viii. Indicate failure to fully comply will result in termination of service and further civil/criminal proceedings

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- (b) Send proposed compliance order marked “draft” to user (registered mail/return receipt) with cover letter indicating that compliance order will be issued by date certain unless consent agreement reached by date certain
- (c) You must be prepared to issue proposed compliance order if no response or if satisfactory progress not made on reaching consent agreement — no bluffing allowed!
- (d) Negotiate appropriate consent agreement
 - i. Can include fines that are less than maximums (even significantly less), but still appropriate to severity of violations — must pass “MDEQ test”
 - ii. Should include any required actions and compliance schedules
 - iii. Should include provisions for stipulated penalties
 - iv. May include covenant not to sue (but should be carefully limited to violations in question, etc.)
 - v. Do not negotiate amount of reimbursable costs!
 - vi. Make any necessary changes to user’s permit (incorporate conditions, etc.)
 - vii. No MCI citations or notices issued — resolved by negotiated settlement

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GEORGE DAVIS

George is a partner at Davis & Davis Law Offices PLC in Grand Rapids, Michigan. He specializes in municipal, environmental, and land use law matters on behalf of public clients throughout the State, with particular emphasis on Clean Water Act, NPDES, POTW and industrial pretreatment program (IPP) issues. He also has significant experience involving zoning, land use and municipal civil infractions.

George's statewide recognized expertise includes the review and custom drafting of local ordinances (including sewer use and storm water ordinances, IPP regulations, and municipal civil infraction provisions, as well as other types of regulatory ordinances and zoning regulations) and assisting with the administration and enforcement of those regulations. He often serves as special legal counsel to local governments for those types of projects, coordinating his efforts with a municipality's existing legal counsel on an as-needed basis.

Prior to joining Davis & Davis, George was a partner with Varnum, Riddering, Schmidt & Howlett LLP where he practiced municipal and environmental law for 12 years. He is now able to offer clients the benefits of his "big firm" expertise at very reasonable prices and with more personalized and efficient service.

George received his J.D. from McGeorge School of Law, University of the Pacific; an LL.M. in Land Use and Environmental Law, *summa cum laude*, from The National Law Center, George Washington University; a Masters degree in Urban Planning from the University of Michigan; and he studied in the Ph.D. Program in Urban Technological, and Environmental Planning at the University of Michigan. He is a member of the State Bars of Michigan and California.

George served on the Civil Infractions Committee of the Public Corporation Law Section of the State Bar of Michigan and helped draft the original bills leading to enactment of the state legislation authorizing enforcement of local ordinance violations as municipal civil infractions. He has served as chairperson of the Publications Committee of the Public Corporation Law Section, and prior to that was chairperson of the Zoning and Land Use Committee, also of the Public Corporation Law Section.

"Drafting, Enacting and Maintaining Local Ordinances," authored by Mr. Davis, has been published as a new chapter in the Michigan Municipal League's two-volume reference set entitled Local Government Law and Practice in Michigan.

George also writes the "Clean Water Law Alert," a column in the Michigan Water Environment Association's "Matters" newsletter.

In 1994, George was awarded the Michigan Municipal League's Distinguished Achievement Award for his work regarding municipal civil infractions. In 2000, he was awarded the Year 2000 Excellence in Service Award by the Michigan Water Environment Association for his work in the areas of local, state and federal clean water laws and regulations.

George served as a member of the MDEQ Phase II Storm Water Advisory Team formed to assist the State in its approach to permitting municipalities under the State's Phase II Water Program. He also served as a member of the MDEQ's Water Quality Trading Workgroup established by the Surface Water Quality Division to provide MDEQ with recommendations and draft rules for a voluntary effluent trading program.