

**Enforcement Response Plans (ERPs) and  
Opportunities for Strategic Goals Program  
Flexibility:**

**Case Study Analysis of  
Four Texas POTWs**

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**By**

**Industrial Economics, Inc.**

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## INTRODUCTION

Publicly Owned Treatment Works (POTWs) play an important role in the Metal Finishing Strategic Goals Program (SGP). Many metal finishers cite their local POTW as their primary contact for environmental regulation. Frequent and on-going interaction often results in a cooperative relationship through which the POTW and the industrial user (IU) can work together to improve environmental performance and regulatory compliance. The purpose of this report is to identify opportunities to build elements of the SGP into both the formal and the informal relationships between POTWs and metal finishing companies. Assisting in efforts to implement the SGP in Texas, IEc conducted an in-depth analysis of the Enforcement Response Plans (ERPs) of POTWs in four Texas cities: Austin, Dallas, Ft. Worth, and Houston. This report presents the results of the analysis, including:

- *General evaluations* of the nature and extent of each of the ERPs, focusing in particular on their enforcement procedures and the flexibility available in selecting response options;
- *Comparisons* across the four ERPs, highlighting both commonalities and differences in their enforcement response actions and related procedures; and,
- Identification of options and opportunities for incorporating *SGP flexibility* into the ERPs.

## FORMAT OF THE ANALYSIS

For this analysis, IEc contacted each of the POTWs, either directly or through EPA, and requested copies of their ERPs and any other materials outlining procedures, guidelines, and/or regulations pertaining to their enforcement responsibilities and response options. The four POTWs in this study are all members of the SGP and actively participate in the Texas SGP stakeholder committee. All express an interest in supporting the goals of the SGP and are committed to working with the metal finishers in their service areas to achieve these goals. Because it focuses on the written text of the ERPs, this analysis cannot fully capture the willingness of key individuals within the POTWs to operate flexibly within the confines of their respective ERPs in order to support and promote improved environmental performance. Instead, our analysis is based on an in-depth investigation of the formal structure and range of enforcement response actions outlined in the ERPs. In looking for opportunities to utilize flexibility options, we also consider the nature, flavor, and language of the instructions written for POTW personnel responsible for carrying out the enforcement procedures.

## **ENFORCEMENT RESPONSE PLANS (ERPs)**

Under federal regulations (40 CFR 403.8(f)), every POTW is responsible for developing their own ERP. Although all ERPs identify various types of violations and related enforcement response options, the structure, format, and presentation of the ERPs will vary from place to place. This individuality by locale adds to the difficulty of making direct comparisons across the different ERPs. While all four of the ERPs investigated here have tiered enforcement response options, the way they present information, and even the basic categories of violations, can be quite different. For this analysis, we focus on three elements of the ERPs to form the basis for the comparison: (1) the nature and extent of the enforcement response criteria; (2) the structure of the enforcement response grids; and (3) the breakdown of the suggested enforcement response actions.

### **Enforcement Response Criteria**

All four of the ERPs have tiered enforcement response plans underpinned by escalating response actions. The tiered structure and escalating penalties create a system where first-time or minor offenses are treated less severely than reoccurring or large and blatant violations. While each POTW develops its own set of response criteria, it is important to note that compliance history and the "good faith" of the industrial user (IU) play a strong role in determining the appropriate level of enforcement response. While Ft. Worth and Austin highlight and explicitly state their response criteria within the text of their ERPs, IEC developed lists of response criteria for Dallas and for Houston out of the descriptions of response options and instructions to POTW personnel.

Table 1 provides a summary comparison of enforcement response criteria across the four ERPs. While it is expected that in reality, POTW personnel informally utilize most, if not all, of the criteria in determining enforcement actions, the ✓'s in the table only mark those criteria that are *explicitly* stated within the ERP guidelines. A quick glance at the table shows that the effect of the violation on the POTW and the compliance history of the IU rank as important considerations across all four ERPs.

<p align="center"><b>Table 1</b></p> <p align="center"><b>Enforcement Response Criteria Comparison</b></p> <p align="center"><b>(✓ indicates explicit listing of this criteria in the ERP guidelines*)</b></p>							
	Magnitude of Violation	Duration of Violation	Effect on Receiving Water	Effect on POTW	Compliance History of Industrial User	Good Faith of Industrial User	Previous Success of Enforcement Actions
Ft. Worth	✓	✓	✓	✓	✓	✓	✓
Austin	✓	✓		✓	✓	✓	
Dallas				✓	✓	✓	
Houston			✓	✓	✓		

\* While Ft. Worth and Austin highlight their enforcement criteria as separate lists in the ERP text, criteria guidelines for Dallas and Houston were derived from their enforcement response grids and instructions for selecting enforcement actions.

The Ft. Worth ERP has the most comprehensive set of criteria, highlighting the first six criteria in Table 1 under a section of the ERP entitled "Response Criteria." The seventh criteria, "previous success of enforcement actions," while not included in the initial list, is mentioned later in the directions on how to select the appropriate enforcement response. While all four POTWs, under the escalating structure of their response options, base their enforcement actions on prior attempts to bring the IU back into compliance, the Ft. Worth ERP goes a step further in drawing direct attention to this rule in its guidelines. The added emphasis on this evaluative criteria, gives the Ft. Worth POTW additional flexibility in selecting response actions when prior experience with a particular IU suggests that a certain response option may be more or less effective given the case at hand.

### **Enforcement Response Grids**

In the materials that we received from the POTWs, three out of the four ERPs included a table or enforcement response grid detailing the range of available response options under various scenarios. (Copies of the original enforcement response grids are included in the Appendix to this report.) These tables were created to assist POTW personnel in selecting the appropriate enforcement action to fit the violation and the IU in question. The enforcement response criteria identified in Table 1 underlie the structure of the grids. Response options progress from least severe to most severe as size and duration of the violation increases and depending upon the remediation efforts made by the IU. The grids are constructed in such a way that if the initial enforcement action does not receive proper and timely acknowledgment and correction by the IU, the next level of enforcement will kick-in shortly thereafter. The enforcement response grids also identify POTW personnel responsible for carrying out the various levels of enforcement actions.

The enforcement response grids offer a useful and effective way to present the essential elements of what can be a complex set of formal procedures. The grids allow both POTW personnel and industry to trace more easily the enforcement process, identify industry's requirements, and select/anticipate appropriate response actions from the POTW. We found that presenting the response options from least severe to most severe created a logical flow to the process giving industry a clearer understanding of what actions they can take to avoid the escalation in enforcement from the POTW. The grid also makes apparent the consequences when industry does not respond in a timely and effective manner to correct the problem.

The material that we received from Houston did not include an enforcement response grid. Relying solely on the ERP text to sketch out the enforcement procedures, we found this format not only harder to trace but also more intimidating. The Houston ERP is written in such a way that for each type of violation the most severe penalty (i.e., termination of service) is usually listed first. Subsequent paragraphs then describe steps the IU can take to avoid having their service terminated and their permits revoked. Although the enforcement actions in the Houston ERP are not significantly different in magnitude nor severity, the format of the ERP text make it appear more stringent in its procedures and less flexible in its options.<sup>1</sup> Given this comparison in presentation and format, we recommend that if the Texas stakeholder group chooses to develop something along the lines of an SGP permit, that an accompanying SGP enforcement response grid, clearly showing the escalating nature of enforcement responses, be included (*see the recommendation under Next Steps below*).

### **Breakdown of Enforcement Response Options**

Another method for investigating the commonalities and differences across the four ERPs is to look at the way they utilize the various response options. Table 2 calculates the number of times a particular enforcement action is listed as a viable response option to a violation. Because the way violations are broken down by category differs across the four ERPs, the number of scenarios depicting potential violations varies. The Austin enforcement response grid details a total of 55 potential violation scenarios. Dallas and Ft. Worth breakdown violations into 26 scenarios and 20 scenarios, respectively. And, a total of 16 scenarios can be identified in reading through the Houston ERP. In this analysis, IEC considered each instance where a particular violation, including any mitigating circumstances, warranted a separate set of enforcement response actions as a single scenario. Table 2 lists both the total number and percentage of times a particular response action is mentioned under a violation scenario.

The response actions listed in the first column of Table 2 represent a conglomeration of options found within the four ERPs. A single enforcement action can be used for multiple violations, and given the escalating nature of the ERPs, a single violation scenario can have

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<sup>1</sup> Although not included in our materials, the Houston ERP may have a version of an enforcement response grid. It is not our intent to criticize the structure or content of the Houston ERP, but we simply wish to use the comparison in the presentation of the enforcement response material to draw useful guidelines and suggestions for creating SGP-specific material in the future.

multiple response actions associated with it. It is important to note that although utilizing different terminology, some of the response categories shown in Table 2 may in fact overlap or mean the same thing. While we acknowledge that it may make the lines between categories less concrete, we feel it is most informative to refer to the original language used in the ERPs where ever possible.

The following points can be drawn from an investigation of Table 2:

- **Notice of Violation:** A Notice of Violation (NOV) is the most common enforcement response action utilized across the four ERPs. NOVs are mentioned in every violation response scenario in the Ft. Worth ERP and are used heavily in the other ERPs as well (Austin: 58%; Dallas: 84%; Houston: 38%).
- **Phone Calls and Letters:** The biggest difference across the ERPs is in how they respond to an initial or minor violation. More than any of the other ERPs, the Dallas ERP formally allows the POTW to make initial responses to violations in the form of a phone call or a letter to the company. These contacts do not carry any penalty but allow the POTW to open discussions with the company to get the problem addressed as soon as possible.
- **Meetings with the Company:** The Ft. Worth ERP is the only one to mention meetings between company and POTW personnel as a required action under certain violation scenarios. Seven out of 20 or 35% of the scenarios in the Ft. Worth ERP suggest meetings with the IU.
- **Administrative Orders and Hearings:** Administrative orders and hearings, like NOVs, are used heavily across the four ERPs. Administrative orders are enforcement documents which direct IUs to undertake or cease specified activities. An administrative order can take several different formats, including: a consent order, a show cause order, a compliance order, or a cease and desist order.
- **Citations:** Citations are another effective enforcement response called for in the ERPs. Citations are usually criminal actions administered through the City's Municipal Court. However, in the instructions to POTW personnel, the Austin ERP encourages the use of warning citations as opposed to full citations whenever possible. The Austin ERP also explicitly supports the use of negotiation efforts.
- **Cost Recovery and/or Criminal Prosecution:** Although sometimes used under different terms, only the Austin ERP lists cost recovery and criminal prosecution as distinct options in its enforcement response grid.
- **Termination of Service:** The most severe action that a POTW can take is to terminate service to the IU. All of the ERPs give the POTWs the authority and the responsibility to revoke permits and terminate service to an IU when deemed necessary.

- **Public Notice:** While it is not explicitly included in the response options of all four ERPs, federal regulations require POTWs to publish annually a list of all IUs in their service area who significantly violated applicable pretreatment standard requirements during the calendar year.
- **Compliance Schedules or Plans of Action:** While often falling under different enforcement procedures, all of the ERPs encourage and/or require IUs to create Compliance Schedules (*also known as, Plans of Action*) to get the IU's system back in compliance as soon as possible. If a company is actively working to correct a violation, as long as it is not causing harm to the POTW or the environment the POTW will often utilize more flexible options in dealing with that IU. Using the Houston ERP as an example, if a parameter violation occurs for a parameter that is currently being addressed under a compliance schedule for the IU, the POTW will send a NOV to notify the IU but no further enforcement action will be taken at the time. The POTW thereby essentially grants a type of grace period while the IU works to get its system back into compliance.

Table 2 Breakdown of Response Actions Listed in the Enforcement Response Grids*								
Response Action	Austin		Dallas		Ft. Worth		Houston	
	# of Responses (55 total)	% of Responses	# of Responses (26 total)	% of Responses	# of Responses (20 total)	% of Responses	# of Responses (16 total)	% of Responses
Phone Call or Letter	0	0%	10	38%	0	0%	2	13%
Meeting with the Industrial User	0	0%	0	0%	7	35%	0	0%
Notice of Violation	32	58%	22	84%	20	100%	6	38%
Show Cause Order/ Hearing	0	0%	4	15%	7	35%	6	38%
Cease and Desist Order	0	0%	0	0%	1	5%	0	0%

<p align="center"><b>Table 2</b></p> <p align="center"><b>Breakdown of Response Actions Listed in the Enforcement Response Grids*</b></p> <p align="center"><b>(continued)</b></p>								
Other Administrative Order/ Hearing	35	63%	15	58%	0	0%	5	31%
Civil Action	10	18%	0	0%	0	0%	0	0%
Cost Recovery	25	45%	0	0%	0	0%	0	0%
General Complaint Citations	21	38%	17	65%	11	55%	0	0%
Final Notice	0	0%	0	0%	0	0%	4	25%
Revoke Permit	8	15%	13	50%	0	0%	0	0%
Criminal Prosecution	30	55%	0	0%	0	0%	0	0%
Termination of Sewer and/or Water Service	11	20%	14	54%	3	15%	9	56%
Public Notice	5	9%	8	31%	0	0%	0	0%
Increased Monitoring/ Reporting/ Sampling	4	7%	0	0%	0	0%	0	0%
Site Investigation	0	0%	0	0%	0	0%	5	31%

\* The materials from Houston did not include an enforcement response grid. The count of response options were calculated directly from the ERP text.

## **OPTIONS FOR SGP FLEXIBILITY**

We assume that those facilities participating in SGP will exhibit many of the criteria that make them "good faith" users in the eyes of the POTWs. While it is not necessarily a criterion for signing up for SGP, we would expect many SGP participants to have good compliance histories, to be up-to-date and complete in reporting requirements and paperwork, and to have good working relationships with their POTW. For IUs fitting this description, the principal advantage of holding SGP status would be to formalize their cooperative relationship with the POTW. For other IUs, SGP participation may signal to the POTW a willingness to seek assistance and improve performance, perhaps opening the door for negotiation options and additional assistance from the POTW. Based on our analysis, we recommend concentrating on the following areas as opportunities to create SGP flexibility within the POTW ERPs:

- Drawing from the Dallas example, the POTWs could look into using of phone calls and letters directly to the IU as first response option over formal citations or NOVs. Knowing a specific person at the IU who has agreed to coordinate the company's SGP participation would also give the POTW a single point person to direct inquiries and follow through on communications.
- POTWs could use SGP participation to signal "good faith" of the industrial user and therefore point towards less severe and more flexible enforcement response options. As discussed under *Next Steps* below, we recommend formalizing the selection process for response actions under a modified SGP enforcement response grid. This grid could point toward more flexible response options (available under the existing ERP) when dealing with good performing SGP participants and help to formalize the process for SGP participation and interaction.
- Most POTWs utilize computerized tracking systems to assist in monitoring, scheduling, and documentation efforts. In fact, both the Houston and the Dallas ERPs describe in detail the use of computer tracking systems under their procedures sections. Computer systems could be modified to include a separate SGP category or marker that readily identifies SGP participants and considers their status in developing monitoring and sampling schedules and in selecting appropriate enforcement response actions.
- Building upon existing procedures for developing and processing Compliance Schedules (or Plans of Action), POTWs could work with SGP participants to develop such agreements when installing new environmental equipment, changing processes, or undertaking other modifications to the IU's systems. The procedures currently outlined in many of the ERPs set a precedence for cooperative agreement in developing the schedules, more flexible response options or grace periods during the transition, and open and informed communication between the POTW and the IU. (See the second bullet point under *Next Steps*.)

## NEXT STEPS

The bullet points that follow outline recommended steps for proceeding in this analysis and in creating opportunities for incorporating SGP flexibility in the Texas program:

- **Constructing an enforcement response grid applicable only to SGP participants:** An SGP enforcement grid would assist POTW personnel in implementing the SGP and at the same time would address one of industry's greatest concerns by providing them with guidelines detailing how they can expect the POTW to respond under different scenarios. An enforcement grid would also help to ensure that all levels of personnel and enforcement at the POTW are on the same page with respect to selecting enforcement options.

Following the tiered system suggested by the draft version of the national performance ladder (e.g., the bronze, silver, and gold levels of achievement), the SGP enforcement response grid could specify multiple levels of flexibility.

- **Conducting a study to trace POTW personnel's use of flexibility in selecting enforcement options:** This analysis explored the range of options available in the different ERPs. A logical next step would be to build a better understanding of how POTW personnel responsible for determining enforcement actions make use of the available options. Results of this study would assist in developing an SGP enforcement response grid that would be most effective from the point of view of the POTWs.
- **Working with industry representatives to understand their perspective of the interaction with the POTW:** It would be useful to know how current and potential SGP participants characterize their relationship with their local POTW. In particular, we would want to investigate: (1) their level of comfort in understanding up-front how the POTW can be expected to respond to a range of violation scenarios; (2) their willingness to enter into agreements concerning Compliance Schedules or Plans of Action with the POTW; and (3) their assessment of which levels of enforcement action are appropriate and most effective in regulating environmental performance and in protecting the POTW and water systems.
- **Developing an SGP-specific permit.** The Texas POTWs have discussed developing a permit applicable only to SGP participants. The SGP-permit could specify monitoring, sampling, and inspection criteria, as well as enforcement response options, for those metal finishers actively participating in the SGP.
- **Creating a Generic Compliance Agreement Template.** Compliance agreements play a central role in many of the POTW enforcement response options. Drawing upon the Detroit MF2000 pilot projects, a generic template for creating up-front compliance agreements could be developed. These agreements could be used when a company wishes to undertake specific process or technology changes to improve environmental performance or when a company needs to re-establish their system after a compliance violation has occurred.