

Article XIV — Affirmative Defenses to Discharge Violations

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Article XIV — Affirmative Defenses to Discharge Violations

§ 65-1401 Upset.

(a) **Definition.** For purposes of this Section, “upset” means an exceptional incident in which there is unintentional and temporary noncompliance with Categorical Pretreatment Standards because of factors beyond the reasonable control of the User. An “upset” does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventative maintenance, or careless or improper operation.

(b) **Affirmative Defense.** An upset shall constitute an affirmative defense to an action brought for noncompliance with Categorical Pretreatment Standards if the User shall demonstrate, through properly signed, contemporaneous operating logs or other relevant evidence, that—

(1) An upset occurred and the User can identify the cause(s) of the upset;

(2) The facility was at the time being operated in a prudent and workman-like manner and in compliance with applicable operation and maintenance procedures; and

(3) The User has submitted the following information to the Borough and the City Director of Public Works within twenty-four (24) hours of becoming aware of the Upset. If this information is provided orally, a written submission must be provided within five (5) calendar days:

(A) A description of the Indirect Discharge and cause of noncompliance;

(B) The period of noncompliance, including exact dates and times or, if not corrected, the anticipated time the noncompliance is expected to continue; and

(C) Steps being taken and/or planned to reduce, eliminate, and prevent recurrence of the noncompliance.

(c) **Burden of Proof.** In any enforcement action, the User seeking to establish the occurrence of an upset shall have the burden of proof.

(d) **Limitation.** Users will have the opportunity for a judicial determination on any claim of Upset only in an enforcement action brought for noncompliance with Categorical Pretreatment Standards.

§ 65-1402 Prohibited Discharge Standards.

A User shall have an affirmative defense to an enforcement action brought against it for noncompliance with the general prohibitions in § 65-601(b) or the specific prohibitions in paragraph (6) or any of paragraphs (8) through (21) of § 65-601(c), if the User can prove that it did not know, or have reason to know, that its discharge, alone or in combination with discharges from other sources, would cause Pass Through or Interference, *and* that either—

(a) A Local Limit exists for each Pollutant discharged and the User was in compliance with each limit directly prior to, and during, the Pass Through or Interference; or

(b) No Local Limit exists, but the discharge did not change substantially in nature or constituents from the User's prior discharge when the City was regularly in compliance with its NPDES permit, and in the case of Interference, was in compliance with applicable biosolids use or disposal requirements.

§ 65-1403 Bypass.

(a) **Definitions.** For purposes of this Section—

(1) **Bypass.** The term “Bypass” means the intentional diversion of wastestreams from any portion of a User’s treatment facility; and

(2) **Severe Property Damage.** The term “Severe Property Damage” means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a Bypass. Severe Property Damage does not mean economic loss caused by delays in production.

(b) **Bypass Permitted for Certain Maintenance.** A User may allow any Bypass to occur which does not cause Pretreatment Standards or Requirements to be violated, but only if it also is for essential maintenance to assure efficient operation. These Bypasses are *not* subject to the provisions of subsections (c) and (d).

(c) **Notice.**

(1) If a User knows in advance of the need for a Bypass, it shall submit prior notice to the Borough and the City Director of Public Works at least ten (10) days before the date of the Bypass, if possible.

(2) A User shall submit oral notice to the Borough and the City Director of Public Works of an unanticipated Bypass that exceeds applicable Pretreatment Standards within twenty-four (24) hours after the time the User becomes aware of the Bypass. A written submission shall also be provided within five (5) calendar days after the time the User becomes aware of the Bypass, unless the oral report was received within twenty-four (24) hours and the written report is waived by the Borough and the City Director of Public Works on a case-by-case basis.

(3) The written submission shall contain—

(A) a description of the Bypass and its cause;

(B) the duration of the Bypass, including exact dates and times, and if the Bypass has not been corrected, the anticipated time it is expected to continue; and

(C) steps taken or planned to reduce, eliminate, and prevent reoccurrence of the Bypass.

(d) **Prohibition; Justification.**

(1) Bypass is prohibited, and the Borough or the City Director of Public Works may take enforcement action against a User for a Bypass, *unless*—

(A) Bypass was unavoidable to prevent loss of life, personal injury, or Severe Property Damage;

(B) There were no feasible alternatives to the Bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a Bypass which occurred during normal periods of equipment downtime or preventative maintenance; and

(C) The User submitted notices as required under subsection (c).

(2) The Borough and the City Director of Public Works may approve an anticipated Bypass, after considering its adverse effects, if the Borough and the City Director of Public Works determines that it will meet the three conditions listed in paragraph (1).