

ORDINANCE NO. 0-2010-12

AN ORDINANCE AMENDING THE CITY OF TYLER CODE CHAPTER 19, "UTILITIES", ARTICLE IV, "INDUSTRIAL WASTES", TO COMPLY WITH THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY REQUIREMENTS AND FEDERAL GENERAL PRETREATMENT REGULATIONS; PROVIDING A SEVERABILITY CLAUSE; PROVIDING A PENALTY AND ESTABLISHING AN EFFECTIVE DATE.

WHEREAS, it is the intent of the City Council to protect the public health, safety and welfare; and

WHEREAS, municipalities may, under their police powers, enact reasonable regulations to promote the health, safety and welfare of citizens; and

WHEREAS, the City of Tyler is a home-rule municipality acting under its Charter adopted by the electorate pursuant to Article 11, Section 5 of the Texas Constitution and Chapter 9 of the Texas Local Government Code; and

WHEREAS, Texas Local Government Code Section 51.001(1) provides that the governing body of a municipality may adopt, publish, amend, or repeal an ordinance, rule or police regulation that is for the good government, peace, or order of the municipality; and

WHEREAS, Texas Local Government Code Section 51.001(2) provides that the governing body of a municipality may adopt, publish, amend, or repeal an ordinance, rule or police regulation that is necessary or proper for carrying out a power granted by law to the municipality or to an office or department of the municipality; and

WHEREAS, Texas Local Government Code Section 51.072(a) states that a home-rule municipality has full power of local self-government; and

WHEREAS, Texas Local Government Code Section 51.072(b) states that the grant of powers to a home-rule municipality under the Texas Local Government Code does not prevent, by implication or otherwise, the municipality from exercising the authority incident to self-government; and

WHEREAS, Section 1 of the Tyler City Charter states that the City of Tyler may make and enforce local police, sanitary, and other regulations, and may such ordinances as may be expedient for maintaining and promoting the peace, good government and welfare of the City; and

WHEREAS, the Texas Water Code Section 7.251 establishes a defense for violations of the statute, rule, order, or permit for events caused solely by an act of God, war, strike, riot, or other catastrophe, where by such an event is not deemed a violation of that statute, rule, order, or permit.

WHEREAS, the Texas Commission on Environmental Quality has established specific requirements for pretreatment compliance; and

WHEREAS, the Texas Commission on Environmental Quality has determined that certain portions of the Tyler City Code relating to Industrial Waste require updating to conform to TCEQ requirements and federal general pretreatment regulations; and

WHEREAS, it is important to amend the requirements in Tyler City Code Section 19-85 to add specific regulations related the “act of God” defense.

NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF TYLER, TEXAS:

PART 1: That the Tyler City Code Chapter 19, “Utilities”, Article IV, “Industrial Wastes”, is hereby amended to read as follows:

Sec. 19-85. Affirmative defenses to discharge violations.

a. Act of God defense.

1. The Act of God defense constitutes a statutory affirmative defense [Texas Water Code Section 7.251] in an action brought in municipal or State court. If a person can establish that an event that would otherwise be a violation of a pretreatment ordinance, or a permit issued under the ordinance, was caused solely by an act of God, war, strike, riot, or other catastrophe, the event is not a violation of the ordinance or permit.

2. An industrial user who wishes to establish the Act of God affirmative defense shall demonstrate, through relevant evidence that:

(a) An event that would otherwise be a violation of a pretreatment ordinance or a permit issued under the ordinance occurred, and the sole cause of the event was an act of God, war, strike, riot or other catastrophe; and

(b) The industrial user has submitted the following information to the POTW and the City within 24 hours of becoming aware of the event that would otherwise be a violation of a pretreatment ordinance or a permit issued under the ordinance (if this information is provided orally, a written submission must be provided within five days):

(1) a description of the event, and the nature and cause of the event;

(2) the time period of the event, including exact dates and times or, if still continuing, the anticipated time the event is expected to continue; and

(3) steps being taken or planned to reduce, eliminate and prevent recurrence of the event.

3. Burden of proof. In any enforcement proceeding, the industrial user seeking to establish the Act of God affirmative defense shall have the burden of proving by a preponderance of the evidence that an event that would otherwise be a violation of a pretreatment ordinance, or a permit issued under the ordinance, was caused solely by an act of God, war, strike, riot or other catastrophe.

b. Upset. An upset constitutes an affirmative defense in an action brought in federal court.

1. For the 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 industrial user. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

2. An upset shall constitute an affirmative defense to an action brought for noncompliance with categorical pretreatment standards if the requirements of Subsection 3. below are met.

3. An industrial user who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

(a) An upset occurred and the industrial user can identify the cause(s) of the upset;

(b) The facility was at the time being operated in a prudent and workmanlike manner and in compliance with applicable operation and maintenance procedures;

(c) The industrial user has submitted the following information to the POTW and treatment plant operator 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) days.

(1) A description of the indirect discharge and cause of noncompliance.

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

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

4. In any enforcement proceeding, the industrial user seeking to establish the occurrence of an upset shall have the burden of proof.

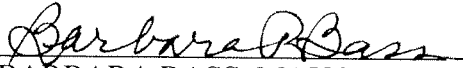
5. Industrial users will have the opportunity for a judicial determination on any claim of upset only in an enforcement action brought for noncompliance with categorical pretreatment standards.

6. The industrial user shall control production or all discharges to the extent necessary to maintain compliance with categorical pretreatment standards upon reduction, loss, or failure of its treatment facility until the facility is restored or an alternative. (Ord. No. 0-2010-12, 1/27/2010)

PART 2: That if any provision or any section of this ordinance shall be held to be void or unconstitutional, such holding shall in no way affect the validity or the remaining provisions or sections of this ordinance, which shall remain in full force and effect.

PART 3: That any person, firm or corporation violating any provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine as provided in Section 1-4 of the Tyler Code. Each day such violation shall continue, or be permitted to continue, shall be deemed a separate offense. Since this ordinance has a penalty for violation, it shall become effective upon its publication in the newspaper as provided by Section 85 of the Charter of the City of Tyler, Texas, which date is expected to be January 29, 2010.

PASSED AND APPROVED this 27th day of January, A.D. 2010.



BARBARA BASS, MAYOR OF
THE CITY OF TYLER, TEXAS

ATTEST:

APPROVED:


CASSANDRA BRAGER, CITY CLERK




GARY C. LANDERS, CITY ATTORNEY