State of Florida
Department of Environmental Protection
Administrative Directive

DEP 923
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Approved by the Secretary

SETTLEMENT GUIDELINES FOR CIVIL AND ADMINISTRATIVE PENALTIES

1. Purpose

These guidelines are provided solely for the use of Department staff in determining what position the agency should take in settlement negotiations concerning civil and administrative penalties. They are intended to provide a rational, fair and consistent method for determining whether the Department should seek a civil penalty in an enforcement action and the appropriate amount of civil and administrative penalties the Department should seek from responsible parties in settling enforcement actions when imposition of a civil penalty is appropriate. These guidelines are not a rule and may not be cited as legal authority for any agency action. These guidelines are not applicable for assessing damages to natural resources. In an appropriate case, monetary relief for actual damages caused to the State's natural resources can be sought in addition to civil or administrative penalties. These guidelines will be periodically reviewed to determine their effectiveness, and whether refinements are needed.

2. Authority

With the enactment of the Environmental Litigation Reform Act (ELRA), the Department has administrative penalty authority for most regulatory programs. The Department now has the authority to impose up to a total of $10,000 in civil penalties in one administrative action for most regulatory violations as provided in ELRA. This authority is codified at Section 403.121, Florida Statutes.

Independent of ELRA, the Department has statutory authority to assess administrative penalties in Beaches and Coastal Systems cases for up to $10,000 per day, Section 161.054(1), Florida Statutes, and in State Lands cases for up to $10,000 per day, Section 253.04(2), Florida Statutes. ELRA does not modify or add to that existing authority. Penalty guidelines for these programs have been adopted by rule.

The Department also has the authority in a judicial proceeding to ask a court to assess penalties of up to $10,000 per day per violation, Sections 403.141, 376.302, and 373.129(5) Florida Statutes; up to $25,000 per day per violation for hazardous substance violations, Section 403.726, Florida Statutes; up to $50,000 per day per violation for hazardous waste violations, Section 403.727, Florida Statutes; up to $5,000 per day per violation for violations of the Safe

Drinking Water Act, Section 403.860, Florida Statutes; and up to $5,000 per day per violation for violations involving phosphate mines in Section 378.211(2),(4), Florida Statutes.

3. Introduction

This Department is directed by the Legislature to protect and enhance Florida's water, air, and lands, to protect human health, safety and welfare from adverse environmental conditions, and to manage the state's natural resources. To accomplish these goals, the Legislature has passed laws restricting or prohibiting activities that may cause pollution, harm the resources of the state, or threaten human health or safety. It has also given the Department the authority to adopt environmental standards, to require that persons engaging in certain activities obtain permits or other authorizations before those activities are undertaken, and to take appropriate actions to ensure that all persons comply with the statutory, rule, and permit requirements.

The Department has multiple ways to encourage compliance with the law, and to address non-compliance. Effective education of the public and regulated persons may prevent non-compliance from occurring in many instances. Such education may be in the form of training or outreach efforts. If a violation occurs, the Department may often obtain a return to compliance by informal means. In such cases, education may still be the appropriate remedy, and the Department may establish an environmental education course for such persons. Assisting with a prompt return to compliance without formal enforcement is the preferred means to correct a violation committed by a person who did not know that the person's actions were contrary to law, or whose actions were inadvertent , if the violation caused no more than "minor harm" as identified in the Program's Penalty Guidelines. An inadvertent violation is one that occurs despite the good faith efforts of the responsible party to comply with the applicable requirements.

Once a decision has been made that formal enforcement is appropriate, Department staff must then decide whether a civil penalty is appropriate. Even when formal enforcement is necessary, these guidelines do not require imposition of a civil penalty in every enforcement action. The Department staff involved in pursuing enforcement, with appropriate supervisory review, should use their sound judgment, along with any program specific guidance that is consistent with this policy, to decide when a penalty should be sought. In exercising this judgment, the user should remember that the imposition of penalties is an enforcement tool that is intended to insure immediate and continued compliance by the subject of the action and by others who may face a similar situation in the future. Thus, penalties should be considered in those cases in which it is determined that penalties are needed to ensure that the

responsible party and others similarly situated will be deterred from future non-compliance.

For example, a person – perhaps a homeowner or a person new to a business venture--may have committed a violation out of sheer ignorance. The person may acknowledge the mistake and be willing to correct any problems created by the violation. For this first time violator, the staff may reasonably believe that the violation was inadvertent or occurred because the responsible party was not aware of or did not understand the requirement, and that a civil penalty would not provide a deterrent effect under the circumstances. In general, such cases may be appropriate for education. However, because of the nature of the corrective actions, the Department staff may decide that a consent order would be most appropriate to ensure that the corrective actions are completed or to provide needed authorization to conduct the corrective actions. In such cases, the staff should ensure that impacts on the environment are corrected, while also minimizing the impact of the consent order on the responsible party. Under these circumstances, devices such as conservation easements, institutional controls, etc., should only be required if necessary to achieve the restoration goal. On the other hand, a penalty may be entirely appropriate for a first time violator who knew or had reason to know that the actions were illegal, who refuses to correct the problem that the person created by those illegal actions, or whose violation resulted in harm to the public health or the environment. A penalty should normally be sought against a person with a pattern of non-compliance.

Once you have made a determination that a civil penalty is appropriate, these guidelines should be used in settling both administrative and judicial enforcement actions brought against the persons violating Department statutes or rules. Although ELRA, enacted in the 2001 legislative session, sets specific penalty amounts for certain violations covered under the Act when those violations are pursued with a Notice of Violation, these guidelines provide: (1) direction about the application of the ELRA penalty schedule to the penalty calculation and negotiation process, (2) direction for programs not covered under ELRA, and (3) direction on cases that involve penalties calculated under ELRA that exceed $10,000.

When formal enforcement is necessary, staff should attempt to negotiate a consent order to resolve all issues, including civil penalties, whenever possible and appropriate, before issuing a notice of violation or filing a judicial complaint. No such notice of violation or complaint should refer to these guidelines. If a settlement cannot be reached and recovering penalties is appropriate, the Department must issue a notice of violation in all cases that are covered under

ELRA that involve only penalties, and that involve penalties in an amount that is $10,000 or less as calculated under ELRA.

In determining whether the Department should settle a case, file a notice of violation, or go to court for a judicial assessment of penalties, the Department will not only look at the statutory authorizations and requirements, but also at the following: does formal enforcement result in the elimination of any economic benefit gained by the violator as a result of the violation; and beyond that, does formal enforcement provide enough of a financial disincentive to discourage future violations not only by the violator but by others contemplating similar activities? At the same time, this policy should not be used to try to obtain more without litigation than could be obtained as civil penalties in an administrative or a judicial action. It must also be recognized that in some cases the benefits to the Department and public are not worth the costs and effort necessary to recover a penalty. In carrying out the mission of the agency, the District and Division Directors are authorized to deviate from these guidelines consistent with state law. However, penalties which are increased for the reasons cited below are subject to Secretarial approval.

4. Applicability to Program Areas

This policy is designed to apply to all program areas except those overseen by the Board of Trustees, unless otherwise preempted by an interagency agreement or other obligation of the Department. The Department currently has guidance and interagency agreements with the EPA, which are updated from time-to-time. Although such guidance and agreements represent a basis for establishing consistency, they are to not be used as mandates, but rather guidelines, applied on a case-by-case basis.

Most of the Department's programs have developed program specific guidelines for characterizing violations routinely found in their program areas. The program specific guidelines do not provide guidelines for every possible violation that may be discovered. The program specific guidelines are intended to be used in conjunction with these Settlement Guidelines when calculating the appropriate penalties to be sought in cases involving penalties exceeding $10,000 or in cases involving programs not covered under ELRA. There may be some cases that involve unusual circumstances that have not been factored into the program specific guidelines. The program area should be consulted in these cases so as to enhance state-wide consistency.

5. Penalty Calculation

The initial step in calculating any penalty is to determine whether the program under which the penalty is being assessed is covered by ELRA, and whether the penalty using ELRA exceeds $10,000. The RCRA, UIC, Asbestos, and Beaches and Coastal Systems programs are not specifically covered by ELRA.

A. **If the program is not covered by ELRA:**
The penalty should be calculated using: (a) the program specific guidelines to determine how the violation should be characterized; and (b) the guidance below in Sections 6, 7, and 8 to determine the total penalty amount.

B. **If the program is covered by ELRA and the penalty does not exceed $10,000**:

1. The civil penalty calculation should start with the application of the specific penalty schedule in ELRA. If the total amount of penalties calculated for all violations using the ELRA penalty schedule is $10,000 or less, those calculations should be used as a basis for settlement discussions.

2. Once the baseline penalty has been established, a decision must be made as to whether there are any mitigating circumstances involved in the particular case that would warrant downward or upward adjustments of the baseline penalty.

3. Downward adjustments could be made for good faith efforts to comply before or after the discovery of the violation, or for violations caused by circumstances beyond the control of the responsible party which could not have been prevented by due diligence. A downward adjustment could also be made if it is determined, after review of the responsible party's financial information, that the responsible party is unable to pay the baseline penalty.

4. Upward adjustments to the baseline penalty could be made based upon a history of non-compliance as provided in ELRA or for economic benefit gained from the violation. If the upward adjustments together with the ELRA schedule baseline penalty exceeds a total of $10,000, the penalty must be capped at $10,000, if the Department is going to pursue the penalty under ELRA.

C. **If the calculated penalty using the specific penalty schedule in ELRA exceeds $10,000**:

The penalty should be calculated using: (a) the program specific guidelines to determine how the violation should be characterized; and (b) the guidance below in Sections 6, 7, and 8 to determine the total penalty amount unless a decision is made by the District Director to cap the recovery of penalties at $10,000 for the particular case. There may be cases in which the calculated penalty marginally exceeds $10,000 and would not warrant a state court action, if not settled. As a practical matter, those cases should either be settled at $10,000 or pursued administratively for the maximum allowed under the ELRA. In all cases where a proposed penalty is to exceed $10,000, a peer review by the Division should be conducted and the proposed penalty must gain Deputy Secretary approval. Proposed penalties established at a value of $50,000 or more must gain approval by the Secretary.

6. Penalty Matrix

The penalty matrix in Attachments I, II, III, and IV have two factors:

a. actual (or in some cases potential) environmental harm; and

b. extent of deviation from a statutory or regulatory requirement.

Subsection a. addresses the actual or potential harm to human health or the environment that may occur as a result of the violation. Generally, penalties that are assessed predominantly for potential harm (where little or no actual harm is done, nor willful intent to violate existed) should not exceed $10,000. There are three levels of harm within this axis of the matrix:

1. MAJOR: violations that actually result in pollution in a manner that represents a substantial threat to human health or the environment;

2. MODERATE: violations that actually or are reasonably expected to result in pollution in a manner that represents a significant threat to human health or the environment;

3. MINOR: violations that actually or are reasonably expected to result in a minimal threat to human health or the environment.

An example of a major violation is a discharge or emission of a pollutant to the air or a water body in a manner which exceeds air or water quality standards by an order of magnitude amount and over a substantial period of time, or where the environment is measurably and substantially affected by the discharge or emission.

Subsection b. addresses the degree to which the violation deviates from Department statutes and rules and thereby upsets the orderly and consistent application of the law. The three levels are classified as follows:

1. MAJOR: the violator deviates from the requirements of the law by a significant extent (e.g. an order of magnitude or more) or the violation was willful and intentional.

2. MODERATE: the violator deviates from the legal requirements of the law significantly but for a short period of time and/or most of the requirements are implemented as intended.

3. MINOR: the violator deviates somewhat from the requirements of the law but most of the requirements are met.

Each box in the penalty matrices contains a range of penalty amounts. If it is determined that the violations were knowing, deliberate or chronic violations, penalties should be calculated by using the top of the applicable ranges.

7. Multiple and Multi-Day Penalties

Violations usually occur in multiples, over extended periods of time. While the policy must be designed to encourage a prompt return to compliance, assessing the full matrix penalty amount for each day of a violation for those cases outside the scope of ELRA could result in an astronomical amount being sought. On the other hand, such a calculation might be useful in setting outside limits if a large economic benefit has been received from the violation. In order to recognize ongoing and multiple violations without unrealistic results, the following applies:

Other than cases where willful or intentional violations have occurred, multiple penalties should not be calculated where a single activity, cause or omission resulted in the exceedances. For example, an accidental water or air release could result in several constituent violations, yet penalties should not be calculated for each individual constituent.

Multi-day penalties may be pursued where daily advantage is being gained by the violator for an ongoing violation; or, where the violation is causing daily adverse impacts to the environment and the violator knew or should have known of the violation after the first day it occurred and either failed to take

action to mitigate or eliminate the violation or took action that resulted in the violation continuing. On the other hand, deference should be given to those rare cases involving regulated entities, whereby the sole alternative to a violation would result in the loss of essential services (e.g. water or electricity) to Florida citizens. Multi-day penalties should be computed by multiplying the appropriate daily penalty calculated or a part thereof by the number of days of noncompliance. Where the impact of the ongoing violation is not significantly detrimental to the environment, a penalty amount that is lower than the matrix amount should be calculated for the violations that occur after the first day. For violations that are significantly detrimental to the environment, a penalty amount at the matrix amount should be calculated for the violations that occur after the first day, up to 30 days of non-compliance. For violations that occur for more than 30 days, judgment should be exercised to determine the appropriate penalty amount to be sought for each additional day of non-compliance that occurs over 30 days. For multi-day hazardous waste violations, staff should consider the guidance provided in EPA's most current RCRA Civil Penalty Policy. Multi-day penalties are also useful when a facility agrees to come into compliance by a specific date. In that case stipulated daily penalties could be required for missing the agreed upon compliance date. Or the overall penalty could be lowered based upon the number of days the violator comes into compliance prior to the compliance date.

An alternative to multiplying the total daily penalty by the number of days of noncompliance for non-ELRA cases that are not significantly detrimental to the environment would be to use one or more of the adjustment factor amounts chosen multiplied by the number of days the adjustment factor is appropriate. For example, assume a total one day penalty of $8,000 was arrived at by adding $6,000 derived from the matrix, $1,000 for lack of good faith before the Department discovered the violation, and $1,000 for lack of good faith after the Department informed the responsible party of the violation, but you feel the penalty is too low considering the nature of the violation. A multi-day penalty could be calculated, for example, by adding to the total one day penalty ($6,000) a multiple of $1,000 times the number of days the violation occurred prior to being discovered by the Department and the violator acted with lack of good faith, and/or by multiplying $1,000 times the number of days the violation occurred after the Department informed the responsible party of the violation and the violator acted with lack of good faith.

If the above described example involved a violation that took place over a twenty day period with the violator acting with lack of good faith for five days prior to the Department discovering the violation, and the violator acting with lack of

good faith for ten days after being informed of the violation by the Department, the total penalty could be calculated as follows:

a. One day penalty - $6,000 (without adjustments), plus

b. A multi-day penalty using the adjustment factor amount for lack of good faith prior to the Department discovering the violation times the number of days lack of good faith was demonstrated by the violator - $1,000 x 5 = $5,000, plus

c. A multi-day penalty using the adjustment factor amount for lack of good faith after the violator was informed of the violation by the Department times the number of days lack of good faith was demonstrated by the violator - $1,000 x 10 - $10,000.

d. Total penalty proposed for settlement: $6,000 + $5,000 + $10,000 = $21,000.

It is important in using daily penalties of this type that the amount be sufficient to discourage the violator from continuing a violation by making it more expensive to pay the daily penalty than to come into compliance. Also, if the case is within the scope of ELRA, multi-day penalties should be pursued consistent with ELRA.

8. Adjustment Factors

The attached Penalty Computation Worksheet sets out the steps you should follow in calculating a penalty based upon the matrix and adjustment factors. After you have calculated the penalty amount derived from the matrix, you should consider the adjustment factors and determine whether any or all of them should be used. When applying adjustment factors, a penalty can be reduced to zero or increased up to the statutory maximum per day allowed for the particular violation.

Good Faith Efforts to Comply/Lack of Good Faith Prior to Discovery of the Violation by the Department: This adjustment factor can be used to increase or decrease the amount of penalties derived from the penalty matrix. This adjustment factor allows you to consider what efforts the responsible party made prior to the Department's discovering a violation to comply with applicable regulations. Some examples of lack of good faith are:

a. The responsible party knew it was not complying with the Department's regulations.

b. The responsible party claims it did not know it was not complying with the Department's regulations, but because of the nature of the responsible party's business and the length of time the business was operating, it is reasonable to assume that the responsible party should have known about the Department's regulations.

c. The violation was caused by an uninformed employee or agent of the responsible party, and the responsible party knew or should have known about the Department's regulations and made no or little effort to train, educate or inform its employees or agents.

Some examples of good faith efforts to comply are:

a. The violation was caused by the responsible party's employees or agents despite the responsible party's reasonable efforts to train, educate or inform its employees or agents.

b. The violation was caused by the responsible party as a result of a legitimate\misinterpretation of the Department's regulations.

c. The violation occurred after a Department regulation was changed and compliance was required, but the responsible party had been making reasonable efforts to bring its operation into compliance with the new Department regulation.

d. The responsible party took action on its own to mitigate the violation once it discovered that a violation had occurred.

e. Once the responsible party discovered the violation, it made changes to its operation on its own to prevent future violations from occurring.

f. The responsible party has demonstrated that it is implementing an acceptable pollution prevention plan.

g. The responsible party has demonstrated that it is operating in accordance with a DEP Ecosystem Management Agreement.

Good Faith Efforts to Comply/Lack of Good Faith after the Department Informed the Responsible Party of the Violation: This adjustment factor

can be used to increase or decrease the amount of penalties derived from the penalty matrix. Some examples of good faith efforts to comply are:

a) Once the responsible party was notified of the violation by the Department, it took immediate action to stop the violation and mitigate any effects of the violation.

b) Once the responsible party was notified of the violation by the Department, it cooperated with the Department in reaching a quick and effective agreement for addressing the violation.

Some examples of lack of good faith efforts to comply are:

a. The responsible party took affirmative action that was in violation of the Department's regulation after being notified by the Department that such action constituted a violation of the Department's regulation.

b. The responsible party failed to take action to stop an ongoing violation or to mitigate the effects of a violation after being notified by the Department that it was in violation of a Department regulation.

c. The responsible party ignores the Department's requests to negotiate a settlement.

History of Non-Compliance: This adjustment factor can be used to increase the amount of penalties derived from the penalty matrix or ELRA schedule. This adjustment factor may be used if a violation has occurred within a five year period previous to the occurrence of the current violation and a consent order, final order, judgment, judicial complaint or notice of violation was issued for the violation; the previous violations involved any of the programs regulated by the Department; and the previous violations involved a penalty obtained or being pursued where at least one of the violations was deemed as major for either the "environmental harm" or "extent of deviation from requirement" categories and was in the amount of $2,000 or more. For ELRA cases, the history of non-compliance prior to June of 2001 cannot be considered.

Economic Benefit of Non-Compliance (requires Deputy Secretary approval): Economic benefits can be both passive, such as avoided costs gained from inaction, where the benefits come from the money saved from avoiding or delaying costs of compliance; and active, such as increased profits or revenue gained from actions taken in violation of Department statutes or rules where the benefits would not have been gained, if the facility had only been

operated in compliance. In certain situations a responsible party could both actively and passively gain economic benefit from violating Department statutes or rules. Other than in ELRA cases, the statute does not specifically authorize the recovery of economic benefits gained by the violator.

Passive economic benefits usually consist of the money that was made or that could have been made by an alternate use of the money that should have been expended to bring the facility into compliance. Assuming the responsible party will be forced to spend money to come into compliance as a result of the enforcement action, the minimum economic benefit associated with avoiding or delaying costs can be determined by calculating the amount of interest that was or could have been earned on the amount of money that should have been spent to bring the facility into compliance. The amount of this form of economic benefit will depend upon the amount of money that should have been spent, the period of time the costs were avoided or delayed, and the prevailing interest rate. A common example of economic benefits gained from avoiding or delaying costs is the situation in which an owner or operator of a regulated source of pollution fails to purchase a pollution control device needed to operate the facility in compliance with pollution control laws.

Active economic benefits usually consist of any increase in profits, revenue gained or reduction in costs that are directly attributable to the activity conducted in violation of Department statutes or rules. Increased profits and/or a reduction of costs, for example, can occur when a facility that is required to operate with a pollution control device is operated without the use of the pollution control device in order to increase the production or reduce the costs of production. Increased profits can also be gained when action is taken such as constructing and operating a facility without obtaining the required permits in order to make money from the operation of the facility sooner than would have been allowed. A possible example could involve a situation in which the developer of a shopping center conducts dredging and filling activities, constructs a stormwater facility or runs water and sewer lines without waiting to obtain permits so that the construction of the shopping center can meet a deadline for opening.

In addition to adjusting ELRA penalties by considering economic benefit, in non-ELRA cases the economic benefit adjustment factor can be used to increase the amount of penalties derived from the penalty matrix. There may be cases that arise in which the economic benefit gained by the violator exceeds the amount of money that can be recovered in civil penalties authorized by law. For example, three days of circumvention of a pollution control device could result in increased profits, revenue gained and/or a reduction in costs amounting to more than

$30,000, the statutory amount that would be allowed for three days of violations for which a $10,000 penalty be day can be imposed. Other than in ELRA cases, the statute does not specifically authorize the recovery of economic benefits gained by the violator. The statute does allow for penalties to be imposed in an amount that ensures immediate and continued compliance, and unless the economic benefit from the violation is taken away by the penalties, the penalties will not ensure immediate and continued compliance. Therefore, economic benefits that are not de minimis may be included in all penalty calculations up to the amount allowed by the applicable statutory per day penalty cap. For example, if a violation occurs for 10 days and the statute allows for the imposition of a penalty up to $10,000 per day, and the matrix penalty calculated for the violations is $60,000, the amount of economic benefit gained by the violator maybe added to the matrix penalty up to the statutory maximum penalty of $100,000. Continuing with the example, if the matrix penalty calculated for the violations is $60,000, and the economic benefit to the violator from the violations is $30,000, the penalty sought may be as high as $90,000. If the matrix penalty calculated for the violations is $60,000 and the economic benefit to the violator from the violations is $50,000, the Department would be limited to pursuing a penalty of $100,000. Staff should consider capturing the economic benefit gained by one or more violations by using the statutory penalty cap for the total of all violations.

For non-ELRA cases, the statute provides that a penalty may be calculated in an amount sufficient to ensure future compliance. Since one factor to ensure future compliance is to eliminate the economic benefits of non-compliance, the approach described for ELRA cases may be applied to the calculation of non-ELRA civil penalties where appropriate.

In some cases it may be very difficult to determine the economic benefits of non-compliance, or the amount of the benefits may be insignificant. For any significant economic benefits the District staff should request that OGC assist in the development of an appropriate amount by use of EPA's computer model for calculating economic benefits (BEN) or by use of some other accepted economic method. The request should be directed to OGC or the appropriate department financial analyst.

Ability to Pay: This adjustment factor may be used to decrease or increase the amount of penalties derived from the penalty matrix. This adjustment factor may be used to decrease the amount of penalties derived from the ELRA schedule. The violator has the burden of providing to the Department all of the financial information needed to determine ability to pay. If sufficient information is not provided by the violator, an ability to pay adjustment decreasing the

penalty may not be considered. Like economic benefits, ability to pay may be a difficult matter to determine by the District staff. If the District staff needs assistance in determining ability to pay, a request should be made by the District staff to OGC to assist in the ability to pay determination by use of EPA's computer model for determining ability to pay (ABEL) or by use of some other accepted financial method.

Other Unique Factors: This adjustment factor can be used to increase or decrease the amount of penalties derived from the penalty matrix, or to decrease the amount of penalties to be pursued in an ELRA case, but may not be used to increase the amount of penalties that can be pursued in an ELRA case. This adjustment factor is intended to provide the District with flexibility to make adjustments in a particular case based upon unique circumstances that do not clearly fit within the other adjustment factors. When it is used, the unique circumstances justifying its use must be specifically explained on the penalty worksheet, and a peer review by the Division should be conducted.

9. In-Kind Penalties

Once the settlement amount has been established, staff should make the violator aware of the opportunity to propose, and should consider if proposed, an in-kind penalty project by the violator as a way of reducing the total cash amount owed the Department. The in-kind penalty project is not designed to give the violator credit for the cost of corrective actions that he would be required to undertake anyway, but only to offset all or some portion of the cash settlement in a mutually satisfactory manner. So long as the financial impact upon the violator is equivalent to that established pursuant to these settlement guidelines, the Department is encouraged to work cooperatively to find alternative ways that the violator may pay the penalty.

In-kind penalties should only be considered in the following circumstances:

a) If the responsible party is a government entity, such as a federal agency, state agency, county, city, university, or school board, including a port or airport, or

b) If the responsible party is a private party proposing an environmental restoration or enhancement project, or

c) If the responsible party is a private party proposing an in-kind project that does not involve environmental restoration or enhancement for a calculated penalty of $10,000 or more.

In-kind penalties are limited to the following specific options:

a. Material and/or Labor Support for Environmental Enhancement or Restoration Projects. Preference should be given to proposals that involve participation in existing or proposed government sponsored environmental enhancement or restoration projects such as SWIM projects. The responsible party shall be required to place appropriate signs at the project site during the implementation of the project indicating that the responsible party's involvement with the project is the result of a Department enforcement action. Once the project has been completed as required by the Consent Order, the sign may be taken down. However, the responsible party should not be allowed to post a sign at the site after the project has been completed indicating that the reason for the project being completed was anything other than a DEP enforcement action. For most environmental enhancement or restoration projects conducted on private property, the responsible party should provide a conservation easement to the Department for the land on which the restoration project took place. For an environmental enhancement or restoration project on public land, the responsible party may need to provide a conservation easement to the Department for private land adjoining the environmental enhancement or restoration project if it is required to protect the completed restoration project.

b. Environmental Information/Education Projects. Any information or education project proposed must demonstrate how the information or education project will directly enhance the Department's pollution control activities. An example of an acceptable information or education project is one that involves training, workshops, brochures, PSAs, or handbooks on what small quantity generators of hazardous waste need to do to comply with RCRA. The information or education projects must not include recognition of the development of the projects by the responsible parties.

c. Capital or Facility Improvements. Any capital or facility improvement project proposed must demonstrate how the capital or facility improvement project will directly enhance the Department's pollution control activities. An example of an acceptable capital or facility improvement project is one that involves the construction of a sewer line to hook up a failing package plant, owned and operated by an insolvent third party, to a regional sewage treatment plant. An example of an

unacceptable capital or facility improvement project is one that involves the planting of upland trees and shrubs.

d. Property. A responsible party may propose to donate environmentally sensitive land to the Department as an in-kind penalty. Any proposals concerning the donation of land to the Department as an in-kind penalty must receive prior approval from the Department's Division of State Lands. The DEP may require proposals concerning the donation of land to another government entity or non-profit organization to include a conservation easement involving the donated property.

If an in-kind penalty is used in lieu of a cash penalty, the value of the in-kind penalty should be 1 and 1/2 times the amount of the penalty if paid in cash. Department staff should not be involved in choosing vendors or agents used by the responsible party in implementing an in-kind project. No in-kind penalty project should include the purchase or lease of any equipment for the Department.

10. Pollution Prevention Projects

Whenever practicable, enforcement staff should affirmatively consider and discuss with responsible parties the option of offsetting civil penalties with pollution prevention projects. Responsible parties should be provided materials on the definition of a pollution prevention project, the nature of preferred pollution prevention projects, a description of the information that would need to be submitted by the responsible party to the Department for a pollution prevention project to be approved, and a description and sample of a pollution prevention plan that would be attached as an exhibit to a consent order or settlement agreement.

Pollution Prevention Project in the context of enforcement is defined as a process improvement that can be classified in one of the following three categories:

a. Source Reduction - Source reduction involves eliminating the source of pollution. It is accomplished when chemicals or processes that produce pollution are eliminated or replaced with chemicals or processes that cause less pollution. The ideal source reduction project is to produce goods with no pollution. This has the most benefit for the environment, and usually requires the greatest change in the production process. Source reduction can be as sweeping as terminating the production of products that cannot be manufactured without pollution, or it can be as

mundane as eliminating an unneeded cleaning step. Other examples of source reduction include:

(1) Replacing a vapor degreaser with a re-circulating, water based cleaning process;

(2) Using darker wood to eliminate solvents in ordinary staining;

(3) Using UV cure paint to eliminate the solvents in ordinary paint;

(4) Using a painted or plastic surface instead of chrome plated surface such as those found on lawnmower handles and the "Euro-look" cars and bumpers;

(5) Eliminating the release of CFC by sending electronic parts for sterilization to a plant that can use pure ethylene oxide instead of the more common ethylene oxide/freon mix;

(6) Keeping supplies and stock out of the weather to eliminate cleaning between processes;

(7) Having a vendor use a no-clean rust inhibitor on incoming parts; and

(8) Using propylene carbonate instead of acetone to clean tools used in fiberglass parts manufacturing.

b. Waste Minimization - Waste minimization involves the conservation of materials that are the source of pollution. This is accomplished when releases of chemicals to the environment are reduced. The ideal situation is a no-loss process. Waste minimization can be as expensive as replacing a regular vapor degreaser with one that has an airlock, or it can be as simple as using large, refillable containers to reduce the amount of material disposed of on the walls of emptied containers. Other examples include:

(1) Using High Volume Low Pressure paint guns in place of High Pressure Low Volume paint guns in a painting line to reduce paint loss.

(2) Using electrostatics with painting to reduce paint loss.

(3) Keeping containers of liquids covered and cool to minimize evaporation.

(4) Using processes less likely to produce spills.

(5) Using rollers instead of sprayers to reduce evaporation loss from atomization.

(6) Adjusting floating lid tanks to keep fixed volume tanks full, reducing evaporation.

(7) Using counter current rinsing to reduce water use.

(8) Reducing dragout to minimize chemical depletion.

c. On-Site Recycling - On-site recycling involves the reuse of materials that are the source of pollution. Process - chemicals are reused directly in the process or are revived in some manner and reused in either their original process or in some other operation within the facility. The ideal is total reuse of materials. On-site recycling can be as complex as an ion exchange system for the recovery of dissolved metals in a rinse water, or it can be as simple as a batch solvent still for the recycling of a cleaner. Other examples include:

(1) Using a cart that rolls up to a vehicle, filters oil or coolant and returns the clean fluid to the vehicle;

(2) Using a solvent still to clean solvent for reuse;

(3) Filtering machining fluids for reuse;

(4) Installing a paint gun cleaner that filters and recirculates the cleaning solvent;

(5) Using electrowinning to remove dissolved metals from plating rinse water and allowing the water to be reused;

(6) Capturing solvent vapors from printing operations for their distillation and reuse.

d. Pollution prevention does NOT include:

(1) Off-site recycling such as sending used process water to be reused at a golf course, sending used motor oil or coolant off-site for reclamation or incineration, off-site solvent recovery, or regeneration of ion exchange columns;

(2) Treatment such as: wastewater treatment to remove contaminants prior to disposal, evaporation of a waste stream to remove water from contaminants, sludge de-watering to reduce volume, air stack scrubbers to remove gaseous contaminants or catalytic incinerators to remove VOCs from air;

(3) Disposal such as: landfilling or incineration.

Before a pollution prevention project should be approved to offset civil penalties, the responsible party must submit a waste audit report to the Department. The responsible party should be given the option of preparing the report on his or her own, by hiring a consultant or by requesting the help of the Department's Pollution Prevention Program staff. The waste audit report must include: 1) a waste audit of the facility or of the process or processes that are relevant to the proposed pollution prevention project; 2) a pollution prevention opportunity penalty calculation; and 3) a conceptual pollution prevention proposal.

The Department retains the option to approve or disapprove the submitted conceptual proposal depending upon the environmental merits of the proposal. The Divisions should provide programmatic guidance to the enforcement staff concerning the nature of preferred pollution prevention projects. Potential or actual economic benefits gained by the responsible party should not be used as a basis for denying an otherwise acceptable proposal for a pollution prevention project.

Once a conceptual pollution prevention project has been approved, the responsible party must prepare a pollution prevention project plan that must, when applicable, include information on the following: design, construction, installation, testing, training, maintenance/operation, capital/equipment costs, monitoring, reporting, and scheduling of activities.

No costs expended by a responsible party on a pollution prevention project that are necessary to bring the facility into compliance with

current law should be used to offset civil penalties. The following costs associated with pollution prevention projects can be used to offset up to 100% of civil penalties on a dollar for dollar basis:

a. Preparation of a pollution prevention plan.

b. Design of a pollution prevention project.

c. Installation of a pollution prevention project.

d. Construction of a pollution prevention project.

e. Testing of a pollution prevention project.

f. Training of staff concerning the implementation of a pollution prevention project.

g. Capital/equipment needed for a pollution prevention project.

The following costs should not be used to offset a civil penalty:

a. Cost incurred in conducting a waste audit and preparing a waste audit report (includes waste audit, opportunity assessment and conceptual proposal).

b. Maintenance and operation costs involved in implementing a pollution prevention project.

c. Monitoring and reporting costs.

A responsible party should not be given the opportunity to bank or transfer pollution prevention credits to offset future civil penalties.

Whenever possible, approval of specific pollution prevention projects should be obtained prior to entering into a consent order or settlement agreement. District Directors or Division Directors are authorized to approve pollution prevention proposals. If the specifics of a pollution prevention plan cannot be worked out in time to meet EPA timelines for taking formal enforcement action, the responsible party can be given the option of paying the civil penalty in cash or having a pollution prevention project reviewed and approved by a time certain to be identified in a consent order or settlement agreement.

For all approved pollution prevention projects, the responsible party must maintain/operate the pollution prevention project for a time certain after initial implementation, and must be required to submit at least one report discussing the status of implementation and the pollution prevention results of the project.

11. Review by the Office of General Counsel

In addition to any unique case identified by a Division or District Director, cases which exceed certain threshold penalties should be reviewed for legal defensibility by OGC. These three situations are:

a. The case involves a proposed penalty of $25,000 or more for non-RCRA cases.

b. The case involves a proposed penalty of $50,000 or more for RCRA cases.

c. The case involves a proposed cash penalty of $10,000 or more to be satisfied with an in-kind proposal that does not involve environmental enhancement or restoration.

All above-described penalty proposals should be submitted to the Office of General Counsel using the Department's form penalty authorization memo and routed to the Chief Deputy General Counsel for review to determine whether the penalty proposals are consistent with this policy.

12. Procedure for Implementation

In order for these guidelines to be implemented properly, adequate record keeping must be followed. The penalty determination matrices are attached.

Also attached is the penalty computation worksheet. This worksheet should be used in all cases in which a penalty is calculated and proposed, and (following applicable peer reviews) should be sent along with the draft Consent Order that is to be reviewed by OGC for final approval. If the penalty being sought includes an adjustment and/or a multi-day determination, fill out both Part I and Part II.

If the penalty amount calculated as the Total Penalties for all Violations in Part I is reduced after meeting with the responsible party, a new penalty computation worksheet or Part III of the penalty computation worksheet must be filled out. If the penalty is being reduced based upon new information concerning the facts or law relied upon to determine the number or character of the violations for which penalties are being sought, a new penalty computation worksheet should be

filled out reflecting the changes in the violations for which penalties are being sought or the characterization of the violations. If the penalty is being reduced for other reasons, Part III of the penalty computation worksheet must be filled out and signed and dated by the Director of District Management.

A narrative explanation should also be prepared in all cases to be reviewed by the Chief Deputy General Counsel to explain how the penalty proposal was reached, and in all cases in which the program specific guidelines are not being followed. This should be completed at the time the penalty is calculated and forwarded with the penalty computation worksheet.

Responsible Office: Office of General Counsel

ATTACHMENTS:

Penalty Calculation Matrix (Potable Water Cases),
(ATTACHMENT I)

Penalty Calculation Matrix (Cases other than PW, HS or HW)
(ATTACHMENT II)

Penalty Calculation Matrix (Hazardous Substance Cases)
(ATTACHMENT III)

Penalty Calculation Matrix (Hazardous Waste Cases)
(ATTACHMENT IV)

Penalty Computation Worksheet,
(ATTACHMENT V)

ATTACHMENT I

PENALTY CALCULATION MATRIX*
(Potable Water Cases)

EXTENT OF DEVIATION FROM REQUIREMENT

ENVIRONMENTAL HARM		MAJOR	MODERATE	MINOR
	MAJOR	$5,000 to $ 4,000	$4,999 to $3,000	$2,999 to $2,300
	MODERATE	$2,299 to $1,600	$1,599 to $1,000	$999 to $600
	MINOR	$999 to $500	$500[1)]	$500[1)]

1) – Environmental Education may be an acceptable substitute

ATTACHMENT II

PENALTY CALCULATION MATRIX
EXTENT OF DEVIATION FROM REQUIREMENT
(For Cases other than PW, HS, or HW)

ENVIRONMENTAL HARM		MAJOR	MODERATE	MINOR
	MAJOR	$10,000 to $ 8,000	$7,999 to $6,000	$5,999 to $4,600
	MODERATE	$4,599 to $3,200	$3,199 to $2,000	$1,999 to $1,200
	MINOR	$1,199 to $ 500	$500[1)]	$500[1)]

1) – Environmental Education may be an acceptable substitute

ATTACHMENT III

PENALTY CALCULATION MATRIX
EXTENT OF DEVIATION FROM REQUIREMENT
(Hazardous Substance Cases)

ENVIRONMENTAL HARM		MAJOR	MODERATE	MINOR
	MAJOR	$25,000 to $ 20,000	$19,999 to $15,000	$14,999 to $11,000
	MODERATE	$10,999 to $ 8,000	$7,999 to $5,000	$4,999 to $3,000
	MINOR	$2,999 to $1,500	$1,499 to $500[3)]	$500[3)]

This matrix should be used whenever the following two conditions exist:

1) The violation creates an imminent hazard as defined in Section 403.726(3), Florida Statutes: "If any hazardous substance creates an immediate and substantial danger to human health, safety, or welfare or to the environment."
2) The violation involves the release, discharge of a hazardous substance as defined in Section 403.703(29), Florida Statutes. Florida's definition of a hazardous substance refers to the federal definition of a hazardous substance under CERCLA. The CERCLA definition of a hazardous substance includes a list of substances that can be found at 40 CFR 302.4. In addition to the list of hazardous substances, hazardous substances can include any toxic pollutant listed under Section 307(a) of the Clean Water Act, any substance designated pursuant to Section 311(b)(2)(A) of the Clean Water Act, and any hazardous air pollutant listed under Section 112 of the Clean Air Act. The list of hazardous air pollutants should only be used as a basis for pursuing hazardous substance penalties if the pollutants have been released or discharged to the ground, surface water or ground water. All hazardous wastes are hazardous substances. If the violation involves a hazardous waste, the hazardous waste matrix should be used for that violation.
3) Environmental Education may be an acceptable substitute

ATTACHMENT IV

PENALTY CALCULATION MATRIX
EXTENT OF DEVIATION FROM REQUIREMENT
(Hazardous Waste Cases)

ENVIRONMENTAL HARM		MAJOR	MODERATE	MINOR
	MAJOR	$37,500 to $ 28,330	$28,330 to $21,250	$21,250 to $15,580
	MODERATE	$15,580 to $11,330	$11,330 to $7,090	$7,090 to $4,250
	MINOR	$4,250 to $2,130	$2,130 to $710[1)]	$710 to $150[1)]

Note: If the violation involving a hazardous waste results in human injury or death, or involves the deliberate disposal to the ground, surface water or groundwater, the $50,000 per day statutory maximum penalty may be pursued.

1) – Environmental Education may be an acceptable substitute

ATTACHMENT V

PENALTY COMPUTATION WORKSHEET

Violator's Name: _____

Identify Violator's Facility_____

Name of Department Staff Responsible for the Penalty Computations:

_____

Date: _____

PART I - Penalty Determinations

	Violation Type	ELRA Schedule	ENVIRON-MENTAL Harm	Extent of Dev.	Matrix Amount	Multi-day	Adjust-ments	Total
1								
2								
3								
4								
5								
6								
7								
8								
9								

Total Penalties for all Violations:_____

_____ _____

Director of District Management Date
Division Director
Peer reviewed by Division: Yes ( ) No ( )

_____ _____

Deputy Secretary (if required by these guidelines) Date

_____ _____

DEP Secretary (if required by these guidelines) Date

ATTACHMENT V

Part II - Multi-day Penalties and Adjustments

ADJUSTMENTS Dollar Amount

Good faith/Lack of good faith prior to discovery:_____

Justification:_____

Good faith/Lack of good faith after discovery:_____

Justification:_____

History of Non-compliance:_____

Justification:_____

Economic benefit of non-compliance:_____

Justification:_____

Ability to pay:_____

Justification:_____

Total Adjustments:_____

MULTI-DAY PENALTIES Dollar Amount

Number of days adjustment factor(s) to be applied: _____

Justification: _____

_____

Or

Number of days matrix amount is to be multiplied: _____

Justification: _____

_____

ATTACHMENT V

Part III - Other Adjustments Made After Meeting with the Responsible Party

ADJUSTMENT	Dollar Amount
Relative merits of the case:	_____
Resource considerations:	_____

Other justification:_____

_____

_____

_____

_____

_____ _____

Date

Director of District Management or Division Director

Guidelines for Characterizing Storage Tank Violations

Revision date: June 28, 2013

Introduction

Department of Environmental Protection (DEP) Directive 923 is the Department's controlling enforcement document. These guidelines are intended to complement Directive 923 to determine the appropriate amount of administrative penalties to seek when settling enforcement actions. These guidelines are intended to provide a rational, fair, and consistent method to determine the appropriate enforcement response for storage tank violations.

Administrative Penalties (ELRA)

Under the Environmental Litigation and Reform Act (ELRA), the Department can seek an administrative penalty for certain violations pursuant to s. 403.121(2), Florida Statutes (F.S.). Administrative penalty amounts are stipulated by statute and cannot not exceed $10,000 per assessment when calculated in accordance with the applicable sections of 403.121, F.S. For additional details, see DEP Directive 923.

Violation (statutory language)	ELRA Base Penalty	Cite (F.S.)
Failure to empty a damaged storage system as necessary to ensure that a release does not occur until repairs to the storage system are completed.	$5,000	403.121(3)(g)
Improper disposal of contaminated media from a storage tank system release or discharge (such as spreading contamination from stockpiled soil).	$5,000	403.121(3)(g)
Failure to satisfy financial responsibility requirements.	$5000	403.121(4)(a)
Depositing motor fuel into an unregistered storage tank system.	$2,000	403.121(3)(g)
Failure to maintain required release detection.	$2,000	403.121(3)(g)
Failure to properly install a storage tank system.	$2,000	403.121(3)(g)
Failure to submit required notification to the department.	$1,000	403.121(4)(e)
Failure to properly operate, maintain, or close a storage tank system.	$1,000	403.121(3)(g)
Failure to timely upgrade a storage tank system.	$3,000	403.121(3)(g)
Failure to conduct or maintain required release detection.	$2,000	403.121(3)(g)
Failure to timely investigate a suspected release.	$2,000	403.121(3)(g)
Failure to timely assess or remediate petroleum contamination (such as failure to remove stockpiled soil after 30 / 60 / 90 days).	$2000	403.121(3)(g)
Failure to conduct required monitoring or testing.	$2,000	403.121(4)(d)

Violation (statutory language)	ELRA Base Penalty	Cite (F.S.)
Failure to prepare, submit, maintain, or use required reports or other required documentation.	$500	403.121(4)(f)
Failure to submit or maintain required documentation.	$500	403.121(4)(f)
Failure to prepare, submit, maintain, or use required documentation.	$500	403.121(4)(f)
Failure to comply with any other departmental regulatory statute, regulation or requirement.	$500	403.121(5)

Civil Penalty Calculation Matrix for Storage Tank Violations

Matrix Factor Considerations

The Department's Penalty Matrix identifying what types of violations fall into what quadrants for cases other than Potable Water, Hazardous Substances, or Hazardous Waste, should be referenced from Attachment II of Directive 923. Remember, in order to place a violation in the 'Major' row for Environmental Harm, the violation must have actually resulted in pollution in a manner that represents a substantial threat to human health or the environment. Moderate violations are those violations that actually or are reasonably expected to result in pollution in a manner that represents a significant threat to human health or the environment. Minor violations are those violations that actually or are reasonably expected to result in a minimal threat to human health or the environment.

Peer Review and Penalty Amount Approvals

In all cases where a proposed solid waste penalty exceeds $10,000, a peer review by the Division of Waste Management is required and the Deputy Secretary must approve the proposed penalty. The Secretary must approve proposed penalties of $50,000 or more.

Matrix Factors—General Prohibition

Matrix Factor	Environmental Harm	Extent of Deviation from Requirement
Major	1. Storage of Pollutants that actually results in pollution in a manner that represents a substantial threat to human health or the environment.	1. Failure to empty a damaged storage system, where necessary, in a timely manner to contain, remove, and abate the discharge and to prevent further discharge to the environment. 2. Failure to satisfy financial responsibility requirements within more than 180 days of due date.

Matrix Factor	Environmental Harm	Extent of Deviation from Requirement
Moderate	1. Storage of Pollutants that actually or are reasonably expected to result in pollution in a manner that represents a significant threat to human health or the environment.	1. Depositing motor fuel into an unregistered storage tank system. 2. Improper disposal of contaminated media from a storage tank system release or discharge. 3. Failure to properly install a storage tank system. 4. Failure to submit required Discharge Reporting Form [DEP Form # 62-761.900(1)] to the department. 5. Failure to properly operate, maintain, or close a storage tank system for more than one inspection or other verification. 6. Failure to timely upgrade a storage tank system. 7. Failure to conduct or maintain required release detection. 8. Failure to timely investigate a suspected release. 9. Failure to satisfy financial responsibility requirements within less than 180 days of due date. 10. Failure to timely assess or remediate petroleum contamination (such as failure to remove stockpiled soil after 30/60/90 days). 11. Failure to conduct required monitoring or testing for more than one inspection or other verification.
Minor	1. Failure to operate or close a storage tank facility in accordance with the rule that actually or is reasonably expected to result in pollution in a manner that represents a minimal threat to human health or the environment.	1. Failure to prepare, submit, maintain, or use required reports or other required documentation, other than a Discharge Reporting Form [DEP Form # 62-761.900(1)]. 2. Failure to comply with any other departmental regulatory statute, regulation or requirement.

Multi-Day Penalties and Adjustment Factors

DEP Directive 923 discusses when and how to assess multi-day penalties. The directive also sets out various adjustment factors to be used when calculating a penalty based on the matrix. These factors include:

- Knowing, deliberate, or chronic violations.
- Good faith efforts to comply (or lack of good faith efforts to comply) either prior to or after Department discovery of the violation.
- History of noncompliance.
- Economic benefit of noncompliance.
- Ability to pay.
- Other unique factors.

In-Kind Penalties and Pollution Prevention Projects

In-Kind Penalties and Pollution Prevention Projects should be considered as provided in Directive 923.