

CHAPTER FIVE

THE ADMINISTRATIVE PROCESS AND REMEDIES

5.0 Nature of the Administrative Process

The administrative process is fundamentally different from the judicial process although many of the procedures followed in administrative cases pending before an administrative law judge (ALJ) with the Department of Administrative Hearings (DOAH) are similar. The administrative process is formalized in the Administrative Procedures Act (APA), which is found in Chapter 120, Florida Statutes. The APA controls the manner in which the Department performs most of its functions, from processing permits to issuing Notices of Violation. Much of what the Department will do in enforcement can be characterized as administrative.

The formal administrative enforcement process is typically initiated by serving a Notice of Violation (NOV), and is finalized through entry of a Consent Order or Final Order. However, in the Bureau of Emergency Response, an administrative action to recover the Department's costs is initiated by serving an invoice, while in the Division of Beaches and Coastal Systems it is initiated when a Final Order is issued. All of these initial documents, whether an invoice, final order, or NOV, are used by the Department to state its understanding of the facts, conclusions of law, and proper remedies in a particular case. Under the APA a person who is substantially affected by the Department's decisions in these documents has a right to contest the findings and decisions.

One of the major differences between a judicial and administrative proceeding is the identity of the final decision-maker. In most administrative proceedings, the Department has the final decision. In proceedings that involve the Environmental Litigation Reform Act (ELRA),

the ALJ has the final decision, and in a judicial proceeding, the judge has the final say. All of these decisions are reviewable in an appellate court. Although the administrative process may be somewhat formal, it is less formal than a judicial proceeding. This informality can sometimes be more conducive to arriving at a negotiated settlement than in more formal judicial proceedings. The administrative process is also less expensive, faster, and often less time consuming.

The disadvantages of the administrative process are significant, however. No penalties can be recovered above the limits set in ELRA or in programs that are not covered by ELRA, with the exception of enforcement of Section 403.93345 Fla. Stat, otherwise known as the Florida Coral Reef Protection Act (CRPA). With regard to the CRPA, the Department is authorized to proceed either judicially or administratively when it seeks damages (See 403.121(1) (a), (2) (a) F.S). Because the CRPA defines “damages” in pertinent part as “... civil penalties paid as a result of either administrative or judicial action...” (See 403.93345(3) (d) F.S.) either forum is appropriate for a CRPA enforcement action.

The Department cannot obtain an order from an ALJ granting temporary injunctive type relief as can be obtained from a court. The Department cannot independently force a respondent to comply with the terms of a Final Order or Consent Order. In case of noncompliance, the Department must go to court and request that a judge enforce those Orders with the entry of a final judgment that can be enforced through the court's power to impose contempt sanctions upon violators.

The Department must consider the advantages and disadvantages of the judicial and administrative process before deciding which route to take. Generally the judicial process is better if:

1. There is an immediate need for injunctive relief. Only a judge can order the respondent to act or stop acting and back up that order with the threat of contempt sanctions (fines or jail or both).
2. There is a need for a civil penalty in a program that has no administrative fine or penalty authority (either through ELRA or other authority) or that exceed the limits in ELRA, and the respondent is unwilling to agree on an acceptable amount. (See the Settlement Guidelines for Civil Penalties in the Appendix for a full discussion of when penalties are appropriate).
3. The Department anticipates that the respondent will be recalcitrant and will ignore any orders from the Department. If so, it may be better to go directly to circuit court since the Department will end up there eventually anyway.
4. The Department is seeking to enforce a Final Order or Consent Order.
5. The judge who would likely hear the case has a history of favorable rulings for Department.

In any case in which there is a question about whether to initiate an administrative action or a judicial action, the District staff should consult with an enforcement attorney.

5.1 The Warning Letter

Whether judicial or administrative, usually the first step in initiating any formal enforcement action is the issuance of a Warning Letter. The Warning Letter is used by the Department to further investigate potential violations and to initiate settlement discussions. The Warning Letter should not make any conclusions about the liability of the recipient; those are

made in an NOV. The Warning Letter should follow the model format, be specific enough to inform the respondent of the alleged violation, and at least refer to the applicable statutes and rules. A request for a conference should also be included in the Warning Letter. The letter should be sent certified mail, return receipt requested to be sure that the recipient has been put on notice.

The Warning Letter is not required by rule or statute. It is merely a mechanism created by the Department to give the recipient a chance to work out a settlement of the violations without an NOV or court case being filed. Because it is not required, in some cases it is advisable to skip the Warning Letter and go directly to an NOV or court case. You should refer to the applicable program-specific manual to determine what program guidance has been provided concerning the timing and use of Warning Letters and NOVs.

5.2 The Notice of Violation

The NOV is the administrative version of a judicial complaint. ELRA NOVs are a special kind of NOV and are discussed in Section 5.2.5. The information in Sections 5.2-5.2.4 generally applies to both regular and ELRA NOVs.

The NOV is really three documents tied into one:

1. The Notice of Violation, which contains the Findings of Facts and Conclusions of Law.
2. The Orders for Corrective Action.
3. The Notice of Rights.

The Notice of Violation section of the NOV does just that: it notifies the respondent of the facts that the Department believes are true and that form the bases of the violations. Each count in the Notice of Violation should address a separate violation or series of related

violations. The Conclusions of Law section should then relate those facts to specific statutory or rule violations. The Orders for Corrective Action section proposes the actions that the Department believes are appropriate to cure the violations described in the counts. The Notice of Rights section informs the respondent of its rights under the APA to contest the proposed findings of fact, conclusions of law, and/or orders for corrective action in the NOV.

5.2.1 The Notice of Violation Subsections

The Notice of Violation Section of the NOV contains two subsections.

1. Findings of Fact

The Findings of Fact subsection should contain the essential allegations of the Department that support the Conclusions of Law. Because the NOV is a legal document, it should be carefully drafted. All of the allegations in the Findings of Fact must be supported by evidence known to, in the possession of, or readily obtainable by the Department. It may also include expert opinion, such as a statement that contaminated soil is leaching to the groundwater. However, mere speculation should never be the basis of an allegation in the Findings of Fact.

The Findings of Fact should not be conclusive. In other words, they should relate either observed or inferred facts and not factual conclusions or legal conclusions drawn from those facts. For example, assume you have observed garbage and trash deposited in the water on respondent's property. A proper way of reciting that fact in the NOV is to write, "Bags of household garbage, tree limbs, and leaves were placed in the pond on respondent's property." This relates specifically what you observed. It is not proper, however, to write, "Solid waste was improperly deposited by respondent," without also specifically alleging the facts that support that conclusion, even though legally this is what occurred. The terms "solid waste" and "improperly deposited" are legal conclusions drawn from the facts you observed. Those terms are more

appropriate in the Conclusions of Law subsection. The distinctions between findings of fact and conclusions of law are difficult to make sometimes. The guiding principle in drafting any document is to ensure that the language should be clear, accurate, and unambiguous.

The Findings of Fact should include brief descriptions of the Department and of the respondent and a description (preferably a legal description) of the location of the violation. Sufficient facts must be alleged to support a basis for the Department 's jurisdiction - e.g., by reciting the specific bases for asserting that an area is within the Department's dredge and fill jurisdiction, or by citing the number of service connections in a drinking water system to establish that it is a public system. Findings of Fact may also describe the inspections performed by the Department and the notices sent to respondent. As a general rule, however, it is best not to load up the NOV with nonessential information and exhibits. For example, letters or notices that do no more than indicate that the respondent was notified of the violation should not be attached as exhibits.

2. Conclusions of Law

The Conclusions of Law should relate directly to the Findings of Facts in each Count. Each conclusion of law must be supported by a finding of fact. Without the corresponding finding of fact, the Department does not have a basis for concluding that the respondent has violated the law. To use a previous example, if Count I of the NOV provided that "Bags of household garbage, tree limbs, and leaves were placed in the pond on the respondent's property," the following separate conclusions of law could be made:

- a. Bags of household garbage, tree limbs and leaves are solid waste as defined in section 403.703(9), Florida Statutes, and Rule 62-701.200(73), Florida Administrative Code.
- b. Respondent has violated section 403.708(1)(a), Florida Statutes, which provides that no person shall place or deposit any solid waste in or on the land or waters except in a manner approved by the Department.
- c. Respondent has violated Rule 62-701.300, Florida Administrative Code, which provides that no solid waste may be disposed of in any body of water.

5.2.2 The Orders for Corrective Action Section

The Orders for Corrective Action section should contain those actions that the Department believes are necessary to remedy the violations identified in the Conclusions of Law. The Orders must relate to the violations and must not order actions that the Department has no authority to order. In the solid waste example, some appropriate orders may be:

- 1. Effective immediately, Respondent shall cease disposing of solid waste within 200 feet of the pond on his property.
- 2. Within 30 days of the effective date of these Orders, Respondent shall remove all solid waste in the pond on Respondent's property and dispose of the solid waste at an approved location.

3. Within 30 days of the removal of the solid waste from the pond, Respondent shall regrade those portions of the pond disturbed by the deposition or removal of the solid waste as described in Exhibit II.
4. Within 30 days of the regrading required in paragraph 3, Respondent shall plant marsh grasses on six inch centers as described in Exhibit II. Respondent shall inspect those grasses at the end of one year from the date they were planted and replace all grasses not surviving.

As the example indicates, the requirements on the respondent can be varied and broad. However, they cannot be too broad, and they can only include corrective actions that are within the statutory and regulatory authority of the Department. The NOV cannot, for example, require respondent to grant a conservation easement to the Department or to pay in-kind penalties, which are authorized by statute for certain violations. Although such requirements may be part of an agreed-upon consent order, they cannot be imposed unilaterally as part of an NOV. An order should specify when an action must occur, but the time periods should be reasonable. For example, the order should not require complete restoration within 30 days if that is not possible. Conversely, the order should not allow an inordinate amount of time to complete an action.

Generally, Orders for Corrective Actions should be as specific as possible. This not only gives the respondent an accurate idea of what the Department wants but also protects the Department if a default final order is entered. If the Orders are vague or confusing, the final order will also be vague and confusing and will be difficult to enforce in court. A few examples of typical problems with vague corrective orders include the failure to include a specific time by which an action must be taken, the failure to require the respondent to perform all the steps

needed to complete the corrective action, not just to start it, and the failure to state the procedure for addressing situations that can arise in the implementation of corrective actions that were not or could not be anticipated. Specificity also protects the Department if a hearing is requested, because the Department is required to prove at the hearing that the corrective orders are an appropriate way of remedying the violation and consistent with the Department's statutes and rules.

5.2.3 The Notice of Rights Section

The Notice of Rights section contains the information that the respondent needs in formulating its response to the NOV. The section describes the legal rights provided to respondents and other substantially affected parties under Florida law and must not be changed unless approved by OGC.

5.2.4 Model NOVs

OGC has developed some model NOVs for use in specific program areas. These models, contained in the Appendix, will give the Department consistency throughout the Districts and will simplify the preparation of NOVs in the specific program areas. These models may also be used as guides for developing NOVs in other program areas. Unlike model Consent Orders, these model NOVs should never be used without prior review and approval by OGC.

5.2.5 Environmental Litigation Reform Act (ELRA) NOVs

The Environmental Litigation Reform Act (ELRA) was enacted on June 15, 2001 and is codified in Section 403.121, Florida Statutes. ELRA authorizes the Department to seek up to \$50,000 in civil penalties for most environmental violations. ELRA is implemented through an NOV, but there are some significant differences between ELRA and regular NOVs. ELRA NOVs are discussed in the following subsections.

ELRA has several purposes. It promotes consistency in the Department by specifying the penalty amounts for each violation. It clarifies for the public the consequences of violating environmental laws, thereby increasing deterrence. By standardizing the process, it increases the efficiency and speed of prosecuting environmental violations.

5.2.5.1 Use of ELRA

The requirements for using ELRA are discussed in this section. ELRA must be used in certain circumstances and cannot be used in other circumstances, but otherwise the Department has some discretion to use it. The Act applies to violations that occurred both before and after ELRA became effective.

The Department should never pursue an enforcement case that is not substantially justified, which means that it had a reasonable basis in law and fact for believing the respondent had committed a violation at the time the NOV was issued. Under ELRA, if the Department pursues a case that was not substantially justified, the ALJ may assess costs and expenses and attorneys fees up to \$15,000 against it.

1. Program Restrictions: ELRA applies to violations in the drinking water, wastewater, dredge and fill, stormwater, mangrove trimming, solid waste, air, and storage tank programs. ELRA must be used if the Department is only pursuing penalties in these program areas (i.e., it is not pursuing corrective actions), and the total amount of penalties, including adjustments, does not exceed \$50,000. ELRA is not required but may be used in the underground injection, hazardous waste, mining, or asbestos programs.
2. Penalty Limitations: Penalties, including adjustments, cannot exceed \$50,000, and the Department may not use ELRA if the penalties exceed \$50,000. However, the Department may pursue violations that would otherwise exceed a calculated penalty of more than \$50,000, if it

decides to cap the penalty amount to be recovered at \$50,000. It may reduce the penalties by eliminating violations or penalty enhancements such as multi-day or economic benefit. The District staff should carefully consider the decision to reduce the penalties, because once reduced and pursued under ELRA, the Department will not be able to pursue the additional penalties.

3. Damages: Damages are not figured in the \$50,000 limit under ELRA and can be of any amount. If the Department pursues an ELRA NOV, it must also include any claim for damages. Otherwise, the Department's claims for those damages are waived.

4. Corrective Actions: The Department can skip ELRA if it wants to pursue injunctive relief in circuit court. If the Department pursues an ELRA NOV, it must also include any claim for corrective actions. Otherwise, the Department's claims for those corrective actions are waived.

5. Multiple Actions: The Department cannot maintain more than one ELRA NOV at a time against the same party involving violations at the same site. For example, the Department cannot pursue one ELRA NOV with \$26,000 in penalties for solid waste violations and a second ELRA NOV for \$26,000 in penalties for drinking water violations. The District program administrators will need to coordinate on violations in different program areas that are discovered at or around the same time so that all of the violations involving the particular facility can be pursued in the same ELRA NOV, assuming the calculated penalties for all of the violations do not exceed \$50,000. If for some reason such coordination does not occur, a second ELRA NOV will have to be delayed until the pending ELRA NOV is resolved.

5.2.5.2 ELRA Penalty Calculation

ELRA has three penalty categories.

1. *Section 403.121(3), Florida Statutes*, lists specific penalties for specific violations by program area. For example, Section 403.121(3)(b) provides in part that “For a domestic or industrial wastewater violation not involving a surface water or groundwater quality violation, the department shall assess a penalty of \$4,000 for an unpermitted or unauthorized discharge or effluent-limitation exceedance.”
2. *Section 403.121(4), Florida Statutes*, lists specific penalties for general violations in all covered program areas. For example, Section 403.121(4)(b) establishes a \$6,000 penalty “for failure to install, maintain, or use a required pollution control device.”
3. *Section 403.121(5), Florida Statutes*, establishes a catchall \$1,000 penalty for all other rule or statute violations not specifically covered in the other sections.

The proper application of ELRA requires that the violations be clearly described to determine whether they are covered under the specific or general violation categories. Any questions about the proper application of ELRA should be discussed with an enforcement attorney to ensure that ELRA is applied consistently.

Penalty Adjustments: The Act authorizes the application of the kinds of adjustments that the Department uses in its Settlement Guidelines for Civil Penalties. Penalties under the ELRA penalty schedule can be adjusted for multi-day violations, history of non-compliance, and economic benefit. In all cases, the total civil penalty after adjustments cannot exceed \$50,000 and still be pursued under ELRA.

Multi-day Penalties: Multi-day penalties should be calculated in accordance with the Settlement Guidelines for Civil Penalties.

History of Non-Compliance: A history of non-compliance can only be used if, after the effective date of ELRA (June 15, 2001), the respondent entered a consent order with a finding of

violation, or a final order or judgment was entered against the respondent, and the document obligated the respondent to pay \$3,000 or more in penalties. The history of non-compliance can be checked by referencing the FEDS system, which is discussed in Chapter 8.

Economic Benefit: Removing the economic benefit of non-compliance should help ensure that a respondent or others who are similarly situated will comply with the law in the future. In addition, the Department must include economic benefit in its penalty calculation in some federally delegated or approved programs. Economic benefit should be calculated in accordance with the Settlement Guidelines for Civil Penalties.

5.3 The Administrative Process

The following subsections describe what happens after an NOV is served.

5.3.1 Service of the NOV

Once the draft NOV has been approved by OGC, it must be signed by the DDM or the Secretary and served on the respondent or its registered agent by certified mail (return receipt requested) or hand delivery. The person sending the NOV to the respondent must verify that the NOV is sent by certified mail, return receipt requested (if issued under the authority of Section 403.121, Florida Statutes), all exhibits are attached, and the document is in order.

If the NOV is returned unclaimed, service may be attempted through hand delivery or through the procedures outlined in Chapter 48, Florida Statutes, providing for personal service by a sheriff. The service fee is twenty dollars. The District should consult with OGC concerning any problems with service of the NOV. Service may also be made in the above-described manner on respondents who reside out of state or out of the country.

5.3.2 Informal Conference

An informal conference is simply a settlement conference that gives the parties an opportunity to meet and settle the case before expensive litigation commences. Because of the time limitations in ELRA, informal conferences are only available in regular NOV's. The Notice of Rights allows a respondent to request an informal conference within ten days of respondent's receipt of the NOV. If it is not requested within that time, the right to request it is waived. Even if timely, the Department need not grant the request, and the request should be denied if the informal conference is being used as a delaying tactic. The Department also has the option of granting an informal conference request made after the 10 days has expired.

The parties may discuss the Findings of Facts, Conclusions of Law, and Orders for Corrective Actions of the NOV at the conference, as well as the terms of a consent order that would have to be signed in order to settle the NOV. This is not a hearing, and respondents' rights will not be adjudicated. Statements made during the conference are generally not admissible at a later hearing. The aim of the informal conference is to reach a resolution of the case, which almost always entails entering into a Consent Order.

A properly conducted informal conference may present the best opportunity for negotiating a settlement of the case. Preparation by the Department prior to the informal conference is the most important way to achieve success. In order to properly prepare, the attached checklist should be completed by the person responsible for the case.

CHECKLIST

CASE NAME:

DATE:

ANTICIPATED DEP PARTICIPANTS (DESIGNATE DEP LEADER):

ANTICIPATED RESPONDENT PARTICIPANTS:

ANTICIPATED ISSUES FOR DISCUSSION:

DEPARTMENT'S INTERESTS (not positions):

ANTICIPATED RESPONDENT'S INTERESTS (not positions):

RESULTS OF INFORMAL CONFERENCE

ISSUES RESOLVED:

ISSUES REMAINING:

DEP'S ACTIONS AND DUE DATES (AND WHO WILL DO WHAT):

RESPONDENT'S ACTIONS AND DUE DATES:

DATE INFORMAL CONFERENCE IS OR WILL BE CLOSED:

Prior to the informal conference, the Department personnel should meet to discuss the Department 's position in the meeting and designate the meeting's leader. The leader's responsibility will be to introduce participants in the meeting and make an initial presentation of the Department 's interests. During or after the meeting it is very important that someone from the Department take detailed notes on what transpired in the meeting.

If an informal conference is to be held, it should be scheduled as soon as possible after the request is made. If no settlement is reached, the respondent should be told that the informal conference is concluded and should be reminded that any petition for hearing must be submitted within 20 days. A written notice to this effect should be provided to the respondent, which should be either hand delivered at the close of the conference or sent certified mail, return receipt.

It is desirable to avoid lengthy settlement negotiations and delays may actually hurt a case, so the informal conference should not be extended solely for purposes of further negotiation unless it appears that settlement is imminent. Long delays could result in statute of limitations problems that prevent the case from going to court, the loss of witnesses, or the loss of attorney or staff continuity. The Department's general practice is that no settlement negotiations be allowed to extend beyond 60 days without placing the respondent in a position to either request or waive the right to a hearing, but reference should be made to the applicable program manual for additional guidance on time guidelines for conducting negotiations over consent orders. Once formal proceedings are initiated (by a request for hearing), negotiations may continue without hindering the Department's ability to obtain a final resolution. Setting a hearing date may also assist in encouraging respondent to offer a serious settlement proposal.

During the informal conference phase, any extensions of time for settlement purposes must be granted in writing by the DDM. If the respondent wishes an extension of time to prepare a petition for hearing, that request must be made in writing and filed with OGC. Such a request can only be granted by the Secretary or the Secretary's designee.

5.3.3 Request for Hearing

If no informal conference is requested, or if it is denied or terminated, the respondent must file a request for hearing pursuant to Sections 120.569 and 120.57, Florida Statutes, within 20 days of receipt of the NOV or notice of the denial or termination of the informal conference. The respondent must timely file a request for hearing, or the right to a hearing will be waived. The request for hearing must be filed with OGC. If a respondent erroneously files the papers in the District office, the District must forward the papers to OGC immediately. If a hearing is not requested, or is not received by OGC in a timely manner, the Department may proceed to final

order without hearing. A final order should be entered as soon as the time expires for filing a request for hearing. The DDM's may enter default final orders, which simply adopt the orders for corrective action. No changes or additions can be made to the orders at this time, which is why they must be drafted carefully in the first place. The model default final order form in the Appendix should be used and prepared for the DDM's signature.

Under ELRA, a respondent has the choice to opt out of the administrative process. The choice must be exercised within 20 days of receipt of the ELRA NOV. If the respondent opts out, the Department can pursue the violations in court, where it is not bound by the limitations in ELRA and can seek penalties for the violations up to the statutory maximums.

The respondent may request mediation of the issues raised in any NOV. In a regular NOV, mediation is only available if the Department and all other parties to the proceeding agree in writing, and a written agreement is prepared and filed within the time period for filing a petition for hearing. The Department is not obligated to agree to mediation if it does not appear that mediation will be worthwhile. In an ELRA proceeding, the respondent may request mediation within 10 days after receipt of the initial order from the administrative law judge. If the respondent timely requests mediation, the Department must participate in the mediation. The rules for an ELRA mediation are set out in section 403.121(2)(e), Florida Statutes.

5.3.4 Procedures after the Request for Hearing

The Department will follow these procedures in both regular and ELRA NOV's unless otherwise noted. The hearing on ELRA NOV's must be held within 180 days of the day the respondent's petition for hearing is referred to DOAH, unless the parties agree to a later date. The hearing on a regular NOV is not subject to this time constraint.

1. Assumption of Case Authority by the Office of General Counsel

The Deputy General Counsel for Enforcement will review the petition for hearing and assign it to an enforcement attorney. A petition for formal hearing must be granted or denied within 15 days. If it is legally insufficient, the Department can dismiss a petition for hearing without forwarding it to DOAH. The order of dismissal typically gives the petitioner the opportunity to amend the petition to fix the defects. If no amended petition is then timely filed, the Department can enter a final order dismissing the petition with prejudice and adopting the orders for corrective action. If a Section 120.57(1) (formal) hearing is in order, the petition and a copy of the NOV must be sent to DOAH.

Once a petition is assigned to an attorney, the attorney becomes the case manager. A Department employee must not contact the respondent or opposing counsel about a case without the express knowledge and consent of the Department attorney, and an opposing counsel should never contact a Department employee directly about a case in litigation. Any inquiries made at the District office by respondent or the respondent's attorney must be referred to the Department's attorney for response. No site inspections are to be made without approval by the Department attorney.

2. Preliminary Motions

The Department attorney may file an answer or motion in opposition to a petition within 20 days of service of the petition. Rather than answer, the Department attorney will normally file a motion for more definite statement or a motion to dismiss if the petition is legally insufficient.

3. Prehearing Discovery

Prior to the hearing, all parties may participate in discovery procedures in accordance with the rules of civil procedure and DOAH rules. These procedures allow all parties to “flesh

out” the allegations in the NOV and petition and more fully understand the other side's position. Through discovery the parties can ask for documents, conduct inspections, depose witnesses, and obtain written statements. The Department attorney may ask staff to assist in preparation of questions or answers for interrogatories or depositions or in other discovery procedures. Cooperation with the Department attorney is essential, as failure to comply with discovery or inadequate compliance could result in a dismissal or other unfavorable result in the case.

4. Prehearing Orders and Conferences

The attorney will be responsible for suggesting a hearing date to the ALJ. The attorney should clear the date with all prospective witnesses before suggesting it to the ALJ. All prehearing conferences will be the responsibility of the attorney.

5. The Hearing

The Department is responsible for preserving the record of an administrative hearing, and Department attorneys must ensure that a court reporter has been retained for the hearing, either by the Department or one of the other parties.

The Department has the burden of proof in an enforcement case and will present its case first. A typical hearing commences with opening statements, which are followed by the presentation of testimony by both sides. The Department will then have the opportunity to present rebuttal testimony. Closing arguments may be heard if the ALJ approves. Prior to adjournment, the parties should confer with the ALJ on the filing of transcripts and proposed orders.

6. Post-Hearing Activity

After the hearing on a regular NOV is concluded, the parties will submit proposed recommended orders to the ALJ within the specified time frames established at the close of the

case. The ALJ will file a Proposed Recommended Order to the Department with recommended findings of fact, conclusions of law, and corrective actions. The Department then issues a final order after receiving and considering exceptions filed by the parties to the recommended order.

After the hearing on an ELRA NOV, the ALJ will enter the final order. The ALJ has the authority to enter the final order as to all of the issues presented in the NOV, including penalties, costs, corrective actions, and damages.

7. Proposed Recommended Order

The Department attorney must file a proposed recommended order (PRO) in a regular NOV proceeding, and district enforcement personnel may be asked to review and comment on the draft PRO. PROs should be prepared and reviewed carefully, as they contain expressions of Department policy. The PRO must be filed within a limited time period, which is set at the conclusion of a hearing. District enforcement personnel should therefore give the review of the PRO top priority. A PRO is not filed in an ELRA proceeding.

8. Recommended Order

The ALJ will issue a recommended order after the hearing is completed on a regular NOV, or after a transcript is filed, if filed. The ALJ will not file a recommended order in an ELRA proceeding.

9. Exceptions

Any party may file exceptions with OGC within ten days of the ALJ's submittal of the recommended order. Exceptions are not filed in ELRA proceedings.

10. Final Orders

In an enforcement case, a final order must be entered by the Department within 90 days of the submittal of the recommended order by the ALJ. The time periods are different in

permitting cases. A final order becomes effective upon filing with the Department's agency clerk. Only after a final order is entered do the orders for corrective action in the NOV become effective and enforceable.

In an ELRA proceeding, the ALJ will issue the final order.

11. Ex parte Communications

No communication relative to the merits of a case may be made by anyone to the Secretary or the General Counsel between the times a recommended order is received and the final order is rendered. This prohibition applies to Department employees, including attorneys, as well as members of the public.

5.4 Costs and Expenses that may be included in a Consent Order Order or Notice of Violation

The costs and expenses of investigating a violation may be included in an administrative order of the Department or the ALJ. Recoverable costs include wages, per diem, travel, mileage, photography, sample analysis, and applicable miscellaneous costs of those individuals employed by the Department who actually perform investigative work in the field, laboratory analyses, or other administrative functions directly related to the investigation or preparation of the Consent Order or any NOV or prosecution of the litigation. The wages paid to other individuals who perform secretarial-clerical functions should be included when significant.

5.4.1 Conditions Under Which Other Costs and Expenses May Be Included or Recovered

Costs in addition to those described above may be included in an administrative enforcement action under the following circumstances:

(1) If the Department contracts with another state agency or a private firm for testing, investigative services, or consultative services directly related to an enforcement action.

(2) If the Department incurs any costs expended from the Water Quality Assurance Trust Fund, the Department is required by law to seek cost recovery from responsible parties, unless the Department finds the amount involved too small or the likelihood of recovery too uncertain. Recovery of these costs should be discussed with an enforcement attorney if the amount appears to be very small or the recovery appears uncertain.

5.4.2 Costs and Expenses Recoverable in an ELRA Proceeding

ELRA has special provisions for the recovery of costs. The prevailing party will recover its costs of litigation (e.g., witness and service fees, court reporter costs). If the final order awards no penalties to the Department and the ALJ finds that the Department's ELRA NOV was not substantially justified, then the respondent is entitled to an award of attorney's fees of up to \$15,000. Substantially justified means the Department had a reasonable basis in law and fact at the time the action was brought for believing the respondent committed the violation. The Department cannot recover its attorney's fees.

5.4.3 Determination of the Costs of Those Persons Employed by the Department

Wages should be calculated by multiplying the actual hourly pay rate of the individual who worked on the case times the actual number of hours (rounded off to the nearest whole hour) for which the Department is seeking compensation. Per diem and travel should be calculated according to the most current and applicable regulations set forth by the Department of Management Services.

5.4.4 Documentation of Costs

An itemization and documentation of all costs and expenses should be maintained in the case file. This information will be used to support a claim for costs and expenses in administrative or court litigation. Although the Department can settle a claim for costs with an

approximate amount (see the next section), claims for costs and expenses must be proven in administrative and judicial proceedings with exact figures and appropriate evidence.

5.4.5 Determination of Costs for Settlements

The Department should recover its costs in settling any enforcement action. In settlement negotiations it is often not necessary to calculate the exact dollar amount of any costs that the Department has incurred. In order to save time, the following guidelines should be followed when estimating the costs to be recovered in settling enforcement actions:

Smaller than Average Enforcement Cases: \$100 to \$500

This category includes cases requiring up to three routine and relatively short site visits, the issuance of a warning letter, the holding of a meeting, and the drafting of a consent order that has been agreed to with little or no opposition. Most short form consent order cases should be included in this category.

Average Enforcement Case: \$500 to \$1,000

A case requiring up to seven site visits, the issuance of a warning letter or NOV, the holding of a meeting, some post-meeting follow-up, and the drafting of a consent order should be considered an “average enforcement case”. The average enforcement case encompasses the majority of the Department’s enforcement cases. The consent orders are more complex, and some amount of negotiation is required to reach an agreement.

Complex Enforcement Cases \$1,000 to \$5,000

A case requiring numerous site visits, multiple meetings, and a very complex consent order and extensive negotiations should be considered a “complex enforcement case”. A decision should be made on a case-by-case basis, particularly for complex enforcement cases, whether to use this estimated cost figure or calculate the actual costs.

5.5 Mediation

Mediation is an informal process in which a neutral mediator who has special training assists the parties in reaching a mutually acceptable and voluntary agreement. Mediation is based on principles of communication, negotiation, and problem solving. It is procedurally flexible and allows creative solutions tailored to the needs and interests of the participants.

Mediation is not a trial proceeding where the parties submit evidence and legal arguments. A mediator does not act as a surrogate judge or as an arbitrator and does not render judgment on the claims or positions of the parties. The role of the mediator is to assist the parties in identifying issues, creating and exploring alternatives to resolve the dispute, and helping the parties reach an agreement, but the final decision and authority to settle rests with the parties.

5.5.1 Agreeing to Mediation

Although Florida courts routinely order litigants to mediation before trial, the Department and other parties can agree to mediation at anytime, even during litigation or before litigation begins. Agreeing to mediation does not affect the Department's rights to seek an administrative hearing or proceed with a court action if the mediation is unsuccessful. Nor must the Department postpone discovery or hearings while the parties mediate. Agreeing to mediation is not a sign of weakness in the Department's case or a depreciation of the potential recovery. The Department must participate in mediation if an ELRA respondent requests it or a court orders it.

Mediation is a tool that should be considered at any point when a negotiable dispute arises. The initial question is whether the case is negotiable. Mediation should be considered in cases where:

- (1) unassisted negotiations have reached an impasse;
- (2) personality conflicts or poor communications are preventing progress;

- (3) multiple responsible parties, other agencies, or interest groups are involved (perhaps the remedy affects third parties or requires their cooperation);
- (4) the dispute involves difficult technical issues; or
- (5) there is no immediate threat to the environment, and the Department has sufficient time to negotiate under court or statutory deadlines.

Generally, mediation should not be considered where criminal charges or immediate injunctive relief are appropriate, or it is clear that the responsible party is merely seeking a delay. However, mediation can be successful even when it appears there is no chance for settlement. Also, a mediated settlement may facilitate complicated resolutions that involve in-kind penalties or pollution prevention projects.

The parties to the mediation select the mediator. In court-ordered mediation the court may provide a list of certified mediators or may appoint the mediator. The selected mediator then enters into a contract with the parties, which allocates the costs and fees associated with mediation and protects the confidentiality of discussions and documents introduced during mediation.

5.5.2 Mediation of Administrative Disputes

Mediation is required if requested by an ELRA respondent and must be completed at least 15 days before the hearing. Some of the mediation costs are paid by the state. In other administrative disputes, such as regular NOV's or dispute resolution proceedings in a consent order, the mediation costs are borne by the parties.

If the Department and all parties to the administrative action timely agree to mediation (in a non-ELRA proceeding), the time for filing a petition is tolled until the end of the mediation. The parties must enter a written mediation agreement that includes the selection of the mediator,

cost allocation, the date and deadlines for the mediation, identity of the parties' representatives, and the parties' agreement on confidentiality of discussions and documents. If mediation results in a settlement, the Department incorporates the agreement in a final order or consent order. If mediation ends without settlement, the Department must notify the parties of their right to request a hearing and the deadlines for such requests.

5.5.3 Preparation for Mediation

The Department's mediation team should plan and prepare for mediation by reviewing the facts, the legal theory of the violations, and the Department's objectives for corrective actions, penalties, and costs. However, because mediation allows the parties to fashion creative solutions, the team should consider alternatives to resolve some or all the issues, which may include in-kind project proposals, performance and sharing of investigative data, involvement of third parties such as potential purchasers, or an objective process to resolve factual or technical disputes. Brainstorming these alternatives involves identifying the interests of other parties, the Department's goals, the mutual risks of litigation, and the parties' best alternative to a negotiated settlement.

Some mediators require that the parties submit mediation statements before the conference. These statements may discuss the nature of the dispute and the positions of the parties and are submitted to the mediator to familiarize the mediator with the dispute. They are not part of the court file. The enforcement attorney will be responsible for preparing the mediation statement with input from the enforcement staff.

The strategy for mediation is similar to the strategy for a settlement conference. Be prepared to ask questions, collect and confirm information, and gain an understanding of the other party's interests. Be ready to offer proposals to resolve some or all the issues on a

principled basis. Because the goal is the voluntary settlement of disputes, it is essential that the parties' representatives physically attend the mediation conference and have full authority to settle without further consultation. Confirm your strategy, goals, and proposals with management before the conference (e.g. authorization to pursue civil penalties above \$75,000 requires approval by the Secretary – time to secure such authorization should be accounted for in scheduling your mediation date).

5.5.4 The Mediation Conference

The mediator's job is to control the mediation. Usually, with all parties and their counsel present, the mediator will start with an explanation of the process, invite questions, give the counsel for the parties an opportunity to make an opening statement, and then function mainly as a moderator of the participants' discussions. Sometimes the mediator will immediately separate the parties and act as a go-between. The mediator is obligated to remain impartial, but may suggest counterproposals or question the parties about their positions and alternatives to settlement as a reality check. Often the mediator will suggest that the parties separate to caucus privately. The mediator may meet privately with any party or counsel. The discussions among the participants and the mediator are confidential. Because mediation is a consensual process, the Department cannot be forced to settle in mediation.

5.5.5 The Conclusion of Mediation

Mediation ends with a recess, impasse, or settlement. A recess may be necessary to arrange further conferences or to allow the parties to gather information. An impasse results when the parties cannot agree on a settlement. In court-supervised mediation, the mediator simply notifies the court of the lack of agreement, without comment or recommendations. The mediator does not report to the court on the offers or positions of the parties and cannot be called

as a witness on matters discussed in the proceeding. With the consent of the parties, the mediator may advise the court of any pending motion, legal issue, or discovery, which, if resolved, would facilitate settlement.

If a partial or final agreement is reached, it must be in writing and signed by the parties and their counsel. In court-supervised mediation a report of agreement is filed, and the court may enforce the agreement.

5.6 The Consent Order

The Consent Order is the administrative version of the judicial consent decree or consent final judgment. It is a legal document that binds the respondent to perform certain acts and is authorized in the APA by Section 120.57(4), Florida Statutes. It may be entered into at any stage of the administrative process, including before or after the filing of an NOV. A Consent Order sets out the terms of a settlement between the Department and the respondent.

The Department uses three types of Consent Orders: the Short Form Consent Order, the Model Consent Order, and the Long Form Consent Order. All Consent Orders must contain a finding by the Department that the respondent violated the law.

5.6.1 Short Form Consent Order

The Short Form Consent Order is used exclusively to settle cases where the only issue left for resolution is the payment of money, either for penalties, damages, cost reimbursement, or a combination of these. The Short Form Consent Order should not be used for any other purpose. A model Short Form Consent Order is approved for use without the need for OGC review. The model contains an option for making payments over time.

5.6.2 Model Consent Orders

Model Consent Orders are pre-approved consent orders that can be used without further OGC review so long as the instructions in the model are followed. Most of the program areas have developed Model Consent Orders. Changes to a Model Consent Order that are not pre-approved should be reviewed by OGC prior to execution.

5.6.3 Long Form Consent Orders

“Long Form”, or regular, Consent Orders include all other consent orders that are not models or short forms. These Consent Orders should be reviewed by OGC. The instructions for preparing a Long Form Consent Order follow, but as a starting point, Model Consent Orders or previously entered Consent Orders should be used as a template. As with the NOV, a Long Form Consent Order contains Findings of Fact and Conclusions of Law, Orders for Corrective Action, and a Notice of Rights, although none of these sections are separated by headings in the Consent Order as they are in the NOV.

5.6.3.1 Findings of Fact and Conclusions of Law

The first few paragraphs of the Long Form Consent Order contain findings of fact and conclusions of law to which the respondent usually agrees. These findings and conclusions include descriptions of the agency and the respondent, an acknowledgment of the Department's jurisdiction, a description of the location of the violation (preferably a legal description), a description of the acts that led to the violation, and a description of the statutes and rules violated.

Specific findings of fact and legal conclusions should be included. They usually make the document easier to comprehend and therefore easier to enforce. Remember that one day a judge who has had no exposure to the case may be asked to enforce the Consent Order. It is not always necessary to require respondent to admit the Department's findings or a violation of the

law so long as the Department makes appropriate findings of fact. If respondent requests that no such admission be made, the request should be reviewed by OGC.

5.6.3.2 The "Ordered" Section

The most important part of the Consent Order appears after the word "Ordered:" This part should contain the paragraphs that describe the actions that the respondent must perform.

It is important to follow a few simple rules in drafting the Ordered sections:

1. Use verb forms that are directive and avoid the passive voice.
"Respondent shall" should always be used if you want respondent to do something.
2. Tie all actions to specific dates. For example, "Within X number of days of the effective date of this Consent Order" or " within X number of days after receipt of written notice from the Department" are useful phrases. Do not tie the commencement of action to the "execution date" of the Consent Order because only the "effective date" has legal significance
3. Do not leave the required actions open-ended. When drafting the Consent Order ask yourself, "If respondent doesn't comply with this requirement, what happens then?"
4. Be specific in describing exactly what respondent must do. Think of how you can explain to a judge that the Order has been violated.

5.6.3.3 The Notice of Rights Section

The Notice of Rights section (sometimes called the "boilerplate") must at a minimum include paragraphs that notify third parties of their rights to challenge the consent order under the

APA, establish the effective date of the consent order, waive the respondent's rights to challenge or appeal the consent order, and provide that the consent order is enforceable under Chapter 120, Florida Statutes. Examples of the approved language of these paragraphs are found in the Model Consent Orders and these paragraphs may only be changed after consultation with OGC. The Notice of Rights section also contains a number of other paragraphs that concern notice to the respondent of the consequences of violation of the consent order, and issues of site access, property transfer, criminal liability, document submittal, and consent order amendments.

5.6.3.4 Effective Date

The APA provides that a Consent Order is effective on the date it is "entered by the clerk." This is not necessarily the date on which the parties sign the Consent Order; it is the date that one of the agency clerks stamps the document. Each District office has an agency clerk, as does OGC and several of the Divisions. The dates for corrective actions do not begin to run in the Consent Order (or Final Order) cannot be enforced unless the order is "clerked in."