State of Florida
Department of Environmental Protection

DEP 923
Effective:

Administrative Directive

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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 do not represent an unadopted rule (inasmuch as the Department is not obligated to settle cases) and may not be cited as legal authority for any agency action. *Envirochem Envtl. Serv. v. Dep't of Envtl. Prot.,* No. 93-5553RU (Fla. DOAH Feb. 9, 1994) (Final Order). 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), Section 403.121, Florida Statutes (2001), the Department was given administrative penalty authority for most regulatory programs. ELRA was amended in 2020 to give the Department the authority to impose up to a total of $50,000 in administrative penalties in one administrative action for most regulatory violations.

Independent of ELRA, the Department has statutory authority to assess administrative penalties in Beaches and Coastal Systems cases for up to $15,000 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 $15,000 per day per violation, Sections 403.141, 377.37, 376.302, and 373.129(5) Florida Statutes; up to $37,500 per day per violation for hazardous substance violations, Section 403.726, Florida Statutes; up to $75,000 per day per violation for hazardous waste violations, Section 403.727, Florida Statutes, for violations of the Pollutant Discharge Prevention and Control Act, Section 376.16, and for gambling vessel violations, Section 376.25, Florida Statutes; up to $5,000 per day per violation for violations of the Safe Drinking Water Act, Section 403.860, Florida Statutes; up to $375,000 for coral reef damage, Section 403.93345, Florida Statutes; and up to $7,500 per day per violation for violations involving phosphate mines in Section 378.211, 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 an administrative or civil penalty is appropriate. Even when formal enforcement is necessary, these guidelines do not

require imposition of a 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 decided 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, permit conditions or rules. Although ELRA, enacted in the 2001 legislative session and amended in 2020, 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 $50,000.

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 for all violations that are covered under ELRA that involve only penalties (i.e. no corrective actions), and that involve penalties in an amount that is $50,000 or less as calculated under ELRA (see Section 5., below).

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 that will not be pursued under ELRA via a Notice of Violation if settlement fails (e.g., where the total penalties exceed $50,000 as

calculated by the ELRA penalty schedule, where correction actions are sought that are of the degree and immediacy that a court order is necessary, or where the violations are 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 to enhance state-wide consistency.

5. Penalty Calculation

Step 1: The initial step in calculating any penalty is to determine whether the penalties will be pursued via a Notice of Violation (pursuant to ELRA) or a judicial complaint in the event a settlement agreement is not reached. In making this determination, the following four questions must be considered:

1) Is the violation for which the penalty is being assessed assigned a mandatory penalty amount under the schedule in ELRA?

In other words, is the violation accounted for in subsection (3) or (4) of ELRA? If so, it is statutorily mandated to proceed administratively, unless the answer to any of the following questions is "yes." If the violation is not accounted for in subsections (3) and (4), the Department may proceed judicially, but can still opt to proceed administratively under ELRA by using the permissive, $500 "catch all" penalty provision in subsection (5) of the statute.

2) Does the violation for which the penalty is being assessed involve the failure to comply with an asbestos, hazardous waste, or underground injection control regulation?

If so, it is not mandated to proceed administratively by ELRA, but it is also not prohibited. Thus, if the violation is assigned a penalty under either of the mandatory provisions in the ELRA schedule, the District may or may not proceed administratively. The District also has the discretion to use the permissive, $500 "catch all" penalty provision, if the violation is not otherwise accounted for in the ELRA schedule, but it still wishes to proceed administratively.

3) Does the violation for which the penalty is being assessed necessitate a corrective action in addition to a penalty?

If so, it is not statutorily mandated to proceed administratively, but it is also not prohibited. However, in the event a temporary injunction is necessary,

the Department should always proceed judicially.

4) Does the total of the penalties calculated under the ELRA schedule for all violations, including all adjustments exceed $50,000?

If so, the Department is prohibited from proceeding administratively unless the District Director opts to cap the total penalty sought at $50,000. For example, the District Director may choose to cap the penalty in a case in which the calculated penalty only marginally exceeds $50,000 or in a case that would not warrant a judicial action if not settled. As a practical matter, those cases should either be settled at $50,000 or pursued administratively for the maximum allowed under the ELRA.

Even when it is optional whether to proceed judicially or administratively, an initial decision should be made as to how the District plans to proceed for the purpose of calculating a penalty to initiate settlement discussions. In making this decision, the District Director and District staff should thoughtfully consider the advantages and disadvantages of the administrative and judicial processes outlined in Chapter 5, Section 5.0 of the Department's Enforcement Manual as well as the factors discussed in the Introduction above.

Step 2: If the penalties will not be pursued via a Notice of Violation in the event a settlement is not reached, 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.

If the penalties will be pursued via a Notice of Violation in the event a settlement is not achieved, the civil penalty calculation should start with the application of the specific penalty assigned to each violation under the penalty schedule in set forth ELRA (i.e., Section 403.121(3)-(6), Florida Statutes). This is the baseline penalty.

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. 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. See Section 403.121(10), Fla. Stat. Upward adjustments to the baseline penalty could be made based upon a history of non-compliance as provided in ELRA (see Section 403.121(7), Fla. Stat.) or for economic benefit gained from the violation (See Section 403.121(8), Fla. Stat.). Note, if the upward

adjustments together with the ELRA schedule baseline penalty exceeds a total of $50,000, the penalty must be capped at $50,000, if the Department is going to pursue the penalty under ELRA.

Step 3: In all cases where a proposed penalty is to exceed $25,000, 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 $75,000 or more must gain approval by the Secretary.

6. Penalty Matrix

The program specific guidelines created under this directive shall include penalty matrices that have two factors: (a) actual (or in some cases "potential") environmental harm and (b) extent of deviation from a statutory regulatory requirement.

Factor (a), the y axis, 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 $15,000. 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 a 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.

Factor (b), the x axis, 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.

An example matrix is attached hereto as attachment I. 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:

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. For non-ELRA cases, 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, this adjustment factor may be used if a violation has occurred within a five-year period previous to the Notice of Violation and resulted in a consent order, final order, or judgment.

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 statutes do not specifically authorize the recovery of economic benefits gained by the violator. However, the statutes do provide 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.

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.

ELRA penalties can be adjusted upward by considering economic benefit up to the per violation and per assessment caps (see Section 403.121(8)-(9), Fla. Stat.). In non-ELRA cases, the economic benefit adjustment factor can be used to increase the amount of penalties derived from the penalty matrix up to the maximum penalty authorized by statute. For example, if a violation occurs for 10 days and the statute allows for the imposition of a penalty up to $15,000 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 $150,000. 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 $80,000 and the economic benefit to the violator from the violations is $750,000, the Department would be limited to pursuing a penalty of $150,000. 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 in all non-ELRA cases.

Ability to Pay: This adjustment factor may only be used in (waste and petroleum) clean up cases to decrease or increase the amount of penalties derived from the penalty matrix or 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. The District Staff should seek

support from the Division of Waste Management in reviewing ability to pay information.

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 $50,000 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.

Pollution prevention does NOT include:

a. 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;

b. 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;

c. 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 $37,500 or more for non-RCRA cases.

b. The case involves a proposed penalty of $75,000 or more for RCRA cases.

c. The case involves a proposed cash penalty of $15,000 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 included in the program specific guidelines.

The program specific penalty computation worksheets listed separately in the Enforcement manual should be used in all cases in which a penalty is calculated and proposed, and (following applicable peer review thresholds) should be sent along with the draft Consent Order that is to be reviewed by OGC for final approval.

If the penalty amount calculated for all violations is reduced after meeting with the responsible party, a revised 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 revised 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, a revised penalty computation worksheet must be filled out and signed and dated by the Director of District Management.

A narrative explanation or civil penalty authorization memo should also be prepared in all cases that are 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

ATTACHMENT I
Example Penalty Matrix

ENVIRONMENTAL HARM	EXTENT OF DEVIATION FROM REQUIREMENT			
		MAJOR	MODERATE	MINOR
	MAJOR	$15,000 to $13,000	$12,999 to $11,000	$10,999 to $9,600
	MODERATE	$9,599 to $8,200	$8,199 to $7,000	$6,199 to $6,200
	MINOR	$6,199 to $5500	$5500[1)]	$5500[1)]

1)– Environmental Education may be an acceptable substitute