State of Florida
Department of Environmental Protection
Program Directive

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David B. Struhs
APPROVED

SETTLEMENT GUIDELINES FOR CIVIL AND ADMINISTRATIVE PENALTIES

1. Purpose

These guidelines are intended to provide a rational, fair and consistent method for determining the appropriate amount of civil and administrative penalties the Department should seek from responsible parties in settling enforcement actions. These guidelines should be used in settling both administrative and judicial enforcement actions brought against persons violating Department statutes or rules. Although the Environmental Litigation Reform Act (ELRA) enacted in the 2001 legislative session sets specific penalty amounts for certain violations covered under the Act when those violations are pursued with a Notice of Violation, these guidelines provide: (1) direction about the application of the ELRA penalty schedule to the penalty calculation and negotiation process, (2) direction for programs not covered under ELRA, and (3) direction on cases that involve penalties calculated under ELRA that exceed $10,000. It is intended that these guidelines be used solely for internal staff guidance in determining what position the agency should take in settlement negotiations concerning penalties. 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

403.061 and 403.121, Florida Statutes

3. Introduction

With the enactment of ELRA the Department now has administrative penalty authority for most programs. The negotiation process involving the use of consent orders to settle matters involving civil penalties should be used, whenever possible and appropriate, before issuing a notice of violation or a judicial complaint. No notice of violation or complaint should refer to these guidelines. If a settlement cannot be reached and recovering penalties is appropriate, the Department must issue a notice of violation in all cases that are covered under ELRA that involve only penalties, and that involve penalties in an amount that is $10,000 or less as calculated under ELRA.

Independent of ELRA, the Department has statutory authority to assess administrative penalties in Beaches and Coastal Systems cases for up to $10,000 per day, Section

161.054(1), Florida Statutes, and in State Lands cases for up to $10,000 per day, Section 253.04(2), Florida Statutes. ELRA does not modify or add to that existing authority. Penalty guidelines for these programs have been adopted by rule.

The Department now has the authority to impose up to a total of $10,000 in civil penalties in one administrative action for most regulatory violations as provided in ELRA. The Department also has the authority in a judicial proceeding to ask a court to assess penalties of up to $10,000 per day per violation in Sections 403.141, and 373.129(5) Florida Statutes; up to $25,000 per day per violation for hazardous substance violations in Section 403.726; up to $50,000 per day per violation for hazardous waste violations in Section 403.727, Florida Statutes; and up to $5,000 per day per violation for violations of the Safe Drinking Water Act in Section 403.860, Florida Statutes and for violations involving phosphate mines in Section 378.211(2),(4), Florida Statutes.

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 enforcement result in the elimination of any economic benefit gained by the violator as a result of the violation; and beyond that, does enforcement provide enough of a financial disincentive to discourage future violations not only from the violator but from 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. The District and Division Directors are authorized to deviate from these guidelines consistent with state law in raising or lowering the penalties when doing so will result in better compliance and better capability for carrying out the mission of the agency.

The Department staff involved in pursuing enforcement, with appropriate supervisory review, should use their judgment along with any program specific guidance that is consistent with this policy as to when a penalty should be sought. The use of penalties is an enforcement tool that should be used in any case in which it is determined that penalties are needed to ensure that the responsible party and others similarly situated are deterred from future non-compliance. In summary, the basic purpose of this document is to provide guidance about how to calculate penalties for initial settlement discussions, and how to make adjustments to the penalties, either up or down, during the negotiation process.

4. Applicability to Program Areas

This policy is designed to apply to all program areas except Beaches and Coastal Systems and State Lands, unless otherwise preempted by an interagency agreement or other obligation of the Department. The Department currently has interagency agreements with the EPA. Those agreements incorporate penalty policies for certain program specific violations, which should be used as guidance to the extent they are different than this policy and not inconsistent with state law. There may be other situations where, from time to time, there may be interagency agreements regarding enforcement of a specific case or series of cases. These must be treated 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 attempt to provide guidelines for every possible violation that may be discovered. The program specific guidelines are intended to be used in conjunction with these Settlement Guidelines when calculating the appropriate penalties to be sought in cases involving penalties exceeding $10,000 or in cases involving programs not covered under ELRA. There may be some cases that involve unusual circumstances that have not been factored into the program specific guidelines.

5. Penalty Calculation

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

A. **If the program is not covered by ELRA:**

The penalty should be calculated using: (a) the program specific guidelines to determine how the violation should be characterized; and (b) the guidance below in Sections 6, 7, and 8 to determine the total penalty amount.

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

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

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

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

4. Upward adjustments to the penalty schedule amount could be made based upon a history of non-compliance as provided in ELRA or for economic benefit gained from the violation. If the upward adjustments together with the ELRA schedule baseline penalty should not exceed a total of $10,000, the penalty must be capped at $10,000, if the Department is going to pursue the penalty under ELRA.

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

The guidance provided below in subparagraphs 1,2, and 3 should be followed, unless a decision is made by the District Director to cap the recovery of penalties at $10,000 for the particular case. There may be cases in which the calculated penalty marginally exceeds $10,000 and would not warrant a state court action, if not settled. As a practical matter, those cases should either be settled at $10,000 or pursued administratively for the maximum allowed under the ELRA. When a particular penalty for violations covered under ELRA exceeds $10,000:

1. The characterization of the violation should be determined using the program specific guidelines.

2. If the characterization of the violation involves a major potential for harm, the base penalty calculated using the schedule in ELRA should not be used. The appropriate penalty should be calculated using the procedure described in Section 5.A. of these Guidelines for programs not specifically covered under ELRA.

3. If the characterization of the violation does not involve a major potential for harm, the total penalty should be calculated using the base penalty calculated under the ELRA schedule and the adjustment factors described in Section 8 of these guidelines.

6. The Penalty Matrix

The penalty matrix in Attachment I has two factors:

a. potential for environmental harm; and

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

Subsection a. addresses the actual or potential harm to human health or the environment that may occur as a result of the violation. Note that the harm may be actual or potential - the focus should be on the activity itself and not upon whether it was discovered in time to prevent serious environmental consequences. There are three levels of potential for harm within this axis of the matrix:

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

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

3. MINOR: violations that actually or are reasonably expected to result in minimal or no pollution.

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 either by a substantial amount or over a substantial period of time, or occurs in an ambient environment that is so classified that it will be substantially affected by the discharge or emission; or a dredge and fill violation that covers a substantial area, occurs over a substantial period of time, or affects a water body that is so classified that it is substantially affected by the activity. Moderate and minor violations are those with impacts on such activities comparable to the degree of harm as defined above.

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

1. MAJOR: the violator deviates from the requirements of the law to such an extent that there is substantial noncompliance.

2. MODERATE: the violator deviates from the legal requirements of the law significantly but some 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.

7. Multiple and Multi-Day Penalties

Violations usually occur in multiples, over extended periods of time. While the policy must be designed to encourage prompt compliance regarding ongoing violations, basing the calculation on a strict addition of an amount for each violation each day 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:

A penalty should be calculated for every violation which constitutes an independent and substantially distinguishable violation, or when the same person has violated the same requirement in substantially different locations. One activity or omission can result in more than one violation. For example, failing to conduct sampling of a public drinking water system may result in a number of separate violations such as: no organic chemical sampling, no inorganic chemical sampling, no turbidity sampling, no microbiological sampling, and so forth. On the other hand, if there is only one activity or omission that serves as the basis for several violations, but the violations are essentially of the same nature or have the same or potentially the same impact on the environment, but prohibited by different rules regulating that same activity, only one penalty should be calculated. For example, discharging solid waste in a wetland can be a solid waste and a dredge and fill violation. Or if one violation results in violations of related rules bearing on basically the same subject, only one penalty should be calculated.

Multi-day penalties are appropriate where daily advantage is being gained by the violator for an ongoing, egregious violation; or where 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; or where economic benefit is being gained on a daily basis. 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 less

detrimental, a lower daily penalty should be calculated. 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 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. Since some programs either have or will develop guidelines for determining when multiple or multi-day penalties are appropriate, you should refer to the program specific guidelines for further guidance. 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, or the responsible party made no efforts to find out about what Department regulations apply when it would have been responsible to have done so.

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 operating in accordance with an acceptable Partnership for Ecosystem Protection (PEP) Implementation Plan, or other DEP sanctioned partnership program.

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

h. The responsible party has demonstrated that it is implementing a self-audit program consistent with the Department's policy on Incentives for Self-Evaluation by the Regulated Community, DEP Directive 922. This would apply in those cases in which the Department discovered the violation.

i. 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 failed to cooperate with the Department in trying to reach a quick and effective agreement for addressing the violation after the Department notified the responsible party it was in violation of a Department regulation.

History of Non-Compliance: This adjustment factor can be used to increase the amount of penalties derived from the penalty matrix or ELRA schedule. This adjustment factor should 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 for at least one of the violations in the amount of $2,000 or more. For ELRA cases, the history of non-compliance prior to June of 2001 cannot be considered.

Economic Benefit of Non-Compliance: 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 gained from actions taken in violation of Department statutes or rules where the benefits arise from the increased profits that are obtained as a result of the violations. In certain situations a responsible party could both actively and passively gain economic benefit from violating Department statutes or rules.

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 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.

The economic adjustment factor should only be used to increase the amount of penalties derived from the penalty matrix. There may be cases that arise in which the economic benefit gained by the violator exceeds the amount of money that can be recovered in civil penalties authorized by law. For example, three days of circumvention of a pollution control device could result in increased profits and/or a reduction in costs amounting to more than $30,000. Other than in ELRA cases, the statute does not specifically authorize the recovery of all economic benefits gained by the violator. This policy focuses on economic benefits as one valid factor for calculating penalties in an amount authorized by statute.

For non-ELRA cases, the statute provides that a penalty should be calculated in an amount sufficient to ensure future compliance. It is therefore the Department's policy to ensure future compliance by eliminating as much of the economic benefits of non-compliance as the statute will allow by adding the economic benefits of non-compliance, where appropriate and practical, to all civil penalty calculations.

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

Ability to Pay: This adjustment factor may be used to decrease or increase the amount of penalties derived from the penalty matrix. This adjustment factor may be used to decrease the amount of penalties derived from the ELRA schedule. The violator has the burden of providing to the Department all of the financial information needed to determine ability to pay. If sufficient information is not provided by the violator, an ability to pay adjustment decreasing the penalty should not be considered. Like economic benefits, ability to pay may be a difficult matter to determine by the District staff. If the District staff needs assistance in determining ability to pay, a request should be made by the District staff to OGC to assist in the ability to pay determination by use of EPA's computer model for determining ability to pay (ABEL) or by use of some other accepted financial method.

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

8. In-Kind Penalties

Once the settlement amount has been established, it may be appropriate to consider 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 may consider 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,

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

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

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

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

9. Pollution Prevention Credits

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 Department's Pollution Prevention Programs as well as 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 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 recirculating, water based cleaning process;

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

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

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

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

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

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

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

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

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

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

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

(4) Using processes less likely to produce spills.

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

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

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

(8) Reducing dragout to minimize chemical depletion.

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

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

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

(3) Filtering machining fluids for reuse;

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

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

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

d. Pollution prevention does NOT include :

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

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

(3) Disposal such as: landfilling or incineration.

Before a pollution prevention project should be approved to offset civil penalties, the responsible party must submit a waste audit report to the Department. The responsible party should be given the option of preparing the report on his or her own, by hiring a consultant or by

requesting the help of the Department's Pollution Prevention Program staff. The waste audit report must include: 1) a waste audit of the facility or of the process or processes that are relevant to the proposed pollution prevention project; 2) a pollution prevention opportunity penalty calculation; and 3) a conceptual pollution prevention proposal.

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

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

No costs expended by a responsible party on a pollution prevention project that are necessary to bring the facility into compliance with current law should be used to offset civil penalties. The following costs associated with pollution prevention projects can be used to offset up to 100% of civil penalties on a dollar for dollar basis:

a. Preparation of a pollution prevention plan.

b. Design of a pollution prevention project.

c. Installation of a pollution prevention project.

d. Construction of a pollution prevention project.

e. Testing of a pollution prevention project.

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

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

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

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

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

c. Monitoring and reporting costs.

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

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

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

10. Review by the Office of General Counsel

There are three situations in which approval by the Office of General Counsel and notice to the appropriate Division Director is required prior to settlement:

a. The case involves a proposed penalty of $25,000 or more for non-RCRA cases, or $50,000 or more for RCRA cases.

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

c. Any other case identified by the district, a Division Director, OGC, a Deputy Secretary, or the Secretary as being one of significant public interest or legal precedent.

All penalty proposals that require Office of General Counsel approval should be submitted to the Office of General Counsel using the Department's form penalty authorization memo and routed through the Deputy General Counsel for Enforcement to the General Counsel for review to determine whether the penalty proposals are consistent with this policy.

11. Procedure for Implementation

In order for these guidelines to be implemented properly, adequate recordkeeping must be followed. The penalty determination matrix and the ELRA penalty schedule are attached. They are to be used in all non-RCRA cases. The RCRA matrix should be used for RCRA cases.

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

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

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

Responsible Office: Office of General Counsel

ATTACHMENTS:

Penalty Calculation Matrix,
(ATTACHMENT I)

Penalty Computation Worksheet,
(ATTACHMENT II)

PENALTY CALCULATION MATRIX*

EXTENT OF DEVIATION FROM REQUIREMENT

POTENTIAL FOR HARM		MAJOR	MODERATE	MINOR
	MAJOR	$10,000 to $ 8,000	$7,999 to $6,000	$5,999 to $4,600
	MODERATE	$4,599 to $3,200	$3,199 to $2,000	$1,999 to $1,200
	MINOR	$1,199 to $600	$599 to $200	$199 to $100

*Reduce by 1/2 all categories for potable water cases.

ATTACHMENT I

ATTACHMENT II

PENALTY COMPUTATION WORKSHEET

Violator's Name: _____

Identify Violator's Facility_____

Name of Department Staff Responsible for the Penalty Computations:

_____

Date: _____

PART I - Penalty Determinations

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

Total Penalties for all Violations:_____

_____ _____

Director of District Management Date
Division Director

ATTACHMENT II

Part II - Multi-day Penalties and Adjustments

ADJUSTMENTS Dollar Amount

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

Justification:_____

Good faith/Lack of good faith after discovery:_____

Justification:_____

History of Non-compliance:_____

Justification:_____

Economic benefit of non-compliance:_____

Justification:_____

Ability to pay:_____

Justification:_____

Total Adjustments:_____

MULTI-DAY PENALTIES Dollar Amount

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

Justification: _____

_____

Or

Number of days matrix amount is to be multiplied: _____

Justification: _____

_____

ATTACHMENT II

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

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

Other justification: _____

_____

_____

_____

_____

_____ _____

Date
Director

Director of District Management or Division