THE 2007 CIVIL PENALTY POLICY OF THE FLORIDA, DEPARTMENT OF ENVIRONMENTAL PROTECTION

OUT WITH THE OLD, IN WITH THE OLD

On July 18, 2007, the Florida, Department of Environmental Protection (FDEP) issued a press release in which Secretary Michael W. Sole announced the adoption of new penalty guidelines[1] (Guidelines) to be used by the FDEP in civil and administrative cases.[2] In the announcement, Secretary Sole is quoted as saying:

> "The changes to DEP's guidelines provide a stronger deterrent for the most egregious violations, ultimately reducing the number of significant infractions that occur," said DEP Secretary Sole. "I want to change the idea that 'penalties are a cost of doing business' by emphasizing the agency's tough stance against violators."

One week later, on July 24, 2007, Secretary Sole, in a letter to the *Tallahassee Democrat*, stated that "Underscoring a commitment to protecting Florida's environment, the updates will result in stiffer penalties for the most serious environmental violations and highlight the leadership of Gov. Charlie Crist in protecting our natural resources."[3] In the letter he also stated that "The updates to the penalty guidelines - which take effect immediately - address violations not covered under ELRA, specifically those significant infractions resulting in fines of $10,000 or more. The stiffer penalties could apply to about 10 percent of enforcement actions taken by the agency but represent between 50 percent and 75 percent of the total penalty amounts assessed by DEP for major

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[1] The penalty guidelines may be found at the FDEP website.
http://www.dep.state.fl.us/legal/penalty/files/dep_923_civil_penalty_directive.pdf
[2] http://www.dep.state.fl.us/secretary/news/2007/07/0718_01.htm
[3] http://www.tallahassee.com/apps/pbcs.dll/article?AID=2007707240308&template=printart

violations." In a story that ran the same day in the *Tallahassee Democrat*[4] we indicated that we welcomed the new guidelines if, in fact, they truly strengthen Florida's enforcement policy.

The question now before us is what the Guidelines really say. What do they say to the people of the State of Florida about the FDEP's new approach to environmental enforcement? And what do they say to the FDEP's front line employees who will be called upon to implement them? Based on our review of the actual policy, it would appear that the new policy has placed the FDEP's employees in an untenable position that gives them little true justification for pursuing tough enforcement in the majority of cases. Accordingly, we do not believe that Floridians can expect significant changes that will work to improve Florida's environment.

A. The Legal Framework Within Which The FDEP Operates

In order to understand the Guidelines it is important to also understand the enforcement prerogatives that the FDEP possesses. It is likewise important to understand the limitations on the agency's enforcement discretion. As will be more detailed below, FDEP's civil enforcement authority can take one of two avenues. The agency can elect to pursue judicial remedies under §403.121 (1), Fla. Stat. For such causes of action there is no statutory schedule of how to calculate civil penalties. There is, however, a cap of $10,000 per day, per violation. In RCRA[5] cases, the cap is $50,000 per day, per violation.[6]

In addition to judicial remedies the agency can pursue civil penalties via the administrative route. This procedure is found in §403.121(2), et. seq., Fla. Stat. and if the

[4] http://www.tallahassee.com/apps/pbcs.dll/article?AID=2007707240327
[5] Resource Conservation and Recovery Act
[6] §376.16(1), Fla. Stat.

agency elects to utilize this procedure it is obligated to follow the civil penalty schedule contained therein. This administrative approach is known as the ELRA, the Environmental Litigation Reform Act. It was adopted in 2001. The intent of the ELRA was to standardize civil penalty assessment across the state. This means that for certain violations, if the FDEP intends to proceed administratively, the agency is obligated to use the schedule and thereby arrive at the base civil penalty assessment. And, if the assessment is less than $10,000 the FDEP has administrative authority to levy the penalty without the necessity of filing a complaint in civil circuit court.

The ELRA also contains a schedule for increasing penalties for repeat offenders. §403.121(7), Fla. Stat. And, the FDEP is required, under the ELRA, to recover the economic benefits enjoyed by the offender, with limitations. §403.121(8), Fla. Stat. All discretion is not removed under the ELRA, but there is no question that it has created a schedule that affords would-be polluters the luxury of knowing what fines are likely to be imposed if they violate Florida's environmental laws.

The ELRA administrative schedule does not apply to hazardous wastes, asbestos, or underground injection cases. §403.121(3), Fla. Stat. Thus, these cases are left to proceed under judicial process.

This dual situation in the Florida statutes creates another alternative for the FDEP for those situations in which the FDEP applies the ELRA schedules and the resulting civil penalty exceeds $10,000.00. In such situations the FDEP cannot proceed administratively. §403.121(2)(b), Fla. Stat. Instead, the agency has two options: either agree to cap the penalties at $10,000 or proceed judicially.

Given the dual routes that the agency can follow in cases involving civil penalties exceeding $10,000 the Guidelines necessarily address the vast majority of civil penalty cases that are brought by the FDEP. They are therefore not limited to non-ELRA matters.

B. The Applicability Of The New Guidelines

The reader should understand that the FDEP has continuously operated with guidelines that serve to show the staff how to calculate civil penalties. The newly adopted Guidelines replace existing guidelines issued on January 24, 2002, by then Secretary David Struhs. Thus, it is not as if this is a new concept within the FDEP. Indeed, when the two sets of guidelines are compared side-by-side it is readily seen that what has taken place is that the FDEP has (with the exception of penalty matrices and multi-day penalties) simply restated, usually verbatim, the guidelines put in place by former Secretary Struhs.

The Guidelines, which are otherwise called Program Directive 923, begin with directory language. "**These guidelines should be used in settling both administrative and judicial enforcement actions brought against persons violating Department statutes or rules.**" (Emphasis added) Therefore, the implication is that to the extent that there is a conflict between individual program guidelines and the Guidelines issued by the Secretary, the program guidelines would be superseded.

The agency takes the position that the guidelines are essentially a policy matter and thus, not subject to the more rigorous standards that would be required if they were adopted as formal rules. Thus, the agency has more discretion in how it arrives at penalties to be imposed. Indeed, the Guidelines state that: "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." (Guidelines @ 1, page 1) Adherence to the Guidelines is therefore not legally required. Indeed, legal enforcement documents are not to refer to them. (Guidelines @ 3, page 1) But it is nevertheless expected that they be followed by the employees. The Guidelines state that: "[i]n 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." (Guidelines @ 3., page 2)

An important point for the reader to understand is that, as indicated above, the civil penalty assessments reached by virtue of applying these guidelines are the starting point in the assessment process. Just because the agency arrives at a figure to be assessed does not mean that this is the figure paid by the polluter. It is axiomatic that the assessments will only drop in negotiation.

Section 4 of the Guidelines addresses how they are to apply to specific program areas. In other words, how they apply to programs such as air, wastewater, dredge and fill etc. The Guidelines specifically state that they are to apply to all program areas except for Beaches and Coastal Systems, State Lands, and programs that are pre-empted by federal law or interagency agreements. The Guidelines also continue the 2002 FDEP guidance which states that:

> "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."

(Guidelines @ 4, page 3) The above guidance therefore indicates that the allegedly stricter Guidelines should be used with more specific program guidelines in those cases in which the FDEP is seeking civil penalties that exceed $10,000 or non-ELRA programs, i.e. RCRA, Asbestos, UIC (Underground Injection) and Beaches and Coastal Systems programs.

C. The Impact Of The Guidelines

The Guidelines provide for 3 separate scenarios in enforcement.

- First, there are the cases that are not covered at all under the ELRA, i.e. hazardous wastes, asbestos, or underground injection cases. For those cases, the Guidelines apply program specific guidelines, and then the Guideline requirements, e.g. penalty matrices, multi-day penalties and economic benefit assessments, are factored into the overall assessment. (Guidelines @ 5.A., Page 3)
- Second, there are cases that fall solely under the ELRA. For those cases the ELRA schedule controls the basic penalty. However, adjustment factors are also allowed by statute. (Guidelines @ 5.B., Pages 2-3) The Guidelines deviate from § 403.121, Fla. Stat. in one notable area, however. The recovery of economic benefits. §403.121(8), Fla. Stat., states that:

> "(8) The direct economic benefit gained by the violator from the violation, where consideration of economic benefit is provided by Florida law or required by federal law as part of a federally delegated or approved program, **shall be added to the scheduled administrative penalty**. The total administrative penalty, including any economic benefit added to the scheduled administrative penalty, shall not exceed $10,000."

(Emphasis added) By contrast, the Guidelines, at Section 5, Para. 4. state that upward adjustments to a civil penalty assessment can be made as such: "[u]pward 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." (Emphasis added) Thus, the Guidelines would give the FDEP discretion in assessing economic benefit penalties where the Florida Legislature has said that no discretion should exist.

- Third, there are cases involving programs covered by the ELRA, but which exceed the $10,000 threshold using the ELRA schedules. For those cases the program specific guidelines apply in characterizing the violation; however, the penalty matrices issued with the Guidelines govern the penalty amount. (Guidelines @ 5.C., Page 4)

1. <u>The Penalty Calculation and Matrix</u>

For cases in which the civil penalty exceeds $10,000 or the ELRA does not apply to the program area in question, the FDEP must use what is known as a penalty matrix. Simply stated, the matrix requires the employee to first categorize the violation according to the potential for environmental harm and according to the extent to which the polluter deviated from a statutory or regulatory requirement. (Guideline @ 6., page 4) Once these decisions are made, the results are applied to a penalty matrix in order to determine the penalty amount.

<u>For non-RCRA cases the penalty matrix that the Guidelines prescribe do not change civil penalty assessments from the previous guidelines, except for minor changes in those situations in which the potential for harm his minor and the extent of deviation is either moderate or minor</u>. Given that these matrices are to be used whenever the civil penalty assessment exceeds $10,000 the practical effect of the changes is de minimis.

For RCRA cases the penalty matrix is markedly different. In both hazardous substance and hazardous waste cases the new matrix more than doubles the penalty assessment. However, hazardous substance cases have 3 pre-requisites in order to qualify for the stiffer penalties:

- "The violation creates an imminent hazard…"
- The discharge must be defined as a hazardous substance under federal law.
- Air releases only qualify if they are released or discharged to the ground, surface water or ground water.

Finally, in cases involving injury or death, or intentional conduct the matrix for hazardous waste prescribes the statutory maximum penalty of $50,000 per day.

Thus, so far as the penalty matrices themselves are concerned the significant changes brought about by the Guidelines affect predominately RCRA cases. Other program areas are essentially unchanged with respect to the matrices amounts. However, a new statement in the Guidelines does state that:

> "If it is determined that the violations were knowing, deliberate or chronic violations, penalties should be calculated by using the top of the ranges. The district staff may calculate penalties at the top of the ranges for any business or individual for any violation if the seriousness of the violation or the history of non-compliance requires a higher penalty to achieve deterrence."

(Guideline @ 6, page 6) This directive would appear to apply across the board to all program areas.

While the language involving intentionality sounds positive, it should be noted that the existing guidelines already allowed for an upward adjustment of penalty assessments when there is a history of non-compliance, or for other unique circumstances. Thus, the practical effect of this language would seem to be negligible.

Overall, the changes in the penalty matrices are a mixed bag. The Secretary, in his letter to the *Tallahassee Democrat*, stated:

> "I had 16 years with DEP before being tapped to lead this agency, and I know the penalties have not always been a deterrent. It is time to take the next step. Taxpayers do not want a Florida where penalties are 'just the cost of doing business.'"

It would seem that if the desire is to create an atmosphere in which penalties are not "just the cost of doing business" the response would be:

- to reform <u>all</u> of the penalty matrices, not just those that apply to RCRA.
- To significantly increase the penalty matrices for violations of dredge and fill laws, thus cracking down on developers—a problem well documented over the past years.
- To significantly increase the penalty matrices for violations of industrial wastewater laws, e.g. NPDES, in order to help bring about effective cleanup of Florida's waterways

The bottom line is that with the exception of RCRA cases, it is fairly clear that for all intents and purposes, it is business as usual in Florida.

2. <u>Multi-Day Penalties</u>

a. *Statutory Considerations*

§403.121(1)(b), Fla. Stat., states that when considering judicial remedies:

> "(b) The department may institute a civil action in a court of competent jurisdiction to impose and to recover a civil penalty for each violation in an amount of not more than $10,000 per offense. However, the court may receive evidence in mitigation. **Each day during any portion of which such violation occurs constitutes a separate offense."**

(Emphasis added) The concept is relatively straightforward. If someone, for example, discharges pollutants into a waterbody in violation of their permit (or without a permit) each day that the discharge continues constitutes a separate offense for which the penalty could be assessed at a rate of as much as $10,000 per day.

The ELRA, which applies to administrative penalty assessments, continues this concept in §403.121(6), Fla. Stat.:

> "(6) For each additional day during which a violation occurs, the administrative penalties in subsection (3), subsection (4), and subsection (5) may be assessed per day per violation."

b. *The Guidelines*

The FDEP's written policy of assessing multi-day penalties is essentially in line with the statutory requirements. But the problem historically has not been with the written policy; rather, the issue has been the FDEP's reluctance to actually apply the policy. Indeed, in its July 18, 2007, press release, the agency admitted, that "[a]lthough the current guidelines allow for assessment of the full penalty matrix amount for each day violations occur, that option is rarely used." The reluctance has been rooted in the concern that the higher penalties resulting from imposition of multi-day penalties would only be obtained through litigation. In other words, the polluters would not agree to them, thus requiring the filing of lawsuits in circuit court or, of late, by administrative proceedings. The practical usage of the enforcement tool has therefore not been particularly high.

Secretary Sole, in his letter to the *Tallahassee Democrat* described the FDEP's new penalty policy insofar as it changed the manner in which the FDEP assesses multi-day penalties. He stated:

> "Under the previous penalty guidelines, most multiday penalties utilized the full amount only for the first day; a 30-day violation with a $10,000 maximum penalty per day might

> have resulted in a $39,000 fine. Under the new guidelines, the recommended penalty would be $10,000 a day for 30 days, for a total of $300,000 - an increase of nearly 770 percent."

He is certainly correct that the FDEP's written policy has been changed in this area. We would add that under the 2004 penalty policy multi-day penalties would be utilized only where the ongoing violation was egregious. The new policy theoretically qualifies all violations, a positive step.

3. Adjustment Factors

The FDEP's Guidelines offer the inspectors the opportunity to apply what is known as adjustment factors after the basic penalty is calculated.[7] Essentially these are factors that are used in situations in which the polluter has shown good or bad faith before or during the enforcement process. The amount by which the penalty assessment is modified is largely subjective once the decision is made that an adjustment factor applies. These factors can be used to reduce a penalty "to zero or increased up to the statutory maximum per day allowed for the particular violation." (Guidelines @ 8., page 8)

The Guidelines issued by the FDEP on July 17, 2007, contain no changes from the previous version issued on January 24, 2002, with the exception of the area known as Economic Benefit of Non-Compliance.

It bears mentioning that the FDEP still considers an example of a good faith effort to comply (a characterization that would allow a downward adjustment of the penalty) as a situation in which the polluter maintains that it had trained, educated or informed its employees of how to comply with Florida's environmental laws, but that the violation(s) was/were nevertheless caused by its employees. (Guidelines @ 8.a, page 9) Thus, any

[7] This is a mechanism that has been used by the FDEP for years, thus it is not new with the issuance of these Guidelines.

corporate polluter can recognize a reduction in the penalty by simply showing that one of its employees committed the violation and that the employee had, at one time or another, attended a seminar on environmental compliance. The continued inclusion of this adjustment factor in the Guidelines is an open invitation to reduce civil penalties on corporate polluters.

4. Economic Benefit of Non-Compliance

This is an area that received a lot of attention in FDEP's announcement of the new penalty policy. The concept is simple. If a polluter reaps an economic benefit from violating Florida's environmental laws the agency seeks, in theory, to recover the ill-gotten monies. Procedurally, in order to identify the economic benefits the FDEP obtains financial documents from the polluter and then analyzes them to determine whether gains can be attributable to the violations. If so, these gains can be added to the calculated penalty up to the statutory maximum allowed.

Once again, the FDEP admitted in its July 18, 2007, press release that the policy of recovering economic benefits is not new. In fact, it is a policy that simply has not been used. Just as when it addressed the use of multi-day penalties, the agency's press release stated that, "[a]lthough the current guidelines allow DEP to calculate and factor in the economic benefit for any violation, that option is rarely used." The agency's announcement of the policy went on, however, and argued that, "This change [in the Guidelines] will require DEP to include economic benefit in all penalty calculations when it can be practically determined, and to establish guidance to help in that determination." This is a sweeping statement that alleges that the employees are required to consider economic benefits. It is not only sweeping, it is also false.

The operative language guiding the employees in the efforts to recover economic benefits is found in the following instruction with respect to non-ELRA cases: "Therefore,

economic benefits that are not de minimus should be included in all penalty calculations up to the amount allowed by the applicable statutory per day penalty cap." (Guidelines, Economic Benefit of Non-Compliance, Page 12) This language is unchanged from the previous guidelines which, the agency apparently now considers, were not a mandatory requirement with respect to collecting economic benefits.

When it comes to non-ELRA cases, the Guidelines provide that:

> "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."

(Guidelines, Economic Benefit of Non-Compliance, Page 12) This language is word for word identical to the guidelines in effect at the FDEP since 2004.[8]

So, what are the actual changes to the written policy? Largely, the section dealing with this topic is verbatim the same as the previous policy. The only change of significance is to consider recovery of economic benefits for revenue gained, not just increased profits. (Guidelines, Economic Benefit of Non-Compliance, Pages 10 and 11) Otherwise, the only change is to provide an example to the employees of how to calculate economic benefits.

5. In-Kind Penalties

In-kind penalties are used by the FDEP in order to allow the polluter an opportunity to pay the civil penalty by means of undertaking certain specified projects such as restoration

[8] However, in a previous (and new) paragraph that also deals with economic benefits the Guidelines now include a curious statement not found in the previously governing guidelines. They now state that "[o]ther than in ELRA cases, the statute does not specifically authorize the recovery of economic benefits gained by the violator." (Guidelines, Economic Benefit of Non-Compliance, Page 11) This statement then goes on to set forth the FDEP's rationale for seeking to recover such benefits. Why the FDEP found it necessary to include such a statement questioning its authority is unclear.

activities, educational programs, donation of land etc. The in-kind project can be used as a complete offset of the civil penalty assessment; however, the project must be at least 1.5 times the amount of the civil penalty. (Guidelines, 9. In-Kind Penalties, Page 14)

The Guidelines do not change existing FDEP policy in this regard. They are the same as the old guidelines.

6. Pollution Prevention Credits

Pollution prevention credits typically work as a dollar for dollar offset of the assessed civil penalty. They allow the polluter to undertake pollution reducing improvements to the polluter's facility, thereby resulting in a cleaner functioning operation. They generally involve source reduction, waste minimization and/or on-site recycling. Guidelines, 10. Pollution Prevention Credits, Pages 15-19)

The Guidelines do not change existing FDEP policy in this regard. They are the same as the old guidelines.

7. Administration Review

The Guidelines provide that in cases (1) exceeding 25,000 ($50,000 for RCRA cases), (2) in-kind proposals with $10,000 or greater civil penalties, and (3) cases identified by districts or upper administration officials, settlement review must be obtained from the Office of General Counsel.

The Guidelines do not change existing FDEP policy in this regard. They are the same as the old guidelines, with the exception of the OGC official given the responsibility for the review.

8. General Review Procedures

The review procedures for such things as consent orders, as well as the completion of penalty computation worksheets are unchanged from the previous guidelines.

The Guidelines direct that the new penalty matrices attached to the Guidelines are to be used in civil penalty calculations.

D. Overall Evaluation Of The New Guidelines

1. How Many Cases Are Affected?

Since the Secretary has indicated that the Guidelines are directed towards major cases, one question that needs to be addressed is how many non-ELRA cases will have penalty assessments that exceed $10,000 and would therefore be expected to be affected by this policy. In order to address this question we consider the FDEP's history in assessing civil penalties. As our report on the FDEP's 2006 performance demonstrates, on average, civil penalty assessments in the key program areas do not exceed the $10,000 threshold. The numbers that we reported were derived from the FDEP's own enforcement data and detailed calendar years 2005 and 2006. In that report we stated that:

"The key program areas also saw average dollars assessed on a per case basis as follows:

Program Area	**2005 Averages**	**2006 Averages**	**Historical Averages**

Asbestos	$5,502.31	**$2,920.59**	$10,025.25
Air (Excluding Asbestos)	$3,346.15	$14,140.44	6,227.09
Beaches/Coastal	$366.67	4,195.00	786.63
Waste Cleanup	0.00	$101,500.00	25,940.05
Dredge & Fill	$2,588.373[9]	$3,536.35	3,287.42
Domestic Waste	$8,868.50	$36,657.73	10,751.37
Hazardous Waste	$8,803.31	**$7,556.85**	15,986.22
Industrial Waste	$5,115.48	$5,973.66	19,506.60
Potable Water	$1,286.95	**$1,257.90**	1,379.30
Stormwater Runoff	$2,015.88	**$1,337.14**	5,768.34
Solid Waste	$9,832.73	$25,641.67	6,867.80
Tanks	$6,121.18	**$5,384.75**	4,934.64
Underground Injection Control	$18,413.60	$162,410.00	9,755.91

In other words, most program areas have average assessments less than $10,000. And those that exceeded that threshold typically did so because of a few very large assessments in 2006.

Do the above figures mean that no cases in the dredge and fill category, for example, will qualify under the Guidelines? No. **What it does mean, however, is that the Guidelines will have little practical effect upon the FDEP's enforcement policies in all but a few cases, assuming that in the lesser cases the FDEP elects to pursue administrative remedies under the ELRA.** In fact, applying the Guidelines to the situation in calendar

[9] This includes Environmental Resource Permitting.

years 2004-2006 for the major program areas[10] the following table shows the number of cases that would have been affected:

PROGRAM AREA	**2004**	**2005**	**2006**
Air	8	13	17
Dredge and Fill (Including ERP)	2	7	12
Domestic Waste	20	21	132
Industrial Waste	6	3	6
Stormwater	1	3	1
Solid Waste	7	14	17
Tanks	12	21	19
ANNUAL TOTALS	**56**	**82**	**204**

Thus, in 2006, which saw the greatest number of large assessments of the 3 above-cited years, out of 1252 civil penalty assessments, 204 that were assessed (16% of the total) would have qualified for application of the new guidelines.[11]

2. A Restatement Of Old Guidelines

As we indicated at the beginning of this report, a careful review of the Guidelines shows that they are in large part a restatement of guidelines already existing at the time that Secretary Sole assumed leadership over the FDEP. For example, the applicability of the Guidelines, much of the penalty calculation instructions, the matrices for most ELRA violations, in-kind penalties, pollution prevention credits and review authority are all

[10] Excluding non-ELRA eligible programs such as RCRA.
[11] Considering only programs covered by the ELRA.

practically identical to the former guidelines. Indeed, they existed while he was the Deputy Secretary over Regulatory Programs, a position that oversaw the FDEP's enforcement policies and their usage.

Have there been changes? Yes. But it would be wise to consider that the changes in upward penalty assessments are predominately found in one program area, RCRA. The matrices for the ELRA programs are largely unchanged. And while the FDEP is keen on saying that the new policy is aimed at the worst of the worst, i.e. intentional misconduct, the fact is that the old guidelines allowed for the same pressure to be applied. Those stiff guidelines were hardly imposed with regularity. They were all but ignored.

The FDEP is maintaining that it is going to be tougher because of the new method of calculating multi-day penalties. This will be laudable if it actually takes place. What causes justifiable skepticism is the simple fact that the FDEP, by its own admission, has hardly ever used multi-day penalties in the past—even though the guidelines, as they existed at the time, also stated that the FDEP's policy was to assess multi-day penalties. The question must be asked: if the FDEP was unable to assess multi-day penalties under a policy that would have resulted in lower penalty assessments, thus making case resolution easier, how does the agency expect to increase their usage when they will allegedly be higher? Does the agency expect polluters to willingly agree to pay the increased penalties?

Another point of emphasis for the FDEP's leadership is the use of economic benefit recovery. In the first place, a side-by-side review of the old and new policies shows that, in fact, there is no new or stronger language ordering the staff to include such recoveries in the overall penalty assessments. The FDEP's announcement of the "new" penalty policy unquestionably mischaracterized the new policy in this area. And to make matters worse, the Guidelines still fail to acknowledge §403.121(8), Fla. Stat., which requires the FDEP to collect such benefits in ELRA cases. Again, we are left with the question, if the FDEP was

rarely collecting such benefits under the old guidelines, and those guidelines are almost word-for-word the same as the new Guidelines, why should the public believe that the policy has changed? Equally important, why should the staff believe that the policies have changed when the Guidelines contain the same wording? Does the word "should" mean something different now than it did when Secretary Sole assumed the position of Secretary?

As we mentioned above, this "new" policy also maintains in effect a guideline that allows the FDEP to reduce penalty assessments for corporate polluters who tell the agency that they have given their employees environmental training. While no one would argue that such training is appropriate, the fact is that corporations in particular should be expected to know the environmental laws if they operate in areas that impact upon the environment. To give them a penalty reduction because they have simply done what any responsible citizen would be expected to do as a matter of course, is nothing less than pandering to such polluters. It is hardly indicative of a tough new age in environmental protection.

3. Budget Issues

The other very practical aspect of this new policy is whether the FDEP is in a position financially to be able to implement it. While the Secretary maintains that there will be no personnel cuts vis-à-vis "essential personnel" the fact is that the FDEP's budget situation, by his own notice to FDEP employees, is serious. One can only guess at how the new policy will be implemented with fewer support staff, tighter travel restrictions, and less training of FDEP employees.

The concern that we have is how the FDEP expects to collect the higher penalty assessments achieved through calculating multi-day penalties, economic benefit recoveries, etc. without utilizing the courts through litigation—a process that top administration officials have previously decried. If the past is any guide it is clear that polluters will not be

predisposed to voluntarily paying even modest increases in penalty assessments, much less the significantly increased amounts that the Secretary suggests will be levied. Litigation costs are expensive and the process is time intensive. In a year in which budget dollars are hard to find, it is doubtful that the public will see the amount of litigation needed to bring about the changes that signal an environmental agency willing to strictly enforce Florida's laws.

4. Recommendations

a. *Non-ELRA Programs Need To Be Strengthened*

While it is wise to pursue intentional and repeated misconduct in RCRA cases, we suggest that another means of encouraging compliance would be to raise, where possible, the civil penalty assessments for the other offenses—particularly offenses related to dredge and fill operations and NPDES discharges. Such an approach would send a strong signal to developers and corporate polluters that, indeed, it is not business as usual in Florida. We see little in the Guidelines to effectively deal with those two program areas.

b. *The ELRA*

There is a disconnect in the logic now voiced by the agency when it comes to the ELRA and the corresponding need for the changes to the FDEP's penalty policy. As Secretary Sole stated in his letter to the *Tallahassee Democrat*:

> "Utilized for nearly three decades, DEP's penalty guidelines provide direction to calculate fines for violations of our environmental protection statutes and rules. In 2001, the Legislature passed the Environmental Litigation Reform Act to outline a clear and efficient process to address less significant violations, which represent about 90 percent of enforcement cases. ELRA has successfully decreased the average time it takes DEP to resolve less significant cases - from two years to four months - and has provided a more efficient basis for negotiating settlements."

The ELRA was passed by the Legislature in order to avoid the necessity of litigation, among other things. As such, the Secretary praises it as being effective. On the other hand, the Secretary now claims that after 16 years with the FDEP he has realized that penalties have become too predictable and are seen as the cost of doing business. If his latter point is accurate (and we agree that it is) then why would there not be efforts to significantly overhaul the ELRA? After all, the ELRA is the epitome of predictable fines, thus allowing businesses to factor into their business plan the payment of such costs.

The FDEP's assessment authority is limited under ELRA. **That being said, if the intent of the agency is to stiffen its enforcement policies, we would also expect to see a legislative agenda being proposed that would increase the scheduled penalties under the statute and that would make the penalty amounts less predictable.** These increases are long overdue.

c. *Accountability*

The simple fact is that two very important aspects of the Guidelines have been heralded as creating essentially sweeping changes when, in fact, the language is largely unchanged from the previous guidelines. In discussing the assessment of multi-day penalties and recovery of economic benefits we pointed out that by the FDEP's own admission these two aspects of the penalty policy have heretofore existed but have been rarely used. The question is, why not? The answer, we dare say, is that there has been no support for the employees from upper management. With no change in the operative language in these two sections the employees are left with mixed signals. Mixed signals ultimately results in a lack of enforcement.

We would strongly suggest that the wording in these sections leave no doubt that in <u>every applicable case</u> multi-day penalties and recovery of economic benefits be factored into

the civil penalty assessment. These amounts must be shown on Part II of the Penalty Computation Worksheet in every case.

More importantly, a downward departure from these initial assessments must be allowed only with the approval of management and there must be a written explanation for the departure. Complete elimination of the factors must only be allowed with the written approval of the District Director. Again, there must be a written explanation for the departure.

In addition, each district should be routinely audited to ensure compliance with the policy. The parties conducting the audit should include enforcement personnel from other districts, not just the Office of Inspector General.

Would these changes fully rectify the problem? It is doubtful. However, what they would do is (1) remove the initial burden from the employees by letting them know that these calculations must be performed and included on the worksheet, (2) remove the possibility of employees being punished for seeking strong enforcement, (3) allow the public to know who in the chain of command is ultimately responsible for weakening agency's enforcement in any given case.

We are frankly sad to have to propose such measures. We want to stress that we do not believe that the problem lies with the staff who has to enforce Florida's laws on a daily basis in the field. The problem clearly lies with middle and upper management not giving support to the employees. Something is seriously wrong when entire sections of the enforcement policies of the FDEP are routinely ignored. Rather than simply acknowledging the non-use of these factors and then not changing the language that has been ignored for many years, we would have thought and expected that affirmative steps would have been taken to ensure compliance in the future.

How can the public expect environmental compliance by regulated parties when the agency charged with their oversight does not comply with their own policies?

d. *Intentional Violations*

The FDEP likewise claims that it is being tough on polluters who intentionally and repeatedly violate Florida's environmental laws. It is true that another paragraph has been inserted in the Guidelines directed at this issue. But the public needs to understand that the following provisions are found under §403.161, Fla. Stat.:

> **(1) It shall be a violation of this chapter, and it shall be prohibited for any person:**
>
> **(a) To cause pollution, except as otherwise provided in this chapter, so as to harm or injure human health or welfare, animal, plant, or aquatic life or property.**
>
> (b) To fail to obtain any permit required by this chapter or by rule or regulation, or to violate or fail to comply with any rule, regulation, order, permit, or certification adopted or issued by the department pursuant to its lawful authority.
>
> (c) To knowingly make any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter, or to falsify, tamper with, or knowingly render inaccurate any monitoring device or method required to be maintained under this chapter or by any permit, rule, regulation, or order issued under this chapter.
>
> (d) For any person who owns or operates a facility to fail to report to the representative of the department, as established by department rule, within one working day of discovery of a release of hazardous substances from the facility if the owner or operator is required to report the release to the United States Environmental Protection Agency in accordance with 42 U.S.C. s. 9603.
>
> (2) Whoever commits a violation specified in subsection (1) is liable to the state for any damage caused and for civil penalties as provided in s. 403.141.
>
> (3) **Any person who willfully commits a violation specified in paragraph (1)(a) is guilty of a felony of the third degree punishable as provided in ss. 775.082(3)(d) and 775.083(1)(g) by a fine of not more than $50,000 or by imprisonment for 5 years, or by both, for each offense.** Each day during any portion of which such violation occurs constitutes a separate offense.

> (4) Any person who commits a violation specified in paragraph (1)(a) due to reckless indifference or gross careless disregard is guilty of a misdemeanor of the second degree, punishable as provided in ss. 775.082(4)(b) and 775.083(1)(g) by a fine of not more than $5,000 or by 60 days in jail, or by both, for each offense.
>
> (5) Any person who willfully commits a violation specified in paragraph (1)(b) or paragraph (1)(c) is guilty of a misdemeanor of the first degree punishable as provided in ss. 775.082(4)(a) and 775.083(1)(g) by a fine of not more than $10,000 or by 6 months in jail, or by both for each offense.
>
> **(6) It is the legislative intent that the civil penalties and criminal fines imposed by the court be of such amount as to ensure immediate and continued compliance with this section.**

(Emphasis added) In other words, intentional violations of Florida's environmental laws are most often felonies. The conduct that the agency has described in its announcement of the Guidelines is clearly criminal conduct. If, the FDEP were truly interested in punishing intentional misconduct and repeat offenders they have the ability to seek criminal prosecutions. Yet the agency has thus far been silent on this matter.

The Guidelines are silent on what parameters the staff should look to when considering whether to seek criminal prosecution. Indeed, the Guidelines are entirely silent on criminal prosecution. If the agency is serious about punishing criminal conduct, then include sections in the Guidelines that instruct the employees on how to recognize cases that could and should be prosecuted. These Guidelines are reviewed by polluters and their attorneys across the state. It would send a serious signal to them if they understood that the agency's policy was changing to aggressively seek criminal convictions in such cases.

d. *Conclusion*

Finally, while we realize that this assessment of the Guidelines is hardly the positive analysis that the administration would like to see, it must be understood that for a decade now the public has been repeatedly told that the FDEP is being tough on polluters. The advent of

the ELRA was heralded as a device that would allow streamlined enforcement that would allow the agency to concentrate on the worst offenders. This, in turn, would allegedly serve to increase the level of environmental compliance in Florida. Now, the same people who were in charge of the agency at various levels and who assured the public that the FDEP was protecting Florida's environment, have now stepped forward to announce that the payment of civil penalties has simply become the cost of doing business in Florida. To combat this we see so-called "new" policies that, with some notable exceptions, do little more than restate previous, failed approaches. At the end of the day, it still amounts to a policy of pay to pollute.