

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

UNIFORM ENFORCEMENT POLICY FOR THE OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT

I. GENERAL PURPOSE

This policy describes enforcement procedures for the permitting programs within the South Carolina Department of Health and Environmental Control (Department), office of Ocean and Coastal Resource Management (OCRM). This policy provides uniform procedures for the conduct of enforcement actions and uniform criteria for the assessment of civil penalties.

II. ENFORCEMENT GOALS

Enforcement of South Carolina's coastal laws and regulations is an essential tool for fulfilling OCRM's goal of protecting and enhancing the State's coastal resources by preserving sensitive and fragile areas while promoting responsible development in the eight coastal counties of South Carolina. The coastal enforcement program seeks to achieve one or more of the following objectives:

1. Return a violator to full compliance with applicable statutes and regulations;
2. Act as a penalty and deterrent against future noncompliance;
3. Ensure that enforcement actions are fair, consistent, clearly communicated, documented and defensible; and,
4. Combined with compliance assistance where appropriate, achieve, maintain, and enhance compliance.

III. ENFORCEMENT AND COMPLIANCE

The enforcement program within OCRM utilizes a range of enforcement and compliance tools to address violations and achieve a full return to compliance by a regulated entity. The enforcement response will depend on the nature, type and severity of the violations. By way of illustration, but without limiting the authority of the enforcement program to select an appropriate enforcement response, the following actions may be taken:

1. **Notice of Violation.** The Notice of Violation outlines the Department's findings and identifies the applicable statutes and/or regulations violated. Typically, this document will also include notice of a scheduled enforcement conference. When concerning the Coastal Zone Management Act and applicable regulations, this document may be combined with an Admissions Letter.
2. **Admission Letter.** Under the Critical Area Permitting Regulations, as amended, an admission letter is used to provide a recipient the opportunity to respond to the Department's findings in writing, within 15 days of receipt. Failure to respond shall result in a conclusion by the Department that the findings are true.
3. **Warning Notice.** A Warning Notice is used to notify a responsible party of a violation and to request the party to immediately stop that activity until corrective measures are taken and completed as required.
4. **Warning Letter.** A warning letter may be used to document violations, set forth a time frame for correction, or provide notice that subsequent violations may result in a formal enforcement action. Warning letters may be used for first-time violators with no previous history of noncompliance and where there is minimal or no actual or potential threat to public health or the environment.
5. **Consent Order.** A Consent Order is a legally binding and enforceable document, the terms and conditions of which are agreed upon by both the Department and the responsible party. The signing of a Consent Order waives the responsible party's right to an administrative appeal.
6. **Administrative Order.** An Administrative Order is an order issued without the responsible party's consent. An Administrative Order can be appealed be in accordance with the rules of procedure of the Administrative Law Court.
7. **Consent Agreement.** A Consent Agreement is a legally binding, enforceable document used to establish a compliance schedule with a responsible party who has demonstrated cooperation with the Department in addressing an environmental concern. The signing of a Consent Agreement waives the responsible party's right to an administrative appeal.

IV. CIVIL ENFORCEMENT PROCEDURES

1. When the Department determines an apparent violation of any applicable statute, regulation, standard, or permit and the alleged violation can be adequately documented, the Department will initiate an enforcement response that may include one or more of the enforcement actions described in Section III.

2. If a Notice of Violation is issued, it will specify the alleged violations and identify the associated laws or regulations. The Notice may also require a response within a specified time as to the measures the responsible party must take to address the alleged violations (corrective action). An enforcement conference will be scheduled with the responsible party on a specified date, time, and location to discuss known issues of regulatory concern, the Department's findings, the laws and regulations or permit conditions the Department alleges were violated, corrective actions taken, and any other information pertaining to the enforcement matter.
3. Several outcomes are possible subsequent to participation in an enforcement conference:
 - (a) The Department determines that the alleged violations are not violations and the matter is resolved with no further action required;
 - (b) The violations are properly alleged, but there is justification to resolve the matter without the issuance of an order; in these instances, a consent agreement, warning letter, or other mechanism may be used;
 - (c) The violations are properly alleged, and the Department and the responsible party mutually agree to enter into a Consent Order; or
 - (d) An agreement cannot be reached regarding the violations and the Department determines that an Administrative Order should be issued. An Administrative Order will be forwarded to the party by certified mail or personal delivery. All Administrative Orders shall be forwarded to the Deputy Commissioner (or designee) for signature through the Chief Counsel for the office of Ocean and Coastal Resource Management. An Administrative Order may be appealed pursuant to applicable law, including S.C. Code Title 44, Chapter 1 and Title 1, Chapter 23.
4. Upon a determination that conditions or provisions of a previous order have not been met, the enforcement program, in consultation with the OCRM Chief Counsel, may issue a Notice of Violation and initiate one or more of the following actions:
 - (a) Amend the original order to include a revised schedule of compliance, necessary modifications, and assessment of civil penalties;
 - (b) Issue a new order to include a revised schedule, necessary modifications, and assessment of civil penalties; or
 - (c) Refer the matter to the OCRM Chief Counsel for action as appropriate.

V. CIVIL PENALTY ASSESSMENT GUIDELINES

1. The following guidelines are provided for the administrative assessment of civil penalties that are provided by law for the violation of any statute, regulation, standard, permit, or order. The guidelines are provided for the following general purposes:
 - (a) To provide uniform and objective criteria against which penalties are assessed for violations;
 - (b) To deter future violations;
 - (c) To ensure that penalties are appropriate for the gravity of the violation committed;
 - (d) To eliminate economic incentives for noncompliance; and,
 - (e) To promote fairness and consistency in the assessment of penalties for similar violations.

2. Any one or combination of factors shall be considered in the assessment of civil penalties:
 - (a) Degree of harm or potential for harm to the public health/environment or coastal resources;
 - (b) Extent of deviation from the requirements of the statute, regulation, standard or permit;
 - (c) Frequency or duration of the violation. This may include multiple or multi-day violations;
 - (d) Economic benefit as a result of noncompliance. This may include any evidence of economic advantage gained through noncompliance;
 - (e) Cost of restoration of the environment or abatement of the environmental harm;
 - (f) Past performance record or past history of violation;
 - (g) Degree of willfulness and/or negligence;
 - (h) Any additional pertinent factors that measure the seriousness or frequency of the violation or the conduct of the party.

3. Circumstances may warrant the downward adjustment of a civil penalty. It will be the responsibility of the responsible party to present documentation of mitigating circumstances

that may be considered by staff in setting the amount of the civil penalty. Any one or combination of the following factors may be considered in making a downward adjustment in the amount of a civil penalty:

- (a) The degree of cooperation by the responsible party in remedying the violation or resolving the problem;
 - (b) Any measures taken to avoid repetition of the violation. However, no downward adjustment should be made for measures taken for the sole purpose of coming into regulatory compliance;
 - (c) Good faith efforts to comply with requirements. However, no downward adjustment should be made for good faith efforts consisting solely of coming into regulatory compliance;
 - (d) Ability to pay. If the responsible party makes a claim of inability to pay, the responsible party must present the necessary complete financial information to enforcement staff to make this determination;
 - (e) Waiver or reduction of the penalty pursuant to the Small Business Regulatory Flexibility Act of 2004, as amended. However, the responsible party must qualify as a "small business" as defined by the Act and the Department must determine that the criteria of Section 1-23-290(E) have been met;
 - (f) Other pertinent factors.
4. The OCRM Civil Penalty Assessment Guideline will be used in the development of every civil penalty. This will promote consistency in assessed civil penalties.
5. The following guidelines are provided for those instances where the Department has determined that the violations are considered repeat violations. "Repeat violations," for the purposes of this guidance, are those violations that are similar or are related to violations that were addressed in a previous enforcement action involving the same party, facility, or site.

STEP 1 Determine the total number of alleged violations incurred and the period of time during which they occurred. Confirm all the pertinent facts.

STEP 2 Calculate the **statutory maximum** penalty amount.

Statutory Maximum Penalty = Number of violations x Days of violation x Statutory maximum penalties per violation per day of violation as set forth in the applicable Act.

[NOTE: This amount is calculated only to determine the potential maximum penalty liability. The total civil penalty settlement amount cannot, by law, exceed this amount.]

STEP 3 Calculate the violation “**gravity component**” using the program-specific penalty determination methodology, i.e., established procedures using penalty matrices, case peer review, etc.

STEP 4 Multiply the gravity component by .5 to 1.0 (50%-100%) to derive a “**violation recurrence component**” for a repeat violation within a three (3) year period.

Third or subsequent repeat violation(s): Multiply the gravity component by 1.0 to 3.0 (100%-300%) for a third or subsequent repeat violation within a five (5) year period.

STEP 5 Multiply the gravity component by zero to 1.5 (0%-150%) to derive a “**recalcitrance component.**”

[NOTE: The penalty may be adjusted upward to address the documented demonstration of uncooperativeness, i.e., unjustified delays in preventing, correcting, or mitigating violations, violations of previous orders, failure to provide timely or complete information, etc.]

[SECOND NOTE: If this component was considered as part of the process used to calculate the gravity component, enter zero.]

STEP 6 Determine appropriate “**adjustments**” to the civil penalty, i.e., 1) economic benefit, 2) other pertinent, mitigating factors associated with the recurrence of the violation(s), or 3) program-specific adjustment amounts.

In summary, the calculation for the total civil penalty amount for repeat violations is based upon the following formula:

$$\text{Civil Penalty} = \text{Gravity Component} + \text{Violation Recurrence Component} + \text{Recalcitrance Component} \pm \text{Adjustments.}$$

6. Those entities that have been evaluated as having repeat violations should also be considered on a multi-media basis and/or on a corporate-wide basis. Those situations of noncompliance that are determined to be multi-media and/or corporate-wide, including those violations that have caused environmental harm or are a threat to the public’s health, should be referred to the Deputy Commissioner for OCRM. The Deputy Commissioner may conduct a conference with appropriate representatives of the entity. If the Deputy Commissioner in consultation with the Commissioner determines that sanctions other than further orders are required

Department staff will initiate the appropriate actions to include but not be limited to preparation of an order to revoke some or all permits held by the entity, preparation of an order requiring cessation of operations, or initiation of a court action seeking specific relief.

7. A civil penalty assessment rationale will be developed for each enforcement action for which a civil penalty is assessed. Penalty calculations shall be retained according to established guidance.
8. If a responsible party is found to meet the criteria pursuant to Section 48-57-100(B) of the Environmental Audit Privilege and Voluntary Disclosure Act, as amended, the Department may waive any associated penalties.
9. Nothing contained herein shall be construed to limit the authority of the Commissioner or Deputy Commissioner to take necessary action.

VI. GENERAL PROVISIONS

1. Where a condition exists or a violation has occurred which may result in a serious risk to the health and safety of persons or the environment, the Department may take appropriate action as authorized by statute or regulation to address the problem.
2. This policy does not preclude the use of criminal sanctions in appropriate circumstances. Procedures for the referral of enforcement matters for criminal investigation and prosecution will be undertaken pursuant to applicable statute and regulations.
3. Reports of Consent and Administrative Orders shall be made to the Board as requested.
4. The procedures set out in this policy are intended as guidance for OCRM staff. They are not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any party involved in enforcement proceedings or matters of litigation with the Department. The Department reserves the right to act in variance with this policy.

Policy Approved by DHEC Board on: September 11, 2008