

**OGC-11 – ORDER ON CONSENT  
ENFORCEMENT POLICY**

New York State Department of Environmental Conservation

**DEC Program Policy**

**Issuing Authority:** Thomas S. Berkman

**Title:** Order on Consent Enforcement Policy

**Date Issued:** February 27, 2020

**Latest Date Revised:** August 28, 1990

**I. Applicability**

This Policy applies to all administrative settlements of the New York State Department of Environmental Conservation’s (“Department” or “DEC”) enforcement actions except for Orders on Consent entered into by the Division of Law Enforcement (“DLE”). The policies and procedures set forth in this document are intended solely for the use and guidance of DEC personnel. They are not intended to create any substantive or procedural rights enforceable by any party in administrative or judicial actions with DEC or the State of New York. DEC reserves the right to act at variance with these policies and procedures at its discretion.

This Policy provides detailed guidance to Department staff on when Orders on Consent are required and the content of such Orders.<sup>1</sup> This Policy is intended to explain necessary elements of an Order on Consent and certain elements that may be added to Orders on Consent in order to meet program goals and objectives. Implementation of this Policy will promote consistency throughout the Department.

The threshold decision as to whether to proceed administratively, civilly, or criminally in an enforcement action should be made independent of this Policy.

**II. Authority for Orders on Consent**

ECL Articles 3 and 71, and the State Administrative Procedures Act (“SAPA”) empower and authorize the DEC Commissioner (and his/her designees) to issue Orders on Consent to resolve violations of statutes, regulations, permits, existing Orders on

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<sup>1</sup> Orders on Consent which solely address the investigation or remediation of sites pursuant to Environmental Conservation Law (“ECL”) Article 27, Title 9 [corrective action]; Article 27, Title 13 [inactive hazardous waste disposal sites]; or natural resource damages are remedial and/or compensatory in nature, rather than strictly enforcement-oriented, and, therefore, are not subject to many of the requirements of this Policy. Requirements for such Orders on Consent are discussed in Section V, paragraphs C. and D., below, and in statutes, regulations, policy, and/or guidance applicable to these specified program areas.

Consent and Commissioner Orders After Hearing.<sup>2</sup> Within an Order on Consent, the Commissioner is authorized to, among other things, assess penalties, require corrective or remedial actions, provide for mitigation, recover damages, and modify, suspend, or revoke permits. With certain exceptions, most notably summary abatement orders and emergency orders (see, *e.g.*, ECL §§ 23-0305[3] and 71-1719), Orders on Consent can only be entered into after DEC has provided a Respondent with notice of the alleged violations and an opportunity to be heard and that Respondent has waived its right to a hearing.

### III. Background<sup>3</sup>

Orders on Consent are settlement documents and are legally enforceable and binding under the law, pursuant to various provisions of ECL Article 71, and the Navigation Law, as well as other legal authorities. Department policy discourages resolution of violations by informal agreements and commitments made to the Department by a violator because informal agreements are typically not enforceable.<sup>4</sup>

An Order on Consent, governed by provisions of applicable State and federal law, constitutes ongoing enforcement until a Respondent's obligations under the Order on Consent have been fully satisfied and the Order on Consent terminates.

### IV. Policy

Orders on Consent are an effective way of resolving violations of law or regulation. They avoid time consuming and resource intensive administrative hearings and/or civil litigation. Generally, Orders on Consent can be categorized as either Long Form Orders on Consent or Short Form Orders on Consent. Long Form Orders on Consent are those that are initiated and negotiated through the Office of General Counsel ("OGC"). Short Form Orders on Consent have a format which has been pre-approved by OGC for a specific program or enforcement issue and are typically utilized by program staff.

Orders on Consent should not be utilized where a minor violation can be corrected within a short period of time unless an applicable program-specific Enforcement Guidance Memorandum provides otherwise. "Minor violations" are described in program-specific guidance. In general, "Minor Violations" mean violations which do not: (i) warrant more than a *de minimis* penalty under applicable Departmental penalty guidance; (ii) require lengthy or extensive remediation; or (iii) compromise statutory objectives.

The Department will only agree to an Order on Consent when the Order on Consent enables the Department to achieve its enforcement objectives. If the

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<sup>2</sup> Orders on Consent can only be issued to resolve violations of a Commissioner's Order after Hearing, through a process designated by DEC's Office of Hearings and Mediation Services ("OHMS").

<sup>3</sup> Note: On August 28, 1990, then-DEC Commissioner Jorling issued "Order on Consent Enforcement Policy." That Policy set forth DEC's procedure for resolving violations by Orders on Consent. This Policy supersedes the August 28, 1990 Policy, as well as any updates or modifications to that Policy.

<sup>4</sup> Minor violations that are addressed pursuant to the terms and conditions of a Notice of Violation, or which are minor and of a short duration may be addressed without the need for an Order on Consent. See further discussion below.

Department's objectives cannot be achieved through an Order on Consent, the Department should proceed to litigation on the matter either administratively or judicially.

#### **A. Purpose of an Order on Consent**

1. An Order on Consent is principally aimed at enforcing violations, gaining compliance, and deterring and punishing violators.
2. An Order on Consent is designed to provide a bridge to compliance for noncomplying activities, and any unpermitted activities must be limited in time and scope.
3. An Order on Consent is not a permit, and should not be used to bypass the legal process and protections associated with DEC's permitting system. The Department's permit issuance mechanisms were created to ensure proper environmental impact review and an opportunity for public involvement, among other things, and do not address violations of environmental law or regulation.
4. An Order on Consent should not allow either the commencement or expansion of an unpermitted activity or the long-term unabated continuation of an unpermitted activity. Consequently, any new or extended activities should be addressed by an appropriate DEC-issued permit(s).
5. An Order on Consent must not restrict, limit or delay the release of information concerning the Order on Consent or copies of the Order on Consent after its execution.

#### **B. "Long Form" and "Short Form" Orders on Consent<sup>5</sup>**

"Long Form" Orders on Consent are those that are initiated and negotiated by the Office of General Counsel (OGC).

"Short Form" Orders on Consent (e.g., expedited enforcement) are orders where a set format or template has been prepared and pre-approved by OGC for use by a specific DEC program or for a particular enforcement issue, and are typically utilized by program staff who insert facts demonstrating a violation's existence. No Short Form Order on Consent should be sent to a Respondent until at least one DEC attorney having enforcement responsibilities has reviewed the template used for that Short Form Order on Consent. Short Form Orders on Consent may require payable penalties not to exceed \$10,000, with an additional \$10,000 suspended, and may authorize remedial actions not to exceed six (6) months in duration.

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<sup>5</sup> The Short Form Orders on Consent referred to in this Section do not apply to the Short Form Orders on Consent utilized and entered into by the Department's Division of Law Enforcement ("DLE").

If staff are unable to obtain an executed “Short Form” Order on Consent from a Respondent, OGC can then escalate enforcement with the use of either another “Short Form” Order on Consent (with raised penalty provisions) or a “Long Form” Order on Consent. In limited situations, Short Form Orders on Consent may be used to address violations that have been designated pursuant to an EPA enforcement policy. Short Form Orders on Consent may only be used in these situations if the Region confirms with the appropriate Central Office program enforcement staff and attorney that the Short Form Order on Consent properly serves to address action for the violation.

Regional Directors and Regional Attorneys must implement processes for issuance, execution, and tracking of Short Form Orders on Consent handled out of their regional offices in compliance with Department policies and the ECL, including compliance with ECL §3-0311. Regional staff will follow the processes established by their respective Regional Directors and Regional Attorneys for use of Short Form Orders on Consent. Within thirty days of final execution of a Short Form Order on Consent, copies of the Order on Consent, and transmittal letter shall be sent to OGC in Albany.<sup>6</sup> For Short Form Orders on Consent issued from Central Office, Division Directors and the OGC will be responsible for issuance, execution, and tracking of Short Form Orders on Consent in compliance with Department policies and the ECL, including ECL §3-0311.

## **V. Necessary Elements for an Order on Consent**

The contents of each Order on Consent<sup>7</sup> will vary depending upon the regulatory program involved,<sup>8</sup> other Enforcement Directives, and Department or EPA enforcement protocols and agreements. In addition to any program specific elements, each of the following elements must be set forth in an Order on Consent:

1. Penalties – The Order on Consent must include penalties consistent with the Department’s policies and relevant Enforcement Directives.<sup>9</sup> If an enforcement action has been referred to OGC, corresponding Department files shall contain a penalty calculation work sheet evaluating the economic benefit obtained by the violator and any gravity components determined by the Department. In addition, if the final assessed penalty in a matter involving violation of a federally delegated, approved or authorized program differs significantly from

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<sup>6</sup> When an Order on Consent allows for delayed payment of penalties or sets forth a payment schedule, copies of those penalty payments shall be sent under separate letter to OGC within 30 days of receipt.

<sup>7</sup> The contents of Short Form Orders on Consent are established by a set format or template approved by the Office of General Counsel.

<sup>8</sup> Orders on Consent solely addressing investigation and remediation of sites pursuant to ECL Article 27, Title 9 (Corrective Action); Article 27, Title 13 (inactive sites); and natural resource damages are set forth in footnote 1, above, and in Section V, paragraphs C. and D., below.

<sup>9</sup> Including Civil Penalty Policy (DEE-1) and program specific policies, ECL Article 71 and the Navigation Law.

staff's recommended penalty, the penalty calculation work sheet shall contain an explanation and rationale for the difference in amounts.<sup>10</sup> Penalty calculation sheets used to develop penalties for an Order on Consent are confidential intra-agency documents that should not be shared with Respondents and are exempt from FOIL until the Order has been signed by all necessary parties.

a. The Order on Consent shall contain language that the penalty shall be made payable to the "New York State Department of Environmental Conservation." Additionally, if the penalty will be deposited into a specific fund<sup>11</sup> or account, such fund or account should be referenced in the penalty clauses of the Order on Consent, and language should be added indicating that payment must be made to that fund or account.

(i) All Orders on Consent with a penalty payment, must include the following language:

"The civil penalty shall be paid within xx days of the Department's execution of this Order [or at the time of execution of this Order], by electronic payment at <http://www.dec.ny.gov/about/61016.html#On-Line> or by check made payable to the order of: "New York State Department of Environmental Conservation," with the enclosed invoice and the Case Number of this Order on Consent written in the memo section of the check, which shall be sent to: Department of Environmental Conservation, Division of Management and Budget Services, 625 Broadway, 10<sup>th</sup> Floor, Albany, NY 12233-4900.

The Order on Consent, along with any applicable submissions shall be sent to the Department of Environmental Conservation, Office of General Counsel, [applicable Central Office or Regional Office address], attention: [applicable contact person]."

b. Orders on Consent without a payable penalty must be approved by the General Counsel. Such request must be accompanied by a detailed summary explaining why a penalty should not be assessed.

c. Orders on Consent shall contain the following language "This Order shall be in full settlement of all claims for civil and administrative penalties that have been or could be asserted by the Department against Respondent, their trustees, officers, employees, successors and assigns for the violations expressly noted in this Order."

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<sup>10</sup> Penalty calculations that have been prepared for a federally delegated program (CAA, CWA, RCRA, Pesticides, etc), shall be sent to program staff for inclusion in their files. The penalty calculation form attached here as Attachment A must be used for these calculations, and maintained in the program files.

<sup>11</sup> Attached as Attachment B to this policy is a reference to each specific fund for civil penalty deposits.

2. Admission Clauses<sup>12</sup> – All Orders on Consent<sup>13</sup> must include a finding that the Respondent has violated an applicable provision of law, unless the General Counsel’s approval is obtained in a specific case to allow a Respondent to either deny or not admit to a violation. The admission clause may either state the Respondent “admits to the violation” or that the Respondent “is in violation of” or “violated” a requirement.
  
3. Violations Addressed – The Order on Consent must state with specificity which violations are addressed and released by the Order on Consent, and that the scope of the Order on Consent is limited to the relief related to those violations. Such statement shall list each individual violation, or categories of violations, addressed by the Order on Consent.
  - a. Recital language - The Order on Consent must set forth the violations and the elements supporting each violation. An itemized list of the violations may be appended to the Order on Consent or set forth in the body of the Order on Consent. The list of violations must specifically state the legal provision(s) violated and facts that establish each element of the stated violation(s).
  
  - b. The following language must be set forth in the Order: “This Order shall not be construed as being in settlement of events regarding which the Department lacks knowledge, or which occur after the effective date of this Order.”
  
4. Effective Date and Termination Clauses – All Orders on Consent must contain clauses stating: (1) that the Order on Consent is effective when signed by the Department or within a specific time after the Department executes the Order on Consent, and (2) that the Order on Consent will terminate when all requirements imposed by the Order on Consent are approved by the Department.
  
5. With limited exceptions<sup>14</sup>, Orders on Consent must contain the following paragraph:

“This Order on Consent is not a permit, or a modification of any permit, under any federal, State, or local laws or regulations.

Unless otherwise allowed by statute or regulation, Respondent is responsible for achieving and maintaining complete compliance with all applicable federal, State, and local laws, regulations, and

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<sup>12</sup> This clause is not required for Orders on Consent with new property owner(s) that have not violated the law but are a Respondent merely by ownership.

<sup>13</sup> Orders on Consent pursuant to ECL Article 27, Titles 9 and 13, and Orders on Consent which only settle Natural Resource Damages do not require admission clauses.

<sup>14</sup> RCRA Orders on Consent.

permits. Respondent's compliance with this Order on Consent shall be no defense to any action commenced pursuant to any laws, regulations, or permits, except as set forth herein."

6. Default of Payment Clause – All Orders on Consent that require a payable penalty due after the effective date of the Order, stipulated, or suspended penalties must contain the following clause:

"The penalty assessed in the Order on Consent constitutes a debt owed to the State of New York. Failure to pay the assessed penalty, or any part thereof, in accordance with the schedule contained in the Order on Consent, may result in referral to the New York State Attorney General for collection of the entire amount owed (including the assessment of interest,<sup>15</sup> and a charge to cover the cost of collecting the debt), or referral to the New York State Department of Taxation and Finance, which may offset by the penalty amount any tax refund or other monies that may be owed to you by the State of New York. Any suspended and/or stipulated penalty provided for in this Order on Consent will constitute a debt owed to the State of New York when and if such penalty becomes due."

7. Modifications and Extensions of Orders on Consent – The Order on Consent must include language that no change or modification shall be effective except as may be specifically set forth in writing by the Department. All modification requests must be submitted in writing to the Commissioner or his/her designee as set forth in the Order on Consent and include the Case number and the named Respondent. All approved modifications must be appended to the original Order on Consent and the modifications must be added to any case tracking system used by OGC.
  - a. Modifications to an Order on Consent compliance schedule of 6 months or longer, or any substantial changes to any provision of an Order on Consent must be signed by both the Respondent and the Commissioner or his/her designee. The Commissioner's designee shall be the Regional Director, or any other persons or titles so designated by the Commissioner in writing.
  - b. Modifications to an Order on Consent compliance schedule that can be completed within 6 months or less may be either accepted or rejected in writing by the Department staff or attorney.
  - c. All modification requests must be submitted to the Department prior to the milestone date required in the original Order on Consent and with an explanation of the good cause for the extension and a justification for the requested extended timeframe or change to an Order on Consent requirement.

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<sup>15</sup> New York State Finance Law §18.

- d. The assessment of additional penalties including the collection of a suspended and stipulated penalty will be evaluated by Department staff upon review of the request for modification.
8. Access for Site and Records Inspection – The Order on Consent must provide access for Department staff to any site, facility, or records owned, operated, controlled or maintained by Respondent in order for Department staff to inspect and/or perform any necessary tests, related to the requirements of the Order on Consent, during reasonable hours. An Order on Consent may state, if allowed under the applicable regulation or law, that no prior notification to Respondent of site inspections is required (see, *e.g.*, 6 NYCRR §424.2[a] which requires proper notification to a permittee of mined land). The following language may be used:

“The Department, including its employees, agents and representatives shall have the right at all reasonable times during normal business hours on normal business days, and after proper notification to the permittee and proper identification as Department employees, agents and/or representatives, to enter and inspect any property or premises covered by a permit for the purpose of ascertaining compliance with ECL Title 27, the permit or this Subchapter. The permittee shall provide a person to accompany the Department’s representative during an inspection of the permit area when notification is provided, be it written or verbal, at least 24 hours prior to such inspection.”<sup>16</sup>
9. Natural Resource Damages – Unless an Order on Consent contains provisions for settlement of a Natural Resource Damages (NRD) claim, the Order on Consent must include a provision reserving the Department’s rights to seek recovery of NRD, if applicable.
10. Spill Fund Cases – Orders on Consent involving oil spills must reserve the right to seek reimbursement of any Oil Spill Fund expenditures from the New York Environmental Protection and Spill Compensation Fund and hold the Spill Fund harmless.
11. Indemnification – Orders on Consent must require the Respondent to indemnify and hold the State, the Department and its employees harmless for all claims, actions, damages and costs resulting from the Respondent’s fulfillment or attempted fulfillment of the provisions of the Order on Consent.
12. Failure, Default and Violation of Order – The following language must be contained in an Order on Consent:

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<sup>16</sup> Policy OGC 7: Staff Access to Property or Premises will apply regardless.



"The failure of Respondent to comply with any provision of this Order shall constitute a default and a failure to perform an obligation under this Order and shall be deemed to be a violation of both this Order and the ECL. Respondent's failure to comply fully and in timely fashion with any provision, term, or condition of this Order shall constitute a default and a failure to perform an obligation under this Order and under the ECL and shall constitute sufficient grounds for revocation of any permit, license, certification, or approval issued to the Respondent by the Department."

13. Reopener and Reservation of Rights – All Orders on Consent must reserve to the Department the right to require that the Respondent undertake any additional measures required to protect human health or the environment, and shall reserve the Department's rights to exercise its authorities under law to protect human health and the environment, or to otherwise require compliance with the law. Such additional reservation shall include a provision preserving the Commissioner's summary abatement power. Such provision shall state that the Order on Consent does not bar, diminish, adjudicate or in any way affect the Department's rights or authorities, except as set forth in the Order on Consent, including but not limited to, exercising summary abatement powers.
14. Binding Effect – All Orders on Consent must contain a provision that states that the Order on Consent is binding on the Respondent, heirs, successors and assigns, employees, and all persons, firms, corporations acting under or for them.
15. Entirety of Order – All Orders on Consent must contain the following language: "The provisions of this Order constitute the complete and entire Order issued to the Respondent, concerning resolution of the violations identified in this Order. Terms, conditions, understandings or agreements purporting to modify or vary any term hereof shall not be binding unless made in writing and subscribed by the party to be bound, pursuant to Paragraph X of this Order. No informal oral or written advice, guidance, suggestion or comment by the Department regarding any report, proposal, plan, specification, schedule, comment or statement made or submitted by the Respondent shall be construed as relieving the Respondent of his/her obligations to obtain such formal approvals as may be required by this Order."

## **VI. Additional Elements for an Order on Consent**

**A.** The following elements may also be necessary in an Order on Consent, if applicable, depending on the program area violated and the circumstances of each particular case:

1. Remedial or Restoration Program – Requirement that the Respondent address any environmental, natural resource, or public health injury resulting from the violations through remediation or restoration.
2. Compliance Schedules – Include a detailed compliance schedule that:
  - (i) provides enforceable milestones for the correction of all violations and leads to full regulatory compliance by a set date; (ii) requires the implementation of

any other remedy, by dates certain; and (iii) requires the Respondent to submit certification or other proof of achieving compliance milestones. Complex Compliance Schedules or Compliance Schedules longer than two years in duration should require structured communication between the Respondent and DEC, such as quarterly progress reports and/or meetings, in accordance with program recommendations, and should also require enforceable milestones approximately every six months. A Compliance Schedule may be set forth in the body of an Order on Consent or in an attached Appendix.

3. Interim Measures, Limits and Controls – Require the use of effective and appropriate controls to minimize any environmental threat or damage during the interval between the Effective Date of the Order on Consent and the date of final compliance in the Compliance Schedule. This may include the use of limited interim permit limits and/or other temporary authorizations or conditions related to statutory, regulatory or permit requirements, if appropriate, as a bridge to compliance to a permit. Any such controls should be limited in scope and time frame as much as possible, and should contain other conditions, such as reporting requirements and operational controls. Any Interim Controls may be set forth in the body of an Order on Consent or in an attached Appendix.
4. Best Management Practices (“BMP”) – The following language may be used to add BMPs to an Order:

“Respondent shall carry out its obligations set forth in the attached Best Management Practices (“BMP”) annexed as Attachment X, which is hereby made part of this Order. Should Respondent sell, transfer, or otherwise convey the subject property or any ownership or controlling interest therein, Respondent shall impose the obligation to comply with the BMP and all other terms and conditions of the Order on the purchaser, successor, or assignor by contract. Respondent shall submit to NYSDEC a copy of any contract for sale of the premises or of a controlling interest therein, within five days of execution. Respondent and its successors and assigns shall apply for any required NYSDEC permits for future work on the site to be conducted by or on behalf of Respondent and obtain them before doing any such work, except that a NYSDEC permit under ECL Article 17 and Article 25 and the regulations promulgated thereunder shall not be required for the performance of the work described in the BMP. All required documentation shall be submitted by mail to XXX, NYSDEC, Address.”

5. Financial Obligations – An Order on Consent may require provision of financial undertakings, such as bonds or insurance, in circumstances where additional financial security is advisable to ensure the complete cessation and remediation of the violations.
6. Force Majeure – A Long Form Order on Consent may contain a Force Majeure clause, excusing Respondent from complying with certain terms of the Order on Consent in the event of an occurrence beyond Respondent’s control. Force Majeure clauses cannot be used in a Short Form Order on Consent. If a Force Majeure clause is included in a Long Form Order on Consent, the following language can be used:

“If Respondent cannot comply with a deadline or requirement of this Order on Consent, because of natural disaster, war, terrorist attack, strike, riot, judicial injunction, or other, similar unforeseeable event which was not caused by the negligence or willful misconduct of Respondent and which could not have been avoided by the Respondent through the exercise of due care, Respondent shall apply in writing to the Department within a reasonable time after obtaining knowledge of such fact and request an extension or modification of the deadline or requirement. Respondent shall include in such application the measures taken by Respondent to prevent and/or minimize any delays. Failure to give such notice constitutes a waiver of any claim that a delay is not subject to penalties. Respondent shall have the burden of proving that an event is a defense to a claim of non-compliance with this Order on Consent pursuant to this subparagraph.”

7. Stipulated and Suspended Penalties – Stipulated and/or suspended penalties may be used in all Orders on Consent and should be applied consistent with the Department’s Civil Penalty Policy (DEE-1). The suspended portion of the penalty may not exceed 80% of the total penalty, without prior approval of the General Counsel.
8. Regulatory Fees – If applicable to a case, an Order on Consent must reserve the right to collect any regulatory fees owed. However, it must be noted that regulatory fees are required and collected separate and apart from any civil penalty imposed.
9. Environmental Benefit Project (EBP) Policy – An Order on Consent may contain an EBP. Pursuant to paragraph V.A. of CP-37, all Regional Attorneys and Central Office OGC Bureau Chiefs are hereby designated the authority to approve any EBP in an Order on Consent that complies with CP-37 *and* meet the following criteria:
  - under \$10,000 in value;
  - will be completed in under one full year; and
  - requires minimal Department oversight.

**B. Remedial Orders:** An Order on Consent that addresses only the investigation or remediation of a site pursuant to ECL Article 27, Title 9 (corrective action) or Article 27, Title 13 (inactive hazardous waste disposal site remedial programs) and which may address the restoration, replacement or acquisition of natural resources pursuant to an NRD settlement are remedial in nature (“Remedial Orders”) and shall not be considered enforcement Orders on Consent subject to this Policy. Requirements for Remedial Orders are set forth in statutes, regulations, policy and/or guidance applicable to those program areas, and in Orders on Consent developed by OGC and the remedial programs.

An Order on Consent that addresses violations of a Remedial Order, regulations or statutes applicable to ECL Article 27, Title 9 (corrective action); and Article 27, Title 13 (inactive hazardous waste disposal site remedial program) are enforcement Orders on Consent and are subject to all provisions of this Policy.

**C. Natural Resource Damages (“NRD”) Orders:** NRD settlements are often addressed in Remedial Orders and Orders on Consent, *e.g.* when resolving Navigation Law violations stemming from a petroleum spill. However, NRD settlements may also be addressed solely in an Order on Consent where no remediation or violation is addressed. Such NRD orders, or other legal instruments where no remediation or violation of state law is addressed, are not required to be issued in accordance with the requirements of this Policy. Regardless, any Order on Consent that addresses a settlement of a NRD claim (“NRD Orders”) shall provide for the restoration, replacement or acquisition of those injured natural resources. NRD Orders shall follow the requirements of applicable state and federal law, regulation and guidance, including 42 U.S.C. 9600, *et seq.*, 33 U.S.C. 2700, *et seq.*, 33 U.S.C. 1251, *et seq.*, 43 CFR Part 11, 15 CFR Part 990, Article 12 of the New York State Navigation Law and the Department’s NRD Policy (CP-44).

The requirements of this Policy do not apply to NRD Orders or other legal instruments where no violation of State law is addressed.

## **VII. Procedures**

- A.** Central Office attorneys will notify the appropriate Regional Attorney and Regional Program manager of any significant enforcement matters being undertaken by Central Office pertaining to a facility or Respondent located in a Region.
1. Regional Attorneys will notify the Bureau Chief for Regional Affairs and Litigation and the General Counsel prior to undertaking any enforcement actions that involve matters of first impression, exercise of discretion over novel issues of law or policy, or contain or may divulge highly sensitive information.
  2. If any case referred to a Regional Attorney involves, or provides reason to believe that violations may be occurring in more than one Region, the Regional Attorney will notify the Regional Attorney(s) for the affected Regions, as well as the Bureau Chief for Regional Affairs and Litigation and the General Counsel to determine which Region should be primarily responsible for the enforcement action.
  3. Prior to mailing a Draft version of an Order on Consent to a Respondent, it must be entered into FMIS as a “Order on Consent Invoice.” The FMIS Invoice must be printed and served with the Order on Consent.<sup>17</sup>
  4. If any payment is incorrectly mailed to or received by a Regional office for payment of penalties, the Regional office must send payment along with the invoice to Management and Budget, Revenue Accounting Services to be deposited.

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<sup>17</sup> During any FMIS shutdown, all Orders shall continue to be sent and executed as usual, but entry of all Orders entered into FMIS as Consent Order Invoices shall be done once the FMIS function is resumed.

## B. Authority for execution of an Order on Consent

1. Pursuant to the ECL, the Commissioner, or his/her designee, has the legal authority to execute all Orders on Consent on behalf of the Department. A list of staff delegated to execute Orders on Consent shall be maintained by the Department's Internal Control Officer and the OGC, pursuant to CP-28.
2. In addition, Regional Directors are delegated the authority<sup>18</sup> to execute *routine* Orders on Consent.
  - a. The procedure for a Regional Director to sign an Order on Consent is as follows:
    - (i) All Orders on Consent will be routed through the Regional Attorney for approval.<sup>19</sup>
    - (ii) The Regional Attorney will recommend to the Regional Director that the Order on Consent be executed, if appropriate, by the Regional Director on behalf of the Commissioner.
  - b. After execution of a *routine* Order on Consent, the Regional Attorney will cause to have served on the Respondent a duplicate or conformed copy of the Order on Consent. Within thirty days, the Regional Attorney will forward a copy of the Order on Consent and transmittal letter, and a copy of any penalty payments that were received by the Regional Office to the OGC in Albany.
  - c. Examples of *non-routine*<sup>20</sup> Orders on Consent include Orders on Consent that:
    - (i) Involve unprecedented issues of statewide policy or, law;
    - (ii) Conflict with an approved policy without prior General Counsel approval;
    - (iii) Contain or divulge highly classified information or involve discretionary authority over important policy matters, program, environmental, social or economic circumstances;
    - (iv) Relate to inactive hazardous waste disposal sites; or
    - (v) Resolve violations that were caused in, or directly caused harm in, more than one Region.

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<sup>18</sup> See Delegation of Authority, 17-10 (issued November 10, 2017). Note that Orders on Consent involving inactive hazardous waste sites are to be executed by the Director of Environmental Remediation.

<sup>19</sup> Short Form Orders on Consent do not need to be routed through the Regional Attorney for approval, if the Short Form Order on Consent was approved by the Office of General Counsel via Section IV.B *infra*.

<sup>20</sup> Regional Offices may also handle non-routine Orders on Consent if the Regional Office coordinates with Central Office OGC.

3. The procedure for Central Office OGC staff to have an Order on Consent executed is as follows:
  - a. The Order on Consent, including Short Form ones, will be routed through the Bureau Chief of General Enforcement, through the appropriate Deputy Counsel, then the Division Director, Assistant Commissioner or whomever is given authority to execute the Order via a Delegation of Authority.
  - b. The assigned attorney will recommend to the delegated individual that the Order on Consent be executed, if appropriate, by the delegated individual on behalf of the Commissioner.
  - c. After execution of an Order on Consent, the assigned attorney will cause to have served on the Respondent a duplicate or conformed copy of the Order on Consent. The assigned attorney will provide a copy of the Order on Consent and transmittal letter, and a copy of any penalty payments that were inadvertently received by the assigned attorney, to the legal assistant of the General Enforcement Bureau, OGC.
  - d. After execution of any Order on Consent negotiated, executed and processed in Central Office, the Order on Consent must be sent to the Regional Attorney of the Region(s) impacted by the Order on Consent.

**C. Service and Post-execution of Orders on Consent Procedures**

1. Within thirty days of service, by mail, e-mail or hand delivery of Orders on Consent, copies of the Orders on Consent and transmittal letters shall be forwarded to OGC in Albany. Any payments that have been received within the Office of General Counsel, must be sent directly to Management and Budget, Revenue Accounting Services, in Albany.
2. OGC in Albany will maintain an electronic library of all final agency Orders on Consent. When copies of final Orders on Consent are sent to Central Office, OGC will utilize the naming convention below to add each order to the library.
3. OGC will utilize the following naming convention when saving an Order on Consent electronically:
  - a. All Orders on Consent, except those identified in subpara. (b) below should be saved electronically using the following naming convention. When saving an Order on Consent electronically, filenames may not contain any punctuation other than periods and underscore characters. Underscore characters take the place of spaces and all normal punctuation. Periods separate the constituent parts of the filename into the bracketed parts shown in the format.

*Format:* ORDER.[CASE # with underscore character in place of hyphens].[Respondent\_Name or Matter\_Name].[Date of Order in YYYYMMDD Format].pdf

*Example 1:* ORDER.R4\_20150828\_104.Respondent's Name.20190101.pdf

- b. Inactive hazardous waste disposal sites, Brownfield Cleanup Program sites (Brownfield Cleanup Agreements), PBS facilities and similar facilities that rely on a site identification number should be electronically saved as follows:

PBS or HAZ.[Site ID #].[Respondent Name].[DATE of Order in YYYYMMDD format].pdf

*Example 1:*

PBS.VA194845.Mom\_and\_Pop\_Shop.20190101.pdf

*Example 2:* PBS.11947445.Joe\_s Garage.19981231.pdf

*Example 3:* HAZ.11947445.ABC\_Corp.20111121.pdf

4. After execution of all Orders on Consent, the regional offices and Central Office will post all of their respective Orders on Consent on the DEC public website.
5. The execution of all Order on Consents with compliance milestones set forth in the Order should be noted in CTS or any alternative or subsequent case tracking system that may be used by OGC.

## **VIII. Responsibility**

The Office of General Counsel oversees all Orders on Consent for the Department. Each Regional Office is responsible for commencing enforcement and seeking Orders on Consent for violations that occurred or are occurring in their region, unless Central Office agrees to commence enforcement.

## **IX. Related References**

DEE-1: Civil Penalty Policy.

DEE-2: Order on Consent Enforcement Policy.

- Organization and Delegation Memoranda #88-13 dated Apr. 15, 1988, #93-10 dated Apr. 29, 1993, and #94-28 dated Aug. 8, 1994 (all hereby superseded).
- New York State Department of Environmental Conservation Civil Penalty Policy dated June 20, 1990, Section IV(D)(2)(a).

CP-28: Delegations of Authority.

CP-37: Environmental Benefit Projects Policy.

Delegation of Authority 17-10, Nov. 10, 2017 – To Execute Orders on Consent Pursuant to ECL Art. 27, Titles 13 and 14; and Art. Art. 56, Title5.

ECL Article 27., Title 9.

New York State Finance Law §18.

OGC 7: Staff Access to Property or Premises.



# **Attachment A**

## **Penalty Calculation Sheet**

**PRIVILEGED & CONFIDENTIAL**



\*\*\*Penalty Recommendation and Adjustment Form\*\*\*

Privileged and Confidential
Attorney Work Product / Attorney-Client Communication
Prepared for Enforcement Purposes

Case Number: [ ] Date: [ ]
DEC Program: [ ] Assigned Attorney: [ ]
DEC Region(s): [ ] Respondent/Facility: [ ]

I. Initial Penalty Calculations

Statutory Max Penalty for all provable violations:\* [ ]
PAYABLE Penalty Recommended by Program: [ ]
SUSPENDED Penalty Recommended by Program:\* [ ]
TOTAL Penalty Recommended (Suspended + Payable): [ ]

\* if applicable

II. Penalty Calculation Explanation<sup>1</sup>

Recommended Civil Penalty based on the following factors:

1. Economic Benefit Component

A. Benefit Component Analysis: Estimated economic benefit of delayed and avoided costs of compliance.<sup>2</sup>

Staff has the professional discretion to adjust or omit economic benefit analysis if the benefit is deemed de minimis, incalculable, or the assessment otherwise involves an inefficient allocation of Department resources:

[Large empty box for explanation]

B. Adjusted Economic Benefit Penalty [ ]

<sup>1</sup> Penalties should be calculated in accordance with DEE-1 (Civil Penalty Policy) and staff should follow appropriate DEC and/or EPA program-specific guidance. Additional space for answers is provided at the bottom of this form. Attach any other relevant documentation, including penalty matrix forms, calculation worksheets, recalculations made by program staff, EPA BEN computer model runs, and/or case referral forms containing penalty calculations.

<sup>2</sup> Include the present value of avoided capital and operating costs and permanently avoided costs which would have been expended if compliance had occurred when required. In appropriate cases, staff may use the EPA BEN computer model to estimate the economic benefit for sophisticated and significant violations.

2. Gravity Component<sup>3</sup>

A. Preliminary Gravity Component Factors

i. Describe potential harm and actual damage to the environment caused by the violation.

ii. Describe the relative importance of the type of violation in the regulatory scheme/program.<sup>4</sup>

B. Gravity Penalty Adjustments: List and describe any factors requiring adjustment of the gravity component.<sup>5</sup>

C. Adjusted Gravity Penalty (A+B):

3. Environmental Benefit Project Adjustments<sup>6</sup>:

**III. Final Penalty Assessment:**

Summarize any appropriate adjustment factors for any significant deviations from the program's Recommended Penalty, including litigation practicalities, compelling public interests, and any adjustment rationale listed in Section II, above.

<sup>3</sup> The recommended preliminary gravity penalty should be proportional to the potential harm and/or actual damage. Measures of potential harm and actual damage include: amount and toxicity of the pollutant released to the environment, the amount and degree of misuse of a substance of concern, or the amount and degree of actual or potential damage to natural resources. Consult DEE-1 and relevant program-specific guidance as necessary.

<sup>4</sup> Focus on the importance of the violated requirement in achieving the goal of the underlying statute. Examples illustrating how this factor should be applied are available in DEE-1 (Civil Penalty Policy).

<sup>5</sup> Consider the following four factors: (1) Culpability; (2) Violator Cooperation; (3) Violator's History of Non-Compliance; and (4) Violator's Ability to Pay. In addition, DEC staff has discretion to adjust the penalties up or down for factors not anticipated in DEE-1 and other penalty assessment guidance.

<sup>6</sup> Consult CP-37 / Environmental Benefit Projects (EBP) Policy for guidance on the use of EBPs in the settlement of enforcement actions.

**Extra Space for Worksheet Answers or Additional Relevant Information**

A large, empty rectangular box with a thin black border, occupying most of the page. It is intended for students to write their answers to worksheet questions or provide any additional relevant information.

# Attachment B

## Civil Penalty Fund Deposits

### Penalty Accounts under the ECL

Article	Title	Fund
3	1 and 3	General Fund
9		General Fund
11		Conservation Fund
13		Conservation Fund
15		General Fund
17	1 thru 11 & 19	General Fund or Conservation Fund*
19		Clean Air Fund
21	7, 9, 11 & 13	General Fund
22		General Fund
23		Environmental Protection Fund
24		Environmental Protection Fund
25		Conservation Fund
27		General Fund or Hazardous Waste Fund**
27	9, 11, 13, 15, 17, 27	General Fund
27	10, 21, 26	Environmental Protection Fund
33		General Fund
35		General Fund
37		General Fund
38		General Fund
39		General Fund
40		General Fund
43		General Fund
45		General Fund
47		General Fund
71	5	General Fund
71	7	General Fund
71	9	Conservation Fund
71	11	General Fund

71	12	General Fund
71	13	Environmental Protection Fund
71	15	General Fund
71	17	General Fund or Conservation Fund***
71	19	General Fund****
71	21	General Fund
71	22	Environmental Protection Fund
71	23	Environmental Protection Fund
71	25	Conservation Fund
71	27	General Fund*****
71	29	General Fund
71	31	General Fund
71	33	General Fund
71	37	General Fund
71	38	General Fund
71	39	General Fund
71	41	General Fund
71	44	General Fund
72	3	Clean Air Fund
72	5	Hazardous Waste Remedial Fund
72	10	Mined Land Reclaimantion Program Account

\*Any penalties for violation of titles 1-11 and 19 of article 17 resulting in the killing of fish or shellfish shall be credited to the conservation fund

\*\*All moneys collected in any action brought on behalf of the state for damages resulting from improper or unlawful dissemination or disposal of hazardous wastes shall be paid over to the commissioner for deposit to the credit of the hazardous waste remedial fund

\*\*\*Any penalties for violation of titles 1-11 and 19 of article 17 resulting in the killing of fish or shellfish shall be credited to the conservation fund

\*\*\*\*except 71-1929(2)- conservation fund

\*\*\*\*\*except 71-2725(2) - hazardous waste remedial fund