

NOTICE OF INTENT

Department of Environmental Quality
Office of the Secretary

Under the authority of the Environmental Quality Act, R.S. 30:2001 et seq., and in accordance with the provisions of the Administrative Procedure Act, R.S. 49:950 et seq., the secretary gives notice that rulemaking procedures have been initiated to amend the Office of the Secretary regulations, LAC 33:I.Chapter 7 (Log #OS026).

This proposed rule will establish a consistent department-wide approach for the assessment of civil penalties. Included in this assessment is the consideration of multiple violations, gravity of any violation committed, and that economic incentives for noncompliance are eliminated. This regulation is designed to promote the goals of deterrence, as well as, to provide fair and equitable treatment of the regulated community. The Louisiana Environmental Quality Act, R.S. 30:2050.3, requires the secretary to establish criteria for the assessment of consistent department-wide penalties based upon the nine factors found in R.S. 30:2025 (E). The basis and rationale for this rule are to comply with R.S. 30:2050.3.

This proposed rule meets the exceptions listed in R.S. 30:2019 (D) (3) and R.S.49:953 (G) (3); therefore, no report regarding environmental/health benefits and social/economic costs is required.

A public hearing will be held on November 24, 1998, at 1:30 p.m. in the Maynard Ketcham Building, Room 326, 7290 Bluebonnet Boulevard, Baton Rouge, LA 70810. Interested persons are invited to attend and submit oral comments on the proposed amendments. Should individuals with a disability need an accommodation in order to participate, contact Patsy Deaville at the address given below or at (225) 765-0399.

All interested persons are invited to submit written comments on the proposed regulations. Commentors should reference this proposed regulation by OS026. Such comments must be received no later than December 8, 1998, at 4:30 p.m., and should be sent to Patsy Deaville, Investigations and Regulation Development Division, Box 82282, Baton Rouge, LA 70884 or to FAX (225) 765-0486. Copies of this proposed regulation can be purchased at the above referenced address. Contact the Investigations and Regulation Development Division at (225) 765-0399 for pricing information. Check or money order is required in advance for each copy of OS026.

This proposed regulation is available for inspection at the following DEQ office locations from 8 a.m. until 4:30 p.m.: 7290 Bluebonnet Boulevard, Fourth Floor, Baton Rouge, LA 70810; 804 Thirty-first Street, Monroe, LA 71203; State Office Building, 1525 Fairfield Avenue, Shreveport, LA 71101; 3519 Patrick Street, Lake Charles, LA 70605; 3501 Chateau Boulevard, West Wing, Kenner, LA 70065; 100 Asma Boulevard, Suite 151, Lafayette, LA 70508; 104 Lococo Drive, Raceland, LA 70394 or on the Internet at <http://www.deq.state.la.us/olae/irdd/olaeregs.htm>.

Dale Givens
Secretary

TITLE 33
ENVIRONMENTAL QUALITY
Part 1. Office of the Secretary
Subpart 1. Departmental Administrative Procedures

Chapter 7. Penalties

§701. Scope

A. The intent of this Chapter is to assure that, after the department has determined a penalty is to be assessed for one or more violations, each penalty is assessed in a fair and equitable manner; that penalties are appropriate for the gravity of the violation committed; that economic incentives for noncompliance are eliminated; that penalties are sufficient to deter persons from committing future violations; and that compliance is expeditiously achieved and maintained.

B. After considering the nine factors in R.S. 30:2025(E)(3)(a), the department realizes there may be numerous circumstances where violations have occurred that are not significant enough to warrant a penalty action.

C. This Chapter is to be utilized by the department only after it has determined that a penalty is to be assessed for a specific violation unless otherwise specified by rule or regulation. Nothing in this Chapter applies to the determination of whether to assess a penalty, or to the compromise or settlement of a penalty.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2050.3.

HISTORICAL NOTE: Promulgated by the Department of Environmental Quality, Office of the Secretary, LR 24:**

§703. Definitions

For purposes of this Chapter, the terms defined in this Chapter shall have the following meanings, unless the context of use clearly indicates otherwise:

Nine Factors—the factors listed in R.S. 30:2025(E)(3)(a) and considered by the department in determining whether or not a civil penalty is to be assessed and in determining the amount agreed upon in compromise.

Penalty Event—any violation (as defined in R.S. 30:2004(21)) for which the administrative authority, after consideration of the factors listed in R.S. 30:2025(E)(3)(a), determines a penalty is warranted.

Violation Specific Factor— the two of the nine factors considered when plotting a violation on the penalty matrix. Each factor is weighed consistently without regard to the violator, and no special circumstances or violator-specific factors are considered when plotting the violation on the penalty matrix. These factors include:

- a. the nature and gravity of the violation; and
- b. the degree of risk to human health or property caused by the violation.

Violator-Specific Factor—the five of the nine factors considered when adjusting the difference between the minimum and maximum penalty range within a particular cell on the penalty matrix. The degree of adjustment in a particular penalty range on the penalty matrix will vary depending upon the specific and unique circumstances of these five factors. These factors include:

- a. the history of previous violations or repeated noncompliance;
- b. the gross revenues generated by the respondent;
- c. the degree of culpability, recalcitrance, defiance, or indifference to regulations or orders;
- d. whether the person charged has failed to mitigate or to make a reasonable attempt to mitigate the damages caused by his noncompliance or violation; and
- e. whether the noncompliance or violation and the surrounding circumstances were immediately reported to the department, and whether the violation or noncompliance was concealed or there was an attempt to conceal by the person charged.

Response Costs—the costs to the state of any response action made necessary by a penalty event that are not voluntarily paid by the violator. These costs shall include, but are not limited to, the costs of surveillance staff activities and the costs of bringing and prosecuting an enforcement action, such as staff time, equipment use, hearing records, and expert assistance.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2050.3.

HISTORICAL NOTE: Promulgated by the Department of Environmental Quality, Office of the Secretary, LR 24:**

§705. Penalty Determination Methodology

A. A penalty range for each penalty event is calculated based on the two violation-specific factors. The two violation-specific factors are plotted on the penalty matrix to determine a penalty range for a particular penalty event (see Table 1). The various penalty ranges for a penalty event are found inside each cell of the penalty matrix.

| Table 1. PENALTY MATRIX | | | | |
|---|-------------------------------------|----------------------|----------------------|----------------------|
| DEGREE OF RISK/IMPACT TO HUMAN HEALTH OR PROPERTY | NATURE AND GRAVITY OF THE VIOLATION | | | |
| | | Major | Moderate | Minor |
| | Major | \$25,000 to \$20,000 | \$20,000 to \$15,000 | \$15,000 to \$11,000 |
| | Moderate | \$11,000 to \$8,000 | \$8,000 to \$5,000 | \$5,000 to \$3,000 |
| | Minor | \$3,000 to \$1,500 | \$1,500 to \$500 | \$500 to \$100 |

1. Penalty Matrix—Degree of Risk to Human Health or Property. The first stage of the penalty calculation involves the categorization of each penalty event as major, moderate, or minor with regard to its degree of risk to human health or property. The following criteria are used to categorize each penalty event with regard to its degree of risk to human health or property:

a. Major. Refers to a violation in which actual harm or substantial risk of harm to the environment or public health occurs. The noncompliance results in, or may result in, the temporary or permanent loss of a use of the environmental resource. A violation of major impact and hazard may be one characterized by high volume and/or frequent occurrence and/or high pollutant concentration. Such violations may have a detrimental impact on sensitive environments or include the discharge of toxic pollutants;

b. Moderate. Refers to a violation that has the potential for measurable detrimental impact on the environment or public health. A violation of moderate impact and hazard may be one characterized by occasional occurrence and/or pollutant concentration that may be expected to have a detrimental effect under certain conditions; and

c. Minor. Refers to a violation that does not directly present actual harm or substantial risk of harm to the environment or public health. Violations that are isolated single incidences and that cause no measurable detrimental effect to the environment or public health may be considered minor. Violations that are administrative in nature may also be considered minor.

2. Penalty Matrix - Nature and Gravity of the Violation. The second stage of the penalty calculation involves the categorization of each penalty event as major, moderate, or minor with regard to its nature and gravity. The following criteria are used to categorize each penalty event with regard to its nature and gravity:

a. Major. Refers to violations of applicable statutes, regulations, orders, permit limits, or permit requirements that result in negating the intent of the requirement. The respondent deviates significantly from the requirements of the statutes, regulations, or permit to such an extent that little or no implementation of requirements occurs;

b. Moderate. Refers to violations of applicable statutes, regulations, orders, permit limits, or permit requirements that result in substantially negating the intent of the requirement. The respondent deviates from the requirements of the statutes, regulations, or permit, but some implementation of the requirements occurred; and

c. Minor. Refers to violations of applicable statutes, regulations, orders, permit limits, or permit requirements that result in some deviation from the intent of the requirement. The respondent deviates somewhat from the requirements of the statutes, regulations, or permit; however, substantial implementation of the requirements occurred.

B. Once a penalty event has been categorized as major, moderate, or minor for both its degree of risk to human health or property and its nature and gravity, a penalty range is obtained by plotting these two categorizations with the corresponding cell of the penalty matrix.

C. Violator-Specific Factors (Adjustment Factors) Per Event. The next stage of the penalty calculation involves the adjustment of the penalty using the following violator-specific factors:

1. the history of previous violations or repeated noncompliance;

2. the gross revenues generated by the respondent;
- 3 the degree of culpability, recalcitrance, defiance, or indifference to regulations or orders;
4. whether the person charged has failed to mitigate or to make a reasonable attempt to mitigate the damages caused by the noncompliance or violation; and
5. whether the noncompliance or violation and the surrounding circumstances were immediately reported to the department, and whether the violation or noncompliance was concealed or there was an attempt to conceal by the person charged.

D. The five violator-specific factors are used to adjust the penalty amount for each penalty event. Each violator-specific factor is assigned a percentage adjustment on a case by case basis. The upward or downward percentage adjustment for each violator-specific factor shall be no more than 100 percent of the difference between the minimum and maximum penalty amount for the chosen matrix cell. The five percentages are added together to calculate a total percentage adjustment for the penalty range for the penalty event. The total upward or downward percentage adjustment is also limited to 100 percent. The total percentage adjustment is multiplied by the difference between the minimum and maximum penalty amount for the chosen matrix cell. The product is then added to, or subtracted from, the minimum penalty amount in the chosen matrix cell.

E. The information obtained from the violation-specific and violator-specific factors can be entered into one of the following formula(s) to obtain a penalty amount (P_n) for each penalty event:

$$P_n = A_n + (B_n \times [C_n - A_n])$$

$$P_n = 2(A_n + [B_n \times (C_n - A_n)]) *$$

where:

P_n = penalty amount for a given penalty event.

A_n = the minimum value of the penalty range for the cell located on the penalty matrix for a given penalty event.

B_n = the sum of percentage adjustments calculated for a given penalty event, where $100 \text{ percent} \geq B \geq -100 \text{ percent}$.

C_n = the maximum value of the penalty range for the cell located on the penalty matrix for a given penalty event.

* Note—The statutory maximum is double in circumstances where the penalty event constitutes a violation of a previous enforcement action as stated in R.S. 30:2025 (E)(2).

F. The values for each penalty amount (P_n) are added to determine a penalty subtotal (P_s):

$$P_s = P_1 + P_2 + P_3 \dots$$

G. The department shall consider the monetary benefits realized through noncompliance. Any monetary benefits calculated may be added to the penalty subtotal. However, the amount calculated may not cause the penalty subtotal to exceed the maximum penalty amount allowed by law.

H. Response costs (R_c) are then added to the penalty subtotal (P_s) to determine the total penalty amount (P_t):

$$P_t = P_s + R_c$$

I. In accordance with R.S. 30:2025 (E)(1)(a), the department reserves the right to assess an additional penalty of not more than \$1,000,000 for any penalty event that is done intentionally, willfully, or knowingly, or results in a discharge or disposal that causes irreparable or severe damage to the environment or if the substance discharged is one which endangers human life or health.

J. In circumstances where the respondent has provided, or has agreed to provide, a grant, donation, or other form of assistance with respect to a designated pollution source, as provided in R.S. 30:2031, the penalty amount may be reduced by the monetary value of such grant, donation, or other form of assistance.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2050.3.

HISTORICAL NOTE: Promulgated by the Department of Environmental Quality, Office of the Secretary, LR 24:**

**FISCAL AND ECONOMIC IMPACT STATEMENT
FOR ADMINISTRATIVE RULES**

LOG #: OS026

Person

Preparing

Statement: Steve Sky-Peck

Dept.: Environmental Quality

Phone: 504-765-0399

Office: Office of the Secretary

Return

Address: P.O. Box 82282
Baton Rouge, La 70884-2282

Rule

Title: Civil Penalty Assessment
LAC 33:I.Chapter 7

Date Rule

Takes Effect: Upon Promulgation

SUMMARY

(Use complete sentences)

In accordance with Section 953 of Title 49 of the Louisiana Revised Statutes, there is hereby submitted a fiscal and economic impact statement on the rule proposed for adoption, repeal or amendment. THE FOLLOWING STATEMENTS SUMMARIZE ATTACHED WORKSHEETS, I THROUGH IV AND WILL BE PUBLISHED IN THE LOUISIANA REGISTER WITH THE PROPOSED AGENCY RULE.

I. ESTIMATED IMPLEMENTATION COSTS (SAVINGS) TO STATE OR LOCAL GOVERNMENTAL UNITS (Summary)

No significant implementation costs or savings to state or local governmental units are expected as a result of this rule.

II. ESTIMATED EFFECT ON REVENUE COLLECTIONS OF STATE OR LOCAL GOVERNMENTAL UNITS (Summary)

No significant increase or decrease in revenues is expected with the promulgation of this rule.

III. ESTIMATED COSTS AND/OR ECONOMIC BENEFITS TO DIRECTLY AFFECTED PERSONS OR NON-GOVERNMENTAL GROUPS (Summary)

No significant economic costs or benefits to directly affected persons are expected as a result of this rule.

IV. ESTIMATED EFFECT ON COMPETITION AND EMPLOYMENT (Summary)

No effect on competition and employment is expected as a result of this rule.

s/J. Dale Givens

Signature of Agency Head or Designee

s/H. Gordon Monk

LEGISLATIVE FISCAL OFFICER OR DESIGNEE

J. Dale Givens, Secretary

Typed Name and Title of Agency Head or Designee

9-18-98

Date of Signature

LFO 10/05/92

9-30-98

Date of Signature

**FISCAL AND ECONOMIC IMPACT STATEMENT
FOR ADMINISTRATIVE RULES**

The following information is requested in order to assist the Legislative Fiscal Office in its review of the fiscal and economic impact statement and to assist the appropriate legislative oversight subcommittee in its deliberation on the proposed rule.

- A. Provide a brief summary of the content of the rule (if proposed for adoption or repeal) or a brief summary of the change in the rule (if proposed for amendment). Attach a copy of the notice of intent and a copy of the rule proposed for initial adoption or repeal (or, in the case of a rule change, copies of both the current and proposed rules with amended portions indicated).

The proposed rule will establish a consistent department-wide approach for the assessment of civil penalties. Included in this assessment is the consideration of multiple violations, gravity of any violation committed, and that economic incentives for noncompliance are eliminated. This regulation is designed to promote the goals of deterrence, as well as, fair and equitable treatment of the regulated community.

- B. Summarize the circumstances which require this action. If the Action is required by federal regulation, attach a copy of the applicable regulation.

The Louisiana Environmental Quality Act, R.S. 30:2050.3, requires the secretary to establish criteria for the assessment of consistent department-wide penalties based upon the nine factors found in R.S. 30:2025.E.

- C. Compliance with Act II of the 1986 First Extraordinary Session

(1) Will the proposed rule change result in any increase in the expenditure of funds? If so, specify amount and source of funding.

No increase in the expenditure of funds is anticipated.

2) If the answer to (1) above is yes, has the Legislature specifically appropriated the funds necessary for the associated expenditure increase?

(a) ____ Yes. If yes, attach documentation.

(b) X No. If no, provide justification as to why this rule change should be published at this time.

The Louisiana Environmental Quality Act, R.S. 30:2050.3, requires the secretary to establish criteria for the assessment of consistent department-wide penalties based upon the nine factors found in R.S. 30:2025.E.

FISCAL AND ECONOMIC IMPACT STATEMENT

WORKSHEET

I. A. COSTS OR SAVINGS TO STATE AGENCIES RESULTING FROM THE ACTION PROPOSED

1. What is the anticipated increase (decrease) in costs to implement the proposed action?

| COSTS | FY 98-99 | FY 99-00 | FY 00-01 |
|------------------------------|----------|----------|----------|
| <hr/> | | | |
| PERSONAL SERVICES | | | |
| OPERATING EXPENSES | | | |
| PROFESSIONAL SERVICES | | | |
| OTHER CHARGES | | | |
| EQUIPMENT | | | |
| <hr/> TOTAL | -0- | -0- | -0- |
| <hr/> MAJOR REPAIR & CONSTR. | -0- | -0- | -0- |
| <hr/> POSITIONS(#) | -0- | -0- | -0- |

2. Provide a narrative explanation of the costs or savings shown in "A.1.", including the increase or reduction in workload or additional paperwork (number of new forms, additional documentation, etc.) anticipated as a result of the implementation of the proposed action. Describe all data, assumptions, and methods used in calculating these costs.

No changes in costs, workload, and paperwork by any state agencies are expected as a result of this rule.

3. Sources of funding for implementing the proposed rule or rule change.

| SOURCE | FY 98-99 | FY 99-00 | FY 00-01 |
|-----------------------|----------|----------|----------|
| <hr/> | | | |
| STATE GENERAL FUND | | | |
| AGENCY SELF-GENERATED | | | |
| DEDICATED | | | |
| FEDERAL FUNDS | | | |
| OTHER (Specify) | | | |
| <hr/> TOTAL | -0- | -0- | -0- |

4. Does your agency currently have sufficient funds to implement the proposed action? If not, how and when do you anticipate obtaining such funds?

Yes, funds are currently available to implement the proposed rule.

B. COST OR SAVINGS TO LOCAL GOVERNMENTAL UNITS RESULTING FROM THE ACTION PROPOSED.

1. Provide an estimate of the anticipated impact of the proposed action on local governmental units, including adjustments in workload and paperwork requirements. Describe all data, assumptions and methods used in calculating this impact.

No significant implementation costs or savings to local governmental units are expected as a result of this rule.

2. Indicate the sources of funding of the local governmental unit which will be affected by these costs or savings.

This section is not applicable.

FISCAL AND ECONOMIC IMPACT STATEMENT

WORKSHEET

II. EFFECT ON REVENUE COLLECTIONS OF STATE AND LOCAL GOVERNMENTAL UNITS

A. What increase (decrease) in revenues can be anticipated from the proposed action?

| | | | |
|---------------------------|----------|----------|----------|
| REVENUE INCREASE/DECREASE | FY 98-99 | FY 99-00 | FY 00-01 |
|---------------------------|----------|----------|----------|

STATE GENERAL FUND
 AGENCY SELF-GENERATED
 RESTRICTED FUNDS*
 FEDERAL FUNDS
 LOCAL FUNDS

| | | | |
|--------------|-----|-----|-----|
| <u>TOTAL</u> | -0- | -0- | -0- |
|--------------|-----|-----|-----|

*Specify the particular fund being impacted.

B. Provide a narrative explanation of each increase or decrease in revenues shown in "A." Describe all data, assumptions, and methods used in calculating these increases or decreases.

No significant increase or decrease in revenues is expected with promulgation of this proposed rule.

III. COSTS AND/OR ECONOMIC BENEFITS TO DIRECTLY AFFECTED PERSONS OR NON-GOVERNMENTAL GROUPS

A. What persons or non-governmental groups would be directly affected by the proposed action? For each, provide an estimate and a narrative description of any effect on costs, including workload adjustments and additional paperwork (number of new forms, additional documentation, etc.), they may have to incur as a result of the proposed action.

No change in costs, workload, and paperwork by directly affected persons or non-governmental groups is expected as a result of this rule.

B. Also provide an estimate and a narrative description of any impact on receipts and/or income resulting from this rule or rule change to these groups.

No significant impact on receipts or income to directly affected persons is expected as a result of this rule.

IV. EFFECTS ON COMPETITION AND EMPLOYMENT

Identify and provide estimates of the impact of the proposed action on competition and employment in the public and private sectors. Include a summary of any data, assumptions and methods used in making these estimates.

No effect on competition and employment is expected as a result of this rule.