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MEMORANDUM

FROM: Mike Sole, Deputy Secretary 
Regulatory Programs and Energy

TO: Department Compliance and Enforcement Staff

DATE: April 24, 2006

SUBJECT: Consent Order Guidance

The Department of Environmental Protection ("department") typically executes over 1,000 consent orders every year. During negotiations over the terms of a consent order, the responsible parties or their attorneys will sometimes request changes to the standard language used in Department consent orders. It is important that the Department treat all responsible parties consistently in how we use consent orders to resolve violations. Therefore, I am providing the following guidance in the use of consent orders:

- 1) Florida law provides the Department with authority to resolve violations by the entry of a consent order. All administrative settlements of violations should therefore be included in a document entitled "consent order". The administrative document resolving violations should not be entitled settlement agreement, agreement, or anything other than consent order.
- 2) Consent orders should only be used to address violations, and the Environmental Litigation Reform Act (ELRA) requires a consent order to include a finding of a violation before it can be used as evidence of a history of non-compliance. Therefore, consent orders should include a finding by the Department that one or more violations have occurred. If a responsible party will not agree to admit the violations, you can include a statement in the consent order that the responsible party does not admit nor deny the violations.
- 3) The Department may want to put an executed consent order into evidence in a subsequent proceeding for any number of reasons, including for the purpose of establishing a history of non-compliance. Therefore, consent orders should not include any language that could preclude the Department from using the executed consent order in any subsequent administrative or judicial proceeding.
- 4) The only purpose for seeking civil penalties to address a violation is to deter the future non-compliance of the violator and other similarly regulated parties. When the resolution

of a violation includes the payment of civil penalties, the consent order should identify that payment in the consent order as "civil penalties". No other words should be used to identify the payment of civil penalties.

- 5) Information concerning the entry of a consent order can have an important deterrent affect on other regulated parties. Therefore, the Department should not negotiate away its right to publicize any information it determines to be appropriate concerning the entry of a consent order.

The guidance in this memo does not restrict or affect the Department from assessing administrative penalties as set forth in 403.121 and 161.054, F.S. Additionally, this does not address penalties or settlements associated with violations of Chapter 253, F.S. (Board of Trustees) as set forth in 18-14, Florida Administrative Code.