



Agenda Item Details

Meeting	Nov 10, 2021 - City Commission Meeting
Category	13. POLICY FORMATION AND DIRECTION
Subject	13.02 Adopt a FDEP Consent Order Policy -- John Powell, Director, Environmental Services & Facilities
Access	Public
Type	Action, Discussion
Fiscal Impact	No
Recommended Action	Option 1- Adopt the FDEP consent order policy that ensures a transparent process and allows the City Manager to exercise existing authority to expeditiously resolve environmental violations in order to maintain continuity of essential services for the community.

Public Content

For more information, please contact: John Powell, Director, Environmental Services & Facilities

Statement of Issue

At its September 22, 2021, City Commission Meeting, the Commission directed staff to establish a policy whereby consent orders proposed by the State of Florida Department of Environmental Protection (FDEP) to the City are presented to the City Commission.

Recommended Action

Option 1- Adopt the FDEP consent order policy that ensures a transparent process and allows the City Manager to exercise existing authority to expeditiously resolve environmental violations in order to maintain continuity of essential services for our community.

Fiscal Impact

None

Supplemental Material/Issue Analysis

History/Facts & Issues

Background on the FDEP Consent Order Process:

FDEP has the power and duty to protect Florida's air and water resources and to administer and enforce the provisions of Chapters 373, 376, and 403, Florida Statutes, and the rules promulgated and authorized in Title 62, Florida Administrative Code. Many aspects of the essential services provided to our community via City operations are subject to FDEP regulation.

When FDEP finds that an environmental violation occurred and intends to pursue formal enforcement, a consent order (CO) is typically offered to the responsible party (Respondent) as a means of settlement prior to FDEP filing a legal action. A CO is a mutually agreed to, legally enforceable document that binds the Respondent to perform certain acts to address the environmental violations of Florida law. In consideration of the Respondent completing all the obligations agreed to in the CO, FDEP waives its right to seek judicial imposition of damages or civil penalties for the violations alleged in the CO. The CO is an administrative final order governed by the Administrative Procedures Act, Chapter 120, Florida Statutes, and is challengeable by a substantially interested party within the timeframes outlined in Chapter 120.

Timely resolution of environmental violations is critical to continuity of essential services.

State law requires FDEP to have “reasonable assurance” that a permittee will comply with environmental regulations prior to issuing a permit. As the City holds several permits with FDEP for essential operations, failure of the City to timely enter into a proposed CO could result in FDEP refusing to issue a future permit due to a lack of “reasonable assurance” and interruption of essential services to our community.

Potential consequences from failing to timely enter into a proposed CO include:

1. FDEP failing to issue a permit or renew a permit that is required for continuation of essential City services.
2. Imposition of additional financial damages, penalties, and FDEP costs.
3. FDEP filing a legal action against the City.

Efficient resolution of environmental violations through a consent order generally results in imposed penalties that are less than what is statutorily authorized, and permits the funding of environmental projects that directly benefit the community in lieu of financial penalties.

FDEP has statutory authority to assess up to \$15,000 per day per violation for most violations, increasing to up to \$37,500 per day per violation for hazardous substance violations and up to \$75,000 per day per violation for hazardous waste violations. FDEP may seek multi-day penalties for each day a violation or polluting condition continues. FDEP has broad discretion to decide whether to impose penalties.

Once FDEP determines a penalty is appropriate, FDEP consults its settlement guidelines in Directive 923 to determine the appropriate settlement penalty. In determining a penalty, FDEP assesses the actual or potential harm to human health or the environment that may occur as a result of the violation along with the extent of deviation from the regulatory requirement. Once a baseline penalty has been established, FDEP reviews mitigating circumstances that would warrant an upward or downward adjustment of the baseline penalty. Generally, downward penalty adjustments may apply if a Respondent makes good faith efforts to comply before or after the discovery of the violation or for violations caused by circumstances beyond the control of the responsible party which could not have been prevented by due diligence. Upward penalty adjustments can be made based on a history of non-compliance, bad faith, or the economic benefit gained from the violation. Generally, FDEP pursues multi-day penalties where a daily advantage is gained by the violator for the ongoing violation or where the violation is causing an adverse daily impact to the environment and the violator knew, or should have known, of the violation after the first day it occurred and either failed to take action to mitigate or eliminate the violation or took action that resulted in the continuing violation. The assessed penalty amount is in addition to necessary corrective actions and FDEP costs associated with the enforcement action. If corrective actions are necessary to resolve the violations, FDEP refers to this as a “long form” CO. If no corrective actions are necessary, the resulting monetary only order is called a “short form” CO.

Once a settlement amount has been established, government entities are able to propose an “in-kind” penalty or “pollution prevention” project to offset the assessed penalty owed to FDEP. An in-kind penalty project is not designed to give the Respondent credit for required corrective actions but allows the Respondent to focus funding that would otherwise be paid as a penalty into the community through environmental restoration projects, environmental education projects, capital or facility improvements, or the donation of environmentally sensitive land. A pollution prevention project is a process improvement that focuses on polluting source reduction, waste minimization, or on-site recycling efforts. If an in-kind penalty is chosen, the value of the in-kind project must be 1.5 times the amount of the assessed penalty.

Recommendations

Consistent with the City’s mission to be the national leader in the delivery of public service, and the desire to formalize a process that ensures transparency and Commission awareness, staff recommends approval of the attached FDEP Consent Order Policy.

Administration

The City’s Environmental Services and Facilities Department will be responsible for the oversight, implementation, and periodic update of this policy.

Department(s) Review

Environmental Services & Facilities

Options

1. Adopt the FDEP consent order policy that ensures a transparent process and allow the City Manager to exercise existing authority to expeditiously resolve environmental violations in order to maintain continuity of essential services for our community.

Pros: Provides a clear process that allows for expeditious resolution of environmental violations, thereby ensuring continuation of essential services.

Cons: None

2. Do not adopt the attached FDEP consent order policy and provide further direction

Attachments/References

Attachment 1- Proposed FDEP consent order policy

 [Proposed FDEP Consent Order Policy am.pdf \(97 KB\)](#)