

Advanced Enforcement Legal Issues

Presented by

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PARTIES

Presented by Ashley Cass



Pre- Inspection

- STCM:
 - Remember- the information is not always accurate/ up-to-date
- Prior inspection reports:
 - Look for parties who have signed the inspection reports in the past
- Property appraisers office:
 - Look at the county website to determine who owns the property
 - Request copies of any deeds and/or leases recorded with the county clerk's office for ownership/operator information

Pre- Inspection Cont'd

- Check on whether any professional licenses have been issued (Department of Business and Professional Regulation- DBPR)
- County licenses through the local County such as the occupational license
- Any permits that have been issued or requested through the local zoning department

Notification of Inspection

- You should provide 5 business days' notice to a responsible party (property owner, tank owner, or facility operator).
- Keep a record of the date notification was provided and to whom—either:
 - If your County routinely provides verbal notification, keep an accurate phone log which clearly indicates the date of the conversation, the substance of the conversation, and the person with whom the conversation took place
 - Or keep a copy of the signed and dated letter notifying a responsible party of the inspection
- If, for some reason, an inspection does not take place on the date originally scheduled, follow up with the responsible party previously contacted and document how and when the inspection was rescheduled.

Inspection

- This is the time to verify who may be responsible for any compliance violations at the facility
- You can ask questions such as:
 - Who controls the day-to-day operations at the site?
 - Who is responsible for making the decisions regarding compliance?
- You may request the identification (e.g. driver's license) of facility contacts to verify names.

Post- Inspection

- Document clearly all information obtained during your pre-inspection research and any information obtained during the inspection to keep in the file.
- Have copies of any deeds/leases and information obtained from the parties themselves available and in the file.

Post Inspection Cont'd

- Determine whether the registration information regarding parties that is currently on file for the facility is correct:
 - compare the information obtained during pre-inspection, inspection, and post-inspection investigations with the registration information
- Remember that inaccurate registration information is a violation of Fla. Admin. Code R. 62-761/762 and penalties may be imposed.

The Non-compliance Letter

- Send all non-compliance letters to each party associated with the property (owners and operators).
- If a party is a corporation then you should send the NCL to the President or registered agent of the corporation. You can find this information on the Department of State, Division of Corporations web site.
- Date your letter.
- Keep a copy of the signed and dated letter in the file.

Prior to Referral for Enforcement

- Update any information in the file obtained from the property appraiser (deeds and/or leases).
- Provide copies of all:
 - Phone logs which clearly indicate the date of the conversation, the substance of the conversation, and the person with whom the conversation took place; or
 - Dated letters notifying a facility contact of the date of inspection; and
 - final, signed, non-compliance/Warning letters sent to all parties.

GRANTING CLEANUP EXTENSIONS

Presented by
Peter J. Caldwell



What do F.A.C. 62-770 time extensions apply to?

- The rules for extensions apply to every cleanup step required of responsible parties under Florida Administrative Code Rule 62-770

Rule for time extensions in cleanup matters:

- The Department or the local program can grant an extension only when the responsible party demonstrates "GOOD CAUSE" for that extension.

What constitutes "GOOD CAUSE SHOWN"?

- F.A.C. Rule 62-770.800(4) defines "GOOD CAUSE" as "unanticipated events outside the control of the responsible party."

STEPS IN THE EXTENSION PROCESS:

- STEP ONE: The responsible party must first make a WRITTEN request for extension to the Department or local program
 - This means that NO VERBAL requests can be made by phone, unless accompanied by a written submission evidencing that request

WHAT MUST THE WRITTEN REQUEST FOR EXTENSION INCLUDE?

- 1) It must state which deadline the responsible party is seeking to have extended
- 2) It must state the amount of additional time required
- 3) The responsible party **MUST** attach documentation which shows **GOOD CAUSE** for the extension

- If any of these are missing, it's not a valid request for extension

WHEN MUST THE EXTENSION REQUEST BE RECEIVED?

- The Department or local program must receive the request **AT LEAST 20 DAYS BEFORE** the deadline which the responsible party is seeking an extension for
- Exception: If **EMERGENCY SITUATIONS AT THE SITE** do not allow for the full 20 DAY notice, the responsible party must provide details of the site emergency with the extension request

When must the Department or local program respond?

- WITHIN 20 DAYS of receiving the request for extension, the Department or local program MUST either deny the request or provide the responsible party with a WRITTEN request for additional information
- If the Department or local program requested more information, then the Department or local program has 20 days from the receipt of the additional information to provide the responsible party with a decision as to the extension

Be Aware

- The F.A.C. Chapter 62-770 deadlines are tolled upon the receipt of a timely request.
- It is important for the Department and local programs to provide prompt WRITTEN responses and it is important for the Department to provide a deadline when requesting additional information from the responsible party

Settlement Guidelines for Administrative and Civil Penalties

DEP Directive 923

Presented by
Amy Duffey

Purpose of Penalty Policy

- Provide a rational, fair and consistent method for determining penalties
- Provide a deterrent effect on violators that commit significant violations
- Provide a deterrent effect on the regulated community from future noncompliance
- Prevent economic benefit gained by violators as a result of violations

Authority to Pursue Penalties

- DEP has authority to impose up to \$10,000 in one administrative action - pursuant to ELRA (Section 403.121, Fla. Stat.)
- DEP also has authority to pursue \$10,000 per day per violation in a judicial proceeding (Sections 376.302 and 403.141, Fla. Stat.)

Calculating ELRA Penalties

- apply the specific penalty schedule outlined in ELRA for each and every violation
- determine whether any mitigating circumstances warrant downward or upward adjustments
- if the Department is going to pursue the violations under ELRA, total penalties must be capped at \$10,000

Calculating Civil Penalties

- Use penalty matrix outlined in DEP 923
- Characterize violation according to:
POTENTIAL FOR HARM

and
EXTENT OF DEVIATION FROM
REQUIREMENT

POTENTIAL FOR HARM

- MAJOR: violations that actually or are reasonably expected to result in pollution in a manner that represents a significant threat to human health of the environment
- MODERATE: violations that actually or are reasonably expected to result in pollution in a manner that represents a significant threat to human health or the environment
- MINOR: violations that actually or are reasonably expected to result in minimal or no pollution

EXTENT OF DEVIATION FROM REQUIREMENT

- MAJOR: the violator deviates from the requirements of the law to such an extent that there is substantial noncompliance
- MODERATE: the violator deviates from the legal requirements of the law significantly but some of the requirements are implemented as intended.
- MINOR: the violator deviates somewhat from the requirements of the law but most of the requirements are met.

Downward Adjustments

- good faith efforts to comply before or after discovery of violation
- Violations caused by circumstances beyond the control of the responsible party which could not have been prevented by due diligence
- Determination of inability to pay

Upward Adjustments

- History of noncompliance
- Economic benefit
- Multi-day violations

History of Noncompliance

- In order to use History of Noncompliance multiplier, must have a prior Consent Order, Final Order, or Final Judgment that makes a finding of violation

Economic Benefit

- Economic benefit should be pursued in all cases where:
 - The economic benefit is determinable
 - The economic benefit is not de minimus
- NOTE: Economic benefit in ELRA NOVs cannot be added to a penalty amount if it causes the penalty to exceed \$10,000

Multi-Day Penalties

- Should be pursued in all cases when:
 - daily adverse impacts to the environment or program occur
 - when the violator failed to take prompt action to stop or mitigate the violations
 - when daily advantage is gained by violator for the ongoing violation

WRITING CONSENT ORDERS & NOTICES OF VIOLATION

Presented by
Kelly Russell



Things to Remember:

- Purpose
- Potential Audience
- Enforceability/Evidence

Purpose of a CO

- To create a legally enforceable document:
 - where the Department and a violator agree to the terms under which the violator will come into compliance, and
 - which deters future violations of the violator and the regulated community.

Potential Audience

- Anyone affected by the CO:
 - The violator/ violator's attorney
 - The Department
 - Anyone whose interests may be substantially affected by the CO.
- Anyone who is asked to enforce the CO:
 - A Judge or Jury

Enforceability- questions to ask:

- Are all conditions in the CO CLEARLY set forth? Ambiguities should be avoided.
- When COs involve multiple parties, does the CO CLEARLY describe each party's obligations?
- Do all conditions have a begin date or time period?
- Do all conditions have an end date or time period?

Enforceability- questions to ask: Cont'd

- Does the CO include a provision for the result of failure to comply?
- Does the CO refer to any other documents, and if so, are they either attached to the CO and are they clearly identified?

CO Guidance Memorandum

April 24, 2006

- Administrative settlements of violations must be in a document entitled "Consent Order." Do not use any other title such as "settlement agreement," "agreement," or "consent agreement."
- A CO should only be used to address violations and must include a finding that one or more of the violations have occurred.
- A CO should not include any language that would limit the Department's ability to use the CO in subsequent administrative or judicial proceedings.
- The purpose of civil penalties is to deter future non-compliance. When civil penalties are to be paid as part of a CO, the CO should identify that payment as a "civil PENALTY" or "administrative PENALTY." No other term should be used.
- Because of the purpose of deterring future violations, the Department should not negotiate away its right to publicize any information it determines to be appropriate concerning the entry of a CO.

Drafting Tips

- Start with the model.
- Add the parties affected by the CO. If the CO involves an indigent person, be sure to investigate whether there are any other viable parties to pursue for the violations and be sure that the language in the CO does not limit the Department's ability to pursue other potentially responsible parties.
- Add enough FACTS to show what the violation is. If the violation includes a failure to submit documentation or do something within a certain time frame, be sure to include dates of non-compliance.
- Use short concise sentences when possible. This will reduce any confusion that could arise.
- Clearly state the corrective actions necessary to bring the facility into compliance and the time-frames for correction. Each separate action should be stated in either a separate paragraph or a separate subparagraph.

Drafting Tips

- Write a first draft of the CO and then set it aside.
- Review the CO to verify that it clearly states who is responsible for the violations, what the violations are, who must perform what corrective action and when that corrective action must be performed.
- Always proofread.

Writing Tips

- Use short, concrete subjects.
- Use short, active verbs.
- Avoid separating the subject from the verb.
- Do not use unnecessary words.
- Use concrete, specific words to avoid vagueness or imprecision.

Purpose of a Notice of Violation (NOV)

- An NOV is an administrative complaint which alleges facts sufficient to show that a violation has occurred and that the person named in the NOV is responsible for the violation.

Potential Audience

- The person named in the NOV (Respondent).
- The Respondent's attorney
- A Hearing Officer
- An Administrative Law Judge (ALJ)
- Any person who may be determined to have a substantial interest in the outcome of the case

Enforceability/Evidence

- Remember- the Department has the burden of proving that a violation has occurred.
- On the face of the NOV, all elements of the violation must be alleged.

Elements of NOV

- Elements include: the facts that give the Department the authority over the particular issues addressed in the NOV.
 - What gives the Department the authority to regulate? See the applicability section in the rules.
 - The party- remember party issues discussed by Ashley (owner/operator/responsible party)
 - Regulated tank system- provide details as to what gives the Department the authority to regulate (for USTs: an “underground” system with capacity greater than 110 gallons that contains or contained pollutants/vehicular fuel...)

Elements Cont'd

- What specific facts make up the violation?
 - Must be sure to look at the exact rule provision alleged to be violated and verify that you have allege all facts that make up that violation:
 - Example: "Respondent failed to have release detection." This may be a true statement or it may only be partially accurate. If Respondent had line leak detectors for their pressurized piping but did not have any mechanism for detecting a release from the tank itself, you should state that specifically.

Tips for Drafting the NOV

- Follow the model which is located on the enforcement manual or other NOVs that have been approved by OGC.
- In the orders for corrective action section of the NOV, be sure to include all corrective actions associated with the specific violations alleged in the NOV.
- Include date ranges. Dates are very important to establish that a certain person is responsible for a certain violation. Dates are also important when establishing that multi-day penalties are justified.
- If using any penalty multipliers such as history of non-compliance or economic benefit, state the facts that justify these multipliers- you can do this in the facts applicable to all counts section or within a specific count.
- Finally, where OGC is concerned, more facts better enable the attorney reviewing the NOV to understand the allegations and violations.

Last but not least:

- Thanks to all of the Department, District, and County staff for your hard work and effort!