

Guidelines for Characterizing Waste Cleanup Violations

Introduction

Department of Environmental Protection (DEP) [Directive 923](#) is the Department's controlling enforcement document. These guidelines are intended to complement Directive 923 to determine the appropriate amount of civil and administrative penalties to seek when settling enforcement actions, where legal responsibility for site rehabilitation exists, but the corrective action process outlined in 780 is not being followed. These guidelines are intended to provide a rational, fair, and consistent method to determine the appropriate enforcement response for waste cleanup violations.

****While as a general matter, Florida does recognize that “the statute of limitations in environmental contexts where there is a continuing invasion of rights does not begin to run until the wrongful invasion of rights that constitutes the violation ceases,” instances where violations are approaching the 4-year mark should be reviewed as soon as possible with the Office of General Counsel to preserve all legal options.**

Legal Responsibility for Site Rehabilitation

Compliance with Chapter 62-780, F.A.C., is only mandatory for parties that have “legal responsibility for site rehabilitation pursuant to chapter 376 or 403, F.S.” Fla. Admin. Code R. 62-780.150(2). In some cases, a party's legal responsibility for site rehabilitation has already been previously established – e.g., via a permit, consent order, court order, or site rehabilitation agreement. The establishment of responsibility for site rehabilitation typically stems from a prior enforcement action or a department rule or permit condition that automatically triggers site rehabilitation upon the achievement of a condition precedent. When a party's responsibility for site rehabilitation has been established, and the party then violates a provision of Chapter 62-780, the procedures below should be followed to determine the penalty amount offered in settlement agreements.

In many cases, a party's legal responsibility for site rehabilitation has not yet been established. In these cases, the Department could not obtain a penalty at DOAH or in a Circuit Court based on a violation of Chapter 62-780, without first establishing their legal responsibility for site rehabilitation. Accordingly, when pursuing settlement with such parties for noncompliance with 62-780, the primary objective should not be to obtain penalties; but rather to establish the party's responsibility for site rehabilitation and obtain a commitment to comply with Chapter 62-780.

Legal responsibility (liability) for site rehabilitation is most frequently established pursuant to section 376.308, Florida Statutes; however, it can less commonly be established under other causes of action including, but not limited to, section 376.302(1)(a), Florida Statutes; section 376.305(1), Florida Statutes; section 403.087, Florida Statutes; 403.161(1)(a), Florida Statutes; 403.726(3), Florida Statutes; and 403.727(4), Florida Statutes. In addition, as stated above, site rehabilitation can be established by application of program specific rules including, but not limited to, Rule 62-701.510(6)(a)8.(c)1 (Solid Waste); Rules 62-762.441(2) and (6) (above ground storage tanks); Rule 62-762.891(8) (mineral acid tanks); Rule 62-761.405(4) (Underground Storage Tanks); Rule 62-730.225 (Regulated Hazardous Waste Facilities); and Rule 62-520.700 (Wastewater and other facilities discharging to groundwater).

Guidelines for Characterizing Waste Cleanup Violations

Direction for Specific Penalties Amounts For Violations Covered Under (ELRA)

Under the Environmental Litigation and Reform Act (ELRA), the Department can seek an administrative penalty for certain violations pursuant to s. 403.121(2), Florida Statutes (F.S.). Administrative penalty amounts are stipulated by statute and cannot exceed \$50,000 per assessment when calculated in accordance with the applicable sections of 403.121, F.S. For additional details, see DEP [Directive 923](#).

Violation (statutory language)	ELRA Base Penalty	Cite (F.S.)
*Failure to install, maintain, use pollution control.	\$6000.00	403.121(4)(b)
*Failure to conduct required monitoring or testing	\$3,000.00	403.121(4)(d)
*Failure to submit required notification to the Department	\$1500.00	403.121(4)(e)
*Failure to prepare, submit, maintain, or use required reports or other required documentation	\$750.00	403.121(4)(f)
Failure to comply with any other Departmental regulatory statute or rule Requirement	\$1,000.00	403.121(5)
Tanks/Petroleum: Failure to conduct remediation/monitoring activities until NFA or site-rehabilitation completion order has been issued	\$7500.00	403.121(3)(g)
Tanks/Petroleum: Failure to timely recover free product	\$7500.00	403.121(3)(g)
Tanks/Petroleum: Failure to timely assess/remediate petroleum contamination	\$3000.00	403.121(3)(g)
Discharge pollutants/hazardous substances into/upon surface or ground waters of the state or lands	\$2500.00	376.302(3)

*In an administrative proceeding, in addition to the penalties that may be assessed under subsection (3), the department shall assess administrative penalties according to the schedule in 403.121(4).

Guidelines for Characterizing Waste Cleanup Violations

Multi-Day Penalties and Adjustment Factors

DEP Directive 923 discusses when and how to assess multi-day penalties. The directive also sets out various adjustment factors to be used when calculating a penalty. The adjustment factors can be used in two ways. After determining the correct box according to the matrix factors (minor, moderate, or major), the adjustments can help determine whether to use the midpoint (default), low end, or high end of the penalty range. In addition, after a penalty amount from the matrix has been determined, adjustment factors can be used to decrease or increase a penalty, down to zero or up to the statutory maximum. These factors include:

- Knowing, deliberate, or chronic violations.
- Good faith efforts to comply (or lack of good faith efforts to comply) either prior to or after Department discovery of the violation.
- History of noncompliance.
- Economic benefit of noncompliance.
- Ability to pay.
- Other unique factors.

In-Kind Penalties and Pollution Prevention Projects

In-Kind Penalties and Pollution Prevention Projects should be considered as provided in Directive 923.

Direction for Calculating Penalty Amounts For Violations Not Covered Under ELRA

For programs not covered under ELRA, and in cases that involve penalties calculated under ELRA that exceed \$50,000, waste cleanup staff should consult program specific guidelines (i.e., the program involved in establishing Defendant's legal responsibility for clean-up) in conjunction with the Settlement Guidelines noted in Directive 923 when calculating the appropriate penalties. There may be some cases that involve unusual circumstances that have not been factored into the program specific guidelines. The program area should be consulted in these cases to enhance state-wide consistency