

CHAPTER SIX

JUDICIAL PROCESS AND REMEDIES, COLLECTIONS, AND BANKRUPTCIES

6.0 Introduction

This Chapter of the manual discusses the decision-making and approval process for filing enforcement actions in court, the available legal remedies, the elements of a typical law suit, the settlement of a judicial enforcement action, and the enforcement of a final judgment or consent final judgment entered by a court.

6.1 The Decision Making Process Before Taking Judicial Action

Although it has significant advantages, judicial litigation can be expensive and time consuming. With the passage of ELRA, many cases that formally had to be pursued judicially can now be filed administratively, which gives the Department greater flexibility and more options. Before a decision is made to file an enforcement action in state court, the Department enforcement staff and the enforcement attorney assigned to the case should jointly discuss, consider, and weigh the following factors.

6.1.1 Nature and Seriousness of the Violation

The Department initiates enforcement actions to address a wide range of environmental problems. Because of the nature of the problem and the community in which it has occurred, there could be a great deal more judicial awareness of one particular environmental problem over another. This judicial awareness can result in more willingness by the court to seriously consider the issues raised and produce a better-reasoned decision. For example, a community in which controversial dredge and fill projects have received significant media coverage may be a better place for filing a dredge and fill enforcement action in court than in a community in which

dredge and fill activities have not been a significant concern. Also, cases with more serious actual or potential environmental harm or human health effects are more likely to be better received by a court than violations with minimal environmental consequences.

6.1.2 Judicial Actions

Two forms of judicial action are available in a state court. First, the Department may file a petition to enforce a previously entered final order or consent order. (Petitions for enforcement are discussed further in Section 6.6). Second, the Department may file a complaint for rule or statutory violations (so long as the case is not barred under ELRA). Both the petition for enforcement and complaint can seek injunctive relief, civil penalties, damages, and costs and expenses.

6.1.3 Likelihood of Responsible Party Complying With a Final Order

As discussed in the last Chapter, administrative orders can only be enforced through a court order. Therefore, if the Department has prior experience with a particular responsible party or the responsible party makes it clear that he or she would not likely comply with a final order, then a lawsuit may be more appropriate than filing an NOV.

6.1.4 Issues Likely to be in Dispute

Environmental enforcement cases can be complicated. If it appears that the case will involve disputes over complicated factual issues with which an ALJ may have more familiarity, an administrative action rather than a judicial action may be preferred. On the other hand, if the primary disputes concern legal issues such as statutory interpretations, a judicial action may be more appropriate.

6.1.5. Local Judges' Records on Environmental Cases

The Office of General Counsel may consider additional matters such as a local judge's record, in recommending whether an administrative proceeding would better serve the client's needs.

6.2 Review and Approval Process Before Taking Judicial Action

Once the District has determined that a judicial action should be filed, the District staff should prepare a case report, which is signed by the District Director and forwarded to the Deputy General Counsel for Enforcement. Sample case reports are included in the Appendix. After review by the Deputy General Counsel for Enforcement, the case will be assigned to an enforcement attorney. The attorney assigned to the case will review the case report to determine whether the case report contains sufficient facts to support a legal cause of action and whether the action is appropriate for filing in state court. Once the attorney assigned to the case completes this review and the attorney and the enforcement staff agree that the case should be pursued through civil litigation, the attorney will recommend that the action be filed. The Deputy General Counsel for Enforcement will review the recommendation and will refer the case to the General Counsel if the legal merits are sufficient for the case to proceed. The General Counsel must give written approval before the action can be filed in state court. The review and approval process by the Deputy General Counsel and the General Counsel usually takes only a few days, and in an emergency situation, the review and approval process can usually be completed on the same day the case report is received.

6.3 Available Enforcement Remedies

Florida law provides the Department with three types of judicial remedies.

6.3.1 Injunctive Relief

The most common remedy sought by the Department is injunctive relief. A court can enter either a temporary or permanent injunction. The temporary injunction is an order entered by the court before trial, usually within a short time period after a complaint has been filed in state court. In a temporary injunction, the court can order a responsible party to stop committing a particular violation while the lawsuit is proceeding. A temporary injunction rarely requires the responsible party to take some affirmative action, although it can be used for that purpose in some circumstances. For example, a temporary injunction would be used to stop a responsible party from continuing an unpermitted dredging project but usually not to conduct restoration activities at the dredged site. The temporary injunction usually lasts until the court enters a final judgment.

A permanent injunction can be entered as part of the final judgment or final consent judgment (also called a “consent final judgment”) at the conclusion of the case. A permanent injunction can require a responsible party to stop certain actions, take certain actions, or both. For example, restoration could be ordered in a permanent injunction. The permanent injunction can last indefinitely but usually it lasts until all those actions required by the permanent injunction have been completed.

6.3.2 Civil Penalties

Separate provisions in Chapters 373, 376, and 403, Florida Statutes, provide the Department with the authority to seek judicially imposed civil penalties. The maximum amount depends on the statutory limits. To eliminate any potential tax benefits to the violator and for purposes of establishing a history of non-compliance under ELRA, all civil penalties agreed to in a consent order or other settlement document must be designated as “civil penalties”.

6.3.3 Damages

The Department occasionally seeks damages in judicial proceedings, which are different from civil penalties, with the exception of Section 403.93345 Fla. Stat., otherwise known as the Florida Coral Reef Protection Act (CRPA). The CRPA defines “damages” in pertinent part as “... *civil penalties* (emphasis added) paid as a result of either administrative or judicial action...” (See 403.93345(3)(d) F.S.) Damages should compensate the state for the value of the loss to natural resources caused by the violation. Civil penalties should create incentives to bring immediate compliance and curb future violations. Because of the difficulty and expense of proving monetary damages to the environment, injunctive relief and civil penalties have been the preferred remedies. The Department, however, has clear legal authority to seek damages for the loss of the state's natural resources and has done so in some circumstances.

The most common cases in which damages have been recovered are those involving fish kills, damage to coral reefs, or damage to the ocean from prohibited discharges, because rules and statutes have established economic formulas that can be used to calculate these damages. The Department can also seek damages for other losses of natural resources such as the loss of or damage to an aquifer, sea grasses, surface water body, or a jurisdictional wetland.

The Department may accept in-kind payment to compensate for the temporary or permanent loss of natural resources. The guidelines for accepting in-kind payment of damages are the same as those for accepting in-kind penalties.

6.4 Case Report

The Department staff must prepare a case report after an alleged violation has been thoroughly investigated and documented, and it believes that judicial enforcement action is appropriate.

Depending on the type of case, either a short form or standard case report will be prepared and sent to OGC. Sample case reports are included in the Appendix. A case report is simply an organized presentation of the information needed to analyze the legal merits of a case and prepare the appropriate legal document for initiating the judicial process. The case report consists of a narrative description of the elements of the case and relevant attachments. The narrative section of case reports is a document prepared by the staff at the direction of OGC in anticipation of litigation, and it is therefore exempt from disclosure under the Public Records law (Section 119, Florida Statutes) as an attorney work product. Public records are discussed in Section 7.2.

6.5 Complaint

A complaint is the initial pleading that is filed with the clerk of the state court in the county in which state court action is initiated. The complaint includes a description of the facts that establish that a violation has occurred, a claim that the court has jurisdiction to decide the case, and a prayer for relief that describes the specific remedies being sought. In a complaint, the Department is called the “plaintiff” and the entity sued is called the “defendant.” In a petition for enforcement (discussed next), the Department is called the “petitioner” and the entity sued is called the “respondent.” For convenience sake, the entity sued will be referred to as the defendant in this Chapter of the manual.

6.6 Petition for Enforcement

A petition for enforcement is the initial pleading authorized in Section 120.69, Florida Statutes, to enforce compliance with an administrative order, such as a final order, consent order, or permit. The petition for enforcement is typically filed with the clerk of the state court in the county in which the violation occurred. A petition for enforcement action is different from an action involving a complaint because the factual allegations and legal merits relating to the

underlying violation and the legal merits of the violation addressed in the consent order or final order are not at issue. The Department merely has to prove that the administrative order was issued and that the defendant did not comply.

The defendant can raise certain statutory defenses, including the invalidity of any relevant statute; the inapplicability of the administrative determination to the defendant; the inappropriateness of the remedies sought by the Department; compliance by the defendant; and the invalidity of Department action. The defense most often raised in response to a petition for enforcement is the inappropriateness of the remedies ordered in the Department's final order.

6.7 Venue

Venue is the county or judicial circuit in which the complaint or petition for enforcement is filed. The law on venue provides that a party initiating a lawsuit can only file the action in certain locations. Complaints or petitions for enforcement initiated by the Department typically must be filed in the county in which the defendant resides or has its principal place of business or in the county in which the violation took place.

6.8 Service of Process

Once a complaint or petition for enforcement has been filed, it must be served upon the defendant before the action can proceed. The complaint or petition for enforcement is almost always served by the sheriff's office in the county in which the defendant is located. In an unusual case, a special process server, who has been authorized by the court, may serve the complaint or petition for enforcement. If the defendant cannot be personally served, the defendant can be constructively served by publishing a notice of the action in a newspaper in a county in which the property in question is located. The enforcement attorney assigned to the case should make decisions about service of process.

6.9 Motions and Answers

Once served with the complaint or petition for enforcement, the defendant has twenty days to file either a motion claiming the complaint or petition for enforcement is legally insufficient or an answer denying or admitting the Department's claims and asserting applicable affirmative defenses. The most common motion filed by a defendant is a motion to dismiss. In a motion to dismiss the defendant argues that even if all the facts alleged by the Department are true, the law does not authorize any relief against the defendant. If a motion to dismiss is granted, the Department can amend the complaint or petition to fix the flaws. If the Department cannot fix the problems, the case is over unless an appeal is filed.

Numerous other motions can be filed at various stages of the judicial proceedings. A party filing a paper with the court initiates most motions. The motions raise legal issues that are resolved at hearings before the court, during which the attorneys for the parties argue their respective legal positions and occasionally present testimony.

6.10 Discovery

Discovery has three main purposes. First, discovery is used to find out as much as possible about the factual basis for the opposing parties' claims or defenses in order to properly prepare the case for trial. Second, discovery is used to preserve testimony or evidence that will later be presented at trial. Third, discovery can be used to limit the issues that need to be tried by establishing the facts that are not in dispute.

The formal discovery procedures that are commonly available to the parties include interrogatories, requests for production of documents, requests for inspection of land or things, requests for admissions, and depositions. Interrogatories are written questions that are sent to the opposing party and must be answered in writing. The number of interrogatories is usually

limited to 25, and the answers to the interrogatories are usually required to be returned within 30 days of their receipt. A request for production of documents requires a party to produce all the requested documents at a particular time and place for inspection and copying. A request for inspection of land or a thing allows the requesting party to observe, take photographs, or conduct tests. Requests for admissions require a party to admit or deny specific statements of fact or law set forth in the requests. Finally, depositions are written or oral question and answer sessions involving parties or nonparties who may have some information about the case. Before a deposition can be taken, the individual to be deposed must be either noticed or subpoenaed to appear in the county in which he or she resides at a set time and place to answer questions under oath with a court reporter present to record the questions and answers.

6.11 Settlement

Judicial actions are usually settled in one of two ways. Either the parties agree on the terms of a final consent judgment, which is then adopted and entered by a judge, or the parties execute a settlement agreement that is filed with the court but is not signed by the judge. If a settlement agreement is used without a judgment being entered, a notice of voluntary dismissal is filed to conclude the case. The preferable way to settle a judicial action is through a final consent judgment. A final consent judgment is enforceable through either or both contempt proceedings, which are directed against the defendant individually, or execution proceedings, which are directed against the defendant's property.

6.12 Mediation

It is not unusual for a court to order that the parties mediate their dispute before a trial will be set. Parties can also voluntarily agree to mediation to try to settle the litigation. See Section 5.8 for a further discussion about mediation.

6.13 Pre-Trial and Trial

Once all the motions have been heard, the answer has been filed, and discovery has been completed, the case is ready for trial. The judge and the parties' attorneys may hold a pre-trial conference before a case goes to trial. During the pre-trial conference, witness lists and documents to be entered into evidence are exchanged, issues that are to be tried are set, discovery is terminated, and the amount of time needed to try the case is discussed.

After the pre-trial conference, the case is set for trial either at a specific date and time or for a specific trial period during which the parties are notified as to the order in which their case will be tried. The parties must then be prepared to try the case when it is set. At the trial, the parties present testimony from all of their witnesses, cross-examine the opposing side's witnesses, introduce documents and other things into evidence, and make legal arguments about the merits of their respective cases. The judge can either enter his or her judgment at the conclusion of the trial or sometime later upon further review of the record and law. Some trials are held before juries. In those trials the attorneys will choose the jurors who will decide the case.

6.14 Post-Judgment Enforcement

The Department has two litigation procedures available for enforcing compliance with a judgment or consent final judgment. If the defendant does not stop doing something the judgment prohibits or does not do something the judgment requires, the Department can set up a hearing before the judge seeking to have the defendant held in contempt of court for failing to comply with the judgment. At a contempt hearing, a District staff member usually will be required to testify about his or her observations concerning the defendant's failure to comply with the requirements of the judgment.

If the defendant refuses to pay damages, penalties, or costs and expenses awarded in the judgment, the Department can have the sheriff or court seize the Defendant's property for sale with the proceeds of the sale to be used to pay the damages, costs and expenses, or civil penalties.

6.15 Appeals

An appeal is a procedure available to any party in a lawsuit to obtain review by appellate judges of any final orders and certain non-final orders entered by the court. A typical non-final order that may be appealed is a denial by a court of a motion for entry of a temporary injunction. A notice of appeal must be filed with the court that entered the order within 30 days of entry of the order being appealed. The appellate review process involves the presentation of written legal arguments to the appellate court in the form of briefs and may also include oral argument by the attorneys. The appellate court can agree with the trial court and affirm its decision, or it can disagree and reverse the trial court and send the case back to the trial court for further proceedings consistent with the appellate court's rulings. It is not unusual for the appellate court to take a year or more to decide a case.

6.16 Collections

The assessment and collection of money for penalties, costs, or damages is a regular part of formal enforcement. In most cases the responsible parties pay the money owed in consent orders or judgments. However, there are parties who will not pay money owed to the Department unless some formal action is taken to collect the money owed. The Department has established a collection protocol to handle those cases in which the responsible parties are not paying money owed to the Department.

6.16.1 Accounts

“Accounts” or “Receivables” are terms given to the monetary obligations an entity owes to the Department. Accounts can arise in a variety of contexts; an entity may be obligated to the Department for park fees, permit fees, license fees, lease fees, reimbursement of costs, damages or penalties. Each of these obligations gives rise to a receivable by the Department for the State of Florida. These obligations may be payable to a trust fund, into the general revenue account, or to programs or entities outside the Department. The obligations may be fixed or subject to interest or other increase. Accounts may be subject to credit for pollution prevention or by payment by a co-obligor on the debt.

When a person or entity is obligated on an account, the Department must obtain and maintain certain fundamental information to allow the Department to collect and appropriately credit payment. The most obvious information is the **Name** and **Address(es)** of the obligor (the one that owes the money), the **Fed. Employer I.D. No.**(if applicable), and the **Amount** and **Due Date** of the obligation. In addition, the Department must provide an explanation of the event or transaction giving rise to the debt and any credits or adjustments that need to be made, as well as any payment schedule.

6.16.2 Duty to collect

Accounts due to the Department (i.e., receivables) are assets of the State of Florida. The statutes require that the Department attempt to collect receivables. If the Department is unsuccessful in its efforts, it is obligated to turn accounts over to one of our contracted collection agencies. The collection agencies are not obligated to pursue accounts that are older than four years.

To fulfill its obligation to attempt to collect accounts, the Department adopted a collection protocol (DEP Directive 540), which is found on the Department's directives website. This protocol provides that each District or Division having responsibilities related to billing or receipt of moneys shall establish a record detailing account information including amount due, payment due dates and payments received. Each District and Division shall designate personnel ("Collection Office") who shall be responsible for maintaining the detailed account records, and notifying the Department's Office of Finance and Accounting, Revenue Section, within 10 days of the end of each month of all outstanding accounts receivable. As noted below, the Districts and Divisions are also responsible for initial collection efforts.

6.16.3 Authority to settle

Because the accounts owed to the Department are property of the State of Florida, no individual in the Department has the unilateral authority to accept less than full payment. This does not prevent the Department from exercising its prosecutorial discretion in setting penalties or settling disputes. It does, however, prohibit the Department from reducing amounts due under final Consent Orders, Judgments, or Settlement Agreements. As a result, after an account is established, the Department must receive pre-approval by the Department of Financial Services before it can write off, forgive, or accept less than full payment. This approval is obtained by communications through OGC to the Department of Financial Services. Requests to write off or settle for less than full payment must contain sufficient information to allow the Department of Financial Services to determine that settlement or write-off is reasonable and not contrary to any law or regulation.

6.16.4 Records

The Department's Office of Finance and Accounting maintains several different records of accounts. These records include receipts for everything from underground storage tank registration fees to payments of criminal restitution. The statutes concerning state revenues require all departments to maintain comprehensive and detailed records of accounts and receipts. To comply with this requirement, the Department's collection protocol requires that the Districts and Divisions maintain records on all amounts assessed and collected. This data is shared with Finance and Accounting. Likewise, all amounts received through the contracted collection agencies are routed through Finance and Accounting, minus the fees the collection agencies are paid. Accounts that are collected by the contracted collection agencies for the Department are credited back to the Department, and adjustments are made to our account balances to reflect the credit.

6.16.5 Initial Efforts to Collect

As noted, the Department is obligated to make reasonable and timely efforts to collect accounts. A process for satisfying this requirement is outlined in the collection protocol. The first step is a notification to the obligor by the District's or Division's "Collection Office" that a debt is owed to the Department and the date such debt is due. If payment is not received by the due date then at least one past due notice shall be sent to the obligor. The past due notice(s) shall notify obligor that if payment is not received by a specific date, the account will be referred to one of our contracted collection agencies and additional fees will be due. The past due notice should prompt the District or Division's "Collection Office" to consult with District or Division management to ascertain whether the responsible party may have (or be seeking) other business interests in the area, such that additional methods of contact may be made. One option available

to the District or Division is to negotiate a repayment plan and establish a payment schedule with the obligor. If an account remains past due for 100 days, the Collection Office shall submit a collection referral to DEP's Finance and Accounting for placement of the account with one of our contracted collection agencies. s. **6.16.6 Referral**

The request to refer an account to a collection agency must be submitted in the approved electronic excel template to DEP's Finance and Accounting. The account must be placed with the collection agency by DEP's Finance and Accounting before the account becomes more than 120 days past due unless an exemption has been approved by Department of Financial Services.

6.16.7 OGC Collection Activities.

OGC prepares a list of cases with past due monies that is sent to the Assistant District and Division Directors and "Collections Coordinators" in each District on a weekly basis. OGC meets monthly to review all of the cases with past due monies to determine which cases will be put on an exemption list that will be sent to the Department of Financial Services by OGC. Those cases placed on the exemption list do not have to be sent to the collection agencies for collection. The exemption list will also be sent to the Assistant District and Division Directors and Collection Coordinators on a monthly basis with a request to the Districts and Divisions to let OGC know if there are any cases that they would like to add to the exemption list developed by OGC.

In evaluating what cases to put on the exemption list, OGC considers the following criteria:

- 1) Does the amount owed exceed \$10,000?
- 2) Are there corrective actions required or are the corrective actions completed?
- 3) Has the account already been sent to the contracted collection agencies?

- 4) Has the money owed been discharged in bankruptcy?
- 5) Is the RP still operating a business?
- 6) Is the RP still in this country?

Once the cases put on the exemption list have been evaluated to determine the viability for collecting on the money owed, those that appear to be viable will be assigned to the District Enforcement Attorney for the District that generated the case. Any information that the District or Division can provide on the viability of the collection efforts should be shared with the District Enforcement Attorneys.

6.16.8 Additional enforcement proceedings

Often an account obligor is also the subject of enforcement by the Department. If an account arises by virtue of a failure to comply with a consent order, which has a stipulated penalty provision, then the efforts to collect the account are probably best combined with the actions to compel compliance with the order. As a result, all evaluations of account collection should be made in conjunction with OGC to determine if the Department has the opportunity to bring all of its actions more efficiently in a single forum.

6.16.9 Setoff

The statutes provide that amounts due and owing to the state may be setoff against obligations of the state to the account debtor, regardless of which Department owes or is owed the money. As a result, in certain cases it may be advantageous to determine whether an obligor may be entitled to distribution from the state and pursue a setoff of those obligations, either through the Comptroller or directly. This is a remedy that needs to be discussed with and approved by the General Counsel prior to implementation.

6.17 Bankruptcies

It is not unusual for staff involved in enforcement actions to find out either before, during, or after initiating formal enforcement actions that a responsible party has filed or has threatened to file for bankruptcy. The following sections provide some direction as to how to proceed in those circumstances.

6.17.1 Notice

The Department often receives information regarding bankruptcies of property owners, responsible parties, and related entities. Typically this information arrives in the form of formal Notices mailed from a bankruptcy court containing vital information about the case. However, it is also possible that the Department learns of a bankruptcy proceeding from the newspaper, the entity's counsel, a landlord, or a neighboring landowner. Under the law, each of these forms of notice is adequate to place the burden on the Department to determine whether it has an interest in the bankruptcy case and to appear and make its claims. Therefore, any knowledge that any employee of the Department has that an entity indebted or obligated to the Department is in bankruptcy needs to be forwarded to OGC as soon as possible. In bankruptcy proceedings, like probate proceedings, time frames for making claims are strictly construed and missing them can result in irreparable prejudice to the Department.

If you learn or are advised of a bankruptcy, you need to forward that information to the OGC. The full and correct **Name** of the Debtor is crucial. If it is a corporation, include the name or names under which the corporation is operating as well as the official name under which it has filed. You should try to obtain as much of the following information as possible: the district and state of the **Bankruptcy Court** where the case was filed (surprisingly, Florida corporations and individuals may file in any state, from Maine to Hawaii), the **Case Number**, the **Date of Filing**, and the name of the **Debtor's Attorney**. Likewise, any information you have with regard to the

Department's interest in the Debtor will be very helpful. With this information, OGC can locate the case, obtain court records, and appear in the case. The information does not have to be complete before it is forwarded, and any information that is available will assist the Department in investigating whether it has an interest in the case.

6.17.2 Department's Interest.

It will not always be apparent to you, or to your District, why the Department may have an interest in a bankruptcy case of which you have received notices. This can be because the Debtor did not do business in your District or did not operate under the name in the Notice. It is possible that the named Debtor is an officer in a corporation with which the Department is involved. Never dismiss a Notice as unimportant simply because you have not heard of the Debtor, the case was filed in another state, or the name does not appear in the Department's database. The Department conducts a multitude of activities, and no person can be expected to know every way that a Debtor has or could be obligated to it. OGC will conduct a search of the Legal Case Tracking system, as well as poll the various Districts and Divisions to determine all of the interests that it may have in a case (some Debtors conduct different businesses in different Districts). By forwarding this information to OGC, the appropriate steps can be taken to determine how to proceed. If you indicate that you have a pending proceeding or discussion with the Debtor, you will be contacted to make sure that the actions you are taking are authorized in light of the bankruptcy and that all issues relating to the Debtor are addressed simultaneously.

6.17.3 Effect of Filing Bankruptcy

You may have heard, or be advised by Debtor's counsel, that the bankruptcy prevents you from proceeding against the Debtor in enforcement, entering in to a Consent Order, or collecting debts owed to the Department. While this is an area with some complexities, the general rule is

that you are not prevented from proceeding with any current inspections, notice of violations, or other enforcement proceedings to abate or prevent violations of our statutes. The best course for you to follow when advised of a bankruptcy is to immediately involve your enforcement attorney. You will receive instruction on any changes in procedure that you need to make as a result of the bankruptcy.

6.17.4 Department's Response to the Filing of Bankruptcy

The OGC will evaluate the nature of the bankruptcy proceeding (there are several types of bankruptcy, and the effects may differ between an individual bankruptcy and a corporate or partnership bankruptcy). In some instances the Department must make a dollar claim in the bankruptcy case. In this event, you may be contacted to help determine or estimate the claim of the Department in the bankruptcy proceeding. Because all claims made or available to the Department are dealt with in the bankruptcy, it may be necessary to estimate potential or contingent claims. Therefore, when considering whether the Debtor is obligated to the Department, you need to consider payments due in the future, possible defaults of ongoing agreements, and any other circumstance that could result in a claim against the Debtor (e.g., default by a previous or current owner in its obligations).

6.17.5 Parallel Proceedings

The bankruptcy case is a separate and independent proceeding from any existing or potential administrative or state court action. The Debtor will often have different attorneys for each. The OGC will notify the appropriate courts or forums of the Debtor's bankruptcy. Once you become aware of a bankruptcy involving a Debtor respondent, you need to begin copying both your enforcement attorney as well as the OGC bankruptcy attorney with information that

you receive. Co-ordination of these processes is key to achieving the best result for the Department.

6.17.6 Discharge

You may be advised that a Debtor has been “discharged” in bankruptcy. While this again is a technical legal term, with many possible implications, the effect of a discharge is best addressed by OGC. In many cases, the discharge obtained by some Debtors has no affect on the Department’s claims. Likewise, the failure of a Debtor to notify the Department in advance could seriously limit the scope of the discharge. The principal of “discharge” does not alter an entity’s obligation to comply with state statutes. Your attorneys will determine whether the discharge requires any modification of the Department’s procedures in a given case.

6.17.7 Subsequent Actions

Prior bankruptcy proceedings are irrelevant to the current statutory or rule obligations of a Debtor. The statutes and rules of the Department regarding operational standards, as well as fees, financial assurance requirements, and renewal obligations are unaffected by a previous bankruptcy (and are generally applicable to any Debtor while it is in bankruptcy). As a result, the fact that an entity has previously filed for bankruptcy should have no affect on subsequent actions by the Department. However, because some pre-bankruptcy monetary obligations are affected by the bankruptcy (e.g., damage clams, restitution claims), you need to advise OGC of the bankruptcy, regardless of how long ago it took place, whether it was dismissed or resulted in a discharge. This information is maintained in the OGC, and can be important.