

Enforcement of State Environmental Laws

June 29, 2022

Presented By:

Frederick L. Aschauer, Jr.



LLW

**LEWIS
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Environmental Enforcement



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Background on State Environmental Enforcement

- Enforcement by the Florida Department of Environmental Protection (DEP) under Chapter 403, Florida Statutes
- Enforcement by DEP or Water Management District (WMD) under Chapter 373, Florida Statutes
- Enforcement by Florida Fish & Wildlife Commission under Chapter 379, Florida Statutes*
 - Under Part VIII, penalties, including criminal penalties, may be assessed

*Not discussed in detail in presentation



Enforcement under Ch. 403, F.S.

DEP

- § 403.121, Fla. Stat. – Florida’s Environmental Litigation Reform Act (ELRA)
 - Provides for the enforcement procedures for violations of Chapter 403
 - causing pollution, failing to obtain a permit, violating a permit, rule, regulation, or law. – § 403.161
- Sewage Disposal Facilities – § 403.086
 - Rule Chapter 63-600, Florida Administrative Code
- “A stationary installation that is reasonably expected to be a source of air or water pollution . . .” - § 403.087
- Discharges of waste into waters of the state – § 403.088



Pollution

- Section 403.031 (7) - “Pollution” is the presence in the outdoor atmosphere or waters of the state of any substances, contaminants, noise, or manmade or human-induced impairment of air or waters or alteration of the chemical, physical, biological, or radiological integrity of air or water in quantities or at levels which are or may be potentially harmful or injurious to human health or welfare, animal or plant life, or property or which unreasonably interfere with the enjoyment of life or property, including outdoor recreation unless authorized by applicable law.



DEP Guidance

- FDEP Enforcement Manual
 - <https://floridadep.gov/ogc/ogc/content/enforcement-manual>
- FDEP Directive 923 – updated July 2020
 - “These guidelines are provided solely for the use of Department staff in determining what position the agency should take in settlement negotiations concerning civil and administrative penalties. They are intended to provide a rational, fair and consistent method for determining whether the Department should seek a civil penalty in an enforcement action and the appropriate amount of civil and administrative penalties the Department should seek from responsible parties in settling enforcement actions when imposition of a civil penalty is appropriate.”
 - Not an adopted rule, but provides the “rules of the road.”



DEP memo on CAOs

- [https://floridadep.gov/sites/default/files/Limitations on Use of CAOs 0.pdf](https://floridadep.gov/sites/default/files/Limitations%20on%20Use%20of%20CAOs%200.pdf)
- Outlines common sense approach to Compliance Assistance Offer
- Limits Compliance Assistance Offers to no more than two in a 5-year period.
- A third Compliance Assistance Offer requires Deputy Secretary approval.
- Denial results in a warning letter, notice of violation, consent order, or case report will result.
- “If a violation is noted during an inspection and the permittee corrects that violation in the presence of DEP personnel during that same inspection, and the inspector does not deem the violation worthy of further enforcement action, then this may not be considered a CAO.”
- Written CAO’s are preferred by DEP.
- “All CAO’s, written and verbal, will be tracked for each permit or registered facility.”



Enforcement under 373

DEP & Water Management Districts

Section 373.129, FS provides enforcement authority under Ch. 373, FS.

The department, the governing board of any water management district, any local board, or a local government to which authority has been delegated pursuant to s. 373.103(8), is authorized to commence and maintain proper and necessary actions and proceedings in any court of competent jurisdiction for any of the following purposes:

- (1) To enforce rules, regulations, and orders adopted or issued pursuant to this law.
- (2) To enjoin or abate violations of the provisions of this law or rules, regulations, and orders adopted pursuant hereto.
- (3) To protect and preserve the water resources of the state.
- ...
- (5) To recover a civil penalty for each offense in an amount not to exceed \$15,000 per offense. Each date during which such violation occurs constitutes a separate offense.
- ...
- (7) To enforce part IV of this chapter in the same manner and to the same extent as provided in ss. 373.430, 403.121(1) and (2), 403.131, 403.141, and 403.161.
- ...



Enforcement under 373

DEP & Water Management Districts

- § 373.119, Fla. Stat. – Administrative enforcement procedures
 - Whenever the executive director of a water management district has reason to believe that a *violation of any provision of this chapter or any regulation promulgated thereunder or permits or order issued pursuant thereto* has occurred, is occurring, or is about to occur, *the executive director may cause a written complaint to be served upon the alleged violator or violators.*
 - May issue emergency order “with the concurrence and advice of the governing board” requiring “such action be taken as the executive director deems necessary to meet the emergency.”
- § 373.136, Fla. Stat. – Enforcement of regulation and orders
 - Provide the authority to bring a “suit for injunction or other appropriate action in the courts of the state.”
 - Allows for citizen suit, but such suit is “governed by the Florida Environmental Protection Act, s. 403.412.”



Enforcement under Chapter 120, F.S.

- 120.69, F.S.
 - (1)(a) Any agency may seek enforcement of an action by filing a petition for enforcement, as provided in this section, in the circuit court where the subject matter of the enforcement is located.



Inspections

- Agency has right to inspect
 - Permit conditions
 - Statutory authority (if no permit – although will require lawful authority to enter property (e.g. court order) if no permit)
- What to expect
 - Meeting onsite prior to inspection (safety briefing)
 - Inspection
 - How to conduct yourself
 - Meeting to close out inspection



Hierarchy of Notices

- Compliance Assistance Offer
 - Normally used when the violation is minor
- Warning Notice
 - Normally used if the Department does intend to pursue a consent order and/or penalties
- Notice of Violation
 - Normally used as an initial response if the violation is causing significant environmental harm or because a program-specific deadline for initiating formal enforcement must be met.
 - If after the issuance of an NOV, the responsible party fails to file a petition for formal or informal hearing within 20 days of receipt of the NOV, a default Final Order will be entered against the responsible party.



Consent Orders & Other Actions

- Consent Order
 - Short Form
 - Long Form
 - Model
- Final Orders
- Settlements- Informal Conferences and Mediation



Litigation – You've been served

- Civil Actions
- Administrative Actions
- General Principles
- Case Review



Initial Pleading – Civil Action

- § 403.121, Fla. Stat. – Florida’s Environmental Litigation Reform Act (ELRA)
(1)(a) The department may institute a civil action in a court of competent jurisdiction to establish liability and to recover damages for any injury to the air, waters, or property, including animal, plant, and aquatic life, of the state caused by any violation.
- Before Circuit Court Judge
- Respond via answer
- Proceeding is governed by the Florida Rules of Civil Procedure



Initial Pleading – Administrative Action

- § 403.121, Fla. Stat.

(2)(a) The department may institute an administrative proceeding to establish liability and to recover damages for any injury to the air, waters, or property, including animal, plant, or aquatic life, of the state caused by any violation. The department may order that the violator pay a specified sum as damages to the state. Judgment for the amount of damages determined by the department may be entered in any court having jurisdiction thereof and may be enforced as any other judgment.

- Administrative Complaint begins with an NOV. § 403.121(2)(c), FS
 - Must respond to the Administrative Complaint or will waive right to challenge. § 403.121(2)(c), FS
- Before Administrative Law Judge
 - Final Order authority if administrative penalties requested. § 403.121(2)(d), FS
 - Agency retains Final Order authority if no administrative penalties are requested. § 403.121(2)(d), FS
- Respond via Petition. § 403.121(2)(d), FS
- Proceeding is governed by the Uniform Rules. § 403.121(2)(h), FS



General Principles

- Administrative hearings must go to final hearing within 180 days, unless the parties agree to a later date. § 403.121(2)(d), FS
 - Timing of civil proceedings will be dependent upon a number of things (e.g. court's calendar)
- In an administrative hearing, the prevailing party gets costs. § 403.121(2)(f), FS
 - Attorney's fees to the licensee (Respondent) if the NOV was not substantially justified ... but limited to \$15,000. § 403.121(2)(f), FS



General Principles

- “The administrative law judge may receive evidence in mitigation.”
403.121(10), FS
- Adjustment factors (from DEP 923):
 - Good faith efforts to comply prior to discovery
 - The violation was caused by the responsible party’s employees or agents despite the responsible party’s reasonable efforts to train, educate or inform its employees or agents.
 - The violation was caused by the responsible party as a result of a legitimate\misinterpretation of the Department's regulations.
 - The violation occurred after a Department regulation was changed and compliance was required, but the responsible party had been making reasonable efforts to bring its operation into compliance with the new Department regulation.
 - The responsible party took action on its own to mitigate the violation once it discovered that a violation had occurred.
 - Once the responsible party discovered the violation, it made changes to its operation on its own to prevent future violations from occurring.
 - The responsible party has demonstrated that it is implementing an acceptable pollution prevention plan.
 - The responsible party has demonstrated that it is operating in accordance with a DEP Ecosystem Management Agreement.



General Principles

- Lack of good faith (prior to Department discovery)
 - The responsible party knew it was not complying with the Department's regulations.
 - The responsible party claims it did not know it was not complying with the Department's regulations, but because of the nature of the responsible party's business and the length of time the business was operating, it is reasonable to assume that the responsible party should have known about the Department's regulations.
 - The violation was caused by an uninformed employee or agent of the responsible party, and the responsible party knew or should have known about the Department's regulations and made no or little effort to train, educate or inform its employees or agents.



General Principles

- Adjustment factors (cont'd):
 - Good faith efforts to comply after Department is informed
 - Once the responsible party was notified of the violation by the Department, it took immediate action to stop the violation and mitigate any effects of the violation.
 - Once the responsible party was notified of the violation by the Department, it cooperated with the Department in reaching a quick and effective agreement for addressing the violation.
 - Some examples of lack of good faith efforts to comply are:
 - The responsible party took affirmative action that was in violation of the Department's regulation after being notified by the Department that such action constituted a violation of the Department's regulation.
 - The responsible party failed to take action to stop an ongoing violation or to mitigate the effects of a violation after being notified by the Department that it was in violation of a Department regulation. DEP 923 July 1, 2020.
 - The responsible party ignores the Department's requests to negotiate a settlement.



General Principles

- Other adjustment factors:
 - History of non-compliance
 - Economic benefit of non-compliance
 - Ability to pay
 - Other unique penalties



Water Management Districts

- 373.129, F.S. “The ... governing board of any water management district ... or a local government to which authority has been delegated pursuant to s. 373.103(8), is authorized to commence and maintain proper and necessary actions and proceedings in any court of competent jurisdiction
”
....
- 373.136, F.S. – General authority to enforce regulations.



General Principles

- Agency has the burden
 - Must spell out allegations in initial pleading
 - No surprises
 - Burden on the agency
 - “The department has the burden of proving with the preponderance of the evidence that the respondent is responsible for the violation.” § 403.121(2)(d), Fla. Stat. (ELRA)
- Experts are critical
 - Like permit challenge, still will involve experts
- Facts are critical, too
 - As compared to permit challenge, where you are predicting whether your permit will cause any harm or is properly mitigation (reasonable assurance)



Case Review

- The statute must be construed in favor of the regulated. *Gardinier, Inc. v. Fla. Dep't of Pollution Control*
- The ability to pay for remediation of environmental harm is not a factor to be considered. *Z.K. Mart, Inc. v. Dep't of Environmental Protection*



Case Review

- An Administrative Law Judge may reduce the penalties. *Fla. Dep't of Environmental Protection v. Holmes Dirt Service, Inc.*; § 403.121(10), Fla. Stat.



Potential Pitfalls

- Sanitary Sewer Overflows
- Violations of Drinking Water regulations
- Violations of Permit Conditions



Questions?



Frederick L. Aschauer, Jr.

faschauer@llw-law.com

850.222.5702

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