
State Groundwater Cleanup Requirements

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I. Overview.

A. *Scope of this Article.*

The primary focus of this article is on the generally-applicable groundwater cleanup and reporting requirements of the Florida Department of Environmental Protection (DEP), along with related soil cleanup issues. Many local governments have the authority to enforce provisions similar to those discussed herein, though the extent of such authority is beyond the scope of this article. While the article also briefly discusses the DEP's additional program-specific cleanup requirements, these programs are covered in much greater detail elsewhere in this *TREATISE*.

This article only briefly discusses local or federal cleanup requirements, focusing primarily upon potential conflicts between various agency requirements. The reader should be aware that other agency programs may at times create or limit liability in a different manner than how DEP can exercise its authority. This article also briefly discusses private causes of action, focusing upon the difference between private causes and DEP remedies (or limitations thereto).

B. *Why History Matters.*

Cleanup requirements at a particular location may be impacted by the dates when groundwater contamination was first identified and brought to the agency's attention. Originally, the Department of Environmental Regulation (DER), later to become the DEP (which will be the agency referenced in this article unless the context requires otherwise), regulated groundwater cleanup on the basis of its general statutory authority under section 403.061, Florida Statutes (F.S.), to protect the air and waters of the state. As explained below, the DER then developed implementing groundwater rules, followed by an extensive array of non-rule policies, including model corrective action orders. Over the years, the legislature gradually granted cleanup authority to the DEP specific to various program areas (primarily, for petroleum contamination, drycleaning solvent contamination, and brownfields), which the DEP followed with program-specific rules for each area that varied depending upon the contaminated media involved, the type of state program that existed to assist with cleanup for the particular media, and the effect of various liability waiver provisions tied to eligibility for any such state program.

In 2005, the regulatory landscape changed with the DEP's adoption of chapter 62-680, Florida Administrative Code (F.A.C.), entitled "Contaminated Site Cleanup Criteria," effective April 17, 2005, as well as changes to related existing rules as discussed below. With the changes, which incorporate the concept of "Risk-Based Corrective Action," usually referenced by the acronym "RBCA" and pronounced "Rebecca," groundwater cleanup is now formally described as "site rehabilitation," a more accurate term because the media being cleaned up could also include soils; and because in appropriate situations, using a process formalized as a result of RBCA, parties responsible for cleanup of contamination need not always complete the cleanup to water quality standards, and in some circumstances not even have to initiate cleanup at all, but let nature do the work.

Notwithstanding enactment of the 2005 rules, there are many currently outstanding DEP cleanup orders that were issued prior to these rules and thus may require compliance with policies established prior to adoption of these rules—though a responsible party in such circumstances has the option to convert to site rehabilitation under these rules. In addition, the development of both the original policies and the subsequent program-specific rules form much of the basis for the language of the current rules, as well as help facilitate an understanding of how the DEP administers these rules. Older cases can thus often act as useful precedent today, even though the regulatory approach has been modified over the years.

II. A Brief History of DEP's General Approach Towards Groundwater Cleanup.

A. Original Groundwater Rule Requirements.

The original DER groundwater cleanup requirements were contained in the DER's first comprehensive groundwater rule, which was developed in 1983 pursuant to DER's general authority in section 403.061, F.S. The groundwater rule is now located in Rule chapter 62-520, F.A.C., though without those original cleanup provisions. A thorough summary and history of the development of the groundwater rule (including water quality classifications and standards and permitting requirements) can be found in the first part of the Groundwater Chapter of this *TREATISE*, which is entitled "Groundwater Quality Protection: An Overview," by Cynthia Christen. Cleanup ("Corrective Action") requirements were originally contained in Rule 17-4.245(7), F.A.C., then moved to Rule 62-522.700, F.A.C., and ultimately repealed in 2009. Generally speaking, DEP now uses Rule chapter 62-520, F.A.C., to establish liability and the consequent need for corrective actions based upon violations of groundwater quality standards resulting from the discharger's failure either to obtain necessary permits for the groundwater discharge or noncompliance with permit conditions. The 2005 rule, chapter 62-680, F.A.C., is now used in such situations as a mechanism for managing and achieving whatever site rehabilitation may be required as a result of such violations. As further explained below, the 2005 rule can also be applied outside of the enforcement context to address newly discovered or reported site contamination not associated with permit violations.

Rule 17-4.245(7), F.A.C., later Rule 62-522.700, F.A.C., applied whether or not a discharger had a valid permit. The rule required the owner to take “immediate action” if there was an imminent hazard, and “appropriate action” if no imminent hazard existed but the plume “threatens or is likely to threaten in the foreseeable future to cause contamination.” The rule listed seven factors to determine what the appropriate action should be, including the size, speed, direction, and toxicity of the plume and the costs/benefits of cleanup.

Shortly after the original groundwater rule was adopted, DER decided to make groundwater cleanup, through both permitting and enforcement, a major priority of the agency. This was accomplished through policy implementation rather than additional rulemaking. Permitting was accomplished through the establishment of groundwater monitoring programs for designated facilities. Enforcement was accomplished through civil and administrative efforts to force those with contaminated sites to clean them up, and to a much lesser extent, through state-funded cleanup programs. Within a couple of years, the DER established a more systematic approach with the development of model orders and model corrective actions.

B. *The Model Orders and Model Corrective Actions.*

The DER first developed model consent orders, which set forth DER’s enforcement mechanisms, and model corrective actions, which were attached to model orders and provided technical details for how cleanups should be accomplished, in the mid-1980s. As the result of the 2005 adoption of chapter 62-780, F.A.C., DEP now uses the cleanup protocols contained in that rule, which is discussed in Part IV *infra*, rather than the model corrective actions, though the basic components as outlined below provided a conceptual framework for the rules. The model corrective actions will be discussed briefly because they may still be applicable in still-active cases that pre-date promulgation of the rule, where the respondent has chosen to remain under those protocols rather than those of the rule.

The model corrective actions contained the following basic components:

- Quality Assurance.
- Interim Remedial Action.
- A Contamination Assessment Plan (CAP), often preceded by a Preliminary Contamination Assessment Plan (PCAP).
- The Contamination Assessment Report (CAR), based upon the CAP, with recommendations that could include:
 - No Further Action (NFA).

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- Monitoring Only Plan (MOP).
 - Remedial Action Plan (RAP).
 - Target Cleanup Levels or a Risk Assessment.
 - Remedial Planning and Remedial Actions. Implementation of the RAP
 - Progress Reporting and Notification.
 - Termination of Remedial Actions.
 - Conflict Resolution and Other Requirements.

C. *The Model Consent Order.*

The DEP historically resolved groundwater cleanup issues in the nonprogrammatic areas through use of a consent order. The above-noted model corrective actions thus became an attachment to the model consent order. Components of the model consent order included the following:

- An option as to whether or not to admit liability, which is subject to negotiation.
- Incorporation by reference of the above-noted Preliminary Contamination Assessment (if appropriate) and Corrective Action documents described above.
- “Come back” provisions if there are further contamination problems.
- A requirement for provision of safe drinking water to those suffering from contaminated wells.
- Dispute resolution provisions.
- An “excusable delay” clause if specifically requested by Respondent.
- Other provisions standard to DEP model consent orders, such as penalty and cost recovery provisions, provisions for stipulated penalties, waiver of further enforcement, notice to third parties and the like.

Respondents who signed these consent orders prior to promulgation of Rule 62-780, F.A.C., have the option either to stay with the existing signed agreements (and the associated model corrective actions) or replace them with a new version developed subsequent to promulgation. The new version, along with the rationale for and relative merits of making the change, are discussed in Part IV *infra*.

D. *Curtain Call for the Model Corrective Actions.*

Shortly before promulgation of the 2005 rules designed to replace the Model Corrective Actions, the urgency of the need to complete the rulemaking process became very apparent. In *Kerper v. Dep't of Env'tl. Prot.*, 894 So.2d 1006 (Fla. 5th DCA 2005), the DEP brought a Notice of Violation against Mr. Kerper for discharging used oil. The DEP prevailed in an administrative enforcement action and obtained a final order that required Mr. Kerper to implement the DEP's Model Corrective Actions. On appeal the District Court noted that section 376.30701, F.S., directed the DEP to develop contaminated site rehabilitation procedures by rule, and held that the DEP's Model Corrective Actions constituted an unpromulgated rule that the DEP could not impose, because the DEP had failed to adopt the policies by formal rulemaking. *Id.* at 1010.

III. DEP's Development of a Risk-Based Corrective Action (RBCA) Approach to Groundwater Cleanup ("Site Rehabilitation").

A. *Birth of RBCA.*

The DEP first started applying RBCA to groundwater cleanup in the petroleum cleanup program in the mid 1990s, under the authority of section 376.3071(5), F.S., as amended by chapter 96-277, Laws of Florida. (See other articles in this *TREATISE* for a discussion of the development and implementation of RBCA in this context.) In short, RBCA allows for the establishment of "default" cleanup target levels, but then allows for alternative, less stringent cleanup levels where engineering and institutional controls can be effectively implemented, often coupled with "natural attenuation" (i.e., letting the contamination clean itself up), to protect human health and the environment.

In essence, what RBCA does is to replace the old question "How clean is clean?" with "How clean does it really need to be?" If the answer is "Not completely clean," the follow-up question would be: "How do we make sure the public is still protected?"

B. *Development of RBCA by Rule.*

RBCA became incorporated into chapter 62-777, F.A.C., as amended in 1997. The rule established cleanup target levels for contaminants found in groundwater, surface water and soils. Until the 2005 changes, the chapter applied only to the establishment of cleanup target levels for certain specified program areas: petroleum contamination (chapter 62-770, F.A.C.) drycleaning solvent contamination cleanup (chapter 62-782, F.A.C.), brownfield cleanup (chapter 62-785, F.A.C.), and soil treatment facilities regulated under chapter 62-713, F.A.C.

C. *Statutory Expansion to All Media.*

Prior to 2003, particularly given that the DEP had no express legislative authority to regulate contaminated soils (except to the extent the DEP could prove the soils would contaminate surface or groundwater), legal debate existed over the extent to which the DEP had authority to develop a groundwater cleanup rule that was sufficiently comprehensive to include RBCA and soil and groundwater target cleanup levels, as opposed to being limited to program-specific rules. As explained in the original version of this article, while the DEP was given statutory authority to apply RBCA concepts to petroleum cleanup, drycleaner cleanup and brownfield cleanup, the DEP did not extend the implementing cleanup target levels of chapter 62-777, F.A.C., to cleanup generally—at least not formally. Nonetheless, at least to some degree chapter 62-777's cleanup target levels became in effect a default position that was often used (in lieu of making ad hoc determinations) not only by the DEP and other agencies seeking cleanups, but also by private parties involved in real estate transactions or other matters where the evaluation of soil or groundwater contamination was at issue.

After years of uncertainty and debate over whether and how to apply RBCA universally, in 2003 the legislature enacted section 376.30701, F.S. The statute was not intended to “create or establish any new liability for site rehabilitation at contaminated sites,” but rather “to describe a risk-based corrective action process to be applied at sites where legal responsibility for site rehabilitation” already existed. § 376.30701(1)(a), Fla. Stat. (2003). The statute was made retroactive to existing sites, with certain exceptions, and required the DEP to develop by rule a “site rehabilitation program” that included procedures for use of various RBCA concepts that had already been developed in the program specific areas (and had been applied at least to some extent as nonrule policy elsewhere), including the establishment of cleanup target levels (for groundwater, surface water and soils) and the use of institutional and engineering controls to allow for more limited site rehabilitation, or even “No Further Action,” in appropriate circumstances. § 376.30701(2), Fla. Stat. (2003).

After passage of the legislation the DEP prepared a memorandum, available at http://www.dep.state.fl.us/waste/quick_topics/publications/wc/GlobalRBCA_Implemnt.pdf, entitled “Implementation of Global RBCA.” It provides some background on RBCA and an indication of DEP plans for implementation of RBCA. As explained in the memo, chapter 62-777, F.A.C., remains at the core of what is now site rehabilitation tasks in all program areas. What was new, however, was the creation of chapter 62-780, F.A.C., to provide the procedural vehicle for how to apply the RBCA criteria in chapter 62-777, F.A.C., to all program areas.

IV. Promulgation and Implementation of Chapter 62-780, F.A.C., “Contaminated Site Cleanup Criteria.”

A. A Brief Rulemaking History.

The DEP commenced an elaborate rule development process, including assistance from University of Florida toxicologists who had already worked on establishing contaminant “Cleanup Target Levels” (CTLs) for inclusion in Rule 62-777, F.A.C. The DEP also used its “Contaminated Soils Forum,” which was originally convened in 1998, to assist with the rule development process. Located at <http://www.dep.state.fl.us/waste/categories/csf/default.htm>, the Forum’s URL address includes much useful information on the history of the development of the CTLs and related matters, as well as materials from various interest groups and the University of Florida. The rulemaking process reached its conclusion with the April 25, 2005 adoption of chapter 62-780, F.A.C. Modifications to chapter 62-777 were adopted that same date, updating the CTLs and formally making them applicable beyond the program specific areas indicated above. chapter 62-780 was subsequently modified in 2007.

B. Rule Overview.

It is important to note that chapter 62-780, F.A.C., “may not be used to establish whether a person is legally responsible for conducting site rehabilitation.” Fla. Admin. Code R. 62-780.110(2). Instead, the rule simply establishes the procedures acceptable to the DEP for determining when rehabilitation of a site that is contaminated has been completed to the DEP’s satisfaction, regardless of whether the particular owner or operator was liable in the first place. Whether or not groundwater contamination does create a cleanup responsibility for a current or former site owner or operator, or even has to be reported, is a complex question that is discussed in Section VIII. of this article. It is also important to note, however, that notwithstanding the foregoing, it is reasonable to anticipate that DEP will act as though that responsibility does exist, and expect reporting and site rehabilitation in compliance with the procedures set forth in this rule unless the site owner or operator or a judge convinces or compels the DEP to act otherwise.

Although chapter 62-780, F.A.C., became effective on April 17, 2005, Rule 62-780.150 provides for the rule to apply retroactively to existing contamination sites unless specifically excluded. Excluded sites include those where DEP has already approved CTLs, had given the site “No Further Action” status or had issued a “Site Rehabilitation Completion” order. Fla. Admin. Code R. 62-780.150(4). In addition, the terms and conditions of existing consent orders supersede the new rule requirements, though the DEP offers consent order signers the opportunity to convert their consent orders to the process under the new rule. Fla. Admin. Code R. 62-780.150(6). The DEP has developed a “Model 780 Modification to Consent Order,” which can be found at <http://www.dep.state.fl.us/legal/Enforcement/enforcement.htm>, which is the link to the DEP’s Enforcement Manual, and provides a vehicle for implementing the conversion. The

effect of such a change would be that site rehabilitation would occur using the procedures and schedules established under the new rule rather than in accordance with schedules established pursuant to an existing consent order.

Evaluation of ongoing corrective action rights and obligations as set forth under existing consent orders can be a challenging task in the context of making a decision as to whether to continue with those corrective actions or elect to proceed with site rehabilitation under chapter 62-780. The main challenge is often figuring out exactly what an existing consent order requires, as corrective actions involve an iterative process whereby each DEP approval of a corrective measure, which often comes in the form of a letter, has the effect of modifying the consent order obligations. Particularly in older but still active consent orders, there may be many such modifications to consider. The impacts of this and other potential changes between Model Orders and the rule, which are discussed in further detail in subpart G below, need to be examined on a case-by-case basis by those contemplating consent order modifications.

Chapter 72-780, F.A.C., is extensive and only some of its more significant provisions will be discussed here. Basically, it covers all aspects of cleanup, including notice requirements, quality assurance protocols, professional certifications, emergency response and interim source removal, site assessment, modeling, the various types of permissible active and passive site remediation options available, ways to reach No Further Action (“NFA”) either with or without natural attenuation or controls, ongoing monitoring requirements after remediation, a timetable for when actions are due, and several forms.

Chapter 62-780, F.A.C., must be read in conjunction with the maximum contaminant levels contained in Tables 1-5 of chapter 62-520, F.A.C., and chapter 62-777, F.A.C., which is discussed below. *See* Fla. Admin. Code R. 62-780.110(4). Briefly stated, chapter 62-780 describes the mechanisms for how to undertake site rehabilitations, chapter 62-520 establishes the groundwater quality standards, and Chapter 62-777 provides the specific site rehabilitation goals (*i.e.*, CTLs), which either match, vary from or supplement the groundwater quality standards in chapter 62-520. The effect is that chapter 62-780 provides the process by which site rehabilitation is undertaken, and chapter 62-777, which in turn incorporates the groundwater quality standards of chapter 62-520 within it, provides the measure for determining when rehabilitation needs to be initiated and when it can be completed. While the CTLs and the site rehabilitation requirements are an amalgam of water quality standards and “guidelines,” the practical effect is to provide default provisions establishing when DEP will consider a rehabilitation task under chapter 62-780 to have been completed, unless the responsible party can persuade the DEP, an administrative law judge or a circuit judge that another approach is appropriate—an approach that can be costly and time consuming. The distinction between “guidelines” and requirements can thus become very fuzzy, and is one that has yet to receive a thorough and definitive judicial exploration.

C. *Documents Incorporated by Reference.*

Chapter 62-780, F.A.C., begins at Rule 62-780.100 with a number of documents identified as “referenced guidelines” that are included “for informational purposes only” and available at <http://www.dep.state.fl.us/waste/categories/wc/pages/LinksToGuidanceDocuments.htm>. These documents are mostly very technical, but are important for understanding how to implement RBCA concepts at individual sites. The document entitled “Institutional Controls Procedures Guidance,” dated November 2010, is of particular legal interest in that it explains in relatively non-technical detail various procedures for how institutional controls can be implemented in a manner acceptable to the DEP, with reference to sample forms for restrictive covenants, conservation easements, subordination of mortgage and the like. More technical but also useful both here and for chapter 62-777, F.A.C., where it is also referenced, is “Technical Report: Development of Cleanup Target Levels (CTLs) for chapter 62-777, F.A.C., Final Report, dated February 2005.” The document provides some technical insight into how CTLs were developed, which could be useful, for example, in evaluating whether or not to propose alternate CTLs to DEP.

D. *Definitions.*

The definitions found in Rule 62-780.300, F.A.C., give some indication of the DEP’s new approach toward cleanup. The following summarizes some of the more significant definitions:

- An “Action Level” is a “specified level of a contaminant that, if exceeded,” can trigger active remediation or additional assessment at a site where active remediation is no longer or never has been required.
- A “Cleanup Agreement Document” (CAD) includes any type of cleanup agreement, including “a voluntary cleanup agreement, permit, consent order, final order, or final judgment.” The definition is part of the rule’s approach of eliminating the historic DEP policy of resolving groundwater cleanup issues through enforcement in the form of either consent orders, final orders or judicial decrees. Cleanup can now be achieved exclusively by submitting paperwork to DEP in accordance with the rule.
- A Cleanup Target Level (CTL) is the concentration level for a particular contaminant “at which a site rehabilitation program is deemed complete.”
- “Engineering control” means “use of existing features (such as buildings) or modifications to a site to reduce or eliminate the potential for migration of, or exposure to, contaminants.” Examples include “physical or hydraulic control measures, capping, point-of-use treatments, or slurry walls.”

- “Institutional control” means procedures to restrict “use of, or access to, a site to eliminate or minimize exposure to contaminants,” such as “deed restrictions, restrictive covenants, and conservation easements.”
- “Natural attenuation” means allowing natural processes, rather than active remediation, to “contain the spread of contamination and reduce the concentrations of contaminants.”
- “PRSR” means a “Person Responsible for Site Rehabilitation,” *i.e.*, a person legally responsible for site rehabilitation or who volunteers to do so and to obtain an “acknowledgement” of doing so from the DEP. Such persons have also frequently been known by the less precise term “responsible party.”

E. *Notice Requirements.*

The extent to which a person discovering contamination has an affirmative obligation to notify either the DEP or adjacent landowners has always been the topic of some debate, with statutory expressions of that obligation varying to some degree from one program area to the next. In 2005, some clarification was provided on this issue both by statute and rule, but without settling the ongoing debate as to notification obligations not specifically addressed by those changes. To date the case law has not clearly defined either the full scope of notice obligations or the extent to which such obligations have been impacted by the 2005 changes. The following analysis, therefore, is only this author’s current take on this subject.

There has never been a contamination notification requirement in Florida law that is generally applicable to all types of contamination. Rather, such requirements have been media or process specific—for example, reporting requirements associated with permits (e.g., section 403.087(7)(c), F.S.), reporting of spills of pollutants specific to petroleum storage systems regulated under chapter 62-762, F.A.C., and reporting requirements specific to eligibility for the drycleaning solvent cleanup program under section 376.3078, F.S. Section 376.30702, F.S., enacted in 2005, contains one new notice requirement. Subsection (1) requires that “any person” discovering contamination “as a result of site rehabilitation activities conducted pursuant to” certain RBCA-listed statutes notify the DEP “in accordance with the requirements of this section,” and makes the DEP “responsible for notifying the affected public.” While at first blush subsection (1) would appear to require notice of contamination whenever it is found as the result of such site rehabilitation activities, subsection (2) appears to significantly limit this obligation by limiting the reporting requirement only to the discovery of contamination “beyond the boundaries of the property at which the site rehabilitation was initiated pursuant to” the RBCA statutes. Subsection (2) then says that the person responsible for site rehabilitation must notify the DEP’s Division of Waste Management (Tallahassee office) within ten days of discovery, on a form prescribed by DEP rule. § 376.30702(2), Fla. Stat. The notice must also be sent to the appropriate DEP district office, county health department, school board chair (to give

to teachers and parents) and “all known lessees and tenants of the source property” (i.e., the original source of the contamination). *Id.* The statute spells out what must be in the notice, including a listing of all property owners where the contamination has been discovered, sampling details, maps and the like. Under subsection (3) the DEP is required to send a copy of the notice to all record owners of the contaminated property, within thirty days of either receipt of the notice or the effective date of the statute. In subsection (4) the DEP is given implementing rulemaking authority.

Thus, the new statutory notice obligation only applies to site rehabilitation activities undertaken pursuant to certain RBCA statutes, and only for off-site contamination or for reporting the results of site rehabilitation activities undertaken pursuant to applicable DEP rules. The obligation does not apply, for example, to the discovery of off-site contamination as the result of an environmental assessment undertaken as part of due diligence associated with a real estate transaction unrelated to a DEP-authorized site assessment, thereby begging the question of whether that obligation otherwise exists under current law. Rule 62-780.220, F.A.C., however, appears to take the notice obligation at least one step further. The rule requires the PRSR to provide notice of any “field activities such as interim source removal activities, installing monitoring or recovery well(s), performing sampling, installing remediation equipment, or installing an engineering control,” prior to commencement thereof. Since the PRSR is required to commence site assessment within sixty days of discovery of contamination under Rule 62-780.600, F.A.C., or twenty-four hours in the event of an emergency situation under Rule 62-780.500, F.A.C., the net effect of reading the rules together is to establish a notification requirement upon discovery of contamination or at least within sixty days thereof. Once again, however, the question is begged as to who has that obligation in the first place, given that as stated in Rule 62-780.110(2), F.A.C., the rule “chapter may not be used to establish whether a person is legally responsible for conducting site rehabilitation.” Thus, once again, given that the definition of PRSR in Rule 62-780.200(32) applies only to one with “legal responsibility” to initiate or who voluntarily initiates the process, if contamination is otherwise discovered, such as pursuant to an environmental assessment as part of due diligence, such discovery would not present any reporting obligation that would not otherwise exist.

Rule 62-780.220, F.A.C., also provides details as to how a PRSR must meet the statutory obligation to provide notice of the discovery of contamination beyond the property boundaries. The rule contains an additional notice provision when the DEP intends to authorize a “temporary extension of the point of compliance [with DEP maximum contaminant levels] beyond the boundary of the source property,” in conjunction with DEP-approved natural attenuation with monitoring, including actual notice to affected property owners and constructive notice to tenants by newspaper publication. Fla. Admin. Code R. 62-780.220(3). Parties have thirty days to comment on the DEP’s proposed action.

The thirty-day comment period in the rule for contamination beyond the source property is substantially different from the notice requirements of Rule 62-110.106, F.A.C., which explain

how and when a person whose substantial interests are affected by proposed agency action on a DEP permit or consent order can challenge that proposed action. It remains to be seen, therefore, to what extent the Rule 62-780.220, F.A.C., notice provisions create any new rights or eliminate any existing rights of substantially affected parties to challenge such action.

F. *Elements of Cleanup/Site Rehabilitation/No Further Action.*

The rule spells out in substantial detail the various elements of the remediation process. They include the following:

- Emergency Response Action or Interim Source Removal. Rule 62-780.500, F.A.C., details various emergency response actions that must be taken within twenty-four hours of “discovery of an unexpected situation or sudden occurrence of a serious and urgent nature that demands immediate action to alleviate a threat to human health, public safety, or the environment,” both with or without the approval of the DEP, depending on the circumstances. The responder then prepares an “Interim Source Removal Report” for approval by the DEP.
- Site Assessment. Rule 62-780.600, F.A.C., sets forth very detailed requirements for site assessment activities that must be commenced within sixty days of discovery of a discharge, followed by preparation of a detailed Site Assessment Report (“SAR”) for DEP approval. The SAR must contain a recommendation for site rehabilitation from among the following options: a No Further Action (“NFA”) Proposal, with or without institutional and engineering controls; a Natural Attenuation with Monitoring (“NAM”) Plan; or a recommendation to prepare a Risk Assessment if the PRSR proposes to justify alternative CTLs; or a Remedial Action Plan (“RAP”). If the DEP considers the SAR incomplete or disagrees with the proposed recommendation, which is often the case, the DEP will identify its concerns, and the PRSR will have sixty days to respond.
- Fate and Transport Models. Rule 62-780.610, F.A.C., describes the process for preparation and DEP approval of models used to justify the Risk Assessment, NFA and NAM provisions of the cleanup rule discussed below. The process is further explained in the ASTM compendium of models cited in the referenced documents contained in Rule 62-780.100, F.A.C.
- Risk Assessment. Rule 62-780.650, F.A.C., explains the risk assessment process, which can lead to the establishment of alternative CTLs as part of the cleanup process or a NFA or NAM Proposal.
- No Further Action (“NFA”) and No Further Action with Controls (“NFAC”). Rule 62-780.680, F.A.C., provides very prescriptive circumstances in which the

DEP will allow no further action on cleanup with or without engineering and institutional controls, depending upon the extent of contamination as a percentage of CTLs and other factors, including the results of fate and transport modeling. Very generally speaking, and unless the PRSR wants to jump through the hoops necessary to propose alternate levels, the NFA and NFAC criteria set forth what documentation is necessary to demonstrate that the site is not expected to cause exceedences in the applicable groundwater or surface water quality CTLs and the soil CTLs contained in the appropriate tables in chapter 62-777, F.A.C. There is also a requirement under NFAC for notification to local governments having jurisdiction over the subject property, as well as residents of any property subject to the institutional control, giving them thirty days to “provide comments” to the FDEP. Once the requirements of NFA or NFAC have been met, the PRSR can apply for a Site Rehabilitation Completion Order.

- Natural Attenuation with Monitoring (“NAM”). Rule 62-780.690, F.A.C., provides a somewhat more flexible, though also detailed, process by which the PRSR can let nature take its course—i.e., not have to pursue active remediation—provided the site is monitored to ensure protection of human health, public safety and the environment. Perhaps the most important requirement is the one contained in paragraph (1)(f), which provides that NAM is acceptable either if the Natural Attenuation Default Concentrations in Table V of chapter 62-777 are met, or if not met, will be met as the result of natural degradation within a specified period of time. Proving the latter can be the biggest challenge for a PRSR wanting to avoid the often substantial expense of ongoing active remediation costs, particularly where the levels of contamination are close to the Default Concentrations but difficult to reduce below them. Once NAM has demonstrated success as set forth in the rule, the PRSR can apply for a Site Rehabilitation Completion Order.
- Active Remediation. Rule 62-780.700, F.A.C., explains in substantial detail the procedures for cleanup of contaminated sites that are not eligible for either NFA or NAM, at least not prior to active remediation. The PRSR is then responsible for preparing a very detailed Remedial Action Plan (“RAP”) containing the information set forth in this rule. After submission the DEP will either request additional information or issue a “Remedial Action Plan Approval Order.” The PRSR will still need to obtain any other DEP authorizations or permits necessary to proceed, if not included in the Approval Order. Active Remediation continues until either NFA or NAM has been reached.
- Post Active Remediation Monitoring. Rule 62-780.750, F.A.C., contains requirements for monitoring, including location and frequency, to determine the success of the Active Remediation. The requirements are a reminder for those

engaged in remediation of the Yogi Berra maxim, “It ain’t over ’til it’s over.” Nonetheless, this rule also contains provisions for applying for and obtaining a Site Rehabilitation Completion Order with No Further Action.

- Time Schedules and Forms. Rule 62-780.790, F.A.C., and Table A provide time frames for when various activities described in the rule must be performed, along with procedures and requirements for obtaining modifications of the time frames for emergencies or “good cause,” defined as “unanticipated events outside the control of the PRSR.” Rule 62-780.900, F.A.C., lists various forms for reporting contamination, free product removal and other reports.

G. *DEP Approval Process and Challenges Thereto.*

As a result of replacing the model corrective actions with chapter 62-780, F.A.C., the DEP no longer consistently requires cleanup through civil suits, notices of violation or consent orders requiring corrective actions, at least not where the groundwater contamination does not constitute a violation of an existing permit or consent order, nor otherwise incur the DEP’s enforcement wrath (for example, in response to illegal dumping). The DEP’s Enforcement Manual URL address, when scrolled down to “Model Documents For 62-780,” sheds some light on DEP’s enforcement approach. The URL page contains a “Global RCBA Notice Letter” form that the DEP uses to notify a potential PRSR of the need to initiate the chapter 62-780 assessment process or face enforcement proceedings. In addition, there is a “Model Warning Letter Permitted Facilities” that DEP uses for monitoring results at permitted facilities indicating groundwater violations. The page also contains a generic and a few program-specific NOVs and Consent Orders that DEP has developed for such miscreants, along with some site access forms.

The new Consent Orders carry forth the specific provisions that existed in the prior model consent orders for how a PRSR or a third party receives notice of and can challenge a DEP decision under Ch. 62-780 through the administrative hearing process set for in sections 120.569 and 120.57, F.S. In addition, chapter 62-780 is interspersed with specific and not so specific descriptions of points at which DEP decisions can be challenged by the PRSR or a third party. As previously noted, a person can “comment” on the DEP’s decision to allow for a temporary extension of the point of compliance beyond the boundary of the source property, but neither the notice rule nor the statute expressly require that the affected neighbor be given “point of entry” language explaining how the neighbor can challenge the DEP’s decision. As noted in Rule 62-780.220(3), F.A.C., the actual decision of the DEP to allow for such an extension would be in the context of a decision on Natural Attenuation or Active Remediation, which would thereby be the action that a third party might likely want to challenge.

The following rules all have procedures for DEP review and approval at various stages of completion prior to the Site Rehabilitation Completion Order, though without dispute resolution language, and are tied to the time frames in Table A : Emergency Response Action or Interim

Source Removal under Rule 62-780.500, F.A.C., Site Assessment under Rule 62-780.600, F.A.C., Risk Assessment under Rule 62-780.650, F.A.C., No Further Action under Rule 62-780.680, F.A.C., Natural Attenuation with Monitoring under Rule 62-780.690, F.A.C., and Post Active Remediation Monitoring under Rule 62-780.750, F.A.C. The lack of dispute resolution language contrasts with inclusion of same in the Model Corrective Actions. The failure to include these procedures for site rehabilitation undertaken outside the formal enforcement process, as chapter 62-780 now allows, does not change the fact that DEP decisions are similarly subject challenge.

The rules are more specific when they provide that the following DEP decisions will be made by Final Order: Fate and Transport Models under Rule 62-780.610, F.A.C.; and Site Rehabilitation Completion Orders for No Further Action (with or without controls), or Natural Attenuation with Monitoring, whether or not preceded by Active Remediation and/or Post Active Remediation Monitoring. In these situations the DEP will give formal notice of the agency action to the PRSR, and in accordance with section 120.60(3), F.S., the DEP should honor any request by a third party for such notice.

V. DEP's Contaminant Cleanup Target Levels (CTLs), Chapter 62-777, F.A.C., as Amended on April 17, 2005.

A. Overview.

DEP originally adopted chapter 62-777, F.A.C., in 1999 in order to establish CTLs for contaminants found in groundwater, surface water and soils, but only for cleanup of petroleum contamination (chapter 62-770, F.A.C.) drycleaning solvent contamination (chapter 62-782, F.A.C.), brownfields (chapter 62-785, F.A.C.), and soil treatment facilities regulated under chapter 62-713, F.A.C. In response to the previously discussed legislative enactment of Global RBCA in 2003, the DEP modified chapter 62-777 to apply to sites covered by chapter 62-780, F.A.C., as well.

As previously noted, even since original enactment of chapter 62-777, F.A.C., there had been a tendency by those both within and outside DEP to look to the CTLs in the rule for guidance for site rehabilitation in general, and not simply for the specific program areas. To counteract that tendency, Rule 62-777.100, F.A.C., has always stated that the CTLs are not “standards” as the term is defined in section 403.803, F.S., and use of the guidelines is not mandatory. Nonetheless, while not being a “mandatory” process, the practical effect of rule implementation had been to place the burden on a person challenging the CTLs to convince the DEP that the challenger had a better approach, whether or not the cleanup was program specific.

As explained in the above-cited 2003 DEP memorandum entitled “Implementation of ‘Global RBCA,’” at pg. 4, the DEP took the position that even prior to enactment of section 373.30701, F.S., it already had authority to require cleanup of contaminated soil, in addition to

air and water. The statute and implementing rule, therefore, “merely [describe] the cleanup process that applies once [cleanup] liability has been established.” DEP could make the case that it already had indirect authority to regulate contaminated soils at least to the extent the soils could be seen as sources of pollution of regulated media such as groundwater, surface water or air. Contaminated soils would thus become a “stationary installation that is reasonably expected to be a source of pollution” under section 403.087, F.S. *Cf. Manatee County v. Department of Environmental Regulation*, 429 So. 2d 360 (1st DCA 1983), *rev. denied*, 438 So. 2d 833. A different position, however, was taken by an Administrative Law Judge in *Department of Environmental Protection v. NEMI, Inc.*, Case No. 09-0941EF, 2009 WL 1524879 (DOAH Final Order 2009), as discussed in Section VIII below.

Nonetheless, notwithstanding the interplay between contaminated soils and water, prior to enactment of section 373.30701, F.S., the DEP chose not to try to expand chapter 62-777, F.A.C., with its reliance on soil CTLs, to all media. In any event, the DEP was obviously on stronger legal footing to engage in rule development once it obtained express legislative authority to do so for all types of contamination.

B. *Understanding How Chapter 62-777 Works.*

As with Rule 62-780.100, F.A.C., chapter 62-777, F.A.C., begins at Rule 62-777.100, F.A.C., with a list of documents incorporated by reference, available for downloading at the same URL address on the above-referenced DEP waste management website. Perhaps the most important of these documents is “Technical Report: Development of Cleanup Target Levels (CTLs) for chapter 62-777, F.A.C., Final Report, dated February 2005,” which, as previously noted, also appears as a referenced document in Rule 62-780.100, F.A.C. This document describes how the CTLs were developed, when they are based upon DEP groundwater or surface water standards, and when they are based upon the groundwater “minimum criteria” of Rule 62-520.400, F.A.C., in which case the CTLs are based upon human health protection calculated using a lifetime excess cancer risk of one in a million, or a hazard quotient of one; as well as upon nuisance, organoleptic, and aesthetic considerations.

As with Rule 62-780.150, F.A.C., Rule 62-777.150 goes over the applicability of the rules and contains a similar caveat regarding the procedural nature of the rule chapter, here saying that the CTLs do not set standards, but simply provide “default cleanup criteria.” Rule 62-777.170 then walks the reader through the various tables and figures that are the heart of this rule.

The tables and figures establish the various categories of CTLs and various methodologies for how they should be measured, as well as procedures for establishing CTLs for constituents that may not be specifically listed in the tables. The following is a brief overview of the CTLs, focusing upon the following established categories of CTL criteria rather than the ad hoc procedures:

- Groundwater and Surface Water CTLs (Table I). These CTLs are based upon either the numeric primary and secondary groundwater standards established in chapter 62-520, F.A.C.; numerical derivations of the narrative minimum criteria established contained in that rule; the numeric surface water standards in chapter 62-302, F.A.C.; and, for “Groundwater of Low Yield/Poor Quality Criteria,” values established by multiplying the groundwater CTL values by a factor of ten. Compliance with these CTLs is tied to achieving NFA under Rule 62-780.680(1)(c), except that the Low Yield/Poor Quality Criteria, is tied to achieving NFAC under Rule 62-780.680(2)(c).
- Soil CTLs (Table II). These are broken down by “Direct Exposure” and “Leachability Based” criteria. The Direct Exposure criteria are tied to protection of human health from a specified amount of human exposure, and are further subdivided into Residential and Commercial/Industrial. The Leachability Based criteria are tied to the likelihood of the soil leaching in an amount sufficient to cause violations of groundwater or surface water standards (including minimum criteria), with Low Yield/Poor Quality once again representing ten times the standard levels. Under Rule 62-780.680, F.A.C., achieving NFA is tied to meeting the Direct Exposure and Leachability-Based CTLs, whereas achieving NFAC is tied to meeting the Commercial/Industrial CTLs.
- Natural Attenuation Default Concentrations (Table V). Like with the Low Yield/Poor Quality Criteria, the Natural Attenuation Default Concentrations are set at ten times the Groundwater Criteria. Achieving these groundwater concentration levels enables a PRSR to be eligible for NAM under Rule 62-780.690(1)(f).

While the focus of this brief summary has been on the relationship between chapters 62-777 and 62-780, F.A.C., chapter 62-777 integrates itself into the program-specific rule chapters listed herein in a similar manner.

VI. DEP’s Approach Towards Cleanup Involving Program-Specific Areas.

A. Overview.

As previously noted, prior to the 2005 rulemaking there already existed program specific statutes and rules establishing RBCA-infused procedures for groundwater cleanup involving petroleum contamination, dry cleaner contamination, and brownfields, but cleanup procedures otherwise were mostly driven by non-rule policy in the form of model orders and related documents. Other articles in this *TREATISE* focus on the cleanup requirements specific to these programs, and so

they will be discussed here only to provide a brief overview of how these requirements were developed and to distinguish them from the general cleanup requirements.

B. Petroleum Contamination Cleanup.

This program was originally created as the “SUPER Act” program in chapter 86-159, Laws of Florida, and was the first effort by the legislature to take a comprehensive approach towards the remediation of groundwater contamination through a self-funded cleanup program. For an early history, see S. Ruhl & S. Lowe, *A SUPER Response to LUST in Florida*, 14 FLA. ST. U. L. REV. 607 (1986). The Act provided for establishment of a dedicated funding source to pay for cleanup of contamination from certain petroleum storage systems based upon priorities established by the legislature or the DER. Program eligibility then replaced the imposition of cleanup liability upon individual owners and operators of petroleum contaminated sites. The program has subsequently been modified, expanded, and contracted over the years, with varying degrees of success.

Under section 376.3071(5), Florida Statutes, the DER was given express authority to develop cleanup criteria rules, including specific authority to use RBCA. The DER first promulgated specific cleanup rules for petroleum sites in 1987 at chapter 62-770, F.A.C., with many revisions since then. The rules apply whether or not a property owner is covered under any of the state petroleum cleanup programs, but not where the contamination has significant quantities of nonpetroleum contaminants. Fla. Admin. Code R. 62-770.160(1). For an early discussion of the philosophical underpinnings of the RBCA approach in Florida, see R. Wells, Jr., *Without “Rebecca,” Cost-Effective Environmental Cleanup Is an Oxymoron at Petroleum Contamination Sites*, 70 FLA. B.J. FEB. 1996. One significant amendment came in 1999, when chapter 62-770 was amended to cross reference the CTLs in chapter 62-777, F.A.C. When chapter 62-780, F.A.C., was adopted in 2005, the DEP also amended chapter 62-770 to provide as much consistency between the two rules as it could, recognizing the fact that the latter rule addresses a much more finite group of contaminants.

C. Dry Cleaning Facility Cleanup.

In section 376.3078, Florida Statutes, the legislature established a program for cleanup of contamination from dry cleaning facilities. The law is loosely modeled after the petroleum cleanup statutes. Once again, the legislature directed DEP to develop RBCA-based cleanup rules. In 1999 the DEP developed cleanup criteria for sites contaminated with dry cleaning solvents (as specifically delineated) at chapter 62-782, F.A.C. The rule incorporates by reference the soil and groundwater target cleanup levels contained in chapter 62-777, F.A.C., which was first adopted at the same time as chapter 62-682. In addition, as with chapter 62-770, F.A.C., chapter 62-782 was again amended in 2005 to synch up with that rule as well.

D. *Brownfields.*

In 1997, the legislature established the “Brownfields Redevelopment Act” at sections 376.77-376.85, Florida Statutes. Once again, DEP was directed to develop rules using RBCA criteria, and also to develop protocols for use of natural attenuation and “no further action” as alternatives to cleanup where appropriate. § 376.81(1), Fla. Stat. (2006). The statute elaborates in much greater detail how these RBCA-related concepts can be implemented.

In 1998 the DEP adopted brownfield cleanup criteria in chapter 62-785, F.A.C., then subsequently amended the rule in 1999 and 2005 with the chapter 62-777 and chapter 62-780 promulgations, as with the petroleum and dry cleaning cleanup rules. It is important to note that, unlike the petroleum or dry cleaning cleanup rules, however, the brownfields cleanup rule applies only to brownfield sites where there is a rehabilitation agreement executed by the person responsible for brownfield site rehabilitation. With the 2005 adoption of chapter 62-780, the need to obtain such a rehabilitation agreement was no longer as critical for ineligible sites, at least to the extent RBCA had now had become universally available.

VII. Exclusions from Liability.

In addition to the limitations on liability placed upon certain program-specific cleanup activities, as discussed elsewhere in this article, there are various provisions of Florida law that provide for broader liability exclusions. The following are some examples, but not an exhaustive list. The list expands as impacted interest groups are successful in creating new exclusions.

A. *Cattle Dip Vats.*

Private property owners who own sites that are contaminated from these vats, which were used to eradicate the cattle fever tick, do not have to clean them up and no government program has been established to clean them up. § 376.306, Fla. Stat. (2010)

B. *Nitrates.*

Owners of agricultural property who have applied nitrates pursuant to certain best management practices are exempt from liability for nitrate contamination under section 576.045, Florida Statutes. There is a regulatory program supported by fees to implement the practices and facilitate cleanup.

C. *Property Acquired by Various Governmental Agencies.*

When property escheats to a county for nonpayment of taxes, the county is insulated from “any liability imposed [under] chapter 373 or chapter 403 for preexisting soil or groundwater

contamination due solely to its ownership.” § 197.502(8)(a), Fla. Stat. (YEAR). The Florida Department of Transportation is similarly insulated when it acquires property for certain transportation purposes. § 337.27(4), Fla. Stat. (2010). Neither a prior nor subsequent owner is entitled to such insulation from liability. Similar laws have been applied to certain other state and local transportation authorities. *See, e.g.*, § 341.835(3), Fla. Stat. (2010) (applying same law to high speed rail acquisitions).

D. *“Sport Shooting and Training Ranges.”*

In order to ensure that the DEP does not use its regulatory authority as a subterfuge to deny Florida citizens their rights to bear and shoot arms at “sport shooting and training ranges,” the legislature, in 2004, passed a law insulating any owner, operator, user, insurer, or other person associated with such ranges from any liability associated with “the use, release, placement, deposition, or accumulation of any projectile in the environment,” provided the range owner makes a “good faith effort” to comply with certain best management practices and cleanup requirements to be established (more or less) by the DEP. § 790.333, Fla. Stat. (2010).

E. *Contamination from Petroleum Storage Systems, Dry Cleaners, and Brownfields*

In these program areas, there are ways to avoid liability that are more properly explained as defenses rather than exclusions. These will be discussed in Section VIII.C. below.

VIII. Liabilities, Enforcement, Penalties, Defenses, Waivers, and Surprises.

A. *General DEP Authority under Chapter 403, Florida Statutes*

General statutory authority for groundwater protection and establishing liability for groundwater contamination can be found in sections 403.087, 403.088 and 403.161, Florida Statutes, which, respectively, require stationary installations reasonably expected to be a source of pollution to obtain permits, prohibit discharge into waters of pollutants without a permit, and establish violations for causing pollution except as authorized. Application of these provisions to groundwater is long established. *See, e.g., Manatee County., supra* (holding that section 403.087(1), Florida Statutes, prohibits construction of a facility reasonably expected to be a source of groundwater pollution without an appropriate DER permit).

What is not so clear is the extent to which an owner of property that is leaching contaminants into the groundwater must obtain a permit, report the contamination to the FDEP, or otherwise be subject to liability for the contamination, particularly as to an owner who acquires the property after cessation of the activity originally causing the discharge to the soils or groundwater. As previously noted, chapter 62-780, F.A.C., as well as the legislation it implements, does not expand upon what liability for such contamination already existed. This

question was perhaps most recently analyzed in the Final Order in *Department of Environmental Protection v. NEMI, Inc.*, Case No. 09-0941EF, 2009 WL 1524879 (DOAH 2009), a case under the Environmental Litigation Reform Act (ELRA), section 403.121(2), Florida Statutes, which means that the Administrative Law Judge (“ALJ”), rather than the DEP Secretary, issued the Final Order. NEMI bought property it knew to have groundwater contamination. The DEP filed a Notice of Violation seeking a fine for NEMI’s maintenance of an unpermitted stationary installation reasonably expected to be a source of pollution under section 403.087(1), Florida Statutes; seeking a fine for NEMI’s failure to submit a completed SAR, as required under Rule 62-780.800(6); and seeking an order directing NEMI to take corrective actions to clean up the contamination. The ALJ dismissed the first count, holding that the existence of contaminated soil at the facility did not make it an “installation” as defined in section 403.031(4), Florida Statutes. The ALJ concluded that a “facility” must be something “built, installed or established to serve a particular purpose,” and thus rejected the DEP’s argument that “mere presence” of contaminated soils made the facility a “stationary installation” requiring a permit under section 403.087(1). The ALJ did, however, find that NEMI failed to submit a SAR as required under the rule, and found NEMI to be an “entity responsible for site rehabilitation.” Distinguishing *Sunshine Jr. v. Department of Environmental Regulation*, 556 So. 2d 1177 (1st DCA 1990), *rev. denied*, 564 So. 2d 1085, discussed further below, the ALJ concluded that NEMI was responsible because it knew about the contamination when it purchased the property and contamination continued to leach into the groundwater during NEMI’s ownership of it.

Since *NEMI* is a final order not issued by the DEP and not binding judicial precedent, it remains to be seen whether broad acceptance will develop for its holding that knowledge of contamination and ongoing leaching will establish the threshold for a property owner’s obligation to report contamination and undertake site rehabilitation activities under chapter 62-780, F.A.C. Arguably, knowledge could be treated in a subsequent case as irrelevant, except when a reporting obligation exists by statute, as it does for the discovery of off-site contamination or for contamination discovered through site rehabilitation activities undertaken pursuant to section 376.30702, Florida Statutes, as previously discussed. On the other hand, if the property is continuing to leach groundwater contamination, arguably self-awareness is irrelevant as long as the leaching has been established — as is suggested, perhaps, by the litigation associated with *Belleau v. DEP*, 695 So. 2d 1305 (Fla. 1st DCA 1997), *reversing DEP v. Belleau*, 96 E.R. F.A.L.R. 86 (DEP 1996), as discussed further below.

B. *DEP Hazardous Waste Authority under Section 403.727, Florida Statutes*

In section 403.727, Florida Statutes, Florida adopted language comparable to the original CERCLA responsible party liability provisions enacted in 42 U.S.C. § 9607 for generators, transporters, and disposers of hazardous waste. Further enforcement authority can be found in section 403.726, Florida Statutes. Since the state law was modeled after the federal act, state courts have construed the state law in a manner similar to federal courts interpreting the federal law. This includes case law relating to retroactive liability. *See DEP v. Allied Scrap*, 724 So. 2d

151, 152 (Fla. 1998) (upholding retroactive liability in a cost recovery action); *State Dep't of Env'tl. Protection v. Fleet Credit Corp.*, 691 So. 2d 512 (Fla. 4th DCA 1997). See also *Florida Power v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 note 3 (11th Cir. 1990). The statute also included defenses, as in the original federal law, relating to acts of war, acts of government, acts of God, and acts or omissions of third parties.

Section 403.727, Florida Statutes, was beefed up by the Water Quality Assurance Act of 1983, at chapter 83-310, Laws of Florida, which created the first state-operated cleanup program. Coupled with the liability provisions similar to the CERCLA responsible party provisions, but without the bureaucratic requirements associated with having first to designate a particular site as a Superfund Site under CERCLA, this gave the DEP considerably more cleanup clout because the threat of initiating cleanup at the taxpayers' expense with broad reimbursement authority could be used to encourage private parties to initiate their own cleanup instead. For a discussion of the Act in its early days, see W. Hopping & B. Preston, *The Water Quality Assurance Act of 1983 - Florida's "Great Leap Forward" into Groundwater Protection and Hazardous Waste Management*, 11 FLA. ST. U. L. REV. 599 (1983). As a result of the facts that the Act never evolved into a substantial, state-funded cleanup program similar to the CERCLA Superfund program and that the section 403.727, Florida Statutes, liability provisions are available only to DEP and not private parties seeking contribution for cleanup costs, most of the litigation in Florida related to generator, transporter, and disposer liability has been in federal court under the CERCLA provisions of 42 U.S.C. § 9607 rather than in state court under section 403.727, Florida Statutes. In addition, while section 403.727(5), Florida Statutes, has the original CERCLA defenses (act of war, government, God, or, to a limited degree, third parties), state law does not have subsequently enacted federal defenses such as lender liability, trustee liability, and the like, although (as discussed elsewhere in this chapter) there are other exclusions from liability. Therefore, appropriate caution should be taken in applying federal precedent to state law.

While the DEP's authority is very broad in seeking groundwater cleanup under section 403.727, Florida Statutes, it has its limits, particularly when there are evidentiary problems with establishing the source of contamination. This is illustrated in *Belleau v. DEP*, 695 So. 2d 1305 (Fla. 1st DCA 1997), reversing *DEP v. Belleau*, 96 E.R. F.A.L.R. 86 (DEP 1996). In that case the DEP took a very expansive approach toward tying the existence of a leak to proof of contamination elsewhere and the administrative law judge did not accept the connection. The court ruled that the DEP could not overturn the judge's findings in this regard.

See also, *Kerper, supra*, a used oil case that does not cite any provision of chapter 403, Florida Statutes. In addition to throwing out the DEP Model Corrective Actions, the court there reversed an administrative law judge's finding that a person operating an auto parts salvage operation for two years on property owned by another was responsible for contamination caused by the discharge of used oil, because of an absence of proof that the salvager was responsible for causing the discharge. The court also held in dicta that where a person is accused of causing

contamination from a spill, the burden is on DEP to prove that the contamination has caused groundwater violations, not on the person to prove that the spill did not. *Cf., Seaboard Sys. R.R. v. Clemente*, 467 So. 2d 348 (3rd DCA 1985), applying a Dade County ordinance similar to the general DEP provisions, in which the court found broad liability among owners, prior owners, and lessors.

C. *DEP Authority under Chapter 376, Florida Statutes.*

Chapter 376, Florida Statutes, has liability provisions that vary somewhat from those contained in chapter 403, Florida Statutes. Section 376.302(1)(a), Florida Statutes, prohibits the discharge of “pollutants or hazardous substances into or upon the surface or ground waters of the state or lands” in violation of DEP standards and cross references the enforcement provisions of chapter 403, Florida Statutes. Section 376.308, Florida Statutes, establishes strict liability, jointly and severally, for a “prohibited discharge or other polluting condition.” Section 376.308(2) contains defenses similar to those in section 403.727(5), Florida Statutes, (i.e., act of war, act of God, third parties, etc.) but additional defenses exist that are specific to petroleum and dry cleaning solvent contamination elsewhere in section 376.308, Florida Statutes, and other provisions of the statute. For example, in section 376.308(1)(c), Florida Statutes, which applies only to petroleum and dry cleaning contamination, there is an innocent purchaser defense, with innocent being a person who “undertook, at the time of acquisition, all appropriate inquiry into the previous ownership and use of the property consistent with good commercial or customary practice in an effort to minimize liability.” While this subsection has not yet been litigated, parties may want to look, once again, to CERCLA, 42 U.S.C. § 9607, for case guidance and particular cases discussing the “innocent purchaser” defense.

Under section 376.308(5), Florida Statutes, persons determined eligible for restoration funding under the Inland Protection Trust Fund (i.e., the petroleum cleanup program, discussed in greater detail elsewhere in this *TREATISE*) are exempt from liability as to any “judicial or administrative action, brought by or on behalf of the state or any local government or any other person, to complete rehabilitation in advance of the commitment of restoration funding” pursuant to the state program. Additional liability protection exists for property with dry cleaning contamination for covered sites under section 376.3078(3), Florida Statutes, based upon criteria similar to that for petroleum contamination. Similarly, liability protection exists for brownfield properties covered under a brownfield site rehabilitation agreement under section 376.82, Florida Statutes. In addition, under the dry cleaner voluntary cleanup program, at section 376.308(11), Florida Statutes, a real property owner who voluntarily initiates cleanup under the criteria and procedures set forth therein is entitled to similar immunity protection. Furthermore, under section 376.30781, Florida Statutes, if such a property owner never owned the dry cleaning business, but was a subsequent purchaser, then the owner may be entitled to tax credits off of Florida’s corporate income tax. The DEP website for this program, which also applies to similarly situated owners of brownfields sites, can be found at <http://www.dep.state.fl.us/waste/categories/vctc/default.htm>.

These limitations on liability are discussed extensively in articles specific to petroleum, dry cleaning, and brownfields discussed elsewhere in this *TREATISE*. The above-described defenses have three significant limitations. First, as explained below in the discussion of private causes of action, the types of contamination covered in chapter 376, Florida Statutes, are not specific only to petroleum, dry cleaning, and brownfields, but include other types of contamination as well. Therefore, if the contamination is from another source, the defenses, other than the general ones in section 376.308(2), are not applicable. Second, as for petroleum and dry cleaning programs, as explained elsewhere in this *TREATISE*, those programs have long been closed to program eligibility restoration funding for newly discovered contamination; thus, the defenses (other than the limited ones for certain subsequent purchasers and lenders, which are not specific to program eligibility) will apply to fewer facilities over the passage of time. Last but not least, while the program eligibility defenses provide protection for site owners and operators from lawsuits for injunctive relief and cleanup costs from both government agencies and private parties, “nothing contained in ss. 376.30-376.317 prohibits any person from bringing a cause of action in a court of competent jurisdiction for all damages resulting from a discharge or other condition of pollution covered by ss. 376.30-376.317.” § 377.313(3), Fla. Stat. (YEAR). What this means, as explained below in the portion of this article discussing private causes of action, is that chapter 376 thus offers a significant expansion to private causes of action for private parties seeking damages for injuries caused by groundwater or other forms of contamination.

In *Sunshine Jr. v. Department of Environmental Regulation*, 556 So. 2d 1177 (1st DCA 1990), *rev. denied*, 564 So. 2d 1085, the court interpreted the defense in section 376.308(2), Florida Statutes, to establish a defense for an innocent purchaser of a contaminated gasoline station. The case was decided prior to the innocent purchaser defense established in section 376.308(1)(c), so that provision remains to be tested judicially. Furthermore, an argument can be made that liability may still exist under sections 403.087, 403.088 and 403.161, Florida Statutes, as discussed above, which do not have comparable defenses. Those other statutes were not at issue in the *Sunshine Jr.* case. In *NEMI*, discussed above, the ALJ interpreted *Sunshine* to suggest a more global innocent purchaser defense applicable also to chapter 403, Florida Statutes, at least to the extent the ALJ imposed site rehabilitation liability on the property owner as a result of its knowledge of the prior contamination. In *State Department of Environmental Protection v. Eastman Chemical Co.*, 699 So. 2d 1051 (3rd DCA 1997), the court treated the defenses in sections 403.727 and 376.308, Florida Statutes, in an interchangeable manner to deny liability to a manufacturer for contamination from a chemical that was spilled by an independent contractor. In addition, the *Kerper* case discussed above, which does not cite to any provision of chapter 373 or 403, Florida Statutes, except as to the rulemaking issue, could be thereby interpreted to apply to any action brought by an agency under either statute.

While the focus of this article is on DEP’s authority, the limitations on liability discussed herein are applicable to other agencies as well. This is shown by *Dade County. v. Chase Federal*

Housing, 737 So. 2d 494 (Fla. 1999), in which the Florida Supreme Court held that the waiver of liability provisions for dry cleaning contamination in section 376.3078, Florida Statutes, applies retroactively to preclude a lawsuit by the local government against the owner of the contaminated property.

D. *Enforcement and Penalties.*

The Department's general enforcement and penalty authority is the subject of another article in this *TREATISE* and will be discussed only briefly here, specifically as it relates to groundwater enforcement and penalties. DEP's previously cited Enforcement Manual web page should be consulted in evaluating the DEP's policies in enforcing groundwater violations, including how penalties should be applied in specific circumstances. Consistent with the general principles as stated in Rule 62-780.110, F.A.C., and related cleanup rule chapters to the effect that those provisions are not intended by themselves to establish liability site assessment and cleanup, the policies are directed for the most part towards program specific violations rather than groundwater violations generally. In other words, the existence of groundwater violations become a factor in how to proceed with enforcement involving solid waste, hazardous waste, storage tanks, dry cleaners, and so forth.

To address assessment and cleanup-related groundwater violations, the DEP can file an administrative proceeding called a Notice of Violation ("NOV") under section 403.121(2), Florida Statutes, to seek corrective actions, damages to the environment, and reimbursement of costs. The NOV process includes the option of seeking civil penalties under the Environmental Litigation Reform Act (ELRA) or its various other authorities. Under ELRA the DEP is authorized to seek penalties of no more than \$10,000 (slightly higher in some instances) through an administrative instead of traditional circuit court proceedings. Alternatively, the DEP litigates in circuit court and seeks injunctive relief, damages, cost recovery, and civil penalties in an amount of up to \$10,000 per day per violation under section 403.121(1), Florida Statutes, and section 376.302, Florida Statutes, and up to \$50,000 per day per violation for hazardous waste violations under section 403.727(3), Florida Statutes. Both the corrective action and penalty provisions are substantial enough to encourage responsible parties to settle cases administratively through consent orders, which are by far the most common way that enforcement matters are resolved.

The Enforcement Manual web page has a number of documents that are pertinent to enforcement of groundwater assessment and cleanup obligations. The "Model Documents For 62-780" reflect the general principles as stated in Rule 62-780.110, F.A.C., and related cleanup rule chapters to the effect that those provisions are not intended by themselves to establish cleanup liability. There is a "Model 780 Consent Order" that is based upon the pre-2005 model orders previously discussed. A "Model 780 Modification to Consent Order" provides the vehicle whereby the requirements of a pre-2005 consent order can be modified to reflect the new chapter 62-780 requirements. There are also model NOV's in program specific areas designed to tie the

substantive groundwater-related violations established for those programs with the site assessment and cleanup mechanisms set forth in chapter 62-780. There are also model orders related to site access.

With regard to penalties, the Enforcement Manual web page has a number of guidance documents on when to assess penalties and in what amount, starting with the general guidance found at “Settlement Guidelines for Civil Penalties--DEP Directive 923 (July 2010).” Generally speaking, the DEP will look at the “extent of deviation from requirement” and “potential for harm” as set forth in a matrix using major, moderate, and minor transgressions in determining the amount of the penalty. The DEP then has a number of program-specific penalty guidelines. Consistent with the concept of tying groundwater violations to program specific areas, there are no penalty policies directed specifically towards violations of chapter 62-780 and the other similar cleanup rules. Rather, once again, violations of those rule requirements are embedded in a general way into the various program-specific guidelines such as solid waste, hazardous waste, petroleum storage tanks, and so forth. For example, if there is a groundwater violation at a solid waste facility, then the violation would be demonstrated at least in part through the permit holder’s noncompliance with the assessment and site rehabilitation requirements contained in chapter 62-780. The existence of a groundwater quality violation would then factor into the “potential for harm” side of the matrix and the lack of responsiveness as to the remedial actions and timeframes for them would factor into the “extent of deviation from requirement.”

E. *Private Common Law and Statutory Causes of Action.*

Strict liability for groundwater contamination has long been a principle of Florida common law. *See, e.g., Pensacola Gas Co. v. Pebley*, 25 Fla. 381, 5 So. 593 (1889). Such common law claims include trespass, negligence, and nuisance against adjoining landowners. *Davey Compressor Co. v. City of Delray Beach*, 639 So. 2d 595 (Fla. 1994).

As to statutory causes of action, section 376.313, Florida Statutes, is an attractive alternative for prospective plaintiffs. As interpreted by the Florida Supreme Court cases below, and subject to certain enumerated defenses, section 376.313(3) creates a cause of action for “all damages resulting from a discharge or other condition of pollution” covered by most of chapter 376. In addition, section 376.313(6) gives the court the authority to grant litigation costs, including attorney’s fees and expert witness fees, “to any party, whenever the court determines such an award is in the public interest.”

The most significant case to date involving groundwater contamination under 376.313, Florida Statutes, is *Aramark Uniform and Career Apparel, Inc., v. Easton*, 894 So. 2d 20 (Fla. 2005), a dry cleaning solvent contamination case in which the Florida Supreme Court held that section 376.313, Florida Statutes, created a new private cause of action that imposes strict liability for damages resulting from contamination against an adjoining landowner who is the source of that contamination, without even the need, as in *Sunshine*, to prove that the landowner

was responsible for the contamination. In so doing, the Court resolved a conflict between two cases, *Kaplan v. Peterson*, 674 So. 2d 201 (Fla. 5th DCA 1996), *rev. dismissed*, 687 So. 2d 11305 (Fla. 1997), finding a private cause and *Mostoufi v. Presto Food Stores*, 618 So. 2d 1372 (2d DCA 1993), *rev. denied*, 626 So. 2d 207 (Fla. 1993), rejecting same. An extensive discussion of *Aramark* can be found in R. De Meo, C. Eldred & L. Feuerstein, *Florida Supreme Court Takes Property Owners to the Cleaners: The Impact of Aramark v. Easton*, 79 FLA. B.J. (JUNE 2005).

The Court concluded that the statute created a new cause of action because it went beyond pre-existing common law remedies. For example, the Court found that the only defenses available under the statutory cause of action were those spelled out in section 376.308, Florida Statutes, the burden of which is upon the person claiming the defense to prove. In addition, the statutory cause of action provides for attorneys' fees. From the tone of the case, it is clear that the Court was not limiting liability under the statute to petroleum or dry cleaning contamination because the Court held that the "innocent purchaser" defense would only apply to causes of action involving those media.

In a case involving both statutory and common law causes of action, *Curd v. Mosaic Fertilizer, LLC*, 39 So.3d 1216 (Fla. 2010), the Supreme Court confirmed the broader range of contamination sources subject to private causes of action under section 376.313, Florida Statutes. The case does not involve groundwater contamination but its principles are clearly applicable to it. The case arose from a spill of pollutants into Tampa Bay from a wastewater pond at a phosphate plant. Plaintiff commercial fishermen alleged that the spill caused damage to the marine life in Tampa Bay, where they earned their livelihood though they did not have an ownership interest in the marine life being damaged. Relying strongly on *Aramark*, the Supreme Court concluded that the statute created a cause of action for the non-negligent discharge of pollution causing damages to real or personal property or destruction of the environment and natural resources, without any proof defendant caused the discharge, and with the only defenses being those established by statute. Significantly increasing the scope of liability, the Court further held that since property ownership is listed as a defense in section 376.313, Florida Statutes, liability can be established if a plaintiff suffers damages, even though there may be no injury to the plaintiff's real or personal property.

The absence of a real or personal property interest did impact the *Curd* Court's common law analysis of liability, however. Unlike the strict liability established under *Pensacola Gas*, the Court here found common law liability for non-property-ownership related issues existed only under traditional negligence foreseeability/duty of care principles. Applying the *Curd* holdings to a groundwater contamination case, it would thus appear that anyone who can prove damages from groundwater contamination can hold the discharger strictly liable under section 376.313, Florida Statutes, without any proof of property ownership and subject only to the

statutory defenses contained in the statute, whereas under common law only property owners can claim strict liability.

Not addressed in either *Aramark* or *Curd* was any analysis of the scope of potential defenses under section 376.308, Florida Statutes, or those specific to dry cleaning under section 376.3078, Florida Statutes. How expansive a court might interpret these defenses may affect a plaintiff's choices in terms of seeking damages under the statute, with its attorney fees provisions, or common law. There is, however, precedent for the proposition that the dry cleaning statutory immunity provisions did not prohibit an adjoining landowner from pursuing a common law cause of action for diminution in the value of its land. See *Courtney Enters., Inc., v. Publix Super Markets, Inc.*, 788 So. 2d 1045 (Fla. 2d DCA 2001), *rev. denied*, 799 So. 2d 218 (Fla. 2001), which rejected defendant's affirmative defense that it had been found eligible for the state cleanup program. Interestingly, the court distinguished *Mostoufi* because that case was based upon a statutory cause of action.

Courtney is also interesting for its discussion of how damages can be measured. The court held that the statutory provisions do not prohibit an adjoining landowner from pursuing a common law cause of action for diminution in the value of the owner's land. The court held that "the measure of damages under the common law in cases such as the instant one is either the diminution of value or the restoration costs, but not restoration costs that exceed the diminution in value of the property." *Id.* at 1049. The statutory defense should be read not "to eliminate common law causes of action altogether but to limit damages in those actions to diminution in property value." *Id.* at 1050.

Courtney's analysis of damage measurement should be compared with *Davey Compressor, supra*. In that common law case, the Florida Supreme Court held that the "restoration rule" applied to groundwater contamination cases. Under that rule, damages are generally measured by the lesser of the diminution in value of the property or the costs of repairing or restoring it to its condition prior to injury. The restoration rule is designed to avoid unjust enrichment. The Court made an exception, however, to contamination of a well field, because the need to provide citizens with ongoing production of drinking water "is not justly compensated by the diminution in value." *Davey Compressor*, 639 So. 2d at 596. What now remains to be seen is whether *Aramark* trumps *Courtney's* limitation by applying *Davey's* more expansive holding to measure damages in a section 376.313, Florida Statutes, private cause of action.

Private parties may also want to look to federal law to avoid application of the liability waiver provisions for property contaminated with petroleum or dry cleaning solvents, as well as eligible brownfields. This is illustrated by *Boyes v. Shell Oil*, 199 F.3d 1260 (11th Cir. 2000). In that case the court said that notwithstanding the waiver of liability available to eligible sites for contamination from petroleum contained in section 376.308(5), Florida Statutes, a person

allegedly exposed to contamination from an adjacent facility has a cause of action to seek cleanup of such contamination under the citizen suit provisions in the Resource Recovery and Conservation Act (42 U.S.C. § 6972). The basis of the decision was that Florida does not have a federally approved petroleum storage tank cleanup program. The impact of *Boyes* may have ramifications on other Florida programs having exemptions from liability, provided there is a federal cause of action.

In a somewhat similar vein, in *United States v. Fort Lauderdale*, 81 F. Supp. 2d 1348 (S.D. Fla. 1999), the court ruled that the standards set for toxic substances for brownfields, petroleum contamination, and dry cleaning contamination did not constitute state Applicable or Relevant and Appropriate Requirements (ARARs) that the EPA is required to attain in remedial actions undertaken under CERCLA. In that case the DEP had not intervened, and the court concluded that the implementing state laws were not enforceable pollution standards and thus not “promulgated” for CERCLA purposes. As with *Boyes*, this case places uncertainty on the ability of owners of contaminated sites to rely too heavily on the state for absolution from liability through participation in the various programs established to facilitate the continued use and development of contaminated property.

IX. Other Issues.

A. Site Access.

Section 403.091, Florida Statutes, authorizes the DEP site access, with inspection warrant authority if necessary. The DEP can also seek site access through injunctive relief under section 403.131, Florida Statutes. Such authorization includes site access to examine the extent of groundwater pollution. *See, e.g., DEP v. Montco Research Prods*, 489 So. 2d 771 (Fla. 5th DCA 1986). In *DEP v. Gibbins*, 696 So. 2d 888 (Fla. 5th DCA 1997), the court ruled that the DEP’s efforts to obtain a warrant for site access for the purpose of drilling a monitoring well does not in itself constitute a compensable taking. The court left open the question of whether there would be a taking if site access had actually taken place for that purpose.

Chapter 4 of the DEP Enforcement Manual, which can be located on its website at the URL cited above in Subsection II.B., describes DEP’s inspection and investigation process in detail. Attached as appendices to the Manual are various site access documents, including model affidavits for inspection warrants, model permission forms, and model easement and license agreements, which can be used to address intrusive forms of site access often required as part of efforts to assess groundwater contamination.

B. Third Party Challenges to Site Rehabilitation Action or Inaction.

As previously noted, with the transition from the Model Corrective Actions to chapter 62-780, F.A.C., DEP still allows for third party challenges to cleanup decisions made by PRSRs. What

has not yet changed is the standard of review for such challenges. DEP has always considered itself to have broad discretion in initiating enforcement or entering into “pure enforcement” consent orders, such as those relating to cleanup of groundwater contamination, as opposed to those that are more the equivalent of a permitting vehicle with permit standards of review. *See, e.g., Brady v. Acre* 92 E.R. F.A.L.R. 170 (DER 1992); *Pierce v. Seaboard/Marion Waste Oil*, 12 F.A.L.R. 1974 (DER 1990). As a result, decisions to initiate enforcement in the first place, as well as the adequacy of the penalty being proposed, are not appropriate items for a consent order challenge. *See, e.g., M.A.B.E. Properties v. DEP*, OGC Case No. 08-1823, DOAH Case No. 10-2334, 2010 WL 6193098 (DEP, January 28, 2010).

The author is unaware of any reported cases in which DEP has determined whether it would treat a third party challenge to a DEP Site Rehabilitation Completion Order under chapter 62-780, F.A.C., as a discretionary enforcement decision similar to a consent order challenge, or more in the nature of a challenge to a DEP permitting decision. In situations where a PRSR is not complying with a Site Rehabilitation Order, or a person with contaminated property is not initiating site rehabilitation activities in accordance with DEP rule requirements in the first place, third parties could initiate a citizens complaint under section 403.412, Florida Statutes, for injunctive relief to compel site rehabilitation activities. The author is also unaware of any reported cases in which section 403.412 has been used to challenge the DEP’s failure to require a person owning property with contaminated groundwater to initiate site rehabilitation under chapter 62-780, F.A.C., or the adequacy of site rehabilitation actions such a person may have undertaken under those rules, either with or without DEP approval.

While the consent order challenge standards remain well established administrative precedent at DEP, civil litigation can sometimes lead to a more nuanced result. *See, e.g., Phibro Resource Corp. v. DER*, 579 So. 2d 118 (Fla. 1st DCA 1991), in which the DER’s dismissal of a third party challenge to a groundwater cleanup consent order was reversed. The challenge was made by the prior owner and operator of the facility, whom the court found to have standing to challenge the consent order over fears that its inadequacy could create later subsequent liability for the prior owner. As implementation of assessment and cleanup procedures under chapter 62-780, F.A.C., becomes more established, perhaps some further nuances will be developed as to how the DEP and the courts will address third party challenges to actions and inactions associated with site rehabilitation.